

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

SIZE APPEAL OF:

Quality Technology, Inc.,

Appellant,

RE: Vistronix, LLC

Appealed From
Size Determination No. 2-2014-95

SBA No. SIZ-5611

Decided: October 27, 2014

APPEARANCES

Donald J. Walsh, Esq., Offit Kurman, P.A., Owings Mills, Maryland, for Appellant

Devon E. Hewitt, Esq., Protora Law, PLLC, Tysons Corner, Virginia, for Vistronix

DECISION

I. Introduction and Jurisdiction

On August 28, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-95, dismissing a size protest filed by Quality Technology, Inc. (Appellant) against Vistronix, LLC (Vistronix). Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied.

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 May 28, 2013, the U.S. Department of Health and Human Services, Indian Health Service (IHS) issued Request for Quotations (RFQ) No. 783832 for "Infrastructure, Office

Automation & Telecommunications Support for IHS” (IOAT). The RFQ stated that IHS planned to award a task order through the U.S. General Services Administration (GSA) Alliant Small Business (ASB) Government-wide Acquisition Contract (GWAC). IHS set aside the order entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, with a corresponding size standard of \$25.5 million average annual receipts. On June 28, 2013, Appellant and Vistrionix submitted timely quotes. Both Appellant and Vistrionix hold ASB contracts.

On September 25, 2013, IHS announced that Phacil, Inc. (Phacil), another ASB contract holder, was the successful offeror. On October 18, 2013, Vistrionix filed a bid protest challenging the award decision at the U.S. Government Accountability Office (GAO). IHS took corrective action shortly thereafter, and GAO dismissed the bid protest as academic. IHS requested revised proposals for the IOAT order, which were due December 16, 2013.

On October 3, 2013, the ASB Contracting Officer (CO) notified Vistrionix that it was required to rerepresent its size status in the System for Award Management (SAM) no later than December 4, 2013. On December 4, 2013, Vistrionix informed the ASB CO that it had updated and validated its representations in SAM.

On March 11, 2014, IHS awarded the IOAT task order to Vistrionix, but did not immediately notify unsuccessful offerors. On April 4, 2014, a business development specialist at GSA emailed a contract “snapshot” report to Appellant and other ASB contract holders. Among a listing of numerous task orders, the report indicated that the IOAT task order had been awarded to Vistrionix. On April 14, 2014, Appellant's President contacted the business development specialist to inquire about the IOAT order. Appellant's President expressed his view that an award to Vistrionix “would be impossible” and stated that Appellant “ha[s] not been notified of [the IOAT] award officially by IHS.” (Email from J. Hamilton to D. Cole (Apr. 14, 2014).) The specialist responded that the snapshot was derived from database information and commented, “Looks like this is a matter of garbage in . . . garbage out. I'll get it cleaned up.” (Email from D. Cole to J. Hamilton (Apr. 14, 2014).) On April 30, 2014, the specialist emailed Appellant's President that award of the IOAT task order was ““more of a contracting issue” and that the specialist would not “reach out to IHS without a few more facts.” (Email from D. Cole to J. Hamilton (Apr. 30, 2014).) Appellant's President replied that “The reason why no one (including us) has protested on the size issue is that IHS DID NOT NOTIFY US OF AWARD! If not for you and the snapshot, we'd still be sending them emails to get a status every couple of weeks.” (Email from J. Hamilton to D. Cole (Apr. 30, 2014) (emphasis in original).)

By letter of May 5, 2014, IHS formally notified Appellant that the IOAT task order was awarded to Vistrionix. Appellant protested Vistrionix's size later that same day. IHS forwarded Appellant's protest to the Area Office for review.

B. Size Determination

On August 28, 2014, the Area Office issued Size Determination No. 2-2014-95, dismissing the protest as untimely. The Area Office reasoned that, on a long-term contract such as the ASB GWAC, size may be challenged at three stages: (1) when the long-term contract is

initially awarded; (2) when an option is exercised; or (3) if a CO requests recertification in conjunction with an individual order. 13 C.F.R. § 121.1004(a)(3). Because Appellant protested Vistrionix's size in connection with the IOAT task order, the Area Office considered whether IHS had requested that offerors recertify their size. Upon reviewing the RFQ, amendments, and information provided by IHS, the Area Office found that recertification was not requested. As a result, there was no available mechanism for Appellant to protest Vistrionix's size in connection with the IOAT task order. (Size Determination at 1, citing *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010), and *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).)

C. Appeal

On September 5, 2014, Appellant filed the instant appeal with OHA. Appellant argues that the Area Office erred in determining that Vistrionix was not required to recertify its small business status. RFQ Amendment 0003, Appellant contends, specifically required Vistrionix to recertify its size, because Vistrionix had by that time acquired another company, Technology Associates International Corporation (TAIC). The amendment stated:

Offers are solicited only from [ASB] industry partners that have not rerepresented as other than small in accordance with [Federal Acquisition Regulations (FAR)] 52.219-28 Post-Award Small Business Program Rerepresentation. *Those ASB GWAC industry partners having experienced an event that triggers the notification requirements contained in FAR 52.219-28(b)(1)-(2), and are other than small as a result of said triggering event, are considered to be other than a small business concern for the purposes of this procurement regardless of whether the industry partner has fulfilled the rerepresentation notification pursuant to FAR 52.219- 28(b).*

(Appeal at 2, quoting Amendment 0003 (emphasis added by Appellant).)

Appellant then recites FAR clause 52.219-28(b), referenced in Amendment 0003. The clause states:

(b) If the Contractor represented that it was a small business concern prior to award of this contract, the Contractor shall rerepresent its size status according to paragraph (e) of this clause or, if applicable, paragraph (g) of this clause, upon the occurrence of any of the following:

(1) Within 30 days after execution of a novation agreement or within 30 days after modification of the contract to include this clause, if the novation agreement was executed prior to inclusion of this clause in the contract.

(2) Within 30 days after a merger or acquisition that does not require a novation or within 30 days after modification of the contract to include this clause, if the merger or acquisition occurred prior to inclusion of this clause in the contract.

(3) For long-term contracts —

- (i) Within 60 to 120 days prior to the end of the fifth year of the contract; and
- (ii) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.

FAR 52.219-28(b). Based on Amendment 0003 and the FAR clause, Appellant draws two conclusions. First, Vistrionix was required to recertify its size within 30 days of acquiring TAIC because after the acquisition, Vistrionix had more than 450 employees. Second, IHS requested recertification of size under 13 C.F.R. § 121.1004(a)(3)(iii) through RFQ Amendment 0003 by requiring offerors to confirm that they had not experienced a “triggering event . . . resulting in the company being other than a small business concern.” (Appeal at 5, quoting Amendment 0003.) Accordingly, Appellant argues, the Area Office erred in determining that there was not a mechanism for protest at the time the IOAT task order was awarded.

D. Vistrionix's Response

On September 23, 2014, Vistrionix responded to the appeal. Vistrionix contends that the Area Office properly dismissed the appeal as untimely, so OHA should deny the appeal.

Vistrionix concedes that it exceeded the size standard as of the date the IOAT task order was awarded. Nevertheless, the issue is immaterial, Vistrionix maintains, because the terms of the ASB contract permitted Vistrionix to compete for, and be awarded, the task order. Vistrionix explains that the ASB contract was modified in December 2013, through the PS12 Modification. According to this modification, Vistrionix would remain eligible for task orders awarded after the beginning of the option period, February 3, 2014, so long as the competition for award preceded this date. Vistrionix submitted its first proposal for the IOAT task order on June 28, 2013, and a revised proposal on December 16, 2013. Therefore, because the competition for award preceded the beginning of the option period, Vistrionix was eligible for the instant procurement, even though Vistrionix currently exceeds the size standard. (Response at 4.) Indeed, Vistrionix included a statement with its revised proposal that:

At the request of the [ASB CO], Vistrionix rerepresented itself as other than a small business under the [ASB GWAC] on December 4, 2013 in anticipation of the exercise of the ASB GWAC option period on or about February 2, 2014. Therefore, Vistrionix is entitled to receive a task order award under this ASB GWAC procurement because its initial proposal, including its price, was submitted prior to its rerepresentation and during the ASB GWAC base period.

(Vistrionix executed Amendment 0003, at 1.)

Vistrionix challenges Appellant's contention that Vistrionix was required to recertify its size. In Vistrionix's view, Amendment 0003 cannot be considered a recertification request, for several reasons. First, the amendment did not explicitly request that Vistrionix recertify its size,

but asked whether Vistronix had already rerepresented its size. Another reason is that the amendment lacked other indicia of an explicit recertification request: it did not include a size standard, nor did it require recertification as of the time of offerors' submission. *Cf.*, *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013).

Moreover, Vistronix argues, interpreting the statements in Amendment 0003 as requiring a recertification is inconsistent with the PS12 Modification and the history of the procurement. The modification makes clear that “All Orders placed under the Basic Contract are subject to the terms and conditions of the Basic Contract at the time of order award. In the event of any conflict between the Order and the Basic Contract, the Basic Contract will take precedence.” (Response at 5, quoting ASB Contract, Section G.9.) Thus, to the extent Amendment 0003 can be construed as a request for recertification, the contrary language in the PS12 modification should take precedence. Further, Vistronix argues, Appellant's interpretation is inconsistent with the history of the IOAT procurement. IHS did not ask ASB contract holders to rerepresent or recertify their size when the RFQ was initially issued, and Phacil, the initial awardee, was not small at the time of award. Logically, if IHS intended to restrict award of the task order to then- small ASB contract holders, IHS would have excluded Vistronix and Phacil from the competition once IHS took corrective action. (*Id.* at 5-6.)

Vistronix also argues that, even if Amendment 0003 is construed as a request for a size recertification, Appellant's protest is untimely. (Response at 6-7.) A size protest must be made within 5 business days upon receiving notice of the apparent awardee's identity. 13 C.F.R. § 121.1004(a)(3)(iii). Vistronix argues Appellant received notice that Vistronix was the awardee on April 4, 2014, when GSA's business development specialist provided Appellant the “snapshot” report listing Vistronix as having been awarded the IOAT task order.¹

Vistronix observes that SBA regulations do not define the term “notice” or explain what constitutes notice for purposes of beginning the 5-day window to file a size protest. OHA has recognized, however, that “[w]hen a term is not defined in a regulation, it is up to OHA to derive a meaning by looking to common everyday meaning of the term or words.” *Size Appeal of Tikigaq Eng'g Servs., LLC*, SBA No. SIZ-4842, at 11 (2007). Here, because the regulation addressing recertifications for task orders does not require notice to come directly from the procuring activity, Vistronix argues that OHA should not read this requirement into the regulation. To do so would narrow the application of the regulation in a manner that is inconsistent with its broad, plain meaning. (Response at 7.) Vistronix cites various cases in which notice of award occurred without the notification coming from the contracting officer for the procurement in question. (*Id.* at 7-8.)

E. Reply

On September 26, 2014, OHA issued an order requesting that Appellant address the

¹ Vistronix also raised this issue to the Area Office during the size review, and provided copies of the specialist's email and the snapshot report. (Protest Response at 4-5 and Ex. J) Thus, the question of whether the snapshot gave Appellant notice of the award to Vistronix is not a new issue raised for the first time on appeal.

notice issue raised by Vistrionix, and on October 3, 2014, Appellant filed its reply.² Appellant emphasizes that IHS did not notify Appellant of the award until May 5, 2014 and that Appellant filed its protest within 5 business days of that notification. (Reply at 2.)

Appellant argues that the source data for the April 4 “snapshot” was unreliable, and that it would be unreasonable to expect Appellant to file a size protest based on uncertain information. Appellant points out that the snapshot report was not issued by the CO for the task order or even by the ASB CO, but by GSA's business development office. Upon receiving the April 4 email and report, Appellant explains that it sought clarity from the business development specialist.

The specialist then stated, “Looks like this is a matter of garbage in . . . garbage out. I'll get it cleaned up. Good to know someone actually looks at the Snapshot.” (*Id.*, quoting Email from D. Cole to J. Hamilton (Apr. 14, 2014).)

Appellant asserts that the snapshot report contains obvious errors. As an example, Appellant argues that line 248 of the snapshot shows award of the IOAT task order to Phacil, but this award has since been terminated. Appellant also references a report from GSA's Office of Inspector General, which, Appellant represents “found that [the database used to prepare the snapshot report] was not generally accurate and depended heavily on information input by the contractors, not the contracting office.” (*Id.*)

Appellant maintains that the email from the business development specialist was outside Appellant's course of dealing with IHS. When Appellant was notified that Phacil was initially selected for award, that notification came in writing from IHS, just like the May 5 notification. Appellant explains it expected notification in this form. (*Id.* at 3.)

As a legal matter, Appellant argues, “OHA has already held that the notice trigger in 13 C.F.R. § 121.1004(a)(3)(iii) must be from the contracting officer.” (*Id.* at 3, citing *Size Appeal of U.S. Information Techs. Corp.*, SBA No. SIZ-5585, at 7 (2014) (“The proper time to file a size protest . . . was within five days *of the CO's notice* of the apparent successful offeror for that particular award.”) (emphasis Appellant's).) Appellant also quotes language from *Taylor Consultants, Inc. v. United States*, 90 Fed. Cl. 531 (2009). In that case, the U.S. Court of Federal Claims stated that SBA regulations at 13 C.F.R. § 121.1004(a)(5) “anticipated a situation where . . . the CO failed to make the required notification to unsuccessful offerors as required by FAR 15.503(a)(2). Section 121.1004(a)(5) ensures that a CO's failure to provide the requisite pre-award notification will not deprive unsuccessful offerors of the opportunity to file a timely protest.” *Taylor*, 90 Fed. Cl. at 543.

Appellant contends that it would be poor policy for the April 4 email and snapshot to constitute notice for purposes of filing a protest. In Appellant's view, this would place a heavy burden on would-be protesters, because they would be obliged to comb all available online resources and emails, regardless of the source, so as not to forfeit their right to protest.

² In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d).

Furthermore, size protests preserve the integrity of the procurement process, and Vistronix should not be awarded a task order intended for small businesses when it is not a small business. (Reply at 4-5.)

F. Sur-Reply

On October 10, 2014, Vistronix requested leave to sur-reply and filed its sur-reply. Vistronix explains it did not previously have the opportunity to address Appellant's arguments on the notice issue, so there is good cause to admit the sur-reply.

In Vistronix's view, Appellant's arguments are unpersuasive for four reasons. First, SBA regulations do not require that an award notice be sent by any particular person. On the contrary, the regulations provide that when a would-be protester does not receive written notice of the apparent awardee's identity from the CO, the 5-day protest period may be triggered by oral notification from the CO or an authorized representative, or by any other means. 13 C.F.R. § 121.1004(a)(5). A similar provision exists with respect to protests against long-term contracts. *See* 13 C.F.R. § 121.1004(a)(3)(i)-(iii) (referring to notice received “in writing, orally, or via electronic posting”). A close reading of the regulations, then, demonstrates that “the adequacy of the notice does not depend on the manner in which or the individual through which notice is provided.” (Sur-reply at 2.)

Second, Vistronix argues, Appellant offers no evidence that the information included in the snapshot was inaccurate. Appellant's example of the Phacil award is specious, Vistronix contends, because Phacil was, in fact, initially awarded the IOAT order. Similarly, the Inspector General's findings from three years earlier do not shed light on whether data is currently accurate. The email exchange with the business development specialist, moreover, shows only that Appellant doubted the accuracy of information in the snapshot, not that the snapshot itself is unreliable. (*Id.* at 2-3.)

Vistronix's third charge is that Appellant's argument implies that a would-be protester may decide for itself whether sufficient notice has been received to trigger the 5-day protest window. (*Id.* at 3.)

Fourth, Vistronix argues, Appellant did little to verify whether the information included in the snapshot was correct. Even assuming Appellant attempted to contact IHS but was unsuccessful, Appellant could have also reached out to the ASB CO, or to the Office of Small and Disadvantaged Business Utilization at GSA and/or at HHS. (*Id.*)

III. Analysis

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

Having reviewed the record and the arguments of the parties, I agree with Vistrionix that Appellant received notice of the IOAT award to Vistrionix through the April 4, 2014 email and snapshot report. Appellant's subsequent protest on May 5, 2014 was therefore untimely, irrespective of whether IHS required recertification for this particular task order.

As Vistrionix observes, SBA regulations recognize that, when a CO fails to provide written notice of an award, the 5-day protest window will nevertheless commence upon oral notification by the CO or an authorized representative, or by “another means (such as public announcements or other oral communications) of the identity of the apparent successful offeror.” 13 C.F.R. § 121.1004(a)(5). Contrary to Appellant's arguments on appeal, then, the regulations do not require that notice be in writing, or that such notice be communicated directly from the CO. OHA likewise reached similar results in prior cases. In *Size Appeal of Garco Constr., Inc.*, SBA No. SIZ-5308 (2011) and *Size Appeal of MWE Servs., Inc.*, SBA No. SIZ-5283 (2011), OHA found that protesters received adequate notice of contract award through postings on the FedBizOpps website. In *Size Appeal of Greenleaf Constr. Co., Inc.*, SBA No. SIZ-4771 (2006), where the procuring agency notified GAO of intent to award to a specific offeror, and served a copy upon the protester's counsel, OHA found this notification was sufficient to trigger the timeline for a size protest.

In the instant case, the snapshot report informed Appellant that the IOAT task order had been awarded to Vistrionix. Unlike the cases where a notification was merely posted on a public portal or provided to a protester's representative, the snapshot report here was emailed directly to Appellant. Further, Appellant received, reviewed, and understood the report, as evidenced by the ensuing dialogue between Appellant's President and GSA's business development specialist. *See* Section II.A, *supra*. Thus, Appellant here had not only constructive notice but actual notice of the award to Vistrionix.

Appellant argues that it could reasonably disregard the snapshot report because data in that report is not generally accurate. Appellant, though, has not identified any specific errors in the report. Although Appellant points to the fact that the snapshot continued to show an award to Phacil, the IOAT task order was in fact previously awarded Phacil and the report did not purport to summarize the current status of orders. In addition, Vistrionix's point is well-taken that Appellant has not demonstrated that it exercised proper due diligence upon learning that the IOAT apparently had been awarded to Vistrionix.

Appellant also argues that finding that the snapshot report triggered Appellant's protest window would be poor policy, as it would impose a heavy burden of vigilance on would-be protesters. I find this argument unpersuasive for two reasons. First, unlike the protesters in *Garco Construction* and *MWE Services*, Appellant received actual notice of award, not merely constructive notice. Contrary to the premise of Appellant's argument, then, Appellant here would not have had to comb through every imaginable online source. Second, OHA will not adjudicate

disputes over the policies reflected in SBA regulations. It is well-settled that OHA “has no authority to determine the validity of the size regulations and can entertain no challenge to them.” *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 9 (2012) (quoting *Size Appeal of Condor Reliability Servs., Inc.*, SBA No. SIZ-5116, at 6 (2010).)

IV. Conclusion

For the reasons discussed *supra*, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge