

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

SIZE APPEAL OF:

A-Top Security Company

Appellant

RE: LOGMET, LLC

Appealed from  
Size Determination No. 05-2011-034

SBA No. SIZ-5227

Decided: April 18, 2011

**ORDER DISMISSING APPEAL**

**I. Background**

On April 14, 2010, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA3047-10-R-0009 seeking a contractor to operate the official mail center, the postal service center, and the central mail room at Lackland Air Force Base. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification (NAICS) System code 491110, Postal Service, with a corresponding size standard of \$7 million in average annual receipts. On February 16, 2011, offerors were notified that LOGMET, LLC (LOGMET) was the apparent successful offeror. On February 18, 2011, A-Top Security Company (Appellant), an unsuccessful offeror, filed a protest with the CO alleging that LOGMET is not a small business.

On March 11, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2011-034 finding that LOGMET is a small business for the procurement at issue. Because LOGMET submitted its initial offer including price for this procurement on May 11, 2010, the Area Office calculated LOGMET's size by averaging the company's receipts, as reported on its federal income tax returns, for the years 2007, 2008, and 2009. 13 C.F.R. §§ 121.104(a), 121.104(c)(1), 121.404(a). The Area Office concluded that LOGMET's average annual receipts fall within the applicable \$7 million size standard.

Appellant filed an appeal of the size determination with the SBA Office of Hearings and Appeals (OHA), and the appeal was received by OHA on March 29, 2011. Appellant filed additional documents to supplement its appeal through April 11, 2011. Appellant contends the Area Office used the incorrect years to calculate LOGMET's size. Appellant also challenges the Air Force's evaluation of proposals and the decision to award to LOGMET. Appellant argues

the contract should have been awarded to Appellant. Finally, Appellant requests clarification as to why the contract was awarded to LOGMET.

On April 11, 2011, I issued an Order to Show Cause directing Appellant to demonstrate why its appeal should not be dismissed as untimely. I explained that an email sent by Mr. Anthony Q. Samuel, Appellant's owner, to Ms. Stephanie J. Lewis, a size specialist in the Area Office, indicates that Appellant received the size determination on March 12, 2011.<sup>1</sup> The instant appeal petition is dated March 18, 2011, and was transmitted to OHA via the U.S. Postal Service. The envelope is postmarked March 22, 2011, but it was not received by OHA until March 29, 2011.

On April 13, 2011, Appellant filed its response to the Order to Show Cause. Appellant alleges the Area Office made various errors during the size determination process that favored LOGMET. Specifically, Appellant asserts LOGMET was improperly given extra time to respond to Appellant's initial protest. Appellant acknowledges that the Area Office directed Appellant's attention to the appeal provisions in the electronic Code of Federal Regulations (CFR), but argues that the electronic CFR website provides that it is "not an official legal edition of the CFR."<sup>2</sup> Appellant claims it contacted the Area Office for clarification as to when its appeal was due but received no response. Finally, Appellant contends it mailed its appeal on March 22, 2011, so it should have arrived to OHA in a timely fashion.

On April 13, 2011, LOGMET filed its response to the appeal. LOGMET argues the appeal is untimely. LOGMET further contends OHA does not have subject matter jurisdiction over Appellant's challenges regarding the Air Force's evaluation of offers. Finally, LOGMET asserts that Appellant's allegation of errors in the calculation of LOGMET's average annual receipts is incorrect.

## II. Discussion

Appellant was required to file any appeal within fifteen calendar days of its receipt of the size determination. 13 C.F.R. § 134.304(a). In this case, Appellant received the size determination on March 12, 2011. Fifteen calendar days after March 12, 2011, was March 27, 2011. Because March 27, 2011, was a Sunday, the appeal petition was due on the next business day: Monday, March 28, 2011. 13 C.F.R. § 134.202(d). The appeal petition was received by OHA on March 29, 2011, and therefore is untimely. The regulations are clear that an appeal petition is not "filed" until it is actually received at OHA. 13 C.F.R. § 134.204(b). Furthermore, OHA has no discretion to waive the deadline for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c); *Size Appeal of Applied Tech., Inc.*, SBA No. SIZ-4682 (2005).

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<sup>1</sup> Appellant observes that the Order to Show Cause mistakenly listed the date of receipt as March 11, 2011, rather than March 12, 2011. As explained below, however, the appeal is still untimely even using the March 12, 2011 date.

<sup>2</sup> The electronic CFR may be accessed at <http://www.gpoaccess.gov/ecfr/>.

Appellant's response to the Order to Show Cause fails to offer any valid basis to accept an untimely appeal. Contrary to Appellant's claims, no special consideration was given to LOGMET. The regulations governing the size determination process provide that a protested concern must submit all requested information to the Area Office "within 3 working days from the date of receipt" of the Area Office's request. 13 C.F.R. § 121.1008(c) (emphasis added). The size determination indicates that LOGMET received the request for information on March 2, 2011, and the record reflects that the Area Office received LOGMET's response on March 4, 2011. Thus, LOGMET complied with the applicable regulations.<sup>3</sup> In any event, whether LOGMET met its deadlines has no bearing on whether Appellant's appeal was timely.

Next, contrary to Appellant's suggestion, it is not the responsibility of the Area Office to advise Appellant of filing deadlines. In its letter accompanying the size determination, the Area Office notified interested parties of their appeal rights and directed them to the applicable regulations. It is settled law that all persons are charged with knowledge of Federal regulations, "regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). Thus, it was Appellant's responsibility to calculate and meet its filing deadlines according to the applicable regulations. If Appellant preferred not to rely upon the electronic CFR, it could have obtained an official copy of the CFR to calculate its deadline.

The fact that Appellant postmarked its appeal by the filing deadline likewise has no effect on its timeliness. In prior cases, OHA has consistently dismissed appeals that were postmarked before the applicable deadline, but not received until after the deadline. *See, e.g., Size Appeal of PM Servs. Co.*, SBA No. SIZ-4878, at 2 (2008) (dismissing an untimely appeal and noting "the postmark date of the appeal is irrelevant"); *Size Appeal of Brooke Ocean Tech. (USA), Inc.*, SBA No. SIZ-4827, at 2 (2006) ("The date of filing for pleadings is the date the filing is received at OHA, not when the filing is postmarked."). It was Appellant's responsibility to ensure that its appeal arrived at OHA before the filing deadline. Appellant could have ensured timely receipt of its appeal by filing its appeal via email or facsimile. 13 C.F.R. § 134.204(a). Appellant instead chose to submit its appeal by regular mail; SBA's regulations specifically warn that regular mail "is not recommended for time-sensitive filings." 13 C.F.R. § 134.204(a)(2).

Lastly, although not relevant to the issue of timeliness, I note that LOGMET is correct that OHA has no subject matter jurisdiction to adjudicate disputes relating to the Air Force's evaluation of proposals or award decision. *See generally* 13 C.F.R. § 134.102. Such matters are not within OHA's purview.

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<sup>3</sup> Appellant references *Size Appeal of Ecotope Env'tl. Servs., Ltd.*, SBA No. SIZ-5173 (2010), but that case is inapposite here. In *Ecotope*, the protested firm failed to file any response to the protest, and the area office therefore drew an "adverse inference" that the missing information would have been unfavorable to the protested firm. By contrast, in the instant case, LOGMET timely responded to the protest and the Area Office properly did not apply the adverse inference rule.

III. Conclusion

The instant appeal is untimely. Accordingly, this appeal is DISMISSED, and the Area Office's size determination remains in effect. 13 C.F.R. § 134.316(d).

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KENNETH M. HYDE  
Administrative Judge