United States Small Business Administration
Office of Hearings and Appeals

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: Straughan Environmental, Inc. Appellant, RE: Integrated Mission Support Services, LLC Petition for Reconsideration of SBA No. SIZ-5767	SBA No. SIZ-5776 Decided: September 13, 2016

ORDER DENYING PETITION FOR RECONSIDERATION[1]

I. Background

A. Prior Proceedings

On August 5, 2016, Straughan Environmental, Inc. (Petitioner) filed the instant Petition for Reconsideration (PFR) of the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision in *Size Appeal of Straughan Environmental, Inc.*, SBA No. SIZ-5767 (2016) ("*Straughan I*"). In the decision, OHA granted a motion to dismiss filed by the challenged concern, Integrated Mission Support Services, LLC (IMSS). OHA agreed with IMSS that Petitioner lacks standing to appeal a size determination favorable to IMSS. OHA reasoned that, because Petitioner did not protest IMSS's size and is not eligible for award of the underlying procurement due to its exclusion from the competitive range, Petitioner is not "adversely affected" by the size determination, as 13 C.F.R. § 134.302(a) requires in order to have standing to appeal. *Straughan I*, at 4.

[1] OHA originally issued this decision under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No party requested redactions. Thus, OHA now publishes the decision in its entirety.

B. The PFR

Petitioner argues that OHA erred in dismissing its appeal for lack of standing. Petitioner highlights that it is the plaintiff in a pending bid protest at the U.S. Court of Federal Claims (Court). In that bid protest, Petitioner asserts, Petitioner is challenging its exclusion from the competitive range as well as the award to IMSS. (PFR at 3.) Petitioner acknowledges that it did not "summarize the non-small business bases for its bid protest" in the appeal or supplemental appeal filed with OHA, but maintains that SBA regulations do not require appellants to bring such matters to OHA's attention. (*Id.*) Petitioner contends that 13 C.F.R. § 134.302(a) and OHA case law impose no conditions on the right to appeal, except that the appellant be an unsuccessful offeror.

Petitioner argues that *Straughan I* relied improperly upon a decision of the U.S. Government Accountability Office (GAO), which denied an earlier bid protest where Petitioner challenged the evaluation of its proposal and its exclusion from the competitive range. Petitioner maintains that, because Petitioner continues to pursue a separate bid protest at the Court, the GAO decision is "non-controlling precedent." (*Id.* at 4.) Petitioner offers a redacted copy of its Court complaint and a list of the filings submitted to the Court to establish that "[Petitioner] is in fact challenging its exclusion from the competitive range" in the Court litigation. (*Id.* at 5.)

Petitioner asserts that "[b]ecause of the *de novo* nature of the Court's review, unless and until there has been a final resolution of [Petitioner]'s bid protest, it remains eligible for award." (*Id.* at 6.) Accordingly, because Petitioner is a disappointed offeror whose competitive range exclusion remains in dispute at the Court, OHA erred in concluding that Petitioner lacks standing to appeal the size determination.

C. IMSS's Response

On August 10, 2016, IMSS responded to the PFR. IMSS argues that Petitioner has not demonstrated clear error of fact or law in *Straughan I*. Therefore, OHA should deny the PFR.

IMSS disputes the notion that Petitioner is still eligible for award of the subject procurement. IMSS emphasizes that, as matters now stand, the procuring agency has excluded Petitioner's proposal from the competitive range, and GAO has affirmed Petitioner's exclusion by denying Petitioner's bid protest. (Response at 2.) Although it is possible that the Court could subsequently overturn these decisions, Petitioner currently "remains excluded from the competitive range" and is ineligible for award. (*Id.* at 3.)

IMSS then argues that Petitioner's exclusion from the competitive range renders it incapable of having standing under 13 C.F.R. § 134.302(a) to appeal a size determination. According to IMSS, "OHA has made abundantly clear that if an offeror's proposal is removed from consideration for award for reasons other than its size, the offeror is not an interested party." (*Id.*, citing *Size Appeal of Integrity Management International, Inc.*, SBA No. SIZ-3586 (1992), *Size Appeal of L. Washington & Associates, Inc.*, SBA No. SIZ-4219 (1996), *Size Appeal of Madison Services, Inc.*, SBA No. SIZ-3853 (1993), and *Size Appeal of Humanics Ltd. Corp. Inc.*, SBA No. SIZ-3858 (1993).)

In IMSS's view, the case precedents cited by Petitioner — *Size Appeal of Q Integrated Companies, LLC*, SBA No. SIZ-5743 (2016) and *Size Appeal of Eagle Home Medical, Inc.*, SBA No. SIZ-4291 (1998) — are distinguishable from the circumstances here, because in those cases there was no indication that the non-protesting offeror was ever eliminated from the competition. (*Id.* at 5-6.) IMSS further challenges the two new exhibits Petitioner attached to the PFR. Petitioner could have produced these exhibits at the time *Straughan I* was decided, so the exhibits may not now be admitted on reconsideration. (*Id.* at 7.)

D. Petitioner's Reply

On August 10, 2016, prior to the deadline for the close of record, Petitioner requested leave to reply to IMSS's Response, or in the alternative, moved to strike IMSS's Response. Petitioner argues that there is good cause to permit a reply in order to address errors in IMSS's Response. Petitioner represents that IMSS does not object to the filing of a reply. Accordingly, for good cause shown, Petitioner's motion is GRANTED and the Reply is ADMITTED.

In its Reply, Petitioner insists that it "***remains very eligible for award***" of the subject contract. (Reply at 4, emphasis in original.) Petitioner reiterates that Petitioner's bid protest at the Court challenges its exclusion from the competitive range, so that exclusion should not be considered final at this juncture. (*Id.*, at 3-4.) "Pending a decision on the merits of that bid protest, and if [Petitioner] prevails on any of its non small business arguments in its bid protest, it remains eligible for award, and can in fact be awarded the contract." (*Id.* at 8.)

Petitioner maintains that the OHA decisions cited in IMSS's Response have no bearing on the issues presented here. *Madison Services* and *Humanics* dealt with standing to file a size protest, not with standing to file an appeal. Petitioner did not file a size protest against IMSS, so *Madison Services* and *Humanics* are irrelevant here. The fact that Petitioner continues to challenge its exclusion from the competitive range distinguishes the instant case from *L. Washington* and *Integrity Management*. According to Petitioner, adopting IMSS's arguments would create the absurd result that "an appellant is automatically stripped of its standing if it has lost a GAO protest, regardless of whether it is pursuing a bid protest at the [Court]." (*Id.* at 7.)

Petitioner also disputes IMSS's contention that the two exhibits attached to the PFR should be excluded from the record. Petitioner states that the exhibits are offered to establish that Petitioner "actually was seeking redress in the Court of Federal Claims from the Government's unlawful exclusion from the competitive range." (*Id.* at 9.) To the extent the exhibits constitute new evidence, they are relevant to the issues on appeal, do not unduly enlarge the issues, and clarify the facts upon which OHA dismissed the appeal. Therefore, the exhibits should be admitted and considered.

II. Discussion

A. Jurisdiction and Standard of Review

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. Petitioner filed its PFR within twenty days of service of *Straughan I*, 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). 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 Enters., Inc.*, SBA No. SIZ-5450, at 2 (2013) (PFR).

B. Analysis

This PFR fails for two reasons.

First, Petitioner has not persuasively explained how it is adversely affected by the instant size determination under 13 C.F.R. § 134.302(a). Petitioner appears to take the position that, although the procuring agency excluded Petitioner from the competitive range, and although GAO effectively affirmed that decision by denying Petitioner's bid protest, Petitioner remains eligible for award until all possible appeals of those decisions have been exhausted. As IMSS correctly observes, though, it is more accurate to state that Petitioner presently is ineligible for award, and will remain ineligible unless the existing decisions are overturned by the Court or another tribunal. Thus, while it may be true that Petitioner could become eligible for award based on future litigation, Petitioner has shown no error in OHA's decision that, at the time of the appeal, Petitioner was "not an unsuccessful offeror that could potentially be awarded the contract if IMSS were determined to be ineligible." *Straughan I*, at 4. It follows that, as of the date the appeal was filed, Petitioner was not adversely affected by the size determination favorable to IMSS, and lacked standing to bring this appeal. *Id.*

Second, it is settled law that "OHA will not entertain arguments which are raised for the first time in a PFR, and which might have been voiced earlier in the litigation." *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5392, at 5 (2012) (PFR). Here, Petitioner's principal argument in the PFR is that Petitioner's exclusion from the competitive range is not yet final due to the ongoing Court litigation. During the *Straughan I* proceedings, though, Petitioner did not argue that a ruling on standing would be premature pending the outcome of the Court litigation. Indeed, although Petitioner repeatedly stated that it is disputing IMSS's size in a bid protest at the Court, Petitioner did not make clear that it also is re-litigating its own exclusion from the competitive range, and Petitioner itself acknowledges in the PFR that it did not "summarize the non-small business bases for its bid protest" in the pleadings Petitioner previously filed with OHA. Section I.B, *supra*. Accordingly, the notion that it would be premature for OHA to dismiss the appeal because Petitioner's exclusion from the competitive

range is still under review is an argument that could have been, but was not, raised at the time of the prior decision. Petitioner therefore has not advanced proper grounds to disturb *Straughan I*.

III. Conclusion

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). Here, although Petitioner disagrees with OHA's decision, Petitioner has not established that significant findings of fact or conclusions of law are erroneous. I therefore DENY the PFR and AFFIRM the decision in *Size Appeal of Straughan Environmental, Inc.*, SBA No. SIZ-5767 (2016).

KENNETH M. HYDE
Administrative Judge