

Cite As: *Size Appeal of Blackhawk Medical Transportation, Inc., d/b/a Vandenberg Ambulance*,
SBA No. SIZ-6097 (2021)

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

SIZE APPEAL OF:

Blackhawk Medical Transportation, Inc.,
d/b/a Vandenberg Ambulance,

Appellant,

RE: Freedom-Elite Joint Venture

Appealed From
Size Determination No. . 04-2021-16

SBA No. SIZ-6097

Decided: May 12, 2021

APPEARANCES

Joseph G. Martinez, Esq., Eric P. Roberson, Esq., Lisette S. Washington, Esq., Denton US LLP, for Appellant

Shane M. McCall, Esq., Nicole D Pottroff, Esq., Quinten R. Fisher, Esq., Christopher S. Coleman, Esq., Koprince Law LLC, for Freedom-Elite Joint Venture

DECISION

I. Introduction and Jurisdiction

On February 17, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2021-16, dismissing for lack of standing the protest of Blackhawk Medical Transportation, Inc. d/b/a Vandenberg Ambulance (Appellant) that Freedom-Elite Joint Venture (Freedom-Elite) was other than small. On appeal, Appellant argues that it does in fact have standing, for the reasons discussed *infra*, the appeal is denied.

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

On November 17, 2020, the Department of Veterans Affairs (VA) issued Solicitation No. 36C25221R0003, for non-emergency ambulance transportation services for the Jesse Brown VA

Medical Center and associate community-based outpatient clinics. The Contracting Officer designated North American Industry Classification System code 621910, Ambulance Services, with a corresponding \$16.5 million annual receipts size standard as the appropriate code for this procurement. While the solicitation is designated in block 10 as a 100% Service-Disabled Veteran Owned Small Business set aside, it is subject to a tiered evaluation. (Solicitation, at 1, 61.) The evaluation included four tiers. First, Service-Disabled Veteran Owned Small Business (SDVOSB) concerns, second, Veteran Owned Small Business concerns, third, small business concerns, with HUBZone small business concerns and 8(a) concerns having priority, and fourth, full and open competition. (Solicitation, Section E, at 61.) Initial offers were due December 14, 2020, with final proposal revisions due on January 20, 2021. The VA received three offers. One in tier one (SDVOSB concerns) Freedom-Elite, one in tier three (small business concerns), and one in tier four (unrestricted), Appellant. On February 4, 2021, the VA made award to Freedom-Elite. On February 11, 2021, Appellant filed a size protest against Freedom-Elite.

On February 17, 2021, the Area Office dismissed the protest because Appellant lacked standing to protest. The Area Office noted that this solicitation provided that proposals would be subject to a tiered evaluation that included four tiers. The procurement thus remained a set-aside unless and until the procuring activity reached the fourth, unrestricted tier. The Department of Veterans Affairs made award at the SDVOSB tier and did not consider offers beyond that tier. The Area Office found that a large business does not have standing to protest a procurement set aside for service-disabled veteran owned small businesses, citing 13 C.F.R. § 121.1001(a)(8).

On March 4, 2021, Appellant appealed the dismissal. Appellant argues the Area Office should have assessed its standing under 13 C.F.R. § 121.1001(a)(7), rather than 13 C.F.R. § 121.1001(a)(8). The VA employed a tiered or cascading evaluation. This evaluation combines aspects of a set-aside, in that the evaluations are initially limited to a specific category of small-businesses (here SDVOSBs), as well as aspects of open-competition, because large businesses are able to submit proposals and may be awarded a contract. Appellant argues that as an actual offeror, it had standing to protest, and the Area Office erred when it concluded that the procurement was a SDVOSB set aside for which only SDVOSB offerors had standing to assert a size protest under 13 C.F.R. § 121.1001(a)(8). (Appeal, at 2.)

First, Appellant argues a cascading or tiered evaluation is governed by 13 C.F.R. § 121.1001(a)(7), citing *NAICS Appeal of Information Ventures*, SBA No. NAICS-4627 (2004). (*Id.*) Second, the Area Office erred when it concluded 13 C.F.R. § 121.1001(a)(8) applied to this procurement. This regulation applies to SBA's SDVOSB set-aside program. The instant solicitation is under the VA's Veteran First program, and so the SBA regulation does not apply. Appellant points to an SBA website, which states that the SBA's program and the VA's program are different. (*Id.*, at 2-3.) Finally, Appellant argues an offeror has standing to protest as long as that offeror would have an opportunity to receive an award if the protest was successful, citing *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5392 (2012). Here, Appellant submitted an offer, it was not evaluated due to size, but if Freedom-Elite is found ineligible, Appellant has the opportunity to receive an award. (*Id.*, at 3.)

On March 19, 2021, Freedom-Elite responded to the appeal. Freedom-Elite noted that the VA made award at the SDVOSB tier, and never considered offers from the other tiers.

Appellant's offer was not made under a tier VA considered under the solicitation. Therefore, Appellant lacked standing. (Response, at 3.) Further, *Information Ventures* does not hold that § 121.1001(a)(7) applies to procurements with a cascade or tiered evaluation approach. Rather, OHA merely noted that small business status was beneficial under such an approach in deciding that OHA had jurisdiction. OHA having jurisdiction over a NAICS code appeal is not the same as an offeror having standing to protest. *Information Ventures* was an otherwise unrestricted procurement, whereas the instant procurement became unrestricted only if no reasonable offers were received in the first three tiers. (*Id.* at 4-5.)

Further, Freedom Elite maintains VA SDVOSB set-aside procurements are covered by 13 C.F.R. 1.1001(a)(8), citing *Size Appeal of Recycle Track Systems*, SBA No. SIZ-6083 (2020). The website Appellant refers to does not say that 13 C.F.R. § 121.1001(a)(8) does not apply to size protests arising from VA procurements, and there is no concrete legal support for this proposition. (*Id.* at 6.)

Freedom-Elite asserts Appellant's argument it has standing because it would be in line for award if its protest were successful is meritless. Under the regulation, only firms who submit an offer for an SDVOSB set-aside have standing, and Appellant did not submit an offer for the first tier, which was set aside for SDVOSBs. Freedom-Elite argues that *Competitive Innovations* is inapposite here. That decision dealt with firms who have been eliminated based upon size and whether they had standing to file a size protest under the HUBZone size protest standing rules in 13 C.F.R. § 121.1001(a)(6). Appellant was not eliminated, it was never considered, and the solicitation never became unrestricted because the VA never reached the fourth tier. Further, *Competitive Innovations* relies on § 121.1001(a)(1), which is not applicable here. (*Id.*, at 6-7.)

Freedom-Elite also disputes Appellant's argument that it would have the opportunity to receive the award if its size protest were successful. VA received technically acceptable and reasonably priced offers at the lower tiers, one at tier one (Freedom-Elite), and one at tier three (other small businesses). Proposals at tier four, for full and open competition, where Appellant's offer was located, were never considered. Appellant would not have been in line for award because there was another offer on a lower tier. (*Id.*, at 7-8.)

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

First, Appellant's contention that standing to protest size in a procurement with a tiered evaluation scheme is governed by 13 C.F.R. § 121.1001(a)(7) is without support. Appellant relies upon *NAICS Appeal of Information Ventures*, SBA No. NAICS-4627 (2004), but this is a NAICS code appeal where size protests were not at issue. The case merely noted small business status could be beneficial in a tiered procurement. The question of standing did not arise.

Further, Appellant's contention that the regulation dealing with standing on size protests for procurements under SBA's Service-Disabled Veteran Owned Small Business Concerns (SDVO SBCs) program are not applicable to procurements under the VA's Vets First program is meritless. Common regulations on ownership and control for these programs were issued in 2018, and these are the regulations OHA applies for both SDVO SBC appeals and CVE protests and appeals. 83 Fed. Reg. 48908 (Sept. 28, 2018); 13 C.F.R. § 125.11 *et seq.* The website Appellant refers to is silent on this matter, it merely notes that there are two programs, and does not speak to standing in size protests.

Parties with standing to file a protest in a SDVOSB procurement are: any concern which submits an offer for a specific SDVOSB contract, the CO, the SBA Government Contracting Area Director, and SBA's Director of the Office of Government Contracting. 13 C.F.R. § 121.1001(a)(8). Here, Freedom-Elite was the sole offeror in the SDVOSB tier. The contract was described as an SDVOSB set-aside. Appellant was not eligible to submit an offer in the SDVOSB tier, did not do so, and so VA did not evaluate its offer. Appellant argues that it should have standing, as long as it would have an opportunity to receive an award if the protest was successful, citing *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5392 (2012). However, in that case, the challenged concern was one of two firms competing for the award, and a successful size protest would have opened the door to full and open competition. Here, if Freedom-Elite is eliminated, there is another offeror in tier three, to be reached before Appellant. Thus, even had Appellant's protest been successful, it would still not have been eligible for award. Accordingly, I conclude that the Area Office properly dismissed Appellant's protest for lack of standing.

IV. Conclusion

Appellant has failed to establish any error of fact or law in the size determination. Accordingly, I DENY the instant appeal. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge