

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

SIZE APPEAL OF:

TIC Security, LLC,

Appellant,

RE: SigNet Technologies, Inc.

Appealed From
Size Determination No. 02-2019-043

SBA No. SIZ-6007

Decided: May 31, 2019

APPEARANCES

Frank V. Reilly, Esq., Law Office of Frank V. Reilly, Fort Lauderdale, Florida, for Appellant

Ira E. Hoffman, Esq., Butzel Long, Washington, D.C., for SigNet Technologies, Inc.

DECISION

I. Introduction and Jurisdiction

On March 26, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2019-043, dismissing a size protest filed by TIC Security, LLC (Appellant) against SigNet Technologies, Inc. (SigNet). The Area Office found that Appellant's protest was untimely. On appeal, Appellant maintains that the dismissal was clearly erroneous, 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 October 2, 2018, the U.S. Navy, Naval Surface Warfare Center Philadelphia, issued Request for Quotations (RFQ) No. N6449818R0030 for Integrated Electronic Security Systems sustainment services. The RFQ contemplated the award of a task order under the U.S. General Services Administration (GSA) Federal Supply Schedule 84 — Total Solutions for Law Enforcement, Security, Facilities Management, Fire, Rescue, Clothing, Marine Craft and Emergency/Disaster Response. The Contracting Officer (CO) set aside the order entirely for small businesses, but did not request that offerors recertify size. The assigned North American Industry Classification System (NAICS) code was 561990, All Other Support Services, with a corresponding size standard of \$11 million in average annual receipts. Quotations were due October 17, 2018. On February 25, 2019, the CO announced that SigNet was the apparent awardee.

On March 4, 2019, Appellant filed a protest with the CO challenging SigNet's size. Appellant alleged that SigNet was acquired by Convergent Technologies, LLC (Convergent), “a nearly billion-dollar entity,” in July 2017. (Protest at 1.) Therefore, Appellant maintained, SigNet is not a small business and should be ineligible for the instant task order. (*Id.* at 3.)

The CO forwarded the size protest to the Area Office for review. During the course of its investigation, the Area Office asked the CO, “[i]s the procurement a task order that was issued from a long[-]term contract such as the GSA Schedule? If so, did you require an explicit size certification for this order?” (Memorandum at 1.) The CO responded, “This order was a GSA order under [Schedule 84]. The solicitation did not require an explicit size certification for this order.” (*Id.*)

B. Size Determination

On March 26, 2019, the Area Office issued Size Determination No. 02-2019-043 dismissing Appellant's size protest as untimely. (Size Determination at 1.)

The Area Office explained that the RFQ called for the award of a task order on a long-term GSA Schedule contract. SBA regulations state that a size protest may be filed at three points during the life of a long-term contract: (1) at the time the long-term contract is initially awarded; (2) at the time an option is exercised; and (3) in response to a CO's request for recertification in connection with an individual order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3).) OHA has repeatedly held that the regulations do not provide for size protests at any other time during the life of a long-term contract. (*Id.*, citing *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010) and *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).)

The instant protest sought to challenge the award of a task order. As a result, “the issue here is whether the CO requested recertification for the [RFQ].” (*Id.* at 2.) The Area Office found that “recertification **was not** a requirement” for the instant task order. (*Id.*, emphasis in original.)

The RFQ contained no provisions explicitly requiring recertification, and the CO confirmed that there was no intent to request recertification. (*Id.*, citing *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013).) As a result, Appellant's protest was untimely.

C. Appeal

On April 10, 2019, Appellant filed the instant appeal. Appellant argues that the Area Office incorrectly focused on whether recertification was required for the RFQ. In Appellant's view, “[r]ecertification was not at issue because the record shows that [SigNet] had already recertified itself previously as ineligible for award at the \$11M size standard.” (Appeal at 2.)

Appellant asserts that, in 2016, SigNet recertified as other than small under a \$15 million size standard on the System for Award Management (SAM) website, www.sam.gov. (*Id.*) Therefore, Appellant contends, “[t]he record fails to show that [SigNet] was ever a small business for the base contract under NAICS [c]ode 561990,” which utilizes an \$11 million size standard (*Id.*) The Area Office erred in assuming that SigNet was a small business at the GSA Schedule contract level. (*Id.* at 3.)

With its appeal, Appellant offers a screenshot of the SAM website dated September 12, 2016, purporting to show that SigNet “was a small business under some size standards prior to being purchased by [Convergint], but not the \$11M size standard.” (*Id.* at 3 and Exh. 3.) Appellant did not file a motion to introduce new evidence on appeal, and does not explain why the new information was not, or could not have been, provided to the Area Office at the time of the protest.

D. SigNet's Response

On April 29, 2019, SigNet responded to the appeal. SigNet maintains that Appellant misconstrues SBA regulations, particularly 13 C.F.R. § 121.1004. (Response at 4.) The instant RFQ involved a task order under a long-term GSA Schedule contract. (*Id.*) The Area Office reviewed the RFQ and information provided by the CO, and correctly determined that there was no recertification requirement at the task order level. (*Id.* at 5.) As a result, Appellant's protest was untimely, because it was not filed within 5 business days after any of the three events described in 13 C.F.R. § 121.1004(a)(3). SigNet reiterates that “[h]aving determined that [Appellant] had failed to file its size [protest] during either the first two opportunities set forth in the regulation, and since the [CO] had not required recertification, the Area Office dismissed [Appellant's] protest on the ground that ‘the protest was not filed in a timely manner as required by the regulations at 13 C.F.R. § 121.1004(a)(3).’” (*Id.*, quoting *Size Determination* at 1.) Appellant has not identified any error in the size determination. (*Id.*)

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 has not shown that the Area Office erred in dismissing the size protest. Therefore, this appeal must be denied.

As the Area Office recognized, SBA regulations identify three instances when a concern's size may be protested in the context of a long-term contract. First, a concern's size may be protested when the long-term contract is initially awarded. *See* 13 C.F.R. § 121.1004(a)(3)(i). Second, a concern's size may be protested when an option is exercised. *Id.* § 121.1004(a)(3)(ii). Third, a concern's size may be protested when the CO requests a size recertification for an individual order. *Id.* § 121.1004(a)(3)(iii). Here, Appellant did not challenge SigNet's size at the base contract level or upon exercise of an option, and there is no dispute that offerors were not required to recertify size for the instant task order. Accordingly, the Area Office correctly dismissed the protest as untimely.

On appeal, Appellant contends that SigNet recertified as other than small under a \$15 million size standard during 2016, and therefore should have been ineligible for this award irrespective of any recertification at the task order level. Section II.C, *supra*. This argument fails for two reasons. First, the Area Office did not reach the merits of Appellant's protest because it dismissed the protest as untimely. *See* 13 C.F.R. § 121.1004(d) (requiring that an untimely protest must be dismissed). Similarly, on appeal, OHA will not address the merits of a case if the underlying protest was untimely. *E.g.*, *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017); *Size Appeal of Allegiance Security Integration*, SBA No. SIZ-5693, at 1-2 (2015). Appellant here has not shown that its protest was timely, and in fact the appeal is silent as to the question of protest timeliness. Accordingly, Appellant's arguments about SigNet's 2016 recertification are not properly before OHA.

Second, Appellant's arguments about SigNet's 2016 recertification are premised upon new evidence not previously presented to the Area Office. OHA is precluded from considering new evidence for the first time on appeal, unless a motion is filed establishing good cause for its submission. 13 C.F.R. § 134.308(a). Appellant, though, filed no such motion, and OHA has held that such an omission may be “fatal” to the introduction of new evidence. *Size Appeal of Arrow Moving & Storage — Mayflower Transit*, SBA No. SIZ-5902, at 2 (2018) (quoting *Size Appeal of Quigg Bros., Inc.*, SBA No. SIZ-5786, at 8 (2016)). Further, even if OHA were to admit the new evidence, the evidence would not establish that the Area Office erred in dismissing the protest, because the Area Office did not have access to the information when it determined that the protest was untimely.

IV. Conclusion

Appellant has failed to establish that the size determination is clearly erroneous. Accordingly, I DENY the instant appeal, and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge