

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

SIZE APPEAL OF:

Log In Systems, Inc.
Appellant

Appealed from
Size Determination No. 2-2009-102

SBA No. SIZ-5130

Decided: May 6, 2010

ORDER DISMISSING APPEAL

On March 22, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2009-102 (Size Determination) finding that Log In Systems, Inc. (Appellant), is an other than small concern under the \$7 million size standard applicable to Solicitation No. HSCEMS-09-R-00004 (RFP), which was issued by the Department of Homeland Security. The Area Office notified Appellant of a size protest in a letter dated September 23, 2009. In the September 23, 2009, letter, the Area Office notified Appellant that it was required to submit an SBA Form 355 and other information. Appellant failed to respond to the Area Office. Based upon Appellant's lack of response, the Area Office "presume[d] that disclosure of the information . . . would demonstrate that [Appellant] is an other than small business," as permitted by 13 C.F.R. § 121.1008(d), and issued the Size Determination finding Appellant was other than small.

Appellant indicates that it received the Size Determination on March 23, 2010, and it appealed the Size Determination on April 22, 2010.¹ Appellant claims its appeal is timely because it was filed within thirty days of the receipt of the Size Determination, pursuant to 13 C.F.R. § 134.304(a)(2). Subsection (a)(2) applies to procurements that are not pending. In *Size Appeal of Blaine Larsen Farms, Inc.*, SBA No. SIZ-4743 (2005), OHA found that "a procurement remains pending even after award of a contract." *Id.* at 6 (citing *Size Appeal of Witter Mfg., Inc.*, SBA No. SIZ-4624 (2004); *Size Appeal of MBI Corp.*, SBA No. SIZ-4375 (1999)). Here, Appellant indicates it was awarded the instant one-year (plus three option years) contract in August, 2009. Thus, this procurement is pending, and it is 13 C.F.R. § 134.304(a)(1) that governs the timeliness of an appeal. Subsection (a)(1) requires an appeal to be filed within fifteen days of the receipt of the Size Determination. Appellant did not meet this fifteen day requirement, and 13 C.F.R. § 134.304(b) provides that untimely appeals "will be dismissed."

¹ OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

Nevertheless, 13 C.F.R. § 134.304(b) also provides that “an appeal which is untimely under paragraph (a)(1) of this section, with respect to a pending procurement or sale, may, if timely under paragraph (a)(2) of this section, proceed with respect to future procurements or sales.” Appellant satisfied the thirty day time limit set forth in subsection (a)(2). Pursuant to this provision, and because Appellant’s size under this size standard has future applicability, I will discuss the merits of Appellant’s appeal.

Even upon consideration of the merits of the appeal, I find it must be dismissed. OHA reviews a size determination issued by an SBA area office to determine whether it is “based on clear error of fact or law.” 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Under 13 C.F.R. § 134.305(a)(3), Appellant must submit an appeal containing “[a] full and specific statement as to why the size determination . . . is alleged to be in error, together with argument supporting such allegations.” Further, 13 C.F.R. § 134.305(e) provides: “An appeal petition which does not contain all of the information required in paragraph (a) of this section may be dismissed, with or without prejudice, by the Judge at his or her own initiative, or upon motion of a respondent.”

The Appeal Petition in this matter does not allege any error by the Area Office. Rather, Appellant indicates disagreement with the Size Determination, but does not address the substance of the Size Determination. That is, Appellant does not challenge the Area Office’s use of an adverse inference. Nor has Appellant proffered any explanation as to why it did not respond to the Area Office’s September 23, 2009, letter other than to allude to the fact that the illness of its owner prevented it from responding. Because Appellant failed to allege clear error, its appeal will be dismissed. *See, e.g., Size Appeal of American Woolen Co. Int’l, Inc.*, SBA No. SIZ-5094 (2009); *Size Appeal of ALROD Enters., Inc.*, SBA No. SIZ-4704 (2005). In any event, I would not sustain the appeal even if Appellant had alleged that the Area Office erred in applying 13 C.F.R. § 121.1008(d). Illness does not provide an exemption from the requirement that a firm must respond to a size protest, and because Appellant made no request for additional time to the Area Office, Appellant has no valid legal excuse for not responding.

Finally, Appellant submitted with its Appeal Petition a Motion for Extension of Time and for Leave to File New Evidence not later than May 6, 2010. Appellant claims that it is unclear what protest generated the Size Determination, although it admits it was aware of a protest filed by Eagle Optimization Solutions (Eagle) in September, 2009. In admitting it was aware of the Eagle protest, Appellant submits that it has undergone significant corporate changes since that time and requests it be allowed to submit new evidence for good cause shown.

There are two reasons why I cannot allow Appellant to submit the kind of evidence it seems to be proffering. First, when, as here, an Appellant fails to respond to a protest letter and an Area Office takes an adverse inference, it is not appropriate to expand the record. The purpose of an adverse inference is to provide a negative consequence to those who fail to timely respond to a request for information by SBA during the size determination process. *See* 13 C.F.R. §§ 121.1008(d); 121.1009(d). If I were to permit Appellant to submit now the evidence that the Area Office’s September 23, 2009, letter required it to produce months ago, I would be voiding 13 C.F.R. § 121.1008(d), and such an action would completely defeat the

purpose of the adverse inference.²

Second, SBA determines a concern's size at the time it submits its initial offer, including price. (13 C.F.R. § 121.404(a)). Accordingly, to the extent that Appellant's corporate condition may have changed since September, 2009, those changes are likely irrelevant. Therefore, because Appellant has not explained how its proffer is relevant in light of 13 C.F.R. § 121.404(a), I conclude it has not shown good cause and decline to permit it to introduce additional evidence.

In sum, Appellant failed to: (1) explain how the Area Office committed any clear error of fact or law; and (2) offer any explanation for its failure to respond to the Area office's September 23, 2009, letter, which lead to an adverse inference being taken against it. For these reasons, the appeal will be dismissed. Appellant has also requested leave to submit new evidence. Because admitting that evidence would void 13 C.F.R. § 121.1008(d) and is likely to be irrelevant under 13 C.F.R. § 121.404(a), Appellant's motion must be denied.

For the foregoing reasons, Appellant's Motion for an Extension of Time and Leave to File New Evidence is DENIED, and the instant appeal is DISMISSED. Appellant remains ineligible for award of any contract arising from the RFP, as well as any contracts employing a \$7 million or smaller size standard. Accordingly, the Department of Homeland Security should not include award of the contract awarded as the result of the RFP toward its small business goals.

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

THOMAS B. PENDER
Administrative Judge

² Size Determinations have the ability to impede the procurement process if not timely carried out. Area offices have a very short time to issue a size determination because procurements are delayed during the protest process. *See* 13 C.F.R. § 121.1009(a). Therefore, protested concerns must timely respond to area office requests for the system to work.