

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

SIZE APPEAL OF:

ProSouth Construction Services, LLC,

Appellant,

RE: Birmingham Industrial Construction,
LLC

Appealed From
Size Determination No. 3-2016-029

SBA No. SIZ-5708

Decided: January 19, 2016

ORDER DISMISSING APPEAL¹

I. Background

On September 23, 2015, ProSouth Construction Services, LLC (Appellant) filed a size protest against Birmingham Industrial Construction, LLC (BIC) in conjunction with a construction procurement. Appellant's protest alleged — without any supporting evidence or explanation — that “BIC's size is over the \$15M [size standard] under which this project was bid.” (Protest at 1.) Appellant also questioned whether BIC has the capability to self-perform at least 25% of the cost of contract performance, in accordance with limitations on subcontracting requirements. (*Id.*)

On December 18, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-029, dismissing Appellant's protest for lack of specificity pursuant to 13 C.F.R. § 121.1007. The Area Office stated that “no supporting information indicating how [BIC] exceeds the size standard was presented with your protest letter.” (Size Determination, at 1.) Further, BIC's compliance with limitations on subcontracting is a matter of contractor responsibility to be assessed by the procuring agency. (*Id.*)

On December 28, 2015, Appellant filed the instant appeal with SBA's Office of Hearings and Appeals (OHA). Appellant does not allege any error of fact or law in the size determination.

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.

Rather, Appellant asks that OHA consider new information Appellant retrieved from usaspending.gov which, Appellant claims, shows that BIC exceeds the size standard. Appellant does not explain why Appellant failed to provide this data, or other evidence, with its protest.

II. Discussion

Appellant's protest alleged, without any supporting evidence or rationale, that BIC exceeds the size standard applicable to the instant procurement. Under SBA regulations, however, a size protest “must include specific facts,” and “[a] protest merely alleging that the protested concern is not small . . . does not specify adequate grounds for the protest.” 13 C.F.R. § 121.1007(b). Thus, the portion of Appellant's protest alleging that BIC is not a small business was properly dismissed as insufficiently specific. Appellant's protest further asserted that BIC may be unable to comply with limitations on subcontracting. As the Area Office correctly observed, though, a contractor's compliance with limitations on subcontracting is “an element of responsibility and not a component of size eligibility.” 13 C.F.R. § 125.6(e). Accordingly, the Area Office properly dismissed Appellant's protest because the issues raised by Appellant were non-specific or non-protestable.

Appellant's appeal to OHA is equally meritless. A proper appeal must contain “[a] full and specific statement as to why the size determination . . . is alleged to be in error, together with argument supporting such allegations.” 13 C.F.R. § 134.305(a)(3); *Size Appeal of Cherokee — Technical Specialists, LLC*, SBA No. SIZ-5434, at 2 (2013); *Size Appeal of Alleghany Wood Products, Inc.*, SBA No. SIZ-5366 (2012) (dismissing appeal that failed to allege error of fact or law in the size determination). The instant appeal, though, does not allege any error in the size determination, and therefore is defective on its face. Appellant's requests that OHA conduct an independent review of BIC, and that OHA consider new evidence not presented to the Area Office, are also improper. On appeal, OHA does not conduct a new investigation into the size of a challenged firm. *Size Appeal of DefTec Corporation*, SBA No. SIZ-5540, at 7 (2014). Further, OHA will not entertain new evidence that was not first presented to the area office for consideration, unless good cause is shown. 13 C.F.R. § 134.308(a); *Size Appeals of Baldt, Inc.*, SBA No. SIZ-4987, at 7 (2008) (excluding evidence presented on appeal that was publicly available at the time the protest was filed).

III. Conclusion

Appellant has not alleged, let alone demonstrated, any error in the size determination. As a result, the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge