

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

SIZE APPEAL OF:

Global Pacific Design Builders, LLC,

Appellant,

RE: Custom Mechanical Systems, Corp.

Appealed From
Size Determination No. 04-2023-023

SBA No. SIZ-6260

Decided: December 21, 2023

APPEARANCES

David A. Rose, Esq., Rose Consulting Law Firm, Valdosta, Georgia, for Appellant

Antonio R. Franco, Esq., Samuel S. Finnerty, Esq., Patrick T. Rothwell, Esq., Daniel J. Figuenick III, Esq., PilieroMazza, PLLC, Washington, D.C., for Custom Mechanical Systems, Corp.

Doris R. Castro, Contracting Officer, U.S. Department of the Navy, Naval Facilities Engineering Systems Command Marianas, U.S. Naval Base Guam

DECISION

I. Introduction and Jurisdiction

On October 16, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2023-023, dismissing a size protest filed by Global Pacific Design Builders, LLC (Appellant) against Custom Mechanical Systems, Corp. (CMS). The Area Office found that the protest was not sufficiently specific. On appeal, Appellant maintains 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 reasons discussed *infra*, the appeal is denied.

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 15 days after 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 and Protest

On May 11, 2021, the U.S. Department of the Navy (Navy), Naval Facilities Engineering Systems Command Marianas, issued Request for Proposals (RFP) No. N40192-21-R-2800 for a design-build multiple-award construction contract. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, which at that time had a corresponding size standard of \$39.5 million in average annual receipts. (RFP at 3.) Phase One proposals were due June 24, 2021. (*Id.*)

On April 28, 2023, the Navy issued Amendment 0016 to the RFP, instructing that “[b]y May 8, 2023 Guam time, Offerors are required to validate their small business size status for NAICS [code] 236220 in [the System for Award Management (SAM)] and [Federal Acquisition Regulation (FAR) clause] 52.212-3 Offeror Representations and Certifications - Commercial Products and Commercial Services.” (RFP, Amend. 0016, at 2.) On May 18, 2023, the Navy issued Amendment 0017 which rescinded this requirement. (RFP, Amend. 0017.)

Appellant and CMS submitted timely proposals. On September 21, 2023, the CO informed Appellant that CMS was an apparent awardee. On September 25, 2023, Appellant filed a protest with the CO challenging CMS's size.

In its protest, Appellant alleged that, according to information in the Federal Procurement Data System (FPDS), CMS “received contracts totaling close to \$100 million each year” during 2021 and 2022. (Protest at 2.) CMS therefore should not be considered small under NAICS code 236220. (*Id.* at 2-3.) Appellant also noted that CMS does not currently represent itself as small for NAICS code 236220. (*Id.* at 3 and Attach. 1.)

B. Size Determination

The CO forwarded Appellant's protest to the Area Office for review. On October 16, 2023, the Area Office issued Size Determination No. 04-2023-023, dismissing the protest as non-specific. The Area Office explained that, pursuant to SBA regulations:

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.

(Size Determination at 1, quoting 13 C.F.R. § 121.1007(b).)

In the instant case, Appellant's protest was premised on data for fiscal years 2021 and 2022. (*Id.* at 2.) A concern's size for two-step procurements, however, is determined as of “the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price).” (*Id.*, quoting 13 C.F.R. § 121.404(f).) Here, CMS submitted its Phase One proposal on June 24, 2021. (*Id.*) The applicable period of measurement is the five most recently completed fiscal years prior to June 24, 2021, so the relevant time period is 2016-2020. (*Id.*) Because Appellant provided no evidence pertaining to CMS's size during this time period, the Area Office dismissed the protest as non-specific. (*Id.*)

C. Appeal

On October 27, 2023, Appellant filed the instant appeal. Appellant argues that the Area Office erred in dismissing its protest as non-specific.

Appellant contends that the Area Office overlooked that the CO requested that offerors recertify in 2023. (Appeal at 2, citing RFP, Amend. 0016.) Contrary to the size determination, then, the financial information Appellant provided for fiscal years 2021 and 2022 was relevant. (*Id.*)

Appellant also highlights that the data Appellant provided for 2021-2022 totals almost \$200 million. (*Id.*) Over a seven-year period of measurement from 2016-2022, the \$200 million would account for nearly \$30 million in receipts each year. (*Id.*) Factoring in CMS's receipts for the remaining years, Appellant maintains that the Area Office should have doubted that CMS is small. (*Id.* at 2-3.) Appellant reiterates that CMS itself concedes on SAM.gov that it is not currently a small business for NAICS code 236220. (*Id.* at 3.)

D. Navy's Comments

On November 7, 2023, the Navy submitted comments on the appeal. While taking no position on the merits of the case, the Navy seeks to clarify two alleged inaccuracies in the appeal petition. (Comments at 1.)

First, the Navy denies that recertification was required. (*Id.*) While Amendment 0016 did instruct offerors to recertify, Amendment 0017 eliminated this requirement. (*Id.*) Second, CMS did not actually recertify its size while Amendment 0016 was in effect. (*Id.* at 2.) The Navy states that it “has not received from CMS any size status recertification that would affect its eligibility under 13 C.F.R. § 121.404 for a contract award”. (*Id.*)

E. CMS's Response

On November 14, 2023, CMS responded to the appeal. CMS urges OHA to deny the appeal because the protest was non-specific; recertification was not required; and CMS never recertified its size. (CMS Response at 1.)

CMS, first, contends that the Area Office correctly dismissed the protest as non-specific. (*Id.* at 2.) Appellant's protest was based on (1) CMS's current SAM.gov certification and (2)

CMS's FPDS data for 2021 and 2022. (*Id.*) As the Area Office recognized, however, the relevant time period for assessing CMS's size is from 2016-2020. (*Id.* at 3.) Because Appellant failed to present any information pertaining to this time period, the Area Office properly dismissed the protest as non-specific. (*Id.*) As for CMS's current SAM profile, CMS argues that Appellant did not explain why this would have any bearing on CMS's size as of June 24, 2021. (*Id.* at 4.)

CMS denies that offerors were required to recertify size for this procurement. (*Id.* at 5.) Amendment 0016, which required recertification, was revoked by Amendment 0017. (*Id.* at 6.) Furthermore, CMS did not recertify its size while Amendment 0016 was in effect. (*Id.* at 6-7.)

Lastly, CMS rejects Appellant's suggestion that CMS could be other than small based on its seven-year average receipts. (*Id.* at 7.) SBA regulations make clear that "size will be determined by calculating average annual receipts from the previous five completed fiscal years as of the date of self-certification." (*Id.* at 7-8, citing 13 C.F.R. § 121.104(c).) In any event, CMS asserts, Appellant exaggerates CMS's receipts by rounding up and by equating contracts newly awarded in FPDS with receipts previously earned by CMS. (*Id.* at 8, citing 13 C.F.R. § 121.104(a).) The Area Office correctly deemed Appellant's protest to be no more than a request to investigate CMS's size, and therefore properly dismissed it. (*Id.* at 9, citing *Size Appeal of Phoenix Env'tl. Design, Inc.*, SBA No. SIZ-5591 (2014).)

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

I find no merit to this appeal. The Area Office determined, and no party disputes, that the relevant date for examining CMS's size is June 24, 2021, the date CMS submitted its Phase One proposal for the instant procurement. 13 C.F.R. § 121.404(f). Furthermore, the applicable period of measurement is the five most recently completed fiscal years prior June 24, 2021, or in this case 2016-2020. *See* 13 C.F.R. § 121.104(c)(1). In order to have been specific, then, Appellant's protest would have had to offer some reason to believe that CMS was not actually small as of June 24, 2021. Appellant's protest, though, only provided information regarding contracts awarded to CMS in 2021 and 2022, and about CMS's size as reflected in SAM during 2023. Section II.A, *supra*. Therefore, the Area Office correctly dismissed the protest as non-specific.

On appeal, Appellant argues that the Navy required offerors to recertify size in 2023. Section II.C, *supra*. However, as is clear from the Navy's comments as well as from the RFP itself, recertification was not required. Sections II.A and II.D, *supra*. While Amendment 0016

did instruct offerors to recertify, Amendment 0017 rescinded this requirement. *Id.* Furthermore, CMS did not actually recertify its size while Amendment 0016 was in effect. Sections II.D and II.E, *supra*.

Appellant also highlights that CMS does not currently represent itself as small for NAICS code 236220. Section II.C, *supra*. CMS's current size, though, is not relevant here, as SBA regulations permit that a concern which qualifies as small at the time of initial offer is considered to be small throughout the life of that contract. 13 C.F.R. § 121.404(g). Because CMS self-certified as small in 2021, and no valid reason was advanced to doubt this representation, CMS is considered small for purposes of the instant contract.

Lastly, Appellant theorizes that CMS could be found other than small by averaging its 2021 and 2022 contract awards over a seven-year period. Section II.C, *supra*. This argument fails for multiple reasons. The mere fact that CMS's receipts may have exceeded the size standard during two recent years does not connote that CMS also exceeded the size standard during a seven-year period, particularly since the two years in question are not part of the correct period of measurement. *See, e.g., Size Appeal of Ascendant Servs., LLC*, SBA No. SIZ-6131, at 5 (2021). Furthermore, as CMS observes, even if Appellant's proposed methodology had been adopted, it would not cause CMS to exceed the applicable \$39.5 million size standard; rather, the Area Office also would have had to assume that CMS had millions of dollars of additional revenues beyond those discussed in the protest.

IV. Conclusion

Appellant has not established that the Area Office erred in dismissing Appellant's protest for lack of specificity. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge