

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

SIZE APPEAL OF:

Prak-Integrity JV,

Appellant,

RE: North Wind Federal Services, LLC

Appealed From
Size Determination No. . 06-2024-032

Bureau of Reclamation
U.S. Department of the Interior

SBA No. SIZ-6289

Decided: May 30, 2024

ORDER DISMISSING APPEAL

I. Background¹

A. Introduction and Jurisdiction

On April 4, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2024-032 (Size Determination), dismissing the size protest of Prak-Integrity JV (Appellant), alleging that North Wind Federal Services, LLC (North Wind) was other than small due to its affiliations with its parent company, North Wind Group. On April 12, 2024, 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.

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.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. After reviewing the decision, Counsel informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

B. Solicitation and Protest

On September 14, 2023, the U.S. Department of the Interior, Bureau of Reclamation, issued Solicitation No. 140R1723R0002 for “comprehensive janitorial services throughout the Grand Coulee Dam complex.” (Solicitation, at 6.) The CO designated North American Industry Classification System (NAICS) code 561720, Janitorial Services, with a corresponding \$22 million-dollar annual receipts size standard, as the appropriate code. (*Id.* at 1.) The CO amended the solicitation and set the procurement aside for Indian Small Business Economic Enterprise concerns. (Solicitation Amendment 0008, at 2.) Offers were due November 10, 2023, and later extended to November 17, 2023. (Solicitation Amendment 0007, at 2.)

On March 21, 2024, the CO issued a pre-award notice that North Wind was the apparent successful offeror. (Pre-Award Notice, at 1.) On March 26, 2024, Appellant filed a size protest, alleging North Wind is not a small business under the applicable NAICS code. (*Id.*) Specifically, North Wind is affiliated with North Wind Group, a large business under the NAICS code. (*Id.* at 2.) In the referral email to the Area Office, the CO informed the Area Office that Appellant was “not in line for award” because Appellant was not registered in SAM.gov, rendering Appellant nonresponsive for award under FAR 52.204-7(b)(1). (Email T. Mest (April 2, 2024).) The CO further informed the Area Office that Appellant “was not notified that they were found to be non-responsive.” (*Id.*)

C. Size Determination

On April 4, 2024, the Area Office issued the Size Determination, dismissing the protest. The Area Office found that the CO eliminated Appellant “from competition because [Appellant] is not registered in SAM.gov,” thus rendering Appellant “non-responsive” for award under FAR 52.204-7(b)(1). (Size Determination, at 1-2.) Therefore, Appellant had no standing to protest, citing 13 C.F.R. § 121.1001(a)(1)(i). (*Id.*)

D. Appeal

On April 12, 2024, Appellant filed this instant appeal and alleges the CO notified Appellant that its offer was non-responsive for the first time on April 3, 2024. (Appeal, at 3-4.) Appellant did not receive notice of award or pre-award notice, and instead received an email from the contract specialist on March 21, 2024, a day after the award was made to North Wind. (*Id.* at 4.)

Appellant reasserts North Wind is other than small for the subject procurement due to affiliation with its parent company, North Wind Group. (*Id.* at 4-5.) Although the Area Office dismissed the size protest on a “technicality,” Appellant asserts that the evidence is sufficient to mandate that SBA review North Wind's size status. (*Id.* at 5-6.) Appellant request that OHA sustain the appeal and order the Area Office to review North Wind's size status. (*Id.*)

E. North Wind's Response and Motion to Dismiss

On April 30, 2024, North Wind filed a Motion to Dismiss and asserts Appellant does not have standing to file the protest or the size appeal. (Motion to Dismiss, at 2.) North Wind contends that only a “person adversely affected by a size determination” has standing to appeal that determination. (*Id.*, citing 13 C.F.R. § 134.302(a).)

North Wind further asserts that OHA has repeatedly prohibited affiliated companies that do not have a direct stake in the outcome of the appeal from filing a size appeal. (*Id.*) In addition, OHA has repeatedly held that a subcontractor to an offeror does not have standing to file a size appeal, nor do its subsidiaries. North Wind asserts here that Appellant did not submit a proposal for the solicitation and therefore does not have standing to file the original size protest nor standing to appeal the size determination. (*Id.* at 4.)

Second, North Wind asserts Appellant “never registered in [System for Award Management] SAM as a joint venture” and thus does not have standing. According to North Wind, the CO required all offerors to register in SAM when submitting an offer under FAR 52.204-7. (*Id.* at 4-5.) North Wind contends that SBA properly determined Appellant was not registered in SAM and thus, as a non-responsive offeror, “its protest was properly dismissed because [Appellant]—an offeror that was eliminated from consideration for a procurement-related reason—did not have standing to file a size protest in the first instance.” (*Id.* at 5.)

Lastly, North Wind contends Appellant has not met its burden of establishing OHA has jurisdiction over the instant size appeal. (*Id.* at 5-6.) North Wind maintains a party seeking relief from any tribunal must first establish that tribunal has jurisdiction over the matter. (*Id.* at 5.) North Wind alleges three facts: “(1) [Appellant] filed the size protest; (2) [Appellant] claims that it did not submit an offer in response to the Solicitation; and (3) [Appellant] also is not registered in SAM.” (*Id.* at 6.) North Wind reasons that if Appellant did not submit an offer, it was not an offeror and therefore does not have standing. Likewise, if Appellant did submit an offer, it was not registered in SAM and therefore eliminated from the consideration for award and thus, does not have standing. For these reasons, North Wind concludes that OHA should dismiss this appeal. (*Id.* at 6-7.)

F. Appellant's Response to Motion to Dismiss and Comments

On May 1, 2024, OHA admitted North Wind under the protective order, and updated the Area Office file to include a document titled “Evidence of Non-Responsiveness — REDACTED.” North Wind's admission and the supplemental document were provided after the close of record and thus, OHA informed all parties that any party “who intend to file a response, or any other pleading, include a Motion for Leave to Respond and/or a Request to Reopen Record with their pleading.” (OHA Email (May 2, 2024).)

On May 6, 2024, Appellant filed “Appellant's Response to Intervenor's Response to Size Appeal and Motion to Dismiss and Appellant's Comment on the Document added to the Record by OHA on May 1, 2024” (Appellant's Response and Comment). In the response, Appellant asserts the agency did not comply with the requirements of FAR 15.503(a)(1), which requires the

CO to promptly inform the protestor in writing that it is eliminated; nor did the agency comply with FAR 15.503(a)(2), which requires the CO to notify each offeror in writing prior to the award of the apparent successful offeror, and FAR 15.503(b), which requires the CO to inform offerors, within 3 days of the award, the number of offers solicited. (Appellant's Response and Comment, at 1-2.) Due to the CO's decision to not comply with the FAR, Appellant was denied the opportunity to challenge the determination.

Appellant further provides a timeline of pertinent events and asserts the agency's failure to comply with the FAR requirements denied Appellant the opportunity and right to challenge the award and present a size protest. Appellant asserts "the agency's failure to comply with the FAR requirements has prejudiced the Protestor and potentially other offerors." (*Id.* at 4.) According to Appellant's timeline, the Prak offer was still open when it filed the size protest and "had not been rejected by the agency and the agency had not advised Prak that its offer was considered to be non-responsive." (*Id.* at 4.) Citing the supplemental document titled "Evidence of Non-Responsiveness — REDACTED" (Supplemental Document), and email exchange between SBA and the CO, the CO confirmed that she "had not so advised [Appellant] that its offer was considered to be non-responsive, and [the CO] did not so advise [Appellant] until after the SBA regional office prodded it to do so." (*Id.* at 5.) More specifically, at the time Appellant filed the size protest, it had no knowledge why its offer was not accepted and had no reason to believe it had been disqualified for being non-responsive. (*Id.*)

Appellant explains that had the Agency complied with FAR requirements, Appellant would have been advised of its non-responsiveness determination prior to award and would have an opportunity to raise its objections to the agency. (*Id.*) Appellant contends that when it filed a size protest, Appellant had no knowledge that its offer was not accepted; thus, Appellant submits that "at the time that the size protest was filed with the agency, the elements required under 13 C.F.R § 1001(a)(1)(i) were met." (*Id.* at 7-8.) Further, Appellant is unaware of the time the CO submitted its protest to the Area Office, but according to the Supplemental Document, the regional office received the size protest before the agency advised Appellant its offer was rejected; therefore, "the offer was still open, and SBA should have proceeded to process the size protest." (*Id.*)

Even if OHA finds Appellant had no standing, Appellant asserts the evidence provided with its protest shows awardee exceeds the \$22 million size standard and should be reviewed by SBA. (*Id.* at 7-8.) Appellant concludes that "the agency's failure to provide required notices both before and after award, the lack of knowledge by the protestor of the allegations against it at the time that the protest was filed, and the compelling evidence provided with the protest dictate that the issues presented in the protest should be examined by SBA." (*Id.*)

G. Subsequent Pleadings

On May 7, 2024, North Wind filed a motion for leave to file a supplemental response and motion to dismiss. (North Wind Motion, at 1.) North Wind asserts new evidence, the Supplemental Document, was not available until May 1, 2024, after the close of record; therefore, North Wind requests OHA grant its motion and update the OHA record with North Wind's supplemental response. (*Id.* at 2.) Accompanying this motion is North Wind's

Supplemental Response to Size Appeal and Motion to Dismiss (Hereinafter “North Wind's Supplemental Motion to Dismiss”), and in its response North Wind asserts, *inter alia*, the “supplemental document confirms that the Size Protest was properly dismissed and that this size appeal should be dismissed because [Appellant] was eliminated for a procurement-related reason.” (North Wind's Supplemental Motion to Dismiss at 3.) Citing OHA case law, North Wind asserts that OHA has repeatedly found an offeror to lack standing when eliminated from consideration for reasons unrelated to size. (*Id.*, citing *Size Appeal of Fin. & Realty Servs., LLC*, SBA No. SIZ-6142 (2022).) In addition, SBA has a long-standing policy that only concerns whose size protest would enable them to compete for award should have eligibility to bring a protest. (*Id.*, citing *Size Appeal of Land Shark Shredding, LLC*, SBA No. SIZ-6037, (2019).) North Wind further contends that even if the procuring agency failed to provide notice to the offeror about its technically unacceptable proposal, the offeror still lacks standing to file a size protest. (*Id.*, citing *Size Appeal of Piedmont Propulsion Sys., LLC*, SBA No. SIZ-6166, at 9 (2022).) North Wind concludes that Appellant “does not have standing to continue with a Size Appeal based on this procurement for which it was an ineligible offeror.” (*Id.* at 5.)

On May 10, 2024, Appellant filed Motion to Strike North Wind's Supplemental Response and Motion to Dismiss (Hereinafter “Appellant's Motion to Strike”). Appellant asserts North Wind's Supplemental Response presents “no new or previously unknown information and should not be permitted to be included in the record of this appeal,” in fact, the Supplemental Response is “simply a reiteration of [North Wind's] April 30, 2023 brief.” (Appellant's Motion to Strike at 2-3.)

On May 13, 2024, North Wind filed a combined response to Appellant's Reply and Appellant's Motion to Strike and asserts the supplemental briefs filed by both North Wind and Appellant should be allowed in the record as both parties are allowed to address the supplemental document added into the record on May 1, 2024. (North Wind's Combined Response at 6.) More specifically, North Wind asserts the Supplemental Document was not included into the record before May 1, 2024, thus both North Wind and Appellant did not have access to the document until after the April 30, 2024 close of record. Thus, North Wind asserts “it is entirely appropriate for both North Wind and [Appellant] to have the opportunity to raise arguments about and to otherwise address that Supplemental Document.” (*Id.* at 2.) Further, North Wind could not raise arguments about the document at the time of the April 30, 2024 close of record because the document was not available in the record until after close of record on May 1, 2024; therefore, it is appropriate for OHA to allow all parties to file their supplemental responses. (*Id.*) Thus, OHA should dismiss Appellant's Motion to Strike. (*Id.*)

II. Discussion

An OHA Judge may permit a reply to a response, and no reply is permitted unless the OHA Judge directs otherwise. 13 C.F.R. § 134.309(d); 13 C.F.R. § 134.206(e). Here, the close of record was April 30, 2024. On May 1, 2024, OHA released the Supplemental Document titled “Evidence of Non-Responsiveness-REDACTED” after the close of record. Considering the addition to the Area Office file, I instructed all parties who intended to file a response, or any other pleading, include a Motion for Leave to Respond and/or Request to Reopen record with their pleading. Section II.F, *supra*. The document was provided to all parties on May 1, 2024,

after the close of record, thus I find good cause to allow all parties to submit a response to the document. Accordingly, for good cause shown, Appellant's Response to Motion to Dismiss and Comments as well as North Wind's Supplemental Response and Motion to Dismiss are ADMITTED into the record.

I find the Area Office properly acted upon the clear language of the regulation that among those entities which may file a size protest:

Any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as nonresponsiveness, technical unacceptability or outside of the competitive range.

13 C.F.R. § 121.1001(a)(1)(i). The regulation thus clearly mandates that an offeror found to be nonresponsive does not have standing to file a size protest. In the supplemental document titled "Evidence of Non-Responsiveness-REDACTED," the CO responded to an inquiry from the Area Office and stated: "I confirm that since Prak-Integrity JV is not registered in SAM.gov, that this makes Prak-Integrity JV non-responsive for award pursuant to FAR 52.204-7(b)(1), and they are not in line for award." Section II.F, *supra*. The Area Office thus acted upon the information submitted by the CO and found Appellant did not have standing to protest North Wind's size. Section II.C, *supra*. This was in line with clear OHA precedent, which requires the dismissal for lack of standing for a protest filed by an offeror where the procuring agency has found the proposal to be technically unacceptable. *Size Appeal of Davis Defense Group, Inc.*, SBA No. SIZ-6016, at 3-4 (2019); *Size Appeal of JEQ & Co., LLC*, SBA No. SIZ-5911, at 3 (2018).

Appellant contends that the CO did not comply with FAR regulations and did not provide proper notice to Appellant that it was found to be nonresponsive. Sections II.D & II.F, *supra*. In addition, the CO informed the Area Office that Appellant "was not notified that they were found to be non-responsive." *Id.* Despite the CO's decision to not inform Appellant, OHA has repeatably held that a lack of notice from the CO does not grant Appellant standing. In a number of cases, procuring agencies have failed to give offerors the notice that their proposals were technically unacceptable prior to their filing size protests. However, lack of notice by the CO is not ground for standing. This case is analogous to *Size Appeal of Piedmont Propulsion Sys., LLC*, SBA No. SIZ-6166, at 9 (2022). In *Piedmont Propulsion Sys.*, the United States Coast Guard (USCG) forwarded appellant's size protest to Area Office IV and within the referral letter, USCG informed Area Office IV that the appellant in that case was found technically unacceptable and informed Area Office IV that the procuring agency did not inform appellant its offer was excluded from competition. *Piedmont Propulsion Sys., LLC*, SBA No. SIZ-6166, at 9. OHA noted that while FAR 15.306(c)(3) and 15.503 required a contracting officer provide the appellant notice of its technical acceptability, this failure to give proper notice did not confer standing upon that appellant. (*Id.*) OHA determined that "while this is regrettable, it does not confer standing upon those offerors who were found to be technically unacceptable, even if they had not received the notice they were entitled to receive." *Piedmont Propulsion Sys., LLC*, SBA No. SIZ-6166, at 9, *citing Size Appeal of KAES Enterprises, LLC.*, SBA No. SIZ-5425, at 3 (2012); *Size Appeal of Glen/Mar Construction, Inc.*, SBA No. SIZ-5143, at 2 (2010).

Here, like *Piedmont Propulsion Sys.*, Appellant was found to be “non-responsive” and thus excluded from the competition. Section II.C, *supra*. Also, similar to *Piedmont Propulsion Sys.*, the CO did not inform Appellant of its non-responsiveness. Nonetheless, lack of notice does not establish standing to file a size protest with the Area Office. Thus, I find that Appellant does not have standing to protest North Wind's size, and therefore the Area Office was correct in dismissing its protest.

III. Conclusion

For the above reasons, North Wind's Motion to Dismiss is GRANTED, and the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge