

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

SIZE APPEAL OF:

University Strategy Group, Inc.,

Appellant,

RE: METIS Solutions, Inc.

Appealed From

Size Determination No. 2-2017-082

SBA No. SIZ-5840

Decided: July 6, 2017

APPEARANCES

Jeffrey Weinstein, Esq., The Weinstein Law Group, PLLC, Washington, D.C., for Appellant

Stephen P. Ramaley, Esq., Sarah C. Miller, Esq., Miles & Stockbridge P.C., McLean, Virginia, for METIS Solutions, Inc.

DECISION

I. Introduction and Jurisdiction

On May 22, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2017-082 dismissing a size protest filed by Universal Strategy Group, Inc. (Appellant) against METIS Solutions, Inc. (METIS). Appellant contends that its protest was improperly dismissed, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter to the Area Office for a new size determination. For the reasons discussed below, the appeal is denied and the size determination is affirmed.

OHA decides appeals of size determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant received the size determination on May 24, 2017 and filed the instant appeal within fifteen days thereafter, 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

In 2015, the U.S. Special Operations Command (SOCOM) awarded multiple indefinite-delivery indefinite-quantity (ID/IQ) contracts for worldwide professional support services. The contracts, known as SOCOM-Wide Mission Support (SWMS), were divided into three acquisition groups. Group B was set aside for small businesses under North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$15 million average annual receipts. Appellant and METIS hold SWMS Group B prime contracts. The SWMS prime contracts include the full text of Federal Acquisition Regulation (FAR) clause 52.217-9, Option to Extend the Term of the Contract (MAR 2000), stating that “[t]he total duration of this contract, including the exercise of any options under this clause, shall not exceed 60 months (at the task order level).”

On January 6, 2017, SOCOM issued Request for Proposals (RFP) No. B022-JSOU seeking contractor support for the Joint Special Operations University. The RFP contemplated the award of a task order under Group B of the SWMS contracts. The RFP did not instruct offerors to recertify size for the task order. Proposals were due February 15, 2017.

On May 9, 2017, the Contracting Officer (CO) announced that METIS had been awarded the order. On May 15, 2017, Appellant, an unsuccessful offeror, protested METIS's size. Appellant alleged that METIS is affiliated with Booz Allen Hamilton, Inc., a large business, under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (Protest at 2-6.) Appellant made no allegation that METIS was required to recertify its size for its SWMS prime contract, and did not contend that METIS had recently undergone a change of ownership or control. The CO forwarded the protest to the Area Office for review.

B. Size Determination

On May 22, 2017, the Area Office dismissed Appellant's protest as untimely. The Area Office found that the instant procurement involves a long-term contract, and that size protests of long-term contracts may occur at three stages: (1) when the contract is initially awarded; (2) when an option is exercised; and (3) if a CO requests recertification in conjunction with an individual order. (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(3).) Appellant's protest did not seek to challenge the award of METIS's SWMS prime contract or the exercise of an option. “Thus, the issue here is whether the CO requested recertification for the subject procurement.” (*Id.*) The Area Office found that “[u]pon review of the task order, contract amendments, and information provided by the CO, recertification **was not** a requirement at the task order level.” (*Id.*, emphasis in original.) Because the CO did not require offerors to recertify size for this task order, there was no mechanism for Appellant to challenge METIS's size. (*Id.*, citing *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010) and *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).)

C. Appeal

On June 7, 2017, Appellant appealed the size determination to OHA. Appellant contends that the size determination is clearly erroneous, so OHA should remand the matter to the Area Office.

Appellant asserts that the Area Office incorrectly found that the SWMS base contracts are long-term contracts. Appellant explains that, in order to be considered long-term, a contract must exceed five years in duration, including options. (Appeal at 2.) Here, the SWMS base contracts contain FAR clause 52.217-9, which indicates that the contracts will expire after 60 months, if all options are exercised. Thus, the Area Office's reliance on 13 C.F.R. § 121.1004(a)(3), and on OHA case law applying this regulation, was misplaced. (*Id.* at 3.) Appellant argues that the Area Office should have found Appellant's protest timely under 13 C.F.R. § 121.1004(a)(2) because the protest was filed within five days after Appellant learned that METIS was apparent awardee. (*Id.* at 4.)

Appellant further argues that METIS was required to recertify its size due to a recent stock sale. According to Appellant, FAR clause 52.219-28 and 13 C.F.R. § 124.404(g)(2)(ii) require small businesses to recertify if they are acquired or change ownership. (*Id.* at 5.) In December 2016, Appellant asserts, METIS's founder sold or transferred her controlling interest in METIS to Blue Delta Capital Partners (Blue Delta), a private equity group. (*Id.* at 5-6.) METIS, though, did not recertify its size after Blue Delta acquired a controlling block of its stock. (*Id.* at 6-7.) Appellant urges that “even if OHA determines that the timeliness of [Appellant's] size protest should be determined by whether [Appellant] filed its protest within five business days of the award of a task order to METIS where the [CO] requested recertification of METIS's size status, OHA should find here that recertification in this case *was* in fact required due to the change in METIS's status as a small business.” (*Id.* at 7, emphasis in original.)

D. METIS's Response

On June 23, 2017, METIS responded to the appeal. METIS requests that OHA deny the appeal and affirm the size determination.

According to METIS, the Area Office correctly found that SWMS is a long-term contract under 13 C.F.R. § 121.1004(a)(3). METIS highlights that the contract permits task orders to be performed after the 60-month ordering period has expired. (Response at 3.) In theory, then, “a 60-month task order could be placed on the last day of the SWMS IDIQ ordering period, creating a total period of performance of 10 years (120 months), between the 60 month IDIQ ordering period and the 60-month task order.” (*Id.*) METIS adds that FAR clause 52.216-22 further supports the Area Office's finding that SWMS is a long-term contract, as the clause indicates that the terms of the prime contract will continue to govern orders that continue beyond the contract's “effective period.” (*Id.* at 3-4.) Therefore, the Area Office did not err in dismissing Appellant's size protest as untimely, because SWMS is a long-term contract and the CO did not require recertification for the instant task order.

Next, METIS maintains that even if SWMS is not a long-term contract under 13 C.F.R. § 121.1004(a)(3), Appellant's size protest was still untimely. METIS observes that size protests involving negotiated procurements must be filed with the CO within five business days after notification of the apparent awardee of a contract or an order issued against an existing Multiple Award Contract “**if the contracting officer requested a new size certification in connection with that order**”. (*Id.* at 4, quoting 13 C.F.R. § 121.1004(a)(2) (emphasis added by METIS).) OHA likewise has recognized that size protests of task orders under Multiple Award Contracts with durations of five years or less are permitted only if the CO requested recertification. (*Id.* at 4-5, citing *Size Appeal of Sys. Res. Mgmt., Inc.*, SBA No. SIZ-4640 (2004).) Because a requirement for recertification must be explicit, and not implied due to the inclusion of standard FAR clauses or the fact that the order was set aside for small businesses, Appellant's size protest was clearly untimely.

Notwithstanding Appellant's suggestions to the contrary, the CO was not obligated to request a recertification of METIS's size after Blue Delta's 2016 investment. METIS contends that Appellant misinterprets the requirements set forth at 13 C.F.R. § 121.404(g), as that regulation does not obligate the CO to request recertification for a particular task order. (*Id.* at 5-6.) Even assuming METIS were required to recertify after Blue Delta's investment, the period for filing a size protest cannot be extended, as filing deadlines are jurisdictional and adopting Appellant's interpretation “would constitute new rulemaking outside the mandatory notice-and-comment process.” (*Id.* at 6.)

METIS maintains that Appellant incorrectly assumes that Blue Delta's investment renders METIS other than small. METIS notes that the CO has also requested a size determination on METIS, which is currently being processed by the Area Office. Further, even if METIS is found to be other than small, METIS would not be ineligible for the instant task order, as the result of METIS being found other than small due to § 121.404(g) would be for SOCOM to be prevented from counting the instant task order towards its small business goals. (*Id.* at 7.) Lastly, Appellant's assertion that METIS is other than small due to Blue Delta's investment is not properly before OHA. According to METIS, Appellant did not voice this allegation in its size protest, and OHA cannot adjudicate new substantive issues raised for the first time on appeal. (*Id.* at 8, citing *Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721 (2016).)

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 principal argument here is that the Area Office incorrectly concluded that SWMS is a long-term contract. Appellant highlights that, according to 13 C.F.R. § 121.1004(a)(3), a long-term contract has a duration greater than five years, including options. The SWMS contracts, though, are exactly five years in duration, including options. Thus, Appellant reasons, SWMS is not a long-term contract within the meaning of SBA regulations, and the Area Office erred in applying 13 C.F.R. § 121.1004(a)(3).

I tend to agree with Appellant that SWMS is not a long-term contract. The issue is immaterial, though, because SBA regulations apply essentially the same rules to protests against task orders under both long-term contracts and “Multiple Award Contracts”. Specifically, the regulations state, in pertinent part:

Negotiated procurement (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts). A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee for

(i) The contract; or

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order.

13 C.F.R. § 121.1004(a)(2). The regulations define a “Multiple Award Contract” as encompassing “[a] multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5,” as well as “[a]ny other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.” *Id.* § 125.1.

Here, irrespective of whether SWMS is a long-term contract, SWMS plainly is a Multiple Award Contract. Section II.A, *supra*. The Area Office determined, and Appellant does not dispute, that the RFP at issue did not require offerors to recertify size for the instant task order. Sections II.B and II.C, *supra*. Thus, based on 13 C.F.R. § 121.1004(a)(2)(ii), the Area Office properly dismissed Appellant's protest because there was no requirement to recertify for this particular task order. While the size determination may have incorrectly referenced 13 C.F.R. § 121.1004(a)(3) rather than 13 C.F.R. § 121.1004(a)(2)(ii), any such error was harmless as the result is the same under either provision. *E.g.*, *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected the outcome).

Appellant's argument that METIS was required to recertify under 13 C.F.R. § 124.404(g)(2) due to a purported change of ownership or control is also meritless. As METIS correctly observes, Appellant made no such allegation in its underlying protest. Section II.A, *supra*. Rather, Appellant's protest contended only that METIS was affiliated with a large

business under the ostensible subcontractor rule. *Id.* It is well-settled 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.”). Further, OHA is precluded from considering new issues raised for the first time on appeal. 13 C.F.R. § 134.316(c). Because the protest was silent on these matters, the Area Office was not required to explore them in the size determination, and OHA cannot review them for the first time on appeal. As a result, Appellant has not shown that the Area Office committed any error in its review. *Size Appeal of K4 Solutions, Inc.*, SBA No. SIZ-5775 (2016).

IV. Conclusion

Appellant has not demonstrated that the Area Office clearly erred in dismissing the size protest. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge