

Small Business Administration (S.B.A.)
Office of Hearings and Appeals

[Size Appeal]

SPECTRUM LANDSCAPE SERVICES, INC., APPELLANT

RE: ROBINS MAINTENANCE, INC.

Docket No. SIZ-98-4-28-20

Solicitation No. RFP F09650-97-R-0109

Department of the Air Force

Robins Air Force Base, George

July 17, 1998

APPEARANCES

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for Appellant

J. Hatcher Graham, Esq.

for Robins Maintenance, Inc.

DIGEST

This Office will dismiss as moot an unsuccessful offeror's appeal of a size determination concluding the challenged firm was small, where the procuring agency has awarded the contract at issue, even though the issues on appeal are not specific to that procurement.

A size appeal becomes moot as to the instant procurement where contract award occurs during the pendency of the appeal.

Where this Office has decided the merits of a previous size appeal, which addresses the same issues as those raised in the instant appeal; and which involves the same protested firm, the same alleged affiliates, and the same SIC code and type of work under the contract, the outcome in the instant case is governed by the previous decision, even though a different party filed the previous appeal, where that party failed either to raise any new issues or to present probative evidence not previously raised.

DECISION

BLAZSIK, Administrative Judge:

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 (1998).

Issues

Whether this Office will dismiss as moot an unsuccessful offeror's appeal of a size determination concluding the challenged firm was small, where the procuring agency has awarded the contract at issue, and the issues on appeal are not specific

to that procurement.

Whether a size appeal becomes moot as to the instant procurement where contract award occurs during the pendency of the appeal.

Whether a previous size appeal decision, which this Office decided on the merits, and which addresses the same issues as those raised in the instant appeal; and which involves the same protested firm, the same alleged affiliates, and the same SIC code and type of work under the contract, governs the outcome in the instant case, even though a different party filed the previous appeal, where that party failed either to raise new issues or to present probative evidence not previously raised.

Facts

On September 12, 1997, the Department of the Air Force, Robins Air Force Base, Georgia, issued this negotiated, total small business set-aside procurement for grounds maintenance. The Contracting Officer assigned to it Standard Industrial Classification code 0782 (Lawn and Garden Services), which has a \$5 million average annual receipts size standard. The procurement was for a base year, plus four option years. Initial proposals were due October 14, 1997.

On March 23, 1998, the Contracting Officer notified the unsuccessful offerors that Robins Maintenance, Inc. (RMI) was the apparently successful offeror. On March 30, 1998, Spectrum Landscape Services, Inc. (Spectrum or Appellant) orally protested RMI's size status to the Contracting Officer, and, through counsel, sent a timely written protest on March 31, 1998. 13 C.F.R. § 121.1004(a)(2); 121.1005.

The Protest

The protest alleged RMI has the following affiliates: Central Georgia Waste Services, Inc. (CGWS); Systems Oriented Solutions, Inc. (SOS); Emergency Network of Georgia, Inc. (ENG); Environmental Science and Technology, Inc. (EST); Everett Dykes Grassing Co., Inc. (EDG); Dykes Construction, Inc. (DCI); Cochran Rental Co., Inc. (CRC); Davis Propane Gas Co., Inc. (DPG); and Dykes Westside Industries, Inc. (DWI). The protest alleged that, although RMI's own annual receipts are below the applicable size standard, these receipts--when combined with RMI's affiliates--exceed the size standard.

On April 1, 1998, the Contracting Officer forwarded the protest to the Small Business Administration's (SBA) Atlanta Office of Government Contracting--Area III (Area Office) for a size determination.

The Area Office Determination

The Area Office file contains RMI's SBA Form 355, financial statements, and 1994, 1995, and 1996 Federal income tax returns, and other documents. As required, RMI reported it had been the subject of a previous size determination.

RMI's response stated that Everett Dykes, III, inherited no ownership interest in EDG because his father, Everett Dykes, Jr., had sold all his EDG stock to purchase for RMI an earlier grounds maintenance contract at Robins. RMI relied on Size Appeal of Aumann, Inc., No. 3743 (1993), in which this Office affirmed the previous SBA size determination that RMI and EDG are not affiliates.

The Area Office determined RMI was not affiliated with EDG because in Aumann, this Office found no substantive business connections between the two firms, and

Spectrum here has provided no new information supporting the existence of common ownership, management, facilities, employees, or equipment between them, except for an equipment lease, an arm's-length transaction. The Area Office found it unnecessary to determine whether RMI and CGWS are affiliated, as their combined receipts do not exceed the size standard. The Area Office determined that, while SOS, ENG, and EST are affiliated with CGWS, these firms are not affiliated with RMI. The Area Office did not determine whether RMI is affiliated with DCI, CRC, DPG, or DWI.

The Area Office concluded RMI was a small business under the applicable size standard. Appellant received the size determination on April 13, 1998, and filed an appeal postmarked April 28, 1998.

Arguments on Appeal

Appellant asserts the Area Office erroneously relied on the earlier size determination, to which Appellant was not a party, and should have conducted a new investigation. Thus, the Area Office erroneously concluded RMI and EDG are not affiliates, and RMI is a small business. Appellant asserts RMI is affiliated with EDG based on familial identity of interests, the newly organized concern rule, and the totality of circumstances. Appellant did not reassert its protest claims, that RMI is affiliated with SOS, ENG, EST, DCI, CRC, DPG, and DWI.

Appellant requests discovery in the form of subpoenas and an oral hearing. (Appellant filed an April 27, 1998 Motion to Admit New Evidence, prior to its appeal.

On May 8, 1998, RMI filed a response to the appeal. RMI asserts Appellant's "new evidence" relates only to issues unconnected with RMI. Further, RMI asserts the issue of affiliation between RMI and EDG was settled five years ago in Aumann.

On May 15, 1998, the Air Force awarded the instant procurement to RMI.

Appellant filed further evidence and argument on June 11, 1998. RMI filed a reply, received on June 30, 1998.

Discussion

Since the appeal was filed and served within 15 days after Appellant received the size determination, the appeal is timely for this procurement. 13 C.F.R. § 121.304(a)(1).

I. Mootness

The threshold issue is whether this Office lacks jurisdiction because the appeal now is moot following contract award. If jurisdiction exists, the sole substantive issue is whether RMI is affiliated with EDG.

Although applicable SBA size regulations neither explicitly require nor prohibit dismissal of moot cases, the Federal Register preamble to the final rules establishing this Office supports such dismissals. It states: "Dismissals based on mootness or lack of jurisdiction are proper under general principles of administrative law and will be undertaken on that authority." 48 Fed. Reg. 55832, 55834 (Dec. 16, 1983).

Absent explicit statutory or regulatory authority, this Office--as an administrative tribunal--looks to the Federal courts for guidance. Among the elements of jurisdiction is whether a live case or controversy exists; if not, the

appeal must be dismissed as moot. *Size Appeal of Resource Applications, Inc.*, No. 4252 (1996) (citing *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 537 (1978); *Benton v. Maryland*, 395 U.S. 784, 788 (1969)).

An essential part of the analysis for a live case or controversy, is standing. Standing to sue a Federal agency requires establishing all elements of a tripartite test: (1) plaintiff's injury-in-fact, which must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) a causal link to the agency's action; and (3) the likelihood, as opposed to the mere speculation, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. Applicability to the Present Procurement

The applicable regulation (13 C.F.R. § 134.302(a)), which permits "[a]ny person adversely affected by a size determination" to file an appeal, encompasses the first Lujan element. The preamble referred to above, explains that "adversely affected" is "grounded in the concept of 'direct economic effect' and has consistently been limited to other bidders or offerors in the procurement at issue in the size protest and appeal." 48 Fed. Reg. at 55833. Thus, Appellant, as an unsuccessful offeror on this procurement, satisfies the first element. The size determination itself, the agency action which caused the alleged injury, satisfies the second Lujan element.

The Federal Acquisition Regulation (FAR) requires that this Office's decision, "if received before award, will apply to the pending acquisition." 48 C.F.R. § 19.302(i). Accordingly, at the time Appellant filed its appeal, this Office's favorable decision likely would have redressed Appellant's injury, thus satisfying the third Lujan element. Based on the above, Appellant's April 28th appeal then satisfied Lujan because it presented to this Office a live controversy.

During the pendency of an appeal, however, a live controversy may become moot and jurisdiction will abate. Specifically, even "where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Columbian Rope Co., v. West*, 1998 WL 247851 at *2 (D.C. Cir. 1998) (vacating as moot *Size Appeals of Columbian Rope Company*, SBA Nos. 4117 (1995) and 4185 (1996)) (citations omitted) (alteration in original); see also *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

In *Columbian Rope*, the D.C. Circuit concluded the size appeal had become moot during the pendency of subsequent litigation, because the contractor had completed all the work under the contract and all options had expired. Thus, the court no longer could order relief that would redress *Columbian's* injury. This holding in essence acknowledges the failure to satisfy the third element of the Lujan tripartite standing test, which results in loss of standing.

Before applying *Columbian Rope* to the instant case, the Administrative Judge notes this Office's authority to grant relief is much more limited than that of a federal court. Even though the Small Business Act requires procuring agencies to "accept as conclusive [SBA's] determination as to which enterprises are to be designated 'small-business concerns'" under the set-aside program (15 U.S.C. § 637(b)(6)), this Office neither can order nor recommend a procuring agency to cancel an award, to make an award, or not to exercise options. [FN1]

Furthermore, the FAR provides that an SBA ruling "received after award shall not apply to that acquisition." 48 C.F.R. § 19.302(i). Regardless of whether the

procuring agency awards the contract prior to a size appeal to this Office, or during the pendency of the size appeal, as here, this Office's subsequent decision will not apply to that procurement. *Marwais Steel Co. v. Department of the Air Force*, 871 F. Supp. 1448 (D.D.C. 1994) (award made prior to size appeal upheld, despite subsequent finding on remand that awardee was other than small); *Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355 (9th Cir. 1974) (award made during pendency of size appeal upheld despite Size Appeals Board's reversal of awardee's "small" size determination). [FN2] GAO also interprets the FAR to authorize award during the pendency of a size appeal, even if this Office subsequently finds the awardee is other than small. *Verify, Inc.*, B-244401.2, 92-1 CPD ¶ 107 (Jan. 24, 1992); *JRR Construction Company, Inc.*, B-220592, 85-2 CPD ¶ 383 (Oct. 4, 1985). [FN3]

Because this Office's decision does not apply to a procurement after award, under *Columbian Rope*, OHA no longer could redress Appellant's injury after the May 15th contract award. As of that date, the instant size appeal became moot as to the present procurement. Under the Lujan tri-partite test, the third element no longer is satisfied, because there is no live controversy as to the present procurement.

The Administrative Judge notes that the present procurement is for a base year and four option years. Although no size regulation governs options, the presence of options does not save a size appeal from mootness because exercise of an option is within the procuring agency's sole discretion. *Size Appeal of Resource Applications, Inc.*, No. (4252) (citing *Size Appeal of Cordant, Inc.*, No. 4193 (1996)). The FAR does not require the contracting officer to review the contractor's size status before exercising an option. See 48 C.F.R. § 17.207. Therefore, notwithstanding the presence of options, this Office lacks jurisdiction over this appeal because it is moot for the instant procurement.

B. Future Applicability

This Office's longstanding practice has been to decide an appeal on the merits, even after contract award, when the appeal raises size issues that are not specific to a particular procurement. It has done so because the size determination would have future applicability.

Where a challenged firm files an appeal, the "future applicability" derives from the prohibition that an other than small firm can neither self-certify as a small business on a future procurement nor can seek any other SBA assistance, until SBA recertifies it as a small business. 13 C.F.R. § 121.1009(g). [FN4] Thus, the other than small firm not only loses the instant procurement, but also suffers a separate injury as a result of the size determination. Because this Office's favorable decision can redress that injury, the firm appealing its own other than small size would satisfy all elements of the Lujan tri-partite standing test.

Conversely, where as here, appellant is an unsuccessful offeror and contract award has occurred, it is problematic whether this Office's decision can redress the injury and, therefore, would satisfy the future applicability test.

This Office dismissed as moot two recent size appeals involving non contract-specific issues, filed by unsuccessful offerors, after contract award. In *Size Appeal of MDP Construction, Inc.*, No. 4007 (1995), the Administrative Judge concluded no live issue remained because "there is no assurance that [the challenged firm] will bid on any future contracts with the same size standard," and, in any event, "a future determination...would depend on its receipts at the time of the determination."

In *Size Appeal of Golden North Van Lines, Inc.*, No. 4304 (1998), the

Administrative Judge specifically rejected the unsuccessful offeror's assertion it suffered injury because of the challenged firm's eligibility to bid on future set-asides, even though the latter had a history of bidding on similar projects with the same size standard. The Administrative Judge noted it was mere speculation that the unsuccessful offeror would bid again and qualify at some future time for a similar procurement with the same size standard.

In *Columbian Rope*, supra, where the issues were contract specific, the D.C. Circuit questioned the concept of future applicability, noting that a conclusion that the challenged firm was other than small would not redress the plaintiff's injury, because "application of these rules depends on facts that change over time." 1998 WL 247851 at *2. This observation is equally applicable to non contract-specific size issues, as here, for the same reason.

Accordingly, the Administrative Judge concludes Appellant failed to show it will suffer a "future applicability" injury because of RMI's continued eligibility to bid on a procurement with the same size standard, and therefore, it failed to satisfy the first Lujan element. Hence, this Office lacks jurisdiction over this appeal because it is moot. [FN5]

II. Effect of Previous OHA Decision

Even if this case were not moot, the Administrative Judge still would deny the appeal. Where this Office has decided the merits of a previous size appeal, which addresses the same issues as those raised in the instant appeal; and which involves the same protested firm, the same alleged affiliates, and the same SIC code and type of work under the contract, the outcome in the instant case is governed by the previous decision, even though a different party filed the previous appeal. *Size Appeal of DCT, Incorporated*, No. 4075 at 4 (1995); see also *Size Appeal of Agrigold Juice Products*, No. 4136 (1996).

Here, Appellant raises the same issue of EDG's alleged affiliation with the protested firm, RMI, as did the Appellant in *Aumann*, and the contracts involved the same type of work. [FN6] In *Aumann* this Office decided EDG and RMI were not affiliates. Thus, to the extent Appellant failed either to raise any new issues or present probative evidence not previously presented in *Aumann*, that decision controls.

Conclusion

This Office lacks jurisdiction over this appeal because it is moot. Accordingly, the Administrative Judge DISMISSES it.

This is the Small Business Administration's final decision. 13 C.F.R. § 134.316(b).

GLORIA E. BLAZSIK

Administrative Judge

FN1. In contrast, the Court of Federal Claims and the district courts "may award any relief that the court considers proper, including declaratory and injunctive relief." 28 U.S.C. § 1491(b)(2). Agency boards of contracting appeals may grant "any relief" available in the Court of Federal Claims. 41 U.S.C. § 607(d). GAO may determine whether an award or proposed award "complies with statute and regulation," and if not, "shall recommend that the Federal agency -- (A) refrain from exercising any of its options under the contract; ... (D) terminate the contract; (E) award a contract consistent with the requirements of [law]." 31

U.S.C. § 3554(b)(1).

FN2. However, if this Office issues its decision before award, it does apply to that procurement. *Three S Constructors, Inc. v. United States*, 13 Cl. Ct. 41 (1987).

FN3. While GAO, as an agent of the Congress, may not bind either the courts or the Executive agencies to its bid protest decisions for Constitutional reasons, the courts give great deference to its long-standing expertise. *QualMED, Inc. v. Office of Civilian Health and Medical Program of the Uniformed Services*, 934 F. Supp. 1227 (D. Colo. 1996).

FN4. A firm need not seek recertification for an other than small size determination relating solely to a particular procurement. 13 C.F.R. § 121.1010(b).

FN5. Because this Office has no jurisdiction over the appeal, the Administrative Judge need not consider Appellant's requests for oral hearing and subpoenas. Similarly she need not consider Appellant's request to introduce new evidence. Also, since the record closed on May 13, 1998, Appellant's June 11th submission and RMI's June 30th reply were late filed, and the Administrative Judge will not consider them.

FN6. The only new issues raised here, not previously addressed in Aumann, are Appellant's assertions that RMI either finances road construction equipment for EDG, or RMI and EDG are both in the road construction business. Because Appellant offered no probative evidence to support these assertions, its arguments are without merit.

SBA No. 4313, 1998