

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

SIZE APPEAL OF:

DataSavers of Jacksonville, Inc.,

Appellant,

RE: Integrated Solutions and Services
Unlimited, Inc.

Appealed From
Size Determination No. 04-2017-04

SBA No. SIZ-5795

Decided: December 7, 2016

DECISION

I. Introduction and Jurisdiction

On October 28, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2017-04, dismissing a size protest filed by DataSavers of Jacksonville, Inc. (Appellant) as non-specific. For the reasons discussed *infra*, the appeal is denied, and the dismissal is affirmed.

SBA's Office of Hearings and Appeals (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 this 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, Protest, and Size Determination

On June 28, 2016, the Contracting Officer (CO) for the Department of Veterans Affairs (VA) informed Appellant that it did not receive the award under Request for Quote VA246-16-Q-0868 (RFQ), but that VA had awarded the task order to Integrated Solutions and Services Unlimited, Inc. (ISS). On July 1, 2016, Appellant notified VA that it was protesting the award to the Government Accountability Office (GAO).¹

¹ GAO dismissed Appellant's protest on October 13, 2016. *DataSavers of Jacksonville, Inc.*, B-413369.1, October 13, 2016.

On July 5, 2016, Appellant further protested ISS's size to VA:

One of the basis for my pending protest to the GAO is that the award of this contract would clearly violate the Ostensible Subcontractor Rule if in fact the subcontractor is not a small business. If the subcontractor is a small business, then, there is a possibility the Ostensible Subcontractor Rule would not be violated if the affiliation between the prime and sub does not exceed the size standard of \$27 million.

(Email, M. Lombardi to E. Ligon-Moton, July 5, 2016.)

On October 28, 2016, the Area Office issued Size Determination No. 04-2017-04 dismissing Appellant's protest as non-specific. The Area Office explained:

The protest contains no allegations of facts; instead, it merely claims that the protested concern might be other than small under the ostensible subcontractor rule if its subcontractor "is not a small business." [] The protest, in other words, is speculative.

(Size Determination at 1, footnote omitted.)

B. Appeal

On November 7, 2016, Appellant filed the instant appeal. Appellant asserts the Area Office instructed it not to submit allegations of how ISS violated the ostensible subcontractor rule, but only the documentation of when and how Appellant questioned ISS's size status to the contracting officer. Appellant then attempts to present new evidence and to argue why ISS is other than small. Appellant includes an email to the VA which is not in the Area Office file, where it states "I understand that small business concerns must show that they will perform more than 50% of the cost of the project for set-asides." The email then includes an analysis of the project, based on the experience of one of Appellant's officials, attempting to argue ISS was not performing 50% of the work. (Email, M. Lombardi to E. Ligon-Moton, July 1, 2016.)

III. Discussion

I find that the Area Office properly dismissed Appellant's protest. The regulations governing size determinations provide:

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not

small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest.

13 C.F.R. § 121.1007(b).

If an area office finds a protest is non-specific, it must dismiss the protest. 13 C.F.R. § 121.1007(c). In the past, OHA has stated that, in reviewing non-specific protests, it will consider “(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds.” *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009).

Here, Appellant's protest to the CO merely states that it is possible ISS is in violation of the ostensible subcontractor rule. Appellant made no assertions of any factual nature which would support a finding that ISS is other than small. Appellant merely speculated that ISS may be in violation of the ostensible subcontractor rule. The protest includes no specific facts, and thus does not meet the requirements of the regulation.

Appellant's complaint, on appeal, that the Area Office instructed it not to submit anything not submitted to the CO by July 5th was not misleading, as Appellant implies. Rather, the Area Office clearly was trying to deal only with those allegations Appellant had made to the CO in a timely fashion, *i.e.*, within five business days of the award. 13 C.F.R. § 121.1004(a)(2). Those would be the allegations Appellant had put before the CO by July 5th. Those allegations included no specific facts to sustain the protest.

Appellant seeks to submit new evidence. OHA will not consider new evidence on appeal unless the Judge orders its submission or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308(a). Appellant has filed no such motion, nor has it provided any reason for its not having submitted this evidence to the CO, when it was available to Appellant at the time Appellant filed the protest. Also, an insufficiently specific protest cannot be cured on appeal by the submission of new evidence. *Size Appeal of AMETEK SCP, Inc.*, SBA No. SIZ-5518 (2013). Further, an examination of the proffered new evidence establishes that it is merely more speculation about ISS's proposal, and puts forth no facts to sustain the protest. Accordingly, I DENY Appellant's attempt to submit new evidence on appeal.

I conclude that the instant appeal fails to state how the Area Office erred in dismissing Appellant's size protest, as required by 13 C.F.R. § 134.305(a)(3). Therefore, Appellant has failed to meet its burden of establishing the Area Office's dismissal of its protest as insufficiently specific was clear error. 13 C.F.R. § 134.314. I therefore must affirm the dismissal and deny the appeal. *Size Appeal of Jenn-Kans Disposal Service*, SBA No. SIZ-5549 (2014).

IV. Conclusion

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

CHRISTOPHER HOLLEMAN
Administrative Judge