

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

SIZE APPEAL OF:

DB Systems Tech, Inc.,

Appellant,

Appealed From
Size Determination No. 01-2018-041

SBA No. SIZ-5961

Decided: September 26, 2018

ORDER GRANTING MOTION TO DISMISS

I. Background

A. Size Determination

On August 13, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-2018-041, finding that DB Systems Tech, Inc. (Appellant) is not an eligible small business for the Department of Veterans Affairs (VA) Solicitation No. 36C24618Q0662. Specifically, the Area Office found Appellant did not meet the solicitation's \$7.5 million annual receipts size standard because Appellant is affiliated with its subcontractor under the ostensible subcontractor rule. (Size Determination, at 5-6.)

The Area Office noted Appellant's proposed key personnel were all employees of the proposed subcontractor. Additionally, the Area Office determined that Appellant's subcontractor will perform the contract's primary and vital requirements. (*Id.*) The Area Office concluded that based on Appellant's unusual reliance on its subcontractor to perform the contract requirements, Appellant was not a small business concern for the instant solicitation. (*Id.* at 6.)

B. Appeal

On August 24, 2018, Appellant filed the instant appeal. Appellant contends the Area Office erred in finding Appellant affiliated with its subcontractor. Appellant argues that it “is performing all management aspects of the contract and is providing its own technician to support the contract.” (Appeal, at 1.) Appellant added the Area Office contacted the wrong CO when it inquired whether Appellant's original proposal would be allowed to be amended. Appellant also stated the Area Office demanded documents from Appellant that take time to put together and that the Area Office misrepresented events which resulted in a negative size determination. (*Id.* at 1-2.) Further, Appellant asserted it will perform the majority of the primary and vital work if

“allowed to cure any missteps and support our duty to proceed as the primary contractor per the Federal Acquisition Regulation.” (*Id.* at 2.)

C. Motion to Dismiss

On September 7, 2018, Elevator Service, Inc. (Elevator Service), the original protestor, moved to dismiss the instant appeal. (Motion, at 1.) Elevator Service contends the appeal fails to assert any factual or legal grounds for reversing the size determination.

Elevator Service argues the appeal “places the burden on the OHA to determine whether any grounds for appeal exist and, if so, what those grounds might be.” (*Id.* at 3.) Further, Elevator Service contends the appeal simply challenges the Area Office's refusal to consider Appellant's proposal revisions, even though the CO did not call for final proposal revisions. (*Id.* at 4.) Thus, the Area Office did not err by considering only Appellant's original proposal. Elevator Service concludes the appeal fails to demonstrate any error on the part of the Area Office, and as such, should be dismissed.

D. OHA's Order

On September 7, 2018, OHA issued an order directing Appellant to respond to Elevator Service's Motion to Dismiss by the close of business on September 24, 2018. In that order, OHA informed Appellant that it must file a response to the motion or it would be deemed to have consented to the relief sought. (OHA's Order, at 1; citing 13 C.F.R. § 134.211(c).)

Appellant failed to file a response with OHA.

II. Analysis

Under OHA's rules, a non-moving party that does not file a response to a motion is deemed to have consented to the relief sought. 13 C.F.R. § 134.211(c). Appellant's failure to respond is thus in itself grounds to grant the motion to dismiss.

Further, Elevator Service's motion to dismiss is based on the allegation that Appellant had failed to specifically assert any error of fact or law by the Area Office in the size determination. I find this allegation to be true.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. Here, not only has Appellant not responded to Elevator Service's motion to dismiss, thus consenting to the relief sought by Elevator Service, but its appeal lacks a clear and concise statement of the factual basis of the case and any applicable legal arguments as directed by SBA regulations. 13 C.F.R. § 134.203(a)(3).

Appellant asserts it will perform all management duties associated with the contract, and that it will perform the majority of the work if “allowed to cure any missteps and support our duty to proceed as the primary contractor per the Federal Acquisition Regulation.” *Supra*,

Section I.B. A review of the appeal clearly establishes Appellant has not met its burden of proving that the Area Office erred in its size determination. Appellant fails to explain how the Area Office's analysis of Appellant's proposal, and the ostensible subcontractor's role in it, is in error. The appeal includes no discussion of clear errors of fact or law committed by the Area Office. Appellant contends the Area Office spoke with the wrong CO, yet provides no evidence to support this allegation, nor does it provide any explanation as to why there was any error on the part of the Area Office in relying on Appellant's proposal when making its determination.

Accordingly, I conclude that I must dismiss the instant appeal, both because of Appellant's failure to respond to the motion and because the appeal fails to identify any error of fact or law in the size determination. 13 C.F.R. § 134.203(c).

III. Conclusion

For the above reasons, I DISMISS the instant appeal. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge