

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

SIZE APPEAL OF:

Navarre Corporation,

Appellant,

RE: Owl, Inc.

Appealed From  
Size Determination No. 3-2018-049

SBA No. SIZ-5942

Decided: July 24, 2018

APPEARANCES

William Weisberg, Esq., Law Offices of William Weisberg PLLC, McLean, Virginia, for the Appellant

Thomas L. Walker, Esq., Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia, for Owl, Inc.

DECISION

I. Introduction and Jurisdiction

On May 8, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-049, dismissing a size protest filed by Navarre Corporation (Appellant) against Owl, Inc. (Owl). The Area Office concluded that Appellant's protest was untimely because unsuccessful offerors, including Appellant, were notified that Owl was the apparent awardee on March 15, 2017, more than a year before Appellant's protest.

On May 23, 2018, Appellant appealed Size Determination No. 3-2018-049 to SBA's Office of Hearings and Appeals (OHA). Appellant maintains that the Area Office erred in dismissing its protest, and requests that OHA remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is denied.

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. Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation

On August 8, 2016, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. VA256-16-R-0642 for ground transportation services at the G.V. (Sonny) Montgomery Veterans Affairs Medical Center in Jackson, Mississippi. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 485991, Special Needs Transportation, with a corresponding size standard of \$15 million average annual receipts. (*Id.*) Offers were due August 31, 2016. On March 15, 2017, the CO awarded the contract to Owl, and informed Appellant that Owl was the apparent successful offeror. (Letter from B. Smith to S. Johnson (Mar. 15, 2017).)

### B. Size Determination No. 3-2017-028

On March 22, 2017, Appellant filed a size protest against Owl. In the protest, Appellant alleged that Owl is not a small business due to affiliation with other concerns. On April 4, 2017, the Area Office issued Size Determination No. 3-2017-028, denying the protest. The Area Office found that Appellant's size protest was timely filed within five business days after Appellant learned the identity of the apparent awardee, but that the combined receipts of Owl and its affiliates do not exceed the size standard. Appellant did not appeal Size Determination No. 3-2017-028 to OHA.

### C. Bid Protest Litigation

On March 23, 2017, Appellant filed a bid protest with the U.S. Government Accountability Office (GAO), alleging that VA had misevaluated proposals and made an unreasonable award decision. *Matter of Navarre Corp.*, B-414505.4, Jan. 4, 2018, 2018 CPD ¶ 15, at 2. In response to the bid protest, VA took corrective action, stating that it would reevaluate proposals. GAO then dismissed the bid protest as academic. *Id.*

On July 17, 2017, VA completed its corrective action and, again, selected Owl for award. Appellant filed a second bid protest with GAO, alleging that Owl did not meet certain requirements in the RFP. *Id.* In response, VA took corrective action by amending the RFP to clarify its requirements, and permitted offerors to submit new or revised proposals. On September 14, 2017, GAO dismissed the second bid protest as academic. *Id.*

On September 28, 2017, VA issued RFP Amendment No. A00005, directing that offerors provide evidence that drivers had completed certain training. Appellant protested Amendment No. A00005 as providing an unfair competitive advantage to Owl, and GAO partially denied and partially dismissed the protest on January 4, 2018. *Id.* at 8-9. On April 25, 2018, VA completed its reevaluation of proposals and, again, selected Owl for award. The CO again announced that Owl was the apparent successful offeror.

Throughout the bid protest litigation and corrective action, performance on Owl's contract was suspended, but VA did not terminate or cancel the award. (Memo from B. Smith to C. Thompson, at 3-5.)

#### D. Size Determination No. 3-2018-049

On May 1, 2018, Appellant filed a second size protest against Owl. In this second size protest, Appellant alleged that Owl is no longer a small business under the size standard associated with this procurement. (2018 Size Protest, at 1.) Appellant further argued that VA should have required offerors to recertify their size, given the “length of time since initial proposals were submitted”. (*Id.*)

On May 8, 2018, the Area Office dismissed Appellant's second size protest as untimely. The Area Office found that the CO originally notified unsuccessful offerors of the award to Owl on March 15, 2017. (Size Determination No. 3-2018-049, at 1.) Despite various delays stemming from the bid protest litigation at GAO, “[a]t no time did the contracting agency cancel the award to Owl.” (*Id.*) The Area Office concluded that, because the CO never terminated Owl's contract, any size protest was due within five business days after the original award notification. (*Id.*, citing *Size Appeal of EFT Architects, Inc.*, SIZ-5460 (2013).) Appellant's second size protest was therefore untimely. (*Id.* at 1-2.)

#### E. Appeal

On May 23, 2018, Appellant filed the instant appeal with OHA, contending that Appellant's second size protest was incorrectly dismissed as untimely. Appellant maintains that it filed its second size protest at the earliest opportunity. (Appeal at 2.) Appellant highlights that the second size protest was filed within five business days after VA's most recent award notification and, moreover, included allegations that did not exist at the time of Appellant's first size protest. (*Id.*)

Appellant urges OHA to distinguish or overrule *EFT Architects*. In particular, Appellant argues, “[w]hen the [procuring] agency takes corrective action and restarts the procurement process, a fair application of the regulations mandates that **each** award decision, and not just the first one, triggers the time for a size protest to be filed.” (*Id.* (emphasis Appellant's).) Appellant further contends that dismissing Appellant's second size protest is inequitable because “Owl is no longer a small business.” (*Id.* at 3.) The Area Office also should have considered whether a new self-certification was necessary due to the extensive delays in conducting this procurement.

#### F. Owl's Response

On June 7, 2018, Owl responded to the appeal, asserting that Appellant filed its second size protest 413 days late. Owl argues that, under OHA case precedent, “[a] GAO protest does not toll the five-day time limit for filing a size protest.” (Response at 4, citing *Size Appeal of TLC Catering, Inc.*, SBA No. SIZ-5388 (2012).) Owl further contends that unless the contract award is cancelled or terminated, “the date to file a size [protest] is five days from the original date the contracting officer notified the protestor of the identity of the prospective awardee.” (*Id.*, citing

*EFT Architects*.) Therefore, the Area Office correctly dismissed Appellant's second size protest as untimely.

Owl argues that *EFT Architects* is indistinguishable from the instant case. (*Id.* at 4-5.) In *EFT Architects*, the procuring agency undertook corrective action in response to a bid protest at GAO, but did not cancel the initial contract award. (*Id.*) Similarly, in the instant case, VA made clear that the award to Owl would not be disturbed unless reevaluation of proposals resulted in a different awardee. (*Id.* at 5-6.)

### 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

SBA regulations stipulate that, on a negotiated procurement such as found here, “[a] protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.” 13 C.F.R. § 121.1004(a)(2). Interpreting this rule, OHA has consistently held that the regulation does not contemplate an exception if corrective action occurs after award notification. *E.g.*, *Size Appeal of Chenega Support Servs., LLC*, SBA No. SIZ-5874 (2017); *Size Appeal of K2 Group, Inc.*, SBA No. SIZ-5805 (2017); *Size Appeal of EFT Architects, Inc.*, SIZ-5460 (2013); *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4937 (2008); *Size Appeal of SDS Int'l, Inc.*, SBA No. SIZ-4541 (2003). Here, in response to the bid protest litigation at GAO, VA undertook corrective action, amended the RFP, and reevaluated proposals. *See* Section II.C, *supra*. Importantly, though, VA never cancelled or terminated the original award to Owl, instead opting to suspend performance of the contract. *Id.* It follows, then, that in order to have been timely, any size protest must have been filed within five business days after the original award notification on March 15, 2017. Appellant's second size protest was filed more than a year later, on May 1, 2018, and thus was plainly untimely.

It is worth noting that Appellant did timely file its first size protest against Owl on March 22, 2017, and the Area Office decided that protest on the merits in Size Determination No. 3-2017-028. Section II.B, *supra*. Rather than a new size protest, then, Appellant's second size protest against Owl could be viewed as an attempt to supplement the first size protest with new allegations. Even if viewed in this light, though, the result is the same. OHA has repeatedly held that an area office has no obligation to consider supplemental protest allegations that were not timely raised with the original protest. *Size Appeal of Conrad Shipyard, LLC*, SBA No. SIZ-5873, at 6 (2017); *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803, at

11 (2017); *Size Appeals of Excalibur Laundries, Inc.*, SBA No. SIZ-5317 (2012). Moreover, Appellant did not appeal Size Determination No. 3-2017-028 to OHA, and SBA regulations preclude an area office from re-opening a size determination once the appeal deadline has lapsed. 13 C.F.R. § 121.1009(h). Accordingly, even if Appellant's second size protest is construed as a supplement to its first size protest, the second size protest was filed too late for the Area Office to have considered it.

Lastly, I find no merit to Appellant's contention that OHA should overturn or distinguish *EFT Architects*. OHA rejected a similar argument as recently as last year, explaining that *EFT Architects* is consistent with both SBA regulations and with long-standing OHA case precedent. *Chenega Support Servs.*, SBA No. SIZ-5874, at 9-10. Furthermore, Appellant has not persuasively shown why the instant case would warrant departure from *EFT Architects*. If anything, it appears that Appellant has already had greater opportunity to voice its concerns than did the would-be protester in *EFT Architects*. This is true because, as discussed above, the Area Office issued a decision on the merits of Appellant's first size protest. *See* Section II.B, *supra*. It was only Appellant's second size protest, filed more than a year after the original award notification, which was dismissed as untimely. Section II.D, *supra*.

#### IV. Conclusion

Appellant has not demonstrated the Area Office's dismissal is clearly erroneous. Accordingly, the appeal is DENIED and Size Determination No. 3-2018-049 is AFFIRMED. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge