United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: K2 Group, Inc., Appellant, RE: Apogee-SSU Joint Venture, LLC Appealed From Size Determination No. 03-2017-009	SBA No. SIZ-5805 Decided: January 18, 2017

APPEARANCES

Damien C. Specht, J. Alex Ward, James A. Tucker, R. Locke Bell, Morrison & Foerster LLP, Washington, D.C., for Appellant

Jenna C. Borders, Benjamin Thompson, Wyrick Robbins Yates & Ponton LLP, Raleigh, NC, for Apogee-SSU Joint Venture, LLC.

DECISION

I. Introduction and Jurisdiction

On December 14, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2017-009 dismissing a size protest filed by K2 Group, Inc. (Appellant) against Apogee-SSU Joint Venture, LLC (Apogee). The Area Office concluded that Appellant's protest was untimely.

Appellant contends its protest was improperly dismissed, and requests the matter be remanded to the Area Office for a new size determination. For the reasons discussed *infra*, the appeal is denied, and the size determination 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 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 29, 2016, the U.S. Defense Threat Reduction Agency (DTRA) issued Request for Proposals (RFP) No. HDTRA1-16-R-0007 seeking technical support group personnel support services. The Contracting Officer (CO) set the procurement aside for Service Disabled Veteran Owned Small Business Concerns (SDVO SBCs) and designated North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, with a corresponding $15 million annual receipts size standard, as the appropriate code. Proposals were due on April 4, 2016.

On September 16, 2016, DTRA notified unsuccessful offerors, via a pre-award notice, that Apogee was the prospective awardee and that the contract would be awarded on September 30, 2016. On September 21, 2016, Appellant alleged to DTRA that Apogee lacked a facility clearance required by the RFP. On October 4, 2016, DTRA initiated a pre-award audit of Appellant, and notified Appellant that it had not awarded the contract to Apogee on September 30th. On November 30, 2016, DTRA awarded the contract to Apogee and notified Appellant of the award. On December 5, 2016, Appellant submitted a size protest to DTRA challenging the size of Apogee and claiming it exceed the applicable size standard.

B. Size Determination

On December 14, 2016, the Area Office dismissed Appellant's protest as untimely. The Area Office stated that on September 16, 2016, Appellant was notified via a pre-award notice that Apogee was the apparent successful offeror for the instant procurement and DTRA did not receive a timely size protest within the applicable time period. Thus, the December 5, 2016, size protest is untimely. (Size Determination, at 1-2.)

C. Appeal

On December 21, 2016, Appellant filed the instant appeal. Appellant challenges the Area Office's dismissal of its size protest as untimely. Appellant requests that OHA find its size protest was timely and subsequently find Apogee is not a small business concern. Alternatively, Appellant requests that OHA remand the appeal back to the Area Office in order for it to perform a size determination on Apogee.

Appellant argues that when "an agency takes actions that are inconsistent with a previous pre-award notice, such that offerors are led reasonably to believe that the agency no longer intends to award to the previously announced awardee, the first pre-award notice is no longer valid." (Appeal at 3.) Appellant relies on *Size Appeal of Hale Laulima, LLC*, SBA No. SIZ-5750 (2016) in claiming that after an agency takes action inconsistent with the pre-award notice, the date for determining the timeliness of a size protest is when the agency notifies offerors of the new award. Appellant notes that in *Hale Laulima*, the agency in question had asked for proposal revisions after the pre-award notice had been sent out, thus the later date in which the agency

once again notified offerors of the awardee's identity is indeed the correct date to determine the timelines of a size protest. (*Id.*)

Accordingly, Appellant argues that the same reasoning applied in *Hale Laulima*, applies to the instant case. After issuing the pre-award notice, DTRA did not award the contract to Apogee as indicated in the pre-award notice, and instead initiated a pre-award review of Appellant and other offerors. Further, DTRA notified Appellant that once an award was made, it would notify all offerors in the competitive range. Appellant contends that the actions taken by DTRA result in the invalidity of the original pre-award notice of September 16, 2016, and therefore the correct date for determining the timeliness of Appellant's size protest is November 30, 2016, the date DTRA notified Appellant that Apogee was once again the awardee. (*Id.* at 4.)

Lastly, Appellant maintains the Area Office erred in not finding Apogee to be an other than small business concern. Apogee is a joint venture, and Appellant contends that one of its members is not a small business concern, in violation of 13 C.F.R. § 121.103(h)(3)(i). Thus, the Area Office erroneously failed to find that Apogee is not a small business concern under the applicable size standard. (*Id.* at 5-6.)

D. Apogee's Response

On January 6, 2016, Apogee responded to the appeal. Apogee requests that OHA deny or dismiss the appeal.

Apogee argues the Area Office correctly interpreted 13 C.F.R. § 121.1004(a)(2) in dismissing Appellant's protest as untimely. (Apogee Response, at 3.) Appellant was notified on September 16, 2016, that Apogee was the prospective offeror, thus Appellant had five days from that date to submit its size protest, which Appellant failed to do. Additionally, Apogee contends that the actions taken by DTRA, particularly the commencement of a pre-award audit of Appellant, "occurred well after the five day period for filing a size protest expired, such that [Appellant] cannot reasonably maintain that it was misled by DTRA's actions in failing to file a size protest in a timely manner." (*Id.*)

Apogee notes that the case relied on by Appellant, *Hale Laulima*, is inapposite to the facts in the instant case. Specifically, Apogee states that *Hale Laulima* involved an originally timely protest at time of pre-award notification, and further, the CO in that case requested proposal revisions. Neither of these factual situations are replicated here. (*Id.* at 4.) The CO in the instant case issued a pre-award notice on September 16, 2016, and at no point thereafter did he reopen discussions or request proposal revisions. Appellant was therefore bound by 13 C.F.R. § 121.1004(a)(2) to file its size protest within five days of receiving the pre-award notice on September 16, 2016.

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

SBA regulations unequivocally state 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). Any size protest filed after five days from the date the protestor learned of the identity of the prospective awardee will be dismissed. *Size Appeal of HAL-PE Associates Engineering Services, Inc.*, SBA No. SIZ-5478 (2013); *Size Appeal of EnviroServices & Training Center, LLC*, SBA No. SIZ-5517 (2013). However, the issue here is whether the actions taken by DTRA after the pre-award notice was issued effectively changed the date the CO notified Appellant of the identity of the prospective awardee. I find they do not.

Appellant relies on two key facts in making its argument: (i) the pre-award notice stated that Apogee would be awarded the contract on September 30, 2016; and (ii) that DTRA conducted a pre-award review of Appellant, thus indicating to Appellant that Apogee was no longer the prospective awardee. These arguments fail for numerous reasons.

First, SBA regulations at no point state that if an award does not occur at the date indicated on the pre-award notice, the date for submitting a size protest is tolled or changes from the date the protester was notified of the prospective awardee's identity. Here, the fact that DTRA did not award the contract to Apogee on September 30th, as it stated in the pre-award notice it intended to do, does not change the fact that Appellant had been notified on September 16th of the identity of the prospective awardee. As stated above, SBA regulations simply require an unsuccessful offeror has been made aware of the prospective awardee's identity, it does not require that procuring agency actually make the award at the time stated in the preaward notice.

I turn next to Appellant's claim that DTRA's actions, framed as a pre-award review of Appellant's accounting system, effectively invalidated the September 16 pre-award notice. I disagree. As the CO explained to the Area Office, award to Apogee did not occur until November 30, 2016, "due to the fact that DTRA had to sponsor [Apogee] for a Top Secret Facility Clearance." (Letter from T. Lower to C. Thompson, December 8, 2016.)

In the past, OHA has contemplated a situation where the procuring agency, as a result of a bid protest, issued a stop work order in order to review the awardee's proposal again. In that case, the appellant argued that the stop work order, and subsequent review of the awardee's

proposal, altered the due date for a size protest to five days after the agency notified the appellant that the protested concern would still be awarded the contract. OHA rejected this argument, holding it "would be persuasive if the CO had canceled the award at this time and then issued a new award. However, the record establishes that the VA did not cancel the procurement and issue a new award prior to Appellant's filing the size protest." *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5460 (2013). Similarly, had the CO in the instant case cancelled the award to Apogee, Appellant's arguments would have merit. However, the CO never cancelled the award to Apogee. Indeed, as the letter quoted above makes clear, DTRA was working to correct the defects in Apogee's clearances, and thus clearly intended to proceed to award.

Appellant's reliance in *Hale Laulima* is misplaced. In that case, the Navy explicitly notified all offerors that it would reopen discussions for the procurement, and followed that notification with a Request for Final Proposal Revisions. This invalidated the preaward notice the Navy initially issued. There was clear public notice the Navy was reopening the procurement. The time to protest thus ran from the preaward notice the Navy issued subsequent to receiving the Final Proposal Revisions. Further, Appellant misreads *Hale Laulima* as based upon the protestor's reasonable belief that the preaward notice is withdrawn or otherwise ineffective. This is not the basis for that decision. Rather than the protestor's subjective belief, *Hale Laulima* is based upon the objective facts that the Navy issued an explicit announcement it was reopening the procurement, and subsequently requested Final Proposal Revisions. The Navy in that case clearly had invalidated the initial preaward notice.

Here, the facts are quite different. At no point did DTRA reopen discussions with offerors, request offerors to submit final proposal revisions, or in any way take action that made clear that the September 16th preaward notice was withdrawn or otherwise ineffective. Thus, I conclude that Appellant had five business days from the date when it was made aware of the identity of the prospective awardee, Apogee. This would not have been a burden on Appellant, as it did question the validity of Apogee's clearances on September 21st. Appellant could as easily have simultaneously filed a size protest, but failed to do so. It cannot now correct that defect.

While Appellant filed a timely appeal with OHA, this cannot cure its untimely protest. *Size Appeal of Admed Consulting, Inc.*, SBANo. SIZ-5355 (2012); *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5145 (2010).

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge