

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

SIZE APPEAL OF:

Navarro Research and Engineering, Inc.,

Appellant,

Appealed From
Size Determination Nos. 3-2013-051 and
-052

SBA No. SIZ-5473

Decided: May 29, 2013

ORDER DISMISSING APPEAL¹

This appeal arises from a size determination concluding that Navarro Research and Engineering, Inc. (Appellant) is not a small business under the size standard associated with solicitation DE-SOL-0004937RFQ45184. Appellant initially was selected for award, but the procuring agency, the U.S. Department of Energy (DOE), subsequently notified the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) that DOE had cancelled the award to Appellant and awarded instead to a different offeror. As discussed *infra*, because the issues in this dispute are specific to this particular procurement, and Appellant is no longer being considered for award, no purpose is served by deciding whether Appellant would have been a small business for the procurement. Accordingly, the appeal is dismissed as moot.

I. Background

A. Procurement and Size Determination

The underlying procurement called for the award of a task order under the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS). The procurement was set aside entirely for small businesses and was assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$14 million average annual receipts. The solicitation did not state that each offeror must certify itself as a small business. After Appellant was selected for award, two competing offerors protested Appellant's size.

On April 17, 2013, SBA's Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 3-2013-051 and -052 concluding that Appellant is not an eligible

¹ 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.

small business for this procurement. The Area Office found that, by submitting a proposal for the task order, Appellant certified itself as a small business because “recent amendments to the Small Business Act provide that the mere submission of a proposal on a small business set-aside 'shall be deemed an affirmative, willful, and intentional certification of small business size status.’” (Size Determination Nos. 3-2013-051 and -052, at 9, citing 15 U.S.C. § 632(w)(2)). The Area Office further determined that the applicable size standard was \$14 million, as stated in the task order solicitation, and that Appellant's average annual receipts exceed \$14 million. The Area Office instructed that, for future procurements, Appellant “may not self-certify as a small business under the size standard of \$14 million or less.” (*Id.* at 10.)

B. Appeal

On April 23, 2013, Appellant filed an appeal of the size determination with OHA. Appellant concedes that its revenues “far exceed” \$14 million. (Appeal at 6.) Appellant asserts, however, that the Area Office erred in applying the \$14 million size standard in the first instance. Rather, in Appellant's view, the Area Office should have measured Appellant's size under a 500-employee size standard, because that is the only size standard associated with Appellant's “consolidated” FSS contract. (*Id.* at 6-10.) Additionally, in Appellant's view, the Area Office erred in concluding that the submission of a task order proposal constitutes certification of small business status. Appellant maintains that certification must be explicitly requested in a task order solicitation, and is not accomplished by submission of a task order proposal. 13 C.F.R. § 121.404(g)(3); *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 21 (2010) (rejecting contention that “merely setting [a] task order aside for small businesses is a request for recertification”). Appellant asserts that the solicitation here contained no explicit certification requirement. Appellant “requests that OHA overturn the Size Determination and confirm that [Appellant] is an eligible small business for the [instant task order].” (Appeal at 19.)

C. OHA Proceedings

On May 13, 2013, DOE notified OHA that DOE had rescinded the task order award to Appellant, and that DOE had awarded the order to a different offeror. In light of these developments, OHA ordered Appellant to show cause why its appeal should not be dismissed as moot.

On May 17, 2013, Appellant responded to the order to show cause. Appellant does not assert that there is any possibility Appellant could still be awarded the instant task order. Appellant maintains, however, that the appeal is not moot because the size determination may prevent Appellant from competing for future FSS orders. According to Appellant, the size determination improperly holds that “[Appellant] is a large business, based on annual receipts, for the purposes of performing any Mission Oriented Business Integration Services (MOBIS) services under [Appellant's] consolidated [FSS contract].” (Response at 2.) Appellant further emphasizes that Appellant disagrees with the reasoning of the size determination, particularly the notion that Appellant is certifying itself as a small business, under the size standard set forth in the task order solicitation, each time Appellant submits a proposal on an FSS task order that is set-aside for small businesses. (*Id.* at 3.) Should OHA find that the appeal is moot, Appellant

requests that OHA vacate the size determination so that Appellant may continue to litigate these issues in the future. (*Id.* at 4.)

II. Discussion

When Appellant filed this appeal, Appellant sought to be declared an eligible small business for the instant task order. *See* Section I.B, *supra*. There is, however, no longer any possibility that Appellant will be awarded this task order. Accordingly, even if OHA were to grant this appeal, Appellant cannot obtain any meaningful relief. *Size Appeal of Valerie Lewis Janitorial*, SBA No. SIZ-5067 (2009) (dismissing size appeal as moot because the challenged firm already had been found ineligible for the procurement in question). Further, the arguments raised on appeal—whether a \$14 million size standard applied to this task order, and whether Appellant self-certified as a small business for this task order under the \$14 million size standard—are specific to this particular acquisition. These issues are now immaterial because Appellant is no longer the awardee of the task order. *Size Appeal of Saint George Indus., LLC*, SBA No. SIZ-5440, at 8 (2013) (contract-specific issues became moot after contract awarded to the challenged firm was terminated). In short, then, no live controversy remains to be decided, and this appeal is moot. By regulation, OHA will not adjudicate issues which have become moot. 13 C.F.R. § 134.316(c). Thus, the appeal must be dismissed.

Appellant's arguments on the issue of mootness are wholly unpersuasive. Appellant contends that the size determination will have prospective effect, because the Area Office found that Appellant is a large business for purposes of competing for future FSS task orders. *See* Section I.C, *supra*. The Area Office, however, made no such finding, but rather determined that this particular task order had been assigned a \$14 million size standard, and that Appellant's receipts exceeded this size standard. The Area Office took no position on what size standard might govern future FSS orders. Thus, insofar as Appellant wishes to debate which size standard applies to future FSS orders, Appellant is free to raise that issue in future proceedings. *Cf.*, *NAICS Appeal of Global Dynamics, LLC*, SBA No. NAICS-5470 (2013) (addressing issue of which NAICS code and size standard applies to an FSS task order procurement). Further, it is well-settled that an area office is not bound by its findings in a prior size determination. *Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427, at 8 (2012). Thus, while it is true that the Area Office in this case rejected Appellant's arguments for applying a 500-employee size standard, the Area Office would not be precluded from reaching a different conclusion in future cases.

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

KENNETH M. HYDE
Administrative Judge