

Cite as: *Size Appeal of Advanced Management Strategies Group, Inc./ReefPoint Group, LLC*,
SBA No. SIZ-5905 (2018)

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

SIZE APPEAL OF:

Advanced Management Strategies Group,
Inc./ReefPoint Group, LLC,

Appellant,

RE: Enterprise Resource Performance, Inc.

Appealed From
Size Determination No. 02-2018-224

SBA No. SIZ-5905

Decided: May 7, 2018

APPEARANCES

Carrol H. Kinsey, Jr., Esq., Redmon, Peyton & Braswell, LLP, Alexandria, Virginia,
Craig A. Holman, Esq., Arnold & Porter, Washington, D.C., for Appellant

Antonio R. Franco, Esq., Peter B. Ford, Esq., Julia Di Vito, Esq., Timothy F. Valley,
Esq., PilieroMazza, PLLC, Washington, D.C., for Enterprise Resource Performance, Inc.

DECISION

I. Introduction and Jurisdiction

On February 12, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area II (Area Office) issued Size Determination No. 02-2018-224, dismissing a size protest filed by Advanced Management Strategies Group, Inc./ReefPoint Group, LLC (Appellant), against Enterprise Resource Performance, Inc. (ERP). The Area Office concluded that Appellant's protest was untimely. Appellant contends that its protest was improperly dismissed, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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 September 28, 2017, the U.S. Department of Veterans Affairs (VA), Office of Acquisition Operations, in Frederick, Maryland, issued Request for Quotations (RFQ) No. VA119A-17-Q-0413 for VA modernization/commercial healthcare consulting services. The RFQ contemplated the award of a single blanket purchase agreement (BPA) against the awardee's General Services Administration (GSA) Schedule contract. In addition, VA planned to award the first task order at the time the BPA was established. (RFQ at 72.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned 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.

Amendment A00002, issued October 24, 2017, contained Questions and Answers and a conformed RFQ. Question and Answer 72 read as follows:

Q72. SF1449 Block 10: Will the awardee have to have certified that they meet the small business size standards in [the System for Award Management (SAM)] within the past year?

A72. The Government is not requiring re-certification of size standard; however, Gov't will review vendor's SAM Reqs and Certs to determine whether small against \$15M size standard upon receipt of quote.

(RFQ Amend. A00002 at 12.) Question and Answer 84 stated:

Q84. Is the \$15M small business size limitation based on the companies size status as set by the VA's [Center for Verification and Evaluation (CVE)] guidelines or will it be based on [GSA Schedule] guidelines. I know that they both have different interpretations as to when you become disqualified. As we set our team strategy I want to make sure we are making decisions based on the right policies/guidelines.

A84. The Government will determine company size by referencing the Quoter's [SAM] Representations and Certifications at the time of receipt of Quotes and at time of award (unless new Reqs and Certs is submitted within Quote), and will verify ownership and control through CVE verification as SDVOSB at receipt and at award. Note that different firms may re-certify their three-year average annual receipts (size) at different times of the year (at tax time, for example).

(*Id.* at 14.) Question and Answer 86 stated:

Q86. Would the government consider including a requirement for all SDVOSB Primes to re-certify their size standard as of the time of proposal submission to

ensure that both the letter and spirit of the \$15 million size standard limitation for NAICS code 541611 is being followed?

A86. The Government does not intend to require recertification of size, but Quoter may submit updated Reps and Certs in its Volume V if it does not wish for the Government to rely on its SAM.gov Reps and Certs.

(*Id.*) The RFQ's submission instructions directed offerors to submit:

Completed Representations and Certifications if the quoter does not wish for the Government to rely on those in [SAM] at SAM.gov.

(RFQ Amend. A00002, Conformed RFQ at 74.)

On October 26, 2017, the CO issued Amendment A00003, extending the deadline for quotations until November 6, 2017. Appellant and ERPi submitted timely quotations.

On February 1, 2018, the CO notified Appellant that ERPi had been awarded the BPA and first task order. On February 6, 2018, Appellant filed a size protest alleging that ERPi is not a small business. Appellant based its allegation on publicly-available data showing that ERPi received \$109,455,804.74 in Federal contracts over the preceding three years. (Protest at 2.) Thus, Appellant reasoned, ERPi has average annual receipts of \$36,485,268.58, an amount well in excess of the size standard. (*Id.*)

The CO forwarded the size protest to the Area Office for review. In a letter accompanying the referral, the CO stated:

Procurement is a BPA and associated task order that was issued against [ERPi's] GSA Schedule. The Government did not require vendors to recertify size status (but did allow them to do so if the firm desired).

(Letter from A. Smith to H. Goza (Feb. 7, 2018), at 1.)

B. Size Determination

On February 12, 2018, the Area Office issued Size Determination No. 02-2018-224, dismissing Appellant's protest as untimely. The Area Office first noted that the contract at issue here is ERPi's GSA Schedule Contract No. GS-10F-0448N, which is a long-term contract. (Size Determination at 1.) Thus, protest timeliness is governed by 13 C.F.R. § 121.1004(a)(3), which permits size protests only at initial award of the long-term contract, at exercise of an option, or in response to a contracting officer's request for size recertification in connection with an individual order. (*Id.*) The Area Office explained that, under OHA case law, a contracting officer's request for recertification of size must be explicit in the solicitation for the task order. (*Id.* at 1-2.) The CO here did not request a size recertification in connection with this RFQ, so ERPi's size status is determined as of its offer on the base contract. (*Id.* at 2.) Under this analysis, Appellant's protest is untimely.

C. Appeal

On February 26, 2018, Appellant filed the instant appeal. Appellant maintains that the Area Office erred in dismissing the protest, and requests that OHA reverse the size determination. (Appeal at 17.)

Appellant asserts that the CO was required to assess ERPI's size eligibility at the time of its quote on the RFQ and at the time of award, but failed to do so. (*Id.* at 3-4.) Had the CO done so, he would have found that ERPI is not a small business and thus ineligible for award. (*Id.* at 4.) Appellant acknowledges that, for a GSA Schedule procurement, a contracting officer normally may rely upon the size certification made on the base contract. This general rule, though, does not apply to SDVOSB set-asides conducted by VA. (*Id.*) Instead, pursuant to “VA-unique regulations”, a VA contracting officer “shall ensure the business is registered and verified as eligible in the [Vendor Information Pages (VIP)] database prior to making an award.” (*Id.* at 4-5, quoting 48 C.F.R. § 819.7006.) This rule applies also to BPAs and orders through the GSA Schedule. (*Id.*, citing 48 C.F.R. § 819.7002.) Appellant quotes VA policy in support of its argument:

[I]f an RFQ for an order or BPA under an VA FSS contract is being set-aside for SDVOSBs or VOSBs, contracting officers shall include a requirement in the solicitation that only verified SDVOSBs or VOSBs in the VIP database when an offer is submitted and at the time of contract award will be considered for award and unverified firms will be considered non-responsive and ineligible for award.

(*Id.*, quoting VA Procurement Policy Memorandum (2016-05) (emphases Appellant's).)

In the instant case, the CO was required to determine SDVOSB status (including size) at both quote submission and at award. (*Id.* at 6.) Because the CO did not do so, the award “cannot stand”. (*Id.*) The Area Office likewise assessed ERPI's size as of its offer on the underlying GSA Schedule contract, so the Area Office's analysis too was flawed. (*Id.* at 7.)

Appellant contends that the RFQ “did require offerors to demonstrate their SDVOSB status prior to receiving award”, because the RFQ contained VA Acquisition Regulation (VAAR) clause 852.219-10, which requires the status of both offerors and awardees to have been “verified”. (*Id.* at 7, quoting 48 C.F.R. § 852.219-10.) Further, the CO's response to Question 72 indicates that an offeror's size status would be assessed upon receipt of the quote. (*Id.* at 8-9.) Appellant also argues that the VAAR, not SBA's “more lenient” rules, apply to VA procurements, citing the “dichotomy” between VA and non-VA procurements; the VAAR itself; the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBA); *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016); and *Veterans Contracting Group, Inc., v. United States*, -- Fed. C. -- 2017 WL 6523676 (Dec. 21, 2017). (*Id.* at 9-11.) In Appellant's view, the Area Office improperly applied “SBA's traditional lenient rule”. (*Id.* at 13.)

Appellant maintains that although *Size Appeal of Total Systems Technologies Corporation*, SBA No. SIZ-5562 (2014) and *Size Appeal of Oxford Government Consulting, LLC*, SBA No. SIZ-5732 (2016) stand for the proposition that SBA does not hear size protests against award of a GSA Schedule BPA, such holdings are “irrelevant” here, since SBA's “traditional rules” cannot supersede the VBA or the VAAR. (*Id.* at 12-13, citing 48 C.F.R. § 819.7002.)

D. ERPi's Response

On March 15, 2018, ERPi responded to the appeal. ERPi maintains that the Area Office correctly dismissed Appellant's size protest as untimely. Therefore, OHA should deny the appeal.

ERPi observes that the VAAR itself makes clear that size protests are governed by SBA's size protest rules at 13 C.F.R. part 121. (Response at 3, citing 48 C.F.R. § 819.307(a).) Under these rules, the time for filing a size protest was in 2013, when Contract GS-10F-0448N was awarded to ERPi. The instant RFQ did not require size recertification, so the relevant time as of which ERPi must be a small business was at the time of ERPi's initial offer on the GSA Schedule contract, not when ERPi submitted its quote for this RFQ. (*Id.* at 3-4.) Further, since the instant award is a BPA, there is no requirement to be small at time of award. (*Id.*, citing *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853 (2017).)

ERPi also contends that Appellant misconstrues the term “verified” in VAAR 852.219-10 to mean an SDVOSB must be recertified as small at the time of award. (*Id.* at 5-6.) Rather, the regulation merely directs the contracting officer to determine that the SDVOSB is listed in the VA's VIP database at time of award. (*Id.*) Finally, ERPi maintains Appellant's argument based on VA policy implementing *Kingdomware* is misplaced. The CO complied with VA policy by including VAAR 852.219-10 in this RFQ. (*Id.* at 6.)

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 that 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 argues at length that because the instant procurement was an SDVOSB set-aside conducted by VA, the VAAR “supersedes” SBA's more “lenient” size regulations. As ERPi observes in its response to the appeal, though, the VAAR clearly indicates that SBA regulations are controlling for purposes of determining a concern's size status. Specifically, the VAAR states:

All protests relating to whether [an SDVOSB] is a “small” business for the purposes of any Federal program are subject to 13 CFR part 121 and must be filed in accordance with that part.

VAAR 819.307(a). This provision has been in effect since the VA issued rules implementing the VBA. *See* 74 Fed. Reg. 64,619, 64,631 (Dec. 8, 2009). Contrary to Appellant's contentions, then, the governing regulations here are SBA's size determination rules.

Under SBA regulations, on a long-term contract such as ERPi's GSA Schedule contract No. GS-10F-0448N, a size protest may be filed within 5 business days after any of three events: (1) when the long-term contract is initially awarded; (2) when an option is exercised; or (3) upon award of a task or delivery order that required recertification. 13 C.F.R. § 121.1004(a)(3). A BPA is not a “contract,” an “option,” or an “order,” and SBA regulations therefore do not contemplate size protests involving such instruments. As a result, OHA has recognized that “a size protest on a BPA issued against a GSA Schedule contract is treated as a size protest on the GSA Schedule contract.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017); *see also Size Appeal of Oxford Gov't Consulting, LLC*, SBA No. SIZ-5732 (2016); *Size Appeal of Total Systems Techs. Corp.*, SBA No. SIZ-5562 (2014).

In the instant case, it is undisputed that Appellant's protest challenged neither the award of the underlying Schedule contract nor the exercise of an option. While the protest did challenge the award of a BPA to ERPi, such a protest is treated as a protest of the GSA Schedule contract. ERPi's Schedule contract was awarded in 2013, so a protest during 2018 is plainly untimely. Accordingly, Appellant's protest could be timely only if it pertained to an order requiring recertification. The instant RFQ did include a task order in addition to the BPA, but that task order did not require recertification. Indeed, in RFQ Amendment A00002, the CO repeatedly stated that offerors were not required to recertify size. Section II.A, *supra*. The RFQ's proposal instructions likewise made clear that a new size certification was necessary only “if the quoter does not wish for the Government to rely on those” in SAM. *Id.* In addition, in his letter referring Appellant's protest to the Area Office, the CO reiterated that “[t]he Government did not require vendors to recertify size status (but did allow them to do so if the firm desired).” *Id.* Based on all of these statements, then, the Area Office correctly concluded that offerors were not required to recertify their size status in this RFQ. Section II.B, *supra*. In sum, because Appellant's protest was not filed within 5 business days after the award of a long-term contract, the exercise of an option, or the award of an order requiring recertification, the Area Office properly dismissed the protest as untimely. 13 C.F.R. § 121.1004(a)(3).

Appellant also argues that the CO did not properly “verify” ERPi's status, but this argument too is meritless. Nowhere in the VAAR's SDVOSB set-aside procedures implementing the VBA is a VA contracting officer required to do anything more regarding the SDVOSB's size status than to ensure that “[b]usinesses are registered and verified as eligible in the VIP database prior to making an award.” 48 C.F.R. § 819.7005(b)(2). Thus, a VA contracting officer is not expected to determine whether an SDVOSB is a small business, but instead must confirm that the apparent awardee is included in the VIP database of verified SDVOSBs and VOSBs.

IV. Conclusion

Appellant has not demonstrated 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. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge