

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

SIZE APPEAL OF:

Daniels Building Co., Inc.,

Appellant,

RE: CAVU-Roncelli Construction JV-10
LLC

Appealed From
Size Determination No. 04-2023-012

SBA No. SIZ-6231

Decided: July 28, 2023

ORDER DENYING APPEAL¹

I. Background

On December 12, 2022, the U.S. Department of Veterans Affairs (VA) issued Invitation for Bids (IFB) No. 36C25022B0071 for the replacement of parking structure elevators. (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 238290, Other Building Equipment Contractors, with a corresponding \$19.5 million annual receipts size standard. (*Id.*) Daniels Building Co, Inc. (Appellant) and CAVU-Roncelli Construction JV-10 LLC submitted timely bids.

On December 15, 2022, VA publicly opened bids and determined that CAVU-Roncelli Construction JV-10, LLC was the lowest bidder. At that time, on December 15, 2022, all bidders present, including Daniels Building Company, were notified of the identity of the apparent successful offeror. A bid abstract signed and dated December 15, 2022, by VA Contracting Officer Scott Brennan, shows that both [CAVU-Roncelli] and Daniels Building Company were in attendance at this bid opening. (Size Determination, at 2)

On February 2, 2023, the CO awarded the contract to CAVU-Roncelli Construction JV-10 LLC and notified the unsuccessful bidders, including Appellant. The February 2nd notice mistakenly listed the awardee as CAVU-Roncelli a Joint Venture, LLC. On February 28, 2023 VA corrected its Notice. On February 9, 2023, Appellant filed a size protest with the CO challenging Roncelli's status as a small business. (Appeal, at 2). The CO forwarded Appellant's

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.

protest to the U.S. Small Business Administration (SBA), Office of Government Contracting — Area IV (Area Office) for review.

On March 9, 2023, the Area Office issued Size Determination No. 04-2023-012, dismissing Appellant's protest as untimely. The Area Office found that on December 15, 2023 both representatives of CAVU-Roncelli Construction JV-10 LLC and Daniels Building Company were in attendance at the bid opening. 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 March 23, 2023, Appellant filed the instant size appeal with the SBA Office of Hearings and Appeals (OHA). In its appeal, Appellant restates its allegations that CAVU-Roncelli Construction JV-10 LLC does not qualify for small business set-aside projects. (Appeal, at 4.) Appellant disputes the Area Office's application of the regulations at 13 C.F.R. § 121.1004(a) and alleges the size determination is based on an error of law or fact. Here, Appellant asserts that because the name of the joint venture was incorrectly stated by the VA initially on bid date, Appellant could not issue a size appeal until the name was corrected. (*Id.*) Further, Appellant claims that it did not have access to the VA created bid abstract on the bid opening day that would list the names of the bidders present.

The Project at issue was bid on December 15, 2022. CAVU-Roncelli, a Joint Venture LLC was read as the low bidder and Daniels was the second lowest bidder. The VA provided notice that the Project was awarded to CAVU-Roncelli, a Joint Venture LLC on February 2, 2023. The first indication that CAVU-Roncelli Construction JV-10 LLC was involved in this Project came on February 28, 2023 when the VA gave notice that the contract had been awarded to CAVU-Roncelli Construction JV-10 LLC. Daniels had no reason or ability to file a bid protest against CAVU-Roncelli Construction JV-10 LLC until February 28, 2023. Therefore, February 28, 2023 must be used as the applicable date or else Daniels will be prevented from having any meaningful ability to challenge the status of CAVU-Roncelli Construction JV-10 LLC. This protest is therefore timely by virtue of being filed within 5 days (exclusive of Saturday and Sunday) of notice of award to the project to CAVU-Roncelli Construction JV-10 LLC, which was the first notice that Daniels received indicating that this entity was involved. (Appeal, at 2)

Appellant asserts that the Area Office's dismissal of the protest because it was not submitted within 5 days of the bid opening on December 15, 2022 is incorrect. Appellant states that when the bids were opened, a different entity, CAVU-Roncelli a Joint Venture LLC, was announced as low bidder. “Nonetheless, the SBA dismissed the protest, essentially ruling that if the VA mistakenly reads and notices the wrong entity, a protestor will be prohibited from bringing a protest of the actual entity when the VA eventually corrects its mistake.” (*Id.*)

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 insert 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 a 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, bid opening was December 15, 2022, and Appellant did not file its protest by December 22, 2022. Appellant's protest was plainly untimely. Untimely protests must be dismissed. 13 C.F.R. § 121.1004(d).

Here, Appellant alleges errors of fact or law in the Area Office's determination. Section II, *supra*. Specifically, Appellant states that Area Office's determination to dismiss the protest because it was not submitted within 5 days of the bid opening is in error. Appellant states that when the bids were opened, a different entity, CAVU-Roncelli a Joint Venture LLC, was announced as low bidder. The VA subsequently sent a Notice of Award identifying CAVU-Roncelli a Joint Venture LLC entity as well as an Unsuccessful Offer Notice naming that same entity. It was only on February 28, 2023, that the VA sent a new Notice of Award and Unsuccessful Offer Notice, for the first time naming CAVU-Roncelli Construction JV LLC as the awardee. Daniels then filed its protest of this entity within five business days. *Id.* I find Appellant's argument that what was, in essence, a typographical error on the part of the VA in misnaming and misstating the successful entity on December 15, 2022, did not allow Daniels to protest the low bid awardee, within 5 days of December 15, 2022, unconvincing.

The referenced procurement represented an invitation for bids on which bids were opened on December 15, 2022. In a public bid opening, all sealed bids are read aloud to all parties in attendance. At that time, on December 15, 2022, all bidders present, including Daniels Building Company, were notified of the identity of the apparent successful offeror. A bid abstract signed and dated December 15, 2022, by VA Contracting Officer Scott Brennan, shows that both personnel from CAVU-Roncelli Construction JV-10 LLC and Daniels Building Company were in attendance at this bid opening. In accordance with 13 CFR § 121.1004(a)(1), the five-day protest period for this procurement ended on December 22, 2022. On March 7, 2023, the CO received the size protest. The regulation is clear, in the case of a sealed bid procurement, the protest must be received by the CO within five business days of bid opening. The VA's typographical errors do not provide an excuse for a later filing. Appellant was present at bid opening and could have ascertained the accurate name of the successful bidder. It failed to do so and did not act within five business days of bid opening. Accordingly, its protest was untimely. Because this protest submission date exceeds the 5-day protest period under 13 CFR § 121.1004(a)(1)(i), the size protest must be dismissed in accordance with 13 CFR § 121.1004(d).

I conclude that the Area Office properly dismissed Appellant's protest as untimely. Therefore, I find the instant appeal has failed to establish 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).

IV. Conclusion

Appellant has failed to show that the Area Office erred in dismissing its protest against CAVU-Roncelli Construction JV-10 LLC, 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