

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

SIZE APPEAL OF:

Southwind Construction Services, LLC,

Appellant,

RE: Red Cedar Enterprises, Inc.

Appealed From
Size Determination No. 05-2014-065

SBA No. SIZ-5610

Decided: October 31, 2014

DECISION¹

I. Background

On April 22, 2014, the U.S. Army Corps of Engineers, Tulsa District (Corps) issued Request for Proposals (RFP) No. W912BV-14-R-0064 for construction services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$36.5 million average annual receipts. The procurement was conducted under the two-phase design-build procedures of Federal Acquisition Regulation (FAR) subpart 36.3. Phase One proposals were due May 21, 2014 and Phase Two proposals, which included price, were due July 25, 2014.

On August 20, 2014, the CO announced that Red Cedar Enterprises, Inc. (Red Cedar) was the apparent awardee. On August 27, 2014, Southwind Construction Services, LLC (Appellant) filed a size protest alleging that Red Cedar and its affiliates far exceed the size standard associated with the RFP. The CO forwarded the protest to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) for review.

On September 8, 2014, the Area Office dismissed Appellant's size protest. The Area Office explained that the Corps had notified the Area Office that Red Cedar had withdrawn its proposal. The Corps stated that it would “proceed to award to the next firm in line.” (Email from D. Foyil to S. Little (Sept. 8, 2014).)

On September 23, 2014, Appellant appealed the dismissal of its protest to SBA's Office of Hearings and Appeals (OHA). Appellant maintains that the Area Office improperly dismissed

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

Appellant's size protest because, under 13 C.F.R. § 121.1008, an area office may not “refrain from making a size determination where a size protest is timely and properly filed in accordance with SBA regulations.” (Appeal at 3.) Alternatively, Appellant argues that the Area Office should have initiated its own size protest against Red Cedar in order to “preserve the integrity of the SBA's small business set-aside program.” (*Id.* at 4.)

Appellant alleges that Red Cedar is “attempting to avoid an adverse size determination from the SBA by simply withdrawing its proposal after being notified of [Appellant's] protest.” (*Id.* at 5 (emphasis in original).) However, in Appellant's view, SBA regulations “do not allow for the dismissal of a size protest for such reasons.” (*Id.*) Moreover, although Red Cedar is no longer the intended awardee for the instant procurement, Appellant maintains that the issue of Red Cedar's size is still significant because Red Cedar may continue to self-certify as small for future set-aside procurements. (*Id.* at 6.)

On October 8, 2014, the date of the close of record, Red Cedar intervened and moved to dismiss the appeal. Red Cedar asserts that, after Red Cedar withdrew from the competition, the Corps awarded the contract to HGL Construction, Inc. (HGL). (Motion at 2.) As a result, Red Cedar maintains, Appellant is not an interested party to bring a size protest because Appellant is not next in line for award. (*Id.*) According to Red Cedar, Appellant's concern that Red Cedar could continue to self-certify as small for future set-aside procurements is “academic and moot,” as Red Cedar does not expect to pursue additional business with The Ross Group, the alleged affiliate identified in Appellant's protest. (*Id.* at 3.) Red Cedar also argues that, although SBA regulations previously permitted an area office to complete a size determination after the challenged firm withdrew its proposal, SBA rescinded that rule in 1996. (*Id.*)

On October 24, 2014, Appellant opposed Red Cedar's motion. Appellant insists that it had standing to file a size protest against Red Cedar because Appellant was never excluded from the competition. (Response at 4-5 (citing *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840 (2007)).) Furthermore, Appellant has also challenged the award to HGL, so Appellant could still be selected for award of this procurement. According to Appellant, Red Cedar's claim that it will not pursue additional business with The Ross Group is “highly dubious” and, even if true, is misleading because the two companies “will continue to perform work on set-aside contracts they never should have received in the first place.” (*Id.* at 9, 12.) Appellant reiterates its arguments that SBA regulations do not allow an area office to refuse to render a size determination when a size protest is timely and properly filed, and do not permit a protested concern to avoid the consequences of an adverse size determination by unilaterally withdrawing its proposal. (*Id.* at 11-12.)

II. Discussion

I find that the Area Office properly dismissed Appellant's size protest against Red Cedar. Appellant's protest was, in effect, premature because, although the Corps initially announced Red Cedar as the apparent awardee, that award notification was then rescinded. Thus, Appellant's size protest was filed before an apparent awardee was identified. Pursuant to 13 C.F.R. § 121.1004(e), any size protest filed “before bid opening or notification to offerors of the apparent successful offer will be dismissed as premature.” This rule reflects SBA's policy judgment that

“SBA does not impose the burdens of an unnecessary size investigation on other offerors or expend its limited resources rendering size determinations that are unlikely to have any practical significance for the procurement question.” 59 Fed. Reg. 39,426, 39,427 (Aug. 3, 1994). Accordingly, the Area Office correctly dismissed Appellant's size protest against Red Cedar upon learning that Red Cedar was not the apparent awardee. *Size Appeal of Bosco Constructors, Inc.*, SBA No. SIZ-5345 (2012); *Size Appeal of W.H. Mosley Co.*, SBA No. SIZ- 5020 (2008).

Appellant also argues that its size protest should not have been dismissed because Red Cedar could continue to compete for future set-aside procurements. This argument fails for several reasons. Under SBA regulations, a valid size protest must “pertain to a particular procurement” and must be filed by an “offeror whom the contracting officer has not eliminated for reasons unrelated to size.” 13 C.F.R. §§ 121.1001(a)(i) and 121.1007(a). Accordingly, it is not permissible for Appellant to bring a size protest related to unknown future procurements, and Appellant lacks standing to make such a challenge because Appellant is not yet an offeror on such procurements. *Size Appeal of Harry A. Stroh Associates, Inc.*, SBA No. SIZ-4363 (1999) (vacating size determination issued in response to a protest that was unrelated to a particular procurement). Further, even assuming Red Cedar were to compete for, and win, future set-aside procurements, Red Cedar's size then could be protested at that time. It is therefore unnecessary and premature to examine Red Cedar's size at this stage.

III. Conclusion

For the above reasons, the appeal is DENIED, and the Area Office's dismissal is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge