

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

SIZE APPEAL OF:

RBVetCo, LLC dba Rocky Bleier  
Construction Group,

Appellant,

RE: PerformanceEPC, LLC

Appealed From  
Size Determination No. 04-2022-011

SBA No. SIZ-6154

Decided: May 23, 2022

ORDER DISMISSING APPEAL<sup>1</sup>

I. Background

On April 11, 2022, RBVetCo, LLC dba Rocky Bleier Construction Group (Appellant) transmitted the above-captioned appeal to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). The appeal challenged Size Determination No. 04-2022-011, which had denied a size protest filed by Appellant against PerformanceEPC, LLC (PerformanceEPC).

In a letter to OHA accompanying its appeal petition, Appellant stated that it had served copies of the appeal to PerformanceEPC and other interested parties on April 8, 2022, the fifteenth day after issuance of Size Determination No. 04-2022-011. (Letter from D. Jameson (Apr. 11, 2022), at 1.) Due to an administrative oversight, however, Appellant neglected to file the appeal petition with OHA until April 11, 2022. (*Id.*) Appellant urged that it “should not be penalized for the error of its counsel.” (*Id.*) Appellant additionally asserted that failure to file the appeal with OHA on April 8, 2022 should not be fatal, because the appeal would not actually have been due until April 11, 2022. (*Id.*)

II. Order to Show Cause

On April 14, 2022, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. (Order at 1-2.) OHA explained that, pursuant to OHA's rules of procedure, a size appeal “must be filed within 15 calendar days after receipt of the formal size

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<sup>1</sup> 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.

determination.” (*Id.*, citing 13 C.F.R. § 134.304(a).) “Filing” is a term of art defined as “the receipt of pleadings and other submissions at OHA.” (*Id.*, citing 13 C.F.R. § 134.204(b)(2).)

Here, SBA's Office of Government Contracting — Area IV (Area Office) transmitted Size Determination No. 04-2022-011 to Appellant during normal business hours on Thursday, March 24, 2022. Specifically, the Area Office e-mailed the size determination to Mr. Rocky Bleier, Appellant's owner and Managing Member, at 3:38 p.m. CST/4:38 p.m. EST. (E-mail from D. Gordon to R. Bleier (Mar. 24, 2022).) Shortly thereafter, the Area Office received an automated confirmation that the size determination was received by Appellant's computer server on March 24, 2022 at 3:38 p.m. CST/4:38 p.m. EST. (E-mail from postmaster@rockybleircg.com to D. Gordon (Mar. 24, 2022).)

OHA's Order stated that, because Appellant evidently received Size Determination No. 04-2022-011 on March 24, 2022, any appeal of the determination would have been due within 15 calendar days, or by Friday, April 8, 2022. (Order at 1.) Appellant did not actually file the appeal with OHA until Monday, April 11, 2022, so the appeal appeared untimely. (*Id.*) In addition, although Appellant indicated that it had served copies of the appeal petition to other parties on April 8, 2022, OHA has long held that “serving an appeal petition to other interested parties is not sufficient to render an appeal timely, if the appeal is not actually filed (*i.e.*, received by OHA) by the required deadline.” (*Id.*, citing *Size Appeal of Silvergate Pharms., Inc.*, SBA No. SIZ-5418 (2012).)

### III. Appellant's Response to OHA's Order

On April 20, 2022, Appellant responded to OHA's Order. Appellant argues that its appeal was timely filed with OHA on April 11, 2022. (Response at 2, citing 13 C.F.R. § 134.304(a).) Appellant does not dispute that the Area Office e-mailed the size determination to Mr. Bleier at 4:38 p.m. EST on March 24, 2022; however, Mr. Bleier did not open the e-mail until 6:41 p.m. EST. (*Id.* at 4.) As such, Appellant should be deemed to have received the size determination on the next day, Friday, March 25, 2022. (*Id.* at 2.) Fifteen calendar days after March 25, 2022 would be Saturday, April 9, 2022, and OHA's rules permit that if a filing deadline falls on a weekend, the deadline extends to the next business day. (*Id.*, citing 13 C.F.R. § 134.202(d).) Accordingly, in Appellant's view, the instant appeal was not actually due at OHA until Monday, April 11, 2022. Appellant nevertheless intended to file the appeal with OHA on April 8, 2022, but due to an administrative error, Appellant failed to do so. (*Id.*)

Appellant argues that it was not in “receipt” of the size determination at 4:38 p.m. EST on March 24, 2022. (*Id.*) The Area Office e-mailed the size determination to Mr. Bleier just 22 minutes before Appellant's close of business at 5 p.m. EST. (*Id.* at 10-11.) Moreover, on the day the size determination was sent, Mr. Bleier was out of the office attending various appointments and did not return until approximately 6:30 p.m. EST. Mr. Bleier thus did not open the e-mail containing the size determination until 6:41 p.m. EST. (*Id.* at 4.) As requested by the Area Office, Appellant sent an e-mail confirming receipt of the size determination on Friday, March 25, 2022. (*Id.* at 3.)

Appellant highlights that, according to OHA's rules of procedure, the appeal deadline is triggered by "receipt" of a size determination, not "issuance" of a size determination. (*Id.*) As a result, it is immaterial that the Area Office issued Size Determination No. 04-2022-011 during normal business hours on March 24, 2022, because Appellant did not receive the size determination until Mr. Bleier opened the e-mail at 6:41 p.m. EST. (*Id.* at 4.) Appellant claims that there is "no way to determine" exactly when the e-mail would have been available for viewing, but Appellant's IT Department can confirm that the e-mail was sent at 4:38 p.m. on March 24 and that Mr. Bleier opened the e-mail at 6:41 p.m. on March 24. (*Id.*) Appellant argues that "'receipt' does not occur until the e-mail is reasonably opened by that individual during business hours." (*Id.* at 7.) Receiving an e-mail is the "functional equivalent of receiving a package sent to a business office," except that "receipt" of an e-mail occurs when the e-mail is actually opened. (*Id.* at 10.) Conversely, in Appellant's view, had the Area Office sent Appellant a paper copy of the size determination, "[Appellant] would be in 'receipt' of the document when it was physically delivered to the office during business hours." (*Id.*)

Appellant maintains that its understanding of "receipt" is supported by OHA case law and SBA Standard Operating Procedures (SOPs). Unlike the "Mailbox Rule," where a document is deemed to have been received when it is mailed, for size appeals, SBA regularly requests that the intended recipient confirm receipt through an "acknowledgement, whether it's a confirmation of a fax, the signed return receipt for a FedEx delivery, or an e-mail acknowledgement." (*Id.* at 5, citing SOP 90 01 5, Chapter 6, Section 3a.) Further, OHA Judges have discretion to assess the "credibility" of representations concerning "receipt" of a document. (*Id.* at 8, citing *Size Appeal of Ordnance Holdings, Inc.*, SBA No. SIZ-5833 (2017) and *Size Appeal of Cont'l Solutions, Inc.*, SBA No. SIZ-5508 (2013).) Appellant offers an affidavit from Mr. Bleier regarding his opening of the e-mail from the Area Office, which in Appellant's view is both credible and reasonable. (*Id.* at 8.) Although OHA has held that each litigant is responsible for properly monitoring its communications, this duty should allow for the possibility that individuals could be away from their e-mail inbox during regular business hours, and for companies to maintain spam filters that may cause brief delays in processing e-mails. (*Id.*)

Appellant contends that it should be deemed to have received the size determination on March 25, 2022, the next business day after the size determination was issued. (*Id.* at 10.) OHA's rules of procedure recognize that 5:00 p.m. is generally considered to be the close of business, such that filings received after 5:00 p.m. are deemed to have been received on the next business day. (*Id.* at 9, citing *Size Appeal of Eagle Home Med. Corp.*, SBA No. SIZ-4701 (2005) and *Size Appeal of AutoFlex AFC, Inc.*, SBA SIZ-5431 (2013).)

Appellant points to decisions from the U.S. Government Accountability Office (GAO) which have held that a bid or proposal is not "received" until the procuring agency actually has the bid or proposal in its e-mail inbox. (*Id.* at 6-7, citing *Washingtonian Coach Corp.*, B-413809, 2016 CPD ¶ 378 (Dec. 28, 2016); *Spanish Solutions Language Servs., LLC*, B-418191, 2020 CPD ¶ 20 (Jan. 2, 2020); *Advanced Decisions Vectors, Inc.*, B-412307, 2016 CPD ¶ 18 (Jan. 11, 2016); and *Western Star Hosp. Auth., Inc.*, B-414216.2, 2017 CPD ¶ 152 (May 18, 2017).) Similarly, in multiple cases, GAO has found that there was no constructive knowledge of an agency-level bid protest decision sent over a weekend. (*Id.* at 9-10, citing *Int'l Marine Prods.*,

*Inc.*, B-296127, 2005 CPD ¶ 119 (June 13, 2005) and *Supreme Edgelight Devices, Inc.*, B-295574, 2005 CPD ¶ 58 (Mar. 4, 2005).)

Accompanying its response to the Order to Show Cause, Appellant attached an affidavit from Mr. Bleier; the Area Office's e-mail containing Size Determination No. 04-2022-011, indicating that the e-mail was “Sent: Thursday, March 24, 2022 4:38 PM”; and an e-mail from Appellant, dated March 25, 2022, acknowledging receipt of the size determination. (Response, Exhibits.)

#### IV. PerformanceEPC's Comments

On April 28, 2022, PerformanceEPC submitted comments in response to OHA's Order. PerformanceEPC argues, first, that Appellant did receive the size determination via e-mail during normal business hours on March 24, 2022. (Comments at 2.) The fact that Appellant did not open that e-mail until after 5:00 p.m. EST is irrelevant, because the applicable regulations “do not start the timeliness clock based on when an email and its attachments are read.” (*Id.*) Rather, OHA has long recognized that “receipt of an email occurs when the email reaches the recipient's email server.” (*Id.*, citing *Size Appeal of KLN Mfg., LLC*, SBA No. SIZ-5631 (2014).) In its response to OHA's Order, Appellant remains silent as to when the Area Office's e-mail reached Appellant's server, although Appellant should have access to such information. (*Id.* at 2-3.) In any event, though, Appellant has offered no reason to believe that the e-mail containing Size Determination No. 04-2022-011 reached Appellant's server after regular business hours. (*Id.*)

Next, PerformanceEPC insists that the instant appeal is untimely because it was not filed at OHA by April 8, 2022. (*Id.*) Appellant attempts to rely on OHA decisions pertaining to size protests. The size protest deadline, however, is measured in business days, rather than in calendar days as required for size appeals. (*Id.* at 4.) Further, the size appeal regulations make no mention of “the effect, if any, of the time of day that a size determination is ‘received’ by an Appellant for purposes of calculating the timeliness of a size appeal.” (*Id.* at 3.) Accordingly, PerformanceEPC argues, OHA's decisions involving size protests have no bearing here, and “any interpretation of 13 C.F.R. § 134.304(a) concluding that the date of receipt of a formal size determination should be extended to the next day based on the time of receipt, would not make sense.” (*Id.* at 5.)

PerformanceEPC concludes that Appellant received the size determination on March 24, 2022 and thus was required to file any size appeal with OHA by April 8, 2022. Appellant failed to do so, and this error mandates dismissal of the appeal. (*Id.* at 6, citing 13 C.F.R. § 134.304(a); *Size Appeal of Bid Solve, Inc.*, SBA No. SIZ-5906 (2018); and *Size Appeal of A-Top Sec. Co.*, SBA No. SIZ-5227 (2011).)

#### V. Discussion

I agree with PerformanceEPC that this appeal is 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, and OHA has no discretion to extend, or modify, the deadline for filing an

appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c). Here, the record reflects — and Appellant itself acknowledges — that the Area Office e-mailed Size Determination No. 04-2022-011 to Appellant during normal business hours on March 24, 2022. Sections II and III, *supra*. Appellant did not file its appeal of that size determination with OHA until 18 days later, on April 11, 2022, so the appeal is untimely. *Id.*

In response to OHA's Order to Show Cause, Appellant highlights that its representative, Mr. Bleier, opened the e-mail containing Size Determination No. 04-2022-011 at 6:41 p.m. EST on March 24, 2022. Section III, *supra*. Appellant contends that, because Appellant did not read the e-mail until after Appellant's regular close of business at 5:00 p.m. EST, Appellant should be deemed to have received the size determination on the next business day, March 25, 2022, such that Appellant's appeal of the size determination would have been due by April 11, 2022. *Id.*

I find Appellant's arguments unpersuasive for several reasons. As PerformanceEPC observes, OHA has long held that “receipt” of an e-mail occurs when the e-mail reaches the intended recipient's e-mail server. *Size Appeal of KLN Mfg., LLC*, SBA No. SIZ-5631 (2014). Here, the Area Office's records confirm that the Area Office e-mailed Size Determination No. 04-2022-011 to Mr. Bleier at 3:38 p.m. CST/4:38 p.m. EST. Section II, *supra*. Moreover, the Area Office also received an automated confirmation that the size determination was received by Appellant's computer server on March 24, 2022 at 3:38 p.m. CST/4:38 p.m. EST. *Id.* Accordingly, while it may be true that Mr. Bleier did not immediately read the Area Office's e-mail, Appellant nevertheless clearly did “receive” the e-mail on March 24, 2022.<sup>2</sup>

OHA's decision in *Size Appeals of Anchor Labs, Inc. d/b/a Anchorage*, SBA No. SIZ-6144 (2022) is instructive here. In *Anchor Labs*, an area office issued multiple size determinations, and transmitted each determination to the challenged firm via separate e-mails. *Anchor Labs*, SBA No. SIZ-6144, at 1. The challenged firm, though, mistakenly believed that only a single size determination had been issued, and therefore appealed only that one size determination. *Id.* at 1-2. OHA rejected the challenged firm's contentions that its failure to comprehend that it had received multiple size determinations would excuse untimeliness. *Id.* at 5-6. Similarly, in the instant case, the relevant issue is when Appellant received Size Determination No. 04-2022-011, not when Appellant first read the document or understood its significance.

In response to OHA's Order to Show Cause, Appellant points to various cases where a delivery occurred over a weekend, or where a bid or proposal was submitted after the exact deadline specified in a solicitation. Section III, *supra*. Such cases are inapposite here because, as

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<sup>2</sup> Appellant curiously maintains that receiving an e-mail is the “functional equivalent of receiving a package sent to a business office,” and that, if the Area Office had chosen to send Appellant a paper copy of Size Determination No. 04-2022-011, “[Appellant] would be in ‘receipt’ of the document when it was physically delivered to the office during business hours.” Section III, *supra*. While OHA agrees with Appellant on these points, Appellant's arguments support the conclusion that “receipt” occurred when the size determination entered Appellant's possession (*i.e.*, when the e-mail containing the size determination reached Appellant's computer server), irrespective of when Appellant opened or read the e-mail.

discussed above, Appellant received Size Determination No. 04-2022-011 on an ordinary business day during ordinary business hours. Sections II and III, *supra*.

Lastly, it is worth noting that Appellant's arguments here are problematic in that they would create irrational, if not unworkable, precedent. Under Appellant's formulation, an individual does not "receive" an e-mail until he or she actually reads or opens it. Section III, *supra*. Logically, then, an individual might avoid ever receiving an e-mail by, for example, simply deleting the incoming message or refusing to open it, a plainly absurd result. Likewise, SBA regulations expressly permit an area office to transmit a size determination through e-mail or by other "verifiable means." 13 C.F.R. § 121.1009(f). Under Appellant's interpretation, though, an area office would be unable to determine when — or even if — "receipt" occurred, thereby casting doubt on whether e-mail would remain a viable method for delivering a size determination.

Ultimately, the fundamental problem for Appellant is that, although Appellant served copies of its appeal petition to other parties 15 days after receipt of the size determination, Appellant neglected to file the appeal petition with OHA until 18 days after receipt of the size determination. Sections I and II, *supra*. These circumstances render the appeal untimely. *E.g.*, *Size Appeal of Bid Solve, Inc.*, SBA No. SIZ-5906 (2018) (dismissing appeal that was timely served but not timely filed). Appellant emphasizes that the delay stemmed from an administrative error, and was not a deliberate choice or stratagem to gain additional time. Sections I and III, *supra*. While I sympathize with Appellant, OHA simply has no discretion to extend, or modify, the deadline for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c); *Size Appeal of Red Orange N. Am., Inc.*, SBA No. SIZ-6121 (2021), *recons. denied*, SBA No. SIZ-6136 (2021) (PFR). As such, this appeal must be dismissed.

## VI. Conclusion

For the above reasons, the appeal is DISMISSED as UNTIMELY. 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