

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

SIZE APPEAL OF:

Advant-EDGE Solutions of Middle
Atlantic, Inc.,

Appellant,

RE: Reliable Pharmaceutical Returns, LLC

Appealed From
Size Determination No. 3-2021-005

SBA No. SIZ-6089

Decided: February 1, 2021

APPEARANCE

Frank V. Reilly, Esq., Fort Lauderdale, Florida, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On October 14, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2021-005, dismissing a size protest filed by Advant-EDGE Solutions of Middle Atlantic, Inc. (Appellant) against Reliable Pharmaceutical Returns, LLC (RPR). The Area Office found that Appellant lacked standing to protest, because Appellant had been eliminated from the underlying competition for procurement-related reasons. On appeal, Appellant maintains that the dismissal was clearly erroneous, 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 denied and the size determination is affirmed.

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.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

II. Background

A. The RFQ

On August 20, 2020, the Defense Health Agency (DHA) issued Request for Quotations (RFQ) No. HT001420R0012 for pharmaceutical waste disposal at the Fort Belvoir Community Hospital. (RFQ at 1.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562211, Hazardous Waste Treatment and Disposal, with a corresponding size standard of \$41.5 million average annual receipts. (*Id.*)

The RFQ contemplated the award of a single firm-fixed-price contract to the offeror with the lowest-price technically-acceptable quotation. (*Id.* at 43, 60.) Quotations were due September 4, 2020. (RFQ at 1.) Appellant and RPR submitted timely quotations.

B. Award Notification

In an award notification letter dated September 24, 2020, the CO informed Appellant that RPR was the apparent awardee. The letter stated that Appellant's quotation “met the Government's stated minimum requirements, therefore the quote was rated acceptable.” (Award Notification Letter, at 1.) However, DHA selected RPR for award because RPR “had the lowest evaluated price meeting the acceptability standards for non-cost factors (Lowest Price/Technically Acceptable).” (*Id.*)

C. Protest

On September 30, 2020, Appellant filed a protest with the CO challenging RPR's size. The protest alleged that RPR will self-perform “virtually none of the work,” and instead must rely upon subcontractors or affiliates to perform the contract. (Protest at 2.) Citing the award notification letter, Appellant asserted that it had “provided a timely response to the solicitation and was deemed ACCEPTABLE.” (*Id.* at 7, emphasis Appellant's.)

D. Area Office Proceedings

The CO forwarded the protest to the Area Office for review. Asked whether Appellant had been eliminated from the competitive range or was otherwise “ineligible for an award for factors unrelated to size (*i.e.* technically unacceptable, price, etc.),” the CO stated:

Yes (information was not included in the unsuccessful offeror letter) [Appellant], the vendor protesting, noted in [its] proposal, “You will see we are not charging for the supplies, profiles and formulary preparation. We have these costs covered in our monthly pick-up fee.” This essentially inflates the cost that will be billed to the Government during the option years. The “supplies” are first purchased during the base year then used throughout the contract. The solicitation included supplies in the option year for replacement purposes. In the solicitation, [DHA stated] “ALTERNATE PROPOSALS Alternate proposals will not be

considered.” This is “alternative pricing” which I do believe would not result in a fair and reasonable price.

[Appellant also] did not complete the representations and certifications at [Federal Acquisition Regulation (FAR)] 52.209-5, 52.219-1, 52.219-28, 52.204-24, 52.204-26 per the instruction in the ADDENDUM TO FAR 52.212-1.

(CO's Response to Size Protest Checklist, at 1-2.) In an e-mail to the CO, the Area Office inquired why the award notification letter had indicated that Appellant's quotation was acceptable. The CO responded:

The [award notification] letter provided to [Appellant] contained a clerical error which stated [that the] quote was acceptable. [Appellant's] quote was only “technically” acceptable and overall was not acceptable due to [its] price not being fair and reasonable.

[Appellant] was removed from the competitive range and deemed unacceptable due to [its] price.

[Appellant] was not notified of [its] unacceptable price.

(E-mail from S. Tees to J. Abioye (Oct. 13, 2020).)

E. Size Determination

On October 14, 2020, the Area Office issued Size Determination No. 3-2021-005, dismissing Appellant's protest for lack of standing. The Area Office explained that, under SBA regulations, 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 of the competitive range.” (Size Determination at 1, quoting 13 C.F.R. § 121.1001(a)(1)(i).) Here, the CO informed the Area Office that Appellant's quotation was eliminated from the competition for procurement-related reasons. (*Id.*) As such, Appellant “do[es] not have standing to initiate a size protest.” (*Id.*)

F. Appeal

On October 29, 2020, Appellant filed the instant appeal. Appellant contends that the Area Office “ignored all the relevant facts in this case.” (Appeal at 3.) In particular, the Area Office did not investigate the merits of Appellant's protest allegations. (*Id.*)

Appellant argues that the Area Office also erred because it did not “require [DHA] to follow the SBA's own mandatory Certificate of Competency procedures.” (*Id.*) Appellant reasons that, as of September 24, 2020, DHA had determined that Appellant's quotation was acceptable, although Appellant was not selected for the award. (*Id.* at 2, citing Award Notification Letter.) After Appellant filed its size protest, though, DHA apparently “re-evaluated” Appellant's

quotation and “found it to be no longer acceptable.” (*Id.*) Appellant insists that DHA could not properly re-evaluate Appellant's quotation, because:

(1.) the Appellant's filing of a size protest did not alter the Appellant's original proposal in any way, and

(2.) there is no law, statute, rule, regulation or provision in the Solicitation that allows [DHA] to re-evaluate and negatively score offerors' proposals after they file a protest.

(*Id.* at 3.)

Appellant complains that “[DHA's] re-evaluation of the proposal was unreasonable and constituted disparate treatment.” (*Id.*) Moreover, because “[DHA's] decision not to award the contract to [Appellant] amounted to a determination of nonresponsibility,” the Area Office should have “require[ed] [DHA] to proceed under the SBA's Certificate of Competency (COC) procedures first.” (*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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

I find no merit to this appeal. As the Area Office correctly recognized, SBA regulations provide that an offeror which has been “eliminated from consideration for any procurement-related reason” lacks standing to protest the size of the apparent awardee. 13 C.F.R. § 121.1001(a)(1)(i). This rule reflects SBA's long-established policy that only those concerns whose successful size challenge would enable them to compete for award should be eligible to bring a size protest. *E.g.*, *Size Appeal of Land Shark Shredding, LLC*, SBA No. SIZ-6037, at 2 (2019).

Here, the CO informed the Area Office that Appellant's quotation was unacceptable and therefore ineligible for award. Section II.D, *supra*. The Area Office thus properly dismissed Appellant's size protest for lack of standing.

On appeal, Appellant contends that DHA performed an unreasonable and improper “re-evaluation” of Appellant's quotation, and posits that such re-evaluation may have been in retaliation for Appellant's decision to pursue a size protest. Section II.F, *supra*. These arguments

fail for two reasons. First, the record does not support the conclusion that DHA did, in fact, re-evaluate Appellant's quotation. Rather, it appears that, due to a clerical error, the award notification letter mistakenly stated that Appellant's quotation was acceptable, when in actuality, DHA considered the quotation “only 'technically' acceptable” but overall “unacceptable due to [its] price.” Section II.D, *supra*.

Second, even assuming, for purposes of argument, that DHA did re-evaluate Appellant's quotation, any impropriety in that re-evaluation would relate to the manner in which DHA conducted the procurement, not to any size issue or any error on the part of the Area Office. It is well-settled that “OHA lacks jurisdiction over disputes arising from an agency's conduct of a procurement.” *Size Appeal of Mystic Ventures Group, LLC*, SBA No. SIZ-6006, at 6 (2019); *Size Appeal of JEQ & Co., LLC*, SBA No. SIZ-5932, at 2 (2018). Rather, such arguments are reserved for bid protests brought before the U.S. Government Accountability Office or other similar forums. Accordingly, insofar as Appellant takes issue with DHA's conduct of the procurement, OHA is not the appropriate forum to adjudicate such matters.

Appellant also complains that DHA did not inform Appellant of any deficiencies in its quotation; on the contrary, the award notification letter indicated that Appellant's quotation “met the Government's stated minimum requirements” and was “rated acceptable.” Section II.B, *supra*. Again, OHA has no jurisdiction over allegations pertaining to DHA's conduct of the procurement. With regard specifically to size protests, however, OHA has held that notification to the protestor of the reasons why a proposal was deemed unacceptable is not necessary in order to find a lack of standing. In, for example, *Size Appeal of Glen/Mar Constr., Inc.*, SBA No. SIZ-5143, at 2 (2010), OHA concluded that an area office correctly dismissed a size protest for lack of standing, notwithstanding that “[the protestor] was not informed that its proposal was determined technically unacceptable.” *See also Size Appeal of KAES Enters., LLC*, SBA No. SIZ-5425 (2012), *recons. denied*, SBA No. SIZ-5435 (2013) (PFR). For purposes of this case, then, it is immaterial that Appellant was not advised of the deficiencies in its quotation.

Lastly, the instant case is distinguishable from OHA's decision in *Size Appeal of Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions*, SBA No. SIZ-5823 (2017). In *Lost Creek*, OHA remanded the dismissal of a size protest for further review, because OHA could not determine from the record whether the procuring agency had found the protestor's proposal technically unacceptable. Conversely, in the instant case, the communications between the CO and the Area Office make clear that Appellant's quotation was deemed unacceptable due to “alternative pricing” and for failure to complete the required representations and certifications. Section II.D, *supra*. The CO further explained that the award notification letter, which had stated that Appellant's quotation was acceptable, was incorrect and stemmed from a clerical error. *Id.* Unlike the situation in *Lost Creek*, the record here thus establishes that Appellant's quotation was deemed unacceptable during the evaluation process.

IV. Conclusion

Appellant has not shown any error in the size determination. 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).

KENNETH M. HYDE
Administrative Judge