

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

SIZE APPEAL OF:

Kisan-Pike, A Joint Venture,

Appellant,

Solicitation No. FA6670-14-R-0001

Department of the Air Force
Air Force Reserve Command
Niagara Falls ARS, NY

SBA No. SIZ-5623

Decided: December 11, 2014

ORDER DISMISSING APPEAL

I. Background

On May 15, 2014, the Contracting Officer (CO) for the U.S. Department of the Air Force, Air Force Reserve Command issued Solicitation No. FA6670-14-R-0001 (RFP) as a set-aside for the U.S. Small Business Administration's (SBA) 8(a) Business Development program. On June 13, 2014, Kisan-Pike, A Joint Venture (Appellant) submitted its response to the RFP.

The CO awarded the contract on October 1, 2014, to two other concerns and not Appellant. Appellant further admits that “on October 2, 2014, the Agency for the first time informed [Appellant] that despite being the second lowest price, technically acceptable offeror, the Agency removed [Appellant] from the underlying competition based upon an alleged finding by SBA that [Appellant] was ineligible for award.” Response, at 2.

On October 27, 2014, the SBA's Buffalo District Office issued a letter to Appellant notifying it that its Joint Venture Agreement (JVA) had been disapproved for the solicitation at issue based on the JVA's failure to meet certain standards.

On November 10, 2014, Appellant filed an appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). The appeal, titled “Joint Venture Agreement Rejection Appeal of Kisan-Pike, A Joint Venure”, challenges the decision by the District Office declining to approve Appellant's JVA. In the appeal petition, Appellant states that “SBA's determination that KPC's JVA does not conform to regulatory requirements is in essence a size determination.” Appeal at 2.

On November 18, 2014, OHA issued a show cause requiring Appellant to show cause

why this appeal should not be dismissed for lack of jurisdiction. OHA noted the determination Appellant seeks to challenge does not appear to be a formal size determination. On November 25, 2014, Appellant filed its response. Appellant argues the District Office rejection of the JVA eliminated Appellant from competition, thus it falls under OHA's jurisdiction. Response at 1.

Once again, Appellant states that the “instant matter is at its very essence a size determination because under the mentor-protégé regulations, the Determination is a finding of affiliation between [Kisan Engineering Company, P.C.] and [The Pike Company].” Appellant contends OHA, in the past, has routinely taken jurisdiction over cases involving size determinations where an SBA Area Office rejected a JVA. Response, at 4; citing *Size Appeal of Trident3, LLC*, SBA No. SIZ-5315 (2012). Appellant maintains the difference here is that the District Office rejected the JVA without explaining that the rejection was based on Appellant's size.

II. Discussion

OHA's jurisdiction, stated by regulation, provides in pertinent part: “OHA has authority to conduct proceedings in the following cases: . . . Appeals from size determinations and NAICS code designations under part 121 of this chapter.” 13 C.F.R. § 134.102(k). The regulations governing size protests and formal size determinations are found in Part 121. Particularly, 13 C.F.R. § 121.1002, “Who makes a formal size determination?” provides: “The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination. . . .” 13 C.F.R. § 121.1002.

Here, the District Office's disapproval of the JVA is not a formal size determination according to this definition. The disapproval did not come from a Government Contracting Area Director, and it was not issued as the “response to either a size protest or a request for a formal size determination.” 13 C.F.R. § 121.1002. A size protest may only be filed after bid opening or notification to offerors of the selection of the apparent successful offeror. 13 C.F.R. § 121.1004(e). After that, an unsuccessful offeror or other party with standing to protest may file a protest with the CO. 13 C.F.R. § 121.1004. Appellant did not file a protest after receiving notification of the identity of the apparent successful offeror, but only upon receipt of the disapproval of the JVA. The regulation does not provide for filing an appeal from this decision. Therefore, OHA has no jurisdiction over this appeal.¹

OHA has previously held that it does not have jurisdiction over a District Office's rejection of a JVA. *Size Appeal of JXM, Inc.*, SBA No. SIZ-5091 (2009). “SBA cannot render a formal size determination concerning the size of any offeror, including a joint venture, in connection with a specific procurement until the procuring agency has identified the offeror as the apparent successful offeror.” 13 C.F.R. § 121.1004(e); *JXM, Inc.*, SBA No. SIZ-5091 (2009).

I also find meritless Appellant's contention that in *Size Appeal of Trident3, LLC*, SBA

¹ I also note that Appellant filed no timely size protest after receiving notification of the award.

No. SIZ-5315 (2012), OHA took jurisdiction over an appeal involving a rejected JVA. What Appellant fails to note is that *Trident3, LLC*, involved an appeal from a formal size award determination. OHA examined the JVA in that case only in the context of the appeal from the size determination. Thus, *Trident3, LLC* is inapposite here.

Accordingly, the District Office's letter rejecting Appellant's JVA is not a formal size determination, or in “essence” a size determination as Appellant argues, and OHA does not have jurisdiction to hear this appeal.

III. Conclusion

OHA does not have jurisdiction over this appeal. Thus, this appeal is DISMISSED.

This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge