

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

SIZE APPEAL OF:

Research and Developments Solutions,
Inc.,

Appellant,

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

PFR of SBA No. SIZ-5626

SBA No. SIZ-5643 (PFR)

Decided: March 3, 2015

APPEARANCES

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

Stephen J. Lamb, Contracting Officer, For the Department of the Navy, Naval Undersea
Warfare Center Division, Newport, Rhode Island

DECISION

I. Introduction and Jurisdiction

The Department of the Navy (Navy), Naval Undersea Warfare Center Division 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 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 September 25, 2014, the CO announced that ICI Services Corporation d/b/a ICI Services (ICI) was the successful offeror. On October 2, 2014, Research and Development Solutions, Inc. (Appellant) filed a size protest challenging ICI's size, stating that it is not a small business concern and thus not eligible for award. 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 Appellant's size protest against ICI. Appellant

contended that the size determination was clearly erroneous and requested that SBA's Office of Hearings and Appeals (OHA) reverse or remand the size determination. On December 12, 2014, OHA denied the appeal. *Size Appeal of Research and Development Solutions, Inc.*, SBA No. SIZ-5626 (2014).

On January 2, 2014, Appellant filed the instant Petition for Reconsideration (PFR), seeking to overturn the earlier decision. For the reasons discussed *infra*, the PFR 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 its PFR within twenty days of service of *Research and Development Solutions, Inc.*, SBA No. SIZ-5626, so the PFR is timely. 13 C.F.R. § 134.227(c). Accordingly, this matter is properly before OHA for decision.

II. PFR

Appellant's PFR asserts that OHA mistakenly accepted the assertions of the CO, the Area Office, and ICI that ICI qualified as a small business concern. Appellant argues OHA failed to consider a "key fact" that an official document, a DD Form 1155 of task order TO-N406, was processed under the Seaport-e MAC contract and issued pursuant to the regulation on long-term contracts. TO-N406 did not classify ICI as a small business because the Seaport-e portal identified ICI as a large business. Appellant argues OHA erred in ignoring this evidence, and finding ICI a qualified small business, despite the official task order and small business regulations indicating ICI was not small.

Appellant asserts OHA also erred when it stated that the task order was issued on July 30, 2013, because a solicitation was issued, not a task order. Appellant states a solicitation is a request to submit offers where a task order results in a binding contract between the government and a contractor. Appellant asserts the task order was issued under Option 2, and thus the Navy could not rely on ICI's certification under Option 1.

Additionally, Appellant argues SBA's five-year recertification requirement is strict and unambiguous. Appellant asserts if a concern is certified as small under a MAC, the concern is small for that contract; however, if the concern is not certified as small, and ICI is not for Option 2, it is not a small business. To support its argument Appellant points to SBA comments on SBA's final rule for the revisions of 13 C.F.R. parts 121 and 124, 71 Fed. Reg. 66,434-378 (Nov. 15, 2006). Appellant also relies on 13 C.F.R. § 121.404(g)(3) and argues that if a procuring agency cannot count a contract towards its small business goals, that agency cannot treat the contractor as a small business and issue a set aside order under its MAC.

Appellant also contends OHA erred in rejecting Appellant's argument that SBA's intention behind 13 C.F.R. part 124 is applicable because Appellant referred only to SBA comments on regulations relating to long-term contracts. Appellant argues OHA should have seen that SBA specifically considered and rejected a provision with the same effect as the decision in *Research and Development Solutions, Inc.*, SBA No. SIZ-5626.

Appellant argues that the timeliness rule at 13 C.F.R. § 121.1004(a)(3) did not apply to its protest, but that its protest was timely under 13 C.F.R. §§ 121.1004(a)(2)(i) and 121.1004(a)(4).

III. The CO's Response

On January 23, 2015, the CO responded to Appellant's PFR. The CO argued the PFR should be denied. The CO asserted that, in addition to the Area Office's dismissal and OHA's decision in *Research and Development Solutions, Inc.*, SBA No. SIZ-5626, SBA stated, in its response to Appellant's Government Accountability Office (GAO) protest, that ICI certified as a small business as of the date it submitted its initial proposal and is small for the instant task order. The CO submits a copy of SBA's response. Further, the CO notes GAO denied Appellant's protest. *Research and Development Solutions, Inc.*, B-410581, B-410581.2 (Jan. 15, 2015).

On January 26, 2015, Appellant sought to reply to the CO's Response. A reply to a response is not permitted unless the judge orders it. 13 C.F.R. § 134.206(e). Accordingly, I did not consider Appellant's Reply.

IV. Analysis

A PFR may be granted by OHA upon a “clear showing of an error of fact or law material to the discussion.” 13 C.F.R. § 134.227(c). A PFR does not allow an unsuccessful party an additional opportunity to argue its position, and the PFR must rise from a manifest error of law or mistake of fact. *Size Appeal of Env'tl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935, at 2 (2008) (PFR). “A PFR is appropriate only in limited circumstances, such as situations where OHA has misunderstood a party or has made a decision outside the adversarial issues presented by the parties.” *Id.* (citing *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (quoting *Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983))). Thus, “[t]he moving party's argument must leave the Administrative Judge with the definite and firm conviction that key findings of fact or conclusions of law of the earlier decision were mistaken.” *Size Appeal of TKTM Corp.*, SBA No. SIZ-4905 (2008) (citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006)); *Size Appeal of KVA Elec., Inc.*, SBA No. SIZ-5057 (2009).

Here, Appellant can point to no misunderstanding by OHA of its arguments or any portion of the decision based on any fact or law outside the issues presented.¹ Rather, Appellant itself misunderstands the ruling in *Research and Development Solutions, Inc.*, SBA No. SIZ-5626. The issue there was the timeliness of Appellant's protest. Appellant repeatedly asserts SBA

¹ Upon review of *Research and Development Solutions, Inc.*, SBA No. SIZ-5626, I did discover a typographical error. The decision incorrectly indicates the Navy issued Solicitation No. N00024-13-R-3331 on July 30, 2013; Solicitation No. N00024-13-R-3331 was issued on August 20, 2013. This error does not impact the outcome of the decision and does not warrant granting a PFR.

found ICI a “qualified small business concern.” The finding rather was that Appellant's protest was untimely.

Appellant attempts to make an issue of TO-N406, the award of the task order at issue here, and claims error in the description of the documents. However, it is clear from the record that the Navy awarded ICI its original long term Seaport-e Multiple Award Contract on April 5, 2004, and awarded ICI an option on the contract in May 2014. The record clearly establishes the Navy issued Solicitation No. N00024-13-R-3331 on August 20, 2013. On September 24, 2014, the Navy awarded ICI the task order resulting from the solicitation, and Appellant protested the award on October 2, 2014. Appellant's attempt to create confusion does not change the essential fact that its protest was untimely.

In *Research and Development Solutions, Inc.*, SBA No. SIZ-5626, I decided the timeliness issue against Appellant:

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's reliance on the regulatory preamble to this rule is misplaced. This rule promulgated 13 C.F.R. § 121.1004(a)(3), and no reading of the preamble can vary the plain meaning of the rule.

Appellant's reliance on 13 C.F.R. § 121.404(g)(3) is also inappropriate. This regulation addresses the question of a procuring agency counting a contract towards its small business goals, and is not applicable to size protests and appeals. *Size Appeal of Tescom*, SBA No. SIZ-5641 (2015). Similarly, Appellant's interpretation of SBA's intention behind 13 C.F.R. part 124 is inapplicable because that regulation covers the 8(a) Business Development program.

Appellant's argument that its protest was timely under either 13 C.F.R. § 121.1004(a)(2)(i) or § 121.1004(a)(4) is also meritless. The instant procurement is a task order off a long-term MAC contract, and thus § 121.1004(a)(3) is the applicable regulation because it

applies to contracts with a duration of greater than five years. The regulation at 13 C.F.R. § 121.1004(a)(2)(i) applies to the time limits for filing a protest in negotiated procurements for contracts of less than five years duration. Section 121.1004(a)(4) applies to the effect of electronic notification of award and does not vary the rules for the time limits for the various types of contracts expressed in § 121.1004(a) (1) — (3).

Appellant's PFR is wholly without merit, and can point to no misunderstanding by OHA or to any reliance on facts or law outside the issues presented. Accordingly, I must deny the PFR.

IV. Conclusion

For the above reasons, I DENY the PFR and AFFIRM the decision in *Size Appeal of Research and Development Solutions, Inc.*, SBA No. SIZ-5626 (2014).

Christopher Holleman
Administrative Judge