

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

SIZE APPEAL OF:

U.S. Information Technologies, Corp.,

Appellant,

RE: Universal Consulting Services, Inc.

Appealed From

Size Determination No. 2-2014-043

SBA No. SIZ-5585

Decided: August 22, 2014

APPEARANCES

David S. Black, Esq., Elizabeth M. Gill, Esq., Holland & Knight LLP, Tysons Corner, VA, for Appellant

Scott A. Schipma, Esq., Winston & Strawn LLP, Washington, D.C., for Universal Consulting Services, Inc.

DECISION¹

I. Introduction and Jurisdiction

On June 27, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-043, dismissing U.S. Information Technologies, Corp.'s (Appellant) protest against Universal Consulting Services, Inc. (UCS) as untimely.

Appellant contends the size determination is clearly erroneous, and requests that the SBA's Office of Hearings and Appeals (OHA) remand the size determination for further investigation. 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

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to propose redactions to the published decision. Appellant indicated it did not wish to propose redactions. OHA now publishes the decision in its entirety.

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 May 2, 2013, the Department of the Navy (Navy), Military Sealift Command (MSC) issued Solicitation No. N00024-13-R-3206, a task order seeking Information Technology Support Services to establish Tier II and Tier III help desks, support system maintenance and sustainment, and provide training for MSC business information systems and related processes. The solicitation was a cost-plus fixed-fee task order for one base year with two one-year options. The task order solicitation was issued under a multiple-award indefinite delivery indefinite quantity (ID/IQ) arrangement known as the Seaport Enhanced (“Seaport-e”) contracts, and specifically, a follow up on rolling admission Solicitation No. N00178-13-R-4000. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and designated North American Industry Classification System (NAICS) code 541330, Engineering Services, the Seaport-e NAICS code, with a corresponding \$35.5 million average annual receipts size standard. Solicitation No. N00178-R-4000 was awarded to UCS on November 19, 2013, as Contract No. N00178-14-D-7985.

On January 27, 2014, the CO notified offerors that UCS was the apparent successful offeror for the instant task order. On January 31, 2014, Appellant filed a protest stating that UCS was affiliated with CACI-CMS Information Systems, Inc. (CACI-CMS) a wholly owned subsidiary of CACI International, Inc. (CACI). Appellant alleged that CACI would be performing the solicitation's primary and vital requirements, in violation of the ostensible subcontractor rule.

B. Size Determination

On June 27, 2014, the Area Office issued its size determination dismissing Appellant's protest as untimely.

The Area Office noted the rule on the time limits for filing a size protest on long term contracts is at 13 C.F.R. § 121.1004(a)(3). The regulation provides an interested party may file a size protest at the time the long term contract was awarded. Additionally, an interested party may protest a size certification made at the time an option is exercised, and when a size certification is made in response to a CO's request for size certifications regarding a task order. Size Determination at 1. The Area Office relied on *Size Appeal of Safety and Ecology Corporation*, SBA No. SIZ-5177 (2010) and *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011) in finding “it can be reasonably concluded that a protest may be filed in connection with an individual task order only when the CO requests certification.” *Id.* After receiving confirmation from the CO, the Area Office determined no requests for size certification were made in connection with the task order at issue, and thus Appellant's protest was untimely.

The Area Office added that after receiving UCS's technical, cost, and past proposals, as well as the teaming agreement, a review of the documents showed that UCS has past performance experience in providing the services sought. In addition, the teaming agreement showed that UCS is managing the contract, providing the key personnel and controls all the personnel and subcontractors associated with the work.

C. Appeal Petition

On July 14, 2014, Appellant filed its appeal of the size determination with OHA. Appellant argues the Area Office improperly dismissed its protest.

Appellant contends the Area Office's failure to apply 13 C.F.R. § 121.404(g)(5) incorrectly led to an untimely dismissal of its protest. Appellant maintains that a March 2011 amendment to § 121.404(g)(5), applicable here because the Navy issued the task order after its effective date, required the CO "to request UCS (and the other offerors) to certify that it remains small under the ostensible subcontractor rule for purposes of task orders issued under the Seaport-e contract." Appeal at 12. Appellant maintains the amendment to § 121.404(g) creates an exception to SBA's timeliness regulations regarding long term contracts. If during contract performance the subcontractor is doing the primary and vital requirements, Appellant argues a concern's size can be challenged even if no size certification was requested. *Id.* at 13-14. Appellant argues that *Size Appeal of Tyler Construction Group, Inc.*, SBA SIZ-5323 (2012) establishes the March 2011 amendment to § 121.404(g) authorizes a task order protest "if the task order solicitation was issued and the protested concern made a size certification with regard to the contract after the effective date of the amendment on March 14, 2011." *Id.* at 14. Here, Appellant claims, UCS made a size certification "in connection with the exercise of the current five-year option under its Seaport-e contract", and thus § 121.1004(a)(3)(ii) applies. *Id.* at 16.

Appellant goes on to argue § 121.404(g)(5) required the CO to request size certifications from potential offerors, and that offerors must certify they are a small business concern under the ostensible subcontractor rule. Thus, even if the CO in this situation failed to require a size certification, she was under a regulatory requirement to do so. *Id.* Appellant further adds UCS filed a size certification with its award of a new five-year option under its Seaport-e contract "sometime prior to the due date for offers that included price in response to the Solicitation." *Id.* at 16. Accordingly, Appellant maintains its protest is timely because it did not find out about this certification until it received the CO's notice that UCS was the apparent awardee for the task order at issue.

Finally, Appellant argues that UCS and CACI are affiliated under the ostensible subcontractor rule. Specifically, Appellant asserts the Area Office erred in finding UCS was not unusually reliant on CACI to perform the task order at issue. Appellant contends the Area Office failed to take into consideration UCS's staffing plan and its reliance on current and former CACI employees in performing the contract's primary and vital requirements. Appellant alleges the Area Office did not properly address the fact that former CACI employees populate the key personnel positions and that UCS probably relied upon CACI in drafting its proposal based on CACI's experience and knowledge with the task order at issue. Appellant further argues that, in

all likelihood, UCS relied on CACI in establishing the required relevant experience in order to be awarded the contract. *Id.* at 18-19.

D. UCS's Response

On July 30, 2014, UCS filed its response to the appeal. UCS argues the Area Office did not err in dismissing the protest, and requests that OHA affirm the Area Office's decision.

UCS maintains that § 121.404(g)(5) cannot modify the timeliness regulations established in § 121.1004. UCS asserts that *Size Appeal of Strata-G Solutions, Inc.*, SBA No. SIZ-5563 (2014) directly refutes Appellant's arguments found here. According to UCS, OHA found “no merit to the claim that 13 C.F.R. § 121.404(g)(5) creates a private right to bring an ostensible subcontractor protest any time during the life of a contract.” Response, at 5. Further, UCS argues that *Tyler Construction Group, Inc.*, SBA SIZ-5323 (2012), relied on by Appellant, does not support Appellant's allegations. UCS contends that OHA, in *Tyler Construction*, did not address whether § 121.404(g)(5) alters SBA's timeliness regulations and Appellant has “grossly” misrepresented OHA's decision. *Id.* at 7. UCS adds that past OHA decisions have consistently held that if a CO does not request a size certification in connection to a task order, a size protest against the award of the task order will be untimely. Thus, Appellant's contention § 121.404(g)(5) creates an exception to SBA's timeliness regulations is meritless.

UCS argues that the regulations found at § 121.404(g) “focus on identifying circumstances where recertification might be required, and they describe the impact those circumstances have on whether the awarding agency can count awards toward its small business goals.” *Id.* at 11. Thus, § 121.404(g) was added in order to offer direction to agencies concerning counting awards towards that agency's small business goals.

Next, UCS contends § 121.404(g)(5) does not require a CO to request a size certification for task orders and Appellant did not show any authority or evidence to support their claim. In contrast, subsections (g)(1)-(3) do state when additional certifications are required, however, no such language exists for § 121.404(g)(5). Additionally, UCS asserts that, contrary to Appellant's argument, § 121.1004(a)(3)(ii) does not make the size protest timely. UCS points out that § 121.1004(a)(3)(ii) governs instances in which a concern has made a size certification, whereas the situation here involves no size certification, as the CO did not require one. UCS acknowledges that it made a size certification on May 2013 relating to an award made on November 2013, which is not at issue here. *Id.* at 14-15.

UCS further addressed Appellant's contention that UCS's relationship with its subcontractor CACI-CMS is in violation of the ostensible contractor rule. UCS asserts the teaming agreement between itself and CACI-CMS clearly shows UCS would be the prime contractor, responsible for overall project management, prepare the proposal and be in charge of any negotiations with the Navy. *Id.* at 18. In addition, UCS asserts it has significant experience as a prime contractor performing similar work as required here, and Appellant's allegations to the contrary are meritless. UCS further challenges Appellant's arguments that CACI's role as the incumbent contractor for the predecessor contract, as well as UCS' proposed use of former CACI-CMS employees, is suggestive of a violation of the ostensible subcontractor rule. *Id.* at

22-27. UCS states those allegations are unfounded and do not establish any unusual reliance on CACI-CMS. Lastly, UCS states that it will be performing the same type of work as CACI-CMS, but it will perform a majority of the overall contract work, thus disputing Appellant's claim CACI-CMS, not UCS, will be performing a majority of the primary and vital contract requirements. *Id.* at 28-29.

E. Appellant's Supplemental Appeal

On July 30, 2014, Appellant filed a supplemental appeal to its original filing. Appellant states that, after reviewing information not previously accessible, it wishes to file a supplemental appeal that supports its argument that its size protest was timely.

Appellant reiterates that in *Tyler Construction Group, Inc.*, SBA SIZ-5323 (2012), OHA “acknowledged that a protest may be filed against the award of a task order under a multiple award contract pursuant to 13 C.F.R. § 121.404(g)(5)” if it was issued after March 14, 2011 and a size certification was made after the same date. Supplemental Appeal, at 1. Appellant asserts the Navy relied on a size certification made by UCS after March 14, 2011. Appellant points to an email received by the Area Office in which the Navy states the task order at issue here was awarded under a Seaport-e follow-on contract awarded in November 2013. Appellant argues the Navy relied on UCS' self-certification made after March 14, 2011, and therefore § 121.404(g)(5) applies here. *Id.* at 3-4.

Appellant proceeds to argue that after reviewing the Area Office file, and UCS' answer to the size protest, it is clear that UCS is in violation of the ostensible subcontractor rule. Specifically, Appellant argues the Area Office failed to consider the fact UCS was using the incumbent contractor as its sole subcontractor when it determined there was no violation of the ostensible subcontractor rule. *Id.* at 5. Appellant adds UCS's proposal clearly states it planned to use CACI-CMS employees to staff key personnel and non-key personnel positions, which the Area Office failed to consider. Lastly, Appellant contends the Area Office “committed clear legal and factual error by not acknowledging the extent to which UCS relied upon CACI's past performance in its proposal.” *Id.* at 13. Appellant concludes these errors by the Area Office confirm it neglected to address multiple factors in its size determination that would lead it to determine UCS violated the ostensible subcontractor rule.

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

The only issue in this appeal is whether the Area Office properly dismissed Appellant's size protest as untimely. I find the Area Office did not err in dismissing Appellant's size protest.²

As the Area Office correctly noted, 13 C.F.R. § 121.1004(a)(3) governs the time limits for filing a size protest on long term contracts. First, an interested party may protest a size certification made when the long-term contract is awarded. § 121.1004(a)(3)(i). Second, an interested party may protest a size certification when an option is exercised. § 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.” 13 C.F.R. § 121.1004(a)(3)(iii). OHA has held a size protest may be filed in connection with an individual task order only when the CO requests certification. *Size Appeal of Safety and Ecology Corporation*, SBA No. SIZ-5177 (2010); *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011). None of these instances are applicable here.

Appellant attempts to establish a new exception to SBA's timeliness rules for long term contracts, stating that § 121.404(g)(5) modified SBA regulations in order to allow a size protest that would otherwise be dismissed under § 121.1004(a)(3). The pertinent regulation reads:

If during contract performance a subcontractor performs primary and vital requirements of a contract, the contractor and its ostensible subcontractor will be treated as joint venturers. *See* § 121.103(h)(4). If the two firms exceed the applicable size standard in the aggregate, the contractor cannot continue to certify as small for that contract or for any task order under that contract.

13 C.F.R. § 121.404(g)(5).

Appellant argues *Tyler Construction Group, Inc.*, SBA SIZ-5323 (2012) created the exception it seeks to have OHA implement here. Additionally, it endeavors to establish that under § 121.404(g)(5), the CO was required to request a size certification. If that argument were to fail, Appellant further argues that because the task order at hand was issued as a result of Contract No. N00178-14-D-7985, awarded on November, 19, 2013, UCS's size certification in connection with that award is sufficient to make its size protest timely. I find all of Appellant's arguments meritless.

Contrary to Appellant's continued insistence, in *Tyler Construction* OHA did not hold “a protest may be filed against the award of a task order under a multiple award contract pursuant

² The Area Office did err in discussing the ostensible subcontractor issue after dismissing the protest as untimely. The case ended there, and the Area Office should not have addressed any substantive issue raised by the protest, and certainly not in the conclusory fashion it addresses the ostensible subcontractor issue here. I will therefore not address the ostensible subcontractor issue in this decision. Nevertheless, this error does not change the fact that Appellant's protest was untimely, and properly dismissed.

to 13 C.F.R. § 121.404(g)(5).” Supplemental Appeal, at 1. This certainly is not the holding in *Tyler Construction*. Rather, while the appellant in *Tyler* attempted to make that argument, OHA found that the regulation was only applicable to solicitations issued and certifications made after March 14, 2011. Because the RFP in *Tyler* was issued prior to that date, OHA held that the regulation was not applicable in that case. OHA did not rule in any way on the issue of whether § 121.404(g)(5) created the right of an unsuccessful offeror to file an otherwise untimely size protest if the issue was the challenged concern's compliance with the ostensible subcontractor rule. Conversely, OHA did state “size protests may only be filed against task orders issued under long term contracts if the contracting officer requests size certification for that task order.” *Tyler Construction Group, Inc.*, SBA SIZ-5323, at 3 (2012). Appellant's argument here borders on the disingenuous.

As UCS points out, *Strata-G Solutions, Inc.*, SBA No. SIZ-5563 (2014), directly addresses the issues here. In *Strata-G*, that appellant made a similar argument that § 121.404(g)(5) allows for size protest on task orders during contract performance. However, OHA dismissed the argument and held “the plain text of the regulation does not confer upon a private party the right to protest at any time during the life of the contract. Indeed, the regulation does not address the size protest process at all.” *Strata-G Solutions, Inc.*, SBA No. SIZ-5563, at 6 (2014). OHA went on to note that the provision may be enforced by protests by the CO or SBA itself, as in *Size Appeal of Red River Computer Co.*, SBA No. SIZ-5512 (2013).

The plain text of § 121.404(g)(5) cannot reasonably be held to create an exception to the time limits enumerated at § 121.1004, as discussed above. The subject of § 121.404 is the date to determine size, not the time limits for filing a size protest, which are set at § 121.1004. The regulation at § 121.404(g)(5) is part of an enumerated list of instances in which an agency cannot count awards under Multiple Award Contracts as an award to small business. There is nothing in the regulation which carves out the timeliness exception for size protests Appellant tries to create here. The preamble to the final rule promulgating the regulation (then numbered 13 C.F.R. § 121.404(g)(4)) refers to the regulation affecting a procuring agency's ability to count the subject contract as an award to small business, and does not refer to the size protest process at all. 76 Fed. Reg. 8222, 8224, 8252 (Feb. 11, 2011).

Appellant also claims UCS's size certification for a contract awarded on November 19, 2013, allows its size protest for the task order at hand to be timely. Again, Appellant's argument is meritless. The proper time to file a size protest in connection with Contract No. N00178-14-D-7985, awarded on November, 19, 2013, was within five days of the CO's notice of the apparent successful offeror for that particular award. 13 C.F.R. § 121.1004(a)(3)(iii).

Appellant further argues § 121.404(g)(5) requires the CO to request a size certification. Arguably, Appellant maintains that every contracting officer will have to require all offerors in every solicitation involving task orders to provide a certification in which they state their compliance with the ostensible subcontractor rule. Again, the plain text of § 121.404(g)(5) does nothing of the sort. Applying Appellant's reasoning would effectively invalidate 13 C.F.R. § 121.1004(a)(3)(iii), as contracting officers will have to request size certifications for all task orders under long term contracts. I find Appellant's arguments meritless.

I therefore reaffirm the holding in *Strata-G Solutions* that 13 C.F.R. § 121.404(g)(5) does not confer upon a private party the right to file an otherwise untimely size protest. In order for a size protest regarding a task order to be timely, the CO must have requested a size certification for the individual order. 13 C.F.R. § 121.1004(a)(3)(iii); *Size Appeal of Strata-G Solutions, Inc.*, SBA No. SIZ-5563 (2014); *Size Appeal of Tyler Construction Group, Inc.*, SBA SIZ-5323 (2012); *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011).

Appellant has thus failed to identify any error of law or fact in the size determination, and I must affirm the Area Office's size determination.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge