United States Small Business Administration
Office of Hearings and Appeals

SIZE Appeal of: Marathon Targets, Inc., Appellant, Re: MVP Robotics, Inc. Appealed from Size Determination No. 01-2025-07	SBA No. SIZ-6346 Decided: March 19, 2025

APPEARANCES

Jerome S. Gabig, Esq., Counsel for Appellant Marathon Targets, Inc.

Eric M. Ransom, Esq., Zachary H. Schroeder, Esq., Issac D. Schabes, Esq., Crowell & Moring, LLP, Counsel for MVP Robotics, Inc.

DECISION[1]

I. Introduction

On January 17, 2025, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 01-2025-07 (Size Determination), dismissing the protest of Marathon Targets, Inc. (Appellant) which asserted that MVP Robotics, Inc. (MVP) is a not small business under the size standard designated for U.S. Marine Corps Systems Command Solicitation No. M67854-25-D-8000. On appeal, Appellant argues the Size Determination is clearly erroneous, and requests that OHA reverse it and find MVP is not an eligible small business. For the reasons discussed *infra*, I DENY this appeal and AFFIRM the size determination.

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 of 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.

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, so OHA therefore now issues the entire decision for public release.

II. Background

A. Solicitation and Protest

On February 21, 2024, the U.S. Marine Corps Systems Command (Agency) issued Solicitation No. M67854-25-D-8000 for training and education support services using trackless mobile infantry targets. The Contracting Officer (CO) set the procurement totally aside for small business and designated North American Industry Classification System (NAICS) code 611519, Other Technical and Trade Schools, with corresponding $21 million annual receipts size standard, as the appropriate code for this procurement. Initial offers were due April 15, 2024, and final proposal revisions were due September 6, 2024. On November 27, 2024, the contract was awarded to MVP.

On December 2, 2024, Appellant filed a size protest arguing MVP was other than small due to its affiliation with another concern based upon common ownership and the ostensible subcontractor rule. On that same day, Appellant also filed an agency-level protest. On December 3, 2024, the Agency informed Appellant that the Agency had discovered that it had inadvertently released source selection and proprietary information that is protected under FAR 2.101 and 3.104, as well as the Procurement Integrity Act, 41 U.S.C. § 2102. This occasioned an extensive correspondence between Appellant and the Agency over Appellant's treatment and use of this information.

On December 10, 2024, MVP requested that the Area Office extend or suspend the deadline for responding to the protest, due to an ongoing Agency investigation into a potential Procurement Integrity Act ("PIA") violation by Marathon. On December 11, 2024, the Area Office suspended the protest indefinitely.

Ultimately, in an email dated January 16, 2025, the CO notified the Area Office that Appellant was eliminated from consideration for award for procurement related reasons. These were its organizational conflict of interest, its appearance of impropriety, and its unfair competitive advantage.

On January 17, 2025, Appellant's counsel contacted the Area Office and urged it to either decide the protest or initiate its own size determination. However, also on January 17, 2025, the Area Office issued Size Determination No. 01-2025-07, dismissing Appellant's protest for lack of standing under 13 C.F.R. § 121.1001(a)(1)(i) because Appellant had been eliminated from consideration for award for a procurement-related reason.

B. Appeal

On January 21, 2025, Appellant filed the instant appeal at SBA Office of Hearings and Appeals (OHA). Appellant argues that the Area Office erred in relying upon 13 C.F.R. § 121.1001(a)(1)(i) because this governs the initiation of a size protest, and standing here is governed by 13 C.F.R. § 134.302(a). Under the latter regulation, standing is granted to any

person adversely affected by a size determination. Appellant argues it meets this standard. (Appeal, at 15-16.)

Appellant further argues that the most logical construction of § 121.1001(a)(1)(i) is that standing should be determined at the time the protestor initiates the protest. Appellant argues that because the CO had not yet eliminated it from consideration on December 3, 2025, the date that it filed its protest, that Appellant had standing at that time. Appellant argues its status to protest should not "change with time variables." (*Id.*, at 16, citing *Size Appeal of The Fechheimer Brothers Co.*, SBA No. SIZ-1947 (1984).) Appellant argues standing must be determined at the time litigation is filed. (*Id.*, at 16-17, citing *Senter v General Motors Corp.*, 532 F.2d 511, 520 (6th Cir. 1976).) Appellant points to the regulation providing that size protests are to be decided within 15 business days of filing. (*Id.*, a 17, citing FAR 19.302(f)(1), *see also* 13 C.F.R. § 121.1009(a).) Appellant argues that if the Agency transmitted its protest to the Area Office on December 5th there should have been a decision by December 30th, prior to the CO's elimination of Appellant. Appellant argues it had standing at that time. (*Id.*, at 18.)

Appellant argues that dismissing is protest for lack of standing so long after it was filed is a *post hoc* rationalization and violates the principal of fundamental fairness. (*Id.*, at 18-19, citing *Size Appeal of Vista Engineering Technologies, LLC*, SBA No. SIZ-5041 (2009).) Appellant maintains it had standing on the date it filed its protest, and that should be the standard.

Appellant further argues that 13 C.F.R. § 121.1001(a)(1)(i) was no longer relevant once award was made. The regulation excludes firms eliminated from consideration for procurement related reasons, but after award all unsuccessful offerors have been eliminated from consideration, and so the regulation is not relevant at that time. (*Id.*, at 20-22.)

Appellant goes on to argue that once the Area Office was on notice of its claims that the Agency's elimination of it from competition was pretextual to deprive it of its right to have its protest decided on the merits, the Area Office violated due process by not inquiring into whether the assertion of pretext was valid. (*Id.*, at 22-23, *Size Appeal of Colt-Sunbelt Rentals, JV, LLC*, SBA No. SIZ-6288 (2024); *Size Appeal of E. Huttenbauer & Sons, Inc.*, SBA No. SIZ-3979 (1995).)

Appellant asserts the Area Office failed to consider an important aspect of the problem before it, that the reason provided by the CO to have Appellant's protest dismissed was pretextual, and so the dismissal was contrary to law. Appellant argues the information it submitted to the Area Office asserted the CO's reasons were there was a pretextual, and the Area Office should not have referred to the CO's self-serving *post hoc* statement. (*Id.*, at 23-24.)

Appellant claims the Area Office abused its discretion by not initiating its own size review of MVP under 13 C.F.R. § 121.1001(a)(1)(iii), and by not explaining why it declined to do so, rendering its decision unreviewable. (*Id.*, at 24.)

C. MVP Motion to Dismiss

On February 4, 2025, MVP moved to intervene. On February 5, 2025, OHA granted the motion. On February 10, 2025, MVP moved to dismiss the appeal.

MVP states that on January 16, 2025 the Agency disqualified Appellant from consideration of award of the subject procurement. (MVP Motion to Dismiss, at 1, and Ex. 1, PIA Investigation Decision Page.) The CO informed the Area Office of the disqualification that same day, stating "Marathon Targets is eliminated from consideration for award related to M67854-25-R-8000 for procurement-related reasons, i.e., its organizational conflict of interest, its appearance of impropriety, and its unfair competitive advantage, reasons which are not related to its small business size." (*Id.*, at 2, Ex. 2.) The Area Office then dismissed the protest for lack of standing.

MVP asserts the Agency eliminated Appellant from the procurement following the conclusion of its Procurement Integrity Act investigation. This concluded Appellant had an organizational conflict of interest, an unfair competitive advantage, and an appearance of impropriety, each of which warranted elimination from the procurement. Further, Appellant was not a responsible contractor and is unqualified and ineligible because it does not meet the standard in FAR 9.104-1(g). Further, its actions indicate a lack of business integrity. (*Id.*, at 3, Exh. 1, 4.)

MVP argues that an offeror found to be ineligible for award has no standing to file a size protest. The fact Appellant was not informed of its elimination until after it filed its protest is irrelevant. Lack of notice from the CO is not a ground for standing. (*Id.* at 5, citing *Size Appeal of Prak-Integrity JV*, SBA No. SIZ-6289 (2024); *Size Appeal of Piedmont Propulsion Sys., LLC*, SBA No. SIZ-6166 (2022) and *Size Appeal of Fin. & Realty Servs.*, SBA No. SIZ-6142 (2022).) The purpose of the regulation is to give standing to concerns whose successful challenge would allow it to compete for the award. An offeror who had been eliminated for reasons unrelated to size would not be able to compete for award if the protest were successful and thus, should not have standing to question another concerns size. (*Id.*, at 6, citing *Size Appeal of FreeAlliance.com, LLC*, SBA No. SIZ-6064 (2020).)

MVP concludes that because Marathon has an organizational conflict of interest, an unfair competitive advantage, an appearance of impropriety, is non-responsible under 9.104-l(g) (which need not be referred to SBA), and is therefore disqualified from the procurement, a successful size protest would have no impact whatsoever on Marathon's ability to compete for award. Marathon would remain disqualified and ineligible. Marathon thus lacks standing under 13 C.F.R. § 121.1001(a)(1)(i).

D. Marathon's Response

On February 24, 2025, Appellant filed an Opposition to MVP's Motion to Dismiss.

Appellant discusses at length the events leading up to the Agency's decision to eliminate it from consideration for this award. On January 17, 2025, Appellant wrote to the Area Office

stating that it was appropriate for the Area Office to decide the size protest and that the Area Office should initiate its own size investigation of MVP under 13 C.F.R. § 121.1001(a)(1)(iii). (Opposition at 7.)

Appellant argues that 13 C.F.R. § 121.1001(a)(1)(i) is not applicable. The plain language of the regulation makes clear that the exclusion must be for "procurement-related reasons" which should be confined to the content (or lack thereof) of the offeror's proposal. (*Id.*, at 10.)

Appellant points to *Focus Revision Partners v. United States*, 161 Fed. Cl. 711 (2022), as standing for "procurement related reason" to be narrowly construed to be limited to the content (or lack thereof) of the protestor's proposal. (*Id.*, at 11.)

Appellant asserts it had a technically acceptable proposal, which the Source Selection Authority did not reject but found it fell short in terms of best value. None of the reasons given for disqualifying Appellant from consideration are procurement related such as non-responsiveness, technical unacceptability or being outside of the competitive range. The Agency's reasons given for rejecting Appellant's proposal are first, there was a possibility of a future Procurement Integrity Act violation, based on Appellant's access to information, there were violations of FAR provisions on procurement integrity, Appellant had an organizational conflict of interest, there was an appearance of impropriety, Appellant is not responsible under FAR 9-104(1)(g), and Appellant's action indicate a lack of business integrity. In sum, Appellant was eliminated from consideration for organizational conflict of interest, appearance of impropriety and unfair competitive advantage. (*Id.* at 11-12.)

Appellant further asserts the phrase "procurement related reason" in the regulation should be interpreted with "traditional responsibility factors" as if they were all "One Law" since both involve division of authority between SBA and the CO as to the authority to exclude a small business based on responsibility. There is a rule of construction that statutes and regulations with similar language and subject matter should be construed as if they were "one law." (*Id.*, at 14, citing *SRA International, Inc. v. United States*, 114 Fed. Cl. 247, 253 (2014).) Integrity is one of the characteristics categorized as "traditional responsibility factors," a phrase frequently used in Court of Federal Claims (COFC) and Government Accountability Office (GAO) decisions, which call for a referral to SBA for a Certificate of Competency determination under 13 C.F.R. § 125.5(a)(2)(ii). Appellant argues that the two regulations should be read harmoniously as one law and so the reason for disqualifying Appellant is not procurement related but an element of responsibility. (*Id.* at 14-17.)

Appellant further maintains that even if § 121.1001(a)(1)(i) applies, the time to determine Appellant's standing is at the time it filed its protest, and not weeks later, long after the Area Office should have rendered a decision on the protest. At that time, the CO had not yet disqualified Appellant. SBA determines size as of the date a concern submits its initial offer, including price. 13 C.F.R. § 121.404(a). Analogously, the time to determine a concern's standing to protest should be at the time the protest is filed. (*Id.*, a 17-20.)

Appellant argues that the Agency's reason for disqualifying it are mere *post hoc* rationalizations which deserve no deference from OHA. Appellant attacks the Agency's reasons for disqualifying it and argues these did not exist at the time it filed its protest. (*Id.*, at 20-33.)

Appellant maintains that 13 C.F.R. 121.1001(a)(1)(iv) is another regulation which grants it standing. This regulation grants standing to large businesses where only one concern submitted an offer for the subject procurement. If, as a result of Appellant's protest, MVP is a large business, there is no other offeror in line for award because of the decision to exclude Appellant. The Agency will have to recompete the requirement and Appellant will have an opportunity to compete for the award. (*Id.*, at 32-35.)

E. Procedural Matters

On February 21, 2025, Appellant filed a Motion for a Stay of Proceedings, pending the outcome of its action in the COFC.

On February 28, 2025, Appellant filed a Motion to re-open the record to allow Appellant to file a motion for the issuance of a protective order and to allow Appellant to submit an application for admission under the protective order. I granted the motion and set March 14, 2025 as the date for the filing of any supplemental pleadings.

Also on February 28, 2025, Appellant filed a motion for a Protective Order, which I granted that same day.

On March 3, 2025, Appellant's counsel, Jerome S. Gabig, Esq., filed an application for admission under a Protective Order.

Also on March 3, 2025, MVP filed an Opposition to Appellant's Motion to Stay, Motion to Reopen Record and Request for a Protective Order. MVP argues that this matter does not require a stay of the proceedings, nor a Protective Order, because it has a limited issue of whether the SBA Area Office erred in dismissing Appellant's protest for lack of standing. MVP also takes exception to Appellant's counsel failing to contact the non-moving party and determine whether the motion will be opposed and informing OHA of that fact, as required by 13 C.F.R. § 134.211(b).

On March 4, 2025, I denied Appellant's Motion to Stay and granted Mr. Gabig's request for admission under the Protective Order.

F. MVP's Supplemental Response

On March 14, 2025, MVP filed a Supplemental Response to the Appeal. MVP asserts Appellant lacks standing to protest because the procuring agency eliminated it from consideration for the procurement. Appellant's COFC appeal challenging the decision has no impact on the issue in this appeal. Neither the Area Office nor OHA are tasked with determining whether the Agency decision was proper. A mere filing in COFC is no indication that corrective action will be ordered. COFC has already denied Appellant's motion for a preliminary injunction.

(Supplemental Appeal at 2, citing *Marathon Targets, Inc. v. United States and MVP Robotics, Inc.*, Case Number 25-121, Docket No. 4.)

III. Discussion

OHA reviews a size determination issued by an SBA Area Office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). It is an appellant's burden to prove, by a preponderance of the evidence, that the Area Office committed such an error. 13 C.F.R. § 134.314. Thus, the Administrative Judge may only overturn a size determination if appellant establishes the Area Office made a clear error based on the record before it.

Here, the issue is whether Appellant had standing to file a size protest. Appellant argues it has standing under 13 C.F.R. § 134.302(a), as a party adversely affected by the size determination. However, while this gives Appellant standing to appeal the size determination which dismissed its size protest, the issue here in deciding the instant appeal is whether the Area Office erred in finding Appellant lacked standing to file a size protest.

The relevant regulation reads:

> (a) *Size Status Protests*. (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small businesses or a particular group of small businesses (including a partial set-aside) the following entities may file a size protest in connection with a particular procurement, sale or order: (i) Any offeror that the contracting officer has not eliminated from consideration any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range. . . .

13 C.F.R. § 121.1001(a)(1)(i).

Relying on this regulation, the Area Office dismissed Appellant's protest, because the CO had disqualified Appellant from the procurement. It is settled law that a concern which the contracting officer has eliminated from consideration for a procurement-related reason such as being technically unacceptable does not have standing to file a size protest and is barred from bringing it. *Size Appeal of Davis Defense Group, Inc.*, SBA No. SIZ-6016 (2019); *Size Appeal of ILKA Techs., Inc.*, SBA No. SIZ-5903, at 2 (2018) (quoting *Size Appeal of Lost Creek Holdings, LLC d/b/a All-Star Health Sols.*, SBA No. SIZ-5823, at 3 (2017)). The purpose of the regulation is to give standing to protest to concerns whose successful challenge would enable them to compete for the award. In promulgating the regulation, SBA explained that an offeror that has been eliminated for reasons unrelated to size would not be able to compete for award if the protest were successful, and, thus, should not have standing to question another firm's size status. *Size Appeal of Fitnet Purchasing Alliance*, SBA No. SIZ-5089, at 4-5 (2009), citing 67 Fed. Reg. 70339, 70345 (Nov. 22, 2002). Here, Appellant has been eliminated from consideration for a procurement related reason, and therefore does not have standing to protest MVP's size. Appellant's argument that "traditional responsibility factors" should be considered here is

meritless. Established OHA precedent holds that when a concern is disqualified for a "procurement related reason" it has no standing. Here, the reason for Appellant's disqualification is related to procurement integrity issues, which are clearly procurement related reasons. Appellant was eliminated from consideration for the award, and thus had no standing to challenge MVP's size.

Appellant's argument that it had standing at the time it filed its protest is meritless. The CO was then in the process of determining how to deal with Appellant's conduct, which had already taken place. The Area Office waited until the Agency made its determination, and then dismissed the appeal once the Agency had acted, which act rendered Appellant ineligible for award.

Further, while Appellant may not have been aware of its disqualification at the time it filed its protest, this does not clothe it with standing. OHA has repeatedly held that lack of notice from the CO to the protestor of their disqualification does not grant it standing. *Size Appeal of Prak Integrity JV*, SBA No. SIZ-6289, at 6 (2024).

Appellant attacks the CO and the Agency's handling of its disqualification for this procurement. However, I have no jurisdiction over any of its complaints against the Agency. Neither the Area Office nor OHA have any jurisdiction over the conduct of the procurement and cannot entertain Appellant's arguments that the Agency's actions against it were improper. *Size Appeal of Ekagra Partners, LLC*, SBA No. SIZ-6189, at 9 (2023)

Appellant's argument that the Area Office should have initiated its own size determination against MVP is meritless. The question of whether an Area Director will initiate their own size determination is a matter of discretion on their part. *Size Appeal of Solis Constructors, Inc.*, SBA No. SIZ-5624, at 3 (2014). Appellant has no basis to challenge the Area Office's decision not to initiate a size determination.

Appellant's argument that it has standing under 13 C.F.R. 121.1001(a)(1)(iv) is meritless. This regulation grants standing to protest to "other interested parties". OHA precedent is clear that this only applies to the specific circumstances outlined in the regulation, a large business where only one concern submitted an offer for the procurement in question or a concern found to be other than small when there is only one remaining offeror. *Size Appeal of FreeAllaince.com*, SBA No. SIZ-6064, at 8 (2020). Appellant does not fit these circumstances and thus cannot be said to be an "other interested party." Appellant was not found to be other than small; it was disqualified on integrity grounds. The regulation is not applicable to Appellant.

Appellant's reliance upon *Focus Revision Partners v. United States*, 161 Fed. Cl. 711 (2022), is misplaced. There, the Court found that an appellant had the right to correct a clerical error in the caption to its pleading, rather than have its appeal dismissed as filed by a fictitious party. The case does not support finding standing where the regulation explicitly states it does not exist.

The appeal is entirely without merit, and I must DENY it and AFFIRM the size determination.

IV. Conclusion

Appellant has failed to establish that the dismissal of its protest was based upon any error of fact or law; I therefore must DENY the appeal and AFFIRM the size determination. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge