

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

SIZE APPEAL OF:

RBVetCo, LLC d/b/a Rocky Bleier
Construction Group,

Appellant

RE: PerformanceEPC-Greenland, JV LLC

Appealed From
Size Determination No. 04-2024-010

SBA No. SIZ-6291

Decided: June 12, 2024

APPEARANCES

D. Matthew Jameson III, Esq., Ryan D. Gleason, Esq., Burns White LLC, Pittsburgh, PA,
for RBVetCo, LLC d/b/a Rocky Bleier Construction Group

Anthony H. Anikeeff, Esq., Williams Mullen, Tysons, Virginia, for PerformanceEPC-
Greenland, JV LLC

DECISION¹

I. Introduction and Jurisdiction

On January 11, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2024-010 (Size Determination), dismissing RBVetCo, LLC d/b/a Rocky Bleier Construction Group (Appellant) as nonspecific. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied 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

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel for PG 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.

15 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 January 19, 2023, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. 36C24423R0002 seeking professional construction services for Project No. 595-13-101 “Boiler Plant Renovation” at the Lebanon VA Medical Center in Lebanon, Pennsylvania. The VA set the procurement aside entirely for Service-Disabled Veteran-Owned Small Businesses (SDVSB) and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$45 million annual receipts size standard, as the appropriate code. Offers were due on March 8, 2023.

On November 28, the VA informed unsuccessful offers that PerformanceEPC-Greenland, JV LLC (PG) was the successful offeror.

B. Protest

On November 30, 2023, RBVetCo, LLC d/b/a Rocky Bleier Construction Group (Appellant) filed a size protest with the Contracting Office (CO), which was referred to the Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office). The size protest raised six “Protest Issues”:

- 1) PG was ineligible for award due to the VA's Source Selection Evaluation Board's (and Source Selection Authority's) failure to consider and thoroughly evaluate the past performance and work experience of each partner to PG.
- 2) PG and the sole member/employee of PerformanceEPC, the SDVOSB member, lacked the necessary project management experience and internal staffing capabilities to perform the project.
- 3) PerformanceEPC does not have the project management experience involving complex construction contracts so the sole member/owner of PerformanceEPC would perform more than administrative and ministerial functions.
- 4) PerformanceEPC has no relevant or recent past experience with construction project of this magnitude. PG mentor/partner Greenland will perform the primary and vital requirements of the contract.
- 5) PG's joint venture agreement (JVA) must be reviewed to determine if it complies with SBA's regulations in identifying PerformanceEPC's duties and responsibilities as Manager.

6) PerformanceEPC lacks the capabilities and experience to meet the self-performance requirements of the Solicitation and SBA's regulations.

7) PG is a mentor/protégé arrangement, which should fail because of PerformanceEPC's total lack of experience and PG's failure to meet the requirements of 13 C.F.R. § 125(b)(2), (c) and (d). Greenland has the ability to provide bid, performance and payment bonds and if it provides them, it will be an ostensible subcontractor.

8) Greenland has engaged in a course of conduct designed to circumvent SBA's SDVOSB set aside regulations by engaging in multiple joint ventures.

(Protest, at 2-3, 7.)

C. Size Determination

On January 11, 2024, the Area Office dismissed the Protest. (Size Determination No. 04-2024-010). The Area Office found that Protest Issues No. 1, 2, 3, 4, 6, and 8 were outside the scope of the size protest process. Further, the Area Office found that Protest Issues No. 5 and 7 were insufficiently specific. (Size Determination, at 1.)

Particularly, the Area Office noted that Protest Issue No. 5 questioned PG's JVA, but it did not allege that the JVA did not contain the elements required by SBA regulations nor provide evidence to support such a claim. It merely states that it is unknown to Appellant whether the JVA contained the required elements. It also requested SBA review the JVA to determine compliance. There was no basis for the allegation, and the Area Office dismissed this count as not sufficiently specific. (*Id.*, at 2.)

Next, Protest Issue No. 7 also concerned the content of PG's JVA. The protest did not provide any evidence to support its claim that PG's JVA does not meet the regulatory requirements. It provided no evidence of any bonding arrangement with Greenland. Without a valid basis for the allegation, the protest was not specific, and the Area Office dismissed this count. (*Id.*)

The Area Office noted that it had initially suspended the intake process pending the outcome of the VA's review under FAR Subpart 33.1. On December 13, 2023, the VA denied Protest Issues No. 1 through 3 in a letter to Appellant. The Area Office then recommenced its own review. (*Id.*, at 3.)

For all other issues, the Area Office explained Protest Issues No. 1 and 2 raised questions concerning the conduct of the procurement, over which neither the Area Office nor OHA has jurisdiction. (*Id.*) Protest Issue No. 3 also raises questions on the conduct of the procurement, and whether SBA's approval of the mentor/protégé arrangement was proper. These issues are also outside the scope of a size determination. Protest Issue No. 4 concerns the evaluating an offeror's past performance, which is the responsibility of the procuring agency. Again, this is an issue over the conduct of the procurement. (*Id.*)

For Protest Issue No. 6 concerning PG's ability to comply with the Limitations on Subcontracting rule, the Area Office noted it is the responsibility of the CO, not SBA. Protest Issue No. 8 questioned whether SBA should have approved the mentor-protégé arrangement in the first instance and is not valid grounds for a size protest. (*Id.*, at 4.) The Area Office thus dismissed the protest in full.

D. Appeal

On January 26, 2024, Appellant filed the instant appeal of the Size Determination. On February 1, 2024, OHS issued a Notice and Order, and a Protective Order. On February 9, 2024, I issued an Admittance Order, granting Appellant's counsel access to the Area Office File.

On February 16, 2024, PG responded to the appeal. On June 11, 2024, I issued an Order Imposing Sanctions, concluding that Appellant's counsel had violated the Protective Order, and therefore striking all Appellant's pleadings. I also revoked Appellant's counsel admission to the Protective Order. (Order Imposing Sanctions, (Jun. 11, 2024).)

III. Discussion

In reviewing this case, I find that the appeal was filed with 15 days of the issuance of the Size Determination and is thus timely. 13 C.F.R. § 134.304(a). 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

However, I conclude the Area Office properly dismissed the Size Protest in its entirety. Particularly, Size Protest Issues No. 1,2,3,4,6, and 8 all question the conduct of the procurement and are outside the jurisdiction of the size protest and appeal process. *Size Appeal of Ekagra Partners, LLC*, SBA No. SIZ-6189, at 9 (2023); *Size Appeal of Advant-Edge Solutions of Missile Atlantic, Inc.*, SBA No. 6089, at 4-5 (2021). Protest Issues No. 3 and 8 question whether SBA should have approved PG's mentor/protégé agreement, and this is not a valid ground for a size protest, *Size Appeal of Daniels Building Co., Inc.*, SBA No. SIZ-6250, at 5 (2023); *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 11 (2028), citing 13 C.F.R. §§ 121.103(b)(6) and 125.9(d)(4). Protest Issue No. 6 deals with the Limitations on Subcontracting question, but compliance with this is an issue of contractor responsibility, and beyond OHA's jurisdiction. *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008, at 21, fn. 4 (2019).

Protest Issues No. 5 and 7 do raise issues within OHA's jurisdiction, but they fail the specificity test. A size protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. The regulation requires “[s]ome 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.” 13 C.F.R. § 121.1007(b). Here, Protest Issue No. 5 questions whether PG's JVA meets the regulatory requirements, but it does not allege that the JVA fails to contain all the provisions required of a JVA by the regulation at 13 C.F.R. § 128.402(c). Without a valid basis for the allegation, the protest is not specific and must be dismissed. 13 C.F.R. § 121.1007(c).

Finally, Protest Issue No. 7 makes allegations regarding the JVA, but provides no evidence to support the claim the JVA does not meet the listed requirements, nor any evidence of the bonding arrangements Appellant speculates PG has with Greenland.

I conclude that Appellant's Protest was based upon mere speculation throughout. The Protest largely questioned the VA's conduct of the procurement, which is outside the jurisdiction of SBA's size protests and appeals process. As to those issues which were within SBA's jurisdiction, Appellant failed to give any basis for its belief that PG's JVA was deficient to the Area Office. On appeal, Appellant has failed to demonstrate any error of law or fact in the Size Determination. Accordingly, I must DENY the instant appeal.

IV. Conclusion

Appellant has not demonstrated clear error of fact or law in the size determination. The appeal therefore is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge