

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

SIZE APPEAL OF:

Potomac River Enterprise Solutions, LLC,

Appellant,

RE: Affordable Engineering Solutions, Inc.

Appealed From
Size Determination No. 06-2022-005

SBA No. SIZ-6138

Decided: February 1, 2022

APPEARANCES

Timothy J. Turner, Esq., Jonathan Perrone, Esq., Whitcomb, Selinsky P.C., Denver, Colorado, for Potomac River Enterprise Solutions, LLC

Joseph Caltagirone, Contracting Officer, for Department of the Navy, Philadelphia, Pennsylvania.

DECISION

I. Introduction and Jurisdiction

On October 29, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2022-005, dismissing as untimely the protest of Potomac River Enterprise Solutions, LLC (Appellant) that Affordable Engineering Services, Inc. (AES) is not a small business for the Task Order No. N00189-21-R-3045 from the Department of the Navy's (DON) Solicitation No. N00178187000.

On November 15, 2021, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA) maintaining the Area Office erred in its dismissal. For the reasons discussed *infra*, the appeal is GRANTED, and the Size Determination No. 06-2022-005 is VACATED and REMANDED to the Area Office for a new size determination.

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. Solicitation

On June 18, 2018, DON issued Solicitation No. N00178187000, a Request for Proposals (RFP) for a base Multiple Award Contract (MAC) for Engineering Services and Program Management Services. (Solicitation, Amendment 0001.) The Solicitation designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with an exception for a \$38.5 million annual receipts size standard at that time.¹ This contract was also known as SeaPort- Next Generation (SeaPort-NxG). Offers were due on July 2, 2018. (*Id.*, at 1, 7.) On December 3, 2018, the base contract award was made to Affordable Engineering Services, Inc. (AES). (AES Seaport Contract N00178187000.)

On March 11, 2021, DON issued a Sources Sought (SS) notice seeking qualified sources capable of providing Stricken Aircraft Reclamation and Disposition (SARDIP) services at Government Facilities along the East Coast. (SSN-RFI SAM, at 2.) The SSN identified NAICS code 541330, with a corresponding \$16.5 million annual receipts size standard, as the appropriate code for the procurement. Respondents were to provide confirmation of their current large or small business status. The SS notice stated, “This is NOT a request for proposal (RFP), invitation for bid (IFB), or an announcement of a solicitation as no solicitation package exists at this time. The request is for informational purposes only.” (*Id.*, at 3.)

On August 12, 2021, DON issued a Task Order Request for Quotation (TORFQ) No. N00189-21-R-3045 for a Task Order issued under SEAPORT NXG MAC. (TORFQ, Amendment 0001 at 19.) On August 17, 2021, DON set the procurement aside for small business. (TORFQ, at 3.) The TORFQ did not specify a NAICS code designation or list a size standard applicable to the Task Order. Further, the TORFQ did not require offerors to make a certification of their small business status.

On September 27, 2021, DON made award of the TORFQ to AES. On October 4, 2021, Appellant filed a protest of AES's size with the CO.

B. Protest Dismissal

On October 29, 2021, the Area Office dismissed Appellant's size protest as untimely. The Area Office found the instant procurement was against a MAC where the TORFQ did not request a recertification of size from the offerors. The Area Office noted that protests of awards of set-asides under MAC must be filed within five days of notification of the identity of the prospective awardee of the contract or of an award issued against the contract if the contracting officer had requested a size recertification in connection with the order. Because this MAC was awarded on December 3, 2018, and no recertification was required here, the protest was untimely. (Size Determination, at 2- 3, citing 13 C.F.R. § 121.1004(a)(2)(i) & (ii).)

¹ Currently, NAICS code 541330 has a corresponding size standard of \$41.5 million annual receipts.

C. Appeal

On November 15, 2021, Appellant filed the instant appeal. Appellant argues the TORFQ was restricted to small business concerns, while the original MAC was not. Appellant characterizes the SS notice as “partnered” with the TORFQ and maintains it explicitly modified the size standard and required the respondents provide confirmation of their large or small business status. (Appeal, at 5.) Appellant also maintains the CO's actions clearly sought to have prospective offerors recertify their size under the restriction being placed on this Task Order. In Appellant's view, it was limited to bids from small businesses only with a \$16.5 million annual receipts size standard, rather than the \$41.5 million exception. (*Id.*)

Further, Appellant argues the instant procurement is a negotiated procurement for a set-aside order against a MAC, and Appellant's size protest was submitted to the CO within five days of notification of the identity of the prospective awardee for an order set-aside for small business (i.e., small business set aside) where the underlying MAC was awarded on an unrestricted basis. Appellant contends, the underlying MAC was unrestricted, and when restrictions are made, as was the case here, the regulation allows for a size protest arising from the specific task order. As the regulation allows for a size protest arising from this restrictive Task Order, making Appellant's protest timely, the Area Office erred in dismissing it. (*Id.*, at 6-7, citing 13 C.F.R. § 121.1004(a)(2)(iii).)

D. CO's Response

On December 2, 2021, the CO responded to the appeal. The CO provided additional context regarding the procurement at issue and explained that the Task Order resulted from the RFQ, which was issued as a small business set-aside. (CO's Response, at 1.) The TORFQ did not require a re-representation of the SeaPort NxG MAC contract holders. The CO offers a copy of the conformed RFP for SeaPort NxG MAC, which required offerors to submit a small business representation. (*Id.*)

The CO maintains that its office screened the vendors' small business status in accordance with SeaPort NXG Standard Operating Procedures, which require, among other things, that the contracting officer for the specific task order procurement verify the status of all offerors at the time of task order proposal submittal. (*Id.*) The CO explains, its office screened the vendors in accordance with these procedures and the awardee was confirmed as an eligible small business and offers the verification. (*Id.*)

As for the specific issues raised on appeal about the SS notice posted on March 11, 2021, the CO states that it was for informational purposes as the notice clearly states. The SS notice was posted to BETA.SAM and NECO and the results of this notice/market research informed its office's decision to process this action as a Task Order through the existing SeaPort NxG MAC. (*Id.*) Although the SS notice included a reference to the NAICS code 541330 and a \$16.5 million small business size standard, the instant Task Order was in fact issued against the SeaPort NxG MAC. (*Id.*, at 1-2). As outlined in the SeaPort NXG MAC RFP, the NAICS code for the MAC (and any following task orders) was the code 541330, exception for marine engineering and naval architecture with a current \$41.5 million size standard. (*Id.*, at 2.) The CO revisits the SS

notice, which indicated that it was “NOT a request for proposal (RFP), invitation for bid (IFB), or an announcement of a solicitation as no solicitation package exists at this time.” (*Id.*, emphasis CO's.)

Therefore, the TORFQ did not require a small business status re-representation of the SeaPort NxG MAC contract holders and did not otherwise change the underlying SeaPort NxG MAC's existing NAICS code exception of \$41.5 million size standard. (*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 findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The Area Office dismissed Appellant's protest as untimely under 13 C.F.R. § 121.1004(a)(2):

Negotiated procurement (including protests on partial set-aside and reserves of Multiple Award Contracts and set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts.).

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 for:

- (i) The contract; or
- (ii) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order.

The Area Office concluded that because the underlying MAC was awarded in 2018, and the TORFQ did not include a request for recertification, that Appellant's protest was untimely. *Size Appeal of Aerosage, LLC*, SBA No. SIZ-5987, at 4 (2019). However, the Area Office did not take into account of a recent revision of the regulation in 85 Fed. Reg. 66146, 66154, 66182-3 (Oct. 20, 2020):

Except for orders or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for

small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or woman-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

13 C.F.R. § 121.1004(a)(2)(iii).

The preamble to the new rule described it: “This rule specifically authorizes a size protest relating to an order issued against a MAC where the order is set aside for small business and the underlying MAC was awarded on an unrestricted basis, except for orders or Blanket Purchase Agreements issued under any FSS contract.” 85 Fed. Reg. at 66154. Here, the underlying MAC was awarded on an unrestricted basis, but the TORFQ was set aside for small business. Accordingly, Appellant's protest was timely under the revised rule.

Appellant has therefore established that the Area Office's dismissal of its protest as untimely was based on an error of law. Accordingly, I VACATE the size determination and REMAND this case to the Area Office for a new size determination.

IV. Conclusion

Appellant has established that the size determination is based upon a clear error of law. Accordingly, I GRANT the instant appeal, and I REMAND the case to the Area Office for new size determination.

CHRISTOPHER HOLLEMAN
Administrative Judge