

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

SIZE APPEAL OF:

Research and Development Solutions, Inc.,

Appellant,

RE: ICI Services Corporation d/b/a ICI  
Services

Appealed From  
Size Determination No. . 2-2015-006

SBA No. SIZ-5626

Decided: December 12, 2014

APPEARANCES

Mike Gardner, Esq., Troutman Sanders LLP, Virginia Beach, VA, for ICI Services.

William J. Shaw, President, Research and Development Solutions, Inc., McLean, VA,  
for Appellant

DECISION

I. Introduction and Jurisdiction

On October 16, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2015-006, dismissing a size protest filed by Research and Development Solutions, Inc. (Appellant) against ICI Services Corporation d/b/a ICI Services (ICI). 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 OHA denies the appeal.

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 July 30, 2013, the Department of the Navy (Navy), Naval Undersea Warfare Center

Division (NUWCD) issued Solicitation No. N00024-13-R-3331, a task order seeking Integrated Product Support and Configuration Management technical and engineering services for submarine Electromagnetic Systems Programs. 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, as a follow-on to Seaport-e task order Solicitation No. N00178-04-D-4113-N406. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$35.5 million average annual receipts size standard. On August 30, 2013, Appellant and ICI submitted timely quotes. At the time ICI submitted its proposal, ICI was certified as small for the underlying Seaport-e contract.

On September 25, 2014, the CO announced that ICI was the successful offeror. On October 2, 2014, Appellant filed a size protest challenging ICI's size, stating that it is not a small business concern and thus not eligible for award. The protest states that as of June 2014, the date ICI was awarded an option on its Seaport-e contract option, ICI had represented and certified itself as an other than small business concern. Based on this certification, Appellant argued ICI was ineligible for award of the task order at issue.

#### B. Size Determination

On October 16, 2014, the Area Office issued Size Determination No. 2-2015-006, dismissing the protest as untimely. The Area Office reasoned that, on long-term contracts, such as the one at issue here, size protests may be filed at three different stages: (1) at the time the long-term contract is initially awarded; (2) when an option is exercised; or (3) if a CO requests recertification in connection with an individual order. 13 C.F.R. § 121.1004(a)(3); Size Determination at 2, 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).

Here, the Area Office found ICI was awarded its original Seaport-e contract in April 2004, and was awarded an option on its original contract in May 2014; therefore ICI's size could have been challenged at either time. After reviewing the solicitation here, the Area Office stated the issue was whether the CO requested a recertification. After being informed by the CO that no recertification request was issued, the Area Office determined Appellant's protest was not timely filed.

#### C. Appeal

On October 31, 2014, Appellant filed the instant appeal with OHA. Appellant argues the Area Office erred in applying 13 C.F.R. § 121.1004(a)(3) when determining the timeliness of a size protest. Appellant counters that 13 C.F.R. § 121.1004(a)(2) is the correct regulation to be applied when determining the timeliness of its size protest. Appellant also finds fault in the Area Office's reliance on *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) because neither of those cases are apposite here. According to Appellant, its size protest “is about the 'size of ICI' for the purpose of the Solicitation and not about ICI's 'certification as SB' because ICI has certified that

it 'is not a small business concern' for Seaport-e, under which [the task order] was issued, and is listed as a 'Large Business' on the Seaport-e portal." Appeal at 6. Appellant adds the Navy violated 13 C.F.R. § 121.101(a) when it awarded the task order to a business concern known to be large. Further, Appellant states that its size protest "is rather a dispute of the actual size of ICI and the Navy's issuance of a SB-set-aside task order to ICI even though ICI was a Large Business under Seaport-e" and not a protest about "ICI's certification as a SB."D' *Id.* at 7.

Next, Appellant argues SBA revised its regulations at 13 C.F.R. Parts 121 and 124 in order "to require all business concerns who held SB size status under the [Multiple Award Contract] to recertify at the MAC level prior to the sixth year of performance and every time an option is exercised thereafter." *Id.* at 10. Appellant contends that once ICI's five-year ordering period of Option 1 for its original contract under Seaport-e ended, and ICI's subsequent certification that it is not a small business concern, ICI cannot utilize its small business certification under Option 1 to be awarded the task order at issue. Because the Navy violated SBA regulations regarding small business set-aside procurements by awarding the task order to ICI, Appellant argues the Area Office erred in dismissing its size protest as untimely by framing the issue as one of small business certification. *Id.* at 11.

Appellant maintains the Area Office "should have considered the objectives of the recertification rule and the SB-set-aside program" when reviewing Appellant's size protest. *Id.* at 13. Appellant asserts the intention behind SBA's 13 C.F.R. Parts 121 and 124 Final Rule are once a small business recertified itself as a large business under a MAC, an agency can no longer count that award as a small business set-aside. Claiming that the Navy issued the award to ICI while in violation of 13 C.F.R. §§ 121.101(a), 121.401, and 121.402(a), Appellant argues the Area Office erred in dismissing its size protest under § 121.1004(a)(3). *Id.* at 14-15. Because the award went to a concern who had certified as a small business concern under Seaport-e, Appellant contends that it was the Area Office's role to "conclude that the CO was nevertheless required to request, and was also presumed to have requested, recertification from ICI for the task order." *Id.* at 17.

#### D. ICI's Response

On November 18, 2014, ICI responded to the appeal. ICI contends the Area Office properly dismissed the appeal as untimely, thus OHA should uphold the Area Office's dismissal.

ICI contends the Area Office properly based their dismissal in accordance with 13 C.F.R. § 121.1004(a)(3). ICI notes Appellant had an opportunity to challenge ICI's size when the Navy exercised Option 2 of ICI's Seaport-e on May 29, 2014. ICI argues that in *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010), OHA clearly established that if on a long-term contract the CO did not request size recertification, a size protest in connection with a task order would be untimely. ICI Response, at 5. Thus, ICI surmises that because the CO here did not request offerors to recertify as small, Appellant's protest is untimely.

ICI challenges Appellant's argument that because the MAC requires recertification, then each order issued under Seaport-e derives its size status from that recertification. According to ICI, *Size Appeal of Safety and Ecology* answers this issue as it establishes that the regulations did

not require the CO to seek recertification at the time of task order award based on a long-term contract. *Id.* at 8. ICI adds that at the time it submitted its offer, in August 2013, ICI was a small business concern, thus even if Appellant's size protest was timely, which ICI does not concede, ICI's size would still not prevent it from being awarded the contract at issue. *Id.* at 9.

### E. Reply

On November 19, 2014, OHA issued an order granting Appellant's motion to extend the close of record in order to reply to ICI's response and on December 1, 2014, Appellant filed its reply.<sup>1</sup> Appellant emphasizes that its appeal is not challenging ICI's certification but rather its size. Reply at 2. Appellant argues that challenging ICI's size in May 2014, when it certified as a large business is illogical since as ICI had expressly stated it was a large business, thus there would be no reason to challenge its size. Thus, the timeliness rules found at § 121.1004(a)(3) do not apply. Appellant once again argues that the Navy cannot count this award towards its small business prime goals if ICI is the awardee.

Next, Appellant maintains that once ICI certified as a large business in May 2014, its MAC was no longer eligible to be issued task orders with a small business set-aside. Appellant further challenges ICI's assertion that its size should be determined at the time it submitted its offer in August 2013. Appellant explains that "ICI attempted to apply the already-expired Option-1 [small business] certification of its Seaport-e MAC under 13 C.F.R. § 121.404(a)(1)(i) to its task order proposal, yet it failed to acknowledge and adhere to the exceptions listed in 13 C.F.R. R. § 121.404(g)(3)." According to Appellant, a business concern's size is therefore determined at the time the task order is issued, in this case September 2014, and not when proposals are submitted. *Id.* at 5.

Lastly, Appellant argues that 13 C.F.R. § 121.1004(a)(3) is not meant to be used when protesting a large business's certification as is the case here. It adds that its protest was timely under 13 C.F.R. § 121.1004(a)(2) and (a)(4), the proper regulations to be followed here. *Id.* at 6.

## 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).

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<sup>1</sup> In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d).

## B. Analysis

After reviewing the record and the arguments put forth by the parties, I agree with the Area Office that Appellant's protest was untimely. Appellant's attempt to argue numerous other regulations are to be followed while § 121.1004(a)(3) should be ignored is meritless.

As ICI observes, the issue of the timeliness of a size protest in the case of long-term contracts is governed by § 121.1004(a)(3). In its appeal, Appellant argues that §§ 121.1004(a)(2), (a)(3), § 121.401, 402, 404(a)(1)(i) or 404(g)(3) apply instead. As discussed below, Appellant's arguments are meritless and show a misunderstanding of the issue at hand.

Appellant argues the CO was required to request certification because ICI could not rely on its small business certification under its Seaport-e. Nevertheless, Appellant has based some of its argument on the wrong regulations. 13 C.F.R. § 121.404 governs the date to determine size, while 13 C.F.R. § 121.1004 governs the timeliness of size protests, the only issue here before OHA. Appellant also contends that SBA's intention behind 13 C.F.R. Part 124, based on the Final Rule comments, is also applicable. Appeal at 8. However, that section concerns 8(a) Business Development set-aside contracts, and is therefore inapplicable to the task order at issue.

Appellant appears to have confused the date to determine size with the deadlines for filing a size protest. The regulation sets the date as of which a concern's size is determined in 13 C.F.R. § 121.404. A concern's size is determined as of the date it submits its written self-certification that it is small as part of its initial offer, including price. 13 C.F.R. § 121.404(a). Generally, once a firm is awarded a contract, it is considered small for the life of the contract. 13 C.F.R. § 121.404(g). An exception to this rule is that under Multiple Award Contracts, where a concern is small under each order issued unless a contracting officer requests a new certification in connection with a specific order, in which case the date to determine size is the date of recertification under the task order. 13 C.F.R. § 121.404(a)(1)(i). A concern in receipt of an award under Multiple Award Contracts with duration of more than five years must recertify its size status prior to 120 days of the end of the fifth year and prior to 120 days of the exercise of any options. Appellant attempts to hang arguments on these regulations. However, these regulations all deal with the date as of which a concern's size is determined. That is, the date as of which the concern's annual receipts, number of employees and affiliates will be examined to determine its size. The regulation at § 121.404 is part of the process for determining a concern's size. It has nothing to do with establishing the time limit for filing size protests.

The regulation governing the time limits for filing size protests is found at 13 C.F.R. § 121.1004. ICI's Seaport-e contract, including options, was longer than 5 years, and thus is considered a long-term contract. The regulation for long term contracts is 13 C.F.R. § 121.1004(a)(3), and sets three times at which a size protest may be filed in connection with a long-term contract. First, an interested party may protest regarding a size certification made at the time the long-term contract is initially awarded. § 121.1004(a)(3)(i). Second, an interested party may protest regarding a size certification made at the time an option is exercised. § 121.1004(a)(3)(ii). Third, an interested party may protest regarding a size certification made “in response to a contracting officer's request for size certifications in connection with an individual

order.” § 121.1004(a)(3)(iii). All three types of protest must be filed with the CO within five business days of receipt of notice of the certification made by the protested concern. No other regulations address time limits for size protest on long-term contracts. Here, the CO did not request a new certification in connection with this order, thus a protest against ICI's size could be filed only within five days of contract award or of exercise of the most recent option. Appellant did neither.

Appellant attempts to argue that § 121.1004(a)(2) or (4) apply [sic] instead of § 121.1004(a)(3), but this misconstrues SBA's regulations. The regulation at § 121.1004(a)(2) concerns timeliness of size protests on task orders for negotiated procurements after award of the contract or a task order “if the contracting officer requested a new size certification in connection with that order.” 13 C.F.R. § 121.1004(a)(2). Here, neither provision is applicable. Appellant's protest was not filed within five days of award of the contract, and the CO did not request new size certifications with the order.

Further, § 121.1004(a)(4) addresses the issue of the time limit for filing protest after an electronic notification of award. Subsections (a)(1) through (a)(3) of the regulation deal with the time limits for filing size protests for various types of contract. Subsection (a)(4) deals with the timeliness of a protest when the protestor received a particular type of notification, and must be read in connection with the previous subsections setting the time limits for protesting size for various types of contracts. Otherwise, the regulation would have set forth carefully the well-considered rules on the time limits for size protests for long-term contracts, only to have them nullified if there was electronic notification. The regulation cannot mean this.

Appellant insists that its size protest is about ICI's size and the small business set-aside task order issued to ICI and not a protest about “ICI's certification as a SB.” Appeal at 7. A size protest is indeed a protest about a concern's size, as Appellant points out, but size protest timeliness regulations are based upon certification, thus whether a party challenges a concern's size or certification, they are not mutually exclusive, and they both fall under the regulations found at 13 C.F.R. § 121.1004. Furthermore, Appellant insists that its protest “was rather about the Navy's action to issue a SB set-aside task order to a Large Business in violation of the regulations related to the SB program.” Appeal at 16. Yet again, Appellant fails to understand the issue here. If Appellant wants to challenge the Navy's action of issuing a task order to a large business concern and counting that contract towards its small business prime contractor goals, OHA is not the correct forum for such a challenge. Appellant would need to file an agency protest or a GAO protest. The only issue at hand here is whether the size protest filed by Appellant was timely, not whether the Navy can count the award made to ICI towards its small business prime contractor goals.

In order to determine the timeliness of Appellant's size protest, we must first understand the task order. ICI was awarded a Seaport-e contract on April 2004. That contract contained multiple options. Within Option 1, exercised in April 2009, the Navy issued Solicitation No. N00024-13-R-3331, the task order at issue here. The CO elected to utilize the size certifications filed for Option 1 instead of requiring prospective awardees to recertify their size for the task order. In the past, OHA has repeatedly 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). Here, the proper time for Appellant to challenge ICI's size was at the time of award of the Seaport-e contract or when the Navy exercised Option 1. However, because the CO undoubtedly did not request certification for the task order at issue, Appellant's October 2nd size protest is clearly untimely.

Appellant further maintains that ICI's subsequent certification as a large business under Option 2 of its Seaport-e contract applies to the case at hand. According to Appellant, this certification should prevent ICI from being awarded the task order at issue. I disagree. The task order here was issued on July 30, 2013, and proposals received on August 30, 2013, almost a year before ICI certified as a large business. Thus, the CO relied on size certifications made under Option 1 and not Option 2, as Option 2 had not yet been exercised. Because ICI submitted its initial offer, including price, under Option 1, the later certification under Option 2 was not applicable. There is also no dispute that ICI was small at the time Option 1 was exercised.

The Area Office stated that Appellant could have challenged ICI's size when Option 2 was exercised, which Appellant contends is pointless since ICI certified as a large business concern. I agree with the Appellant. However, the Area Office's empty recommendation does not alter the facts found here, that absent a CO's requests for certification for the task order at issue, ICI's certification as a large business under Option 2 does not make Appellant's untimely size protest timely under SBA regulations.

Lastly, Appellant states that the Area Office should “conclude that the CO was nevertheless required to request, and was also presumed to have requested, recertification from ICI for the task order.” Appeal at 17. This argument has been addressed by OHA before. Once a contract has been established to be a long-term contract, the CO is not “required to request recertification for task orders resulting from the ID/IQ contract. Instead, whether to request recertification on a task order issued under an ID/IQ contract is a matter within the CO's discretion.” *Size Appeals of Safety and Ecology Corporation*, SBA No. SIZ-5177, at 22 (2010); citing *Size Appeal of LB&B Associates, Inc.*, SBA No. SIZ-4748, at 23-27 (2005); *Matter of Enter. Info. Servs.*, Comp. Gen. B-403028, Sept. 10, 2010, available at <http://www.gao.gov/decisions/bidpro/403028.pdf>. OHA added that “the very existence of the five-year recertification requirement belies the reasoning that merely setting the task order aside for small businesses is a request for recertification. If the CO were required to request recertification for every task order, there would be no need to require recertification at the five-year mark to ensure that businesses holding ID/IQ contracts are small. Additionally, the SBA considered requiring recertification for every task order and rejected that approach in favor of the five year recertification rule.” *Safety and Ecology*, SBA No. SIZ-5177, at 22 (2010); citing 71 Fed. Reg. 66,434, 66,436, 66,444 (Nov. 15, 2006).

Therefore, I conclude that 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 how

the Area Office committed 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