

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

SIZE APPEAL OF:

DRI, Inc.,

Appellant,

RE: CMR Construction & Roofing, LLC

Appealed From

Size Determination No. No. 04-2022-009

SBA No. SIZ-6150

Decided: April 19, 2022

ORDER DENYING APPEAL¹

I. Background

On July 13, 2021, the U.S. Department of Veterans Affairs (VA) issued Invitation for Bids (IFB) No. 36C24621B0011 for a roofing construction project. (IFB, at 1.) The Contracting Officer (CO) set aside the procurement entirely for service-disabled veteran-owned small business concerns and assigned North American Industry Classification System (NAICS) code 238160, Roofing Contractors, with a corresponding \$16.5 million annual receipts size standard. (*Id.*) DRI, Inc. (Appellant) and CMR Construction & Roofing, LLC (CMR) submitted timely bids.

On November 23, 2021, the VA publicly opened bids and determined that CMR was the lowest bidder. On the same day, Appellant's President, Zack Blenkinsopp, e-mailed the VA's Contracting Specialist for this instant procurement:

I sent you a voicemail regarding the apparent low bidder on the project at Bldg. 8, Bldg. 11, and Corridors 75-78. I want to start off by saying, all I want is to make sure we have a level playing field, for all of us who are bidding. [CMR] is well known in the roofing industry and is one of the largest roofing companies in America. Their CEO frequently is a speaker at events and conferences within our industry. They also are consistently in the Inc Magazines Top 100 (in revenue) and last year finished #10 with over \$122,000,000 in sales (<https://www.roofingcontractor.com/RC-List-Tog-100-2021>).

¹ 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.

They are so big, they even have their own race team! <https://www.jaY-ski.com/2020/08/28/cmr-returns-full-tme-in-2021-with-ryan-sieg/> Large companies like this have much more buying power with suppliers and there's no way we can compete with them on the price, labor, etc. I can link a lot more information but a simple Google Search will show exactly how big these guys are.

I know you are going to do your due diligence, but it's just frustrating to see because they have won several federal government projects in the past under Total Small Business NAICS Code 238160 - Roofing Contractor, which is set at \$16.5 Million. I don't know exactly how they are doing this, I just wanted to make sure you were aware before this project was awarded.

I hope I didn't overstep. I just feel like I would want to know if I was in your shoes and not want to have to worry about having to be re-bid this project again or dealing with a protest.

(E-mail from Z. Blenkinsopp to B. Guerrant (Nov. 23, 2021).)

On February 4, 2021, the CO awarded the contract to CMR and notified the unsuccessful bidders, including Appellant. On the same day, Appellant filed a size protest with the CO challenging CMR's status as a small business, alleging that CMR had \$100 million in annual revenue based on public and media information. (E-mail from Z. Blenkinsopp to P. Stults (Feb. 4, 2022)). The CO forwarded Appellant's protest to the U.S. Small Business Administration (SBA), Office of Government Contracting — Area IV (Area Office) for review.

On February 15, 2022, the Area Office issued Size Determination No. 04-2022-009, dismissing Appellant's protest against CMR as untimely. The Area Office found that on November 23, 2021, the VA conducted a public bid opening, followed by a public meeting on Microsoft Teams, an internet application, which was attended by at least one of Appellant's employees. The Area Office explained that to be timely, Appellant's protest should have been submitted to the CO within five business days of bid opening. (Size Determination, at 1.)

II. Appeal

On February 22, 2022, Appellant filed the instant size appeal with the SBA Office of Hearings and Appeals (OHA). In its appeal, Appellant restates its allegations that CRM is not a small business, having over \$100 million in annual revenue. (Appeal, at 1.) Appellant does not dispute the Area Office's application of the regulations under 13 C.F.R. § 121.1004(a) or allege the determination is based on any error of law or fact. However, Appellant asserts that Mr. Blenkinsopp's e-mail on November 23, 2021, to the VA “was more than enough to start the protest” and the CO “should have induced a formal protest” at that moment. (*Id.*) Appellant adds that its President had difficulties contacting the CO and never heard back until the project was awarded on February 4, 2022. Further, the CO was not aware of Mr. Blenkinsopp's e-mail because the Contracting Specialist never forwarded it to the CO. (*Id.*, at 2.)

Appellant concedes that the Area Office's determination to dismiss the protest because it was not submitted within 5 days of the bid opening is correct and that Appellant misread the applicable regulations for IFBs. Appellant thought it must submit its protest within 5 days of the award. "In retrospect, that was incorrect." (*Id.*) Appellant explains that in "most federal government construction projects, the low bidder is not always awarded the contract. However, this project was bid out as an IFB Sealed Bid, not an RFP. Had this been an RFP, we would have been correct. As a company who is still new to this process, we read this incorrectly." (*Id.*) Referring to the Area Office's determination that its protest was untimely, Appellant concedes, "[a]fter further review, [the Area Office] is correct." (*Id.*)

However, Appellant claims the Contracting Specialist or the CO chose to ignore the phone call and e-mail sent on November 23, 2021, and never responded back; therefore, "no protest was submitted during the correct timeframe." (*Id.*) Citing to 13 C.F.R. § 121.1007(b) and what a protest must include, Appellant asserts it "did that and should have invoked the protest then on November 23rd, 2021." (*Id.*, at 2-3.) Finally, Appellant maintains:

The fact that the [CO] and Contracting Specialist didn't communicate with us as the contractor shows they made a judgement call instead of following the procedure. While [the Area Office] was following rules and is correct, I would like to formally appeal the determination not to investigate [CMR].

(*Id.*, at 3.)

CMR did not respond to the appeal.

III. Discussion

Appellant filed the instant appeal within 15 days of receiving the size determination, and so the appeal is timely. 13 C.F.R. § 134.304(a). Nevertheless, a timely appeal cannot cure an untimely protest. *Size Appeal of AdMed Consulting, Inc.*, SBA No. SIZ-5355 (2012). After reviewing the record, I conclude that the Area Office did not err in dismissing Appellant's protest as untimely.

The regulations require that in procurement conducted under sealed bid procedures, such as the instant procurement a size protest must be received by the CO within five business days after bid opening for the contract. 13 C.F.R. § 121.1004(a)(1). Here, the bid opening was November 23, 2021, and Appellant filed its protest on February 4, 2022. Appellant's protest was plainly untimely. Untimely protests must be dismissed. 13 C.F.R. § 121.1004(d).

OHA has repeatedly found that issues not raised on appeal are abandoned and the Administrative Judge will not consider them. 13 C.F.R. § 134.316(c); *Size Appeal of Birmingham Industrial Construction, LLC*, SBA No. SIZ-5984, at 11 (2019). Here, Appellant does not dispute the regulation and does not allege any errors of fact or law in the Area Office's determination. Section II, *supra*. Appellant even concedes that it misread and misapplied the regulations for filing a timely protest for this instant IFB procurement, and that the Area Office was correct to dismiss its protest. *Id.* Therefore, I find the instant appeal has failed to raise any

error of law or fact in the Area Office's dismissal of Appellant's untimely protest. 13 C.F.R. § 121.1004(d); *Size Appeal of American Patriot Construction Services, Inc.*, SBA No. SIZ-5671, at 2 (2015).

I find to be meritless Appellant's argument it had *invoked* a protest to the Contracting Specialist via e-mail, on November 23, 2021. First, Appellant is attempting to raise a new issue on appeal that I cannot consider here. 13 C.F.R. § 134.316(a). Certainly, Appellant did not raise this issue with the Area Office and conceded that at the time of filing its formal protest on February 4, 2022, Appellant thought it could file within 5 days of the award to CRM, which understanding it now concedes was incorrect. Sections I and II, *supra*. Thus, I cannot hold the Area Office erred by not considering Appellant's alleged *invoked* protest on November 23, 2021. *See Size Appeal of Serviam Construction, LLC*, SBA No. SIZ-5872 (2017) (finding that “[i]t is settled law that an area office cannot have erred by failing to address information or arguments that were never presented to it in the first instance.”)

Even on the merits, I find Appellant's *invoked* protest farfetched. While Appellant's e-mail to the Contracting Specialist on November 23, 2021, complained of CMR not being a small business, Appellant also stated that it did not want the CO to worry about a re-bidding or to deal with a protest. Section I, *supra*. Appellant's November 23rd e-mail is too equivocal to be considered a protest. Clearly, Appellant did not intend and did not submit a protest on November 23, 2021, or within five business days of bid opening. Appellant's request now for an investigation is not one either the Area Office or I may consider, because the regulation limits us to considering timely protests and timely appeals from those protests.

I conclude that the Area Office properly dismissed Appellant's protest as untimely.

III. Conclusion

Appellant has failed to show that the Area Office erred in dismissing its protest against CMR as untimely filed. Accordingly, the instant appeal is DENIED, and the Area Office's Size Determination is AFFIRMED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge