

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

SIZE APPEAL OF:

ILKA Technologies, Inc.,

Appellant,

RE: Inverness Technologies, Inc.

Appealed From
Size Determination No. 02-2018-256

SBA No. SIZ-5903

Decided: May 3, 2018

APPEARANCES

Laurel Hockey, Esq., John O'Brien, Esq., Cordatis, LLP, Arlington, Virginia, for
Inverness Technologies, Inc.

DECISION

I. Introduction and Jurisdiction

On March 23, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) dismissed the protest of ILKA Technologies, Inc. (Appellant) that Inverness Technologies, Inc. (Inverness) was other than small because the protest was untimely and Appellant lacked standing to file a protest. Size Determination No. 02-2018-256. On April 9, 2018, Appellant filed the instant appeal of that 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 November 3, 2017, the Contracting Officer (CO) for the United States Department of Labor (DOL) issued Request for Proposal (RFP) No. 1605DC-18-R-00003 for the DOL Veterans' Employment and Training Service (VETS) Transition Assistance Program (TAP). The

CO set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$15 million annual receipts size standard. Proposals were due on December 11, 2017. Appellant and Inverness submitted timely offers.

On March 6, 2018, DOL notified the unsuccessful offerors that Inverness was the apparent successful offeror. On that same day, Appellant requested a Post-Award Debriefing (Debriefing) as explanation of the CO's evaluation of Appellant's proposal. On March 9, 2018, the CO submitted the Debriefing to Appellant which found Appellant's overall technical rating "Unacceptable." (Debriefing, March 9, 2018, at 1.) On March 12, 2018, Appellant filed a size protest with the CO, alleging that Inverness's annual receipts exceeded the applicable size standard.

B. Size Determination

On March 23, 2018, the Area Office found that Appellant's protest was not filed in a timely manner, as required by 13 C.F.R. § 121.1004. The Area Office also found that the CO rated Appellant's offer as technically unacceptable for two factors and "Unacceptable" for Appellant's overall rating. (Size Determination, at 1.) Because Appellant was eliminated for a reason other than size, it lacked standing to file a size protest. (*Id.*, See 13 C.F.R. § 121.1001(a)(1)(i)). Therefore, the Area Office dismissed Appellant's protest for lack of timeliness and a lack of standing.

C. Appeal Petition

On April 9, 2018, Appellant filed the instant appeal with OHA. In its appeal petition, Appellant argues that its protest was filed on March 6, 2018 and was therefore timely. Appellant also disputes the CO's findings that its offer for the instant procurement was unacceptable. (Appeal, at 3-11). Appellant also raises issue with the solicitation and the processes employed by the CO in determining the successful offeror. (*Id.* at 4-9).

D. Inverness' Response

On April 24, 2018, Inverness responded to the appeal petition. Inverness argues that Appellant "filed its protest in the wrong forum" because "OHA has no authority to review such procurement protests." (Response, at 2). Inverness contends Appellant should have filed its protest with the Government Accountability Office (GAO) or the U.S. Court of Federal Claims. (*Id.*) Further, Inverness concurs with the Area Office finding that Appellant lacks standing to file a size protest because DOL eliminated Appellant from the competition for technical unacceptability. (*Id.*) Therefore, Inverness requests that OHA deny Appellant's appeal. (*Id.*)

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 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). Here, the CO notified unsuccessful offerors on March 6th, and Appellant filed its protest on March 12th. The protest was thus timely, and the Area Office erred in citing timeliness as a basis for dismissing the protest. However, this error by the Area Office was harmless. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5728, at 6-8 (2016) (PFR).

Under 13 CFR § 121.1001(a)(1)(i), “any offeror that the [CO] has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability, or outside of the competitive range,” may file a size protest in connection with a particular procurement. OHA has held that “a technically unacceptable offeror is barred from bringing a size protest.” *Size Appeal of Lost Creek Holdings, LLC D/B/A All-Star Health Solutions*, SBA No. SIZ-5823 (2017) (citing *Size Appeal of KAES Enters., LLC*, SBA No. SIZ-5425 (2012)).

Here, the CO determined that Appellant's proposal was technically unacceptable and Appellant was given a full debriefing explaining the CO's reasoning for the rating. Appellant's size protest against Inverness was barred, because it was eliminated from consideration for a procurement-related reason, *i.e.*, technical unacceptability. I agree with Inverness that Appellant should have filed a protest in the proper forum - with the GAO or the Court of Federal Claims. Therefore, I find that Appellant lacks standing to appeal the instant protest to OHA, and the Area Office properly dismissed the protest.

Appellant raises concerns with the processes utilized by the CO for the instant procurement at length. However, such arguments need not be addressed due to Appellant's clear lack of standing in this matter.

IV. Conclusion

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