

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

ELR Consultants, LLC

Appellant

Re: Wastren Advantage, Inc.

Appealed from  
Size Determination No. 4-2008-7

SBA No. SIZ-4875

Decided: December 6, 2007

APPEARANCE

Jack W. Elrod, CEO of ELR Consultants, LLC, Oak Ridge, Tennessee, for Appellant.

ORDER REMANDING SIZE DETERMINATION

PENDER, Administrative Judge:

I. 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.

II. Issue

Whether the Area Office's determination that a size protest lacked specificity under 13 C.F.R. § 121.1007(b) was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

On April 4, 2007, Uranium Disposition Services, LLC (UDS), a contractor for the U.S. Department of Energy (DOE), issued RFP No. JS-040407-001 as a small business set-aside. UDS designated North American Industry Classification System (NAICS) codes 541611 and 541618 as the applicable NAICS codes for this procurement, with corresponding \$6.5 million size standards. Proposals were due on April 18, 2007.

On September 27, 2007, UDS notified unsuccessful offerors that Wastren Advantage,

Inc. (Wastren) was the apparent successful offeror.

On October 1, 2007, ELR Consultants, LLC (Appellant) filed a size protest with both UDS and the DOE Contracting Officer (CO). Appellant requested that SBA confirm Wastren's size based on "[Appellant's] CCR registration inquiry and a market profile report of [Wastren] issued by Inc 500." It is unclear whether Appellant attached these public documents to this protest.

Also on October 1, 2007, Appellant filed a size protest with UDS, but not DOE, which alleged that Wastren "does not meet the size standards of these NAIC Codes (\$6.5 million) nor has registered these NAIC Codes with CCR. Our information, which is 'attached' indicated that [Wastren] revenues of \$11 million does exceed the NAIC Code standards." Appellant's protest attached Wastren's CCR profile and a market profile report of Wastren.

On October 10, 2007, Appellant filed a letter with a Program Analyst at the Small Business Administration (SBA) Office of Size Standards in Washington, D.C. Appellant referenced its October 1, 2007 protest and reiterated its concerns with Wastren's size. Appellant then inquired about how to file its size protest at SBA. That same day, Appellant emailed the Program Analyst with two unspecified attachments.

On October 11, 2007, Appellant filed a letter with DOE protesting the actions of UDS as a prime contractor, citing various source selection irregularities and failure to comply with the FAR.

On October 11, 2007, the SBA Program Analyst referred Appellant's October 10, 2007 email (containing two unspecified attachments) to the Small Business Administration (SBA) Office of Government Contracting – Area IV in Chicago, Illinois (Area Office).

On October 17, 2007, UDS forwarded both October 1, 2007 protests to DOE.

#### A. The Dismissal of the Protest

On November 8, 2007, the Area Office summarily dismissed Appellant's October 1, 2007 protest to DOE and UDS as insufficiently specific<sup>1</sup>. 13 C.F.R. § 121.1007. The Area Office then dismissed Appellant's October 11, 2007 "protest" as untimely. 13 C.F.R. § 121.1004(a)(2). The Area Office also dismissed Appellant's October 10, 2007 letter to the SBA Program Analyst as untimely and noted that Appellant failed to properly file the protest with the CO pursuant to 13 C.F.R. § 121.1003.

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<sup>1</sup> From notations in the Area Office file, it appears the Area Office disregarded Appellant's October 1, 2007 protest addressed solely to UDS because it was not filed with the DOE CO pursuant to 13 C.F.R. § 121.1003.

## B. The Appeal

On November 20, 2007, Appellant filed the instant appeal. Appellant asserts that its October 1, 2007 protest was sufficiently specific as Appellant alleged that Wastren exceeded the \$6.5 million size standard and attached public documents (Wastren's CCR profile and Inc. 500 Profile) that indicated Wastren's 2006 revenue was \$11.5 million.

Appellant avers that its October 11, 2007 letter to DOE was not a size protest and should not have been forwarded to the Area Office. Accordingly, Appellant does not dispute the Area Office's finding that the October 11, 2007 letter was untimely.

## IV. Discussion

### A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

### B. Standard of Review

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. I will find clear error and thus disturb the Area Office's size determination only if, after reviewing the Record and pleadings, I have a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

### C. The Merits

First, Appellant's October 11, 2007 letter was not a size protest but rather a protest to DOE regarding UDS's alleged failure to comply with the FAR. It is unclear why (or when) the DOE CO forwarded this October 11, 2007 letter to the Area Office. Accordingly, it is unnecessary to address the timeliness of Appellant's October 11, 2007 letter.

Second, I note that the Record fails to show when the DOE CO forwarded Appellant's October 1, 2007 protest, filed with DOE, to the Area Office<sup>2</sup>. Instead, it appears that the Area Office began processing Appellant's size protest after receiving the SBA Program Analyst's October 11th email forwarding Appellant's protests as attachments. Thereafter, the Area Office made inquiries to the CO regarding the protests. Therefore, while it appears the Area Office disregarded Appellant's October 1st protest to UDS because it was not served on the DOE CO, I note the responsible DOE contracting official appears to have also contravened 13 C.F.R. § 121.1003 by not forwarding the October 1st protest filed at DOE.

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<sup>2</sup> The Record does contain an October 17, 2007 letter from UDS to DOE, which forwards both of Appellant's October 1, 2007 protests. It is unclear when this letter was supplied to the Area Office.

The Area Office also dismissed Appellant's October 10th letter to the SBA Program Analyst as untimely and for failure of service on the CO. However, I do not view this letter as a size protest; rather, Appellant was forwarding to the SBA its size protests that it had already filed with UDS and DOE and asking for help in getting these protests resolved.

The remaining issue is thus the specificity of Appellant's October 1, 2007 protest filed with both DOE and UDS. I need not decide whether the October 1st protest filed with UDS was effective because Appellant did serve a timely protest with the DOE. My review of the record indicates that Appellant's October 1, 2007 protest filed with both the DOE and UDS was sufficiently specific.

A size protest must contain specific facts to provide reasonable notice of the grounds upon which the protested concern's size is questioned. 13 C.F.R. § 121.1007(b); *Size Appeal of Jacob-Reliable Enterprises*, SBA No. SIZ-4836 (2007). While Appellant's request that SBA "check the revenue standard of the apparent successful bidder" in isolation would be insufficiently specific, Appellant explained that its concern arose "as a result of [Appellant's] CCR registration inquiry and a market profile report of Wastren Advantage issued by Inc 500." Protest, at 1-2. It is unclear from the Record whether Appellant attached these public documents to this protest; the documents were attached to the October 1, 2007 UDS protest, which was ultimately forwarded to DOE. Regardless, Appellant's protest included adequate notice of the grounds upon which it protested Wastren's size, and contained specific factual allegations as a basis for those grounds. Therefore, I hold the protest was sufficiently specific. *See Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430, at 6 (2001).

OHA remands appeals to the Area Office for a size determination when the Area Office commits clear error in dismissing a protest on specificity grounds. *See Size Appeal of Gate Engineering Corporation*, SBA No. SIZ-4655 (2004). I find the Area Office committed clear error in dismissing the protest for lack of specificity. Accordingly, I VACATE the dismissal of Appellant's protest and REMAND the case to the Area Office for a new size determination.

## V. Conclusion

For the above reasons, I VACATE the Area Office's dismissal of Appellant's size protest and REMAND the instant appeal to the Area Office. The Area Office is instructed to conduct a full size determination.

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THOMAS B. PENDER  
Administrative Judge