

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

TMC Global Professional Services

Appellant,

RE: Tech2 Solutions

Appealed From
Size Determination No. . 6-2016-079

SBA No. SIZ-5792

Decided: November 18, 2016

APPEARANCES

Amy L. O'Sullivan, Esq., Olivia L. Lynch, Esq., Crowell & Moring LLP, Washington, D.C., for Appellant

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Maria D. Vasquez, Contracting Officer, U.S. Department of Energy, National Nuclear Security Administration, Albuquerque, New Mexico

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a size protest filed by TMC Global Professional Services (Appellant) against Tech2 Solutions (Tech2). The U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) dismissed Appellant's size protest for lack of standing, concluding that Appellant had no reasonable chance to be selected for award.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA offered the parties the opportunity to propose redactions to the decision. No redactions were requested, and OHA now issues the decision for public release.

Because I agree with Appellant that the protest was improperly dismissed, the appeal is granted, and the dismissal is vacated. On remand, the Area Office must address the merits of Appellant's size protest.

SBA's Office of Hearings and Appeals (OHA) decides appeals of size determinations 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. Solicitation and Protest

On February 1, 2016, the U.S. Department of Energy (DOE), National Nuclear Security Administration, issued Request for Proposals (RFP) No. DE-SOL-0008449 for the Design, Integration, Construction, Communication, and Engineering 2 (DICCE2) procurement, in support of DOE's nuclear smuggling detection and deterrence efforts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$36.5 million average annual receipts. Proposals were due March 23, 2016. (RFP, Amendments 00001 and 00002.)

According to the RFP, DOE “anticipated that there w[ould] be two (2) awards resulting from this solicitation.” (RFP at L-4.) Awards would be made on a best value basis, considering six evaluation factors: (1) Relevant Corporate Experience; (2) Organizational Structure and Key Personnel; (3) Central Alarm Station (CAS) Communications System Management; (4) Technical Approach to Vietnam Task Order; (5) Past Performance; and (6) Cost. (*Id.* at M-2.)

The RFP cautioned offerors that:

A proposal will be eliminated from further consideration if the proposal is so grossly and obviously deficient as to be totally unacceptable on its face or the Offeror does not meet any Pass/Fail criteria. For example, a proposal will be deemed unacceptable if it does not represent a reasonable initial effort to address itself to the essential requirements of the RFP, or if it clearly demonstrates that the Offeror does not understand the requirements of the RFP. Therefore, if a proposal is determined to be technically unacceptable, no further evaluation of the proposal (technical, cost, or management) will be performed. In the event that a proposal is eliminated, a notice will be sent to the Offeror stating the reasons that the proposal will not be considered for further evaluation under this solicitation.

(*Id.* at M-1.) Similar language was repeated elsewhere in the RFP, reiterating that “if a proposal is determined to be unacceptable, no further evaluation of the proposal (technical or cost) will be performed”, and indicating that “the [CO] shall notify the Offeror, in writing, as to the basis of

an Offeror's elimination from the competition and that a proposal revision will not be considered.” (*Id.* at M-6.)

The RFP stated that, for the first four evaluation factors, DOE would assign each proposal an adjectival rating of Excellent, Good, Satisfactory, or Less than Satisfactory. The RFP defined these adjectival ratings as follows:

Excellent - The Proposal addresses the requirements in an exceptional manner normally evidenced by at least one significant strength or a combination of strengths and no weaknesses and a very high probability of successful contract performance with a low degree of risk.

Good - The Proposal addresses the requirements in a comprehensive manner normally evidenced by strengths that outweigh any weaknesses and a high probability of successful contract performance with a low degree of risk.

Satisfactory - The Proposal addresses the requirements in an acceptable manner normally evidenced by strengths and weaknesses that are generally offsetting and a reasonable probability of successful contract performance with a moderate degree of risk.

Less than Satisfactory - The Proposal addresses the requirements in a less than acceptable manner with weaknesses that outweigh strengths, if any; and a low probability of successful contract performance with a moderate to high degree of risk.

(*Id.* at M-3.) In addition to the adjectival scores, the third evaluation factor, CAS Communications System Management, contained a pass/fail element. The RFP stated that, if an offeror's proposal were to fail this element, “all further evaluation will cease and the Offeror's proposal will be deemed unacceptable for award.” (*Id.*)

For the Past Performance factor, DOE would assign a rating of Exceptional, Very Good, Satisfactory, Marginal, Unsatisfactory, or Neutral. (*Id.*) A Neutral rating would be utilized if “the offeror lacks a record of relevant past performance history, or for whom past performance information is not available.” (*Id.* at M-4.)

Appellant, Tech2, and two other offerors submitted timely proposals. One of the other two offerors was eliminated from the competition after DOE determined that its proposal did not “represent a reasonable initial effort to address the essential requirements of the RFP, and demonstrated that the offeror did not understand the requirements of the RFP.” (CO's Statement, at 6.)

On August 12, 2016, the CO notified Appellant that Tech2 was an apparent awardee. On August 18, 2016, Appellant timely protested Tech2's size. Appellant alleged that Tech2 is not a small business because it is affiliated with SES-Tech Global Solutions, Sealaska Environmental

Services, Sealaska Technical Services, and Tetra Tech. (Protest at 1.) The protest asserted that Appellant has standing to protest because it “is a legitimate small business concern that participated in the competition conducted under the RFP.” (*Id.* at 2.)

With its protest, Appellant provided the post-award notice it received from the CO. The notice contained the following table summarizing DOE's evaluation of Appellant's proposal for the DICCE2 procurement:

Best Value Criteria	Adjectival Rating
Criterion 1 — Relevant Corporate Experience	Less Than Satisfactory
Criterion 2 — Organizational Structure and Key Personnel	Less Than Satisfactory
Criterion 3 — Central Alarm Station (CAS) Communications System Management	Less Than Satisfactory
Criterion 4 — Technical Approach to Vietnam Task Order	Less Than Satisfactory
Criterion 5 — Past Performance	Neutral

(Protest, Ex. 3.)

B. Size Investigation

On September 13, 2016, the Area Office emailed the CO concerning the evaluation of Appellant's proposal. The Area Office observed that “DOE rated [Appellant's] proposal ‘less than satisfactory’ under four of the technical evaluation criteria and ‘neutral’ under past performance.” (Email from T. Cole to M. Velasquez (Sept. 13, 2016).) In addition, the RFP “define[d] the rating ‘less than satisfactory’ in a less than acceptable manner with weaknesses that outweigh strengths and a low probability of successful contract performance.” (*Id.*) As a result, “[a]lthough DOE states that [Appellant] was not eliminated from competition for any reason unrelated to size, it's unclear if [Appellant] would be in line for award since its proposal is considered less than acceptable based on the evaluation ratings given.” (*Id.*) The Area Office asked the CO to clarify whether Appellant “has a reasonable chance to be selected for award if [it is] successful in [its] size protest.” (*Id.*)

The CO responded that Appellant “would not have a reasonable chance to be selected if [it] were to be successful in [its] size protest.” (Email from M. Velasquez to T. Cole (Sept. 14, 2016).) “**Because [Appellant] was found less than satisfactory in four of the five criteria, I did not consider [Appellant] for award when compared to the other offer[ors]’ superior proposals.**” (*Id.*, emphasis in original.) The CO did not dispute the Area Office's assertion that Appellant's proposal was not eliminated from the competition for any procurement-related reason.

C. Size Determination

On September 21, 2016, the Area Office dismissed Appellant's protest for lack of standing. The Area Office noted that, according to the CO, Appellant's proposal was not considered for award and Appellant would not be selected even if Appellant were to prevail in its size protest. Because “the purpose of [SBA's size protest regulations] is to ‘give standing to those concerns whose successful [size] challenge would enable them to compete for award’”, Appellant lacked standing to protest Tech2's size. (Size Determination at 1, quoting *Size Appeal of A & H Contractors, Inc.*, SBA No. SIZ-5417, at 5-6 (2012) and *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089, at 5 (2009).)

D. Appeal

On October 6, 2016, Appellant filed the instant appeal and moved to introduce new evidence. Appellant argues that the Area Office clearly erred in dismissing the protest, and urges OHA to remand the matter for a proper size determination of Tech2.

Appellant observes that SBA regulations permit a size protest to be filed by “[a]ny offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range.” (Appeal at 5, quoting 13 C.F.R. § 121.1001(a)(1)(i).) None of these circumstances is present in the instant case, Appellant contends.

Further, the two OHA cases cited in the size determination do not stand “for the proposition that something other than a formal agency determination of non-responsiveness, technical unacceptability, or exclusion from the competitive range can count as ‘elimination from consideration.’” (*Id.* at 6.) In *A & H Contractors*, OHA found that a protester lacked standing because it had been “eliminated from the competition by statute”, which legally prohibited the procuring agency from awarding a contract to a bidder whose price exceeded the Government's estimate by 25% or more. (*Id.*, citing *A & H Contractors*, SBA No. SIZ-5417, at 4.) In *FitNet*, the procuring agency notified OHA that the protester's offer was “not technically acceptable” for various reasons. OHA concluded that “under the terms of the RFQ, [the protester's] quote could not be considered for award.” (*Id.* at 7, quoting *FitNet*, SBA No. SIZ-5089, at 5.)

Appellant argues further that the Area Office's interpretation of § 121.1001(a)(1)(i) is at odds with the regulatory history. Prior to June 30, 2016, the regulation stated that “[a]ny offeror whom the contracting officer has not eliminated for reasons unrelated to size” could bring a size protest. SBA recently amended the regulation, though, explaining:

Small businesses and contracting officers have found the current language to be unclear because it contains a double negative, stating that any offeror that has not been eliminated for reasons not related to size may file a size protest. The intent is to provide standing to any offeror that is in line or consideration for award, but to not provide standing for an offeror that has been found to be non-responsive, technically unacceptable or outside of the competitive range.

(*Id.*, quoting 81 Fed. Reg. 34,243, 34,253 (May 31, 2016).) Appellant concludes from this commentary that “SBA drew the line at where there has been a finding of non-responsiveness, technical unacceptability, or competitive range exclusion”. (*Id.*, emphasis in original.) Conversely, DOE made no such finding in the instant case.

Appellant contends that the Area Office mistakenly determined that Appellant was not in line for award. Appellant emphasizes it was neither excluded from the competitive range nor found to be technically unacceptable, so it is in line for award. To support this argument, Appellant highlights that DOE did not inform Appellant that it was eliminated from the competitive range, and the post-award debriefing notice did not state that Appellant was technically unacceptable or unsatisfactory. Moreover, one of the other three offerors was determined to be “not technically acceptable overall” and was excluded from the DICCE2 competition on this basis. (*Id.* at 8.) Therefore, had DOE deemed Appellant's proposal to be unacceptable, DOE would have excluded Appellant from the competition as it did the other offeror.

E. Tech2's Response

On October 24, 2016, Tech2 responded to the appeal. Tech2 argues the Area Office correctly dismissed Appellant's protest, so OHA should deny the appeal.

In Tech2's view, the Area Office's application of 13 C.F.R. § 121.1001(a)(1)(i) was proper because the regulation gives standing only to an offeror that the CO “has not eliminated from consideration for any procurement-related reason. . .” (Tech2 Response at 2, quoting 13 C.F.R. § 121.1001(a)(1)(i) (emphasis added by Tech2).) Here, Appellant was eliminated for a procurement-related reason—its “critically low technical ratings”. (*Id.*) As a result, the Area Office properly determined that Appellant lacked standing to protest.

Tech2 argues that there is no requirement that an offeror be formally excluded in order to be deemed eliminated from consideration for purposes of standing. Further, Tech2 observes, the procurement-related reasons for elimination listed in the regulation—non-responsiveness, technical unacceptability, or outside the competitive range—are preceded by the phrase “such as”. As a result, these reasons are merely illustrative and do not constitute a comprehensive list. (*Id.* at 3-4.)

The regulatory history and OHA precedent confirm this understanding, Tech2 contends. The regulatory history makes plain that SBA's “intent is to provide standing to any offeror that is in line or consideration for award.” (*Id.* at 4, quoting 81 Fed. Reg. 34,243, 34,253 (May 31, 2016) (emphasis added by Tech2).) Likewise, OHA stated in *A & H Contractors* that “case precedent indicates that an offeror whose proposal is unacceptable, and is not capable of being made acceptable, lacks standing to protest, regardless of whether that offeror is ever formally excluded.” (*Id.*, quoting *A & H Contractors*, SBA No. SIZ-5417, at 4 (emphasis added by Tech2).) Here, because Appellant's proposal was rated “Less than Satisfactory” under four of the evaluation factors, it was “less than acceptable under the RFP.” (*Id.*) It therefore is immaterial whether DOE formally excluded Appellant from the competition.

F. CO's Statement

On October 24, 2016, the CO filed a statement of facts. As attachments, the CO provided the technical evaluation report of Appellant's proposal and copies of her correspondence with the Area Office.

The CO states that DOE received four proposals for the DICCE2 procurement, but one proposal “was determined not to represent a reasonable initial effort to address the essential requirements of the RFP and demonstrated that the offeror did not understand the requirements of the RFP. Subsequently, the proposal was eliminated from further consideration.” (CO's Statement, at 6.) As a result, DOE evaluated the proposals of Appellant, Tech2, and one other offeror. Because Appellant's proposal was rated “Less than Satisfactory” for four evaluation factors and “Neutral” for past performance, DOE “did not consider [Appellant] for award when compared to the other offerors' superior proposals.” (*Id.* at 7-8.)

G. Motion to Strike

On November 4, 2016, Appellant moved to strike the technical evaluation report attached to the CO's statement. This document, Appellant maintains, was not provided to the Area Office during the size investigation, and the CO has not explained why there is good cause to admit it, as 13 C.F.R. § 134.308(a) requires. Accordingly, OHA should disregard the report in considering this appeal. On November 8, 2016, Tech2 opposed Appellant's motion. Tech2 argues that OHA should deny the motion because the technical evaluation report merely confirms the CO's statements to the Area Office.

Contrary to the parties' contentions, the technical evaluation report was, in fact, provided to the Area Office during the size review, and is already in the Area Office file. Accordingly, the technical evaluation report does not constitute new evidence and need not be admitted into the record. *E.g., Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 12 (2015). Appellant's motion to strike is therefore DENIED.

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

I agree with Appellant that the Area Office clearly erred in dismissing Appellant's size protest for lack of standing. The applicable regulation, 13 C.F.R. § 121.1001(a)(1)(i), provides that a size protest may be filed by “[a]ny offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range”. Here, Appellant was an offeror on the DICCE2 procurement, and it is undisputed that Appellant's proposal was not formally eliminated from the competition. Indeed, according to correspondence between the Area Office and the CO, “DOE state[d] that [Appellant] was not eliminated from competition for any reason unrelated to size”. Section II.B, *supra*. Pursuant to 13 C.F.R. § 121.1001(a)(1)(i), then, Appellant has standing to file a size protest.

It is true, as the Area Office recognized, that OHA has in some instances held that an offeror lacks standing to protest if the offeror's proposal is technically unacceptable or otherwise incapable of being selected for award, regardless of whether that offeror was ever formally excluded from the competition. *E.g.*, *Size Appeal of KAES Enters., LLC*, SBA No. SIZ-5425, at 3 (2012) (protest lodged by a technically unacceptable offeror was properly dismissed, although it was “regrettable that the [protester] was not informed that its proposal was technically unacceptable”); *Size Appeal of Glen/Mar Constr., Inc.*, SBA No. SIZ-5143, at 3 (2010). In the instant case, though, the Area Office made no finding that Appellant's proposal was technically unacceptable or otherwise ineligible for award. Section II.C, *supra*. Further, although DOE rated Appellant's proposal “Less than Satisfactory” for four of the evaluation factors, such a rating does not necessarily connote that the proposal was technically unacceptable. Rather, a “Less than Satisfactory” rating indicated that the proposal contained “weaknesses that outweigh strengths”, as opposed to “strengths and weaknesses that are generally offsetting” which would be needed in order for the proposal to achieve a “Satisfactory” rating. Section II.A, *supra*. Moreover, the RFP stated that, if DOE were to find an offeror's proposal technically unacceptable, DOE would then cease its evaluation of the proposal and inform the offeror in writing of its determination. *Id.* DOE did, in fact, follow this procedure with respect to a different offeror, but did not eliminate Appellant's proposal from the competition, nor discontinue its evaluation of Appellant's proposal. Section II.F, *supra*. Thus, DOE's own actions during the evaluation process confirm that DOE did not consider Appellant's proposal to be technically unacceptable. In short, then, the record here does not support the conclusion that Appellant's proposal was technically unacceptable or was otherwise ineligible for award.

The CO's remark that Appellant “would not have a reasonable chance” to be selected for award does not compel a contrary result. Read in context, the CO merely opined that Appellant's proposal was unlikely to be chosen “**when compared to the other offer[ors'] superior proposals**”. Section II.B, *supra* (emphasis in original). In other words, DOE evaluated proposals and selected the offerors that, in DOE's judgment, had the strongest proposals. It does not follow, though, that Appellant was excluded from the competition or was ineligible for award, simply because Appellant ultimately was unsuccessful. Indeed, OHA has recognized that an unsuccessful offeror with a relatively weak proposal still does have standing to protest, if the offeror was not excluded from the competition and could be selected for award if the apparent awardee were disqualified as a result of a size protest. *Size Appeal of Bosco Constructors, Inc.*,

SBA No. SIZ-5345, at 3 (2012) (“An offeror is not “eliminated’ from a competition merely because it is not selected for award.”); *Size Appeal of Ironclad-EEI: A Joint Venture*, SBA No. SIZ-4800, at 2 (2006) (“a size protestor need not be among the finalists for award” to have standing).

IV. Conclusion

Appellant has demonstrated that the Area Office clearly erred in dismissing Appellant's protest. Accordingly, the appeal is GRANTED and the matter is REMANDED to the Area Office for a review of Appellant's protest on the merits.

KENNETH M. HYDE
Administrative Judge