

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

SIZE APPEAL OF:

Seaborn Professional Staffing

Appellant,

RE: Global Empire, LLC

Appealed From
Size Determination No. 2-2017-158

SBA No. SIZ-5868

Decided: November 20, 2017

APPEARANCE

Jacqueline Amadio, President, Seaborn Professional Staffing, Saint Petersburg, Florida

DECISION

I. Introduction and Jurisdiction

On September 21, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2017-158 dismissing a size protest filed by Seaborn Professional Staffing (Appellant) against Global Empire, LLC (Global) as untimely. Appellant maintains that the Area Office improperly dismissed the protest. For the reasons discussed *infra*, the appeal is granted and the size determination is remanded for further review.

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 after 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 August 25, 2017, the U.S. Department of Justice, Bureau of Prisons issued Request for Quotations (RFQ) No. 1232251 for medical and dental services at the Federal Correctional Institution, Phoenix. According to the RFQ's Statement of Work (SOW), “[t]he Federal Correctional Institution in Phoenix, AZ, intends to make a single award of a firm fixed price

requirements type contract.” (SOW at 1.) The SOW twice reiterated that the RFQ would result in a “non-personal Service requirements contract.” (*Id.* at 7, 14.)

On August 31, 2017, the Contracting Officer (CO) announced that Global was the apparent awardee. On September 6, 2017, Appellant filed a size protest with the CO, alleging that Global is not a small business. Appellant contended that Global has been acquired by Noor, Inc., and is affiliated with other companies owned and controlled by Mr. Habib Noor.

The CO forwarded Appellant's protest to the Area Office for review. In a memorandum to the Area Office, the CO stated that the RFQ called for the award of a blanket purchase agreement (BPA) through existing U.S. General Services Administration Federal Supply Schedule (GSA Schedule) contracts.

B. Size Determination

On September 21, 2017, the Area Office issued Size Determination No. 2-2017-158 dismissing Appellant's size protest as untimely. The Area Office stated that “the issue here is whether the CO requested recertification for the subject procurement.” (Size Determination at 1.) After reviewing “the task order, contract amendments, and information provided by the [CO],” the Area Office concluded that “recertification was not a requirement at the task order level.” (*Id.*) As a result, Global's size must be determined as of the time it “submitted its offer for the base contract.” (*Id.*)

C. Appeal

On September 26, 2017, Appellant filed the instant appeal. Appellant argues that the protest was timely because it was filed within five business days after notification of the apparent awardee. Appellant adds that the instant procurement is “not a task order” but a stand-alone single-award contract. (Appeal at 2.)

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 find it appropriate to remand this matter for further review. The principal problem here is that it is unclear whether the instant RFQ called for the award of a contract, a task order, or a BPA, and as a result, which size protest rules are applicable to this dispute. The Area Office

found that the RFQ contemplated the award of a task order under a long-term contract, and that therefore, Appellant's protest was untimely because the CO did not request recertification for the task order. Section II.B, *supra*. Appellant, though, points to language in the RFQ itself, which stated that the procuring agency would make “a single award of a firm fixed price requirements type contract.” Section II.A, *supra*. Insofar as the RFQ involved a stand-alone contract, Appellant's protest would appear to have been timely pursuant to 13 C.F.R. § 121.1004(a)(2)(i). Meanwhile, the CO takes the position that the instant procurement contemplated neither a task order nor a stand-alone contract, but rather a BPA. If the CO is correct, the protest would likely be dismissed but on different grounds than stated in the size determination, as OHA has recognized that “there is no regulatory mechanism for [a protester] to bring a size protest based on the award of a BPA under an existing GSA Schedule contract.” *Size Appeal of Oxford Gov't Consulting, LLC*, SBA No. SIZ-5732, at 3 (2016) (quoting *Size Appeal of Total Systems Technologies Corp.*, SBA No. SIZ-5562, at 4 (2014)). Accordingly, further development of the record is necessary in order to determine whether this RFQ called for the award of a contract, a task order, or a BPA, and which size protest rules govern.

IV. Conclusion

For these reasons, the appeal is **GRANTED**, Size Determination No. 2-2017-158 is **VACATED**, and the matter is **REMANDED** to the Area Office for further investigation and review.

KENNETH M. HYDE
Administrative Judge