

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

SIZE APPEAL OF:

ARNC/Bridge Consulting, LLC,

Appellant,

RE: Sage Acquisitions, LLC

Appealed From

Size Determination No. 3-2016-036

SBA No. SIZ-5736

Decided: May 12, 2016

APPEARANCES

Deborah C. Baxter, ARNC/Bridge Consulting, LLC, Palm Beach Gardens, Florida

Richard W. Oehler, Esq., Perkins Coie LLP, Seattle, Washington, for Sage Acquisitions, LLC.

DECISION

I. Introduction and Jurisdiction

This appeal arises from the rescission of a size determination pertaining to Sage Acquisitions, LLC (Sage). On November 4, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination Nos. 3-2016-010, -011, -012, -013 concluding that Sage is a small business for the instant procurement. On March 8, 2016, the Area Office issued a second size determination, No. 3-2016-036, finding that Sage is not a small business for the same procurement. Then, on March 28, 2016, the Area Office rescinded Size Determination No. 3-2016-036 and dismissed the underlying size protest filed by ARNC/Bridge Consulting, LLC (Appellant). Appellant argues that the rescission is a clear error of law and requests that SBA's Office of Hearings and Appeals (OHA) reinstate Size Determination No. 3-2016-036. For the reasons discussed *infra*, the appeal 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 the instant appeal within

fifteen days of receiving the letter rescinding Size Determination No. 3-2016-036, so the appeal is timely.<sup>1</sup> Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation

On July 25, 2014, the U.S. Department of Housing and Urban Development (HUD) issued Request for Proposals No. DU204SA-13-R-0005 for the management and marketing of HUD-owned properties in different geographic areas across the United States. Portions of the procurement were set aside for small businesses. In September 2015, HUD awarded contracts to Sage for several areas, including Areas 1D and 4P.

### B. Prior Proceedings

On September 30, 2015, Appellant protested Sage's size status in connection with the contracts for Areas 1D<sup>2</sup> and 4P. On November 4, 2015, the Area Office issued Size Determination Nos. 3-2016-010, -011, -012, -013 concluding that Sage is a small business for the procurement. Appellant did not appeal Size Determination Nos. 3-2016-010, -011, -012, -013. Appellant explains it “did not have access to Sage's [joint venture agreement] at the time and the Area Office's decision provided no information or basis upon which [Appellant] might have appealed.” (Appeal at 2.) In addition, Appellant “did not appeal at that time because it is SBA's function to get to the bottom of these issues and [Appellant] assumed that the SBA did their job.” (*Id.*)

### C. Size Determination No. 3-2016-036 and Rescission

On February 1, 2016, after a different offeror was determined to be ineligible, HUD awarded an additional contract to Sage.<sup>3</sup> The contract was for services to be performed in Area 3P, and was set aside for small businesses.

Appellant filed a size protest against Sage pertaining to the award of Area 3P. On March 8, 2016, the Area Office issued Size Determination No. 3-2016-036, finding that Sage is not a

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<sup>1</sup> Under 13 C.F.R. § 134.202(a)(2), if the SBA action being appealed specifies a different deadline than SBA regulations, “the longer time period (or later deadline) governs.” Here, in the rescission letter, the Area Office stated that “[a]ny person adversely affected by this decision [to rescind the second size determination] may appeal to [OHA]. To be timely, an appeal must be submitted to OHA in writing within 15 days of the receipt of this letter.” (Rescission Letter, at 1 (Mar. 28, 2016).)

<sup>2</sup> HUD's award to Sage for Area 1D was enjoined beyond the first option period on May 31, 2017. *Q Integrated Cos., LLC v. United States*, 2016 U.S. Claims LEXIS 360, at 76.

<sup>3</sup> The Court in *Q Integrated* denied a motion to amend the complaint to add challenges to Area 3P. *Id.* at 44 n.17.

small business for the instant procurement. On March 22, 2016, Sage appealed Size Determination No. 3-2016-036 to OHA. After the Area Office rescinded Size Determination No. 3-2016-036, Sage withdrew its appeal because “SBA ha[d] granted the relief requested by [Sage] in its appeal.” *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5726, at 1 (2016).

In the rescission letter, the Area Office reasoned that, “by addressing the same procurement, at the request of the same protestor, on the same issues, with the same date for determining size,” Size Determination No. 3-2016-036 had effectively reopened Size Determination Nos. 3-2016-010, -011, -012, - 013. (Rescission Letter, at 1 (Mar. 28, 2016).) Such a reopening was improper, the Area Office continued, because under 13 C.F.R. § 121.1009(h) an area office may only reopen a size determination within the 15-day period for appealing a size determination, and Size Determination No. 3-2016-036 was issued more than 15 days after issuance of the Size Determination Nos. 3-2016-010, -011, -012, -013. (*Id.*) Accordingly, Size Determination No. 3-2016-036 was rescinded, Appellant's protest for Area 3P was dismissed, and Sage is once again an eligible small business for the subject procurement.

#### D. Appeal

On April 11, 2016, Appellant filed the instant appeal challenging the Area Office's rescission of Size Determination No. 3-2016-036. Appellant argues the rescission constitutes clear legal error.

Appellant notes that SBA regulation permits an area office to modify or reopen a size determination only if an appeal has not been filed. (Appeal at 4-5, citing 13 C.F.R. § 121.1009(h).) Here, Sage filed an appeal of Size Determination No. 3-2016-036 on March 22, 2016, six days before the Area Office's rescission. Sage's appeal was still pending at the time of the rescission. Therefore, the Area Office lacked authority to rescind Size Determination No. 3-2016-036 and doing so was a clear error of law.

Appellant contends the Area Office misconstrued the regulation governing reopening of size determinations, 13 C.F.R. § 121.1009(h), because the rule “does not provide a substantive jurisdictional bar to size protests.” (*Id.* at 5.) Rather, the regulation exists so an area office can correct a mistake without requiring a party to appeal to OHA. (*Id.*, citing 60 Fed. Reg. 57,982, 57,993 (Nov. 24, 1995).)

Appellant argues that it is of no import that Size Determination Nos. 3-2016-010, -011, -012, -013 was never appealed, and became the final decision of the SBA under 13 C.F.R. § 121.1101(a). In Appellant's view, the finality of that decision pertains to the awards in Areas 1D and 4P, whereas the protest that led to Size Determination No. 3-2016-036 was for a new contract to Sage. The later protest was timely and valid, and nothing in 13 C.F.R. §§ 121.1009(h) or 121.1101(a) prohibited Appellant from protesting the award of the contract for Area 3P. If the later protest resulted in inconsistent size determinations, “then only OHA ha[s] the jurisdiction and authority to resolve the difference between the two size determinations.” (*Id.* at 6.)

### E. Sage's Response

On April 28, 2016, Sage responded to the appeal. Sage argues that the Area Office correctly rescinded Size Determination No. 3-2016-036, so OHA should deny the appeal.

Sage emphasizes that neither Appellant nor any other party appealed Size Determination Nos. 3-2016-010, -011, -012, -013, so it is now “the final decision of the agency.” (Response at 4, quoting 13 C.F.R. § 121.1101(a).) The Area Office therefore was correct to dismiss Appellant's later size protest. To hold otherwise would undermine SBA's regulatory scheme and judicial efficiency. It would also create an unfair situation for challenged firms, like Sage, that must defend against multiple, repetitive protests. Appellant's contention that it did not appeal because it “assumed SBA did their job” lacks support, Sage argues, because “there is no indication that the SBA did not ‘do its job’ in its consideration of the October 201[5] protests and its issuance of [Size Determination Nos. 3-2016-010, -011, -012, -013].” (*Id.* at 5.)

Next, Sage argues that the rescission did not violate 13 C.F.R. § 121.1009(h), contrary to Appellant's claims. The fact that Sage filed an appeal before the rescission occurred does not render the rescission invalid. The purpose of the regulation allowing an area office to reopen a size determination is to “permit SBA to correct error or mistake without requiring the filing of an appeal at OHA.” 60 Fed. Reg. 57,982, 57,993 (Nov. 24, 1995). Thus, “the rule plainly is intended to avoid unnecessary litigation at OHA, not to mandate reopening of a size review.” *Size Appeal of EASTCO Building Servs., Inc.*, SBA No. SIZ-5437, at 6 (2013). The rescission serves these purposes. It corrected the erroneous issuance of Size Determination No. 3-2016-036 and avoided unnecessary litigation at OHA by granting Sage the relief Sage sought in its appeal. If there was any violation of 13 C.F.R. § 121.1009(h), it was when the Area Office issued Size Determination No. 3-2016-036, contradicting its own earlier size determination, which was a final agency decision. The rescission properly corrected this error. (Response at 5-6.)

Appellant's protests, moreover, presented the same facts, issues, and law. The protests concerned the same solicitation, small business representation, proposal, joint venture agreement, and challenged firm. Both protests questioned whether Sage's joint venture agreement complies with 13 C.F.R. §§ 124.513(c) and (d) and whether the mentor-protégé exception to affiliation applies. The standards by which these issues are analyzed are the same, regardless of which geographic region of the procurement was at issue. (*Id.* at 6-9.)

Sage argues that the Area Office acted consistent with the Federal Acquisition Regulation (FAR) in dismissing Appellant's size protest for Area 3P. The FAR provides that “an interested party ‘may protest the small business representation of an offeror in a specific offer.’” (*Id.* at 8, quoting 48 C.F.R. § 19.302(a)(2).) Because Sage submitted only a single offer, Appellant had one opportunity to protest Sage's size status. Appellant did so in 2015 and did not appeal the resulting size determination.

Sage disputes Appellant's summary of the prior proceedings insofar as Appellant contends that Sage's joint venture agreement does not comply with 13 C.F.R. §§ 124.513(c) and

(d) or that Size Determination No. 3-2016-036 is correct. These assertions are inaccurate, according to Sage. (*Id.* at 9-11.)

### III. Discussion

Appellant has not demonstrated that the Area Office committed reversible error in rescinding Size Determination No. 3-2016-036. As a result, the appeal must be denied.

Appellant is correct that 13 C.F.R. § 121.1009(h) precludes an area office from reconsidering a size determination once an appeal to OHA has been filed. After Sage appealed Size Determination No. 3-2016-036 to OHA, the proper procedure for reconsidering the size determination would have been for the Area Office to request a remand of the size determination, rather than simply rescinding the size determination. Nevertheless, had the Area Office requested a remand, it is clear that OHA would have granted such a motion as a matter of course. *E.g.*, *Size Appeal of Integrated Mission Support Servs., LLC*, SBA No. SIZ-5724 (2016); *Size Appeal of Newport Materials, LLC*, SBA No. SIZ-5702 (2015); *Size Appeal of American-Paragon Protective Servs.*, SBA No. SIZ-5670 (2015); *Size Appeals of Strongwatch Corp. et al.*, SBA No. SIZ-5625 (2014); *Size Appeal of Ceres Envtl. Servs., Inc.*, SBA No. SIZ-5299 (2011); *Size Appeal of Norris Profl Servs. Inc.*, SBA No. SIZ-5268 (2011); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5265 (2011). This is true even if one or more parties opposed the remand request. *Size Appeal of A2Z Supply Corp.*, SBA No. SIZ-5364 (2012) (granting remand over protester's objection). Furthermore, the result of a remand would have been for the Area Office to prepare a new size determination, which could then have been appealed to OHA. Here, the rescission letter itself in effect served as a new size determination, dismissing Appellant's protest for Area 3P and granting appeal rights to Appellant. If anything, by rescinding Size Determination No. 3-2016-036 without requesting a remand, the Area Office accelerated the issuance of a new size determination. Accordingly, while I agree with Appellant that the Area Office should have requested a remand of the size determination in accordance with 13 C.F.R. § 121.1009(h), the Area Office's failure to do so was harmless procedural error, as the end result was no different than if a remand had been requested.

It is worth noting that, in prior cases, OHA has permitted area offices to correct mistakes notwithstanding that an appeal had already been filed. For example, *Size Appeal of DuraMed Enterprises*, SBA No. SIZ-4184 (1996), like the instant case, involved two size determinations. OHA remanded the first size determination, but the area office, unaware of the remand, issued a second size determination. After an appeal of the second size determination was filed, the area office “acknowledged that it had erred in the second size determination” and stated that it would “proceed with the remanded case based on OHA's decision.” *DuraMed*, SBA No. SIZ-4184, at 1. OHA then dismissed the appeal of the second size determination as moot. Notably, OHA did not conclude that the second size determination could not be reopened because an appeal had already been filed. Similarly, in *Size Appeal of ProServe Corp.*, SBA No. SIZ-4198 (1996), an area office issued a size determination, and that determination was appealed to OHA. While the appeal was pending, an SBA official requested that the area office issue a new size determination. Citing the area office's discretion to reopen a size determination, OHA construed the official's request as a motion to remand, and remanded the matter to the area office. More recently, in *Size Appeal of In and Out Valet Co.*, SBA No. SIZ-4949 (2008), an area office

reopened a size determination to correct a mistake, even though an appeal to OHA had already been filed. *In and Out Valet*, SBA No. SIZ-4949, at 2. When the corrected size determination was on appeal, OHA did not take issue with the area office's reopening but rather affirmed the corrected size determination. It follows from these cases, then, where an area office confesses error in a size determination, OHA will allow the area office reasonable flexibility to correct the mistake. Such a result is consistent with the underlying purpose of 13 C.F.R. § 121.1009(h), which is to “permit SBA to correct error or mistake without requiring the filing of an appeal at OHA.” 60 Fed. Reg. 57,982, 57,993 (Nov. 24, 1995).

#### IV. Conclusion

Appellant has not proven that the Area Office committed reversible error in rescinding Size Determination No. 3-2016-036. Accordingly, the appeal is DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge