

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

SIZE APPEAL OF:

Glen/Mar-Hensel Phelps Joint Venture,

Appellant,

RE: Pacific Federal Contractors, LLC

Appealed From

Size Determination No. 06-2020-076

SBA No. SIZ-6079

Decided: November 6, 2020

APPEARANCES

Mary E. Brown, Executive Committee Member, Glen/Mar-Hensel Phelps Joint Venture, Clackamas, Oregon

Brian A. Darst, Esq., Reston, Virginia, for Pacific Federal Contractors LLC

Liana Gonzalez, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

On September 10, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2020-076, dismissing a size protest filed by Glen/Mar-Hensel Phelps Joint Venture (Appellant) against Pacific Federal Contractors, LLC (PFC). The Area Office determined that the protest was untimely. On appeal, Appellant contends that the Area Office miscalculated the deadline to file a size 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 granted.

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

¹ OHA issued a protective order in this case on September 21, 2020. This decision, though, does not contain any confidential or proprietary information. Accordingly, this decision is not issued under the protective order and is intended for public release

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. The RFP

On July 3, 2019, the National Guard Bureau, United States Property & Fiscal Office for Hawaii, issued Request for Proposals (RFP) No. W912J6-19-R-5000 for a construction project at Joint Base Pearl Harbor-Hickam, Hawaii. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$39.5 million. Proposals were due February 28, 2020. Appellant and PFC submitted timely offers.

By letter dated August 3, 2020, the CO informed Appellant that PFC was the apparent awardee. (Letter from C. Simmons-Carroll to M. Brown (Aug. 3, 2020). The letter was transmitted to Appellant via e-mail at 3:35 p.m. Hawaii Standard Time (HST) on Monday, August 3, 2020. (E-mail from to M. Llanes to M. Brown (Aug. 3, 2020).) On August 7, 2020, the CO awarded the contract to PFC.

B. Protest

On Tuesday, August 11, 2020, Appellant e-mailed the CO a protest challenging PFC's size. The CO informed the Area Office that he received the protest at 2:37 p.m. HST on August 11, 2020. (E-mail from to M. Llanes to J. Nietes (Sept. 3, 2020).)

C. Size Determination

On September 10, 2020, the Area Office issued Size Determination No. 06-2020-076, dismissing Appellant's size protest as untimely. The Area Office explained that the CO notified Appellant by e-mail that PFC was the apparent awardee at 3:35 p.m. HST on Monday, August 3, 2020. (Size Determination at 2.) Because Appellant is located in the state of Oregon, Appellant would have received the e-mail at 6:35 p.m. Pacific Standard Time (PST) on August 3, 2020, “which is after [Appellant's] close of business day.” (*Id.*) As a result, Appellant is deemed to have received the notification on Tuesday, August 4, 2020. (*Id.*)

Under 13 C.F.R. § 121.1004(a)(2), an unsuccessful offeror must file any size protest within five business days after the CO notifies the offeror of the identity of the apparent awardee. In this case, the Area Office found, Appellant's protest was due by Monday, August 10, 2020. (*Id.*) The Area Office reasoned that “8/4/20 is counted as Day 1, 8/5/20 is Day 2, 8/6/20 is Day 3, 8/7/20 is Day 4, and 8/10/20 is Day 5.” (*Id.* at fn.1.) The CO did not actually receive Appellant's protest until 2:37 p.m. HST on Tuesday, August 11, 2020, so the protest is untimely. (*Id.*)

D. Appeal

On September 15, 2020, Appellant filed the instant appeal. Appellant argues that the Area Office misapplied 13 C.F.R. § 121.1004(a)(2) and clearly erred in dismissing the protest as untimely.

Appellant maintains that the Area Office correctly found “that the day [Appellant] received the pre-award notification letter from the [CO] was August 4, 2020 and that [Appellant] submitted its protest on August 11, 2020.” (Appeal at 1.) As the Area Office recognized, although the CO sent the pre-award notification to Appellant by e-mail on Monday, August 3, 2020, Appellant did not actually receive the notification on that day because the notification arrived “after hours at [Appellant’s] office in Oregon [during] the night.” (*Id.*)

Appellant contends that, under 13 C.F.R. § 121.1004(a)(2), a size protest is due on the fifth business day “*after* the contracting officer has notified the protestor of the identity of the prospective awardee.” (*Id.*, emphasis Appellant’s.) Here, Appellant did not receive the pre-award notification until Tuesday, August 4, 2020, and that day is not counted as one of the five business days. (*Id.*) Appellant points to *Size Appeal of American Patriot Constr. Servs., Inc.*, SBA No. SIZ-5671 (2015) for the proposition that the day of the notification is not included when determining the protest deadline. Rather, the correct calculation should have been:

Day 1: Wednesday, August 5, 2020
Day 2: Thursday, August 6, 2020
Day 3: Friday, August 7, 2020
August 8-9, 2020: Saturday and Sunday.
Day 4: Monday, August 10, 2020
Day 5: Tuesday, August 11, 2020

(*Id.*, emphasis Appellant’s.) Appellant filed its protest on Tuesday, August 11, 2020, and the protest therefore was timely. (*Id.* at 2.)

E. SBA's Response

On October 1, 2020, SBA responded to the appeal. SBA agrees with Appellant that the Area Office should not have counted the day of the pre-award notification in determining the protest deadline. (SBA Response at 3.) The issue is immaterial here, though, because the Area Office incorrectly found that the notification occurred on Tuesday, August 4, 2020.

SBA observes that the CO sent the pre-award notification to Appellant by e-mail on Monday, August 3, 2020 at 3:35 p.m. HST, which was “during the Government’s business hours.” (*Id.* at 2.) Because “the government contracting office is located in Hawaii, the date of issuance of a notification is based on Hawaii Standard Time.” (*Id.* at 3.) Thus, contrary to the size determination, the notification occurred on Monday, August 3, 2020, not on Tuesday, August 4, 2020. (*Id.*) SBA highlights that OHA has considered a solicitation’s deadlines relevant in determining protest timeliness. (*Id.* at 2, citing *Matter of Major Contracting Servs.*, SBA No. VET-226 (2012).)

SBA further contends that utilizing HST to determine the pre-award notification date treats all offerors consistently. (*Id.* at 3.) Conversely, if the date of the offeror's receipt of the notification controls, offerors located outside the state of Hawaii might have more than five business days to file a protest. (*Id.*)

F. PFC's Response

On October 1, 2020, PFC responded to the appeal. PFC maintains that the appeal is flawed for two reasons. First, although the Area Office stated that the CO received Appellant's protest at 2:37 p.m. HST on August 11, 2020, the Area Office file does not support this conclusion. (PFC Response at 2.) Rather, the e-mail transmitting the protest appears to have been sent at 8:37 p.m. PST. (*Id.*) If so, the CO could not have received the protest any earlier than 5:37 p.m. HST. (*Id.* at 7.) PFC argues that while 13 C.F.R. § 121.1004(a)(2) does not define a “close of business” for protest purposes, OHA has recognized that “5:00 p.m. is generally considered close of business under SBA's regulations.” (*Id.* at 6, citing *Matter of Major Contracting Servs.*, SBA No. VET-226 (2012).) If the protest was received by the CO after the close of business on August 11, 2020, the protest is untimely, regardless of whether August 11, 2020 is the fifth or the sixth business day after notification. (*Id.* at 9.)

Second, PFC argues that OHA should reject the Area Office's finding that the pre-award notification occurred on August 4, 2020. (*Id.* at 2.) The Area Office file clearly establishes that the CO sent the notification to Appellant by e-mail on August 3, 2020 at 3:35 p.m. HST, which is “well before the close of business and is all that was required to start the five-business day window for filing a Size Protest under 13 C.F.R. § 121.1004(a)(2).” (*Id.* at 3.) According to PFC, prior OHA decisions have focused on whether the procuring agency transmitted the notification prior to the agency's close of business. (*Id.* at 12-13, citing *Matter of Major Contracting Servs.*, SBA No. VET-226 (2012); *Size Appeal of AutoFlex AFC, Inc.*, SBA No. SIZ-5431 (2013); and *Size Appeal of Eagle Home Med. Corp.*, SBA No. SIZ-4701 (2005).) Finding that notification occurred on August 3, 2020 is further bolstered here by the fact that Appellant's joint venture partners both have a physical presence in the state of Hawaii. (*Id.* at 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

I agree with Appellant that the Area Office correctly concluded that Appellant received the pre-award notification on Tuesday, August 4, 2020. Although the CO transmitted the notification to Appellant via e-mail at 3:35 p.m. HST on Monday, August 3, 2020, the notification was sent only to a representative of Appellant located in the state of Oregon. Sections II.A and II.C, *supra*. The Area Office thus correctly recognized that the notification would have arrived at Appellant's office at 6:35 p.m. PST on August 3, 2020, "which is after [Appellant's] close of business day." Section II.C, *supra*. It is well-settled that "5:00 p.m. is generally considered the close of business." *Size Appeal of Fed. Maint. Hawaii, Inc.*, SBA No. SIZ-5887, at 1 (2018). As a result, the Area Office appropriately determined that Appellant should be deemed to have been notified that PFC was the apparent awardee on the next business day: Tuesday, August 4, 2020.

On appeal, PFC and SBA argue that Appellant was notified that PFC was the apparent awardee on Monday, August 3, 2020, the date the CO sent the e-mail to Appellant. OHA has repeatedly held, however, that notification occurs when a protestor actually receives the notification and thereby learns the identity of the apparent awardee. *Size Appeal of HAL-PE Assocs. Eng'g Servs., Inc.*, SBA No. SIZ-5478, at 3 (2013); *Size Appeal of Falcon, Inc.*, SBA No. SIZ-5239, at 2-3 (2011) (notification was transmitted "after business hours on [a] Friday," so "the day of [the protestor's] receipt of the notice for the purposes of computing time was Monday"); *Size Appeal of Eagle Home Med. Corp.*, SBA No. SIZ-4701, at 1-2 (2005) (explaining that "in calculating protest timeliness, one must consider not only whether the contracting officer received the protest before the close of business, but also whether the protestor received the notice identifying the prospective awardee before the close of business," and finding that "because [the protestor] received the notification after the close of business . . . , it is deemed received the following business day."). Indeed, given that a CO is not required to convey the notification through any particular means, it would not make logical sense for the protest deadline to begin to run from the date the notification was first transmitted, as this could create the absurd situation where the protest deadline entirely lapses before the protestor even receives the notification. In the instant case, then, it is immaterial that the CO transmitted the notification to Appellant during normal business hours in Hawaii, or that the RFP expressed deadlines in Hawaii Standard Time, because the record does not support the conclusion that Appellant actually received the notification until Tuesday, August 4, 2020. The fact that both of Appellant's joint venture partners have offices in Hawaii likewise is irrelevant, since the notification was sent only to Appellant's representative in Oregon.

I further agree with Appellant, and SBA, that Appellant's five-day window for filing a size protest began on the business day after Appellant received the notification. SBA regulations stipulate that a protest must be filed within five business days "after the [CO] has notified the protestor of the identity of the prospective awardee." 13 C.F.R. § 121.1004(a)(2). The day the notification was received is not counted as one of the five days. *E.g.*, *HAL-PE Assocs.*, SBA No. SIZ-5478, at 3; *Eagle Home Med. Corp.*, SBA No. SIZ-4701, at 1. Here, the fifth business day after Appellant's receipt of the award notification was Tuesday, August 11, 2020, and Appellant therefore had until 5 p.m. HST on that day to file its size protest. The Area Office erred in concluding that Appellant's protest was due on Monday, August 10, 2020.

As PFC correctly observes, however, it is unclear from the existing record whether Appellant actually did file its protest before 5 p.m. HST on Tuesday, August 11, 2020. Although the CO informed the Area Office that he received the protest at 2:37 p.m. HST on August 11, 2020, other evidence in the record suggests that the protest may have been sent at 8:37 p.m. PST. Sections II.B and II.F, *supra*. If Appellant submitted its protest after 5 p.m. HST on August 11, 2020, the protest would be deemed to have been filed the next business day, and would be untimely. Therefore, additional review is needed to determine whether Appellant's protest was filed prior to 5 p.m. HST.

IV. Conclusion

For the above reasons, the appeal is GRANTED, Size Determination No. 06-2020-076 is VACATED, and the matter is REMANDED to the Area Office for further review. On remand, the Area Office should determine whether Appellant submitted its protest before 5 p.m. HST on Tuesday, August 11, 2020. If so, the protest is timely and the Area Office should then proceed to review the merits of the protest. If the protest was not submitted before 5 p.m. HST on Tuesday, August 11, 2020, the protest should be dismissed as untimely.

KENNETH M. HYDE
Administrative Judge