

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Complete Packaging and Shipping
Supplies, Inc.,

Appellant,

RE: Galaxie Management, Inc.

Appealed From
Size Determination No. 06-2014-054

SBA No. SIZ-5570

Decided: June 13, 2014

APPEARANCES

James S. Phillips, Esq., Kevin P. Joyce, Esq., Centre Law Group, Vienna, Virginia, for
Complete Packaging and Shipping Supplies, Inc.

DECISION

I. Introduction and Jurisdiction

On April 1, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2014-054, dismissing as untimely the size protest of Complete Packaging and Shipping Supplies, Inc. (Appellant) against Galaxie Management, Inc. (GMI).

Appellant contends the dismissal of its protest is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) vacate it and remand the matter to the Area Office for a size determination. I find the dismissal was appropriate and affirm it.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed this appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Therefore, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On October 8, 2013, the General Services Administration (GSA) issued Request for Quotation No. 819581 (RFQ). The RFQ sought Government-Wide Multiple Blanket Purchase Agreements (BPAs) for Maintenance, Repair, and Operations (MRO) Supplies. The quotes were solicited from GSA Multiple Award Schedule (MAS) 51 V Contract Holders. GSA contemplated three categories of supplies: one for Hardware, with up to 11 BPAs, eight to be set aside for small business; one for Tools and Tool Cabinets, with up to six BPAs, four to be set aside for small business; and Paints, Adhesives, and Sealants, with up to six BPAs, four to be set aside for small business. The RFQ does not include FAR § 52.219-1 (which designates a North American Industry Classification System (NAICS) code and assigns size standard) or a NAICS code designation or a size standard in any other form.

The RFQ stated, under General Instructions for Quotation Submission: “The Contractor shall recertify its size status on the cover sheet of its quotation.” (RFQ at 32 ¶ 7.2.6.)

On November 5, 2013, GSA issued Amendment PA003, incorporating questions and answers from prospective quoters. The amendment contained several answers notifying prospective quoters of the small business set-aside requirements.

7) Question: Can a large business bid on this RFQ?

Answer: Large businesses can submit quotes on each of the three categories. There are small business set-asides for each category, as well as unrestricted opportunities.

11) Question: Will the Government accept, in lieu of completing the financial overview outlined in Attachment 8, a letter from the financial institution which covers the Contractor's financial responsibility with respect to the FSSI contract? If the answer is no, is the release of the financial overview mandatory to submit an offer for FSSI?

Answer: No, the financial information in Attachment 8 shall be completed and returned as part of the quote. The submission of the requested financial information is required; non-receipt of this information shall make the quote unacceptable.

12) Question: Can this RFQ have a set-aside for an SDVOSB?

Answer: The Government was unable to include a set-aside for an SDVOSB because there were not enough Contractors to compete in this category. However, an SDVOSB can submit a quote as a small business.

13) Question: Paragraph 5.2.6, Waiver of Nonmanufacturer Rule. Does this allow small businesses to quote and sell products from a large business?

Answer: Yes. By obtaining a waiver to the nonmanufacturer rule from the Small Business Administration for this RFQ, small business resellers are allowed to provide the products of a manufacturer who is “other than small”.

(Amendment No. PA003, at 3-4.)

The RFQ also incorporates “Attachment 8 — Cover Sheet”. This cover sheet is to be completed and submitted with the quotes. A quoter must include the business size, its number of employees, annual revenues, and indicate whether the firm is Small Business, Small Disadvantaged Business, 8(a) concern, HUBZone business, Women-Owned Small Business, Service-Disabled Veteran-Owned Small Business or Veteran-Owned Small Business.

GMI submitted its quote for a BPA against its MAS 51 V Contract #GS-21F-0061W.

On February 28, 2014, the Contracting Officer (CO) issued a notice to unsuccessful offerors of the identity of the offerors awarded BPAs. On March 7, 2014, Appellant filed a protest asserting one of the awardees for Category 1-Hardware, GMI, is other than small because it is affiliated with a large business.

On April 1, 2014, the CO confirmed to the Area Office by telephone that none of the offerors on this RFQ were requested or required to recertify themselves as small businesses.

B. Size Determination No. 06-2014-054

On April 1, 2014, the Area Office dismissed Appellant's protest as untimely. The Area Office noted that the procurement in question was for a Blanket Purchase Agreement (BPA) against a GSA Multiple Award Schedule (MAS) which is a long term contract. The Area Office noted that this solicitation is not a procurement that results in an individual order, and that the CO had stated that offerors were not required to recertify their small business status.

The Area Office stated that 13 C.F.R. § 121.1004(a)(3) provides the time limits for size protests at three different stages of a long-term contract: (i) when the long-term contract is initially awarded; (ii) when an option is exercised; and (iii) in response to a contracting officer's request for size certifications in connection with an individual order. Then the Area Office found that none of these stages applies in this case. The Area Office therefore concluded Appellant's protest was untimely and dismissed it.

On April 1, 2014, Appellant received the dismissal letter.

C. The Appeal

On April 10, 2014, Appellant filed the instant appeal. Appellant argues that the Area Office erred in finding that the BPA solicitation did not require quoters to recertify as part of their initial offer including price and that, under 13 C.F.R. § 121.1004(a)(3)(iii), Appellant could protest awardees. Appellant received the notice of the identity of apparent successful offerors on February 28, 2014, and argues its March 7, 2014, protest was timely filed.

Appellant describes this procurement as a partial small business set-aside. Appellant argues that specific provisions of the RFQ constitute a requirement that offerors recertify their size. These provisions are RFQ ¶ 7.2.6; Amendment 0003, Questions 7, 11, and 12; and Attachment 8, Cover Sheet. Appellant argues prior OHA decisions holding that size protests may be filed against the award of an order under a long-term contract. (Appeal at 9-10.)

Appellant also asserts that the applicable NAICS code for each relevant Schedule 51 V SIN is included in the GSA Schedule Contract Solicitation. Appellant further argues that this BPA is a new contract and that the applicable regulation is 13 C.F.R. § 121.404, not § 121.1004(a)(3). Appellant argues this case is governed by *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002) (*SETA*). Under *SETA*, the instant RFQ was issued prior to award of a BPA and was therefore a new procurement. Quoters had to certify their size as part of their offers in response to the RFQ. Therefore, since this was a procurement that required a recertification upon submission of quotes, 13 C.F.R. § 121.404 governs and GMI's size must be determined as of the date of its response to the RFQ which required the recertification. (Appeal at 11-14.)

As relief, Appellant requests OHA to vacate the protest dismissal and remand the matter to the Area Office for a size determination.

GMI did not file a response to the appeal.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The Area Office correctly dismissed Appellant's protest as untimely.

The instant RFQ is for a BPA against GMI's underlying GSA MAS 51 V contract (Contract #GS-21F-0061W), a long-term contract of more than five years duration. The regulation provides that size protests regarding size certifications made for long-term contracts must be made: (1) within five days of notification of the identity of the prospective awardee of the contract itself (13 C.F.R. § 121.1004(a)(3)(i)); (2) within five days of notification of the exercise of an option (13 C.F.R. § 121.1004(a)(3)(ii)); or (3) within five days of notification of the identity of the prospective awardee of an individual order where the contracting officer has requested size certifications (13 C.F.R. § 121.1004(a)(3)(iii)). Appellant argues that its protest

falls within the third category, that the RFQ required certifications of size, and therefore its protest was timely because filed within five days of the CO's February 28, 2014 notification.

I find Appellant's argument is meritless. The instant RFQ is for a BPA, not an order, and 13 C.F.R. § 121.1004(a)(3)(iii) provides the opportunity to protest on an order, not a BPA. Further, when this RFQ was issued, in 2013, the size regulation in effect governing when the size status of a business is determined provided:

A Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA when an order is issued. Thus, a concern's size may not be determined based on its size at the time of a response to solicitation for a BPA.

13 C.F.R. § 121.404(g)(3)(vi) (2013).

Therefore, under the then-applicable regulation, GMI's size could not be determined as of the time of its response to the instant RFQ, which was a solicitation for a BPA. Regardless of whether the CO was requesting certifications or not, no size determination was appropriate at this time under 13 C.F.R. § 121.1004(a)(3)(iii) or 13 C.F.R. § 121.404(g)(3)(vi) (2013).¹ Because Appellant's size protest could not relate to this BPA, and no options on the long-term contract have been exercised (to invoke § 121.1004(a)(3)(ii)), the only other possibility is that Appellant's size protest could relate to the long-term contract itself, Contract #GS-21F-0061W, under § 121.1004(a)(3)(i). Contract #GS-21F-0061W, however, was put in place in 2010, long before the instant RFQ was issued. Appellant's size protest, made on March 7, 2014, is thus clearly untimely under the five-day rule in 13 C.F.R. § 121.1004(a)(3)(i).

Appellant's contention, that prior OHA decisions holding that size protests may be filed against the award of an order under a long-term contract, is similarly unavailing because, again, the instant solicitation is for a BPA, not an individual order, as required to invoke 13 C.F.R. § 121.1004(a)(3)(iii).

In the alternative, Appellant argues the instant RFQ was a new procurement which requires quoters to recertify as small, and thus its protest was timely under OHA's decision in *SETA*. I disagree. In *SETA*, in absence of any size regulation concerning when size status may be determined in connection with a BPA, OHA affirmed the Area Office's conclusions that, for size determination purposes, a BPA was a separate procurement, that a size protest filed within five days of award of a BPA was timely, and that the concern's size status would be determined as of the date of its offer on the solicitation for a BPA. *SETA*'s holding that an RFQ for a BPA establishes a new procurement, however, has been superseded by the major revision to 13 C.F.R. § 121.404 that SBA put in place in 2006. *See* 71 Fed. Reg. 66434, 66444 (Nov. 15, 2006).

I also find meritless Appellant's other argument, that the instant RFQ itself required recertification of size status. First, the questions and answers Appellant relies upon clearly are not recertification requirements. Rather, they make clear that the procurement is open to large

¹ The result under current § 121.404 would be the same. *See Size Appeal of Total Systems Technologies Corporation*, SBA No. SIZ-5562, at 6 (2014).

and small businesses, that there will be small business set-asides, that there is a waiver of the nonmanufacturer rule, and that the cover sheet in Attachment 8 must be completed.

Appellant argues that ¶ 7.2.6 of the RFQ, combined with the cover sheet required by Attachment 8, is a requirement that quoters certify their size status. However, the RFQ does not contain a NAICS code designation or a size standard, the *sine qua non* of size determinations. A contracting officer must determine the appropriate NAICS code and size standard and include them in all solicitations above the micro purchase threshold. 13 C.F.R. § 121.402(b); FAR § 19.303(a). A concern's size is determined in reference to the size standard for the NAICS code specified in the solicitation. 13 C.F.R. § 121.402(a). Therefore, without a NAICS code designation and size standard, a request to certify size is meaningless, because there is no way to measure a concern's size without a size standard.

Appellant's attempt to reference multiple NAICS codes referenced in a web link is risible. The link is not referenced in the RFQ, and the link itself references a number of NAICS codes with varying size standards, without any guidance as to which code and size standard might apply to this RFQ. I hold that a request for recertification as to size must include a NAICS code designation and size standard. Otherwise, the responders to the solicitation cannot know whether they are small for the procurement or not. In this case, because there was no NAICS code designation, there was no request to certify size, under 13 C.F.R. § 121.1004(a)(3)(iii).

The Area Office properly dismissed this protest. Appellant has failed to meet its burden to show clear error in the Area Office's dismissal of the protest.

IV. Conclusion

For the reasons stated above, I conclude the Area Office correctly dismissed Appellant's protest. Therefore, the Area Office's dismissal of Appellant's size protest is AFFIRMED and the appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge