

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

SIZE APPEAL OF:

CodeLynx, LLC,

Appellant,

RE: Securityhunter, Inc.

Appealed From

Size Determination No. 2-2016-026

SBA No. SIZ-5720

Decided: March 9, 2016

APPEARANCES

Drew Weston, Director of Sales and Marketing, CodeLynx, LLC, North Charleston, South Carolina

Heather A. James, Esq., Whiteford, Taylor & Preston, LLP, Washington, D.C., for Securityhunter, Inc.

Donald S. Hadrick, Contracting Officer, U.S. Department of Health and Human Services, Rockville, Maryland

DECISION

I. Introduction and Jurisdiction

On February 1, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2016-026 dismissing a size protest filed by CodeLynx, LLC (Appellant) against Securityhunter, Inc. (Securityhunter). 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,<sup>1</sup> so the

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<sup>1</sup> Appellant received the size determination on February 4, 2016.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## I. Background

### A. Solicitation and Protest

On October 22, 2015, the U.S. Department of Health and Human Services (HHS) issued Request for Quotation (RFQ) No. 16-233-SOL-00004 for electronic security maintenance and installation. The RFQ contemplated awarding a firm-fixed price task order through the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) 84, Law Enforcement and Security Services. (RFQ § 1.2.) The period of performance would be for one year from the date of contract award. (*Id.* § 5.2.) HHS instructed offerors that “[s]ubmission of written quotes must be in accordance with [Federal Acquisition Regulation (FAR)] 52.212-1, Instructions to Offerors, Commercial Items. Verbal quotes will not be accepted.” (*Id.*, at 1.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561621, Security Systems Services (except Locksmiths), with a corresponding \$20.5 million annual receipts size standard. The CO solicited offers from 25 contractors on GSA FSS 84. Offers were due November 13, 2015. Four offerors, including Securityhunter and Appellant, submitted timely quotations.

On January 15, 2016, HHS notified offerors that Securityhunter was the apparent awardee. On January 21, 2016, Appellant protested Securityhunter's small business size status. Securityhunter was not a small business, Appellant alleged, because its annual receipts exceed the \$20.5 million size standard.

### 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, “No, the contracting office did not request re-certification in the RFQ, we relied on the self-certification contained in the current SAM record, as the GSA Schedule Pricelist gave no indication of Business Size Status for the assigned NAICS code.” (Letter from D. Fessler to V. Mazzotta (Jan. 28, 2016).)

On February 1, 2016, the Area Office issued Size Determination No. 2-2016-026 dismissing the protest as untimely. The Area Office reasoned that, on a long-term contract such as Securityhunter's GSA FSS contract, 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 HHS had requested that offerors recertify size for that order. Upon reviewing the RFQ and information provided by HHS, the Area Office found that recertification was not required. As a result, there was no available mechanism for Appellant to challenge Securityhunter's size in connection with

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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 February 18, 2016, Appellant filed the instant appeal. Appellant maintains that the Area Office improperly dismissed the protest because the CO required offerors to recertify their small business size status for the task order. In Amendment 0001, HHS stated, “**all offerors shall certify in writing that their proposed solution falls within the scope of the referenced GSA Schedule contract(s).**” (Appeal at 1, quoting Amendment 0001, emphasis Appellant's.) Appellant contends this language “is an explicit call to all offerors to certify that they meet the requirements of the solicitation including the small business requirement and cannot be construed in any other way.” (*Id.*)

Appellant points to other provisions of the RFQ, arguing they too support a requirement to recertify at the task order level. For instance, the RFQ explicitly directed offerors to submit their quotations in accordance with FAR 52.212-1. Appellant points out that FAR 52.212-1(b)(8) requires the offer to show “[a] completed copy of the representations and certifications at FAR 52.212-3 (see FAR 52.212-3(b) for those representations and certifications that the offeror shall complete electronically).” 48 C.F.R. § 52.212-1(b)(8). FAR 52.212-3, Appellant notes, requires offerors to provide a certification of size, which can be done in two ways. Either the offeror can attach written representations and certifications to the bid response, or the offeror can incorporate the representations and certifications it made on the System for Award Management (SAM) website. (Appeal at 1.)

Appellant argues this case is distinguishable from *Size Appeal of RX Joint Ventures, LLC*, SBA No. SIZ-5683 (2015), a case in which OHA determined that the CO did not require recertification. Unlike that case, the CO for HHS explicitly stated at the outset that all offerors' submissions must conform to FAR 52.212-1. Appellant contends that by either incorporating their published representations and certifications on SAM or “by the extent of agreement with terms, conditions and provisions” offerors were required to recertify their size status. (*Id.* at 1-2.)

Appellant points to *Size Appeal of Navarro Research and Engineering, Inc.*, SBA No. SIZ-5473 (2013), a case where an area office found that the act of submitting a proposal for a task order against a FSS was a certification of size. Appellant argues further that the purpose behind the recertification requirement is that contracts set aside for small businesses should be awarded to small businesses. (*Id.* at 2, citing *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013).)

The protest is also timely, Appellant argues, because the performance period for the instant task order extends beyond the end date of Securityhunter's existing GSA Schedule contract, which terminates on October 31, 2016. (*Id.*)

#### D. Securityhunter's Response

On March 7, 2016, Securityhunter responded to the appeal. OHA should deny the appeal, Securityhunter contends, because the Area Office properly determined the protest was untimely.

Securityhunter disputes the contention that the RFQ's inclusion of FAR 52.212-1 amounts to a request for recertification. Securityhunter points out that “recertification does not occur simply because mandatory FAR clauses were incorporated” in a solicitation. (Securityhunter Response at 4, quoting *Size Appeal of ReliaSource*, SBA No. SIZ-5536, at 4 (2014).) OHA has also held that merely setting a task order aside for small businesses is not a request for recertification. (*Id.*, citing *Safety and Ecology Corp.*, SBA No. SIZ-5177, at 21.) More specifically, OHA has held that FAR clause 52.212-3 does not constitute a request for recertification. (*Id.*, citing *Size Appeal of RX Joint Venture LLC*, SBA No. SIZ-5683 (2015).)

Securityhunter argues *Metters Industries* and *Navarro Research and Engineering* do not support the appeal. *Metters* is distinguishable because there the RFQ contained specific language indicating that the contracting agency sought recertification for the task order. It stated:

Please be advised that **the quotation contents require you to provide the socio-economic status for yourself and each subcontractor/team member utilized in this quotation. Your submission of this information serves as confirmation that the status shown is the same as that identified in the applicable GSA schedule, subject to the [North American Industry Classification System (NAICS)] applicability defined in the BPA and the current associated size standards established by [SBA], as of the date of your task order quotation submission.**

(*Id.* at 6, citing *Metters* at 2.) Also, the CO in *Metters* confirmed that he intended for offerors to recertify their size status for the task order. Here, by contrast, the RFQ did not contain any language similar to the recertification requirements in *Metters*, and other than FAR clauses, Appellant points to no specific statements in the RFQ indicating that recertification was ever required. Further, the CO here specifically advised the Area Office that recertification was not required for the task order, and that he did not intend for offerors to recertify their size in response to the RFQ. (*Id.* at 6-7.)

*Navarro* does not support the appeal, Securityhunter argues, because OHA dismissed the appeal in that case as moot and made clear that the underlying size determination had no precedential effect. In any event, Securityhunter argues, the size determination at issue in *Navarro* is inconsistent with FAR 8.405, which requires contracting agencies to rely upon the representations made at the FSS contract level. (*Id.* at 7-8.)

Securityhunter then addresses the argument that the recertification requirement's purpose is to ensure set-asides are awarded to businesses that are actually small. This argument lacks merit, Securityhunter contends, and is not supported by SBA regulations or statute. After *Metters* and *Navarro*, SBA confirmed, “Requiring a business to certify its size at the time of an offer for a multiple award contract, and not for each order issued against the contract,

strikes the right balance and is consistent with SBA's current policy.” 78 Fed. Reg. 61,114, 61,119 (Oct. 2, 2013).

### E. CO's Response

On March 7, 2016, the CO responded to the appeal. The CO argues the Area Office correctly determined the protest was untimely, so OHA should deny the appeal.

The CO argues Appellant makes many arguments for the first time on appeal. OHA should disregard these arguments. (CO Response at 3, citing 13 C.F.R. § 134.308(a).)

Next, the CO argues the RFQ supports the Area Office's conclusion that recertification was not required. HHS's statement that “all offerors shall certify in writing that their proposed solution falls within the scope of the referenced GSA Schedule contract(s)” does not reference small business status, nor was it intended to. The CO clarifies that HHS's use of the term “scope” refers to the type of work being performed. (*Id.* at 5.)

Appellant's contention that the inclusion of FAR clause 52.212-1 indicates a recertification requirement lacks merit, the CO argues, because “[t]he use of this provision was merely intended to provide guidance of preparation of a written quote, noting that verbal quotes will not be accepted.” (*Id.*)

The CO points out that this RFQ was issued under FAR 8.405, which provides, “Ordering activities should rely on the small business representations made by schedule contractors at the contract level.” (*Id.*, citing FAR 8.405-5(b).) In accordance with this provision, the CO represents, “[i]t was the intent of the Government to rely on the small business representations made by the schedule contractors at the GSA Schedule contract level, not to request re-certification of business size status.” (*Id.*)

The CO then addresses Appellant's argument that the protest is untimely. This argument is meritless because the instant task order does not, in fact, extend beyond the end date of Securityhunter's existing GSA Schedule contract. HHS specifically instructed offerors to “use the period from November 23, 2015 — September 30, 2016” to develop a fixed price quote, and offerors “should provide pricing for the base year only.” (*Id.* at 6, citing RFQ, Q&A.) The task order, therefore, is set to expire on September 30, 2016, well before Securityhunter's GSA Schedule contract expires.

## 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 Securityhunter's GSA Schedule 84 contract, 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 Schedule 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 RX Joint Venture, LLC*, SBA No. SIZ-5683 (2015); *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 RFQ 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 52.212-1 and 52.212-3 in the RFQ 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. What is more, OHA has specifically addressed the FAR clause referenced by Appellant in the context of task order competitions, and has determined that its inclusion does not amount to a requirement to recertify. *Reliasource*, SIZ-5536; *AIS Eng'g*, SBA No. SIZ-5614. Appellant's attempt to distinguish *RX Joint Ventures* is unconvincing because explicitly stating that offers must conform to FAR 52.212-1 has no more legal effect than the inclusion of that clause in the RFQ.

OHA's decision in *Navarro Research and Engineering* does not compel a different result in this case. In *Navarro*, OHA dismissed the appeal as moot because the underlying task order was canceled. All that is left, then, is the size determination that was appealed, and as OHA has explained, "a prior size determination is not binding upon either an Area Office or OHA." *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 6 (2009) (citing *Size Appeal of Lajas Indus., Inc.*, SBA No. SIZ-4263, at 9 (1997).); *accord Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427, at 7 (2012). Accordingly, what the area office said in the size determination on appeal in *Navarro* has no bearing on this decision.

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).

CHRISTOPHER HOLLEMAN  
Administrative Judge