

SIZE PROTEST RELATED TO LONG TERM CONTRACT MAY ONLY BE FILED AT THREE STAGES

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The Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) reiterated in a recent protest that in a long term contract, such a 5 year multiple award contract (“MAC”) or a General Services Administration (“GSA”) Federal Supply Schedule Contract (with a duration longer than 5 years), a size protest may only be filed at three stages, and the protester here did not qualify for any of those.

The Army Corps of Engineers issued a Task Order Request for Quote for a 100 per cent small business set aside contract for survey of water piping systems under a GSA schedule contract. EBA Ernest Bland Associates protested challenging the awardee, Global Engineering Solutions (“GES”), size. EBA asserted that EBA didn’t comply with an explicit request for certification in FAR 52.212-3, and failed to inform the CO of a status change requiring recertification triggered by 13 CFR121.404(g)(2).

The area office noted the size regulations at 13 CFR §121.1004(a)(3)(i) provide that a size protest may be filed at only three stages:

First an interested party may protest a size certification made at the time the long-term contract is initially awarded. §121.1004(a)(3)(i). Second, an interested party may protest a size certification made at the time an option is exercised. §121.1004(a)(3)(ii). Third, an interested party may protest a size certification made in response to a [CO’s] request for size certifications in connection with an individual order. §121.1004(a)(3)(iii).

Based on this section of the rules, the Area SBA office stated that when a CO doesn’t request recertification under a long-term contract, there is no mechanism for a private party to protest a successful offer’s size with that order, and dismissed the protest as untimely.

On appeal, EBA not only protested the lack of certification, but also that a merger of GES indicated that it no longer qualified as a small business.

OHA concurred in the Area Office’s reasoning, and said that it had repeatedly stated that SBA will not entertain a size protest under a long-term contract unless the procuring agency requested recertification. SBA’s longstanding rule is that a concern that represents itself as small at the time of contract award remains small for the lifetime of the contract, including orders issued under that contract.

OHA also noted that the CO did not request recertification for the task order, and although FAR 52.212-3 includes FAR regulatory language requiring recertification in the event of a merger by reference, this does not mandate recertification by incorporation. OHA has repeatedly declined to accept that interpretation.

Finally, SBA'S recertification rules pertaining to mergers and acquisition at 13 CFR §121.404(g)(2) did not obligate EBA to recertify after a merger. Absent express language in the task order synopsis to a CO requesting size recertification, this section makes it clear that SBA still continues to follow its long-standing rule that "a prime contractor that is small at the time of the contract award remains small for all orders issued under the contract, unless the CO chooses to request recertification." OHA also noted that this section of the rules does not make the prime contractor ineligible for award of pending or future task orders, but rather, that the procuring agency cannot claim goaling credit for these orders.

OHA dismissed the protest.

Takeaway. The small business rules only permit size protests on long term contracts, such as GSA schedule contracts, at three points as explained above. Also, there is a difference between a company no longer qualifying for small size, and an agency not being able to claim goaling credit (i.e. how many/how much work was awarded to small business) by the agency.

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