

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

SIZE APPEAL OF:

GovSmart, Inc.,

Appellant,

RE: Cypher Analytics, Inc. d/b/a Crown  
Point Systems,

Appealed From  
Size Determination No. 06-2018-026

SBA No. SIZ-5894

Decided: April 3, 2018

APPEARANCES

Jerry Alfonso Miles, Esq., Lan Jin, Esq., Deale Services, LLC, Rockville, Maryland, for  
GovSmart, Inc.

Constance M. Kobayashi, Esq., U.S. Small Business Administration, Office of General  
Counsel, San Francisco, California

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On January 16, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2018-026, dismissing a size protest filed by GovSmart, Inc. (Appellant) against Cypher Analytics, Inc. d/b/a Crown Point Systems (Crown Point) for lack of standing. On appeal, Appellant contends that the Area Office improperly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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<sup>1</sup> OHA issued a protective order in this case on February 2, 2018. This decision, though, does not contain any confidential or proprietary information. Accordingly, the decision is not issued under the protective order and is intended for public release.

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. Procurement and Protest

On December 29, 2017, the U.S. Department of the Navy, SPAWAR Systems Center Pacific (Navy) issued Purchase Order No. N66001-18-P-0066 (Purchase Order) to Crown Point as a direct 8(a) sole source award. The Purchase Order was for commercial off-the-shelf firmware and software license renewals and hardware maintenance. The Contracting Officer (CO) assigned the Purchase Order North American Industry Classification System (NAICS) code 541519, Information Technology Value Added Resellers, with a corresponding 150 employee size standard.

On January 3, 2018, Appellant filed a size protest against Crown Point. Appellant alleged that Crown Point is ineligible for award under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (Protest at 1.) Appellant asserted it has standing to protest under 13 C.F.R. § 121.1001(a)(1)(i), because Appellant “is an actual offeror” having “previously entered into five weeks of negotiations with the [Navy] and submitted a quote ... but was ultimately not awarded the contract.” (*Id.*) Appellant further contended its protest was timely. (*Id.* at 2.) Appellant included with its protest various materials related to its negotiations with the Navy.

On January 4, 2018, the CO forwarded Appellant's protest to the Area Office for review. The CO's cover letter stated that Appellant initially was considered for a direct 8(a) award, but that after learning that Appellant was ineligible for direct 8(a) awards because it had reached its dollar limit under 13 C.F.R. § 124.519, the Navy “proceeded to look to [Crown Point] as a viable source.” (Letter from L. Hartpence to E. Sanchez (Jan. 4, 2018), at 1.) The CO attached the SBA District Office's Acceptance Letter, 8(a) Sole Source Requirement, on behalf of Crown Point, as Enclosure 11 in the package he sent to the Area Office.

### B. Size Determination

On January 16, 2018, the Area Office issued Size Determination No. 06-2018-026, dismissing Appellant's size protest against Crown Point for lack of standing under 13 C.F.R. § 121.1001(b)(2). (Size Determination at 1.) The Area Office explained that because the Purchase Order is an 8(a) sole source requirement, only “the participant nominated for award” is eligible to request a size determination in connection with the Purchase Order, and that Appellant is not that participant. (*Id.* at 2.)

### C. Appeal

On January 31, 2018, Appellant filed this appeal. Appellant contends that the Area Office improperly dismissed Appellant's protest for lack of standing. (Appeal at 1.) Appellant maintains

it is an interested party because it is “a contractor who is ‘nominated for award’ under [Federal Acquisition Regulation (FAR)] 19.804-3(c)” even though it did not ultimately receive the award. (*Id.*)

By way of background, Appellant notes that it is the incumbent for this Purchase Order, and that, on October 27, 2017, the Navy invited Appellant to submit an offer for the renewal. (*Id.*) Appellant states that it “was informed by the [Navy] that this would be an 8(a) sole source contract and thus was nominated for the contract.” (*Id.*) Over the ensuing weeks, there were several contacts between Appellant, its proposed suppliers, the Navy, and SBA's District Office regarding the Purchase Order. (*Id.* at 2-4.) Among the topics discussed was Appellant's request for a waiver under 13 C.F.R. § 124.519(e). On December 15, 2017, Appellant discovered that the Navy had entered into negotiations with a different 8(a) contractor, and on December 19, 2017, Appellant was told by the SBA's District Office that it had processed a signed offer letter with Crown Point for the Purchase Order. (*Id.* at 2-4.) Appellant then filed a size protest against Crown Point. (*Id.* at 4.)

Appellant argues that, according to FAR 19.804-3(c), “[i]n the sole source context, the language ‘nominated for award’ has a different meaning than simply ‘considered for award.’”D’ (*Id.* at 4.) Either the contracting officer or SBA nominates an 8(a) participant for the contract. (*Id.*) Here, the Navy “nominated [Appellant] as an 8(a) participant for this contract because [Appellant] was **identified as a particular participant (that is, ‘nominated’)** for a sole source award of the Purchase Order by the [Navy] and/or SBA thus allowing it to commence negotiations with the [Navy].” (*Id.* at 5, emphasis Appellant's.) The Navy informed Appellant that the Purchase Order would be an 8(a) sole source contract. (*Id.*)

Appellant posits that the Area Office misinterpreted the meaning of the phrase “nominated for award” in FAR 19.804-3(c). Appellant asserts:

A contractor who is “nominated for award” under FAR 19.804- 3(c) means that it is identified and selected by the contracting officer or the SBA to be a participant to the sole source contract, not that the contractor receives the award. Here, [Appellant] was a participant identified and selected by the contracting officer and/or the SBA even though it did not receive the award ultimately. [Appellant] was approved by the contracting officer and the SBA to go through the sole source negotiations effectively constituting “nomination for award” and is undoubt[ed]ly an interested party in this procurement.

(*Id.* at 5.) Appellant included with its appeal an October 27, 2017 e-mail from the Navy and a spreadsheet, both of which Appellant also had included with its original protest.

Appellant requests that OHA conclude that Appellant has standing to file this size protest, and that the Area Office erred in dismissing the protest. As relief, Appellant requests that OHA either sustain the size protest or remand the matter to the Area Office. (*Id.* at 5-6.)

#### D. CO's Memorandum

On February 7, 2018, the CO filed a Memorandum discussing the procurement. The CO explains that on December 12, 2017, the Navy e-mailed the Request for Quotations (RFQ) to Crown Point. On December 19, 2017, after determining Crown Point to be “a viable concern” for the procurement, the Navy submitted to SBA an 8(a) direct award offer letter for Crown Point. On December 21, 2017, the Navy received an acceptance letter from SBA, and on that same day Crown Point submitted its quote. (Memorandum, at 1.) The CO notes that the Navy “did not submit an offer letter to SBA on behalf of [Appellant] under 13 CFR § 124.502 and FAR 19.804-2 for the current requirement.” (*Id.*)

#### E. SBA's Response

On February 16, 2018, SBA responded to the appeal. SBA maintains that the Area Office correctly dismissed Appellant's size protest for lack of standing. Therefore, OHA should deny the appeal.

SBA draws a distinction between competitive and sole source 8(a) awards, arguing that the applicable regulations permit size protests in a competitive 8(a) award, but do not permit size protests in a sole source 8(a) award. (Response at 4-5, citing 13 C.F.R. § 121.1001(a)(2), (b)(2)(ii).) Further, 8(a) program regulations forbid size protests in a sole source award. (*Id.* at 4, citing 13 C.F.R. § 124.517(b).) SBA also points to OHA's decisions in *Size Appeal of Sunset Marine, LLC*, SBA No. SIZ-4726 (2005) and *Size Appeal of L. Washington & Associates, Inc.*, SBA No. SIZ-4463 (2001), where OHA affirmed dismissals of size protests filed in connection with 8(a) sole source contracts. (*Id.* at 8.)

As for Appellant's argument that it is a “Participant nominated for award”, SBA maintains that Appellant is not, because although Appellant was initially considered for award, it was found ineligible, so a different 8(a) concern, Crown Point, was nominated instead. (*Id.* at 5-7.)

#### F. Additional Pleadings

On February 15, 2018, Appellant requested an extension of the close of record until February 20, 2018, “in order that its counsel may retrieve the record from [OHA] along with reviewing, researching and responding to the same”. (Motion at 2.) OHA granted Appellant's motion and extended the close of record to February 20, 2018.

On February 20, 2018, at 7:48 p.m. Eastern time, Appellant filed a motion to reply to SBA's response, the proposed reply, a motion to introduce new evidence, and the proposed new evidence. The proposed new evidence consists of a December 4, 2017 e-mail from the Navy, the affidavit of Appellant's Senior Business Development Manager, and an audio recording of a telephone call between Appellant and the Navy. SBA opposes both of Appellant's motions as untimely and improper.

On February 28, 2018, Appellant filed a “Consolidated Motion for Leave to Respond in Opposition to SBA's Objection; Second Motion to Extend the Close of Record; and First Motion to Reopen the Record” (Consolidated Motion). On March 7, 2018, SBA filed its opposition to Appellant's Consolidated Motion.

Crown Point did not respond to the appeal.

### III. Discussion

#### A. Preliminary Matters

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). In determining the filing date, any submission received at OHA after 5:00 p.m. Eastern time is considered filed on the next business day. *Id.* § 134.204(b)(2).

Here, OHA did not direct Appellant to file a reply, and Appellant has not persuasively explained why a reply is necessary. Moreover, Appellant filed its Motion to Reply, its proposed Reply, its Motion for New Evidence, and its proposed new evidence on February 20, 2018, at 7:48 p.m. Eastern time. Section II.F, *supra*. Thus, these submissions are considered to have been filed on February 21, 2018. Since the record closed on February 20, 2018, these submissions are late and will not be considered in this appeal.

For these reasons, Appellant's motions are DENIED, and the reply and new evidence are EXCLUDED from the record and have not been considered for purposes of this decision.

#### B. 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).

#### C. Analysis

SBA regulations governing standing to file a size protest or to request a size determination are found at 13 C.F.R. § 121.1001. The regulations state, in pertinent part:

(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(B) The SBA program official with authority to execute the 8(a) contract or, where applicable, the procuring activity contracting officer who has been delegated SBA's 8(a) contract execution functions; or

(C) The SBA District Director in the district office that services the Participant, or the Associate Administrator for Business Development.

13 C.F.R. § 121.1001(b)(2). Except for certain SBA officials, then, only “[t]he Participant nominated for award of the particular sole source contract” may file a size protest or request a size determination. *Id.* § 121.1001(b)(2)(ii)(A).

Applying these rules, OHA affirmed the dismissal for lack of standing of a size protest filed by a non-governmental entity in connection with a sole-source 8(a) contract in *Size Appeal of Sunset Marine, LLC*, SBA No. SIZ-4726 (2005). There, OHA explained that:

Nowhere does the regulation give other potential offerors the right to file a size protest [on a sole-source 8(a) award], as it does in the case of 8(a) competitive awards. . . . Therefore, it is clear that [the protester], as another potential offeror, had no standing to file a size protest, and the Area Office was correct to dismiss it.

*Sunset Marine*, SBA No. SIZ-4726, at 2. OHA reached a similar result in *Size Appeal of L. Washington & Associates, Inc.*, SBA No. SIZ-4463 (2001).

In the instant case, the Area Office correctly determined that Appellant lacked standing to protest. The Purchase Order in question was a sole-source 8(a) award to Crown Point. Section II.A, *supra*. As Appellant was not the 8(a) participant nominated for this award, Appellant lacks standing to challenge Crown Point's size.

Appellant suggests that more than one 8(a) participant might be “nominated” for an 8(a) sole source award. In support, Appellant emphasizes it was in negotiation with the Navy for weeks concerning this Purchase Order. In Appellant's view, an 8(a) participant, such as itself, which has entered into negotiations with a procuring agency for a possible 8(a) sole source contract is “nominated for award”, and thus has standing to file a size protest against the eventual awardee of an 8(a) sole source contract.

I find no merit to Appellant's arguments, for two reasons. First, although neither FAR subpart 19.8 nor SBA's 8(a) program regulations define what “nominated for award” means, each time the phrase (or a variant) appears in those regulations, it clearly contemplates a single concern. FAR 19.804-3(c), for example, indicates that “the contracting officer nominates a specific 8(a) participant” for an 8(a) sole source award. If SBA deems that nominated participant unacceptable, SBA “may then nominate an alternate 8(a) participant.” Thus, the regulatory scheme anticipates there will be only a single “nominated” 8(a) participant for a given sole source 8(a) award, or at least only one nominated participant at a time.

Second, even assuming that both Appellant and Crown Point were “nominated” for the instant Purchase Order, SBA regulations and the FAR still would prohibit Appellant's size protest against Crown Point. This is true because SBA regulations governing size protests in connection with 8(a) procurements clearly state that: “The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.” 13 C.F.R. § 124.517(b). The same rule is found nearly verbatim at FAR 19.813(b), which provides that “[t]he size status of an 8(a) participant nominated for an 8(a) sole source contract may not be protested by another 8(a) participant or any other party.” Accordingly, given that Crown Point clearly was nominated for the instant 8(a) sole source award, Appellant cannot pursue a size protest against Crown Point, regardless of whether Appellant also may have been nominated.

#### IV. Conclusion

Appellant has not demonstrated any error in the size determination. 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