

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

SIZE APPEAL OF:

Unissant, Inc.

Appellant,

RE: Digital Infuzion, Inc.

Appealed From
Size Determination No. 02-2017-156

SBA No. SIZ-5871

Decided: December 4, 2017

APPEARANCES

Christopher R. Shiplett, Esq., Randolph Law, PLLC, Falls Church, VA, for Appellant Unissant, Inc.

Paul M. Vincent, Esq., Elizabeth J. Cappiello, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC, for Digital Infuzion, Inc.

DECISION

I. Introduction and Jurisdiction

On September 21, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office), issued Size Determination No. 02-2017-156 dismissing as untimely the size protest of Unissant, Inc. (Appellant), alleging that Digital Infuzion, Inc. (Digital), is not an eligible small business for the procurement at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that Digital is not an eligible small business for the instant procurement. For the reasons discussed *infra*, I affirm the size determination and deny the appeal.

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 19, 2012, the National Institutes of Health, Information Technological Acquisition and Assessment Center (NITAAC) awarded Contract No. HHSN316201200077W to Digital. This is a Chief Information Officer — Solutions and Partners 3 (CIO-SP3) small business multi-award Government-wide Acquisition Contract (GWAC). This is a ten-year Indefinite Delivery/Indefinite Quantity Contract for Information Technology solutions and services, under North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding \$27.5 million annual receipts size standard. The contract is for the use of all Federal agencies. NITAAC also awarded Appellant a CIO-SP3 GWAC, No. HHSN316201200104W.

On June 9, 2017, the National Center for Advancing Translational Sciences (NCATS) issued Request for Proposals No. N02TR-17-4001 (RFP) to qualified 8(a) contract holders for purpose of entering into a Task Order under the CIO-SP3 GWAC for Information Technology (IT) Support Services. The RFP did not request that offerors recertify their small business status. Proposals were due on July 9, 2017.

On August 23, 2017, the NCATS Contracting Officer (CO) informed Appellant that Digital was the apparent successful offeror for the Task Order. On August 28, 2017, Appellant filed a size protest with the NITAAC CO. Appellant stated it was protesting Digital's size under Contract No. HHSN316201200077W, and noted that the FAR requires that holders of long-term small business set-aside contracts recertify their small business status within 60 to 120 days prior to the end of the fifth year of the contract. (Protest at 1, citing FAR 52.219-28(b)(3)(i).) Appellant alleges the end of the fifth year of Digital's CIO-SP3 contract was June 18, 2017. Therefore, Digital should have re-certified its small business status on some date between February 19, 2017 and April 20, 2017. The NCATS RFP for the IT Support Services Task Orders was issued after the latest date for Digital to recertify its small business status. (*Id.*)

Appellant further alleged that it had reviewed publicly available information from the Federal Procurement Data System (FPDS) concerning Digital's sales to the Government over the last several years, and found that Digital was not a small business at the time it would have been required to re-certify its size status. (*Id.* at 2.) Appellant asserted that, according to data published at the FPDS, Digital received at least \$21,011,791.77 in revenue in 2014, \$31,318,324.15 in 2015, and \$49,234,077.44 in 2016, for an average annual revenue of \$33,854,731.12, well in excess of the size standard. (*Id.* at 3.)

Appellant next argued that its protest was timely because it was filed within five days of Appellant's receiving notice of the award of the IT Support Services Task Order to Digital. This was its first notice of Digital's having recertified itself as small on the CIO-SP3 GWAC. Appellant maintains there is no mechanism which would have provided it with notice of Digital's certification. (*Id.*) Appellant alleged that the SBA Profile for Digital on the Dynamic Small Business Search (DSBS) website makes no reference to a size recertification, and suggests instead that Digital has certified as other than small, because Digital is recorded as having left

the Disadvantaged Small Business program in 2017. Appellant further alleges Digital has chosen to hide its System for Award Management (SAM) profile, and so a search returns a result of “you don't have access to this information.” (*Id.* at 3-4.) Appellant maintains it has never received notice of Digital's certification, and therefore has filed its protest within five days of the only notice it has received, the notice that Digital was the apparent successful offeror on the NCATS IT Support Services Task Order. Therefore, Appellant maintains, its protest was timely. (*Id.* at 4.)

B. The Size Determination

On September 21, 2017, the Area Office issued Size Determination No. 02-2017-156, dismissing Appellant's protest as untimely. The Area Office noted that for long-term contracts, protests may be made at three stages in the life of the contract: First, at the time of award, second at the time an option is exercised, and third, in response to a contracting officer's request for size certification in connection with an individual order. (Size Determination at 1, citing 13 C.F.R. § 121.1004(a)(3).) Here, there was no request for recertification with the RFP for the Task Order. Therefore, Appellant's protest of the award of the Task Order was untimely.

C. The Appeal

On October 4, 2017, Appellant filed the instant appeal. Appellant asserts the Area Office erred, first, by erroneously concluding that Appellant was challenging Digital's size for the award of the Task Order, rather than its size as of its exercise of its recertification option. Appellant argues SBA's second error was in failing to consider Appellant's arguments for the timeliness of its protest. (Appeal at 1-2.)

First, Appellant maintains the Area Office analyzed a protest Appellant did not file, a protest against the award of the Task Order. (*Id.* at 3.) Appellant based its protest on Digital's size recertification in connection with the underlying long-term contract. (*Id.* at 2-3, citing Protest at 2.) Appellant renews the argument, made in its protest, that under the FAR, the time had come for Digital's recertification on the CIO-SP3 contract and for a contract modification to that effect; however, Appellant had no notice that either had happened until it received notice that Digital was the apparent successful offeror for the Task Order. Digital calculated its time to protest as beginning to run when it received this notice. (*Id.* at 4.)

Second, Appellant asserts the Area Office erred when it failed to consider Appellant's argument that its protest was timely for the purpose of Digital's recertification on the CIO-SP3. Instead, the Area Office discussed the protest only in connection with the Task Order. (*Id.* at 4-5.) Appellant requests that OHA find its protest timely, reverse the size determination, and remand the matter for a new size determination.

D. Digital's Response

On October 20, 2017, Digital responded to the appeal. Digital asserted that months prior to the June 9th issuance of the RFP, the Contracting Officer asked Digital and all other contractors under the long-term IDIQ, including Appellant, to re-certify their size status. Digital

did so on April 6, 2017. Digital argues Appellant must have known of the date of recertification, because it was required to re-certify at the same time, and admits so in its appeal. Digital points out that in its protest Appellant concedes that it knew Digital had been required to recertify no later than April 20, 2017. Thus, Digital argues that Appellant knew Digital must have re-certified in April, but waited more than four months to challenge Digital's status, and did so only when it failed to receive a Task Order under the June 9th RFP. (Response at 1.)

Digital asserts its award of the Task Order was not protestable, because the RFP did not require any size recertification. (*Id.* at 2.) Digital further argues that the timeliness rules for protests, whether at SBA or GAO, serve the crucial purpose of insuring Government repose in its purchases of goods and services, after the running of the deadline for protests. (*Id.* citing *GSE, Inc.*, B-415135 (Sept. 22, 2017).) Appellant admits that it knew Digital had been required to recertify no later than April 20, 2017, yet it chose to proceed in the dilatory fashion that timeliness rules are meant to prohibit. Appellant waited four months, until it failed to receive the Task Order before protesting Digital's size. It is not permitted to do so. (*Id.*)

Digital submits two exhibits with its response. Exhibit 1 is a list of CIO-SP3 8A contract holders, taken from NITAAC's public access website for the GWAC. Exhibit 2 is an excerpt from the questions and answers on the NCATS Task Order RFP, where, in response to a bidder question, the CO stated that Digital currently provides the services, and that it was eligible to bid on the Task Order. Digital argues that these exhibits establish that Appellant had actual notice of Digital's recertification well before it received the August 23, 2017 letter from NCATS informing it that Digital was the apparent successful offeror. Therefore, Appellant's protest was untimely, and the Area Office properly dismissed it. (*Id.* at 2-3.)

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).

Digital submits new evidence on appeal. New evidence on appeal is not considered unless it is ordered by the Judge or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308; *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5839, at 5 (2017). Digital submits part of the contract documentation for the GWAC and part of the RFP package for the Task Order, material that the Area Office should have obtained and included in the record. Accordingly, I ADMIT both of Digital's exhibits into the record.

B. Analysis

I find that Appellant is correct that the Area Office did not properly evaluate the protest Appellant actually filed. The Area Office treated the protest as a protest filed in response to the award of a task order, and dismissed it as untimely filed because the RFP did not require that offerors recertify their size. *See Size Appeal of Platinum Business Services, LLC*, SBA No. SIZ-5800 (2016). However, Appellant was not protesting Digital's size in response to the award of the Task Order. Instead, Appellant was protesting Digital's size in response to its recertification for the underlying long-term GWAC. The question of whether this error harmed Appellant or was harmless need not be answered, because Appellant's protest was untimely in any event.

On a long-term contract such as the one at issue here, a concern's 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); *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016). Here, Appellant's protest did not challenge the award of the underlying GWAC or the task order.

Rather, Appellant sought to challenge Digital's size as of the date of the Government's exercise of the option after five years. A size protest in connection with the size certification made for the option period of a long-term contract must be received by the contracting officer prior to the close of business on the fifth business day after receipt of notice of the size certification made by the protested concern. 13 C.F.R. § 121.1004(a)(3)(ii). Appellant filed its protest at least four months after Digital's recertification. Ordinarily, this protest would be untimely. Appellant thus argues that the only notice it had of Digital's recertification was the August 23, 2017 letter from NCATS informing it that Digital was the apparent successful offeror for the Task Order, and that its protest, filed within five business days of that notice, is therefore timely. I disagree with Appellant.

Appellant admits it knew that Digital had been awarded the CIO-SP3 GWAC in 2012 at about the same time as Appellant, that Appellant had received its recertification modification, and that Digital's recertification had to occur no later than April 20, 2017. Based on these admissions, I find Appellant therefore knew or should have known that Digital would have received its recertification modification at that time, and could have learned whether and exactly when Digital was recertified. In addition, as Digital points out, Digital was listed among the eligible small business offerors for task orders under the GWAC. Further, the NCAT CO's questions and answers informed potential offerors, which of course included Appellant, that Digital was eligible for this Task Order. Thus, Digital must have been recertified as small before the CO released the questions and answers. Appellant had numerous opportunities to protest Digital's size in connection with its recertification, but chose not to until the end of August 2017, after learning Digital had won the NCATS Task Order. Appellant may not choose when to file its protest; it must do so within the regulatory time limits. Appellant failed to timely file its protest, and the Area Office thus did not err when it dismissed that protest.

Accordingly, I find that Appellant's appeal has failed to establish clear error in the size determination. Therefore, I must deny the appeal.

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, the appeal 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