

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

SIZE APPEAL OF:

S4, Inc.

Appellant

Appealed from

Size Determination Case No. 1-SD-2008-17

SBA No. SIZ-4959

Decided: June 27, 2008

APPEARANCE

Ronald S. Perlman, Esq., and Ralph C. Thomas, Esq., Buchanan Ingersoll & Rooney PC, Washington, D.C., for Appellant.

Laurel A. Hockey, Esq., Cohen Mohr LLP, Washington, D.C., for EMW, Inc.

DECISION

HOLLEMAN, 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 size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Size Determination

On January 7, 2008, the Small Business Administration (SBA) 8(a) Business Development Office (8(a) BD Office) in Boston, Massachusetts, requested the Office of Government Contracting, Area I (Area Office), in Melville, New York, perform a formal size determination on S4, Inc., (Appellant). The initial request was not identified with any pending procurement. The 8(a) BD Office believed Appellant may be affiliated with other firms due to a

recent size determination on a business owned by Appellant's owners' sister. The Area Office informed the 8(a) BD Office that the Area Office does not perform formal size determinations based on primary North American Industry Classification System (NAICS) codes of an 8(a) company already in the 8(a) program because the business may be large for its primary NAICS code, but small for other NAICS codes under which it performs federal contracts.

The 8(a) BD Office revised its request for a formal size determination. The 8(a) BD Office indicated Appellant is in line for award of Solicitation No. USSS040042 (solicitation), issued by the United States Secret Service (Secret Service) on August 6, 2004, and assigned NAICS code 541513, with a corresponding size standard of \$23 million. Appellant certified as a small business for the procurement on December 4, 2007.

On February 7, 2008, the Area Office issued Size Determination No. 1-SD-2008-017 (size determination) finding Appellant to be other than small under the relevant size standard. According to the size determination, Appellant is 85% owned by Chandu Shah, Appellant's president, and 15% owned by Venilal Sumaria. The size determination notes Mr. Shah and Mr. Sumaria are brothers. The size determination states Mr. Sumaria is also the 74% owner of Sumaria Systems and Sumaria Networks. Mr. Shah's and Mr. Sumaria's sister, Kamala Gudka, owns Cliffside Systems, which was found to be other than small for the \$6.5 million size standard on December 18, 2007, due to affiliation with Appellant, Sumaria Systems, and Sumaria Networks. The Area Office stated all the companies are in "similar lines of business and transact business with each other." Size Determination, at 5. The Area Office asserted that Appellant was unable to establish a clear line of fracture among family members in business affairs. Ultimately, the Area Office found Appellant to be affiliated with Sumaria Systems, Sumaria Networks, and Cliffside Systems based on the identity of interest rule and determined Appellant to be other than small for the \$23 million size standard.

B. Appeal

On February 22, 2008, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant argued the Area Office size determination was based on clear error. Appellant asserted the size determination ignored clear evidence of fracture between family members and penalized two independent brothers for shared ownership even though such ownership is permissible under 8(a) ownership regulations. Moreover, Appellant argued the size determination improperly relied on the size determination performed on Appellant's owners' sister's business, Cliffside Systems.

On March 12, 2008, Appellant filed a Supplemental Appeal Petition and Motion to Submit New Evidence. Appellant argued, in accordance with 13 C.F.R. § 121.1004(e), the size determination must be dismissed as premature because the protest was filed before offerors were notified of the apparent successful offeror. Appellant also requested the Secret Service's contract specialist's March 11, 2008 email, notifying Appellant of award to EMW, Inc. (EMW), be included in the record.

On March 26, 2008, EMW moved to intervene in the appeal. On March 28, 2008, I granted EMW's Motion to Intervene and issued a Protective Order in the case. On April 2, 2008, I admitted EMW's outside counsel under the Protective Order.

On April 8, 2008, EMW's counsel filed an opposition to Appellant's Appeal and Supplemental Appeal Petition. EMW argued SBA properly assessed Appellant's size. EMW stated the preaward notice required by 13 C.F.R. § 121.1004(e) and cited by Appellant is inapplicable to 8(a) competitive procurements. EMW also asserted the size determination issued by the Area Office is not reliant on the Cliffside Systems size determination as suggested by Appellant. Moreover, EMW argued the size determination is well-founded in fact and law and Appellant failed to rebut the identity of interest of family members.

On April 16, 2008, Appellant filed a reply to EMW's Opposition to Appellant's Appeal and Supplemental Appeal Petition. Appellant reiterated its argument that the size determination was premature and that the Area Office failed to notify Appellant that it was questioning Appellant's size in relation to the Secret Service's solicitation. Appellant reasserted that notice of award is required before SBA can initiate a size protest action and that SBA unfairly based its analysis on an earlier adverse size determination finding Cliffside Systems other than small.

On June 5, 2008, I requested SBA Office of General Counsel clarify procedural issues raised by the appeal. Specifically, I asked SBA: (1) to identify the type of procurement Solicitation No. USSS040042 is and whether it is a competitive 8(a) procurement; (2) whether the official initiating the size determination had authority to do so; and (3) whether the size determination was issued prematurely, under 13 C.F.R. § 134.304(a).

On June 13, 2008, SBA filed its comments. SBA stated the Secret Service's solicitation is a competitive 8(a) procurement and the SBA official who initiated the size determination had authority to do so. However, the SBA acknowledged that the size determination was premature because the Secret Service requested an eligibility determination for two concerns in a single-award 8(a) procurement. SBA notes, in accordance with 13 C.F.R. § 121.1004(e), a protest filed by any party before notification of the apparent awardee "will be dismissed as premature."

On June 19, 2008, EMW replied to SBA's comments. EMW disagreed with SBA's conclusion that the size protest was premature. EMW asserts that the predicate to finding a protest premature under 13 C.F.R. § 121.1004(e) does not apply because Federal Acquisition Regulation (FAR) 15.503(a)(2)(iii) does not require preaward notifications for 8(a) contracts. Additionally, EMW argues that although the Secret Service deviated from the requirements of 13 C.F.R. § 124.507(b)(3) by requesting simultaneous size determinations for Appellant and EMW, the SBA process was the same as if the Secret Service had made separate requests and Appellant was not harmed by the Secret Service's concurrent request. EMW asserts there is no benefit in vacating the size determination and requiring SBA to perform a new size determination. Finally, EMW argues the Appeal should be dismissed as moot because the contract was awarded to EMW and contract performance initiated.

On June 20, 2008, Appellant responded to SBA's comments. Appellant asserts the size determination must be reversed because SBA has conceded the size protest was premature. Appellant disputes SBA's claim that the Lead Business Development Specialist had authority to initiate the size determination. Additionally, Appellant states SBA's assertion of the facts indicate the Area Office did not determine the size of Appellant as of Appellant's initial offer to the solicitation, as required by the regulations, and Appellant argues if the Area Office used the correct date Appellant would have been found to be small. Appellant reasserts its concerns regarding SBA's reliance on the Cliffside Systems size determination.

IV. Discussion

Appellant filed the appeal within 15 days of receiving the size determination. Thus, it is timely. *See* 13 C.F.R. § 134.304(a).

The threshold issue in this appeal, which ultimately is dispositive, is whether the 8(a) BD Office's request for a size determination was initiated at the appropriate time.

The regulation, 13 C.F.R. § 121.1004(e), requires a size protest filed by any party before notification of the successful offeror to be dismissed as premature.¹ *Size Appeal of Department of the Air Force*, SBA No. SIZ-4720 (2005); *Size Appeals of IQ Solutions, Inc., and Substance Abuse and Mental Health Administration, Department of Health and Human Service*, SBA No. SIZ-4711, 3 (2005); *Size Appeal of Barbosa Group Incorporated d/b/a Executive Security*, SBA No. SIZ-4565 (2003). Notification may be either the preaward notice or, if none is issued, the notice of award itself. *Barbosa*, SBA No. SIZ-4565, at 3. OHA vacates and grants the appeal when an Area Office issues a size determination in response to a size protest filed prior to the notice to the unsuccessful offerors of the identity of the successful offeror. *Id.*

Here, the record is clear that the Secret Service had not issued a preaward notice before the Area Office issued its size determination. In fact, the Secret Service issued notice of award after the size determination was issued while this appeal was pending. Thus, in accordance with 13 C.F.R. § 121.1004(e), the SBA's protest was filed prior to any notice of an apparent successful offeror and is premature.

SBA was explicit when it promulgated the regulation. SBA stated that by restricting the filing of size protests until an apparent successful offeror is identified "SBA does not impose the burdens of an unnecessary size investigation on other offerors or expend its limited resources rendering size determinations that are unlikely to have any practical significance for the procurement in question." 59 Fed. Reg. 39,426, 39,427 (Aug. 3, 1994).

¹ The provision of the regulation on protests by contracting officers and SBA, 13 C.F.R. § 121.1004(b), reiterates that the timing of SBA protests are specifically limited by 13 C.F.R. § 121.1004(e). The regulation does include a specific exception to allow the contracting officer or SBA to file a protest in anticipation of award for purposes of the Small Business Innovation Research (SBIR) program. 13 C.F.R. § 121.1004(b). However, the SBIR exception is inapplicable in this case.

Because the size protest in this case was premature, 13 C.F.R. § 121.1004(e), the Area Office erred in evaluating Appellant's size and issuing a size determination. There are no provisions which permit SBA to waive the regulations.

EMW's argument that 13 C.F.R. § 121.1004(e) is inapplicable because FAR § 15.503 does not require preaward notices in 8(a) competitive procurements is unpersuasive. The importance of 13 C.F.R. § 121.1004(e), as expressed in SBA's policy in promulgating the regulation, does not hinge on notice, but on the selection of an apparent successful offeror; SBA's intention, as expressed in its commentary on the regulation, was to prevent unnecessarily burdening businesses with size investigations and to focus SBA's resources on businesses where it is clear they are the potential awardees. Moreover, OHA has previously held "notification may be either the preaward notice or, if none is issued, the notice of award itself." *Barbosa*, SBA No. SIZ-4565, at 3.

Additionally, EMW's argument that OHA's previous cases regarding 13 C.F.R. § 121.1004(e) "are easily distinguished and provide no legal basis for OHA to vacate and reverse the size determination" is overstated. EMW's Opposition, at 5. Although the OHA cases Appellant relies on do not involve 8(a) procurements, the decisions do analyze and enforce SBA's procedural regulations for size protests and requests for formal size determinations which are applicable to 8(a) procurements.

Accordingly, I vacate the size determination and grant the instant appeal. Due to the disposition of this case on procedural grounds, it is unnecessary to rule on Appellant's Motion to Submit New Evidence in the Record. Similarly, even though a Protective Order was issued in this case, this decision is not being issued under the Protective Order because the decision does not incorporate proprietary information.

V. Conclusion

For the above reasons, I VACATE the Area Office's size determination and GRANT the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge