

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

SIZE APPEALS OF:

Anchor Labs, Inc. d/b/a Anchorage,

Appellant,

Appealed From
Size Determination Nos. 06-2021-062,
-063, and -064

SBA No. SIZ-6144

Decided: March 31, 2022

ORDER DISMISSING APPEALS¹

I. Background

On October 7, 2021, Anchor Labs, Inc. d/b/a Anchorage (Appellant) filed an appeal of Size Determination No. 06-2021-062 with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). (Appeal at 1 and Exh. A.) The appeal noted that Appellant's size had been challenged by three different protestors, but Size Determination No. 06-2021-062 related to only one of the three protests. (*Id.* at 2.) In response to an inquiry from OHA concerning the scope of the appeal, Appellant stated that “to the best of our knowledge, [SBA's Office of Government Contracting — Area VI (Area Office)] has only issued one size determination 06-2021-062. Thus, [Appellant] has only filed one size appeal but respectfully reserves the right to file additional appeals if the Area Office has issued or does issue separate size determinations for the other two protests.” (E-mail from T. Carp (Oct. 12, 2021).)

The Area Office subsequently delivered to OHA a copy of the case file relating to the protests. According to the case file, the Area Office received size protests pertaining to Appellant from three different concerns: Arcane Advisory LLC; Ethan Yeh; and ECC Solutions, Inc. d/b/a cryptosolutions.io (ECC). The Area Office reviewed each protest and on September 21, 2021, issued three separate size determinations (Nos. 06-2021-062, -063, and -064), each concluding that Appellant is not a small business under the size standard associated with the subject procurement. The Area Office then sent three separate e-mails transmitting each size determination as a PDF attachment to Appellant; to the procuring agency; and to the respective protestors. (E-mails from E. Sanchez to [Employee 1] and [Employee 2] (Sept. 21, 2021).) The

¹ This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release

three e-mails to Appellant each were directed to two representatives of Appellant: [Employee 1], Appellant's [XXXX], and [Employee 2], Appellant's [XXXX]. (*Id.*)

II. Order to Show Cause

On January 11, 2022, OHA ordered Appellant to show cause why its appeal of Size Determination No. 06-2021-062 should not be dismissed as moot. (Order at 1-2.) OHA explained that, according to the Area Office file, the Area Office had issued three separate size determinations finding Appellant not small. Appellant appealed Size Determination No. 06-2021-062, but did not appeal the remaining two size determinations, and the deadline to bring any such appeal had long since expired. (*Id.* at 1.) SBA regulations stipulate that “[u]nless an appeal is made to OHA, the size determination made by a[n] SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency.” (*Id.*, quoting 13 C.F.R. § 121.1101(a).) The appeal of Size Determination No. 06-2021-062 therefore appeared moot, because Appellant would not qualify as a small business, irrespective of the outcome of that appeal. (*Id.*)

III. Appellant's Response to OHA's Order

On January 25, 2022, Appellant responded to OHA's Order. Appellant argues that it did not miss the deadline to file appeals of Size Determination Nos. 06-2021-063 and -064, because Appellant previously was unaware of the existence of those determinations. (Response at 1.) Appellant acknowledges that, on September 21, 2021, the Area Office transmitted copies of each of the three size determinations by e-mail to [Employee 1] and [Employee 2]. However, [Employee 2] stopped working for Appellant [before the size determinations were issued], and thus would not actually have received the size determinations.

Meanwhile, although [Employee 1] did receive the three size determinations, [Employee 1] mistakenly believed that the Area Office had issued only one determination. Appellant offers a declaration from [Employee 1], in which [Employee 1] attests that “[a]t 5:59 pm on September 21, 2021, [Employee 1] received” Size Determination No. 06-2021-062, which [Employee 1] “immediately forwarded to [Appellant's] outside counsel.” ([Employee 1] Decl. ¶ 6.) [Employee 1] states that, after OHA issued its Order to Show Cause, “I went back to search my e-mails from September 21, 2021. To my great surprise and dismay, I discovered that I had received two additional e-mails from [the Area Office].” (*Id.* ¶ 7.) [Employee 1] adds that “[a technical issue with the e-mail program] was the reason that I only noticed the first one. Had I noticed the other two e-mails, there is no question whatsoever that I would have sent them to [Appellant's] outside counsel at the same time that I sent the first one.” (*Id.* ¶ 9.)

Appellant explains that it had “expected to receive” three size determinations by October 7, 2021, when Appellant filed its appeal of Size Determination No. 06-2021-062. (Response at 2, 5.) However, because Appellant believed, in good faith, that only one size determination had been issued, Appellant proceeded to “file[] its appeal of the one and only Size Determination 06-2021-062” on October 7, 2021. (*Id.* at 2.)

Appellant observes that, according to 13 C.F.R. § 134.304(a), a size appeal must be brought within 15 calendar days after “receipt” of the size determination. (*Id.* at 4.) Here, Appellant was unaware of two of the three size determinations until OHA issued its Order to Show Cause. Therefore, OHA should deem the date of its Order — January 11, 2022 — as the date of Appellant's receipt of the remaining size determinations. (*Id.*) Appellant offers new appeals of Size Determination Nos. 06-2021-063 and -064, dated January 25, 2022.

Appellant insists that it had “every intention of appealing all three protests but Appellant simply did not know that Size Determination Nos. 06-2021-063 and 06-2021-064 had already been sent.” (*Id.* at 6.) Further, if OHA agrees with Appellant that the appeals of Size Determination Nos. 06-2021-063 and -064 are timely, the appeal of Size Determination No. 06-2021-062 would not be moot. (*Id.*)

Appellant additionally argues that, although Appellant was not contemporaneously aware that Size Determination Nos. 06-2021-063 and -064 had been issued, Appellant nevertheless attempted to anticipate the substance of those determinations in its appeal of Size Determination No. 06-2021-062. (*Id.* at 5.) Appellant thus “purposely chose language to attempt to address arguments made by all three protesters,” and planned, once it had appealed the remaining size determinations, to request that OHA consolidate the appeals. (*Id.*)

Finally, Appellant highlights that one of the three protestors, ECC, likewise overlooked that multiple size determinations were issued. ECC responded to the merits of Appellant's appeal of Size Determination No. 06-2021-062, even though that size determination relates to the protest filed by a different protestor, Arcane Advisory LLC. (*Id.* at 6-7.) Because ECC has now had fair opportunity to respond to the appeal of Size Determination No. 06-2021-062, and still could respond to the appeals of Size Determination Nos. 06-2021-063 and -064, ECC would not be prejudiced if OHA declines to dismiss the appeals. (*Id.*)

IV. ECC's Response

On February 1, 2022, ECC responded to OHA's Order to Show Cause. ECC argues, first, that Appellant has the burden to monitor its communications, and its failure to do so does not excuse missing the deadline to appeal Size Determination Nos. 06-2021-063 and -064. (ECC Response at 1-2.) ECC rejects the notion that Appellant was not in “receipt” of Size Determination Nos. 06-2021-063 and -064 until January 11, 2022. (*Id.* at 2.) On the contrary, [Employee 1] admits that [Employee 1] did receive these size determinations on September 21, 2021, although [Employee 1] reportedly did not notice them due to [XXXXXX]. (*Id.*)

OHA case law instructs that “[i]nsofar as Appellant may have simply overlooked the . . . e-mail, such negligence is not excusable, as OHA has made clear that each litigant is responsible for ‘properly monitor[ing] its communications’.” (*Id.*, quoting *Size Appeal of Ordnance Holdings, Inc.*, SBA No. SIZ-5833, at 2 (2017) and citing *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707 (2016); *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016); and *Size Appeal of Red Orange N. Am., Inc.*, SBA No. SIZ-6121 (2021), *recons. denied*, SBA No. SIZ-6136 (2021) (PFR).) Here, by Appellant's own admission, Appellant received all three size determinations on September 21, 2021, and the mere fact that Appellant's “email

systems may have obscured or hidden such emails” is not a valid basis to conclude that the appeals are timely. (*Id.* at 2.) Because Appellant did not file timely appeals of Size Determination Nos. 06-2021-063 and -064 within 15 calendar days after September 21, 2021, any new appeal is now time-barred. (*Id.* at 3.)

Next, ECC argues that language in Appellant's appeal of Size Determination No. 06-2021-062 does not make it an appeal of Size Determination Nos. 06-2021-063 and -064. (*Id.*) Appellant points to no legal authority to suggest that an appeal of one size determination serves as an appeal of other size determinations, regardless of how similar those size determinations may be. (*Id.* at 5.) Therefore, in accordance with 13 C.F.R. § 121.1101, “unless a particular size determination in question is appealed, it becomes a final decision.” (*Id.* at 3.) Here, the three size determinations “went into full effect and remain in full force and effect,” unless appealed to, and overturned by, OHA. (*Id.* at 4, citing *Size Appeal of Miltope Corp. d/b/a VT Miltope*, SBA No. SIZ-5066 (2009).) Since Appellant did not “even arguably” file timely appeals of Size Determination Nos. 06-2021-063 and -064, OHA must conclude that those size determinations are final, and that Appellant's appeal of Size Determination No. 06-2021-062 is moot. (*Id.*)

Finally, ECC argues that any confusion on its part regarding which size determination Appellant was attempting to appeal has no bearing on the question now before OHA. (*Id.* at 4-5.) Although Appellant claims that ECC would not be harmed or prejudiced if OHA were to refuse to dismiss the appeals, OHA need not, and should not, reach that issue. (*Id.* at 5.) Rather, the dispositive inquiry is simply whether Appellant filed timely appeals of Size Determination Nos. 06-2021-063 and -064. OHA's rules of procedure require that an untimely appeal must be dismissed. (*Id.*, citing 13 C.F.R. § 134.304(c).) Further, pursuant to 13 C.F.R. § 134.202(d)(2)(i)(A), OHA has no discretion to modify the time period governing commencement of a case. (*Id.*, citing *Size Appeal of Silvergate Pharms., Inc.*, SBA No. SIZ-5418 (2012).)

V. Discussion

I agree with ECC that Appellant's appeals of Size Determination Nos. 06-2021-063 and -064 are untimely and must be dismissed. OHA's rules of procedure stipulate that an appeal of a size determination must be filed within 15 calendar days after receipt of the size determination. 13 C.F.R. § 134.304(a). An untimely appeal must be dismissed. *Id.* § 134.304(c). Here, by Appellant's own admission, Appellant received Size Determination Nos. 06-2021-063 and -064 by e-mail on September 21, 2021, but Appellant did not file appeals of these size determinations until January 25, 2022. Section III, *supra*. The appeals of Size Determination Nos. 06-2021-063 and -064 are thus plainly untimely and must be dismissed.

In response to OHA's Order to Show Cause, Appellant asserts that its representative, [Employee 1], received Size Determination Nos. 06-2021-063 and -064 on September 21, 2021, but that [Employee 1] did not “notice” them due to technical issues with [the] e-mail program. Section III, *supra*. While I sympathize with Appellant, OHA has no discretion to extend, or modify, the deadline for filing an appeal. 13 C.F.R. § 134.202(d)(2)(i)(A). Further, OHA has long held that each litigant is responsible for “properly monitor[ing] its communications.” *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707, at 10 (2016) (citing *Size Appeal*

of *Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016)). Thus, where an appellant “may have simply overlooked [an] e-mail” from an area office containing a size determination, OHA found that “such negligence is not excusable,” and dismissed the appeal as untimely. *Size Appeal of Ordnance Holdings, Inc.*, SBA No. SIZ-5833, at 2 (2017). Accordingly, [Employee 1’s] failure to realize that [Employee 1] had received Size Determination Nos. 06-2021-063 and -064 does not render Appellant’s ensuing appeals timely.

Apart from inadequately monitoring its e-mail communications, Appellant also appears to have been more broadly negligent in its handling of the size appeals process. Appellant was well aware, for example, that three separate size protests had been lodged against it, and Appellant states that it “expected” to receive multiple size determinations. Section III, *supra*. Yet, Appellant apparently did not attempt to contact the Area Office to confirm its understanding that only one size determination actually was issued. *Id.* Likewise, Appellant would have known that [Employee 2], one of Appellant’s two points-of-contact with the Area Office, had ceased working for Appellant more than [XXXX] before the size determinations were issued. *Id.* Appellant thus could have designated one or more new points-of-contact to replace [Employee 2], yet evidently did not do so, instead choosing to rely solely on [Employee 1]. *Id.* Appellant’s lack of awareness that Size Determination Nos. 06-2021-063 and -064 had been issued therefore stems largely, if not entirely, from Appellant’s own decisions or inaction.

In response to OHA’s Order to Show Cause, Appellant also argues that, although Appellant contemporaneously believed it had received only one size determination, OHA could construe Appellant’s appeal of Size Determination No. 06-2021-062 as addressing all three size determinations. Section III, *supra*. This argument, though, is counterfactual, as the appeal of Size Determination No. 06-2021-062 referenced, and attached, only that one size determination. Section I, *supra*. In an e-mail to OHA dated October 12, 2021, Appellant reiterated that Appellant filed only one appeal, pertaining only to Size Determination No. 06-2021-062. *Id.* Furthermore, as ECC observes, Appellant offers no legal authority for the proposition that an appeal of one size determination also serves as an appeal of other size determinations. Contrary to the premise of Appellant’s argument, the applicable regulations instead indicate that each individual size determination becomes final after 15 days, unless an appeal of that particular size determination is made to OHA. *See* 13 C.F.R. § 121.1101(a) (“Unless an appeal is made to OHA, the size determination made by a[n] SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency.”).

In sum, Appellant admits that it received Size Determination Nos. 06-2021-062, -063, and -064 by e-mail on September 21, 2021. Section III, *supra*. Appellant filed an appeal of Size Determination No. 06-2021-062 on October 7, 2021, but did not file appeals of Size Determinations Nos. 06-2021-063 and -064 until January 25, 2022. *Id.* The appeals of Size Determinations Nos. 06-2021-063 and -064 are thus untimely, and OHA has no discretion to extend, or waive, the deadline for filing those appeals. 13 C.F.R. §§ 134.304 and 134.202(d)(2)(i)(A).

Because the appeals of Size Determinations Nos. 06-2021-063 and -064 must be dismissed as untimely, the remaining appeal of Size Determination No. 06-2021-062 is moot. In each of the three size determinations, the Area Office found Appellant “other than small” under

the size standard associated with the subject procurement. Section I, *supra*. The Area Office's findings in Size Determination Nos. 06-2021-063 and -064 were not timely appealed and are now final decisions of the SBA. 13 C.F.R. § 121.1101(a). The appeal of Size Determination No. 06-2021-062 has thus become moot, because Appellant would not qualify as small even if it were to prevail on that appeal. *See, e.g., Size Appeal of Valerie Lewis Janitorial*, SBA No. SIZ-5067 (2009) (size appeal was dismissed as moot, because the challenged concern did not appeal a status determination finding the challenged concern ineligible for the procurement). OHA cannot adjudicate matters that have “become moot.” 13 C.F.R. § 134.316(c). Nor does Appellant dispute that its appeal of Size Determination No. 06-2021-062 would be moot, if OHA concludes that the appeals of Size Determinations Nos. 06-2021-063 and -064 are untimely. Section III, *supra*.

VI. Conclusion

For the above reasons, the appeals of Size Determination Nos. 06-2021-063 and -064 are DISMISSED as UNTIMELY. In light of this outcome, the appeal of Size Determination No. 06-2021-062 is MOOT and therefore is also DISMISSED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge