

FEDERALLY SPEAKING

Federal Procurement Litigation: Size Protests: The Basic Rules of the Game

By Edward J. Kinberg

Introduction

In my practice, which is focused on federal contract litigation, I have noticed a significant increase in a unique area: size/status protests. While such protests have been around for years, they have been relatively limited. Size protests arise from an agency's decision to "set-aside" or limit a procurement to a class of contractors based on the size of their business or one of several special statuses established by Congress such as disadvantaged, disabled veteran-owned, woman-owned or other special category.

Contractors that do not qualify according to size and/or status as required by the contracting officer can file a pre-proposal protest challenging the decision to set-aside the solicitation; contractors that qualify for the status can file a post-award protest challenging the status of the contractor selected for award. This article is limited to the issues involved in post-award protests.

With the on-going federal budget crisis and market competition, contractors are increasingly looking for ways to increase their opportunities to bid contracts. One of the more common methods for doing so is for large businesses to "team-up" with small businesses to bid on size/status limited procurements. While this increases their bidding opportunities, it also increases the risk of a protest. Federal litigators need to be aware of the basic issues involved in such protests ...

The Basics

Size/status protests are very different from traditional bid protests. They are initially decided by an area office of the Small Business Administration (SBA) with appeal to the SBA Office of Hearing and Appeals (OHA). The rules and procedures for size protests are found in two general sections of the Code of Federal Regulations (CFR). Title 13, Part 121 provides the general rules for size protests. The rules for appealing size determinations are in Part 134 of Title 13.

Size protests involve complaints that the company that won the award does not meet the required size/status standard due to its relationship with a large company. This article will be limited to a review of the basic rules for filing a size protest and the issues involved.

The Basic Rules for Filing a Protest

While you need to carefully read the rules for filing a size protest, the following is a summary of the key requirements:

1. File the protest on time: Size protests must be received by the Contracting Officer prior to the close of business on the 5th business day following the day sealed bids are opened or a notice of intent to award a negotiated procurement is issued by the Contracting Officer. (13 CFR §121.1004).

2. The protest must contain specific facts as to the basis for the protest. The protest does not have to have a substantial amount of detail, but it must contain sufficient information to identify the issue involved. The CFR includes the following examples of an adequate protest:

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is \$5 million) because it received government contracts in excess of \$5 million last year is sufficiently specific.

See 13 CFR §121.1007(c)

3. File a timely appeal of an adverse size determination. Size decision appeals must be filed within 15 calendar days of the receipt of the formal size determination and NAICS appeals must be filed within 10 days. (13 CFR §134.304)

The Issues

All of the various areas the SBA analyzes in deciding a size protest are based on a single issue: **control**. While there are specific names for various types of issues, they are all based on determining whether a large business, directly or indirectly, has the ability to control the business that received the contract award (13 CFR §121.103). The SBA can find control even though the large business or individual affiliated with the large business does not have a majority ownership in the small business.

The regulations contain an interesting concept called "**negative control**" which can be found to exist when "minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders." (13 CFR §121.103(a)(3)). Negative control may also exist when "an individual, concern, or entity exercises control indirectly through a third party." (13 CFR §121.103(a)(4)).

These, as well as many other similar types of control, are all included in the CFR under the term "affiliation." The regulation lists the following different types of affiliation:

- Based on stock ownership (13 CFR §121.103(c))
- Arising under stock options, convertible securities and

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- agreements to merge (13 CFR 121.103(d))
- Based on common management (13 CFR §121.103(e))
- Based on identity of interest (13 CFR §121.103(f))
- Based on the newly organized concern rule (13 CFR §121.103(g))
- Based on joint ventures (13 CFR §121.103(h))
- Based on franchise and license agreements (13 CFR §121.103(i))

In examining these issues, the SBA considers the “totality of the circumstances and may find affiliation even though no single fact is sufficient to constitute affiliation” (13CFR §121.103(a) (5)). As a result, the SBA can find affiliation even though they are unable to find sufficient records to support any of the specific types of affiliation listed in the regulation.

Hidden within the above categories of affiliation is a rule known as the “ostensible subcontractor rule” (13 CFR §121.103(h)). This subsection provides that affiliation can be found if a subcontractor that does not qualify as small will be performing “primary and vital requirements of the contract” or if the prime contractor is unusually reliant on the subcontractor.

In making this determination the SBA will examine the subcontract, the nature of the services or materials for which the subcontractor is responsible, agreements such as bonding assistance or financing, and whether the subcontractor is the incumbent contractor. Again, it is important to keep in mind that the SBA will look at the “totality of the circumstances” and may find affiliation based on a combination of factors even though each in itself may be insufficient to constitute affiliation.

If you would like to learn more information about the various

issues involved in size protests, I recommend a web site maintained by Stan Hinton (stanhinton.com). The SBA tab will provide you with quick access to applicable rules and cases.

Conclusion

While initial compliance with federal size standards may seem like an issue for a transactional attorney, reductions in federal spending and increased competition for limited funds is likely to result in a long-term increase in both the number and complexity of size protests. Given the very short period of time to file protests and appeals, it is essential that federal litigators become familiar with issues and rules so they can quickly and accurately represent their clients when the call comes. **SB**

Ed Kinberg served as a procurement attorney with the U.S. Army Judge Advocate General (JAG) Corp before opening Kinberg & Associates LLC in Melbourne, Fla. He represents clients in all aspects of government contract law including size protests, bid protests, and litigating disputes before federal and Florida courts and federal and state agencies.

