

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

SIZE APPEAL OF:

Solis Constructors, Inc.,

Appellant,

RE: Red Cedar Enterprises, Inc.

Appealed From
Size Determination Nos. 05-2014-077, -
078

SBA No. SIZ-5624

Decided: December 11, 2014

APPEARANCES

Robert L. Magrini, Esq., Marvin Laws, Esq., Sarah M. Brockhaus, Esq., Hayes Magrini & Gatewood, Oklahoma City, Oklahoma, for Appellant

Wayne A. Keup, Esq., Washington, D.C., for Red Cedar Enterprises, Inc.

DECISION

I. Introduction and Jurisdiction

On October 6, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination Nos. 05-2014-077 and 05-2014-078 dismissing a size protest filed by Solis Constructors, Inc. (Appellant) against Red Cedar Enterprises, Inc. (Red Cedar). Appellant contends that the Area Office improperly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand the matter for further investigation into Red Cedar's size status. For the reasons discussed *infra*, the appeal is denied, and the Area Office's dismissal is affirmed.

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 the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitations and Protest

On June 19, 2014, the U.S. Army Corps of Engineers (Corps) issued Request for Proposals Nos. W9126G-14-U-0887 and W9126G-14-U-0889 for the renovation of buildings at Fort Sam Houston, Texas. The solicitations contemplated award of two task orders, which were to be competed among a group of five firms holding indefinite-delivery indefinite-quantity (ID/IQ) contracts. The five ID/IQ contractors, including Appellant and Red Cedar, were identified by name in the address block of the solicitations. (Protest, Ex. 15, at 16-21.) Although the underlying ID/IQ contracts were restricted to 8(a) Business Development participants, the Corps did not request that contractors recertify size for these two task orders.

On September 18, 2014, the Corps announced that Red Cedar was the apparent awardee of both orders. On September 25, 2014, Appellant filed a size protest against Red Cedar. Appellant's protest referenced the two task order solicitations and contended that Red Cedar should "be declared ineligible for these awards" based upon Red Cedar's relationship with The Ross Group. (*Id.* at 14.) Attached to its protest, Appellant provided printouts from the FedBizOpps website which announced that Appellant and Red Cedar had been awarded their ID/IQ contracts on December 19, 2013. (*Id.*, Ex. 15, at 6, 14.) The Corps forwarded Appellant's protest to the Area Office for review.

B. Size Determination

On October 6, 2014, the Area Office issued Size Determination Nos. 05-2014-077 and 05-2014-078, dismissing Appellant's size protest. The Area Office explained that the instant procurements involved task orders under an ID/IQ contract, and that size protests against task order awards are permitted only if the procuring agency requests recertification of size in conjunction with the order. (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(3) and *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010).) In this case, the Corps did not request recertification for the two task orders, so "Red Cedar Enterprises' size is determined as of the date it self-certified as small for [the ID/IQ contract]." (*Id.*) The Area Office also found that Appellant could not timely protest Red Cedar's size at the ID/IQ contract level because "[a] notice of the successful five offerors [for the ID/IQ contracts] was issued on December 19, 2013." (*Id.*) As a result, any size protest against those awards would have been due "within five days of December 19, 2013." (*Id.*) Appellant's protest was not filed until September 25, 2014, and was therefore untimely. (*Id.* at 1-2.)

C. Appeal Petition

On October 21, 2014, Appellant appealed the size determination to OHA. Appellant states that the award notification letter it received from the Corps in December of 2013 did not identify Red Cedar or the other ID/IQ contract awardees. Appellant was not formally informed of the ID/IQ contract award to Red Cedar until September 18, 2014, when Appellant learned that Red Cedar was the apparent awardee of the two task orders. (Appeal at 2.) Appellant argues that "[t]he [Area Office] was correct in determining that [Appellant] had five days to protest after the

[Corps] notified it of the award to Red Cedar - but that occurred on September 18, 2014, not December 19, 2013.” (*Id.* at 3.) Alternatively, Appellant maintains that, based on the evidence and allegations contained in Appellant's protest, the Area Office should have initiated its own size protest against Red Cedar if the Area Office considered Appellant's protest to be flawed.

D. Red Cedar's Response

On November 5, 2014, Red Cedar responded to the appeal and moved to dismiss.¹ Red Cedar argues that Appellant's protest was untimely and that “a timely appeal cannot cure an untimely size protest.” (Response at 3 (quoting *Size Appeal of Ian, Evan, & Alexander Corp.*, SBA No. SIZ-5272, at 2 (2011))

Red Cedar maintains that Appellant had notice of the ID/IQ contract award to Red Cedar well before September 18, 2014. (*Id.* at 2.) A notice of award was posted to the FedBizOpps website on December 19, 2013. (*Id.*) Furthermore, between March 19, 2014 and August 26, 2014, at least 16 task order solicitations were issued to the ID/IQ contract holders, including Appellant, and each solicitation identified all five ID/IQ contract awardees. (*Id.*) Accordingly, in Red Cedar's view, there is no validity to Appellant's contention that Appellant was unaware of the award to Red Cedar until September 18, 2014. (*Id.*)

Red Cedar asserts that, by regulation, public notice of an award is sufficient to begin the five-day window to file a size protest. Appellant's deadline for filing a size protest was five business days from December 19, 2013, and, accordingly, a size protest filed ten months later is untimely.

III. Analysis

Appellant's primary argument in this case is that Appellant did not have notice that Red Cedar had been awarded an ID/IQ contract until September 18, 2014. This contention, however, is undermined by the documentation provided with Appellant's protest. In particular, Appellant attached to its protest a FedBizOpps notice from December 2013 announcing the ID/IQ contract award to Red Cedar, and the task order solicitations from June 2014 similarly identified Red Cedar as one of the five ID/IQ contract holders. *See* Section II.A, *supra*. Thus, the record does not support the conclusion that Appellant learned of the ID/IQ contract award to Red Cedar for the first time on September 18, 2014. Because Appellant's protest was filed more than five business days after Appellant knew, or should have known, that Red Cedar was awarded an ID/IQ contract, Appellant's protest was untimely. 13 C.F.R. § 121.1004. The fact that Appellant may have been informed of the award indirectly - such as through a FedBizOpps posting - does not extend Appellant's deadline for filing a size protest. *See* 13 C.F.R. § 121.1004(a)(5) (recognizing that, if the contracting officer “fail[s] to provide written notification of award”, the five-day protest window may commence from “public announcements” or other means); *Size Appeal of Quality Technology, Inc.*, SBA No. SIZ-5611 (2014).

¹ Although styled as a motion to dismiss, Red Cedar's pleading does not state valid grounds to dismiss the appeal, such as lack of jurisdiction or a defective appeal petition. As a result, the pleading is treated as a response to the appeal under 13 C.F.R. § 134.309.

Appellant also argues that, based on the evidence and allegations in Appellant's protest, the Area Office should have initiated its own size protest against Red Cedar. This argument too is meritless. The decision to bring a size protest is reserved to the discretion of an area office, and Appellant has not demonstrated that the Area Office in this case acted improperly by declining to further investigate Red Cedar's size. Notably, SBA regulations contemplate that, on a task order contract such as an ID/IQ, the contractor may outgrow its small size during the life of the contract while remaining eligible to compete for orders under that contract, unless recertification is required. 13 C.F.R. § 121.404(g). Thus, even accepting Appellant's arguments that Red Cedar is currently a large business, it would not necessarily follow that Red Cedar is in violation of SBA rules.

IV. 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