

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

SIZE APPEAL OF:

System Studies & Simulation, Inc.,

Appellant,

RE: System Dynamics International, Inc.

Appealed From

Size Determination No. 03-2016-82

SBA No. SIZ-5780

Decided: September 27, 2016

DECISION

I. Introduction and Jurisdiction

On August 18, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2016-82 dismissing as untimely a size protest filed by System Studies & Simulation, Inc. (Appellant), against System Dynamics International, Inc. (SDI).

Appellant contends its protest was improperly dismissed, and requests that the matter be remanded for a new 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 June 17, 2016, the U.S. Department of the Army, Mission and Installation Contracting Command (MICC), at Ft. Benning, Georgia, issued Request for Proposal No. W9124G-16-R-6598 (RFP) for a task order in support of the TRADOC Capabilities Manager (TCM) Future Vertical Lift (FVL) requirement, Ft. Rucker, Alabama. The task order was set aside for Women-Owned Small Businesses (WOSB), under North American Industry

Classification System (NAICS) code 541712 and a corresponding size standard of 1,000 employees. No new size certification was requested in connection with this task order. Initial offers were due on June 30, 2016.

On July 25, 2016, the Contracting Officer (CO) awarded the task order to SDI as Order No. W9124G-16-F-0034, against SDI's General Services Administration (GSA) Schedule Contract No. GS-23F-0033P. SDI's GSA Schedule Contract No. GS-23F-0033P covers the time period January 1, 2004 through December 31, 2018, and is updated through January 14, 2016 (Mod PA-0025). On July 26, 2016, the CO notified Appellant that the task order had been awarded to SDI.

On July 29, 2016, Appellant filed a protest with the CO, citing **both** FAR 19.302 and 19.308. The CO forwarded the protest as a size protest to the Area Office. The Area Office treated the protest as a size protest but also forwarded a copy to SBA's Office of Government Contracting in Washington, D.C., for a separate determination of SDI's WOSB status.

B. Size Determination

On August 18, 2016, the Area Office issued Size Determination No. 03-2016-82, in which it dismissed Appellant's protest as untimely. The Area Office noted that, on a long-term contract such as this one, size may be protested at three stages: (1) when the contract is initially awarded; (2) when an option is exercised; or (3) if a CO requests certification in conjunction with an order. (Size Determination at 2; citing 13 C.F.R. § 121.1004(a)(3).)

The Area Office then determined that none of these three stages applies here, because initial award of the base GSA contract was on January 1, 2004, the last modification was on January 14, 2016, and the CO had not requested that offerors recertify their size on the instant task order. (Size Determination at 2.) Thus, the Area Office concluded that there was no regulatory basis for a size protest to be filed regarding the instant task order. Accordingly, the size protest was untimely. (*Id.*)

C. Appeal

On August 19, 2016, Appellant filed the instant appeal. Appellant argues that the Area Office improperly dismissed a WOSB protest, and that the Area Office had addressed none of the legal and factual issues presented in the protest. Further, Appellant argued that, because of the nature of a GSA Contract, the protest timeliness requirements of 13 C.F.R. § 121.1004 are inapplicable.

SDI, the protested concern, did not respond to the appeal petition.

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 only issue in this appeal is whether the Area Office properly dismissed Appellant's size protest as untimely. SBA's Office of Government Contracting is addressing Appellant's protest of SDI's WOSB status. I find that the Area Office correctly determined Appellant's size protest was untimely and properly dismissed it. As a result, this appeal must be denied.

A concern that qualifies as a small business at the time of its initial offer is considered to be a small business throughout the life of that contract. 13 C.F.R. § 121.404(g). A concern that is small at the time of initial offer for a Multiple Award Contract will be considered small for each order issued under the contract, unless a contracting officer requests a size certification in connection with a specific order. *Id.* Further, SBA will not entertain a size protest against the award of an order under a long-term contract unless the contracting officer requests a size certification in conjunction with the order. § 121.1004(a)(3)(iii); *Size Appeal of AIS Engineering, Inc.*, SBA No. SIZ-5614, at 5 (2014).

Here, the GSA Contract under which the instant task order is placed is also a long-term contract (*see* 13 C.F.R. § 121.1004(a)(3)), and the CO did not request a size certification in conjunction with this task order. Therefore, there is no mechanism to protest SDI's size as it relates to the task order, and a size protest relating to the underlying GSA Contract is very untimely. Therefore, I conclude the Area Office did not err in dismissing Appellant's size protest as untimely and I must deny this appeal.

IV. Conclusion

The Area Office properly dismissed Appellant's protest. This appeal therefore, is, 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