

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

SIZE APPEAL OF:

ALOG Corporation,

Appellant,

RE: GAP Solutions, Inc.

Appealed From  
Size Determination No. 02-2019-092

SBA No. SIZ-6030

Decided: October 4, 2019

APPEARANCES

Jerome S. Gabig, Esq., Richard J.R. Raleigh, Jr., Esq., Christopher L. Lockwood, Esq.,  
Wilmer & Lee, P.A., for Appellant ALOG Corporation

DECISION

I. Introduction and Jurisdiction

On August 27, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 02-2019-092, dismissing a size protest filed by ALOG Corporation (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 December 8, 2010, the Department of the Army, Army Contracting Command, Mission and Installation Contracting Command, Fort Sam Houston, Texas (Army) issued Solicitation No. W9124J-11-R-0001 for Base Support Services. The Contracting Officer (CO)

issued the solicitation as a total small business set aside and designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding \$38.5 million annual receipts size standard, as the appropriate code. The contract was to be an indefinite quantity, indefinite delivery (IDIQ) Multiple Award Task Order Contract (MATOC). On December 30, 2011, the Army made awards to, among others, Appellant and GAP Solutions, Inc. (GAP). The contract had provided for a base period of performance of the calendar year 2012, with four one-year options ending December 31, 2016.

On September 1, 2017, the Army issued Modification P00007 to GAP's MATOC contract, changing GAP's representation to "other than small." On September 25, 2018, the Army issued Modification P00008 to GAP's MATOC contract, extending the ordering period to March 31, 2020.

On June 20, 2019, the Army issued Request for Task Order Proposal No. W911RX-19-RTOP-0001 (RTOP) for services to be provided under the Support Base Services MATOC. The RTOP did not require offerors submitting proposals to certify their size.

On August 15, 2019, the Army informed Appellant that GAP was the selected awardee. On August 20, 2019, Appellant filed a size protest with the CO. Appellant argued its protest was timely because it was filed within five days of being notified of the award, and that it was an interested party because it had submitted a proposal in response to the RTOP. (Protest at 1.)

Appellant first noted that the Army had awarded multiple MATOC contracts for base support services with an effective date of December 20, 2011, and that Appellant and GAP had been among the awardees. The MATOC contract provided that the base period of performance was the calendar year 2012, with four one-year options ending December 31, 2016. Appellant argued this task order is being made to an expired contract. (*Id.* at 2, citing MATOC contract at 2.)

Appellant further argued that this procurement was limited to small businesses because the original MATOC contract included FAR 52.219-6 "Notice of Total Small Business Set-Aside." (*Id.*, citing MATOC Contract at 81.) Further, Paragraph H.14 of the MATOC contract stated that small business size status would be re-evaluated prior to exercising an option, and that small businesses would be required to re-certify their size when purchased or merged with another business. Options may not be exercised to companies which were no longer small. (*Id.*, citing MATOC contract at 77.)

Appellant further argued GAP was not an eligible small business because a Dunn & Bradstreet report showed that Appellant's annual sales exceeded the size standard for the MATOC contract. (*Id.*) Further, GAP is affiliated with System One, a large business. (*Id.* at 3.)

#### B. Size Determination

On August 27, 2019, the Area Office issued Size Determination No. 02-2019-092 dismissing Appellant's protest because Appellant lacked standing and the protest was untimely. (Size Determination, at 1.)

The Area Office noted the regulation provides that in the case of an unrestricted procurement in which a concern has represented itself as a small business concern, any offeror may file a protest. (*Id.*, citing 13 C.F.R. § 121.1001(a)(7).) Here, however, the instant RTOP was an unrestricted procurement for which GAP did not represent itself as a small business. The Area Office found that the RTOP is a Task Order awarded against the Enterprise MATOC under the Support Base Services (SBS) Suite for Mission Installation Contracting Command (MICC). Although the basic contract was a small business set-aside, this task order was not. While the task order was limited to all Enterprise MATOC holders under the SBS Suite for MICC, because the task order itself was not a small business set-aside, firms in that pool which had become other than small, and certified as such, and had modifications made to their original MATOCs to reflect their new size, were still eligible. (*Id.*)

The Area Office thus concluded that the requirements for a party to have standing to file a size protest were not met and dismissed Appellant's protest for lack of standing. Further, the CO reported that GAP had re-represented itself as other than small and provided the Area Office with a copy of a modified MATOC confirming this. Any awards made to GAP would not be counted as small business awards. (*Id.*)

The Area Office further found Appellant's protest was not timely filed. (*Id.* at 2.) The regulation provides for size protests at three different stages during the life of a long-term contract. First, at the time of initial award, second, at the exercise of an option, third, when a contracting officer requires a size certification in connection with an individual order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3).) Since the CO did not request recertification with the RTOP, Appellant's protest was untimely. (*Id.*, citing *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010).)

### C. Appeal

On September 9, 2019, Appellant filed the instant appeal. Appellant first contends the MATOC contract was synopsisized on November 1, 2010, as a total small business set-aside. On December 30, 2011, the CO awarded several MATOC contracts for base support services, including to Appellant and GAP. (Appeal at 2.) Appellant points to the inclusion of FAR clause 52.219-6, "Notice of Total Small Business Set-Aside" in the MATOC contract. Further, Appellant points to clause H.14 of the MATOC contract providing that small business size status would be re-evaluated prior to exercising an option, and that small businesses would be required to re-certify their size when purchased or merged with another business. Options may not be exercised to companies which were no longer small. (*Id.* at 2-3, citing MATOC contract at 77, 81.) Further, the contract had provided that the base period of performance was the calendar year 2012, with four one-year options ending December 31, 2016. Appellant argued this task order is being made to an expired contract. (*Id.* at 3, citing MATOC contract at 2.)

Appellant maintains that the RTOP was not an unrestricted procurement but was set aside for small business. Appellant argues that this is because the MATOC was set aside for small business:

- The FEDBIZOPP posting described the MATOC solicitation as a total small business set aside.

- It included FAR 52.219-6 “Notice of Total Small Business Set Aside”

- Paragraph H.14 providing that small business size status would be re-evaluated prior to exercising an option, and that small businesses would be required to re-certify their size when purchased or merged with another business. Options may not be exercised to companies which were no longer small.

Appellant argues that because the RTOP is a task order on MATOC, and MATOC is a small business set aside, the RTOP must be a small business set aside. (*Id.* at 4-5.) Further, Appellant argues that paragraph H.14 required GAP to recertify its size with its response to the RTOP. Appellant alleged GAP was required to recertify first, because it merged with another concern. Further, because the MATOC contract expired on December 31, 2016, and so the RTOP is the equivalent of issuing a new sole source contract because this extension is out of the scope of the original contract, and so recertification is required (FAR 6.001(c)). Third, even if the extension is not a sole source contract, it was accomplished by adding more options (DFARS § 217.2904(e)(i)(B)), therefore because clause H.14 required that small business size status be re-evaluated prior to exercising option, GAP was obligated to recertify for this last option period. (*Id.* at 5-6.)

Appellant argues GAP is not eligible for award because it has not recertified. (*Id.* at 6, citing *Size Appeal of Canal Barge Co., Inc.*, SBA No. SIZ-3961 (1994); *Size Appeal of Container Service Corp.*, SBA No. SIZ-3482 (1991).) Alternatively, GAP's MATOC contract expired when it failed to provide the recertification required by paragraph H.14. A delivery order cannot be placed against an expired IDIQ contract. (*Id.* at 6, citing *Matter of AllWorld Language Consultants, Inc.*, B-411481.3 (Jan 6, 2016) and *HP Enterprise Svcs., LLC*, B-405692 (Dec. 14, 2011).)

### 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. While the MATOC was initially issued as a small business set-aside, GAP over time has grown to be other than small and has so certified to the Army. The Army has recognized this, and extended the contract,

but will no longer count any awards to GAP as awards to small business. The RTOP is an unrestricted procurement. The size determination regulations provide that:

For any unrestricted Government procurement in which a business concern has represented itself as a small business concern, the following entities may protest in connection with a particular procurement:

13 C.F.R. § 121.1001(a)(7).

Under this regulation “any offeror” may file a size protest on an unrestricted procurement, provided the challenged firm represented itself as a small business concern. *Size Appeal of Aerosage, LLC*, SBA No. SIZ-5883 (2018). Here, however, GAP did not do so. The regulations do not provide for competing offerors to file size protests in the case of unrestricted procurements where the concern to be challenged has not represented itself as small. Here, the RTOP was an unrestricted procurement, and required no such representation. Further, GAP did not represent itself as a small business concern, indeed, it has forthrightly represented itself as other than small, and the Army has extended its MATOC. Therefore, the Army did not make an award under an expired contract, as Appellant alleges.

Appellant bases its arguments on the small business set aside provisions included in the original MATOC. But the MATOC holders who become other than small since their original awards, have certified as such, and had their MATOCs modified to reflect their new size status are eligible for the award of this unrestricted RTOP. Appellant lacks standing to protest GAP's size for the RTOP, because it is unrestricted, and GAP has not represented itself as small business.

Appellant's protest is also untimely. The MATOC is a long-term contract of over five years duration. The regulation provides for size protests at three points in the life of a long-term contract. First, within five days of receipt of notice of the awardee's identity. 13 C.F.R. § 121.1004(a)(3)(i). Second, within five days of receipt of notice of the exercise of an option. 13 C.F.R. § 121.1004(a)(3)(ii). Third, in the case of an individual order, within five days of notification of the identity of the prospective awardee, when a contracting officer requests a size certification in connection with that order. 13 C.F.R. § 121.1004(a)(3)(iii). GAP received its MATOC award in 2011, its most recent extension of the contract in 2018, and the RTOP included no request for recertification. Therefore, Appellant's protest is untimely. *Size Appeal of Davis Defense Group, Inc.*, SBA No. SIZ-6016 (2019).

#### 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