

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

SIZE APPEAL OF:

AeroSage, LLC,

Appellant,

RE: Foster Fuels, Inc.

Appealed From
Size Determination Nos. 2-2018-039 and
-040

SBA No. SIZ-5880

Decided: January 19, 2018

ORDER DISMISSING APPEAL¹

I. Background

On December 21, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination Nos. 2-2018-039 and -040, dismissing size protests filed by AeroSage, LLC (Appellant) against Foster Fuels, Inc. The Area Office concluded that Appellant lacked standing to protest.

On January 8, 2018, at 5:02 p.m. Eastern time, Appellant transmitted the instant appeal by e-mail to SBA's Office of Hearings and Appeals (OHA). In its appeal, Appellant acknowledged that it received the size determination on December 21, 2017. (Appeal at 1.) Because the appeal appeared to have been filed more than 15 days after Appellant's receipt of the size determination, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely.

On January 16, 2018, Appellant responded to OHA's order. Appellant states that it was surprised by the Area Office's dismissal, which occurred during the holiday season. Appellant "quickly made a good faith, but erroneous, assessment" that the deadline to appeal was January 6, 2018. (Response, at 2.) "It was not until after receiving [OHA's] order and preparing this [response], that [Appellant] realized January 5th was the deadline." (*Id.* at 3.) Appellant adds that it sent the appeal on January 8, 2018, but "formatting, content preparation and server delays" resulted in the appeal being received after OHA's close of business. (*Id.*)

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.

II. Discussion

SBA regulations provide that a size appeal must be filed within 15 calendar days of receiving a size determination. 13 C.F.R. § 134.304(a). Further, “[a]ny submission received at OHA after 5 p.m. eastern time is considered filed the next business day.” *Id.* § 134.204(b)(2). In the instant case, Appellant acknowledges that it received the size determination on December 21, 2017. Any appeal was therefore due by Friday, January 5, 2018. Appellant transmitted its appeal by e-mail on Monday, January 8, 2018, but OHA did not receive the appeal until 5:02 p.m. Eastern time, so the appeal is deemed to have been filed on Tuesday, January 9, 2018. Thus, Appellant filed its appeal 19 calendar days after Appellant received Size Determination Nos. 2-2018-039 and -040, and the appeal is plainly untimely.

Appellant maintains that it miscalculated the appeal deadline in good faith. While I sympathize with Appellant's situation, OHA has no discretion to extend, or waive, the deadline for filing an appeal. *Id.* §§ 134.202(d)(2)(i)(A) and 134.304(c); *Size Appeal of Autonomic Resources, LLC*, SBA No. SIZ-5453 (2013); *Size Appeal of A-Top Security Co.*, SBA No. SIZ-5227 (2011). Nor can the doctrine of excusable neglect salvage an untimely appeal. *Size Appeal of Silvergate Pharms., Inc.*, SBA No. SIZ-5418 (2012).

Appellant also contends that technical difficulties contributed to its untimely appeal, but this argument is meritless. As discussed above, the appeal was due by January 5, 2018, and therefore still would have been untimely even if it had been filed during OHA's normal business hours on January 8, 2018. Further, SBA regulations make clear that, when a filing is sent by e-mail, “[t]he sender is responsible for ensuring . . . a successful, virus-free transmission.” 13 C.F.R. § 134.204(a)(1). Thus, “having chosen to submit its appeal by e-mail, Appellant was responsible for ensuring that the e-mail successfully reached OHA.” *Size Appeal of Supplies Now, Inc.*, SIZ-5655, at 2 (2015).

III. Conclusion

For the above reasons, I DISMISS the instant appeal as untimely. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge