

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

SIZE APPEAL OF:

Southwind Construction Services, LLC,

Petitioner,

RE: Red Cedar Enterprises, Inc.

Petition for Reconsideration of
SBA No. SIZ-5610

SBA No. SIZ-5634 (PFR)

Decided: January 23, 2015

APPEARANCES

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

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

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

On September 8, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2014-065, dismissing a size protest filed by Southwind Construction Services, LLC (Petitioner) against Red Cedar Enterprises, Inc. (Red Cedar). The Area Office explained that, after the protest was filed, Red Cedar withdrew its proposal for the subject procurement and therefore was no longer in line for award.

On September 23, 2014, Petitioner appealed the dismissal of its protest to SBA's Office of Hearings and Appeals (OHA). Petitioner argued that the Area Office improperly dismissed the protest because, under 13 C.F.R. § 121.1008, once a size protest is timely and properly filed in accordance with SBA regulations, an area office must render a size determination. Alternatively, Petitioner asserted that the Area Office should have initiated its own size protest against Red Cedar.

On October 31, 2014, OHA issued its decision in *Size Appeal of Southwind Construction Services, LLC*, SBA No. SIZ-5610 (2014), denying the appeal and affirming the dismissal of the size protest. OHA reasoned that Petitioner's protest was, in effect, premature because, although the procuring agency initially selected Red Cedar as the apparent awardee, that award decision was rescinded. OHA stated that, pursuant to 13 C.F.R. § 121.1004(e), any size protest filed before notification of the apparent successful offer must be dismissed as premature. The rule requiring dismissal of premature size protests "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 in question.'" *Size Appeal of Southwind Construction Services, LLC*, SBA No. SIZ-5610, at 2-3 (quoting 59 Fed. Reg. 39,426, 39,427 (Aug. 3, 1994)).

B. Petition for Reconsideration (PFR)

On November 20, 2014, Petitioner requested that OHA reconsider the decision. Petitioner emphasizes that it received the notice of award to Red Cedar on August 20, 2014, and subsequently filed its size protest on August 27, 2014, within the time limit prescribed by 13 C.F.R. § 121.1004(a)(2). Not until September 9, 2014 was a second notice of award issued identifying another offeror, HGL Construction, Inc. (HGL), as the prospective awardee. Thus, contrary to OHA's decision, the size protest against Red Cedar was not premature at the time it was filed. (PFR at 5-7.)

Petitioner maintains that OHA incorrectly found that the procuring agency rescinded the award to Red Cedar. Rather, Petitioner contends, although the agency notified the Area Office that it would proceed to award to another offeror, and eventually selected HGL for award, the agency did not exclude Red Cedar from the competition or formally retract the August 20, 2014 notice of award. Thus, "[a]s far as anybody can tell based on the record submitted, on September 9, 2014, there were actually two prospective awardees designated by the Government to receive a contract under the Solicitation." (*Id.* at 6.)

Petitioner also argues that OHA's decision is legally flawed because the regulations and case law cited in the decision are inapposite. Petitioner reiterates that the record here demonstrates that the size protest was timely filed after notice of the planned award to Red Cedar and therefore was not premature. (*Id.* at 7-10.) Petitioner further maintains that OHA failed to grapple with Petitioner's underlying contention that "there are no regulations that allow protested concerns to avoid size determinations by withdrawing their proposals." (*Id.*) In denying the appeal, "OHA has ratified the error of law committed by the [Area Office]." (*Id.* at 8.)

Petitioner concludes that OHA's decision should be reversed, and the matter remanded to the Area Office for a proper investigation of Red Cedar's size.

C. Red Cedar's Response

On December 9, 2014, Red Cedar responded to the PFR. Red Cedar argues that OHA's decision is "well-rounded in fact and law" and should be affirmed. (Red Cedar Response at 1.)

Red Cedar highlights that it eliminated itself from the competition by withdrawing its proposal, as allowed by Federal Acquisition Regulation (FAR) 15.208(e). (*Id.*) According to Red Cedar, “once Red Cedar withdrew its proposal from consideration in this procurement, . . . the Government was not obligated to take any further action with respect to the Red Cedar proposal.” (*Id.*)

II. Discussion

A. Timeliness and Standard of Review

OHA adjudicates 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. Petitioner filed its PFR within twenty days of service of *Size Appeal of Southwind Construction Services, LLC*, SBA No. SIZ-5610 (2014), so the PFR is timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a PFR upon a “clear showing of an error of fact or law material to the decision.” 13 C.F.R. § 134.227(c). This is a rigorous standard. *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5493, at 3 (2013) (PFR); *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5392, at 5 (2012) (PFR). A PFR must be based upon manifest error of law or mistake of fact, and is not intended to provide an additional opportunity for an unsuccessful party to argue its case before OHA. *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5450, at 2 (2013) (PFR).

B. Analysis

I find no material error in OHA's decision. Petitioner's principal argument is that OHA incorrectly found the size protest to be premature because Petitioner filed the protest on August 27, 2014, after the notification that Red Cedar was the intended awardee. This argument fails, however, because Red Cedar withdrew its proposal shortly after the protest was filed, and a new apparent awardee was not identified until September 9, 2014. Accordingly, as explained in the prior OHA decision, Petitioner's size protest was, in effect, premature because the size protest was brought against an offeror that removed itself from the competition, and before any new apparent awardee was selected. *Size Appeal of Southwind Construction Services, LLC*, SBA No. SIZ-5610, at 2.

Petitioner contends that a protested concern may not avoid the consequences of an adverse size determination by withdrawing its proposal, but this argument is meritless. As Red Cedar observes, the FAR permits an offeror to unilaterally withdraw its proposal “at any time before award.” 48 C.F.R. § 15.208(e). Likewise, the procuring agency in the instant case recognized that Red Cedar had withdrawn from the competition, stating that the agency would proceed with award to another offeror. Section I.A, *supra*. By withdrawing its proposal, then, Red Cedar's status became analogous to that of a firm which had not submitted a proposal in the first instance. Petitioner does not attempt to argue, or explain, how it could have pursued a size protest against a rival firm under such circumstances.

Lastly, although Petitioner complains that the Area Office did not investigate its allegations against Red Cedar, Petitioner has not demonstrated how dismissal of the protest is detrimental to Petitioner's interests or to the interests of the small business programs. Having withdrawn its proposal, Red Cedar was no longer competing for this contract award, so there is no direct competitive harm to Petitioner or other small business offerors. Further, given that Red Cedar will not benefit from this small business set-aside, no useful purpose is served by considering whether Red Cedar would have qualified as a small business for the procurement.

IV. Conclusion

Petitioner disagrees with OHA's decision, but has not established that key findings of fact or conclusions of law are erroneous. I therefore DENY the PFR and AFFIRM the decision in *Size Appeal of Southwind Construction Services, LLC*, SBA No. SIZ-5610 (2014).

KENNETH M. HYDE
Administrative Judge