

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

SIZE APPEAL OF:

MWE Services, Inc.

Appellant

RE: NW Demolitions & Environmental, A
Joint Venture

Appealed from
Size Determination No. 6-201-111

SBA No. SIZ-5283

Decided: September 14, 2011

APPEARANCE

Jessica S. Wolff, Esq. Gross & Welch PC, Omaha, Nebraska for Appellant.

DECISION

I. Introduction & Jurisdiction

On August 11, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) dismissed a size protest filed by MWE Services, Inc. (Appellant) against NW Demolition & Environmental, a Joint Venture (NWD&E).

SBA's Office of Hearings and Appeals (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 dismissal. Thus, the appeal is timely, 13 C.F.R. § 134.304(a), and this matter is properly before OHA.

II. Background

A. Solicitation and Protest

On May 16, 2011, the United States Fish & Wildlife Service issued Solicitation No. F11PS00617 for the removal of lead-based paint and lead contaminated soil at Midway Island. The Contracting Officer (CO) set the procurement aside for service-disabled veteran-owned small business concerns and designated North American Industry Classification System (NAICS) code 562910, Remediation Services, with a corresponding \$14 million annual receipts size standard, as the applicable NAICS code for the procurement.

On July 18, 2011, the CO published a notice of award to NWD&E on the Federal Business Opportunities (FedBizOpps) website (<https://www.fbo.gov/>). On July 19, 2011, Appellant filed a letter with the Government Accountability Office (GAO) with a copy to the CO, protesting the award to NWD&E. The letter asserts that Appellant was the low bidder, that Appellant was denied due process, that there was favoritism for local concerns, that Appellant is better qualified, and that the “qualifying individual alone is not qualified to perform the project without the assistance of a joint venture that is not qualified.” The letter does not assert that NWD&E is other than small or make any allegations concerning NWD&E’s size.

On July 22, 2011, Appellant sent an email to the U.S. Department of the Interior and copied the CO. In the email, Appellant questioned NWD&E’s qualifications and asserted that one of the members of the joint venture is not a small business. The email included no statement as to why NWD&E or any of its members is not a small business.

On July 28, 2011, Appellant sent the CO an email with links to two articles announcing that NWD&E had won a \$43.5 million subcontract to be performed from 2010 to 2013.

On July 29, 2011, counsel for Appellant sent the CO a letter recounting that on July 22, Appellant copied the CO on the email asserting that NWD&E was not a small business and that, on July 28, Appellant sent the CO the press releases announcing NWD&E’s subcontract award. Counsel also included a copy of Appellant’s July 29 bid protest submission to GAO. Appellant’s counsel requested that the CO forward its size protest of July 22, 2011 to SBA. On August 2, 2011, the CO referred Appellant’s protest to the Area Office.

B. Size Determination

On August 11, 2011, the Area Office dismissed Appellant’s protest as insufficiently specific. The Area Office explained that the July 19 letter to GAO gave no indication that Appellant intended to challenge NWD&E’s size and that the July 22 email merely alleged that one of the joint venture partners is not small without providing any basis for that assertion. The Area Office thus concluded that although the July 19 and July 22 submissions were timely, they must be dismissed for lack of specificity. 13 C.F.R. §§ 121.1004(a)(2), 121.1007(b)-(c).

The Area Office also observed that the July 28 email containing the press releases and the July 29 letter to which the GAO bid protest was attached were not filed within the five-day time limit to submit a size protest. 13 C.F.R. § 121.1004(a)(2). The Area Office explained that information submitted after expiration of the five-day time limit may not be used to correct a nonspecific protest. *See Size Appeal of Southwind/Todd, A Joint Venture*, SBA No. SIZ-4142 (1996). Accordingly, the Area Office dismissed the July 28 and July 29 supplemental protests as untimely. 13 C.F.R. § 121.1004(d).

C. Appeal Petition

On August 26, 2011, Appellant filed the instant appeal. Appellant argues that it timely protested NWD&E’s size and that the regulation does not provide any guidelines as to when a protestor must submit the specific supporting facts. Appellant further argues that because the

CO did not submit the protest to SBA until August 1, 2011, NWD&E was not harmed by any delay. Appellant also attaches to its appeal a letter dated August 1, 2011, from the CO to Appellant informing Appellant of the award to NWD&E. Appellant asserts that, taking this letter as its notice of award, its protest was timely.

III. Discussion

A size protest in a negotiated procurement must be filed by the close of business on the fifth business day after the CO has notified the protestor of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2). The protest must be filed with the contracting officer, who must forward it to SBA. 13 C.F.R. § 121.1003. “A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern’s size is questioned.” 13 C.F.R. § 121.1007(b). The protest must give some basis for the allegation that the challenged concern is other than small. *Id.* A protest that merely alleges that the challenged concern is not small is not sufficiently specific. *Id.* Any evidence that supports the protest “should be *submitted with the protest.*” *Id.* (emphasis added).

Here, the CO gave notice to Appellant and to the general public by posting the award notice on FedBizOpps on July 18, 2011. The five business day period thus expired on July 25, 2011, and, as the Area Office found, Appellant’s July 19 and July 22 submissions were timely. However, Appellant’s July 19 letter contained nothing protesting NWD&E’s size, and Appellant’s July 22 email merely alleged NWD&E was other than small, without giving any basis for the allegation. Accordingly, the Area Office properly determined that these submissions were insufficiently specific under 13 C.F.R. § 121.1007(b).

Appellant’s other communications, on July 28 and July 29, were made after the five-day deadline for filing protests with the CO had expired. Appellant’s argument that it is permitted to provide supplemental information to support the protest is meritless. Appellant offers no support for its position, except to say that “121.1007(b) does not provide any guidelines as to when the protestor must submit the supporting, specific facts.” On the contrary, however, 13 C.F.R. § 121.1007(b) explicitly provides that supporting information is to be filed with the protest.¹ I find the Area Office committed no clear error in determining that Appellant’s July 28 and July 29 submissions were untimely.²

¹ Moreover, even if Appellant’s July 28 submission were admitted, an announcement that a concern has won an award that will bring it \$43.5 million over the period from 2010 to 2013 does not establish that its annual receipts exceeded \$14 million over the last three years. *See* 13 C.F.R. § 121.104.

² Although OHA has previously permitted the Area Office to accept supplemental information at its discretion, nothing in the regulations requires the Area Office to do so. *Compare Size Appeal of Dynalantic Corp.*, SBA No. SIZ-5125, at 3 (2010) (noting, without further comment, that the protestor submitted supplemental information on three occasions following the initial protest) *with Size Appeal of Frontier Applied Sci., Inc.*, SBA No. SIZ-4316, at 4 (1998) (noting, without further comment, that the Area Office treated a supplemental submission as untimely and did not consider it); *see also Size Appeal of Fort Carson Support*

Appellant also contends that because the CO made no submission to SBA until August 1, NWD&E was not prejudiced. This argument is inapposite. A size protest is filed when the protestor submits it to the CO, not when the CO transmits it to SBA. *See* 13 C.F.R. §§ 121.1003, 121.1004. Therefore, in evaluating whether a protest is timely and specific, OHA examines the protestor's filings with the CO, not the CO's transmission to SBA. Here, the protestor's timely filing was insufficiently specific, and its subsequent filings were not timely.

Finally, Appellant's argument that its time to protest should be measured from the CO's letter of August 1 is meritless and disingenuous. Posting an award notice to FedBizOpps constitutes sufficient notification of the identity of the prospective awardee within the meaning of SBA's size regulations. *See* 13 C.F.R. § 121.1004(a)(4) ("Where notification of award is made electronically, such as posting on the Internet under Simplified Acquisition Procedures, a protest must be received by the contracting officer before close of business on the fifth day, exclusive of Saturdays, Sundays, and legal holidays, after the electronic posting."). Furthermore, the record clearly reflects that Appellant had actual notice of award and acted upon that notice in timely filing its initial protest. I conclude that none of Appellant's arguments can overcome the fact that its timely protest filing was not specific, and its more specific protests were not timely.

IV. Conclusion

Appellant failed to prove that the Area Office committed any clear error of fact or law in dismissing its protest. Accordingly, this appeal is DENIED, and the dismissal is AFFIRMED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

Servs., SBA No. SIZ-4740, at 3 (2005) (observing that size protest deadlines are short because "the Government must be allowed to continue to do its business on a timely basis" and "[t]he size protest process is not open ended").