

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

SIZE APPEAL OF:

American Patriot Construction Services,
Inc.

Appellant,

RE: C3T, Inc.,

Appealed From
Size Determination No. 04-2015-43

SBA No. SIZ-5671

Decided: August 18, 2015

ORDER DENYING APPEAL¹

I. Background

On April 23, 2015, the U.S. Department of Veterans Affairs (VA) issued Invitation for Bids (IFB) No. VA69D-15-B-0706 for a construction project. The Contracting Officer (CO) set aside the procurement entirely for service-disabled veteran-owned small business concerns, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$36.5 million in average annual receipts. American Patriot Construction Services, Inc. (Appellant) and C3T, Inc. (C3T) submitted timely bids.

On May 22, 2015, VA publicly opened bids and determined that C3T was the low bidder. On June 8, 2015, Appellant filed a size protest with the CO challenging C3T's status as a small business. Appellant alleged that C3T is affiliated with several other concerns through common ownership. (Protest at 1.) The CO forwarded Appellant's protest to the U.S. Small Business Administration (SBA), Office of Government Contracting — Area IV (Area Office) for review.

On June 30, 2015, the Area Office issued Size Determination No. 04-2015-43 dismissing Appellant's protest as untimely pursuant to 13 C.F.R. § 121.1004(a)(1). The Area Office explained that, to be timely, Appellant's protest should have been submitted to the CO within five business days of bid opening. (Size Determination at 1.)

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.

On July 21, 2015, Appellant filed the instant appeal with SBA's Office of Hearings and Appeals (OHA). Appellant maintains that the Area Office erred in applying 13 C.F.R. § 121.1004(a)(1) in lieu of Federal Acquisition Regulation (FAR) subpart 33.1. Appellant argues that it “did not file a challenge to the legality or ability of C3T to bid the solicitation, but rather the legality of awarding this contract to C3T based upon misrepresentation of business size in section 3.1 of the solicitation and FAR 52.204-8, Annual Representations and Certifications.” (Appeal at 1.) Appellant asserts that C3T illegally obtained the subject contract by falsely claiming to be a small business. Accordingly, Appellant reasons, the contract should be terminated.

C3T did not respond to the appeal.

II. Analysis

Appellant received the size determination on July 8, 2015, and filed the instant appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). However, a timely appeal cannot cure an untimely size protest. *Size Appeal of Absolute Staffers, LLC*, SBA No. SIZ-5441, at 2 (2013). The key issue presented, then, is whether the Area Office properly dismissed Appellant's size protest as untimely.

Under SBA regulations, a size protest of a sealed bid procurement is timely if “received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid opening.” 13 C.F.R. § 121.1004(a)(1). An untimely protest will be dismissed. *Id.* § 121.1004(d). Here, it is undisputed that VA publicly opened bids on May 22, 2015. Excluding weekends and the Memorial Day holiday, Appellant was required to file any size protest by June 1, 2015. Appellant's protest was not actually filed until June 8, 2015. Thus, Appellant's protest was untimely, and the Area Office correctly dismissed it.

Appellant contends that the Area Office erred in applying 13 C.F.R. § 121.1004 and instead should have utilized FAR subpart 33.1. This argument has no merit. FAR subpart 33.1 does not apply to size protests, but rather pertains to bid protests filed with the procuring agency or the U.S. Government Accountability Office. Notably, FAR subpart 33.1 specifically instructs the reader to refer to FAR 19.302 for “protests of small business status.” FAR 33.102(a). FAR 19.302 in turn recites the same timeliness rules for size protests as are found in SBA regulations.

For the above reasons, I AFFIRM the Area Office's dismissal of Appellant's untimely protest and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge