

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

SIZE APPEAL OF:

AeroSage, LLC,

Appellant,

RE: Foster Fuels, Inc.

Appealed From

Size Determination No. 2-2018-026

SBA No. SIZ-5883

Decided: February 2, 2018

APPEARANCE

David M. Snyder, President, AeroSage, LLC, Tampa, Florida

DECISION

I. Introduction and Jurisdiction

On November 28, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2018-026, dismissing a size protest filed by AeroSage, LLC (Appellant) against Foster Fuels, Inc. (Foster Fuels). The Area Office concluded that Appellant lacked standing to protest. On appeal, Appellant maintains that the Area Office clearly erred in dismissing the protest. For the reasons discussed *infra*, the appeal is denied.

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

On March 31, 2017, the Defense Logistics Agency (DLA) issued Request for Proposals (RFP) No. SPE600-17-R-0210 for delivery of petroleum distillates and residuals. The RFP identified 11 line items as “set-asides for Service Disabled Veteran Owned Small Businesses (SDVOSB),” and stated that “the remaining line items are issued under Full and Open Competition.” (RFP at 2.) The Contracting Officer (CO) assigned North American Industry

Classification System (NAICS) code 324110, Petroleum Refineries, with a corresponding size standard of 1,500 employees. (*Id.*) Proposals were due May 8, 2017. (RFP, Amendment 0005.) Appellant and Foster Fuels submitted timely offers.

On August 23, 2017, the CO requested that Appellant extend its offer through November 17, 2017 because DLA had not yet completed its evaluation of proposals. (E-mail from C. Cross to D. Snyder (Aug. 23, 2017).) After receiving no response, the CO again e-mailed Appellant on September 1, 2017, reiterating that:

[Appellant's] offer under Solicitation SPE600-17-R-0210 will expire on September 05, 2017. Please notify me no later than 11:59 p.m. [Eastern] time on September 05, 2017 as to whether [Appellant's] offer under Solicitation SPE600-17-R-0210 is extended through November 17, 2017. The Government will not accept an expired offer.

(E-mail from C. Liu to D. Snyder (Sept. 1, 2017).)

On September 5, 2017, Appellant responded to the CO. Appellant declined to extend its offer, stating that it believed the procurement was improper, and that certain requirements of the RFP were unreasonable. (Letter from D. Snyder to C. Liu (Sept. 5, 2017), at 1-2.) Appellant urged DLA to cancel the RFP and resolicit. (*Id.*)

On October 18, 2017, DLA published a list of the awardees for each contract line item. Foster Fuels was awarded 12 contract line items, none of which were set aside for SDVOSBs. Appellant was not awarded any line items.

B. Protest

On October 23, 2017, Appellant filed a size protest with the CO, alleging that Foster Fuels is not a small business. Appellant contended that Foster Fuels is dominant in the industry; that Foster Fuels will not provide fuel from a domestic source; and that Foster Fuels likely underreported its revenues and employees, and failed to disclose affiliates. (Protest at 2-3.)

The CO forwarded Appellant's protest to the Area Office for review, but stated that he did “not support the protest” because the line items awarded to Foster Fuels were unrestricted. (E-mail from C. Liu to H. Goza (Nov. 20, 2017).) The CO added that “[Appellant] did not extend its offer under the solicitation, allowing it to expire on September 5, 2017, and therefore is no longer an interested party.” (*Id.*)

C. Size Determination

On November 28, 2017, the Area Office dismissed Appellant's protest for lack of standing. The Area Office explained that, under 13 C.F.R. § 121.1001(a)(1)(i), a size protest may only be brought by an “offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside the competitive range.” (Size Determination at 1.) Here, Appellant “was not an offeror

on the date of award” because Appellant's offer expired on September 5, 2017 and Appellant declined to extend it. (*Id.*) “Consequently, as your firm was not considered for a reason unrelated to size, e.g. that it was not a valid offeror at the time of award, it does not have standing to initiate a size protest.” (*Id.*)

D. Appeal

On December 13, 2017, Appellant appealed the size determination to OHA, arguing that the Area Office clearly erred in dismissing the protest. Appellant contends that the Area Office utilized the wrong regulation to assess Appellant's standing. Specifically, because the instant procurement was mostly unrestricted, the applicable regulation is 13 C.F.R. § 121.1001(a)(7), which permits “[a]ny offeror” to initiate a size protest. (Appeal at 5.) Appellant highlights that it never received any formal notice excluding it from the competition. (*Id.* at 7.) Appellant also elaborates upon its protest allegations that Foster Fuels is not a small business.

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 agree with Appellant that the Area Office incorrectly cited 13 C.F.R. § 121.1001(a)(1) in determining that Appellant lacked standing to protest. Whereas § 121.1001(a)(1) applies when a procurement is a partial or total small business set aside, the awards in question here were unrestricted, so the applicable portion of the regulation is § 121.1001(a)(7). Under § 121.1001(a)(7), “[a]ny offeror” may bring a size protest on an unrestricted procurement, provided that the challenged firm represented itself as a small business concern. *Size Appeals of Pacific Power, LLC*, SBA No. SIZ-5520, at 5 (2013).

Nevertheless, as the Area Office explained in the size determination, the problem for Appellant is that Appellant in effect withdrew its proposal for this procurement through its letter of September 5, 2017. Specifically, the CO notified Appellant that its offer would expire on September 5, 2017, and warned that Appellant's offer could not be considered unless extended. Section II.A, *supra*. In its letter of September 5, 2017, Appellant expressly refused to extend its offer. *Id.* It is well-settled law that “[a]n offeror that declines, in writing, an agency request to extend its offer acceptance period, has unequivocally removed itself from the competition.” *Western Star Hospital Authority, Inc.*, B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶ 183 at 18. Accordingly, because Appellant discontinued its participation in this procurement on September 5, 2017, the Area Office correctly concluded that Appellant was no longer an

“offeror” at the time of the size protest. Section II.C, *supra*. As a result, Appellant lacked standing to challenge the size of Foster Fuels.

IV. Conclusion

Appellant has shown no material error of fact or law in the size determination. Therefore, the appeal is DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge