

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

SIZE APPEAL OF:

Lost Creek Holdings, LLC d/b/a ALL-STAR Health Solutions,

Appellant,

RE: Dentrust Dental Texas, P.C.

Appealed From
Size Determination Nos. 2-2017-033, -041,
-044

SBA No. SIZ-5823

Decided: April 17, 2017

APPEARANCES

Corey L. Tomlinson, Esq., Gressley, Kaplin & Parker, LLP, Toledo, Ohio, for Appellant

Theodore P. Watson, Esq., Watson & Associates, LLC, Aurora, Colorado, for Dentrust Dental Texas, P.C.

DECISION

I. Introduction and Jurisdiction

This appeal arises from size protests filed by Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions (Appellant) against Dentrust Dental Texas, P.C. (Dentrust). The U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) dismissed Appellant's size protests for lack of standing, concluding that Appellant did not submit technically acceptable proposals for the underlying procurements. Because the existing record does not support the conclusion that Appellant's proposals were technically unacceptable, the appeal is granted, the dismissals are vacated, and the matter is remanded to the Area Office for further review.

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 determinations, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitations, Protests, and Size Determinations

In December 2016 and January 2017, the U.S. Department of the Army, National Guard Bureau issued Request for Proposals (RFP) Nos. W912L1-17-R-0003, -0004, - 0006, and -0008 for mobile medical and dental services at military installations in the state of Texas. All four procurements were set aside entirely for small businesses. In January and February 2017, the Contracting Officer (CO) announced that Dentrust was the apparent awardee for each of the procurements. Appellant, an unsuccessful offeror, filed timely size protests challenging Dentrust's size.

In correspondence with the Area Office, the CO initially stated that Appellant “was considered technically qualified but was not the next lowest priced.” (Letter from C. Koenig to V. Mazzotta (Jan. 18, 2017).) Another Army official likewise commented that Appellant “was in the competitive range and technically acceptable”, and further responded “Yes” to the question of whether Appellant “still has an opportunity at some point to be awarded this contract, even if not next in line for award, if the size protest is successful.” (E-mail from K. Crowder to H. Goza (Feb. 22, 2017), at Ex. 1.) On February 27, 2017, though, in response to a follow-up inquiry from the Area Office, the CO stated that Appellant “appears to be a managing (business) company and based on the terms of our solicitation[s], [is] not technically acceptable to operate as a professional company.” (E-mail from C. Koenig to H. Goza (Feb. 27, 2017).)

On February 27 and 28, 2017, the Area Office issued Size Determination Nos. 2-2017-033, -041, and -044 dismissing Appellant's size protests for lack of standing pursuant to 13 C.F.R. § 121.1001(a)(1)(i). The Area Office explained that, according to the CO, Appellant's proposals were technically unacceptable for each of the four procurements.

B. Appeal

On March 13, 2017, Appellant filed the instant appeal, asserting that the Area Office clearly erred in dismissing the protests for lack of standing. (Appeal at 2.) According to Appellant, the Area Office incorrectly concluded that Appellant's proposals did not meet solicitation requirements based on language that either was never part of, or was later deleted from, each of the underlying solicitations. (*Id.* at 3-4.)

C. Dentrust's Response

On March 31, 2017, Dentrust intervened and moved to introduce new evidence. Specifically, Dentrust offers an e-mail from the Texas State Dental Board, an excerpt from the Texas Dental Practice Act, a Texas Dental Health Services Corporation statute, and portions of a U.S. Department of Defense procurement manual.

On April 5, 2017, Dentrust responded to the appeal, maintaining that the Area Office correctly dismissed Appellant's size protests for lack of standing. (Response at 3.) According to Dentrust, Appellant does not dispute that it was eliminated from consideration for technical

unacceptability and, thus, concedes to lacking standing. (*Id.* at 6.) Moreover, Appellant improperly seeks review of the proposal evaluation, rather than identifying any error on the part of the Area Office. (*Id.* at 6-7.)

D. Reply

On April 11, 2017, after the close of record, Appellant replied to Dentrust's response. Appellant contends that a reply is warranted in order to address “significant issues of standing, jurisdiction, affiliation, and constitutional law” raised by Dentrust. (Appellant's Motion, at 1.) In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct Appellant to file a reply, the proposed reply was filed after the close of record, and Appellant does not persuasively explain why a reply is appropriate. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. *E.g.*, *Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 7 (2015); *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 14 (2015).

III. Discussion

SBA regulations provide that an offeror lacks standing to protest if it was “eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range.” 13 C.F.R. § 121.1001(a)(1)(i). In interpreting this provision, OHA has held that a technically-unacceptable offeror is barred from bringing a size protest regardless of whether that offeror was ever formally excluded from the competition. *Size Appeal of KAES Enters., LLC*, SBA No. SIZ-5425 (2012), *recons. denied*, SBA No. SIZ-5435 (2013) (PFR); *Size Appeal of Glen/Mar Constr., Inc.*, SBA No. SIZ-5143, at 2 (2010) (protest was correctly dismissed for lack of standing although it was “regrettable that [the protester] was not informed that its proposal was determined technically unacceptable”).

The problem in the instant case, however, is that it is unclear whether Appellant's proposals were in fact determined to be technical unacceptable. The Area Office relied upon the CO's February 27, 2017 statement that Appellant “appears to be a managing (business) company and based on the terms of our solicitation[s], [is] not technically acceptable to operate as a professional company.” Section II.A, *supra*. The CO, though, did not elaborate as to what “terms of our solicitation[s]” may have rendered Appellant technically unacceptable, and prior to this e-mail exchange both the CO and another Army official had stated that Appellant was technically acceptable for all four procurements. *Id.* Further, the record contains no other evidence — such as evaluation reports or debriefing letters — indicating that the Army deemed Appellant's proposals technically unacceptable during the evaluation process. Given this inconsistent record, I find it appropriate to remand this matter to the Area Office to investigate whether Appellant's proposals were in fact eliminated from consideration as technically unacceptable.

IV. Conclusion

For these reasons, the appeal is **GRANTED**, Size Determination Nos. 02-2017-033, -041, and -044 are **VACATED**, and the matter is **REMANDED** to the Area Office for further

investigation and review. In light of this outcome, it is unnecessary to rule upon Dentrust's motion to introduce new evidence on appeal. *E.g.*, *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721, at 16 (2016); *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 9 (2014).

KENNETH M. HYDE
Administrative Judge