

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

FOR PUBLIC RELEASE

SIZE APPEAL OF:

Hale Laulima, LLC

Appellant,

RE: Spectrum-CBS JV, LLC

Appealed From

Size Determination No. 2-2016-050

SBA No. SIZ-5750

Decided: June 9, 2016

APPEARANCES

Brad S. Miller, Esq., Cooper Morrison & Miller, LLC, Philadelphia, PA, for Appellant

Devon E. Hewitt, Esq., Protorae Law, PLLC, Tysons Corner, VA, for Spectrum-CBS JV,
LLC

DECISION¹

I. Procedural History and Jurisdiction

On April 21, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 02-2016-050, dismissing Hale Laulima, LLC's size protest against Spectrum-CBS JV, LLC (Spectrum JV) as untimely.

Hale Laulima, LLC (Appellant) requests that SBA's Office of Hearings and Appeals (OHA) remand the size determination back to the Area Office for a determination of Spectrum JV's small business size. For the reasons discussed *infra*, I grant the appeal, and remand the size determination.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel for the parties an opportunity to file a request for redactions if desired. After reviewing the decision, the parties informed OHA that they had no requested redactions. Therefore, I now issue the entire decision for public release.

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. Procedural History

On March 10, 2015, the Department of the Navy (Navy), Naval Facilities Engineering Command, issued Solicitation No. N40080-13-R-0458 (RFP) for facilities support services at the Naval Research Laboratory. The Contracting Officer (CO) designated the procurement as a small business set aside, and assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding \$38.5 million annual receipts size standard. Offers were due on June 19, 2015. On February 18, 2016, the CO notified unsuccessful offerors that Spectrum JV was the apparent awardee. On February 23, 2016, Appellant filed a size protest challenging Spectrum JV's size. On February 29, 2016, the Area Office dismissed Appellant's size protest for lack of specificity. (Size Determination No. 2-2016-035.)

On March 4, 2016, the CO notified all offerors that it would reopen discussions for the instant procurement. On March 9, 2016, the CO issued a Request for Final Proposal Revision, with any written final proposal revisions, to either an offeror's non-price related factors or price proposal, to be due on March 16, 2016.

On April 1, 2016, the CO once again notified unsuccessful offerors that Spectrum JV was the apparent awardee of the instant solicitation. On April 6, 2016, Appellant filed a size protest challenging Spectrum JV's size. Appellant alleged that Spectrum JV is a joint venture between Spectrum Management, LLC (Spectrum) and Complete Building Service (CBS), a large company and a wholly-owned subsidiary of The Donohoe Companies. The protest stated that Spectrum JV must meet the affiliation rules found at 13 C.F.R. § 121.103(a) and (h) in order to be considered a small business concern for the procurement at issue. With its protest, Appellant included information regarding CBS's SAM reports, showing CBS is a large business concern.

B. Size Determination

On April 21, 2016, the Area Office issued its Size Determination finding Appellant's size protest against Spectrum JV untimely. The Area Office stated that the CO notified unsuccessful offerors on February 18, 2016, that Spectrum JV was the apparent awardee for the instant procurement. Therefore, the Area Office concluded that Appellant's size protest, filed on April 6, 2016, was untimely. (Size Determination, at 1.)

The Area Office further noted that Spectrum JV is a mentor-protégé joint venture, but that only the mentor-protégé agreement has been approved by SBA as the instant procurement is not an 8(a) set-aside. The Area Office added that “there is no requirement for SBA to review a

joint venture agreement issued under the SBA Mentor-Protégé Program for a procurement that is a non-8(a) BD set-aside.” (*Id.*; citing 13 C.F.R. § 124.513(e).)

C. The Appeal

On May 9, 2016, Appellant filed the instant appeal. Appellant argues the Area Office erred in dismissing its size protest as untimely and requests OHA remand it back to the Area Office.

Appellant contends the Area Office erred when it found that the CO notified Appellant Spectrum JV was the apparent awardee of the instant solicitation on February 18, 2016. Appellant asserts that on March 9, 2016, the Navy issued a Request for Final Proposal Revisions to all offerors, thus Spectrum JV was no longer the apparent awardee. (Appeal, at 3.) Appellant maintains that in light of the Navy's request, and subsequent award to Spectrum JV on April 1, 2016, its size protest was timely filed. (*Id.* at 4; citing *Size Appeal of Southwind Construction Services, LLC*, SBA No. SIZ-5610 (2014); *Size Appeal of Bosco Constructors, Inc.*, SBA No. SIZ-5345 (2012).)

Appellant also argues the Area Office failed to properly evaluate whether Spectrum JV, a joint venture, is in compliance with the exceptions to affiliation found at 13 C.F.R. § 124.513(c) and (d). (*Id.* at 5.) Appellant argues that because it filed a timely and specific protest the Area Office erred in failing to conduct a full size determination to determine whether Spectrum JV is a large concern for the instant procurement.

D. Spectrum JV's Response

On June 1, 2016, Spectrum JV files its response to the appeal. Spectrum JV requests that OHA deny the appeal and the size determination be upheld.

Spectrum JV maintains Appellant's argument challenging whether the joint venture agreement between Spectrum and CBS is compliant with SBA regulations may not be addressed here because it was not raised in the size protest and thus is a substantive issue raised for the first time on appeal. (Response at 2-3; citing *Size Appeal of Keystone Ocean Services, Inc.*, SBA No. SIZ-4712 (2005).)

Spectrum JV further argues Appellant's size protest was not sufficiently specific. 13 C.F.R. § 121.1007. Spectrum JV states Appellant's size protest lacks any detail challenging Spectrum and CBS's joint venture agreement and its compliance with SBA's 8(a) regulations. According to Spectrum JV, the size protest simply raises the issue of whether the SBA had the approved the joint venture agreement. (*Id.* at 4.) Spectrum JV argues the size protest therefore failed to put Spectrum JV on notice that the content of the joint venture agreement was being challenged.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

In considering a size appeal, OHA will not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330 (2012). Appellant attempts to argue the Area Office erred by not evaluating whether Spectrum JV's joint venture agreement met the requirements of 13 C.F.R. § 124.513(c) and (d). That joint venture agreement is not at issue here, and Appellant is clearly attempting to raise new issues on appeal. Ironically, Spectrum JV is also attempting to raise new issues on appeal by arguing that the instant size protest is not sufficiently specific enough and should be dismissed under 13 C.F.R. § 121.1007. I conclude that I must dismiss the above arguments by Appellant and Spectrum JV because they fail to address the only issue on appeal, whether the Area Office erred by dismissing Appellant's protest as untimely.

SBA regulations provide that “a protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.” 13 C.F.R. § 121.1004(a)(2). In the past, OHA has repeatedly ruled that any size protest filed after five days from when the protestor learned of the identity of the apparent awardee will be dismissed. *Size Appeal of EnviroServices & Training Center, LLC*, SBA No. SIZ-5517 (2013); *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089 (2009).

Here, it is very clear that after the February 18, 2016, notification from the CO that Spectrum JV was the apparent awardee, the Navy reopened discussions regarding the instant solicitation on March 4, 2016. *Supra*, Section II.A. More importantly, on March 9, 2016, the Navy issued a Request for Final Proposal Revision, directing offerors to submit their final written proposal revisions. (*Id.*) This establishes the Navy's evaluation process was not complete, and that the Navy had made no award. FAR 15.307. The notice further stated that after the receipt of all final proposal revisions, award of the instant solicitation will be made. Consequently, the record is very clear that the Navy's notification of February 18, 2016, was no longer valid and a new award was to be made.

On April 1, 2016, the CO notified all offerors that Spectrum JV was once again the apparent awardee. Thus, this notification is the correct date when the CO notified the protester, Appellant, of the prospective awardee as contemplated by the regulation. It is from this date that Appellant's time to file a protest began to run. Appellant filed its protest April 6th, within five

days of this date. Appellant's protest was therefore timely. 13 C.F.R. § 121.1004(a)(2)(i). I therefore conclude that the Area Office committed an error of fact in dismissing Appellant's protest as untimely and grant the appeal and remand the matter back to the Area Office.

IV. Conclusion

For the above reasons, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further review consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge