

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

SIZE APPEAL OF:

NiSUS Technologies Corporation,

Appellant,

RE: Varen Technologies, Inc.

Appealed From  
Size Determination No. 2-2013-151

SBA No. SIZ-5513

Decided: November 18, 2013

ORDER DISMISSING APPEAL<sup>1</sup>

I. Background

On February 4, 2013, the U.S. Department of Defense issued Request for Proposals No. H98230-13-0025 for computer programming services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541511, Custom Computer Programming Services, with a corresponding size standard of \$25.5 million average annual receipts. On August 30, 2013, the CO announced that Varen Technologies, Inc. (Varen) was the apparent awardee.

On September 3, 2013, NiSUS Technologies Corporation (Appellant), an unsuccessful offeror, protested Varen's size. On September 11, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2013-151 dismissing Appellant's protest. The Area Office found that Appellant did not set forth sufficiently specific grounds for a protest as required by 13 C.F.R. § 121.1007. Appellant received the size determination on September 13, 2013. (Appeal at 1.)

On November 5, 2013, SBA's Office of Hearings and Appeals (OHA) received Appellant's appeal of the size determination. The appeal was forwarded to OHA by the Area Office via UPS Next Day Air. Because the appeal appeared to have been submitted 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.

On November 12, 2013, Appellant responded to OHA's order. Appellant asserts that it transmitted its appeal by email and by first class mail to OHA and other required parties on

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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.

September 27, 2013. Appellant states that it inadvertently omitted OHA's email address when serving its appeal, but insists that “OHA was included in the first class mailing that occurred on the same day.” (Response at 1, emphasis in original.) Appellant offers no evidence to support its claim that OHA was sent a copy of the appeal by first class mail, and the certificate of service attached to the appeal petition does not reflect that Appellant transmitted its appeal to OHA at all. Appellant further argues that failure to submit the appeal to OHA should be excused because the appeal was timely served upon SBA's Office of General Counsel, which is located in the same building as OHA.

Appellant implores OHA to consider the appeal. Appellant cites *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993), for the proposition that a tribunal should consider “the danger of prejudice to [opposing parties], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith” in deciding whether delay is excusable. Appellant argues these factors weigh in favor of accepting the appeal.

## 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, Appellant received the size determination on September 13, 2013. Fifteen days after September 13, 2013 was September 28, 2013. Because September 28, 2013 was a Saturday, the appeal petition was due on the next business day: Monday, September 30, 2013. 13 C.F.R. § 134.202(d). The appeal petition was received by OHA on November 5, 2013, and therefore is plainly untimely.

Based on the certificate of service attached to the appeal petition, it appears that Appellant timely served copies of the appeal upon other interested parties within the fifteen day timeframe of 13 C.F.R. § 134.304(a), but that Appellant neglected to file the appeal with OHA. By regulation, an appeal must be received at OHA in order to be considered “filed.” 13 C.F.R. § 134.204(b); *Size Appeal of A-Top Security Co.*, SBA No. SIZ-5227, at 2 (2011) (“The regulations are clear that an appeal petition is not 'filed' until it is actually received at OHA.”) (emphasis in original). Further, service of other parties — including other offices within SBA — does not satisfy the requirement for filing. *Size Appeal of ARGO/LRS, JV*, SBA No. SIZ-5027, at 2 (2009). As a result, OHA has repeatedly held that an appeal which is timely served upon the parties, but not timely filed at OHA, must be dismissed as untimely. *Size Appeal of Silvergate Pharmaceuticals, Inc.*, SBA No. SIZ-5418 (2012); *Size Appeal of REES Group, Inc.*, SBA No. SIZ-5387 (2012); *Size Appeal of UXB International, Inc.*, SBA No. SIZ-4930 (2008).

I must also reject Appellant's request to find its tardiness excusable. OHA has no discretion to waive, or extend, the deadline for filing an appeal. 13 C.F.R. §§ 34.202(d)(2)(i)(A), 134.304(c); *Size Appeal of Autonomic Resources, LLC*, SBA No. SIZ-5453 (2013). Consequently, the doctrine of excusable neglect cannot salvage an untimely appeal. *E.g.*, *Silvergate*, SBA No. SIZ-5418, at 2.

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