

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

SIZE APPEAL OF:

Hummingbird Data Systems, LLC,  
d/b/a Hummingbird Solutions,

Appellant,

RE: Integrated System Diagnostics, Inc.

Appealed From  
Size Determination No. 1-SD-2012-005

SBA No. SIZ-5311

Decided: December 20, 2011

APPEARANCES

Dr. W. Nick Cline, President and Chief Executive Officer, Hummingbird Data Systems, LLC, d/b/a Hummingbird Solutions, Springfield, Virginia

DECISION

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 Area Office made clear error in dismissing Appellant's protest because Appellant had been eliminated from consideration for reasons other than size.

III. Background

On October 5, 2011, Hummingbird Data Systems, LLC, d/b/a Hummingbird Solutions (Appellant) protested the size of Integrated Systems Diagnostics, Inc. (ISD), the identified awardee for Mission and Installation Contracting Command, Fort Sill, Oklahoma, Solicitation No. W9124L-11-021, a small business set aside. The Contracting Officer forwarded Appellant's size protest to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office).

On October 19, 2011, the Area Office dismissed Appellant's size protest. The Area Office stated:

The contract requires vendors to provide quote on Standard Capability Maturity Model Integration Appraisal Method for Process Improvement (SCAMPI). The performance standards are predefined by Software Engineer Institute (SEI). SEI requires that appraisals are conducted by recognized and licensed SEI certified partners that are trained in the SCAMPI method.

The contracting officer has informed you that your offer was eliminated due to the fact that you are not listed as a certified partner with SEI. For this reason, your quote was determined to be non-responsive to the requirement and was not evaluated for technical capability.

Accordingly, the Area Office dismissed the protest based on 13 C.F.R. § 121.1001(a)(1), which does not permit offerors eliminated for reasons unrelated to size to file a size protest.

On October 22, 2011, Appellant requested the Area Office reconsider its decision. On October 24, 2011, the Area Office notified Appellant the Area Office would not change its dismissal decision. The Area Office explained 13 C.F.R. § 121.1009 requires the Area Office to swiftly issue size determinations and the Area Office must make a determination based on the facts presented at the time of the determination. The Area Office indicated it cannot make a decision pending the outcome of Appellant's protest challenging its elimination from consideration.

On October 28, 2011, the SBA Office of Hearings and Appeals (OHA) received an appeal petition from Appellant. Appellant appeals the Area Office's size determination dismissing Appellant's protest due to lack of standing.

Appellant alleges the Contracting Officer (CO) provided partial information that misled the Area Office and the size determination was based upon incorrect information. The Appellant acknowledges it was dismissed as non-responsive, but asserts the CO should have informed the Area Office that Appellant's dismissal for non-responsiveness was being contested.

On November 4, 2011, I issued an Order to Show Cause why the appeal should not be dismissed. On November 22, 2011, I reissued the Order due to a problem with service.

On December 2, 2011, Appellant responded to the Order to Show Cause. Appellant asserts that the CO should have accepted its representation in its bid that it was a small business, citing FAR 19.301-1. Appellant further argues that it could not be ruled out as an offeror, because it had protested its elimination from the procurement for the reasons unrelated to size. Appellant asserts the CO manipulated the flow of information, by not informing the Area Office of Appellant's appeal of its elimination from competition. Appellant asserts the regulation permits any firm the contracting officer has not eliminated for reasons related to size may protest, citing 13 C.F.R. § 121.1001(a)(1)(i). Appellant argues that because it was not eliminated due to its size, it has standing to protest. Appellant further asserts that even if it were eliminated

as an offeror it remains an interested party, and was still eligible to protest. Appellant further argues that it has standing to protest as an offeror under FAR 19.302.

#### IV. Discussion

##### A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

##### B. Merits of the Appeal

Appellant has misquoted the applicable regulation. The regulations governing standing to file protests in procurements states:

For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement has been restricted to or reserved for small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale, or order:

- (i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;
- (ii) The contracting officer;
- (iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located regardless of the location of a parent company or affiliates, or the Director, Office of Government Contracting; and
- (iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

13 C.F.R. § 121.1001(a).

The regulation thus specifically excludes protests from firms who have been eliminated from the process for reasons unrelated to size. Appellant's assertions are contrary to the regulation.

The CO notified the Area Office that Appellant had been eliminated from consideration for a reason unrelated to size; the fact that Appellant was not listed as a certified partner with SEI. This deprived Appellant of standing to file a size protest. The fact that Appellant was contesting its elimination does not confer standing upon it. Appellant had been eliminated at the time it protested ISD's size, and thus lacked standing. Size determinations must be made within 15 business days, if possible. 13 C.F.R. § 121.1009(a)(1). Therefore, the Area Office could not wait for the disposition of Appellant's challenge to its elimination. It was not clear error for the Area Office to act timely on Appellant's protest based upon the status of Appellant as an eliminated offeror at the time the Area Office had to act.

Appellant does not meet the standard of interested party set forth in § 121.1001(a)(1)(iv). The regulation's definition of interested party applies to special circumstances specified in the regulation, neither of which applies to Appellant. *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089, at 5 (2009). Further, the specific definition of a party eliminated from consideration for reasons unrelated to size applies to Appellant, and so it cannot take advantage of the more general category of interested party.

Appellant's selective quotations from the FAR are inapposite here. First, SBA's regulations, not FAR, are the applicable law on size protests. *Size Appeal of The Barbosa Group Inc.*, SBA No. SZI-4565, at fn. 1 (2003). Second, the FAR provisions Appellant relies upon are inapposite here, and do not deal with protests brought by offerors eliminated for reasons unrelated to size. FAR 19.301-1 deals with the representations made by offerors of their status, and is not applicable to the issue of standing to protest. FAR 19.302 deals with protests of small business representations, but size protests are governed by SBA's regulations. Appellant's allegations that the CO has manipulated the process here are beyond OHA's jurisdiction.

In sum, Appellant was eliminated from consideration for reasons unrelated to size, and thus had no standing to protest ISD's size. *Size Appeal of FitNet Purchasing Alliance*, SBA No. SIZ-5089 (2009). Although Appellant's appeal raises concerns about the CO's handling of Appellant's protest, Appellant's Appeal and its Response to the Order to Show Cause fail to establish any error in the size determination. As explained in the Area Office's decision on Appellant's request for reconsideration, the Area Office is required by regulation to promptly issue a size determination based on the facts before it. The Area Office made its determination based on the regulation and the fact, at that time, Appellant had been eliminated for reasons unrelated to size. Thus, the legal and factual basis for the Area Office determination is sound, even if Appellant is successful on its protest of its elimination from consideration.

The Area Office made no error in dismissing Appellant's protest, and I must deny Appellant's appeal.

### III. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge