

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

SIZE APPEAL OF:

IAP World Services, Inc.,

Appellant,

RE: J&A World Services, LLC

Appealed From
Size Determination No. 5-2013-35

SBA No. SIZ-5480

Decided: June 24, 2013

APPEARANCES

J. Alex Ward, Esq., Leslie H. Lepow, Esq., Daniel E. Chudd, Esq., Damien C. Specht, Esq., Ethan E. Marsh, Esq., Jenner & Block LLP, Washington, D.C., for IAP World Services, Inc.

Adam K. Lasky, Esq., James F. Nagle, Esq., Benjamin D. Greenberg, Esq., Oles Morrison Rinker & Baker LLP, Seattle, Washington, for J&A World Services, LLC

Meagan K. Guerzon, Esq., Agency Representative, for the U.S. Small Business Administration

DECISION¹

This is an appeal of an Area Office dismissal of a size protest for lack of jurisdiction. For the reasons discussed below, I grant the appeal and remand the matter to the Area Office.

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

¹ A Protective Order was issued in this case on April 26, 2013. OHA is satisfied that this Decision contains no confidential or proprietary information. Therefore, this Decision is not issued under the Protective Order, but is issued in its entirety for publication.

II. Issue

Whether the Area Office clearly erred in dismissing the protest. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On December 21, 2011, the Department of the Navy, Naval Facilities Engineering Command (NAVFAC), at Patuxent River, Maryland, issued Solicitation No. N40080-12-R-3002 for base operating support services. The procurement was unrestricted. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding \$35.5 million annual receipts size standard, as the appropriate code for this procurement.

On March 21, 2013, the CO notified IAP World Services, Inc. (Appellant) of award to J&A World Services, LLC (J&A). On March 28, 2013, Appellant filed a timely size protest with the CO. There Appellant alleged that Alutiiq Global Solutions LLC (Alutiiq), one of the joint venture partners of J&A (the other partner being J&J Worldwide Services) was not a small business. Appellant alleged that Alutiiq claimed small business status for this procurement, and the award to J&A was based in part upon Alutiiq's small business status.

The CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office).

B. The Size Determination

On April 1, 2013, the Area Office issued Size Determination No. 5-2013-35 dismissing Appellant's protest. The Area Office stated:

This protest is dismissed because the apparent successful offeror, J&A World Services, LLC, self-certified that it is a large business for the subject procurement. This is an unrestricted procurement. Since J&A World Services, LLC, has already declared that it is not a small business for the subject procurement, a size determination is not necessary.

Your protest alleged that J&A World Services, LLC, is counting its small business joint venture partner towards its small business subcontracting plan goals. This allegation is outside the scope of a size determination.

Size Determination at 1. Appellant received the Size Determination on April 1, 2013, and filed its appeal on April 11, 2013.

C. The Appeal

Appellant alleges that the Area Office clearly erred in dismissing the size protest because

the SBA has jurisdiction over it. Appellant asserts its protest was filed under SBA's Subcontracting Program, and that it is an interested party with standing to protest under 13 C.F.R. § 121.1001(a)(3)(v). Appellant also argues that it has standing under 13 C.F.R. § 121.1001(a)(7)(i), because any offeror may file a size protest in an unrestricted procurement in which a business concern has represented itself as small.

As relief, Appellant requests OHA to remand this matter for a complete size determination on Alutiiq.

D. J&A World Services, LLC's Response to the Appeal

On April 29, 2013, J&A responded to the appeal. J&A asserts that it certified as other than small for this procurement. It further asserts that Alutiiq is certified as “other than small” in ORCA/CCR (now consolidated into SAM). J&A asserts that neither it nor its joint venture partner Alutiiq certified as small for the subject procurement. J&A further asserts Appellant does not have standing to file a protest, because it is not a subcontractor who has certified as small for the instant procurement. And neither J&A nor Alutiiq represented themselves as small business concerns.

J&A asserts Appellant's protest was based entirely upon unsupported speculation that Alutiiq was included J&A's small business subcontracting plan. J&A files a motion to admit new evidence, portions of its proposal, to establish that neither J&A nor Alutiiq claimed small business status for this procurement, and that Alutiiq was not part of J&A's small business subcontracting plan.

E. The SBA's Response to the Appeal

On April 29, 2013, the SBA responded to the appeal. SBA asserts that it does in fact have jurisdiction to determine the size protest of a small business subcontractor, and that IAP has standing to protest as an “other interested party”, that is to say, an offeror on the procurement. SBA, in effect, confesses error by the Area Office and requests that this case be remanded to the Area Office for a new size determination.

F. Appellant's Opposition to New Evidence

On May 3, 2013, Appellant filed its Opposition to J&A's Motion to Admit New Evidence. Appellant argues that the proffered new evidence is irrelevant to the jurisdictional question here. Further, it pertains to new arguments on appeal and thus unduly enlarges the issues. Third, the evidence is incomplete and misleading. J&A did not submit its entire proposal, and thus there is not enough evidence for a full and accurate assessment of Alutiiq's role in this contract.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within fifteen days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's dismissal of Appellant's size protest was based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Proceadyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the dismissal of the size protest only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction 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. The Merits of the Appeal

Here, the Area Office dismissed the protest because the subject procurement is unrestricted, and it held that the issue of whether Alutiiq was counting towards J&A's small business subcontracting goals is outside the scope of a size determination.

In this dismissal, the Area Office erred. The regulations at 13 C.F.R. § 121.1001(a)(3) provide that:

- (3) For SBA's Subcontracting Program, the following entities may protest:
 - (i) The prime contractor;
 - (ii) The contracting officer;
 - (iii) Other potential subcontractors;
 - (iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and
 - (v) Other interested parties.

13 C.F.R. § 121.1001(a)(3).

Further, the regulations governing size procedures for the subcontracting program provide that:

The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

13 C.F.R. § 121.411(c).

Here, Appellant argues that the solicitation required offerors to submit contracting plans

in accordance with FAR subpart 19.7, which implements SBA's Small Business Subcontracting Program. Appellant alleged that J&A was using Alutiiq as a small business subcontractor, and that the Government's award to J&A was based in part on its evaluation of J&A and Alutiiq under the "Small Business Utilization" factor.

Appellant thus, as an "other interested party", that is, a competing offeror for the prime contract, was filing a protest under SBA's Subcontracting Program. There is not a requirement that the "interested party" itself have certified as small. The Area Office's statement that this is outside the scope of the size determination is in error, because the regulation contemplates that there will be protests of the small business size status of subcontractors under SBA Subcontracting Program, and that these may be filed by "other interested parties." I find that an unsuccessful offeror for the prime contract is such an interested party, because of its interest in the successful offeror's eligibility for award.

I therefore conclude that the Area Office erred in dismissing Appellant's protest as not within SBA's jurisdiction. The appropriate relief is to vacate the size determination, and to remand this matter to the Area Office for consideration of the protest.

However, upon receiving this matter, the Area Office must first address the threshold question of whether J&A did, in fact rely upon Alutiiq as a small business in its subcontracting plan, or in any other way in its proposal. If, as J&A argues, it did not, and neither J&A nor Alutiiq represented itself as small at any time in the procurement, then there is no small business issue here and the matter must be dismissed.

Contrary to J&A's contentions, I cannot, and should not, make that determination here. Nor can I consider the matter moot because there is no size issue until it can be determined that there is no size issue. While J&A has submitted some evidence, I agree with Appellant that, because this is not the entire proposal, there is not enough in the record here to make the required determination either way. The Area Office should obtain the entire proposal, and should consult with the Contracting Officer, to determine whether there was any representation by Alutiiq that it was a small business in the J&A proposal. If there was not, then there is no size issue here and the matter should be dismissed.

V. Conclusion

The Area Office erred in dismissing Appellant's protest as outside of SBA's size protest jurisdiction. I GRANT the appeal, VACATE the size determination, and REMAND this case for a new size determination consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge