

A VAGUE EMAIL IS NOT A PROTEST

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In a recent size appeal filed at the Small Business Administration Office of Hearings and Appeals (“OHA”), the Office made it clear that a vaguely worded email that does not explicitly state it is a protest and ask for specific relief, will not be considered to be a protest.

The Department of Veterans Affairs (“VA”) issued an Invitation for Bids for a roofing construction project that was set aside entirely for service-disabled veteran owned small business concerns. Two contractors submitted timely bids, DRI, Inc. and CMR Construction & Roofing, LLC. On November 23, 2021 the VA publicly opened bids and determined that CMR was the lowest bidder.

On the same day, November 23, 2021, Appellant DRI emailed the VA’s contracting specialist for this procurement, stating as follows:

I sent you a voicemail regarding the apparent low bidder on the project at Bldg. 8, Bldg. 11, and Corridors 75-78. I want to start off by saying, all I want is to make sure we have a level playing field, for all of us who are bidding. [CMR] is well known in the roofing industry and is one of the largest roofing companies in America. Their CEO frequently is a speaker at events and conferences within our industry. They also are consistently in the Inc Magazines Top 100 (in revenue) and last year finished #10 with over \$122,000,000 in sales (<https://www.roofingcontractor.com/RC-List-Tog-100-2021>).

They are so big, they even have their own race team! <https://www.jaY-ski.com/2020/08/28/cmr-returns-full-tme-in-2021-with-ryan-sieg/> Large companies like this have much more buying power with suppliers and there's no way we can compete with them on the price, labor, etc. I can link a lot more information but a simple Google Search will show exactly how big these guys are.

I know you are going to do your due diligence, but it's just frustrating to see because they have won several federal government projects in the past under Total Small Business NAICS Code 238160 - Roofing Contractor, which is set at \$16.5 Million. I don't know exactly how they are doing this, I just wanted to make sure you were aware before this project was awarded.

I hope I didn't overstep. I just feel like I would want to know if I was in your shoes and not want to have to worry about having to be re-bid this project again or dealing with a protest.

(E-mail from Z. Blenkinsopp to B. Guerrant (Nov. 23, 2021).

After the VA made award on Feb. 15, 2022, and on the same day, DRI filed a size protest. The SBA Area Office dismissed DRI’s protest as untimely, noting that since this was an Invitation for Bids, a timely protest had to be submitted to the CO within five business days of bid opening.

DRI appealed to OHA which noted that a “timely appeal cannot cure an untimely protest.” A protest in a sealed bid (IFB) case must be received by the CO within five business days after bid opening. 13 CFR § 121.1004(a)(1). DRI’s protest was untimely, and untimely protests must be dismissed.

OHA also considered whether the Nov. 23, 2021 email from Zack Blenkinsopp of DRI was actually a protest. OHA noted that there was no merit to the statement that the company had “invoked” a protest via email. The OHA judge found it farfetched that an email that complained that CMR was not small, and then stated it did not want the CO to worry about a re-bidding or deal with a protest was “too equivocal to be considered a protest.” The judge believe it was clear that DRI did not intend and did not submit a protest on Nov. 23, 2021.

Takeaway: If you want to submit a size protest, explicitly state to the SBA that this is a size protest, request relief, and request a determination that the protested company be found “not small.” Do not clutter your protest with vague comments about size—make specific allegations of why the protested company is not small, and support them with written factual material.

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