

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

SIZE APPEAL OF:

Global Dynamics, LLC,

Appellant,

RE: GiaCare and MedTrust JV, LLC

Appealed From

Size Determination No. 3-2018-073

SBA No. SIZ-5979

Decided: December 17, 2018

APPEARANCES

Craig A. Holman, Esq., Alexandra L. Barbee-Garrett, Esq., Arnold & Porter Kaye Scholer, LLP, Washington, D.C., for the Appellant

Antonio R. Franco, Esq., Patrick T. Rothwell, Esq., Michelle E. Litteken, Esq., Jacqueline K. Unger, Esq., PilieroMazza PLLC, Washington, D.C., for GiaCare and MedTrust JV, LLC

DECISION

I. Introduction and Jurisdiction

On October 2, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-073, dismissing a size protest filed by Global Dynamics, LLC (Appellant) against GiaCare and MedTrust JV, LLC (GiaMed). The Area Office concluded that Appellant's protest was untimely. Appellant maintains that the Area Office incorrectly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is granted.

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. The Solicitation

On September 14, 2012, the U.S. Army Medical Command (MEDCOM) issued Request for Proposals (RFP) No. W81K04-12-R-0025 for registered nursing services in the San Antonio Military Health System. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of \$7 million in average annual receipts.<sup>1</sup> Proposals were due October 16, 2012. Appellant and GiaMed submitted timely offers.

### B. Procedural History

On December 12, 2012, the CO informed Appellant that its proposal was excluded from the competitive range. MEDCOM thereafter completed the evaluation of proposals, and on January 24, 2013, notified Appellant that GiaMed was the apparent successful offeror. (Letter from G. Hankins to L. Weaver (Jan. 24, 2013).) No size protest was filed at that time.

Appellant filed a bid protest with the U.S. Government Accountability Office (GAO) challenging its exclusion from the competitive range. On May 6, 2013, GAO sustained the protest and recommended that MEDCOM re-evaluate proposals and make a new competitive range determination. *Global Dynamics, LLC*, B-407966, May 6, 2013, 2013 CPD ¶ 118. MEDCOM made a new competitive range determination, which included both Appellant and GiaMed, and obtained revised proposals.

On January 29, 2015, the CO informed GiaMed that Appellant was now the apparent successful offeror. (Letter from G. Hankins to M. Giannini (Jan. 29, 2015).) GiaMed filed a size protest challenging Appellant's size. The size protest was denied and GiaMed appealed that decision to OHA. On October 29, 2015, OHA denied GiaMed's appeal. *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690 (2015).

While the size litigation was ongoing, GiaMed also challenged MEDCOM's award decision through a bid protest at GAO. MEDCOM undertook corrective action, and GAO dismissed the bid protest as moot. In June 2016, after concluding corrective action, MEDCOM reaffirmed the award to Appellant. GiaMed filed another bid protest, and GAO partially sustained that protest. *GiaCare and MedTrust JV, LLC*, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321.

In November 2017, MEDCOM announced that it would cancel the RFP and award a sole source extension to the incumbent contractor. Appellant filed a bid protest at the U.S. Court of Federal Claims challenging these decisions. MEDCOM then rescinded the cancellation, amended the RFP, reopened discussions, and requested revised proposals. On August 23, 2018, the CO

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<sup>1</sup> Effective July 14, 2014, SBA increased the size standard for NAICS code 621399 to \$7.5 million. 79 Fed. Reg. 33,647 (June 12, 2014).

notified Appellant that GiaMed was the apparent successful offeror. (Letter from D. Robledo to L. Weaver (Aug. 23, 2018).)

### C. The Instant Size Protest

On August 29, 2018, Appellant filed a size protest with the CO alleging that GiaMed is not a small business. (Size Protest at 1.) The CO forwarded Appellant's protest to the Area Office for review.

GiaMed responded to the merits of the size protest, but, by separate e-mail, urged that the protest be dismissed as untimely because Appellant first received notice that GiaMed was the apparent awardee in January 2013. (E-mail from M. Litteken to K. Silvia (Sept. 10, 2018).) The Area Office contacted the CO to request additional information about the procurement, including “copies of all amendments to the solicitation, all Dates discussions were reopened with the offerors and copies of all GAO protests and GAO responses and all document[s] related to the [Court] Action.” (E-mail from K. Silvia to D. Robledo (Sept. 13, 2018).) The CO did not provide the requested materials.

### D. The Instant Size Determination

On October 2, 2018, the Area Office issued Size Determination No. 3-2018-073, dismissing Appellant's protest as untimely. The Area Office found that the protest “was not received by the [CO] within five business days after the date [Appellant] w[as] notified of the identity of the successful offeror.” (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(2).) In addition, the CO was not forthcoming with the information requested by the Area Office. (*Id.*)

### E. Appeal

On October 16, 2018, Appellant appealed Size Determination No. 3-2018-073 to OHA. Appellant insists that the protest was timely because it was filed within five business days of the most recent notice identifying GiaMed as the apparent successful offeror. (Appeal at 9.) Further, a size protest may not properly be dismissed based on the procuring agency's failure to respond to requests for information. (*Id.* at 11.)

Appellant contends it had no prior opportunity to challenge GiaMed's size. (*Id.* at 12). Although GiaMed was identified as the apparent awardee in January 2013, Appellant at that time had been excluded from the competitive range, and thus lacked standing to protest. (*Id.* at 12-13.) Appellant also emphasizes that the initial award to GiaMed has not been in place since 2013. In fact, MEDCOM twice selected Appellant for award “only to face a series of GiaMed protests.” (*Id.* at 12.) Appellant maintains that OHA will find a post-corrective action size protest untimely only when the award remains undisturbed throughout corrective action, such that the protester would have had an earlier opportunity to pursue a size protest. (*Id.* at 14, citing *Size Appeal of Navarre Corp.*, SBA No. SIZ-5942 (2018).)

## F. GiaMed's Response

On October 31, 2018, GiaMed responded to the appeal. GiaMed maintains that the appeal “amounts to no more than mere disagreement with the Area Office's decision.” (Response at 1.) Therefore, OHA should deny the appeal.

GiaMed contends that Appellant was required to have filed any size protest in January 2013, upon learning that GiaMed was the apparent successful offeror. (*Id.* at 6.) Appellant did not do so, and instead waited for more than five years before submitting the instant size protest in August 2018. Thus, the protest is plainly untimely. (*Id.*)

GiaMed argues that bid protest litigation does not extend, or toll, the deadline for filing a size protest. Further, OHA has repeatedly held that size protests filed after corrective action are untimely. (*Id.* at 6-8, citing *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5460 (2013) and *Size Appeal of Global Sols. Network, Inc.*, SBA No. SIZ-4937 (2008).)

GiaMed disputes the notion that Appellant could not have filed a size protest in January 2013. Appellant's exclusion from the competitive range was under review at GAO, so Appellant would have had standing to bring a size protest under SBA regulations in effect at that time. (*Id.* at 8-9.) GiaMed also asserts that, contrary to Appellant's suggestions, the Area Office did not base the dismissal on MEDCOM's lack of responsiveness. According to GiaMed, the Area Office would have reached the same result even if it had received the requested information from MEDCOM. (*Id.* at 10.)

## 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 that 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 clearly erred in dismissing Appellant's size protest as untimely. Therefore, the appeal must be granted and the matter remanded to the Area Office for a new size determination. *E.g.*, *Size Appeal of Federal Maintenance Hawaii, Inc.*, SBA No. SIZ-5887 (2018).

SBA regulations stipulate that, on a negotiated procurement such as found here, “[a] protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.” 13 C.F.R. § 121.1004(a)(2). Here,

Appellant learned that GiaMed was the apparent awardee on Thursday, August 23, 2018, and Appellant filed its protest within five business days thereafter, on Wednesday, August 29, 2018. Sections II.B and II.C, *supra*. Thus, Appellant's protest was timely and should not have been dismissed.

On appeal, GiaMed argues that Appellant was required to have filed any size protest within five business days of the original award notification, which occurred in January 2013. OHA has explained, however, that an award notification will not trigger the deadline for filing a size protest if the procuring agency subsequently takes actions that are inconsistent with that award notification. Thus, in *Size Appeal of Hale Laulima, LLC*, SBA No. SIZ-5750 (2016), OHA found that a size protest was timely because, after the original award notification, the procuring agency reopened discussions and obtained revised proposals. These actions demonstrated that the “evaluation process was not complete” and that the original award notification “was no longer valid.” *Hale Laulima*, SBA No. SIZ-5750, at 4. Likewise, in the instant case, while it is true that MEDCOM originally selected GiaMed for award in January 2013, MEDCOM thereafter took numerous actions inconsistent with this decision, including reopening discussions, obtaining revised proposals, and twice awarding the contract to a different company (*i.e.*, Appellant). Section II.B, *supra*. As in *Hale Laulima*, then, the original award notification was invalidated by the procuring agency's subsequent actions, and there was no requirement to have filed a size protest within five days of the original award notification.

GiaMed also points OHA's decisions in cases such as *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5460 (2013) for the proposition that corrective action occurring after award notification will not extend, or toll, the deadline for filing a size protest. A key aspect of these decisions, though, is that the original award merely is stayed during the corrective action. OHA has emphasized that the result would be different if the original award were cancelled or terminated, rather than stayed. *EFT Architects*, SBA No. SIZ-5460, at 3 (protester's contention that size protest was timely “would be persuasive if the CO had canceled the award [] and then issued a new award”); *Size Appeal of K2 Group, Inc.*, SBA No. SIZ-5805, at 4-5 (2017).

In contrast to the situation presented in *EFT Architects*, the original award to GiaMed here was cancelled, so Appellant's deadline to file a size protest did not begin until Appellant again was notified that GiaMed was the apparent awardee on August 23, 2018. Appellant's protest was timely filed within five business days of the latter notification.

#### IV. Conclusion

Appellant has shown that the Area Office clearly erred in dismissing Appellant's protest as untimely. Therefore, the appeal is GRANTED, Size Determination No. 3-2018-073 is VACATED, and this matter is REMANDED to the Area Office to conduct a new size determination of GiaMed.

KENNETH M. HYDE  
Administrative Judge