

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

SIZE APPEAL OF:

Jupiter Corporation

Appellant

Appealed from

Size Determination No. 02-2010-01

SBA No. SIZ-5095

Decided: December 1, 2009

APPEARANCE

Lawrence J. Sklute, Esq., Sklute & Associates, Potomac, Maryland, for Appellant

DECISION

I. Introduction and Jurisdiction

Jupiter Corporation (Appellant) appeals Size Determination No. 02-2010-01 (Size Determination) issued by SBA's Office of Government Contracting, Area Office II (Area Office). The Area Office determined Appellant exceeded the size standard applicable to the procurement and was thus other than small. For the reasons discussed below, this appeal is dismissed.

OHA decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA.

II. Issue

May Appellant assert a size protest lacked specificity upon appeal when it did not make such an assertion in response to the size protest? (13 C.F.R. § 134.316 (a))

III. Background

A. Facts

1. On August 12, 2009, the Transportation Security Administration, Office of Acquisition, in Arlington, Virginia (TSA), issued Request for Proposals (RFP) No. HSTS03-09-R-SEC070, for Personnel Suitability & Security Adjudicative Support Services.

The TSA set the RFQ aside for small businesses, with a North American Industrial Classification System code of 561611 and a size standard of \$12.5 million. Offers were due on August 26, 2009 (later changed to August 28, 2009 in RFP Amendment 001).

2. On September 29, 2009, Corbin Company (Corbin) protested Appellant's size to the Contracting Officer, noting the \$12.5 million size standard applicable to the RFP. Corbin explained it received notice that Appellant was the successful bidder in a letter dated September 25, 2009. Corbin expressed surprise TSA awarded Appellant a contract resulting from the RFP as a small business, because Appellant's web site claimed it was a "mid-sized company." Corbin requested SBA verify Appellant's revenue for the three most recent years as per SBA's size standards.<sup>1</sup>

3. On October 5, 2009, the Area Office requested Appellant complete a SBA Form 355 and provide tax returns verifying its revenues. The Area Office provided Appellant with a copy of Corbin's September 29, 2009 protest.

4. Appellant responded to the Area Office's request in a letter dated October 6, 2009. Appellant's only substantive reply to Corbin's protest was:

We understand that the Corbin Company challenged JUPITER's business size as a result of a statement in JUPITER's web site characterizing the company as "mid-size." The challenge has no basis in this case because the web site information was based on a NAICS Code size standard of \$7.5 million, whereas JUPITER's bid in the instance cited above was under NAICS Code 561611 with a size standard of \$12.5 million.

Appellant made no other response to the Corbin's protest, such as to challenge the specificity of the protest.

5. The Record establishes that Appellant's average annual revenue for the three most recent and thus relevant years exceeds \$12.5 million.

#### B. The Size Determination

On October 29, 2009, the Area Office issued the Size Determination in which it determined Appellant was other than small under NAICS code 561611 because Appellant's average annual revenues for the past three years exceeded \$12.5 million. The Area Office also found the underlying protest was timely and specific.

#### C. The Appeal

Appellant filed the instant appeal on November 5, 2009. Appellant bases its appeal upon the premise that the Area Office erred by finding Corbin's size protest to be specific. Instead,

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<sup>1</sup> The Record does not contain sufficient information as to whether the contracting officer complied with FAR 15.503(a)(2) before awarding the contract to Appellant.

Appellant argues Corbin's protest violates 13 C.F.R. § 121.1007(b). Moreover, Appellant alleges Corbin premised its appeal upon facts (an increase in employee ownership) that are inapposite of the revenue based standard applicable to the RFP and thus it could not be specific under 13 C.F.R. § 121.1007(b). Finally, Appellant does not contest that it exceeds the size standard applicable to the RFP in its appeal.

#### IV. Discussion

##### A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

##### B. Standard of Review

The standard of review for this appeal is whether the Area Office based the Size Determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. Consequently, I will disturb the Area Office's Size Determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

##### C. Analysis

The Area Office provided Corbin's protest to Appellant (Fact 3). Appellant responded to the protest, but failed to challenge any lack of specificity in Corbin's protest. Instead, Appellant challenged the factual basis of Corbin's protest by arguing its statement in its web site that it was a mid-sized business did not apply to the NAICS code applicable to the RFP. (Fact 4).

An unsuccessful offeror must file a size protest within five days after a contracting officer notifies it of the identity of the prospective awardee. (13 C.F.R. § 121.1004) Because: (a) 13 C.F.R. § 121.1007(c) requires area offices to dismiss a non-specific protest; and (b) Area Offices have at least ten days to issue a size determination (13 C.F.R. § 121.1009(a), dismissal of a non-specific protest invariably means a dismissed protest need not be considered. Hence, a determination of a lack of specificity is substantive.

OHA may not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(a). Nevertheless, Appellant challenges the specificity of Corbin's protest on appeal without having challenged the specificity of its protest when the Area Office provided the protest to it (Facts 3 and 4). Accordingly, I cannot consider Appellant's appeal and it must be DISMISSED.

V. Conclusion

For the foregoing reasons, Appellant's appeal is DISMISSED. Since the Area Office has determined Appellant exceeds the \$12.5 million size standard applicable to the RFP, a matter uncontested by Appellant, I hold Appellant was not eligible to compete for award of a contract arising under this RFP and that TSA may not count award of the contract to Appellant toward any set-aside goals.

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

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THOMAS B. PENDER  
Administrative Judge