United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: AOC Connect, LLC, Appellant, RE: By Light Professional IT Services, LLC Appealed From Size Determination No. 02-2019-076	SBA No. SIZ-6025 Decided: August 29, 2019

APPEARANCES

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DECISION

I. Introduction and Jurisdiction

On July 15, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 02-2019-076, dismissing a size protest filed by AOC Connect, LLC (Appellant), as non-specific. For the reasons discussed *infra*, the appeal is denied, and the Area Office's dismissal of the protest is affirmed.

SBA's Office of Hearings and Appeals (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 this 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 26, 2018, the Contracting Officer (CO) for The Defense Information Systems Agency, Defense Information Technology Contracting Organization (DISA/DITCO), issued

Request for Proposals (RFP) No. HC101318R0024 as a small business set-aside for DISN Optical Network Enhancement Link 40. The CO assigned to the RFP North American Industry Classification System (NAICS) code 517311, with a corresponding 1,500 employee size standard. The RFP is for one base year, with nine one-year options. Award will be to the lowest price technically acceptable (LPTA) offeror. The original deadline for initial offers was November 30, 2018. Amendment 0001, issued on November 27, 2018, made changes to the Performance Work Statement (PWS) and to Section L, and extended the initial offer deadline to December 5, 2018. Amendment 0003, issued on February 7, 2019, also changed the PWS and extended the offer deadline to February 22, 2019. Amendment 0005, issued on March 27, 2019, made additional changes to the PWS, and extended the deadline for offers to April 12, 2019.

By Light Professional IT Services, LLC (By Light) made its initial offer, including price, on December 5, 2018. (Memorandum from B. Meyer to A. Kim, June 24, 2019.) Following Amendments 0003 and 0005, By Light submitted offers on February 22, 2019, and April 12, 2019. (*Id.)* On June 17, 2019, the CO announced that DISA/DITCO had awarded Contract No. HC101319C0005 to By Light on June 14, 2019. (*Id.*)

On June 20, 2019, Appellant filed a size protest with the CO. Appellant asserted:

> The basis of this protest is straightforward: the only proposals submitted for [the RFP] were submitted on April 12, 2019 . . . and at that time, By Light was a large business under [NAICS code 517311] due to its acquisition of Phacil, Inc. during March 2019 and the "present effect" rule applicable to By Light's acquisition of Metova Federal, LLC during May 2019.

(Protest at 1 (footnote omitted).)

Further, Appellant asserted a news article on By Light's website informs that the acquisition of Phacil, Inc. (Phacil), in March 2019 "added about 600 employees," and that By Light now has "an employee roster topping 1,700 employees." (*Id.* at 5-6, quoting "Recent Acquisitions Mean Bright Future for By Light Professional IT Services" (June 10, 2019).) In 2017, By Light was acquired by Sagewind Capital, LLC (Sagewind), a private equity firm with over 2,300 employees. (*Id.* at 5-6, citing Exh. 3 (material from Sagewind's website which Appellant visited on June 20, 2019).) Appellant also asserted By Light made various revisions to its System for Award Management (SAM) information between May 15 and June 16, 2019, suggesting By Light knew it was not a small business at its April 12, 2019 proposal submission. (Protest at 7-8.) Appellant also alleged, with respect to the acquisition of Metova Federal, LLC (Metova) in May 2019, that By Light failed to recertify its size status as required by 13 C.F.R. § 121.404(g)(2)(ii)(D). (*Id.* at 9.)

On June 24, 2019, the CO forwarded the protest to the Area Office.

B. Size Determination

On July 15, 2019, the Area Office issued Size Determination No. 02-2019-076 dismissing Appellant's protest as non-specific, because the protest allegations were based on the

initial offer submission date of April 12, 2019, while By Light's initial offer on the instant RFP was submitted on December 5, 2018. (Size Determination at 2.) In its reasoning, the Area Office quoted 13 C.F.R. § 121.404(a) and OHA's decision in *Size Appeal of Ramcor Services Group, Inc.*, SBA No. SIZ-5510 (2013) for the proposition that, unless an exception applies, size is determined by the date of the initial offer, even if there are multiple rounds of offers. (*Id.* at 3-4.)

C. Appeal

On July 26, 2019, Appellant filed the instant appeal. Appellant first contends that it had asserted By Light was a large business as of both October 26, 2018, and December 5, 2018, due to its affiliation with Sagewind which had 2,300 employees in 2017. (Appeal at 3-4.)

Second, Appellant maintains that the Area Office's dismissal of Appellant's size protest based on "the wrong date" is incorrect. (*Id.* at 5.) Here, the CO "told the offerors four times after the 'initial' proposal submission that the proposal due date was being extended" and "never requested a final proposal revision or any intermittent proposals with a price." (*Id.*) Appellant further explains, "In other words, the December 5th "initial" proposals were a non-event." (*Id.*) The "initial" proposals were "completely irrelevant" because of the changes to the PWS, and the "initial" price "meant nothing if the proposal was not technically acceptable." (*Id.*) In Appellant's view, "under an LPTA procurement, the date for determining the size status of a competitor should be the date of the operable proposal which the government relied upon to make its award." (*Id.* at 6.) Appellant then argues, based on the examples set out in the protest specificity regulation, and which the Area Office quoted in the size determination, Appellant's size protest is specific. (*Id.*at 6-8.) For each of the four examples based on employee size standards, Appellant sets out its various allegations and argues they are sufficiently specific.

Third, Appellant contends that 13 C.F.R. § 121.404(g)(2)(ii) requires recertification after merger, and that By Light did not make the required recertification. (*Id.* at 8-9.)

As relief, Appellant asks OHA to reverse the size determination and to direct the Area Office to consider the merits of Appellant's protest. (*Id.* at 9.) On July 30, 2019, Appellant corrected an error in its appeal.

D. By Light's Response to the Appeal

On August 14, 2019, By Light responded to the appeal, arguing it "is wholly without merit and should be denied." (Response at 1.) By Light contends that Appellant's protest did not allege By Light was large as of October 26, 2018 or December 5, 2018, and points to these allegations as new issues on appeal. (*Id.* at 9.)

By Light principally contends that (1) the Area Office correctly used December 5, 2018 as the date on which to determine By Light's size, and that (2) it correctly dismissed Appellant's protest as non-specific because Appellant had made no specific allegations about By Light's size as of that date. (*Id.* at 3.) In support of its first point, By Light cites *Size Appeal of Ramcor Svstems Group, Inc.*, SBA No. SIZ-5510 (2013) and *Size Appeal of Stellar Innovations & Solutions, Inc.*, SBA No. SIZ-5851 (2017). (*Id.*) As for the second point, By Light notes the

protest "repeatedly, and incorrectly, stated that the date to determine size was April 12, 2019." (*Id.* at 7.) Amongst Appellant's allegations, By Light notes its acquisition of Phacil and Metova occurred after December 5, 2018, and thus these firms are irrelevant to By Light's size on that date. (*Id.* at 7-8.) Regarding Sagewind, which acquired By Light in 2017, By Light points out that Appellant's information regarding Sagewind's employee count reflects that count as of June 20, 2019, the day Appellant visited Sagewind's website, and not the employee count as of December 5, 2018, the correct date to determine By Light's size. (*Id.* at 8.)

By Light also maintains Appellant's argument, based on 13 C.F.R. § 121.404(g), which requires size recertification after post-offer mergers and other changes, is incorrect and does not apply for purposes of award eligibility, but for changes occurring after award. (*Id.* at 9-12.) In support, By Light cites *Size Appeal of Enhanced Vision Systems, Inc.*, SBA No. SIZ-5978 (2018). (*Id.* at 12-13.)

Lastly, By Light asserts that, even if the protest were specific, By Light was below the applicable 1,500 employee size standard on December 5, 2018. (*Id.* at 15-16.)

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 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 and law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

I find that the Area Office properly dismissed Appellant's protest. The regulations governing size determinations provide:

> *A protest must include specific facts*. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. . . . Where materials supporting the protest are available, they should be submitted with the protest.

13 C.F.R. § 121.1007(b).

If an area office finds a protest is non-specific, it must dismiss the protest. 13 C.F.R. § 121.1007(c). In the past, OHA has stated that, in reviewing non-specific protests, it will consider "(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual

allegations as a basis for these grounds." *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009).

Here, Appellant presents three arguments: (1) that its protest did reference the correct self-certification date, which is either October 26, 2018 or December 5, 2018; (2) that the correct self-certification date is April 12, 2019; and (3) that By Light failed to provide a necessary recertification under 13 C.F.R. § 121.404(g). I reject each argument in turn.

Appellant's first argument is that its protest included By Light's size as of "both October 26, 2018, and December 5, 2018" and, thus, that its allegations relate to the proper date. By Light counters that allegations based on these dates would constitute new issues on appeal. I agree with By Light. The protest states:

> The basis of this protest is straightforward: the only proposals submitted for [the RFP] were submitted on April 12, 2019 . . . and at that time, By Light was a large business under [NAICS code 517311] due to its acquisition of Phacil, Inc. during March 2019 and the "present effect" rule applicable to By Light's acquisition of Metova Federal, LLC during May 2019.

II.A, *supra*. The protest clearly focuses on April 12, 2019 and further clarifies its focus solely on that date because "the only proposals . . . were submitted on April 12, 2019."

Moreover, the protest references the Phacil acquisition in March 2019, but qualifies its reference to the May 2019 Metova acquisition with mention of the "present effect" rule. Had the protest truly focused on December 5, 2018 (rather than April 12, 2019), Appellant would have had to invoke the "present effect" rule with respect to both acquisitions, not just the one that occurred in May 2019. Also, with respect to the Phacil acquisition, the protest notes By Light "added about 600 employees," and that it now has "an employee roster topping 1,700 employees." This information, from a June 10, 2019 article, speaks of a March 2019 event before which By Light had 1,100 employees (600 fewer than 1,700). Thus, this article, while it could support a protest allegation that By Light exceeds the applicable 1,500 employee size standard as of April 12, 2019, it clearly indicates By Light was well within that size standard before March 2019. With respect to the 2017 acquisition of By Light by Sagewind, the protest notes Sagewind has over 2,300 employees. This information, however, came from a website visited on June 20, 2019, and gives no indication of Sagewind's employee count at any point before June 20, 2019.

Second, Appellant argues that December 5, 2018, is not the correct date for determining By Light's size because the CO had extended the offer date several times to accommodate changes in the PWS. Appellant refers to an offer submitted that day as "non-event," particularly since this is an LPTA procurement. By Light counters that December 5, 2018, is the correct date for determining its size, even with extensions to the offer due date, agreeing with the Area Office that OHA's case law supports this position.

I agree with By Light. The size regulations provide:

> SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation), which includes price.

13 C.F.R. § 121.404(a). OHA has addressed the issue of offers that are revised over time. In *Size Appeal of Ramcor Services Group, Inc.*, SBA No. SIZ-5510, 3-4 (2013), OHA reviewed the history of the regulation and determined that the self-certification date is the date initial offers, including price, are submitted, and that absent the special instances outlined in 13 C.F.R. § 121.404(b)-(h), that date does not change except with respect to analysis under the ostensible subcontractor rule and the nonmanufacturer rule, both of which require the complete final proposal. Appellant has stated no legal basis to its assertion that LPTA evaluation is an exception to the general rule in 13 C.F.R. § 121.404(a), and I know of no such basis.

In its third argument, Appellant contends that 13 C.F.R. § 121.404(g)(2)(ii) required recertification after the post-offer acquisitions of Phacil and Metova, and that By Light failed to make that recertification. By Light argues that 13 C.F.R. § 121.404(g)(2) does not apply here. I agree with By Light. The regulation at 13 C.F.R. § 121.404(g) provides:

> A concern that represents itself as a small business and qualifies as small at the time of its initial offer (or other formal response to a solicitation), which includes price, is considered to be a small business throughout the life of that contract. This means that if a business concern is small at the time of initial offer for a Multiple Award Contract . . . then it will be considered small for each order issued against the contract with the same NAICS code and size standard, unless a contracting officer requests a new size certification in connection with a specific order. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business. However, the following exceptions apply to this paragraph (g):
>
> (1) . . .
>
> (2)(i) . . .
>
> (ii) Recertification is required:
>
> (A) When a concern, or an affiliate of the concern, acquires or is acquired by another concern;
>
> . . .
>
> (D) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.
>
> . . .

> (4) The requirements in paragraphs (g)(1), (2), and (3) of this section apply to Multiple Award Contracts . . . .

13 C.F.R. § 121.404(g)(2)(ii).

The recertification requirement of 13 C.F.R. § 121.404(g)(2) does not apply to the situation here, where the acquisition occurs after initial offer but before any award has been made. Otherwise, this rule would render useless the general rule that size is determined at the time of initial offer, including price. *See* 13 C.F.R. § 121.404(a). By its own terms, 13 C.F.R. § 121.404(g)(2) applies to Multiple Award contracts. 13 C.F.R. § 121.404(g)(4). OHA addressed this issue in *Size Appeal of Enhanced Vision Systems, Inc.*, SBA No. SIZ-5978, at 18-20 (2018), where it held that 13 C.F.R. § 121.404(g) requires a prior contract award, a situation that does not exist here.

Here, none of the special circumstances for which there are exceptions listed in § 121.404(b)-(h) applies. To the contrary, the case here involves a final proposal revision that was submitted after an initial offer, such as happens in many negotiated procurements.

Accordingly, I conclude that the Area Office did not err when it used December 5, 2018, the date of Appellant's initial offer, including price, to determine that Appellant's protest was nonspecific. I therefore affirm the Area Office's dismissal of the protest and deny the appeal.

IV. Conclusion

For the above reasons, I AFFIRM the Area Office's dismissal of the protest and DENY the instant appeal. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge