

SIZE APPEAL OF: CHENEGA SUPPORT SERVICES, LLC, APPELLANT RE: PRAIRIE
QUEST, INC., SBA No. SIZ-5874, 2017, 2017 WL 6419993

December 12, 2017

Small Business Administration (S.B.A.) Office of Hearings and Appeals
[Size Appeal]

Appealed from Size Determination No. 04-2017-007

*1 December 12, 2017

Appearances

- *1 Stowell Holcomb, Esq.
- *1 Jackson Rosenfield LLP
- *1 Seattle, Washington
- *1 For Appellant
- *1 Jonathan T. Williams, Esq.
- *1 Megan C. Connor, Esq.
- *1 Kathryn M. Kelley, Esq.
- *1 PilieroMazza PLLC
- *1 Washington, D.C.
- *1 For Prairie Quest, Inc.

DECISION

I. Introduction and Jurisdiction

*1 On November 2, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2017-007 dismissing a size protest filed by Chenega Support Services, LLC (Appellant) against Prairie Quest, Inc. (Prairie Quest). Appellant contends that its protest was improperly dismissed, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter to the Area Office for a new size determination. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

*1 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 appeal within fifteen 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

*1 On November 24, 2014, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA8052-14-R-0013 for operation of Air Force Medical Service Referral Management Centers. The RFP contemplated the award of multiple indefinite-delivery indefinite-quantity (ID/IQ) contracts and an initial task order. The Contracting Officer (CO) set aside the procurement for participants in the 8(a) Businesses Development program, and assigned North American Industry Classification System (NAICS) code 621399, Office of All Other Miscellaneous Health Practitioners, with a corresponding size standard of \$7.5 million average annual receipts. Proposals were due January 5, 2015.

*1 On December 19, 2016, the Air Force awarded Contract No. FA8052-17-D-0002 to Prairie Quest, and notified Appellant of its decision. Appellant and another unsuccessful offeror, Kili, LLC, then filed timely bid protests at the U.S. Government Accountability Office (GAO) challenging the award. On January 10, 2017, the Air Force issued a stop work order suspending performance on Contract No. FA8052-17-D-0002, and on January 18, 2017, the Air Force notified GAO that the Air Force would undertake corrective action by conducting a new past performance evaluation and preparing a new source selection decision. The Air Force explained that the awarded contract would remain in place, but that “if the new evaluation results in award to an offeror other than the current awardee, the Air Force will terminate the contract and award to the company representing the best value to the Government.” (Letter from C. Cole to Y. Cho (Jan. 18, 2017), at 1.) GAO then dismissed the bid protests as academic. (Matter of Kili, LLC; Chenega Support Services, LLC; Comp. Gen. B-414264.1, B-414264.2 (Jan. 23, 2017).) On October 3, 2017, the Air Force informed Appellant that the award to Prairie Quest was confirmed. On October 10, 2017, Appellant filed a size protest with the CO challenging Prairie Quest's size. The CO forwarded the size protest to the Area Office for review.

B. Size Determination

*2 On November 2, 2017, the Area Office issued Size Determination No. 04-2017-007 dismissing Appellant's size protest as untimely. The Area Office found that neither Appellant nor any other offeror had filed a size protest against Prairie Quest in December of 2016 upon learning that Prairie Quest had been selected for award. Although the Air Force confirmed the award decision on October 3, 2017 after completing corrective action, the original contract awarded to Prairie Quest was never terminated. (Size Determination at 1.) Rather, the Air Force “merely validated an existing award; it did not make a new award.” (Id.) Citing Size Appeal of EFT Architects, Inc., SBA No. SIZ-5460 (2013) and Size Appeal of K2 Group, Inc., SBA No. SIZ-5805 (2017), the Area Office dismissed Appellant's size protest as untimely because the protest was not filed within five business days after Appellant initially learned of the award to Prairie Quest.

C. Appeal

*2 On November 3, 2017, Appellant filed the instant appeal. Appellant maintains that the Area Office erred in dismissing the size protest, and requests that OHA remand the matter to the Area Office for a size investigation of Prairie Quest.

*2 Appellant asserts that “the rule from EFT is incorrect, at least where the agency undertakes a new source selection.” (Appeal, at 3.) Specifically, although EFT Architects held that the date of the original award notification controls for purposes of determining the timeliness of a size protest, this reading assumes that the identity of the prospective awardee remains unchanged following corrective action. In the instant case, though, the Air Force made clear that it planned to make “a new source selection decision.” (Id. at 4, quoting Matter of Kili, LLC; Chenega Support Services, LLC; Comp. Gen. B-414264.1, B-414264.2 (Jan. 23, 2017), at 1 (emphasis added by Appellant).) Therefore, Prairie Quest could not have been the apparent awardee while the corrective action was ongoing, and no prospective awardee existed until the Air Force made its new selection decision in October 2017. Appellant adds that, under EFT Architects, protest timeliness “depend[s] on whether the original award is cancelled or merely stayed,” but there is no support in the underlying regulations for this approach.

*2 Appellant reiterates that “the status of ‘prospective awardee’ must cease the moment the agency decides to conduct a new source selection if that selection is to be consistent with the ‘fair play’ envisioned by the Competition in Contracting Act.” (Id. at 4-5 (emphasis Appellant’s).) Once the Air Force chose to revisit its award decision, no prospective awardee existed until the new source selection was completed. Thus, the timeliness of Appellant’s size protest should be determined as of October 3, 2017.

D. Prairie Quest’s Response

*3 On November 21, 2017, Prairie Quest responded to the appeal. Prairie Quest argues that Appellant has shown no error in the size determination. Therefore, OHA should deny the appeal.

*3 Prairie Quest highlights that there is no dispute that Appellant first learned that Prairie Quest was the prospective awardee on December 19, 2016. According to 13 C.F.R. § 121.1004(a)(2), any size protest would thus have been due by December 27, 2016. Appellant did not actually file a size protest until October 10, 2017. (Response, at 4.)

*3 Prairie Quest argues that the operative facts in EFT Architects are essentially identical to those presented here. In EFT Architects, the procuring agency did not cancel the contract awarded to the apparent successful offeror while corrective action was ongoing. (Id. at 5.) The protester in EFT Architects argued that the time to file the size protest was not triggered until the original awardee was confirmed, but OHA rejected this argument, explaining that the procurement had not been canceled and no new award had been made. Similarly, in the instant case, the Air Force never canceled the contract awarded to Prairie Quest. Rather, the original December 19, 2016 award to Prairie Quest remained intact during the corrective action, and the October 3, 2017 notice merely confirmed the previous award. (Id. at 6.) Prairie Quest observes that both the December 2016 and October 2017 notices referred to the same contract number,

and the October 2017 notice stated that the Air Force would lift the stop work order on the existing contract and issue a modification to reflect the new ordering period.

*3 In Prairie Quest's view, Appellant has not offered any valid reason to overturn or distinguish EFT Architects. Appellant does not contend that EFT Architects is inconsistent with OHA precedent or that it is directly contrary to law or regulation. Prairie Quest insists that unless an award is canceled and a new award is made, a protester is required to file any size protest within 5 business days after it learns the identity of the prospective awardee. (Id. at 8.)

III. Discussion

A. Standard of Review

*3 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

*4 I agree with the Area Office and Prairie Quest that the instant case is highly analogous to OHA's decision in *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5460 (2013). In *EFT Architects*, the protester was notified of the identity of the apparent awardee in October 2012, but did not file a size protest at that time. *EFT Architects*, SBA No. SIZ-5460, at 1. The procuring agency subsequently decided to take corrective action in response to a bid protest. The original contract award, though, was never cancelled. *Id.* Following corrective action, the procuring agency confirmed its original award decision in February 2013. On appeal, OHA held that a size protest filed after the corrective action was correctly dismissed as untimely. *Id.* at 4. OHA explained that because the procuring agency did not cancel the original award or issue a new award, "the October [] 2012 notification date is still the operative date for determining timeliness of the protest at issue." *Id.*

*4 Similarly, in the instant case, the Air Force notified unsuccessful offerors on December 19, 2016 that Prairie Quest was the apparent awardee. Section II.A, *supra*. In response to bid protest litigation, the Air Force agreed to undertake corrective action and suspended Prairie Quest's contract. However, as in *EFT Architects*, the award was never cancelled. *Id.* Consequently, any size protest was due within 5 business days of the original award notification. Appellant's size protest was filed nearly 10 months later, on October 10, 2017, and thus is plainly untimely. *Id.*

*4 Appellant does not dispute that its protest is untimely under *EFT Architects*. Instead, Appellant maintains that *EFT Architects* itself was wrongly decided. The decision in *EFT Architects*, though, is consistent with SBA regulations, which make clear that "[a] protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee." 13 C.F.R. § 121.1004(a)(2). Notably, the regulations do

not contemplate any exception if corrective action occurs after the award notification. Further, although Appellant takes issue specifically with EFT Architects, Appellant overlooks that OHA has applied essentially the same reasoning in several other cases. See, e.g., Size Appeal of K2 Group, Inc., SBA No. SIZ-5805 (2017); Size Appeal of Global Solutions Network, Inc., SBA No. SIZ-4937, at 2 (2008); Size Appeal of Vistrionix, Inc., SBA No. SIZ-4550, at 3 (2003) (“A lifting of a stay of award does not afford unsuccessful offerors another opportunity to protest.”); Size Appeal of SDS Int'l, Inc., SBA No. SIZ-4541, at 3 (2003). Accordingly, EFT Architects is supported not only by SBA regulations, but also by long-standing OHA precedent.

IV. Conclusion

*5 Appellant has not demonstrated that the Area Office clearly erred in dismissing the size protest. Accordingly, the appeal 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).

*5 Kenneth M. Hyde

*5 Administrative Judge

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