United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Systems Technologies Corporation Appellant, RE: Java Productions, Inc. Appealed From Size Determination No. 2-2014-85	SBA No. SIZ-5562 Decided: May 29, 2014

APPEARANCES

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, Vienna, Virginia, for Appellant

William A. Wozniak, Esq., ***1*** Williams Mullen PC, Tysons Corner, Virginia, for Java Productions, Inc.

DECISION

I. Introduction and Jurisdiction

On April 18, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-85, dismissing a protest filed by Total Systems Technologies Corporation (Appellant) against Java Productions, Inc. (JPI). In its protest, Appellant alleged that JPI is not a small business under the size standard associated with Request for Quotations (RFQ) No. 843808, which contemplated award of a blanket purchase agreement (BPA) under the U.S. General Services Administration (GSA) Federal Supply Schedules (hereafter, GSA Schedules or FSS). Appellant further alleged that JPI did not meet the eligibility criteria for Historically Underutilized Business Zone (HUBZone) small businesses.

Appellant contends that the Area Office improperly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a proper investigation into JPI's size status. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within

fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On January 13, 2014, the U.S. Department of Homeland Security, U.S. Coast Guard (Coast Guard) Operations Systems Center in Kearneysville, West Virginia, issued RFQ No. 843808 for business management support services at the Coast Guard's Command, Control, Communication, Computers and Information Technology (C4IT) Service Center. The Coast Guard issued the RFQ under the Mission Oriented Business and Integration Services (MOBIS) Schedule 874, and stated that the RFQ would result in the award of a single BPA. The Contracting Officer (CO) set aside the procurement entirely for HUBZone small businesses, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of $14 million in average annual receipts. The RFQ did not specifically request or require that offerors recertify their size. Proposals were due February 5, 2014.

On April 8, 2014, the CO announced that JPI was the apparent awardee. On April 13, 2014, Appellant protested Appellant's size and HUBZone status. Appellant alleged that JPI's revenues exceed the $14 million size standard. (Protest at 5.) Appellant further alleged JPI is in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), because JPI will be dependent upon a subcontractor to meet HUBZone eligibility criteria. (*Id.* at 5-6.) The CO forwarded the size allegations to the Area Office and the HUBZone status allegations to SBA's Director, Office of HUBZone.[1]

B. Size Determination

On April 18, 2014, the Area Office dismissed Appellant's protest as untimely. The Area Office explained that it had inquired whether the CO requested recertification of size and eligibility status in the RFQ. The CO responded that recertification was not required. Therefore, because the BPA was issued under a long-term FSS contract, and because the CO did not instruct offerors to recertify themselves as small businesses, the Area Office reasoned that there was no mechanism for entertaining a size protest in conjunction with this procurement. (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(3), *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010), and *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied,* SBA No. SIZ-5225 (2011) (PFR).)

[1] The HUBZone status decision is not in the record before OHA. This absence is immaterial, however, because OHA does not adjudicate appeals of HUBZone eligibility determinations. 13 C.F.R. §§ 126.805 and 134.102; *see also Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369, at n.5 (2012), *recons. denied*, SBA No. SIZ-5392 (2012) (PFR). Accordingly, this decision pertains only to the Area Office's dismissal of the size protest allegations.

C. Appeal Petition

On May 1, 2014, Appellant filed the instant appeal with OHA. Appellant maintains that the size determination is clearly erroneous and requests that OHA remand the matter to the Area Office for a size investigation.

Appellant argues the relevant inquiry for timeliness is not whether the CO requested recertification. Instead, Appellant maintains, because the BPA was set aside exclusively for HUBZone small businesses, all offerors represented that they complied with the HUBZone and size criteria at the time they submitted their offers.

Appellant argues that the protest was timely because "this solicitation is the initial phase of a 'long-term' contract." (Appeal at 5, citing 13 C.F.R. § 121.1004(a)(3)(i).) Moreover, Appellant argues, the regulations "effectively require" recertification. (*Id.*) To this end, Appellant observes that a HUBZone business must recertify its eligibility every three years and has an ongoing obligation to "immediately notify SBA of any material changes that could affect its eligibility." (*Id.*, quoting 13 C.F.R. §§ 126.500 and 126.501.) In addition, for long-term contracts, the CO is required to request recertification prior to the end of the fifth year. Here, Appellant alleges, JPI's MOBIS Schedule contract was awarded April 2, 2009. As a result, JPI was required to recertify by April 2, 2014. (*Id.* at 6.)

Appellant also argues that the RFQ required recertification when it stated:

> This is a notice that this BPA competition is a total set-aside for HUBZone Small Business. Only quotes submitted by HUBZone Small Businesses will be accepted by the Government. Any quote that is submitted by a contractor that is not a HUBZone Small Business will not be considered for award.

(*Id.*, quoting RFQ at 1.). As further evidence, Appellant observes that various standard clauses from the Federal Acquisition Regulation (FAR), which are required for small business set asides, are not included in JPI's MOBIS Schedule contract. (*Id.* at 7.) Appellant also contends that vendors were not allowed to rely upon their representations and certifications submitted under their GSA Schedule contract; instead, they "were required to use updated and current certifications and representations." (*Id.*)

Appellant argues the Area Office's reliance on the *Safety and Ecology* and *Quantum* decisions is misplaced. Appellant argues these cases bear on the issue of "organic growth," and do not address the issues Appellant raised in the protest—HUBZone status and ostensible subcontracting. (*Id.* at 7-8.)

D. JPI Response

On May 20, 2014, JPI responded to the appeal. JPI contends that the Area Office's dismissal was proper. Accordingly, OHA should deny the appeal.

JPI challenges Appellant's suggestion that a BPA is a type of long-term contract. Appellant's claim, JPI argues, ignores the fact that BPAs issued under a GSA Schedule contract are specifically exempted from any certification requirement, and is contrary to SBA regulations stating that a BPA is not a contract. (Response at 1, citing 13 C.F.R. § 121.404(a)(2).)

JPI next highlights that the instant RFQ did not require offerors to recertify their size and eligibility. First, nothing in the solicitation's language or the FAR clauses referenced by Appellant requires recertification. The mere fact that the BPA was set aside for HUBZone small businesses does not establish that offerors were required to recertify. Indeed, if recertification were required for every small business set-aside, it would be meaningless for the regulations to include the provision "unless a contracting officer requests a new size certification in connection with a specific order," in the regulation that provides that a concern ordinarily is considered small for the life of a contract. Third, the size determination makes clear that the Area Office consulted the CO as to whether he requested recertification, and he confirmed that he did not. Thus, even if this procurement had involved a task or delivery order, a size protest still would be impermissible because the CO did not require recertification. (*Id.* at 2.)

JPI also responds to Appellant's argument that recertification was required because JPI's MOBIS Schedule contract is a long-term contract for which JPI was required to recertify its size and eligibility by April 2, 2014. JPI argues that, to the extent Appellant is attempting to protest JPI's recertification for the Schedule contract, such a protest is untimely. JPI states that it recertified on the Schedule contract after it submitted its offer for the BPA but prior to award, and argues that there was nothing improper about the CO's reliance on the representation that JPI is a small business. (*Id.* at 3.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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. Analysis

SBA regulations permit that a size protest may be filed at three different stages during the life of long-term contracts, including GSA Schedule contracts. *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 19 (2010). First, an interested party may protest a size certification made at the time the long-term contract is initially awarded. 13 C.F.R. § 121.1004(a)(3)(i). Second, an interested party may protest a size certification made at the time an option is exercised. *Id.* § 121.1004(a)(3)(ii). Third, an interested party may protest a size certification made "in response to a contracting officer's request for size certifications in connection with an individual order." *Id.* § 121.1004(a)(3)(iii). A BPA, though, is not a

"contract," an "option," or an "order," and 13 C.F.R. § 121.1004(a)(3) does not contemplate size protests involving such instruments. In the instant case, Appellant seeks to protest the award of a BPA, not an order, an option, or a GSA Schedule contract. Accordingly, as the Area Office correctly recognized, there is no regulatory mechanism for Appellant to bring a size protest based on the award of a BPA under an existing GSA Schedule contract.

Appellant suggests that its protest could be timely because JPI was required to recertify for the first option period under its MOBIS Schedule contract no later than April 2, 2014. Appellant's protest made clear, however, that Appellant was protesting the award of a BPA under RFQ No. 843808, and not the exercise of an option on the underlying Schedule contract. *See* Protest at 1. Moreover, even assuming that Appellant's protest could be construed as a protest against the exercise of the option, such a protest would be untimely under 13 C.F.R. § 121.1004(a)(3)(ii). As Appellant itself recognizes, JPI was required to recertify for the GSA Schedule contract prior to April 2, 2014, and Appellant's protest was filed more than five business days later, on April 13, 2014.

Appellant further argues that, although the RFQ did not expressly call for offerors to recertify their size, recertification was nevertheless "effectively required" because the BPA was set-aside exclusively for HUBZone small businesses. This argument fails for two reasons. First, as discussed above, even if recertification had been required for this BPA, it is not evident that Appellant could have brought a proper size protest under 13 C.F.R. § 121.1004(a)(3) because a BPA is not a "contract," an "option," or an "order." Second, the notion that recertification is "effectively required" for a set-aside BPA under an existing Schedule contract is contradicted by SBA regulations, particularly 13 C.F.R. § 121.404. Prior to December 31, 2013, the regulation stated that:

> A Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA when an order is issued. Thus, a concern's size may not be determined based on its size at the time of a response to a solicitation for a BPA.

13 C.F.R. § 121.404(g)(3)(vi) (2012). Effective December 31, 2013, SBA revised the regulation as it pertains to BPAs.[2] The regulation currently reads as follows:

> With respect to "Agreements" including Blanket Purchase Agreements (BPAs) (except for BPAs issued against a GSA Schedule Contract), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves awards to any type of small business, a concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement. Because an Agreement is not a contract, the concern must also qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and for an agency to receive small business goaling credit for the order.

[2] *See* 78 Fed. Reg. 61,114 (Oct. 2, 2013). The instant RFQ was issued on January 13, 2014, after the effective date of the amendments, so the amended version of 13 C.F.R. § 121.404 is applicable here.

13 C.F.R. § 121.404(a)(2) (2014).

Thus, although the current rule does stipulate that a concern submitting an offer for a set-aside BPA must qualify as small when it submits an initial offer including price, BPAs issued under GSA Schedule contracts are specifically exempted from this requirement. In the preamble to the final rule, SBA explained that the rationale for this exception is that:

> SBA does not believe that size needs to be determined at the time of the BPA issued against a GSA Schedule because size has already been determined at the time of submission of the offer for the GSA Schedule contract. Requiring additional certifications other than those already required under this rule would be a burden.

78 Fed. Reg. 61,114, 61,120 (Oct. 2, 2013). In short, then, under the current version of 13 C.F.R. § 121.404, recertification is not required for BPAs issued against existing GSA Schedule contracts, even if the BPA is set aside or otherwise restricted to small businesses. Appellant is therefore incorrect in asserting that the regulations "effectively require" recertification in this situation. On the contrary, because JPI certified its size for the MOBIS Schedule contract, JPI did not need to recertify when it submitted its offer for a BPA issued against that contract.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge