

UNITED STATES OF AMERICA  
SMALL BUSINESS ADMINISTRATION  
OFFICE OF HEARINGS AND APPEALS  
WASHINGTON, D.C.

_____	)	
SIZE APPEAL OF:	)	
	)	
Seminole Systems LLC	)	Docket No. SIZ-2007-04-05-07
	)	
Appellant	)	Decided: April 27, 2007
	)	
RE: Protection Strategies, Inc.	)	
	)	
Solicitation No. DE-RP05-06OR-23206	)	
Department of Energy	)	
Oak Ridge Office	)	
Oak Ridge, TN	)	
_____	)	

APPEARANCES

David R. Sampson, Secretary  
for Appellant Seminole Systems, LLC

Keith P. Hedman, President & CEO  
for Protection Strategies, Inc.

DIGEST

The receipt by a party of facsimile transmission of a size determination by a Small Business Administration Area Office of Government Contracting is receipt of the size determination, for purposes of computing the time limit for filing an appeal under 13 C.F.R. § 134.304(a).

A challenged firm is small when its tax returns establish that the annual receipts of the firm are within the applicable size standard.

DECISION

HOLLEMAN, Administrative Judge:

- 2 -

### 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.

### I. BACKGROUND

On March 10, 2006, the Department of Energy (DOE), issued the subject procurement for administrative support services. Offers were due on April 14, 2006. The Contacting Officer (CO) designated North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$6.5 million annual receipts size standard as the appropriate NAICS code for the procurement.<sup>1</sup>

On February 15, 2007, DOE notified offerors that Protection Strategies, Inc. (Protection), was the apparent successful offeror. On February 21, 2007, Seminole Systems, LLC (Appellant), filed a size protest, challenging Protection's size and Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) status.<sup>2</sup>

On March 13, 2007, the Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office), in Philadelphia, Pennsylvania, issued a size determination finding Protection to be an eligible small business. Protection's fiscal year is the calendar year. The Area Office examined Protection's Federal income tax returns for the years 2003, 2004, and 2005, and found that its annual receipts are within the applicable size standard. Appellant received the size determination on March 13th, via facsimile transmission, and again on March 21st by certified mail. On March 23, 2007, DOE awarded the contract to Protection.<sup>3</sup>

On April 5, 2007, Appellant filed the instant appeal. Appellant asserts that information on Protection's website regarding the company's past and present contracts supports a finding that its annual receipts exceed the size standard. Appellant also asserts the Area Office may not have accounted for all of Protection's affiliates, as its website mentions subsidiary operations in foreign countries.<sup>4</sup>

On April 12, 2007, I issued an Order to Show Cause why the appeal should not be found untimely for this procurement. On April 18, 2007, Appellant responded, stating that it had

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<sup>1</sup> The solicitation contained an erroneous \$10 million size standard. The Area Office corrected this error in the size determination. *See* 13 C.F.R. § 121.402(d).

<sup>2</sup> The SDVO SBC protest would have been handled by the Associate Administrator for Government Contracting, and is not here before me. *See* 13 C.F.R. § 125.25.

<sup>3</sup> The CO has informed this Office that work is suspended on this contract due to a pending protest at the Government Accountability Office.

<sup>4</sup> Appellant also challenged Protection's SDVO SBC status, but that issue is not before me. *See* fn. 2.

- 3 -

received the size determination first by facsimile transmission on March 13th, and subsequently a hard copy by certified mail on March 21st. Appellant asserts that the Area Office's March 13th fax did not state it was to be considered the official notification. Further, the fax was followed by a certified letter. Appellant concluded that the letter was the official notification, and that its time to appeal ran from March 21st.

On April 20, 2007, Protection filed its Response to the appeal. Protection asserts that, while some of the contracts referenced on its website are large, it is not the sole awardee of these contracts. Further, the reference to certain foreign firms as subsidiaries was inaccurate, and they are now more accurately described as "teaming partners". On April 20, 2007, the appeal record closed.

On April 24, 2007, Appellant filed a Reply to Protection's Response. However, Appellant filed this pleading after the close of record, and moreover a reply to a response is not permitted unless the Administrative Judge otherwise directs. 13 C.F.R. § 134.309(d). I have not directed Appellant to file any reply. Accordingly, Appellant's Reply is EXCLUDED from the record.

## II. DISCUSSION

### A. Timeliness

In a pending procurement, an appellant must file its appeal within 15 days of receiving the size determination. 13 C.F.R. § 134.304(a)(1). In other cases, the appeal must be filed within 30 days. 13 C.F.R. § 134.304(a)(2). An appeal that is untimely under § 134.304(a)(1) may proceed only with respect to any future procurement, if it is timely under § 134.304(a)(2). 13 C.F.R. § 134.304(b).

Appellant filed the instant appeal on April 5th, more than 15 days after receiving the facsimile transmission of the size determination on March 13th, but within 15 days of receiving the certified letter on March 21st. The issue, then, is from which date Appellant's time to appeal the size determination began to run.

A review of the size determination establishes that Appellant's claim that the March 13th fax transmission was not official is wholly without merit. The March 13th cover letter accompanying the size determination states that it is a formal size determination, it contains the full size determination, and it states Appellant's appeal rights, including a citation to the regulation, where the time limits for filing an appeal are found. Further, this Office has consistently computed the time limit for filing an appeal from the date of the facsimile transmission of the size determination. *Size Appeal of Brooke Ocean Technology (USA), Inc.*, SBA No. SIZ-4827 (2006). Accordingly, I find that Appellant failed to file a timely appeal for a pending procurement, and its appeal is untimely for this procurement.

However, Appellant did file within the 30-day time limit for a size determination other than in a pending procurement. 13 C.F.R. § 134.304(a)(2). Accordingly, the instant appeal is timely for future procurements concerning Protection, and thus this Office may consider this appeal as to whether Protection is small for future procurements. 13 C.F.R. § 134.304(b); *Size Appeal of VRC, Inc.*, SBA No. SIZ-4793 (2006).

#### B. The Merits of the Appeal

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). This Office will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of law or fact. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

In determining the size of a challenged firm under an annual receipts size standard, SBA computes the firm's receipts by adding "total income" plus "cost of goods sold" as those terms are defined on the firm's Federal income tax returns. 13 C.F.R. § 121.104(a); *Size Appeal of Educational Services, Inc.*, SBA No. SIZ-4782 (2006) (*ESI*). The period of measurement for a firm's receipts is the total of its receipts over its three most recently completed fiscal years, divided by three. 13 C.F.R. § 121.104(c)(1); *ESI*. A firm's size is determined as of the date of its submission of its self-certification that it is small with its initial offer, including price. 13 C.F.R. § 121.404(a); *ESI*. Therefore, a firm's annual receipts are computed by averaging the figures from its Federal income tax returns for its last three fiscal years completed before the date of its self-certification. *ESI*, at 3.

Here, Protection self-certified as small with its initial offer in April, 2006. The Area Office properly reviewed its tax returns for 2003, 2004, and 2005, and concluded Protection's annual receipts were within the size standard. A review of the record, which includes Protection's Federal income tax returns, establishes that the Area Office made the correct determination, and that Protection's annual receipts are well within the applicable size standard. Accordingly, the size determination must be affirmed. *Size Appeal of LBM, Inc.*, SBA No. SIZ-4703 (2005).

Appellant's other arguments are meritless. The puffery on a firm's website may be the basis for a protest, but the definitive evidence for a size determination must be a firm's signed, sworn statements on its SBA Form 355, and its Federal income tax returns. *Size Appeal of Byrne Dairy*, SBA No. SIZ-4104 (1995). As noted above, the regulations require that a size determination be based on the hard information in the challenged firm's tax returns.

### III. CONCLUSION

For the above reasons, the Administrative Judge AFFIRMS the Area Office's size determination and DENIES the instant appeal.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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CHRISTOPHER HOLLEMAN  
Administrative Judge