

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

SIZE APPEAL OF:

QuaLED Lighting,

Appellant,

RE: Atlantic Diving Supply, Inc.

Appealed From

Size Determination No. 2-2018-024

SBA No. SIZ-5876

Decided: December 21, 2017

ORDER DENYING APPEAL¹

I. Background

On February 26, 2015, the U.S. Department of Navy, Military Sealift Command (MSC) issued Request for Proposals (RFP) No. N00033-15-R-8002 for Light Emitting Diode lighting products and technical support. The RFP contemplated the award of multiple Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 335122, Commercial, Industrial and Institutional Electric Lighting Fixture Manufacturing, with a corresponding size standard of 500 employees. After evaluating offers, MSC awarded three contracts. (Letter from M. Siebeking-Knox to S. Taliaferro, at 1-2 (Nov. 6, 2017).) QuaLED Lighting (Appellant) and Atlantic Diving Supply, Inc. (ADS) were two of the awardees. Appellant was notified that ADS was an apparent successful offeror on August 30, 2016. (*Id.*)

On October 2, 2017, MSC issued a Request for Delivery Order Proposals (RDOP) to renovate the lighting of four ships. On October 19, 2017, MSC awarded the order to ADS.

On October 24, 2017, Appellant filed a size protest with the CO, captioning the filing as “Size Protest contract #N32205-16-D-2022.” (Protest at 1.) Appellant alleged that ADS “was under investigation [by the U.S. Department of Justice] when the contract N32205-16-D-2022 was awarded. [Appellant] believe[s] [ADS] and [its] affiliates are over 500 [employees] and are not eligible for a set aside award.” (*Id.*) The protest did not reference any task or delivery order.

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

The CO forwarded Appellant's size protest to the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) for review, commenting that “[w]e believe that the protest may be untimely considering awards were made over a year ago.” (E-mail from M. Draluck to H. Goza (Nov. 6, 2017).) On November 13, 2017, the Area Office dismissed Appellant's protest as untimely. The Area Office explained that any size protest against ADS's base contract should have been filed by September 7, 2016, so Appellant's protest was untimely by “more than a year.” (Size Determination 2-2018-024, at 1.)

On November 28, 2017, Appellant appealed the size determination to the SBA Office of Hearings and Appeals (OHA). Appellant maintains that the timeliness of its protest should be measured from October 19, 2017, when MSC competitively awarded an order to ADS. (Appeal, at 2-3.)

On December 15, 2017, ADS responded to the appeal. ADS argues that the Area Office correctly dismissed Appellant's protest as untimely because the protest was filed more than a year after ADS's base contract was awarded. (Response, at 5.) ADS further contends that, even if OHA were to construe the protest as pertaining to an order, the RDOP did not request recertification, nor does Appellant even allege that recertification was required. (*Id.*, at 6, 7.) In addition, ADS argues, OHA should dismiss the appeal for lack of specificity, because Appellant fails to identify any factual or legal error by the Area Office. (*Id.*, at 8-10.)

II. Discussion

SBA regulations provide that a size protest on a negotiated procurement normally must be filed within five business days after the protester learns the identity of the apparent awardee. 13 C.F.R. § 121.1004(a)(2)(i). A protester may also, however, protest a task or delivery order issued under an existing Multiple Award Contract, “if the contracting officer requested a new size certification in connection with that order.” *Id.* § 121.1004(a)(2)(ii). An untimely size protest must be dismissed. *Id.*, at § 121.1004(d).

Here, Appellant's size protest against ADS was filed more than a year after Appellant was notified that ADS was a contract awardee. Section I, *supra*. As a result, the protest was plainly untimely. While Appellant's protest might have been timely if it had challenged the award of a task or delivery order, and if such an order had required recertification, nothing in Appellant's protest even alluded to the issuance of an order. Rather, Appellant's protest cited its own base contract, N32205-16-D-2022, and made no mention of any order requiring recertification. *Id.* Furthermore, in forwarding the size protest to the Area Office, the CO understood Appellant's protest as attempting to challenge ADS's initial contract award, not the award of a task or delivery order. *Id.* Accordingly, the Area Office properly concluded that Appellant's size protest was untimely.

III. Conclusion

For the above reasons, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge