

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

SIZE APPEAL OF:

K4 Solutions, Inc.

Appellant,

RE: Systems Integration, Inc.

Appealed From
Size Determination No. 2-2016-070

SBA No. SIZ-5775

Decided: September 7, 2016

APPEARANCES

Joseph P. Hornyak, Esq., Elizabeth N. Jochum, Esq., Holland & Knight LLP, Tysons, Virginia, for Appellant

Isaias “Cy” Alba, IV, Esq., Michelle E. Litteken, Esq., PilieroMazza PLLC, Washington, D.C., for Systems Integration, Inc.

DECISION

I. Introduction and Jurisdiction

On June 24, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2016-070 dismissing a size protest filed by K4 Solutions, Inc. (Appellant) against Systems Integration, Inc. (SII). 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 timely filed the instant appeal on July 11, 2016.¹ Accordingly, this matter is properly before OHA for decision.

¹ Ordinarily, a size appeal must be filed within 15 calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on June 24, 2016. Fifteen calendar days after June 24, 2016, was July 9, 2016. Because July 9, 2016, was

II. Background

A. RFQ and Protest

On January 5, 2016, the Transportation Security Administration (TSA) issued Request for Quotations (RFQ) No. HSTS01-16-Q-TCC009 for TSA Customer Service Center support. The RFQ contemplated the award of a single blanket purchase agreement (BPA) to a small business holding a U.S. General Services Administration (GSA) Federal Supply Schedule 70 contract. Task orders issued under the BPA would have a combined maximum value of \$200 million. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561421, Telephone Answering Services, with a corresponding size standard of \$15 million average annual receipts. Quotations were due February 15, 2016.

On June 10, 2016, TSA announced that SII was the apparent awardee. On June 16, 2016, Appellant filed a protest challenging SII's size. Appellant maintained that SII is not a small business because SII is “so closely aligned with other business entities that the relationship must invoke consideration for the potential for an Affiliation.” (Protest at 2.) Specifically, Appellant asserted that SII “is a wholly owned subsidiary of RIMHUB Holdings, Inc. [(Rimhub)] since July 28, 2014”. (*Id.* at 3.) As a result, 13 C.F.R. § 121.103(c) creates an “irrefutable presumption” that SII is affiliated with Rimhub and Rimhub's affiliates. (*Id.* at 2-3.) Appellant did not address the timeliness of its protest, and made no allegation that SII was required to recertify its size for its GSA Schedule contract due to the acquisition by Rimhub. The CO forwarded Appellant's protest to the Area Office for review.

B. Size Determination

On June 24, 2016, the Area Office issued Size Determination No. 2-2016-070 dismissing Appellant's protest as untimely. The Area Office reasoned that, on a long-term contract such as the GSA Schedule 70 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 the CO requests recertification in conjunction with an individual order. (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(3).) Because the RFQ did not require SII to recertify as small, size was determined from the date of SII's self-certification for the GSA Schedule 70 contract. *Id.* As a result, there was no available mechanism for Appellant to challenge SII's size in connection with the instant procurement. *Id.* at 1-2, citing *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010), *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016), and *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013).

a Saturday, the appeal petition was due on the next business day: Monday, July 11, 2016. 13 C.F.R. § 134.202(d).

C. Appeal

On July 11, 2016, Appellant filed the instant appeal. Appellant maintains that the Area Office erred in dismissing the protest. In particular, Appellant contends that the Area Office ignored 13 C.F.R. § 121.404(g)(2), which required SII to recertify its size status on the GSA Schedule contract within 30 days of being acquired by Rimhub. Rimhub is a subsidiary of a large business, so SII's affiliation with Rimhub renders it ineligible for the subject BPA. Appellant argues that the protest is timely because it was filed within five business days of learning that SII continued to represent itself as a small business despite its acquisition by Rimhub. (Appeal at 3-4.)

Moreover, as a policy matter, Appellant argues that “[i]nterested parties *must* be able to protest an entity's failure to recertify . . . or there is no recourse for award of a set-aside task order to an entity that is now other-than-small due to an acquisition or merger, as is the case here.” (*Id.* at 3, emphasis Appellant's.) Appellant finds support for this argument in the regulatory history, where SBA commented:

We have essentially adopted the existing five business day rule for size protests in connection with many long term contract awards, options, and orders. Because written notice is not required in many instances, *e.g.*, in connection with an order competition or when an option is exercised, unsuccessful offerors will be required to file protests within five days of receipt of notice, whether the notice is received in writing, orally or via electronic posting.

(*Id.*, quoting 71 Fed. Reg. 66,434, 66,439 (Nov. 15, 2006).)

D. SII's Response

On July 28, 2016, SII responded to the appeal. SII argues that the Area Office correctly dismissed Appellant's protest.

SII argues that, according to SBA regulations, BPAs issued under GSA Schedule contracts are exempt from any recertification requirement. (Response at 4, citing 13 C.F.R. § 121.404(a)(2) and *Size Appeal of Total Systems Technologies Corp.*, SBA No. SIZ-5562 (2014).) Appellant's arguments to the contrary are unsupported by statute, regulation, or OHA precedent, SII maintains. Further, the regulatory history Appellant cites “demonstrates that SBA did not intend for the recertification rule following mergers/acquisitions to change the timeliness requirements for long-term contracts.” (*Id.*, emphasis in original.)

The appeal fails, too, for procedural reasons. Appellant failed to mention 13 C.F.R. § 121.404(g)(2) in its size protest, and did not discuss the requirement to recertify as a result of a merger or acquisition. Because this is a new issue raised for the first time on appeal, OHA cannot consider it. (*Id.* at 5.)

E. Reply

On August 2, 2016, after the record in this matter had closed, Appellant moved to reply to SII's response. The reply is necessary, Appellant argues, because SII makes factual and legal claims which Appellant disputes. Appellant notes that SII opposes the motion. 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. Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record.

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

Appellant's sole argument in this case is that, under 13 C.F.R. § 121.404(g)(2), SII was required to recertify its size for its GSA Schedule 70 contract following its acquisition by Rimhub. As SII correctly observes, though, this issue was not raised in Appellant's underlying size protest. As a result, the Area Office did not err in failing to consider this issue.

It is settled law that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012); *see also Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3-4 (2009) (“Contrary to [the protester's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.”). In the instant case, Appellant's size protest alleged that SII and Rimhub are affiliated under 13 C.F.R. § 121.103(c) due to Rimhub's ownership of SII. Section II.A, *supra*. Appellant did not argue, however, that SII was required to recertify its size under 13 C.F.R. § 121.404(g)(2) following its acquisition by Rimhub. *Id.* Indeed, the protest was completely silent on the question of recertification, notwithstanding that recertification generally is not required for BPAs issued under GSA Schedule contracts. *Size Appeal of Total Sys. Techs. Corp.*, SBA No. SIZ-5562 (2014). Accordingly, given that Appellant's protest did not allege that SII was required to recertify its size pursuant to 13 C.F.R. § 121.404(g)(2), the Area Office could reasonably choose not to explore this issue in the size determination, and Appellant has not demonstrated that the Area Office committed any error in its review. *E.g.*, *Size Appeal of Fin. & Realty Servs., LLC*, SBA No. SIZ-5719, at 4 (2016); *Size Appeal of Int'l Filter Mfg. Corp.*, SBA No. SIZ-5711, at 4 (2016); *Size Appeal of Wescott Elec. Co.*, SBA No. SIZ-5691, at 5 (2015). Nor can OHA now decide this question in the first instance, as SBA regulations

preclude OHA from adjudicating new issues presented for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Hale Laulima, LLC*, SBA No. SIZ-5750, at 3 (2016); *Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 13 (2016) (“OHA will not consider an issue that was neither raised to, nor investigated by, the Area Office.”).

IV. Conclusion

Appellant has not established that the Area Office erred in dismissing the 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