

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

SIZE APPEAL OF:

AeroSage, LLC,

Appellant,

RE: HMS Technologies, Inc.

Appealed From  
Size Determination No. 02-2019-018

SBA No. SIZ-5987

Decided: March 4, 2019

APPEARANCES

David M. Snyder, President, AeroSage, LLC, Tampa, Florida

Roy H. Jones, Jr., Vice President of Contracts, HMS Technologies, Inc., Martinsburg,  
West Virginia

DECISION

I. Introduction and Jurisdiction

On December 4, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2019-018, dismissing a size protest filed by AeroSage, LLC (Appellant) against HMS Technologies, Inc. (HMS). The Area Office concluded that Appellant lacked standing to protest. Appellant maintains that the Area Office incorrectly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (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 received the size determination on December 6, 2018, and filed the appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The Solicitation

On August 14, 2018, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. 36C10B19N10140032 for “Unified Communications Infrastructure Support (UCIS) Avaya/Nortel National Consolidated Private Branch Exchange (PBX) Maintenance.” The solicitation contemplated the award of a task order under VA's Transformation Twenty-One Total Technology-Next Generation (T4NG) multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts. The Contracting Officer (CO) set aside the order for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industrial Classification System (NAICS) code 541512, Computer Systems Design Services. Offers were due October 2, 2018.

VA received timely proposals from four T4NG prime contractors, including HMS. On October 22, 2018, the CO announced that HMS was the apparent awardee.

### B. Protest

On October 29, 2018, Appellant filed a size protest with the CO, alleging that HMS is not a small business. (Protest at 1-2.) Appellant maintained that it had standing to protest because Appellant is “currently an SDVOSB subcontractor” on a predecessor task order for similar work. (Id. at 1.)

The CO forwarded Appellant's protest to the Area Office for review. Asked whether Appellant had submitted a technically-acceptable offer and had been included in the competitive range, the CO responded: “No, [Appellant] is not a Prime Contractor on the T4NG IDIQ vehicle, [and] therefore was not able to bid.” (E-mail from C. Varricchio to H. Goza (Nov. 19, 2018).)

### C. Size Determination

On December 4, 2018, the Area Office issued Size Determination No. 02-2019-018, dismissing Appellant's protest for lack of standing. The Area Office observed that, under 13 C.F.R. § 121.1001(a)(7)(i), “[a]ny offeror” may initiate a size protest on an unrestricted procurement. (Size Determination at 1.) Appellant, though, did not make an offer for the instant task order, nor could Appellant have done so because Appellant is not a T4NG prime contractor. (Id.) Because Appellant “was not an offeror, and was not eligible to make an offer due to not being on the contract vehicle,” Appellant lacked standing to protest HMS's size. (Id.)

#### D. Appeal

Appellant appealed the size determination to OHA on December 20, 2018.<sup>1</sup> Appellant reiterates that it was a subcontractor on a predecessor order for similar services. (Appeal at 2.) Appellant expected that the subcontract should automatically renew, but the October 22, 2018 award of the new task order ended that subcontract, resulting in economic loss to Appellant. (Id. at 2-3.)

Appellant argues that the size determination was “erroneously based” on 13 C.F.R. § 121.1001(a)(7)(i). (Id. at 3.) Instead, Appellant contends, the Area Office should have found Appellant to be an “other interested party” under 13 C.F.R. § 121.1001(a)(1)(iv). (Id.) Appellant requests that OHA remand the matter to a different area office to conduct a proper size determination of HMS. (Id. at 4.)

#### E. HMS's Response

On January 4, 2019, HMS responded to the appeal. HMS insists that “there are numerous errors of fact as well as faulty logic in reasoning in the appeal.” (Response at 1.) Therefore, the appeal should be denied.

HMS asserts that it is a verified SDVOSB, and was an SDVOSB at the time the T4NG contracts were awarded in 2016. (Id. at 2-3.) Applicable regulations indicate that a prime contractor retains its status for five years, so Appellant's attempt to challenge HMS's size during 2018 is “frivolous and irrelevant.” (Id. at 3.)

HMS maintains that, although Appellant was a subcontractor to HMS on an earlier T4NG task order, Appellant breached the terms of the agreement, and the parties mutually decided to terminate their relationship. (Id. at 3-5.) HMS disputes the notion that Appellant can be considered an “other interested party” for purposes of filing a size protest, highlighting that Appellant was no longer even a subcontractor at the time of the protest. (Id. at 5.)

#### F. Motion to Reply

On January 7, 2019, Appellant requested leave to reply to HMS's Response. There is good cause to permit a reply, Appellant argues, because HMS's Response is misleading and contains errors. (Motion at 1.)

In OHA practice, a reply to a response is not ordinarily permitted, unless OHA directs otherwise. 13 C.F.R. § 134.309(d). Here, OHA did not direct Appellant to file a reply, and the proposed Reply merely elaborates on points previously made in the appeal petition. Accordingly,

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<sup>1</sup> Appellant transmitted its appeal to OHA by e-mail at 6:27 p.m. on Wednesday, December 19, 2018. Pursuant to 13 C.F.R. § 134.204(b)(2), “[a]ny submission received at OHA after 5 p.m. eastern time is considered filed the next business day.”

Appellant's motion to reply to HMS's Response is DENIED. E.g., Size Appeal of Mali, Inc., SBA No. SIZ-5506, at 3 (2013).

### 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's principal argument here is that the Area Office incorrectly analyzed Appellant's standing to protest under 13 C.F.R. § 121.1001(a)(7), which applies to full and open procurements, rather than § 121.1001(a)(1), which applies to small business set asides. The distinction is important, Appellant maintains, because § 121.1001(a)(1) permits “[o]ther interested parties” to bring a size protest. Specifically, the regulation states, in pertinent part:

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

13 C.F.R. § 121.1001(a)(1)(iv). Here, Appellant is not a T4NG prime contractor and therefore could not compete for the instant task order. Sections II.A and II.B, *supra*. Nevertheless, Appellant argues that it can be considered an “other interested party” with standing to protest under § 121.1001(a)(1)(iv).

I find no merit to Appellant's contention. OHA has interpreted § 121.1001(a)(1)(iv) in prior cases, and has held that an “other interested party” refers only to the specific situations outlined in the rule. Size Appeal of Hummingbird Data Systems, LLC d/b/a Hummingbird Solutions, SBA No. SIZ-5311, at 3 (2011); Size Appeal of FitNet Purchasing Alliance, SBA No. SIZ-5089, at 4-5 (2009). Because four T4NG contractors submitted offers for the instant task order, and because Appellant itself did not submit an offer, neither of the special circumstances set forth in § 121.1001(a)(1)(iv) applies in the instant case. Sections II.A and II.B, *supra*. Nor is there any other possible basis in § 121.1001(a)(1) that would permit a private party, which was not a bidder/offeror, to have standing to challenge the awardee's size. Thus, Appellant lacks standing to protest HMS's size. Accordingly, even assuming, as Appellant asserts, that the Area Office should have relied upon § 121.1001(a)(1) rather than § 121.1001(a)(7) to conduct its analysis, any such error was harmless because Appellant lacks standing to protest in any event.

E.g., Size Appeal of Automation Precision Tech., LLC, SBA No. SIZ-5850, at 17 (2017) (errors in size determination were harmless because they would not have affected the outcome).

It is worth noting that, apart from the question of standing, Appellant's protest also may have been untimely. SBA regulations require that a size protest involving a multiple-award contract be filed within five business days after award of the base contract, or within five business days after award of an order requiring recertification. 13 C.F.R. § 121.1004(a)(2); Size Appeal QuaLED Lighting, SBA No. SIZ-5876 (2017). Here, the underlying T4NG contracts were awarded in 2016, and Appellant does not allege that the instant task order required recertification. Thus, Appellant's protest — which was filed October 29, 2018 — appears to be untimely. It is unnecessary to further explore the issue of timeliness, however, because the record supports the Area Office's conclusion that Appellant lacked standing to protest.

#### IV. Conclusion

Appellant has not proven reversible error in the size determination. Accordingly, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge