

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

SIZE APPEAL OF:

The Trevino Group, Inc.,

Appellant,

Appealed From  
Size Determination No. 5-2013-038

SBA No. SIZ-5472

Decided: May 22, 2013

**ORDER DISMISSING APPEAL**<sup>1</sup>

**I. Background**

On February 14, 2013, the U.S. Department of Veterans Affairs (VA) issued solicitation VA257-13-B-0123 (IFB) for roof replacement at the VA Medical Center in Dallas, Texas. The Contracting Officer set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns, and assigned North American Industry Classification System (NAICS) code 238160, Roofing Contractors, with a corresponding size standard of \$14 million in average annual receipts.<sup>2</sup> Bids were opened on March 22, 2013, and The Trevino Group, Inc. (Appellant) was the lowest bidder. On March 29, 2013, A-Vet Roofing & Construction, LLC (A-Vet), the next-lowest bidder, submitted a protest of Appellant's size.

On Friday, April 19, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 5-2013-038. The Area Office found that Appellant's average annual receipts for the years under review exceeded \$14 million, so Appellant is not a small business. The Area Office sent copies of the size determination to Appellant by electronic mail and by UPS Next Day Air. The copy sent via UPS was guaranteed to arrive at Appellant's address no later than Monday, April 22, 2013.

On May 13, 2013, SBA's Office of Hearings and Appeals (OHA) received Appellant's appeal of the size determination by electronic mail. Because the appeal appeared to have been filed more than fifteen days after Appellant's receipt of the size determination, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely.

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<sup>1</sup> 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.

<sup>2</sup> The IFB mistakenly stated that the size standard was \$33.5 million. The Area Office found the \$14 million size standard to be applicable, and utilized that size standard in the size determination.

On May 16, 2013, A-Vet responded to the appeal. A-Vet urges OHA to dismiss the appeal as untimely under 13 C.F.R. § 134.304. Alternatively, A-Vet contends that the appeal should be dismissed or denied because the appeal fails to provide a full and specific statement as to why the size determination is alleged to be erroneous, as required by 13 C.F.R. § 134.305(a)(3).

On May 20, 2013, Appellant responded to the order to show cause. Appellant does not argue that its appeal was timely filed, nor does Appellant identify the date it received the size determination. Rather, Appellant focuses on the timeliness of A-Vet's protest. According to Appellant, A-Vet's protest concerned an alleged solicitation defect, and therefore should have been filed before bid opening pursuant to U.S. Government Accountability Office (GAO) regulations.

## II. Discussion

The instant appeal is untimely and must be dismissed. In accordance with 13 C.F.R. § 134.304(a), a size appeal must be filed at OHA within fifteen days of receipt of the size determination. Here, the Area Office transmitted the size determination to Appellant by electronic mail on April 19, 2013. In addition, the Area Office sent the size determination to Appellant by UPS Next Day Air, with delivery guaranteed by Monday, April 22, 2013. Appellant does not deny receiving these transmissions. Thus, assuming Appellant did not actually receive the size determination until April 22, 2013, any appeal of the size determination would have been due by Tuesday, May 7, 2013. Appellant's appeal was received at OHA approximately a week later, on May 13, 2013. Accordingly, the appeal is plainly untimely. OHA has no discretion to waive, or extend, the deadline for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c); *Size Appeal of Autonomic Resources, LLC*, SBA No. SIZ-5453 (2013).

Appellant asserts that A-Vet's protest was untimely because GAO regulations required the protest to be filed before bid opening. This argument is meritless. GAO regulations are not applicable to size protests and size appeals. Under SBA regulations, a size protest of a sealed bidding procurement is timely if "received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening." 13 C.F.R. § 121.1004(a)(1). Here, A-Vet's size protest was filed five business days after bid opening, and therefore was timely. Further, it would not have been possible for A-Vet to bring a size protest prior to bid opening, because A-Vet would not yet have known the identity of the apparent awardee. SBA regulations specifically state that a size protest filed prior to bid opening "will be dismissed as premature." 13 C.F.R. § 121.1004(e).

For the above reasons, I DISMISS the instant appeal as untimely. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge