

Cite as: *Size Appeal of Advant-Edge Solutions of Middle Atlantic, Inc.*,
SBA No. SIZ-6194 (2023)

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

SIZE APPEAL OF:

Advant-Edge Solutions of Middle
Atlantic, Inc.,

Appellant,

RE: Talon Veterans Services, Inc.

Appealed From
Size Determination No. 2-2022-052

SBA No. SIZ-6194

Decided: March 2, 2023

APPEARANCE

Donald J. Holland, Vice President of Marketing and Sales, for Advant-Edge Solutions of Middle Atlantic, Inc.

ORDER DISMISSING APPEAL

I. Introduction and Jurisdiction

On October 26, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determination No. 2-2022-052 (Size Determination), denying the size protest of Advant-Edge Solutions of Middle Atlantic, Inc. (Appellant) that Talon Veterans Services, Inc. (TVS) was other than small. On November 9, 2022, Appellant filed the instant appeal from that Size Determination. Appellant argues that the Size Determination is clearly erroneous and requests that OHA reverse it. For the reasons discussed *infra*, the appeal is DISMISSED, 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.

II. Background

A. Solicitation

On June 22, 2022, the U.S. Air Force (USAF) issued a Request for Quotations (RFQ) No. FA481422TF072 for Medical Waste Pick-up and Disposal for MacDill and Sabal Park Clinic in accordance with Federal, state, and county regulations. The Contracting Officer (CO) set the procurement 100% aside for small business and designated North American Industry Classification System (NAICS) code 562112, Hazardous Waste Collection, with a corresponding \$41.5 million annual receipts size standard as the appropriate code. Quotations were due July 14, 2022. Appellant and TVS made timely offers.

B. Protest

On August 22, 2022, the CO notified Appellant that TVS was selected for award. On August 23, 2022, Appellant filed a size protest, alleging that TVS is not eligible for award because (1) TVS was in violation of the ostensible subcontractor rule and is affiliated with a large business, and (2) TVS would not comply with the limitation on subcontracting requirements of the Solicitation. (Protest, at 1.)

Appellant argued that TVS was not a registered business in the State of Florida, was not a registered medical waste transporter in the State of Florida and was not registered with the U.S. Department of Transportation because TVS did not own transportation vehicles that were necessary to perform the services in the Solicitation. The lack of registrations and vehicles alone established that TVS is not able to perform the primary and vital requirements of the contract. (*Id.*, at 3.)

Appellant also complained that TVS was unusually reliant on a large business, Trilogy MedWaste, Inc. (TM) and its subsidiaries for the performance of the contract. TVS would use TM to perform all of the primary and vital elements of the contract, including the provisions of containers (roll-offs), transportation, and disposal services for the contract. TVS would also use Trilogy MedWaste Southeast d/b/a ProMed Waste for all the transportation services. Appellant proffered a copy of a Dun & Bradstreet report, purporting to show that both companies are subsidiaries of TM, a large business. (*Id.*, at 3-4.)

Further, Appellant maintained that TVS would not comply with the limitations on subcontracting requirements in 13 C.F.R. § 125.6, because it would use the subcontractor(s) to provide containers and for the disposal and transportation services required by the contract. Because TVS does not have any of the applicable licenses in the State of Florida or with the U.S. Department of Transportation, Talon would have to subcontract the work. In Appellant's view, this is further proof that TVS would not be performing most of the work on the contract and be non-compliant with the subcontracting requirements. As a result, TVS is not eligible for award. (*Id.*, at 4.)

C. Area Office Investigation

On August 25, 2022, the CO referred the protest to the Area Office. (CO Referral, at 1.) On September 6, 2022, the Area Office informed TVS of the protest, and requested it submit an SBA Form 355 and other information.

On September 12, 2022, TVS stated that it is not affiliated with a large business and does not have a subcontractor for this procurement. TVS further stated:

The subject solicitation does not reference 13 CFR § 125.6 nor 52.219-14. Nonetheless, if and when we do issue a subcontract once this protest is cleared, it will be to a similarly situated business. We will require any potential subcontractor to complete SBA Form 355 to ensure that they are small, and even under the rules of affiliation, overall, we still remain under the size standard of this requirement.

(Response, at 1.)

TVS submitted a completed SBA Form 355, tax returns for itself and its affiliates for the applicable years, and all additional requested information arguing that it is small and eligible for the instant Solicitation.

D. Size Determination

On October 26, 2022, the Area Office issued Size Determination No. 2-2022-052. The Area Office first noted that Appellant made allegations based on two potential violations; the first was a violation of the ostensible subcontractor rule and the second was TVS's alleged lack of registration or licenses. Here, the Area Office found Appellant's second claim is outside the scope of a size determination since it is beyond OHA's jurisdiction, citing a number of OHA decisions. OHA has consistently held that compliance with the limitations on subcontracting rule in FAR 52.219-14 is a matter of contractor responsibility, and thus beyond OHA's jurisdiction. (Determination, at 3.) The Area Office explained the regulation provides that compliance with the limitation on subcontracting is "an element of responsibility and not a component of size eligibility", citing 13 C.F.R. 125.6(d)(2). Thus, the Area Office did not address Appellant's second claim as outside the jurisdiction of the size protest process.

Turning to Appellant's other contention, the Area Office noted the only basis of the protest is an alleged violation by TVS of the ostensible subcontractor rule resulting in affiliation with a large concern, which TVS denied. (*Id.*, at 3-4.) Upon being contacted by the Area Office, TVS conceded that it is not a registered medical waste transporter. However, TVS pointed out the lack of license does not equate to a violation of the ostensible subcontractor rule. TVS has no agreement with any firm, small or large, to subcontract this procurement as of yet, but "if and when we do issue a subcontract once this protest is cleared, it will be to a similarly situated business." (*Id.*)

Here, the Area Office concluded there cannot be a violation of the ostensible subcontractor rule where there is no subcontractor and that subcontracting to a similarly situated

concern “[W]ould not be a violation of the ostensible subcontractor rule had they done so in their proposal.” The Area Office reviewed the TVS proposal and verified there was no mention of a subcontractor. Further, the Area Office confirmed with the CO that there was no requirement to provide evidence of registration as a medical waste transporter nor was it a consideration in selection of an awardee. (*Id.*) Accordingly, as TVS did not have a subcontractor and was selected without a subcontractor, the Area Office found no violation of the ostensible subcontractor rule. (*Id.*)

Next, the Area Office reviewed TVS's annual receipts to determine its size as of the date of its self-certification as small as part of its initial offer including price. The Area Office found that TVS and its affiliates' five-year average combined annual receipts were under \$41.5 million.

Therefore, the Area Office concluded that TVS is a small business concern for the applicable size standard of \$41.5 million.

E. Appeal

On November 9, 2022, Appellant filed the instant appeal. Appellant claims the Area Office merely determined that TVS is a small business concern for the applicable size standard of \$41.5 million and ignored the application of appropriate State Laws. (Appeal, at 1.) Specifically, Appellant maintains the Area Office and the CO have disregarded the overwhelming evidence that TVS was ineligible for this award because it is a vendor who is not a registered biomedical waste transporter in the State of Florida and therefore, is ineligible to enter into a contract with the Government. (*Id.*, at 1-2.)

Appellant points to the Statement of Work (SOW), which calls for the pick-up and destruction of medical waste at MacDill and Sabal Park Clinic in accordance with federal, state, and county regulations. Appellant then claims that Florida requires generators to only contract with registered biomedical waste transporters, citing the Florida Department of Health, Bureau of Community Environmental Health, Chapter 64E-16, Florida Administrative Code, Biomedical Waste Section 64E-16.006. TVS is not registered and is therefore ineligible for award. (*Id.*, at 2.) Appellant argues the applicable Florida regulation clearly states that “A biomedical waste generator shall not negotiate for the transport of biomedical waste with a person who is not registered with the department as a biomedical waste transporter.” (*Id.* at 2, citing FL Administrative Code 64e16_1.” Thus, the procuring agency should not be negotiating nor contracting with TVS, because it violates the applicable state law. (*Id.*)

While Appellant recognizes that OHA has held that the “CO, rather than SBA, is responsible for ensuring compliance with the limitations on subcontracting”, citing 13 C.F.R. § 125.6(d)(2) (2022) and *Size Appeal of Mystic Ventures Group, LLC*, SBA No. SIZ-6006, at 6 (2019), with the evidence submitted to the CO and then to SBA, Appellant claims neither of them should ignore evidence that places the federal government in violation of Florida law, as discussed above. Thus, the Area Office finding that TVS did not violate the limitations on subcontracting rule must be overturned. (*Id.*)

In the format of a discussion, Appellant repeats allegations that the Area Office's and the CO's determination that TVS did not violate the limitations on subcontracting rule is based on one major fundamental error, that the government should not be negotiating with a firm not registered with the State of Florida. (*Id.*) Even though TVS would be utilizing a similarly situated subcontractor to performing this entire contract, the CO and the Area Office overlooked the state laws that prohibit a generator of medical waste, i.e., MacDill AFB, from negotiating for the transport of biomedical waste with an entity, TVS, who is not registered with the State of Florida Department of Health, as a biomedical waste transporter. In Appellant's view, the overwhelming evidence clearly demonstrates that TVS is not a registered biomedical waste transporter in the State of Florida, which TVS concedes. These mere facts alone show that TVS should not be eligible to subcontract these services even to a similarly situated firm, as the State laws prohibit, and the SOW clearly requires compliance with all federal, state, and local regulations. (*Id.*, at 2-3.)

Lastly, Appellant argues the Area Office and the CO placed the Federal Government in the position it should not have been in, that of negotiating with an unqualified, unregistered firm for medical waste transportation services. Appellant argues this contract award places the Federal Government in violation of the Florida law under Section 64E-16.006. (*Id.*, at 3.)

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 instant appeal raises two issues. First, Appellant argues TVS's lack of necessary licenses and certifications to perform the contract is in violation of the ostensible subcontractor rule. Second, Appellant argues that because TVS is not a registered biomedical waste transporter in the State of Florida, the Federal Government may not contract with it.

The first issue is not within OHA's jurisdiction. Whether a concern complies with the performance of work requirements is a matter of capability and thus of contractor responsibility, not within the jurisdiction of the size protest and appeals process. *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466, at 10 (2013) (compliance with the limitations on subcontracting is a responsibility issue, beyond OHA's jurisdiction); *Size Appeal of Assessment and Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 3 (2012). The determination of what capabilities are necessary to perform a contract and whether the awardee has them, are matters of responsibility for the contracting officer to determine and are thus not within OHA's

jurisdiction. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 23 (2011)

Turning to the second issue, Appellant failed to raise the issue of whether TVS was in violation of the ostensible subcontractor rule because it was not a registered biomedical waste transporter in the State of Florida, and the Government could therefore not contract with it, in its initial protest. Section II.B, *supra*. On appeal, Appellant has failed to point to any authority in statute, regulation or OHA case law to support this contention. More importantly, OHA may not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c). Therefore, Appellant's new arguments are not within OHA's jurisdiction, and I must dismiss this portion of the appeal. *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5678, at 3 (2015); *Size Appeal of Bacik Group, LLC*, SBA No. SIZ-6071, at 2 (2020).

I conclude that in raising the issue of TVS's compliance with the SOW requirements and licenses, Appellant has raised an issue of contractor responsibility, which is not within OHA's jurisdiction. Therefore, I must dismiss this appeal in its entirety.

IV. Conclusion

Accordingly, I DISMISS the instant appeal because the issues Appellant raise are beyond OHA's jurisdiction. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge