

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

SIZE APPEAL OF:

Critical Contingency Solutions, LLC,

Appellant,

RE: Alithos Anesti LLC

Appealed From
Size Determination No. 06-2021-065

SBA No. SIZ-6126

Decided: November 3, 2021

APPEARANCES

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., Schoonover & Moriarty LLC, Olathe, Kansas, for Appellant

Daniel Needham, Esq., Law Office of William Igbokwe, New York, New York, for Alithos Anesti LLC

DECISION¹

I. Introduction and Jurisdiction

On August 6, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2021-065, dismissing a size protest filed by Critical Contingency Solutions, LLC (Appellant) against Alithos Anesti LLC (Alithos). The protest alleged that Alithos will be unusually reliant upon a subcontractor to perform the required work, in contravention of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(2). The Area Office concluded, however, that Appellant's failure to identify the alleged ostensible subcontractor by name rendered the protest non-specific. On appeal, Appellant contends that the Area Office improperly 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 and the matter is remanded to the Area Office.

¹ OHA issued a protective order for this case on August 12, 2021. This decision, though, does not contain any confidential or proprietary information. Accordingly, this decision is not issued under the protective order and is intended for public release.

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 July 12, 2021, the U.S. Department of the Army, Mission and Installation Contracting Command, issued Request for Quotations (RFQ) No. JBLM275AJO0015, seeking a contractor to provide portable shower units, and associated “[d]elivery, installation, and removal” services, at Fort Irwin, California. (RFQ at 7.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562991, Septic Tanks and Related Services, with a corresponding size standard of \$8 million average annual receipts. Appellant and Alithos submitted timely quotations.

B. Protest

On July 27, 2021, the CO informed Appellant that Alithos was the apparent awardee. On August 3, 2021, Appellant filed a protest challenging Alithos's size. Appellant alleged that Alithos will be reliant upon, and affiliated with, an ostensible subcontractor to perform the instant contract. (Protest at 2-3.)

Appellant observed that, according to Alithos's website, Alithos's team consists only of one person, Ms. Jazze Gorman, the owner and operator of the firm. (*Id.* at 2.) Although Alithos's website states that Alithos performs work in over 100 separate NAICS codes, Alithos does not appear to have prior experience with the type of work required by the instant RFQ. (*Id.*) As such, Appellant asserted, Alithos must rely upon a subcontractor to “provide mobile hygiene facilities” as well as to perform “the delivery, set-up, and demobilization services” for the Army. (*Id.*) Moreover, the website declares that Alithos is “dedicated to subcontracting government contracts with assistance from reputed large-scale organizations.” (*Id.* at 3, quoting Exh. C.) Alithos, then, by its own admission, is “little more than a small business prime contractor that simply subcontracts work to large businesses” in direct violation of SBA rules. (*Id.*, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) Due to Alithos's lack of appropriate experience, personnel, and equipment, the Area Office should find that Alithos is affiliated with an ostensible subcontractor. (*Id.*)

Appellant acknowledged that, because it does not have access to Alithos's quotation, Appellant does not know the identity of Alithos's proposed subcontractor(s). (*Id.* at 2, n.3.) This omission, however, “does not matter for the sufficiency of arguments in this protest.” (*Id.*) In *Size Appeal of iGov Techs., Inc.* SBA No. SIZ-5359, at 9 (2012), OHA explained that:

[b]y nature, ostensible subcontractor allegations turn largely on the challenged firm's own proposal, so the challenged firm ordinarily can prepare a

proper response to the protest even if the protest does not name the alleged ostensible subcontractor.

(*Id.*) Further, SBA regulations at 13 C.F.R. § 121.1007(c) indicate that “a protest that sets forth specific basis for affiliation is sufficiently specific.” (*Id.*)

C. Size Determination

On August 6, 2021, the Area Office issued Size Determination No. 06-2021-065, dismissing Appellant's size protest as nonspecific because Appellant did not state the name of the alleged ostensible subcontractor. SBA regulations governing protest specificity provide:

(b) A protest must include specific facts. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) Non-specific protests will be dismissed. Protests which do not contain sufficient specificity will be dismissed by SBA.

(Size Determination at 2, quoting 13 C.F.R. § 121.1007.) The Area Office found that Appellant's inability to name the alleged ostensible subcontractor “is analogous to asserting that the protested concern is affiliated with unnamed other concerns, an assertion that, pursuant to 13 C.F.R. § 121.1007(b), [the Area Office] deems to fail to specify adequate grounds for the protest.” (*Id.*)

D. Appeal

On August 11, 2021, Appellant filed the instant appeal. Appellant argues that the Area Office clearly erred by dismissing the protest as nonspecific. (Appeal at 6.) The dismissal was based solely on the fact that Appellant could not identify Alithos's alleged ostensible subcontractor(s). (*Id.*) The Area Office's reasoning is flawed since OHA case law instructs that “a protester's failure to identify the subcontractor does not undermine the specificity of a protest.” (*Id.*, citing *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5294 (2011).)

Appellant argues that the operative facts here are identical to those presented in *C2G Ltd.*, where OHA vacated and remanded a “dismissal of a protest solely because it failed to identify the alleged ostensible subcontractor.” (*Id.*) In *C2G Ltd.*, a protestor alleged that the challenged concern could not perform the contract without reliance upon an ostensible subcontractor. (*Id.*) In granting the appeal, OHA found that “the critical consideration for protest specificity was whether the protested concern could meaningfully respond to the allegations.” (*Id.*) OHA later invoked similar reasoning in *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359 (2012). (*Id.* at 7.) OHA's decisions in *C2G Ltd.* and *iGov Techs.* are consistent with OHA's long-standing view

that an assessment of protest specificity turns upon: “(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds.” (*Id.* at 7-8, quoting *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4888, at 5 (2008).)

Appellant asserts that the instant protest was sufficiently detailed to meet these requirements. The protest met the first specificity requirement because it put Alithos on notice that the basis for alleged affiliation was the ostensible subcontractor rule. (*Id.* at 8.) Further, in light of Alithos's stated preference for subcontracting to “large scale organizations,” it is likely that any ostensible subcontractor would not be small. (*Id.*) The protest also met the second specificity requirement because it provided supporting factual allegations based on information and statements from Alithos's website. (*Id.*) Alithos does not normally perform the type of work at issue here, and therefore can reasonably be expected to rely upon a subcontractor to provide the necessary services. (*Id.*) Based on the protest, Alithos would not have had any doubt as to the basis of the affiliation claim, and could have responded with reference to its quotation, teaming agreements, or subcontracts for the award. (*Id.* at 9.)

Finally, Appellant argues that the facts presented here are analogous to those in *White Hawk/Todd*. In that case, a protestor alleged affiliation between a mentor and protégé, and submitted a copy of SBA's approved mentor/protégé list which did not include the firms in question. Although the protest initially was dismissed for lack of specificity, OHA vacated the dismissal and remanded the matter for further review. (*Id.*) OHA found that the protest had clearly stated its affiliation allegations and supplied the requisite factual support. (*Id.*) Here, like *White Hawk/Todd*, Appellant provided a clear basis for the affiliation allegation accompanied by specific factual grounds. (*Id.*) Accordingly, Appellant urges, OHA should vacate the dismissal and remand the matter to the Area Office for further investigation. (*Id.* at 9-10.)

E. Alithos's Response

Upon receipt of the appeal, OHA established August 27, 2021 as the deadline for any response to the appeal. On September 3, 2021, Alithos moved to reopen the record and provided its Response. Alithos maintains that its Response does not introduce new information, and thus is not prejudicial to Appellant. (Motion at 1.) Appellant does not oppose the motion. Accordingly, for good cause shown, Alithos's motion is GRANTED and the Response is ADMITTED into the record.

In its Response, Alithos maintains that the Area Office properly dismissed the protest. (Response at 1.) In Alithos's view, the protest did little more than “allege that [Alithos] is affiliated with other concerns,” and therefore was impermissibly vague and nonspecific. (*Id.* at 2.)

Alithos asserts that the references to its website, discussed in the protest and the Appeal, depict “an ordinary relationship with subcontractors, if they describe any relationship at all.” (*Id.* at 2-3.) None of Appellant's claims of “unusual reliance” on a large business subcontractor

were supported by factual allegations. (*Id.* at 3.) Appellant thus failed to meet the standard for “protest specificity analysis” set forth in its own Appeal. (*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 agree with Appellant that the Area Office clearly erred by dismissing Appellant's protest for lack of specificity. As Appellant observes, OHA has previously considered the exact issue presented here, and has concluded that a protestor's inability to name the alleged ostensible subcontractor does not render the protest nonspecific. In *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5294 (2011), OHA explained that the purpose of the protest specificity regulations “is to ensure that a protested concern receives adequate due process so it may craft a meaningful response to the protest.” *C2G Ltd.*, SBA No. SIZ-5294, at 2 (quoting *Size Appeal of Unitron, LP*, SBA No. SIZ-5084, at 2 (2009)). OHA therefore vacated the dismissal of a protest alleging violation of the ostensible subcontractor rule, after concluding that the challenged firm would have been able to meaningfully respond to the protest. OHA expounded on this reasoning in *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359 (2012), stating:

[b]y nature, ostensible subcontractor allegations turn largely on the challenged firm's own proposal, so the challenged firm ordinarily can prepare a proper response to the protest even if the protest does not name the alleged ostensible subcontractor.

iGov Techs., SBA No. SIZ-5359, at 9. As in *C2G Ltd.*, OHA found that the protest was adequately detailed to have enabled the challenged firm to “ascertain that its proposal for the [subject] procurement was at issue, based on alleged violation of the ostensible subcontractor rule.” *Id.* The challenged firm thus “had notice of the specific grounds upon which its size was being challenged.” *Id.*

In the instant case, Appellant filed a lengthy protest alleging that Alithos is in violation of the ostensible subcontractor rule. Section II.B, *supra*. Appellant's allegations were supported by information and quotations from Alithos's own website, including Alithos's curious assertion that it is “dedicated to subcontracting government contracts with assistance from reputed large- scale organizations.” *Id.* Appellant further alleged that available information did not demonstrate that Alithos has the experience or resources necessary to perform the instant procurement. *Id.*

Consequently, the protest provided factual support for the ostensible subcontractor allegations, and was sufficiently detailed to enable Alithos to respond. Although Appellant, like the protestors in *C2G Ltd.* and *iGov Techs.*, was unable to identify the alleged subcontractor(s) by name, Alithos nevertheless would have had notice of the specific grounds upon which its size was being challenged, and was provided enough information to prepare a proper response. Because ostensible subcontractor allegations largely turn on the challenged firm's proposal, Alithos could have responded to the protest by explaining whether it proposed to utilize subcontractor(s) for this procurement, and if so, the role that those subcontractor(s) would play in performing the primary and vital contract requirements.

Notably, in response to the appeal, Alithos does not contend that it lacked sufficient information to meaningfully respond to the protest, nor does Alithos address whether it proposed to engage any subcontractor(s) for this procurement. Section II.E, *supra*. Alithos thus has not persuasively shown that it could not have meaningfully responded to the protest.

IV. Conclusion

For the above reasons, the appeal is GRANTED, Size Determination No. 06-2021-065 is VACATED, and the matter is REMANDED to the Area Office for a new size determination.

KENNETH M. HYDE
Administrative Judge