

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

SIZE APPEAL OF:

Penn Enterprises, Inc.

Appellant,

RE: Robinson's Cleaning and Laundry

Appealed From
Size Determination No. 04-2018-036

SBA No. SIZ-5940

Decided: July 18, 2018

APPEARANCES

Alix K. Town, Esq., Adam K. Lasky, Esq., David Y. Yang, Esq., Oles Morrison Rinker & Baker, LLP, Seattle, WA, for Appellant

DECISION

I. Introduction and Jurisdiction

On June 18, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2018-036, dismissing as untimely the size protest of Penn Enterprises, Inc. (Appellant). In its size protest, Appellant argued that Robinson's Cleaning and Laundry (Robinson's) is not an eligible small business under the \$38.5 million annual receipts size standard applicable to the instant solicitation.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find its size protest timely. For the reasons discussed *infra*, the appeal is granted, the size determination is reversed, and the matter is remanded to the Area Office.

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 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 March 19, 2018, the Department of the Army (Army) issued Solicitation No. W911S0-18-B-0007 as an Invitation for Bid (IFB) for Laundry and Dry Cleaning Services at Fort Leonard Wood, Missouri. The Contracting Officer (CO) set the procurement entirely aside for small business and designated North American Industry Classification System (NAICS) code 812332, Industrial Launderers, with a corresponding \$38.5 million annual receipts size standard as the appropriate code. The bid opening date was April 17, 2018, at 2:00pm EST. Amendment 3, issued on April 27, 2018, made the final extension of bid opening date to May 8, 2018, at 11:00pm (sic) EST.

The Army held a public bid opening on May 8, 2018. According to the roster submitted to the Area Office, the only attendees were Army contracting personnel. Only two concerns submitted a bid, Appellant and Robinson's. After reviewing the bids, Robinson's, as the low bidder, was the apparent awardee.

On May 9, 2018, Appellant contacted the Army as an interested party, requesting the name and amount of the apparent low bidder. (Email, A. Gonzales to L. Chatman, (May 9, 2018).) On May 21, 2018, having received no response, Appellant inquired again. (Email, A. Gonzales to L. Chatman (May 21, 2018).) This time the Army replied "Yes, there was a PUBLIC opening. We will provide that information soonest." (Email, P. Paige to A. Gonzales (May 21, 2018).) On May 29, 2018, Appellant again requested the information. (Email, A. Gonzales to P. Paige (May 29, 2018).) On that same day, the Army finally provided the Abstract of Offers, listing two offerors, Appellant and Robinson's, and Robinson's was the low bid. (Email, P. Paige to A. Gonzales (May 29, 2018).)

On June 4, 2018, Appellant, who submitted a competing bid, filed a size protest with the CO, alleging that Robinson's was a large business for the instant procurement.

After receipt of the size protest, the Area Office inquired of the CO, via email communication, "It appears from the information included in the package that bid opening was held on May 8 and was open to the public. Can you confirm this information? Also, can you indicate whether any announcement (either via e-mail or posted notice) was provided to offerors about that bid opening?" (Email, D. Gordon to P. Paige (June 13, 2018).) That same day, the Army responded "The public bid opening was conducted on 8 May 2018 at 11:00 AM EST. . . . A sign in sheet was available for all who attended. A total of two (2) hardcopy bids were received. . . . I announced bid opening and no others (sic) bids would be received." (Email, P. Paige to D. Gordon (June 13, 2018).) The Area Office further inquired "[D]id the parties know before May 8 that bids would be opened on that date and that they could attend?" (Email, D. Gordon to P. Paige (June 14, 2018).) The Army replied "Yes, they knew. It was stated in the IFB. This information was posted on FedBizOps. Amendment 3." (Email, P. Paige to D. Gordon (June 14, 2018).) The Area Office further inquired "Did any of the bidders question or ask for clarification about the typographical error in Amendment 3 that says 11:00 PM instead of 11:00

AM?” (Email, D. Gordon to P. Paige (June 14, 2018).) The Army replied “Wow. No.” (Email, P. Paige to D. Gordon (June 14, 2018).)

B. Size Determination

On June 18, 2018, the Area Office dismissed the protest as untimely. In dismissing the size protest, the Area Office relied upon 13 C.F.R. § 121.1004(a)(1) which requires size protests be received within five business days of bid opening. The Area Office explained that Appellant's President, Ms. Alesha Gonzalez, had signed a copy of Amendment 3, making her aware that a public bid opening would occur on May 8, 2018. (Size Determination, at 1.) Because the size protest was received on June 4, 2018, the Area Office dismissed the size protest as untimely.

C. The Appeal

On June 26, 2018, Appellant filed the instant appeal. Appellant argues its appeal was timely because the Army failed and refused to inform Appellant that Robinson's was the apparent successful offeror until May 29, 2018.

Appellant contends that its protest was timely because it was filed within five days of its learning that Robinson's is the apparent successful offeror. Appellant relies upon *In the Matter of NEIE Medical Waste Services, LLC*, SBA No. VET-141 (2008) in arguing that “OHA has afforded protesters more time to file a protest where the sealed bid process is not performed in accordance with the requirements under the FAR.” (Appeal, at 4.) Appellant maintains the Army failed to follow bid opening procedures in accordance with FAR 14.403(a) and (b) and hence, Appellant's time to protest began to run when it received actual notification of the identity of the low bidder on May 29th. (*Id.* at 5.) Appellant argues that the Army's “inexplicable failure to provide information that was apparently available” for nearly three weeks prevented Appellant from protesting within five days of bid opening. (*Id.* at 6.)

D. CO's Response

The CO filed a response to the appeal after 5:00 p.m. EST on July 12, 2018. Here, OHA established the close of record as July 12, 2018, with instructions that any filing received after 5:00 p.m. EST would be deemed received the following business day. OHA does not entertain evidence or argument filed after the close of record. 13 C.F.R. § 134.225(b). In determining the filing date, any submission received at OHA after 5:00 p.m. EST is considered filed on the next business day. *Id.* § 134.204(b)(2); see *Size Appeal of Orion Construction Corporation*, SBA No. SIZ-5694, n. 1 (2015).

Thus, the CO's submission is considered to have been filed on July 13, 2018. I therefore EXCLUDE the CO's response from the record in this appeal as untimely filed because the record closed on July 12, 2018.

E. Appellant's Reply

On July 16, 2018, after the close of record, Appellant filed a motion seeking leave to reply to the CO's response. Appellant argues the reply should be admitted as it alleges the CO's response contains erroneous claims of fact and law. (Motion, at 1.) A reply to a response is not permitted unless the Judge orders a reply to be filed and served. 13 C.F.R. § 134.206(e).

Here, Appellant seeks to reply to the CO's untimely response, which is excluded from the record. Therefore, in the interest of judicial economy, I DENY Appellant's motion and EXCLUDE its reply from the record.

F. New Evidence

With its appeal, Appellant filed a motion to submit new evidence in support of its appeal. Appellant seeks to introduce a sworn declaration by James Penn, a member of Appellant's Board. The declaration states that Mr. Penn called the CO after bid opening on May 8th to inquire who the low bidder was, how many bidders were there, and whether an award was pending or had been made. Mr. Penn states that the CO replied she could not provide that information.

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New Evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

Here, I find that Appellant has shown good cause to admit the proffered new evidence. It is relevant to the issues on appeal — the timeliness of Appellant's protest — and will not unduly enlarge the issues. Further, Appellant could not have offered the evidence to the Area Office, because it was unaware that the timeliness of its protest was disputed. *Size Appeals of Pacific Power, et al*, SBA No. SIZ-5520 (2013). Accordingly, I ADMIT Appellant's proffered new evidence.

C. Analysis

There is no question as to the facts in this case. The Army conducted a public bid opening on May 8, 2018, which only Army personnel attended because the IFB did not make in-person or telephonic attendance to the bid opening mandatory. There were two bidders, Appellant and Robinson's, and Robinson's was the low bidder. The Army repeatedly failed and refused to share information on the apparent low bidder with Appellant for nearly three weeks, despite Appellant's numerous telephonic and email requests that it do so.

As OHA previously ruled, if sealed bid procedures have not been followed, the deadline for submitting a timely protest under 13 C.F.R. § 121.1004(a)(1) does not apply. *In the Matter of NEIE Medical Waste Services, LLC*, SBA No. VET-141 (2008).¹ Under FAR Part 14.403, an Abstract of Offers must be completed and certified as to accuracy as soon after bid opening as possible, and the Abstract of Offers must be available for public inspection. FAR 14.403(a) and (b). In the case at hand, the record makes clear that these procedures were not followed by the Army until May 29th. Appellant constantly requested information from the Army as to the identity of the lowest bidder, and not until May 29, 2018, that the Army provided this information to Appellant via the Abstract of Offers. Based on *NEIE Medical Waste Services, LLC*, this case meets OHA's precedent establishing an exception to the requirements of § 121.1004(a)(1) or 13 C.F.R. § 125.28(d)(2) when the procuring agency fails to follow sealed bid procedures. The Army was required to provide the Abstract of Offers, which it failed to do time after time, despite Appellant's multiple requests.

As the record shows, the Area Office relied on the date of bid opening to determine the timeliness of Appellant's appeal. However, the Area Office completely disregarded the fact that attendance at bid opening was not mandatory. Indeed, attendance might have been difficult if offerors had taken literally, as they generally must, the stated time of bid opening, because the Army had set it at 11:00 pm on May 8th. Further, the record clearly shows that it was not until May 29th when the Army finally revealed the identity of the apparent awardee via the Abstract of Offers. Thus, it is illogical to hold that a size protest is untimely when it was not submitted within 5 days of bid opening even though the procuring agency failed and refused to disclose the identity of the lowest bidder within that time frame. I find the Area Office's dismissal to be a clear error. Consequently, Appellant's June 4, 2018, size protest was timely submitted, because Appellant submitted it within 5 days of being notified of the identity of the lowest bidder.

¹ In *NEIE*, OHA was interpreting the regulation on protests of a firm's Service Disabled Veteran Owned Small Business Concern status. 13 C.F.R. § 125.28(d)(2). However, the rule is essentially the same as that for size protests, and the same principle applies.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED back to the Area Office for a new size determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge