

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

FOR PUBLIC RELEASE

SIZE APPEAL OF:

Straughan Environmental, Inc.,

Appellant,

RE: Integrated Mission Support Services,
LLC

Appealed From
Size Determination No. . 6-2016-046

SBA No. SIZ-5767

Decided: August 1, 2016

ORDER DISMISSING APPEAL¹

I. Background

A. Introduction

On June 28, 2016, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received the instant appeal from Straughan Environmental, Inc. (Appellant). The appeal challenges Size Determination No. 6-2016-046, in which the SBA Office of Government Contracting — Area VI (Area Office) found Integrated Mission Support Services, LLC (IMSS) to be an eligible small business for the subject procurement. IMSS is a joint venture whose majority owner is Herndon Solutions Group, LLC (HSG), an 8(a) Business Development (BD) concern. IMSS's minority owner is InoMedic Health Applications, Inc. (InoMedic), a large business and HSG's mentor under an 8(a) BD Mentor-Protégé Agreement (MPA).

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).

¹ This order was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA offered the parties the opportunity to propose redactions to the order. Each party indicated that it did not wish to propose redactions. OHA now issues the order for public release.

B. Solicitation

On October 10, 2014, the National Aeronautics and Space Administration (NASA), Kennedy Space Center, Florida, issued Request for Proposals (RFP) No. NNK14513883R for the Kennedy Environmental and Medical Contract (KEMCON). The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 541620, Environmental Consulting Services, with a corresponding size standard of \$15 million average annual receipts. IMSS self-certified as a small business with its initial offer on January 6, 2015. Appellant also submitted a proposal on the KEMCON procurement, but Appellant's proposal was not included in the competitive range. Appellant then filed a U.S. Government Accountability Office (GAO) bid protest challenging the evaluation of its proposal and its exclusion from the competitive range. GAO denied the protest. *Straughan Envtl., Inc., B-411650 et al.*, Sept. 18, 2015, 2015 CPD ¶ 287. On September 29, 2015, NASA awarded the KEMCON contract to IMSS.

C. Court of Federal Claims Litigation

On October 19, 2015, Appellant filed a bid protest at the U.S. Court of Federal Claims (Court) challenging the award to IMSS. In its appeal petition filed with OHA, Appellant states that it argued to the Court that IMSS is ineligible for award because IMSS did not comply with 13 C.F.R. §§ 124.513(c) and (d). (Appeal at 3.) Appellant does not claim that it challenged its exclusion from the competitive range at the Court. On December 1, 2015, the parties informed the Court that the CO intended to initiate a size protest against IMSS. (*Id.*) On December 2, 2015, the Court stayed further litigation pending the SBA proceedings. (*Id.*)

D. SBA Proceedings

On December 9, 2015, the CO protested IMSS's small business size status, raising the question of whether IMSS “had appropriate SBA approval of its mentor/protégé relationship.”² (Protest at 2.) The CO forwarded her size protest to the Area Office for review.

On January 13, 2016, the Area Office issued Size Determination No. 6-2016-024. The Area Office determined that IMSS did not have an approved MPA in place as of the date it submitted its proposal. Therefore, IMSS could not avail itself of the mentor-protégé exception to affiliation. Together, HSG's and InoMedic's receipts exceeded the size standard, so IMSS was not an eligible small business.

On January 28, 2016, IMSS appealed Size Determination No. 6-2016-024 to OHA. On March 21, 2016, SBA moved to remand the matter to the Area Office. The next day, OHA granted the motion. *Size Appeal of Integrated Mission Support Servs., LLC*, SBA No. SIZ-5724 (2016).

² A contracting officer's size protest is always timely. 13 C.F.R. § 121.1004(b); *see also Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5469, at 2 (2013) (contracting officer's size protest filed “more than a year after contract award” was nevertheless timely).

E. Instant Size Determination

On June 13, 2016, the Area Office issued Size Determination No. 6-2016-046. The Area Office found that IMSS did have an approved MPA in place when it submitted its offer on the KEMCON procurement. Accordingly, the mentor-protégé exception shields HSG and InoMedic from affiliation. HSG's receipts do not exceed the size standard, so IMSS is an eligible small business.

F. Appeal

On June 28, 2016, Appellant filed the instant appeal challenging Size Determination No. 6-2016-046. Appellant asserts that it has standing to bring the appeal because it is “a disappointed offeror with respect to the Procurement”, and therefore is adversely affected by the size determination. (Appeal at 2, citing 13 C.F.R. § 134.314, *Size Appeal of Q Integrated Companies, LLC*, SBA No. SIZ-5743 (2016), and *Size Appeal of Eagle Home Medical, Inc.*, SBA No. SIZ-4291 (1998).)

G. Motion to Dismiss

On July 13, 2016, IMSS moved to dismiss the appeal for lack of standing. To support this motion, IMSS directs OHA's attention to *Straughan Envtl., Inc.*, B-411650 *et al.*, Sept. 18, 2015, 2015 CPD ¶ 287, where GAO denied Appellant's bid protest challenging Appellant's exclusion from the competitive range. As a result of Appellant's elimination from the procurement, IMSS argues, Appellant is ineligible for award of the contract. Because Appellant cannot be awarded the contract, it is not adversely affected by the size determination finding IMSS to be an eligible small business. IMSS then discusses principles of standing enunciated in *United States v. International Business Machines Corp.*, 892 F.2d 1006 (Fed. Cir. 1989).

On July 15, 2016, Appellant responded to the motion. Appellant argues that OHA should deny the motion for three reasons. First, IMSS did not mention the ongoing litigation at the Court. Second, IMSS relies on principles of standing not applicable to OHA. The *International Business Machines* case discussed standing under the Competition in Contracting Act and the Tucker Act, statutes which do not pertain to size appeals. Third, IMSS does not grapple with OHA's case law which has granted disappointed offerors standing to appeal a size determination, even if the disappointed offeror did not file a size protest.

On July 25, 2016, IMSS moved to reply to Appellant's response and included the proposed reply. IMSS did not argue that there was good cause to admit the reply, nor did it state whether Appellant objected to the motion to reply, as required by 13 C.F.R. § 134.211(b). The next day, Appellant opposed the motion to reply. Under applicable regulations governing size appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Accordingly, IMSS's motion to reply is DENIED, and the reply is EXCLUDED from the record.

II. Discussion

I agree with IMSS that Appellant lacks standing to bring the instant appeal. SBA regulations state that “[a]ny person adversely affected by a size determination” may file an appeal with OHA. 13 C.F.R. § 134.302(a). In interpreting this provision, OHA has found that a party has standing to appeal, even if that party was not also a protester, if it is “an otherwise eligible small business offeror on the procurement.” *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4647, at 7 (2004) (citing *Size Appeal of Empire Home Med., Inc.*, SBA No. SIZ-4291, at 3 (1998)). The rationale behind this policy is that, if an otherwise eligible small business offeror were to prevail on its appeal, there is a chance it could ultimately be awarded the contract. This possibility is what causes an unsuccessful offeror to be adversely affected by a size determination favorable to a rival. In the instant case, however, Appellant is not an otherwise eligible small business offeror on this procurement because NASA excluded Appellant's proposal from the competitive range, and GAO affirmed this result by denying Appellant's bid protest challenging its elimination from the procurement. Section II.B, *supra*. As IMSS correctly observes, then, Appellant is not an unsuccessful offeror that could potentially be awarded the contract if IMSS were determined to be ineligible. Rather, because Appellant has already been excluded from the competition, Appellant cannot be awarded the contract, regardless of whether it prevails on appeal at OHA. Appellant therefore is not adversely affected by the instant size determination and lacks standing to bring this appeal.

The two OHA decisions cited by Appellant—*Size Appeal of Q Integrated Companies, LLC*, SBA No. SIZ-5743 (2016) and *Size Appeal of Eagle Home Medical, Inc.*, SBA No. SIZ-4291 (1998)—do not support the conclusion that Appellant has standing to appeal in this case. In *Q Integrated*, OHA found that a non-protester had standing to appeal, but there was no indication that the non-protester was not a small business or that it was otherwise ineligible for award. *Q Integrated*, SBA No. SIZ-5743, at 2. In *Eagle Home Medical*, OHA determined that a non-protester was “an eligible small business offeror” on the procurement, and noted that the firm had attempted, albeit unsuccessfully, to file its own size protest. *Eagle Home Med.*, SBA No. SIZ-4291, at 3. Accordingly, neither *Q Integrated* nor *Eagle Home Medical* involved a situation such as presented here, where a non-protester that has been excluded from the competition and that is ineligible for award nevertheless seeks to appeal a size determination.

III. Conclusion

Appellant lacks standing to bring the instant appeal. IMSS's motion to dismiss is therefore GRANTED, and the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge