

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

SIZE APPEAL OF:

Platinum Business Services, LLC,

Appellant,

RE: Redhorse Corporation

Appealed From
Size Determination No. 06-2017-006

SBA No. SIZ-5800

Decided: December 28, 2016

APPEARANCES

Jody J. Venkatesan, President and CEO, for Appellant

Alissa K. Schrider, Esq., Assistant General Counsel, General Services Administration, for
GSA

DECISION

I. Introduction and Jurisdiction

On October 25, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2017-006 dismissing a size protest filed by Platinum Business Services, LLC (Appellant) against Redhorse Corporation (Redhorse). The Area Office concluded that Appellant's protest was untimely.

Appellant contends its protest was improperly dismissed, and requests 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, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On June 13, 2016, the U.S. General Services Administration (GSA) issued Request for Quotation (RFQ) No. QTA 0016ACB3007 for Transition Ordering Assistance in support of the Network Services Program, Federal Acquisition Service, Integrated Technology Services. The Contracting Officer (CO) set the procurement aside for Service Disabled Veteran Owned Small Business Concerns (SDVO SBCs) and designated North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$15 million annual receipts size standard, as the appropriate code. The RFQ included FAR 52.204-8, Annual Representations and Certification, and Section 10- Representations, Certifications, and Other Statements of Quoters or Respondents. Quotations were due July 5, 2016. Responding to a subsequent question from the CO, Redhorse said that it was not small under NAICS code 541611 for any new contract, but that it remained small under its Professional Services Schedule contract, No. GS-00F-0013Y, because it was small on the date it certified its size under that contract.

On September 29, 2016, GSA issued a Notice of Award to Redhorse. On October 5, 2016, Appellant filed a size protest with the CO, alleging Redhorse was not a small business. On October 6, 2016, the CO forwarded the protest to the Area Office. The CO informed the Area Office that Appellant had been eliminated from competition because it was found to be technically unacceptable. (Letter, A. Chiu to P. Chann, October 6, 2016.) On October 11, 2016, the Area Office asked the CO to confirm that the RFQ was a task order under a multiple award schedule contract No. GS-00F-0013Y. The Area Office also asked whether the CO had requested recertification in the RFQ. (Email, E. Sanchez to A. Chiu, October 11, 2016.) On October 12, 2016, the CO responded that the task order was awarded against a multiple award schedule, GSA Professional Services Schedule, and that she had not required any quoter to recertify. (Email, A. Chiu to E. Sanchez, October 12, 2016.)

B. Size Determination

On October 25, 2016, the Area Office dismissed Appellant's protest as untimely. After reviewing documentation submitted by the CO, the Area Office found that GSA Schedule Contract No. GS-21F-0043W was awarded to Redhorse on January 1, 2010, effective through December 13, 2014 and Contract No. GS-10F-0218X was awarded on April 28, 2011 through April 29, 2016. These contracts later migrated into one contract under Consolidated Schedule Contract No. GS-00F-0013Y in December of 2011. It was given a new corporate contract period of January 1, 2012 through December 13, 2014. (Size Determination, at 1.)

The original award of GS-00F-0013Y has three 5-year options in which GSA looked at recertification. In order to be considered for exercising Option 1 of the Consolidated Schedule Contract, Redhorse re-represented itself as a small business under NAICS code 541690, Other Scientific and Technical Consulting Services, which also has a \$15 million annual receipts size standard, on October 7, 2014. Redhorse represented in its recertification that it has more than one NAICS code that applies to the awarded SINs under their contract. The majority of the work

awarded under this contract was under SIN 874-1, and most of the work awarded under this contract was under NAICS code 541690, which was included in Redhorse's System for Award Management (SAM) registration. According to GSA, as a result of this recertification, Redhorse is a small business through December 2019. (*Id.* at 2.)

The Area Office further found that on October 1, 2015, this solicitation was changed to the Professional Services Schedule but retained the same contract number: GS-00F-0013Y. The purpose of modifying the contract was to change the program name to Professional Services Schedule, but retain all other terms and conditions. At that time, Redhorse's SAM record showed it was still considered small under NAICS code 611430, Professional and Management Development Training, with a corresponding \$11 million annual receipts size standard, for the next five years. GSA also determined Redhorse was small under NAICS code 541611. (*Id.*)

The Area Office found Redhorse is in its Option 1 period, and noted that GSA confirmed in its October 12th email it did not request a recertification for this Task Order. (*Id.*)

The Area Office found that SBA regulations established time limits for size protests for long-term contracts. An interested party may protest a size certification made at the time the long term contract is initially awarded, at the time an option is exercised, or in response to a contracting officer's request for size certifications in connection with an individual order. 13 C.F.R. § 121.1004(a)(3). (*Id.* at 1.)

The Area Office determined that Appellant filed its protest on October 5, 2016, more than one year after Redhorse's last certification of its size. Accordingly, the Area Office concluded Appellant's protest was untimely and dismissed it. (*Id.* at 2.)

C. Appeal

On November 9, 2016, Appellant filed the instant appeal. Appellant does not dispute the Area Office's findings as to the status of Redhorse's Consolidated Schedule Contract No. GS-00F-0013Y. Rather, Appellant argues the instant RFQ did call for recertification. GSA's letter of September 29, 2016 informing Redhorse it had received the Task Order refers to "awarding" the Task Order to Redhorse. Appellant maintains it had five days from this date to file its protest, which it did. (Appeal at 1-2.)

Appellant argues the inclusion in the RFQ of FAR clause 52-204-8, which mandates that an offeror make certain Representations and Certifications, is a request for recertification. Appellant argues this certification is a representation by an offeror that it is a small business. (*Id.* at 3; citing *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013).) By incorporating this clause, GSA was requiring offerors to certify their small business status. While Appellant admitted that OHA has held that including FAR 52-204-8 is not a request for recertification, in this case it was explicitly cited. (*Id.* at 3.)

Appellant further states that on page 73 of the RFQ, Section 10.1 identifies NAICS code 541611 as the appropriate code for the acquisition. Section 10.2 follows and states that "Representations and Certifications will be reviewed before award." Appellant argues

the *Metters* decision requires OHA to consider whether this RFQ was reasonably understood as a request to recertify at the Task Order level. Appellant asserts here Section 10.2 means bidders whose annual receipts are in excess of the \$15 million size standard for NAICS code 541611 are ineligible for this procurement. (*Id.* at 4.)

Appellant contends the Size Determination is based upon clear error, that the CO incorrectly read the requirements of her own RFQ, and thus Redhorse should have been required to recertify its size. Therefore, this was a case where the CO was requiring recertification, and hence Appellant's protest was timely under 13 C.F.R. § 121.1004(a)(3)(iii). (*Id.* at 4.)

D. GSA's Response

On November 18, 2016, GSA responded to the appeal. GSA noted that the RFQ incorporates FAR 52.204-8, Annual Representations and Certifications, and Section 10, entitled Representations, Certifications, and Other Statements of Quoters or Respondents, which notes the applicable code and indicates that the Representations and Certifications will be reviewed. The RFQ does not expressly require offerors to recertify their size status as part of their quotation. (GSA Response, at 1.)

GSA notes that under SBA regulations, a concern that qualifies as small at the time of its initial offer or other formal response to a solicitation, is small throughout the life of the contract. (*Id.*; citing 13 C.F.R. § 121.404(g).) GSA further asserts that if a business concern is small at the time of its initial offer for a Multiple Award Contract (including GSA Schedule contracts) it is small for each order issued against the contract with the same NAICS code and size standard, unless the contracting officer requests a new size recertification in connection with a specific order. (*Id.*; citing *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016).)

GSA argues Appellant's protest is timely only if the CO requested recertification for this particular order. (*Id.* at 2.) GSA further argues that Appellant's reliance on *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013) is misplaced. There, OHA found the RFQ did require recertification at the task order level because it instructed each offeror to specify its size status in its quotation, verify its size as of the date of quotation submission, and reconfirm size as of the date of award. Thus, read in its entirety, OHA held the RFQ in *Metters* did require recertification. (*Id.*)

Here, however, the RFQ neither explicitly required recertification, nor contained any statements that amount to requiring recertification. While Appellant argues that the inclusion of FAR clause 52.204-8 and the standard Representation and Certifications clause at RFQ Section 10.0 amount to a request for recertification, OHA has repeatedly rejected this argument in *CodeLynx, supra*, *Size Appeal of RX Joint Venture, LLC*, SBA No. SIZ-5683, and *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010). (*Id.*) GSA maintains that the RFQ did not explicitly require recertification and the CO did not request recertification, thus the Area Office properly dismissed Appellant's protest as untimely. (*Id.*)

E. Supplements to the Appeal

On November 14, 2016, Appellant supplemented its appeal, adding a citation to *Coast Professional Inc. v. United States*, 828 F.3d 1349 (Fed. Cir. 2016). There, the Federal Circuit held that the Supreme Court's holding that a task order fits the definition of a contract in *Kingdomware Technologies Inc. v. United States*, 136 S. Ct. 1969 (2016) applied to agencies other than the Department of Veterans Affairs. In both cases, the court held that issuance of a new task order against a GSA Supply Schedule contract constitutes an award of a contract. Appellant also points to 13 C.F.R. § 125.14(a), which states that at the time of contract offer, an SDVO SBC must be small under the applicable size standard. Appellant argues that because the award was an SDVO SBC set-aside and under *Kingdomware* the issuance of a Task Order is a contract, Redhorse was required to be small at the time of award.

On November 23, 2016, Appellant again supplemented the appeal, proffering an October 17, 2016 memorandum from SBA's Associate Administrator for Government Contracting and Business Development reporting that SBA's General Counsel had advised that the Supreme Court's rationale in *Kingdomware* should be broadly applied. Appellant further cited to *Matter of Golden Key Group, LLC*, SBA No. VET-236 (2013) in support of its argument that SDVO SBCs must represent their status each time they submit an offer, regardless of whether the CO requested recertification.

Finally, on November 25, 2016, Appellant submitted its final supplement to the appeal. Appellant resubmits the AA/GC&BD's October 17th memorandum. Appellant essentially recapitulates the arguments in its November 23rd submission.

III. Discussion

A. Standard of Review and New Evidence

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).

Appellant proffers as new evidence an internal SBA memorandum. OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies

the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). The memorandum was not before the Area Office and does not address the issue of timeliness of size protests on long-term contracts. Accordingly, I EXCLUDE Appellant's proffered new evidence.

B. Analysis

The Area Office correctly recognized that, on a long-term contract such as Consolidated Schedule Contract No. GS-00F-0013Y, 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 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); and *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).

My review of the RFQ leads me to conclude that it does not include a specific request for recertification, and the provisions Appellant relies upon are merely standard FAR clauses. Further, the CO expressly confirmed she did not intend to request recertification. Given this record, then, the Area Office properly dismissed Appellant's protest as untimely.

Appellant's argument that inclusion of FAR 52-204-8 and Section 10 in the RFQ constitute a request for recertification is meritless. OHA has consistently held that the inclusion of standard FAR provisions does not constitute a request for recertification. *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016); and *Size Appeal of RX Joint Venture, LLC*, SBA No. SIZ-5683 (2015).

Appellant's reliance on *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013) is also misplaced. There, the RFQ contained provisions explicitly instructing offerors to specify their size status in their proposal and OHA held that this constituted a request for recertification. The instant RFQ does not contain such provisions.

Appellant's reliance on *Kingdomware* and *Coast Professional* is likewise erroneous. The holdings in those cases that a task order off a Federal Supply Schedule is a contract does nothing to disturb SBA's regulatory scheme for establishing the times at which size protests may be placed against awards for long term contracts.

Finally, Appellant attempts to argue *Matter of Golden Key Group, LLC*, SBA No. VET-236 (2013) supports its position. There, OHA declined to apply the regulations which establish the time size is determined for long-term contracts to certifications of SDVO SBC eligibility.

OHA carefully distinguished between size protests and SDVO SBC protests, and reaffirmed the precedents on determining size for long term contracts. Therefore, *Golden Key* is inapposite here.

IV. Conclusion

Because the instant RFP did not require recertification, the Area Office correctly dismissed Appellant's protest as untimely.¹ 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

¹ Even if Appellant's protest were timely, Appellant did not have standing to protest, because its offer was eliminated from consideration as technically unacceptable. *Size Appeal of KAES Enterprises, LLC*, SBA No. SIZ-5425 (2012).