

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

SIZE APPEAL OF:

Conrad Shipyard, LLC,

Appellant,

RE: Gulf Island Shipyards, LLC

Appealed From

Size Determination Nos. 05-2018-001, 004

SBA No. SIZ-5873

Decided: December 8, 2017

APPEARANCES

Karl Dix, Jr., Esq., Garrett E. Miller, Esq., Smith, Currie & Hancock, LLP, for Appellant
Conrad Shipyard, LLC

Jonathan T. Williams, Esq., Jacqueline K. Unger, Esq., David J. Medalia, Esq.,
PilieroMazza, PLLC, for Gulf Island Shipyards, LLC.

DECISION

I. Procedural History and Jurisdiction

On October 18, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office), issued Size Determination No. 05-2018-001, dismissing the protest of Conrad Orange Shipyard, Inc. (Conrad Orange), against an award of a contract to Gulf Island Shipyards, LLC (GIS), because Conrad Orange is not an interested party.

Also on October 18, 2017, the Area Office issued Size Determination No. 05-2018-004, dismissing as untimely the protest of Conrad Shipyard, LLC (Appellant), against the same award to GIS.

Appellant contends the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determinations and find Appellant has standing and that its protest is timely, and remand the matter to the Area Office for full size determination on GIS.

For the reasons discussed *infra*, I deny the appeal and affirm the size determinations.

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 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. The Solicitation and Protests

On June 30, 2017, the U.S. Department of Transportation, Saint Lawrence Seaway Development Corporation (DOT) issued Solicitation No. DTSL5517R0050 for construction of an ice-breaking tugboat. The Contracting Officer (CO) set the procurement aside for small business, and designated North American Industry Classification System (NAICS) code 336611, Ship Building and Repairing, with a corresponding 1,250 employee size standard, as the appropriate code. Initial offers were due on August 23, 2017, and final proposal revisions were due September 21, 2017. There were two offerors: Appellant and GIS. On September 28, 2017, DOT awarded the contract to GIS, and on September 29, 2017, the CO notified Appellant of the award to GIS.

On October 6, 2017, Conrad Orange, through counsel, filed a size protest with the CO, alleging GIS is not a small business. Conrad Orange alleged that GIS, together with its affiliates, has more than 1,250 employees. (October 6th Protest at 1.) Conrad Orange represented that it is an interested party because it submitted an offer in response to the solicitation and has not been eliminated from competition. (*Id.* at 2.)

On October 11, 2017, Appellant, through the same counsel as Conrad Orange, filed with the CO what it characterized as a “Notice of Amendment” to the October 6th Protest. Appellant stated that Conrad Orange is its subsidiary. Appellant further stated that Appellant, and not Conrad Orange, had submitted an offer in response to the solicitation. Appellant then requested that the October 6th Protest be amended to reflect that Appellant, and not Conrad Orange, is the protestor. (October 11th filing at 1.)

B. The Size Determinations

On October 18, 2017, the Area Office issued Size Determination No. 05-2018-001, dismissing Conrad Orange's size protest against the award to GIS. The Area Office concluded that Conrad Orange is not an interested party because Conrad Orange did not submit an offer on the solicitation. Even though Conrad Orange is an affiliate of Appellant, it is still not an interested party because it is not an offeror. In support, the Area Office cited *Matter of InSpace 21, LLC*, B-410852, B-410852.3 (2014). (Size Determination No. 001, at 1.)

Also on October 18, 2017, the Area Office issued Size Determination No. 05-2018-004, dismissing as untimely Appellant's protest against the same award to GIS. While Appellant characterized its October 11th filing as an amendment to the protest Conrad Orange filed on October 6th, Conrad Orange is a different company from Appellant. The Area Office concluded, “An amendment cannot be made to change the protestor outside of the five-day window.”

Therefore, the Area Office treated Appellant's October 11th filing as a new size protest, and untimely because it was filed more than five business days after Appellant's receipt of the CO's notification of the apparent successful offeror. (Size Determination No. 004, at 1.)

C. The Appeal

On October 24, 2017, Appellant filed the instant appeal. Appellant contends the Area Office clearly erred in dismissing its protest. Appellant's October 11th filing “was not an attempt to ‘change the protestor outside of the five-day protest window’, but was instead the correction of a minor, clerical error.” (Appeal at 1.) The Area Office disregarded entirely its recent determination that GIS was other than small. (*Id.* at 2.)

Appellant states that DOT issued Solicitation No. DTSL5516R0100 on March 4, 2016, for construction of a tugboat as a small business set aside. DOT awarded the contract to Technology Associates, Inc. (TAI). Conrad Orange protested the award, arguing TAI was affiliated with GIS under the ostensible subcontractor rule. The Area Office found TAI was ineligible because GIS, not TAI, was the manufacturer of the tugboat, and GIS exceeded the 1,250 employee size standard. OHA affirmed the size determination on appeal. (*Id.* at 4, citing *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017).) DOT canceled that solicitation, and later issued the instant solicitation for construction of a tugboat. Appellant submitted a proposal. On September 29, 2017, the CO notified Appellant it was awarding the contract to GIS. Appellant asserts it timely protested this award on October 6, 2017. The Area Office dismissed this protest. (*Id.* at 4-5.)

Appellant submits a corporate organization chart, showing its parent company is Conrad Industries, Inc. This firm has two wholly-owned subsidiaries, Conrad Shipyard, LLC (Appellant), and Conrad LNG, LLC. Appellant in turn has two wholly-owned subsidiaries, Conrad Orange Shipyard, Inc. (Conrad Orange), and Conrad Shipyard Amelia, LLC. (*Id.* at 5 and Ex. E.)

Appellant argues the Area Office disregarded the law governing amendments of original filings. Appellant asserts it is undisputed that the October 6th Protest was filed within five business days of the CO's September 29th Notice of Award, with a copy of the Notice attached to the protest. Further, Appellant notified the Area Office seven days prior to the issuance of the size determinations that it was amending the protest to correctly reflect Appellant, not Conrad Orange, was the protestor. Appellant argues the Area Office erred in dismissing its protest on the basis of a clerical error. (*Id.* at 6.)

Appellant maintains an amendment is the proper mechanism for curing flaws in original filings pertaining to size determinations. Appellant relies on *Three S Constructors, Inc. v. U.S.*, 13 Cl. Ct. 41 (1987), where a protesting party permissibly amended its pending size protest. Because the amendment concerns the same transaction as the original pleading, the amendment “properly relates back to the date of the original pleading.” (Appeal at 6, citing *Three S Constructors*, 13 Cl. Ct. at 47.) Appellant also points to Rule 15(c) of the Federal Rules of Civil Procedure, which permits amendments changing a party's name to relate back to the original filing. (Appeal at 6.)

Appellant argues that its October 11th filing did not change the nature of its original, timely protest; it lacked sufficient detail to be treated as a new protest. The Amendment merely replaced the name of one Conrad Industries-owned entity with another, so that the name of the protestor properly corresponded with the record. (*Id.* at 7.) Any doubts as to the identity of the protestor easily could have been resolved with reference to the Notice of Award, attached to the protest. The Notice of Award also reflected that Appellant was the only disappointed offeror, and that Appellant and GIS were the only offerors for the procurement, further establishing that the reference to Conrad Orange in the protest was a mere clerical error. (*Id.*)

Appellant also relies on OHA's regulations which permit amendments to remedy discrepancies in original filings when so doing does not prejudice non-moving parties and does not cause unreasonable delay. (*Id.*, citing 13 C.F.R. § 134.207.) Appellant's correction of its protest resulted in no delay and no prejudice to GIS. (*Id.*) The Area Office provides no justification for holding Appellant's amendment to a stricter standard than amendment standards recognized by OHA, other Federal courts, and the Federal Rules of Civil Procedure. (Appeal at 7-8.)

Appellant also challenges the Area Office's reliance on *Matter of InSpace 21* as factually dissimilar. That case involved a protest filed by one joint venture member over the objections of the other, while there is no dispute here between Appellant and Conrad Orange regarding the authority to file the protest. (*Id.* at 8.) Further, Conrad Orange is an interested party, because as a member of the same corporate family as Appellant, it has direct economic interest in the award to GIS. Given that SBA aggregates the size of all affiliates in making size determinations, the Area Office's treatment of Appellant and Conrad Orange as separate entities is unreasonable and without justification. (*Id.* at 8-9.)

Finally, Appellant argues the dismissal of its protest on the basis of the amendment disregards SBA's mission to aid, counsel, assist, and protect the interests of small business concerns. (*Id.* at 9, citing 13 C.F.R. § 101.100.) Appellant maintains that the Area Office had previously found that GIS exceeded the same size standard, and OHA affirmed that size determination. Appellant further maintains DOT ignored these findings in making the award to GIS. The Area Office refused to consider GIS's eligibility solely because of an inconsequential clerical error. This action is "manifestly unjust" to Appellant, a small business concern. (*Id.* at 9-10.) Appellant requests OHA to find the Area Office erred by treating the October 11th filing as a new protest, and to remand the matter for a new size determination. (*Id.* at 10-11.)

D. GIS's Response to the Appeal

On November 9, 2017, GIS filed its Response to the Appeal. GIS maintains the Area Office did not err in dismissing the October 6th Protest after finding Conrad Orange is not an interested party. An interested party must be one with a direct connection with the solicitation in question. SBA's regulations require that the party be an offeror. Conrad Orange does not meet this standard. (Response at 5-6.) Only eligible offerors may protest the size status of another offeror to a solicitation. (*Id.* at 6.) GIS points out that GAO has held that a parent may not protest on behalf of a subsidiary. (*Id.* at 6-7, citing *Integral Systems, Inc.*, B-405303.1 (Aug. 16, 2011).)

GIS further maintains the Area Office did not err in determining that Appellant's October 11th protest was untimely. This letter was not an amendment to the October 6th Protest, but a new, separate protest by a legally distinct entity. There is no dispute that this letter was filed after the deadline for submitting protests and, as such, it is untimely. (*Id.* at 7-8.)

GIS contends Appellant's reliance on F.R.C.P. 15(c) is misplaced. These rules govern the procedures of civil actions in the United States district courts, not SBA Area Offices. The procedures governing size protests are found in SBA's regulations. Accordingly, F.R.C.P. 15(c) is inapposite here. (*Id.* at 8-9.) Further, GIS maintains SBA rules do not permit a protestor to amend its protest after the deadline for filing the protest. (*Id.* at 9, citing *Size Appeal of MWE Services, Inc.*, SBA No. SIZ-5283 (2011); *Size Appeal of Ian, Evan & Alexander Corp.*, SBA No. SIZ-5272 (2011); *Size Appeal of Silver Enterprises Assoc., Inc.*, SBA No. SIZ-5124 (2010).)

GIS argues that Appellant's reliance on *Three S Constructors* is misplaced. In that case the court upheld an OHA decision to permit an appellant to modify its notice of appeal letter to add a missing certification after the conclusion of the five-day window. The court likened it the correction of an unsigned pleading under F.R.C.P. 11. This was an error of omission. Here, the “amendment” constituted a protest filed by an entirely different entity. (Response at 10.) Further, the *Three S Constructors* court merely recognized OHA's discretion to relate back an untimely certification; it did not rule OHA was obligated to consider the filing. This is in line with OHA precedent which leaves it to the Area Office's discretion whether or not to consider untimely filings. (*Id.* at 10-11, citing *Size Appeal of Excalibur Laundries, Inc.*, SBA No. SIZ-5317 (2012); *MWE Services, supra.*)

GIS concludes by stating that the Area Office's dismissal of the protests is not “manifestly unjust” to Appellant. Appellant does not identify any factual or legal error in this respect. Appellant appears to refer to the size determination in *Technology Associates*. This however, was a contract-specific size determination of a different protested concern, which included a statement that GIS exceeded 1,250 employees for purposes of analyzing whether the protested concern qualified as a manufacturer. That size determination, therefore, it is not applicable here. (*Id.* at 11-13.)

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

A size protest against an awardee of a small business set aside contract may be filed by: any offeror the contracting officer has not eliminated from consideration for any procurement-related reason, the contracting officer, the SBA Area Director, and other interested parties. This last category includes large businesses where only one concern submitted an offer for the procurement in question. 13 C.F.R. § 121.1001(a)(1). A size protest filed by entities other than SBA or contracting officers must be filed within five business days after the CO has notified the protestor of the identity of the apparent successful offeror. 13 C.F.R. § 121.1004(a)(2).

The CO notified Appellant that GIS was the apparent successful offeror on September 29th. Therefore, the document Appellant filed on October 11th, which the Area Office characterized as a protest, was, if a protest, clearly untimely, and the Area Office was correct to dismiss it. Appellant maintains the October 11th filing does not have the necessary information required of a protest, but the Area Office did not say it was a sufficient protest; merely that it was an untimely one. Appellant does not argue that its October 11th filing was a timely protest. Rather, Appellant maintains it was an amendment to the October 6th Protest, correcting a clerical error by changing the name of the protestor.

The October 6th Protest was timely and specific. However, the protest was not filed by an offeror for the subject procurement. On its face, the Protest was not filed by a party with standing to file a protest. An area office must dismiss a protest filed by a party without standing to protest. *Size Appeal of KAES Enterprises, LLC*, SBA No. SIZ-5425 (2012). The issue here then, is, was the Area Office correct in dismissing the October 6th protest, or should it have permitted Appellant's October 11th "amendment" of the protest, to change the identity of the protestor.

Appellant argues its October 11th filing should be treated as an amendment to Conrad Orange's protest. Appellant's reliance on the Federal Rules of Civil Procedure in this matter is without merit. These rules govern the proceedings of civil actions in United States district courts; they are not applicable to size determination proceedings at SBA area offices, which are covered by SBA's regulations. F.R.C.P. 1. Also not applicable are OHA's regulations on the amendment of pleadings, which apply to proceedings before OHA, not to the size determination process at the area office level. 13 C.F.R. § 134.102.

Appellant relies upon *Three S Constructors, Inc. v. U.S.*, 13 Cl. Ct. 41 (1987) as supporting its contention that the protest could be amended. There, a size appeal was filed which lacked a certification then required by the regulation. OHA permitted that appellant to provide the certification after the filing date. *Size Appeal of Gibson Hart Co.*, SBA No. SIZ-2699, at 2 n.2 (1987). The Claims Court upheld OHA's decision. However, the Court did not find that OHA was required to accept the certification, but that the matter was within OHA's discretion. Further, this matter dealt merely with the signature on a certification, not the very identity of the party bringing the proceeding. The question of whether to consider late filings supplemental to a protest is left to an Area Office's discretion. *Size Appeal of Excalibur Laundries, Inc.*, SBA No. SIZ-5317 (2012). Here the Area Office used its discretion to dismiss Conrad Orange's protest. I find that *Three S Constructors* does not support Appellant's case.

By contrast, protestors are not permitted to amend protests after the filing deadline. After filing a protest, the regulation contemplates no further role for the protestor in the size determination process. It has no further submissions to make. *Excalibur Laundries, supra*; *Size Appeal of Silver Enterprises Associates, Inc.*, SBA No. SIZ-5124 (2010). A protest must be complete and sufficient when filed with the contracting officer; a protestor is not permitted to amend it after filing. Otherwise, new protest allegations could constantly be added up until issuance of the size determination. *Size Appeal of South Georgia Services Joint Venture*, SBA No. SIZ-5024 (2009); *Size Appeal of Kara Aerospace, Inc.*, SBA No. SIZ-4584 (2003). Here, the Area Office took the October 6th Protest as a timely and specific protest, but dismissed it because the protestor lacked standing to file it. The Area Office did not permit the major alteration of a change in the identity of the protestor after the filing deadline. The protestor's time for filing had expired, and the Area Office was not compelled to accept the October 11th filing as an amendment.

The Area Office's determination is supported by GAO precedent. GAO has held that a parent corporation has no standing to file a protest on behalf of a subsidiary, because it is not the parent who would be contracting with the Government. *Integral Systems, Inc.*, B-405303.1 (August 16, 2011). Here Appellant's subsidiary attempted to file a protest on its behalf, but it was not the offeror on this procurement. Where a parent may not file for its subsidiary, a subsidiary surely may not file for its parent.

I further find meritless Appellant's argument that dismissal of its protest is inconsistent with SBA's mission. SBA has promulgated regulations in order to achieve its mission, and cannot disregard their requirements in response to every plea that they should not be applicable in a particular case. *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017) was a case determining the size of another challenged concern, in connection with another solicitation, and it is not apposite here.

IV. Conclusion

Appellant has failed to demonstrate that the size determinations are clearly erroneous. Accordingly, the appeal is DENIED, and the size determinations are AFFIRMED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge