

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

SIZE APPEAL OF:

RX Joint Venture, LLC,

Appellant,

RE: Agile Defense, Inc.

Appealed From
Size Determination No. 2-2015-117

SBA No. SIZ-5683

Decided: September 28, 2015

APPEARANCES

David F. Barton, Esq., Gardner Law, San Antonio, Texas, for Appellant

Paul A. Debolt, Esq., Nathaniel S. Canfield, Esq., Venable LLP, Washington, D.C., for
Agile Defense, Inc.

DECISION

I. Introduction and Jurisdiction

On August 11, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2015-117 dismissing a size protest filed by RX Joint Venture, LLC (Appellant) against Agile Defense, Inc. (Agile). 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.

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. 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 March 13, 2015, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA2816-15-R-0006 for Network Control and Livelink/Sharepoint Services at Los Angeles AFB, California. The RFP indicated that the Air Force would award a task order through the U.S. General Services Administration (GSA) Alliant Small Business (ASB) Government-wide Acquisition Contract (GWAC). The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding size standard of \$27.5 million average annual receipts. The RFP included the full text of Federal Acquisition Regulation (FAR) clauses 52.212-3, Offeror Representations and Certifications — Commercial Items (MAY 2014) and 52.219-1, Small Business Program Representations (APR 2012). (RFP at 44-57, 65-68.) In addition, the RFP incorporated by reference FAR clause 52.219-6, Notice of Total Small Business Set-Aside (NOV 2011). (*Id.* at 59.) Offers were due April 16, 2015.

On July 31, 2015, the Air Force announced that Agile was the apparent awardee. On August 4, 2015, Appellant filed a protest of Agile's small business eligibility, alleging that Agile is in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). The CO forwarded the protest to the Area Office for review.

B. Size Determination

Upon receiving the protest, the Area Office asked the CO whether offerors were required to recertify size for this task order. The CO responded that he “did not request an explicit size certification for the Task Order.” (E-mail from D. Hass to V. Mazzotta (Aug. 5, 2015).)

On August 11, 2015, the Area Office issued Size Determination No. 2-2015-117 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's protest pertained to a task order, the Area Office considered whether the Air Force had requested that offerors recertify size for that order. Upon reviewing the RFP, amendments, and information provided by the Air Force, the Area Office found that recertification was not required. As a result, there was no available mechanism for Appellant to challenge Agile'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 Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).)

C. Appeal

On August 21, 2015, Appellant filed the instant appeal. Appellant maintains that the Area Office improperly dismissed the protest. In particular, Appellant asserts that the CO did require

offerors to recertify their small business size status for the task order. Appellant highlights that the RFP included FAR clauses 52.212-3, 52.219-1, and 52.219-6, and that the RFP instructed offerors to complete the Standard Form (SF) 1449, which indicated that the order was set aside entirely for small businesses. As a result, Appellant reasons, the Area Office should have found that recertification was required for the instant task order. (Appeal at 3-6.)

Appellant also reiterates its arguments that Agile is in violation of the ostensible subcontractor rule.

D. Partial Withdrawal of Appeal

On August 31, 2015, Agile moved to partially dismiss the appeal. Agile argued that, because the Area Office did not reach the merits of Appellant's protest, OHA should only consider whether the Area Office properly dismissed the protest as untimely. Agile urged OHA to dismiss the portions of the appeal relating to the substance of the protest.

On September 8, 2015, Appellant responded to the motion. Appellant stated that it “continues its appeal of the timeliness of its size protest and withdraws its request that OHA make an award of the contract based upon the adjudicative facts of the case.” (Response at 7.)

On September 9, 2015, OHA granted Appellant's request to partially withdraw its appeal. OHA stated that “the remaining issue on appeal is the timeliness of the protest.” (Order at 1.)

E. Agile's Response

On September 17, 2015, Agile responded to the appeal. Agile argues the Area Office did not err in dismissing the protest.

The requirement to complete SF 1449 was a request for certain basic information, Agile contends, and does not constitute a request for recertification. The RFP instructed offerors to “complete blocks 12, 17, and 30” and “use the SF 1449 Continuation Sheet in place of completing blocks 19, 20, 21, 22, and 23.” (Response at 2, quoting RFP.) Those blocks, Agile explains, did not even mention size status, let alone request recertification.

The fact that the CO provided a partially complete SF 1449, where NAICS code 541512 was prefilled, likewise does not constitute a recertification requirement. It signifies only that the task order was set aside for small businesses, and OHA has rejected the notion that merely setting aside a task order for small businesses is a request for recertification. (*Id.*, citing *Size Appeal of ReliaSource*, SBA No. SIZ-5536 (2014).)

In addition, Agile points out, OHA has stated that “the inclusion of standard FAR clauses ... does not constitute a request for recertification.” (*Id.*, quoting *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5614, at 5 (2014).) In fact, OHA has previously addressed FAR clauses 52.212-3 and 52.219-6, and has held that the inclusion of those clauses does not amount to a recertification request. (*Id.* at 3, citing *AIS Eng'g* and *Safety and Ecology Corp.*)

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 Area Office correctly recognized 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). In the instant case, there is no dispute that the Appellant's protest did not seek to challenge the award of the underlying GWAC contract or the exercise of an option. Therefore, Appellant's protest is timely only if the CO requested recertification for this particular order. OHA has repeatedly held that “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.” *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5614, at 5 (2014); *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323 (2012); *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).

The Area Office determined that the RFP did not require recertification for the task order, and the CO confirmed that he did not intend to request recertification. Sections II.A and II.B, *supra*. Further, the RFP contained no provisions explicitly requiring recertification. *Cf.*, *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013) (considering language within a task order solicitation). Given this record, then, the Area Office properly dismissed Appellant's protest as untimely.

Appellant argues that the inclusion of FAR clauses 52.212-3, 52.219-1, and 52.219-6 in the RFP amounted to a request for recertification, but this argument is unavailing. OHA has explained that “recertification does not occur simply because mandatory FAR clauses were incorporated.” *Size Appeal of ReliaSource*, SBA No. SIZ-5536, at 4 (2014). Likewise, OHA has rejected the notion that “merely setting [a] task order aside for small businesses is a request for recertification.” *Safety and Ecology Corp.*, SBA No. SIZ-5177, at 21. As Agile observes, OHA has previously addressed two of the clauses referenced by Appellant in the context of task order competitions, and has determined that neither of those clauses requires recertification. *AIS Eng'g*, SBA No. SIZ-5614, at 5; *Safety and Ecology Corp.*, SBA No. SIZ-5177, at 22 (“I do not agree . . . that the inclusion of FAR clause 52.219-6 constitutes a requirement by the CO to recertify.”).

IV. Conclusion

Because the instant RFP 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