

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

SIZE APPEAL OF:

Environmental Protection Certification
Co., Inc.

Appellant

Appealed from
Size Determination No. 2-2008-03

SBA No. SIZ-4915

Decided: March 14, 2008

ORDER DISMISSING APPEAL AS UNTIMELY¹

I. Background

On January 19, 2007, the Department of Veterans Affairs, Southern Arizona VA Health Care System, Tucson, Arizona (VA) issued Solicitation No. VA-678-07-RP-0010 (RFP) as a total small business set-aside. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 562112, Hazardous Waste Collection, with a corresponding \$11.5 million size standard as the applicable NAICS code for the RFP. On September 20, 2007, the Contracting Officer (CO) notified an unsuccessful offeror, Sure-Way Systems, Inc. (Sure-Way), that Environmental Protection Certification Company, Inc. (Appellant) was the apparent successful offeror.

On September 27, 2007, Sure-Way protested Appellant's size with the CO, asserting that Appellant was unduly reliant on its subcontractor, Stericycle, Inc (Stericycle). On October 15, 2007, the CO forwarded the protest to the Small Business Administration's (SBA) Office of Government Contracting, Area II, in Philadelphia, Pennsylvania (Area Office).

On February 8, 2008, the Area Office issued Size Determination No. 2-2008-03 (size determination) finding Appellant unduly reliant upon and thus affiliated with Stericycle under 13 C.F.R. § 121.103(h)(4). Accordingly, the Area Office found Appellant other than small for the instant procurement.

On February 8, 2008, Appellant received the size determination. Appeal, at 1. On February 29, 2008, Appellant appealed the size determination at the SBA Office of Hearings and

¹ 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.

Appeals (OHA). On March 6, 2008, Appellant was ordered to show cause why the appeal should not be dismissed as untimely because it was filed more than 15 days after Appellant received the size determination.

On March 12, 2008, Appellant filed a response to the Order to Show Cause. Appellant contends it relied upon 13 C.F.R. § 134.103(a) in excluding Saturdays, Sundays, and a federal holiday in calculating the deadline for filing its appeal. Appellant asserts the regulation is ambiguous whether the exclusion of weekends and holidays applies to the entire 15-day period or merely the last day of the deadline. Accordingly, since the regulation is ambiguous, Appellant urges OHA to not dismiss the case.

Appellant also argues that the Judge may modify the time limit for filing an appeal under 13 C.F.R. § 134.103(b) because “there is no statutory deadline and the issue does not concern the commencement of the case, but rather the commencement of the appeal.” Finally, Appellant argues dismissal is inappropriate under 13 C.F.R. § 134.304(b) as Appellant intends to contest the size determination with respect to future procurements.

II. Discussion

In accordance with 13 C.F.R. § 134.304(a)(1), a size appeal in a pending procurement must be filed within 15 days after an appellant receives the size determination.² Contrary to Appellant’s argument, the appropriate regulation unambiguously defines “day” as a calendar day unless the Judge specifies otherwise. 13 C.F.R. § 134.101. Further, in calculating time periods, “The day from which the time period is computed is excluded, but the last business day is counted, excluding Saturday, Sunday, or Federal holiday.” 13 C.F.R. § 134.103(a).

Accordingly, weekend days and federal holidays are calendar days that are included in the timeline calculus. 13 C.F.R. § 134.101. However, if the last day (due date) falls on a weekend or federal holiday, then the last day falls on the next business day. 13 C.F.R. § 134.103(a); *see also Size Appeal of PM Services Company*, SBA No. SIZ-4878 (2008).

Thus, Appellant’s appeal should have been filed (received at OHA) no later than 15 calendar days after February 8, 2008, *i.e.*, February 25, 2008.³ *See* 13 C.F.R. §§ 134.101, 134.304(a)(1). Instead, Appellant filed its appeal on February 29, 2008; the appeal is thus untimely and I must dismiss it. 13 C.F.R. §§ 134.103(b), 134.304(b). I have no discretion to waive the time limit for filing an appeal. The regulation specifically provides “the Judge may modify any of the applicable time limits, *other than* those established by statute and *those governing when a case may be commenced.*” 13 C.F.R. § 134.103(b) (emphasis added). Appellant’s argument that there is a distinction between commencing a case and commencing an

² As long as there is a continuing procurement action to meet the federal government’s needs, even if the contract has been awarded, there is a pending procurement. *See Size Appeal of Blaine Larsen Farms, Inc.*, SBA No. SIZ-4743 (2005).

³ Fifteen calendar days after February 8, 2008, is February 23, 2008, a Saturday. Pursuant to 13 C.F.R. § 134.103(a), the due date falls to the next business day, Monday February 25, 2008.

appeal defies logic.

Appellant also contends that dismissal is unjustified because “the appeal is timely under 13 C.F.R. § 134.304(b) as [Appellant] intend[s] to contest the size determination with respect to future procurements.” This argument is without merit because the size determination involved a contract-specific issue, *i.e.*, Appellant’s undue reliance on its subcontractor to perform the instant solicitation. Accordingly, the size determination only applies to the instant procurement. Therefore, there is nothing for Appellant to appeal with regard to future procurements as the size determination explicitly states that Appellant is other than a small concern for the *subject* procurement.

III. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DISMISS the instant appeal as untimely.

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

THOMAS B. PENDER
Administrative Judge