

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

SIZE APPEAL OF:

AIS Engineering, Inc.,

Appellant,

RE: UltiSat, Inc.

Appealed From
Size Determination No. 2-2014-137

SBA No. SIZ-5614

Decided: November 13, 2014

APPEARANCES

Jonathan T. Williams, Esq., Alexander O. Levine, Esq., Kathryn V. Flood, Esq.,
PiliroMazza, PLLC, Washington, D.C., for Appellant

John E. Jensen, Esq., Alexander B. Ginsberg, Esq., Travis L. Mullaney, Esq., Pillsbury
Winthrop Shaw Pittman, LLP, McLean, Virginia, for UltiSat, Inc.

Sharon D. Bickford, Contracting Officer, U.S. Department of Veterans Affairs, Austin,
Texas

DECISION¹

I. Introduction and Jurisdiction

On September 24, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-137 dismissing a size protest filed by AIS Engineering, Inc. (Appellant) against UltiSat, Inc. (UltiSat). The Area Office concluded that Appellant's protest was untimely.

Appellant contends that its protest was improperly dismissed, and requests that the matter be remanded to the Area Office for a new size determination. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205(f), OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

SBA's Office of Hearings and Appeals (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. The record reflects that the size determination was issued September 24, 2014, but not received by Appellant until September 29, 2014. 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. RFP and Protest

On May 9, 2014, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. VA118A-14-R-0092 for “Enterprise Satellite Communications (SatCom) Operations.” The RFP stated that VA planned to award a task order through a group of indefinite delivery / indefinite quantity (ID/IQ) contracts known as Custom SATCOM Solutions - Small Business (CS2-SB). The Contracting Officer (CO) set aside the order entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 517410, Satellite Telecommunications, with a corresponding size standard of \$30 million average annual receipts.

On August 6, 2014, VA announced that UltiSat was the apparent awardee. Appellant requested and received a debriefing, and on August 18, 2014, filed a bid protest with the U.S. Government Accountability Office (GAO) challenging the award to UltiSat. Appellant contended, *inter alia*, that “UltiSat did not provide the required small business representation with its proposal. The [RFP] required offerors to represent their small business status at the time of submitting their proposal for the [RFP].” (Bid Protest at 2.)

On August 21, 2014, a VA contract specialist contacted the Area Office seeking “confirmation whether UltiSat is still considered a Small Business under the IDIQ since the task order was issued against their CS2-SB contract.” (Email from B. Steensland to V. Mazzotta (Aug. 21, 2014).) The contract specialist further requested that “SBA make a size status determination under these circumstances in order to address the size status allegation against UltiSat.” (*Id.*) The size specialist inquired, “Did the [CO] make an explicit request for a size certification for the specific task order? If not, size is determined from the date of offer of the master contract. Subsequent task orders are considered small for at least the first 5 years or until an option is due.” (Email from V. Mazzotta to B. Steensland (Aug. 21, 2014).) The contract specialist stated that there had not been a specific recertification request.

On August 27, 2014, Appellant wrote the CO asking her to “initiate a size status inquiry” against UltiSat. Appellant asserted that UltiSat is not a small business under the \$30 million size standard; that the RFP should be considered a stand-alone procurement, rather than an order issued under an existing IDIQ contract; and that the RFP required offerors to recertify size. The contract specialist forwarded Appellant's letter to the Area Office, stating “I will need a formal response addressing the size status inquiry that can be filed with [GAO].” (Email from B. Steensland to V. Mazzotta (Aug. 27, 2014).)

B. Size Determination

On September 24, 2014, the Area Office issued Size Determination No. 2-2014-137. The Area Office treated Appellant's letter of August 27, 2014 as a size protest and dismissed the protest as untimely. The Area Office reasoned that, on a long-term contract such as the CS2-SB ID/IQ contracts, 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's protest was in connection with a task order, the Area Office considered whether VA had requested that offerors recertify their size. Upon reviewing the RFP, amendments, and information provided by VA, the Area Office found that recertification was not requested. As a result, there was no available mechanism for Appellant to challenge UltiSat's size in connection with the task order. (Size Determination at 1, citing *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).)

C. Appeal

On October 14, 2014, Appellant filed the instant appeal. Appellant states that it “did not at any point file a size protest against UltiSat with the CO. Rather, on August 27, 2014, [Appellant] sent a letter to the CO asking the CO to initiate her own size protest against UltiSat.” (Appeal at 4.)

Appellant argues that the Area Office improperly dismissed the protest. Appellant asserts that VA required offerors to recertify their small business size status for the task order by including Federal Acquisition Regulation (FAR) clause 52.212-3 in the RFP. As a result, the Area Office erred in concluding that recertification was not required for the instant task order. (*Id.* at 6-8.)

D. CO's Response

On October 17, 2014, the CO responded to the appeal. The CO denies that she filed her own size protest against UltiSat. Rather, she “merely forwarded [[Appellant's] request per FAR 19.302(c)(1) which states ‘any contracting officer who receives a protest, whether timely or not, . . . shall promptly forward the protest to the SBA Government Contracting Area Office. . . .’” (CO's Response at 1.) The CO states that she has verified that UltiSat is a small business on the underlying CS2-SB contract. (*Id.*)

The CO asserts that the inclusion of FAR clause 52.212-3 in the RFP did not constitute a request for recertification at the task order level. Instead, the CO explains, the clause was included so that the CO could make a proper responsibility determination. The CO further “reject[s] the contention that setting aside a task order for small business is a request for recertification.” (*Id.*) The CO reiterates that “[f]or the purpose of this task order award, I did not specifically seek a recertification of small business status.” (*Id.*)

E. UltiSat's Response

On November 6, 2014, UltiSat responded to the appeal. UltiSat argues that the protest was untimely, so OHA should dismiss the appeal.

The protest was untimely, UltiSat argues, because the CO did not protest UltiSat's size. Rather, Appellant protested UltiSat's size as part of its GAO bid protest, and the CO merely complied with the FAR and SBA regulations in forwarding the protest to the Area Office. (UltiSat Response at 2-3.)

UltiSat disputes Appellant's claim that it “did not at any point file a size protest against UltiSat with the CO.” UltiSat contends that Appellant challenged UltiSat's size as part of a multi-allegation bid protest to GAO on August 18, 2014, which VA subsequently forwarded to the Area Office on August 21, 2014. Six days later, Appellant wrote the CO requesting a formal size inquiry, which VA also forwarded to the Area Office. UltiSat contends that the size determination stems from the August 18 protest, and that to the extent Appellant wishes to retract this protest, the appeal is moot. (*Id.* at 3-4.)

The August 18 size allegations are untimely, UltiSat argues, because Appellant did not protest UltiSat's size within five business days of receiving notification that UltiSat was the apparent awardee. VA notified Appellant that UltiSat was the apparent awardee on August 6, 2014. To be timely, then, any size protest must have been filed no later than August 13, 2014. (*Id.* at 5-6.)

UltiSat argues the protest was also untimely for the reason cited by the Area Office: the CO did not request recertification for this particular order, so there is not a mechanism for protesting size in connection with the RFP. The inclusion of FAR clause 52.212-3 does not change this fact, because OHA has specifically held that inclusion of this standard FAR clause does not by itself constitute a request for a size recertification. (*Id.* at 6-9, citing *Size Appeal of Reliasource*, SBA No. SIZ-5536 (2014).)

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

I agree with the Area Office and UltiSat that Appellant's protest was untimely. As a

result, this appeal must be denied.

SBA regulations provide that a concern that qualified as a small business at the time it receives a contract is considered to be a small business throughout the life of that contract. 13 C.F.R. § 121.404(g). Accordingly, SBA will not entertain a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with the order. *Id.* § 121.1004(a)(3)(iii). OHA has repeatedly recognized that “size protests may only be filed against task orders issued under long term contracts if the contracting officer requests size recertification for that task order.” *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323, at 3 (2012); *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).

Here, there is no dispute that the CS2-SB is a long-term contract. Therefore, unless the CO requested recertification for the instant task order, there is no mechanism to protest size at the time the order is awarded. The CO states-and the record confirms-that the CO did not request such a recertification for the instant order, so the protest was properly dismissed.

Appellant argues that the inclusion of FAR clause 52.212-3 amounted to a request for recertification, but this argument is unavailing. OHA has specifically held that the inclusion of standard FAR clauses, and FAR 52.212-3 specifically, does not constitute a request for recertification. *Size Appeal of Reliasource*, SBA No. SIZ-5536, at 4 (2014).

Further, as UltiSat observes, even assuming the CO had requested recertification for this order, the protest still would be untimely. This is true because SBA regulations stipulate that:

Protests relating to size certifications made in response to a contracting officer's request for size certifications in connection with an individual order must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

13 C.F.R. § 121.1004(a)(3)(iii). Here, VA notified Appellant that UltiSat was the apparent awardee on August 6, 2014. To be timely, then, any size protest must have been filed no later than August 13, 2014. Appellant first challenged UltiSat's size with the bid protest filed on August 18, 2014, so Appellant's size protest is plainly untimely.

Appellant seeks to circumvent 13 C.F.R. § 121.1004(a)(3)(iii) by arguing that it was the CO, rather than Appellant, that filed the size protest with the Area Office.² This argument fails because, although Appellant urged the CO to file a size protest, the CO makes clear that she did not adopt Appellant's request. Instead, as the CO points out, she merely acted in conformance with regulations by forwarding Appellant's request to the Area Office. 13 C.F.R. §§ 121.1003

² The time limits in § 121.1004(a) do not apply to size protests brought by a contracting officer or by SBA itself. 13 C.F.R. § 121.1004(b).

and 121.1006. Indeed, SBA regulations require that a size protest be forwarded to SBA even if the CO believes the protest to be untimely. *Id.* § 121.1004(d). Appellant's contention that the CO was persuaded to file her own size protest is therefore not supported by the record.

IV. Conclusion

Because the instant task order did not require recertification, the Area Office correctly dismissed Appellant's protest. The appeal is therefore DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge