

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

SIZE APPEAL OF:

ACE Ventures, LLC,

Appellant,

RE: ACTFL Professional Services, LLC

Appealed From  
Size Determination No. 2-2022-028

SBA No. SIZ-6160

Decided: June 21, 2022

APPEARANCES

Andrew Mohr, Esq., C. Kelly Kroll, Esq., Morris, Manning and Martin, LLP, for Appellant

Hugh Webster, Webster, Chamberlain & Bean, for ACTFL Professional Services, LLC

DECISION

I. Introduction and Jurisdiction

On May 9, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2022-028 (Size Determination), dismissing as untimely the size protest of ACS Ventures, LLC (Appellant) that ACTFL Professional Services, LLC (ACTFL) was other than small. On May 23, 2022, Appellant filed the instant appeal from that Size Determination. Appellant argues that the Size Determination is clearly erroneous and requests that OHA reverse it. For the reasons discussed infra, the appeal is denied, and the Size Determination is affirmed.

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 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

On January 18, 2022, the U.S. General Services Administration (GSA) issued Solicitation No. 47QFHA22R0001, for Standard Setting Studies for the Defense Language Institute Foreign Language Center. (Solicitation, at 1.) The Contracting Officer (CO) set the procurement 100% aside for small business, and designated North American Industry Classification System (NAICS) code 611710, Educational Support Services, with a corresponding \$16.5 million annual receipts size standard, as the appropriate code. (*Id.*, at 2.) The purpose of the solicitation was Defense Language Institute Foreign Language Center Standard Setting Studies. (*Id.*) Proposals were due on February 17, 2022. (*Id.*) Appellant and ACTFL submitted timely offers.

### B. Protest and Size Determination

On April 13, 2022, the Contracting Officer (CO) informed Appellant via email that ACTFL was the apparent successful offeror. (Size Protest Referral Letter, at 3.) That same day, Appellant responded to the CO via email:

Thank you for letting us know. We are concerned the apparent successful offeror has the same address of its not-for-profit parent company (ACTFL) and the formation of a for-profit entity that shares resources circumvents the intent of the small business set aside. Because the named entity does not have a website or presence other than through the parent organization, it appears to be an unfair advantage for a not-for profit company if the funds effectively flow through.

Who would we need to contact in order to file a formal protest regarding the eligibility of the entity given the legal structure and more importantly, the operations the appear (sic) to comingle staff and functions?

(*Id.*, at 3-4.)

On April 20, 2022, at 7:17 PM CST, Appellant filed a formal size protest with the CO, of which the CO forwarded to the Area Office on April 21, 2022. (*Id.*, at 5-6.) Appellant argued that ACTFL is owned by American Council on the Teaching of Foreign Languages, a non-profit organization with tax exempt status under the Internal Revenue Code (IRS). (*Id.*, at 6.) Appellant contends that the IRS considers this non-profit parent company the owner of ACTFL's assets and direct activities. (*Id.*) Further, the IRS considers ACTFL a disregarded entity, meaning income is not subject to unrelated business income tax. (*Id.*) Appellant alleges that the non-profit parent “controls the activities of the for-profit subsidiary and also benefits from the pass-through taxation for income.” (*Id.*) Appellant concludes that the awardee of this procurement is the non-profit parent company; and this contradicts SBA's intent of a 100% set-aside for a small business. (*Id.*)

On May 9, 2022, the Area Office issued Size Determination No. 2-2022-028, dismissing Appellant's protest as filed late because it was filed after the close of business on the fifth day

after Appellant received the notice of award. (Size Determination, at 1-2.) The Area Office reasoned that any documents received after close of business, 4:30 PM, local time, is considered filed the next day. (*Id.*, at 2.) Area Office further references OHA precedent that 5:00 PM is considered close of business. (*Id.*, citing *Size Appeal of Fed. Maint. Hawaii, Inc.*, SBA No. SIZ-5887, at 1 (2018).) Area Office concluded that the size protest was untimely both under FAR regulation and OHA case law; therefore, the Area Office dismissed the protest. (*Id.*, at 2.)

### C. Appeal

On May 23, 2022, Appellant filed the instant appeal. (Appeal, at 1.) Appellant does not attempt to argue that its April 20th filing was timely. Rather, Appellant argues that its April 13th email to the CO should be considered a protest, and thus timely. (*Id.*, at 4.) Appellant argues it clearly stated it believed ACTFL was ineligible for award because of its relationship with a non-profit parent company. (*Id.*) Appellant also clearly stated its intention to protest the award. Appellant argues that this meets the specificity test in the regulation to provide reasonable notice of the grounds upon which the challenged concern's size is questioned. (*Id.*) The communication need not use the word protest or cite a particular regulation. (Appeal at 5, citing *Size Appeal of W.H. Smith Hardware Co.* SBA No. SIZ-4516, at 2 (2002).) While OHA has ruled that emails to COs which were not designated as formal protests were properly not found to be protests, Appellant argues that these cases can be distinguished from the instant appeal. (*Id.*, at 5.) In *Size Appeal of DRI, Inc.*, SBA No. SIZ-6150, at 3 (2022), the email to that contracting officer stated that it did not want that CO to have to deal with a protest or rebidding, and thus was not a protest. (*Id.*) In *Size Appeal of Enviroservices & Training Center, LLC*, SBA No. SIZ-5517, at 4 (2013), the emails lacked the necessary explicitness to alert the CO that the appellant was filing a protest. (*Id.*, at 6-7.) Here, Appellant used the word “protest” and argued ACTFL was ineligible for award under SBA regulations because of its relationship with its parent. (*Id.*, at 7.) The April 13th email did not contain the kind of vague and precatory statements that OHA has found insufficient to constitute a protest. (*Id.*) Appellant maintains the CO should have forwarded the April 13th email to the Area Office as a timely protest. (*Id.*)

Also on May 23, 2022, Appellant filed a Motion to Admit into Evidence Appellant's April 13th email to the CO, arguing that while the Area Office never saw this email, the CO should have forwarded it to the Area Office, and therefore it should be included in the record here. (Motion, at 3-4.)

### D. ACTFL's Response to Appeal

On June 8, 2022, ACTFL filed Response of ACTFL Professional Services, LLC. (ACTFL Response, at 1.) ACTFL argues Appellant's protest is untimely and this is not in dispute, as the protest was filed at 7:17 PM CST, 2-3 hours after the deadline. (*Id.*) ACTFL rejects Appellant's argument that its April 13th email constitutes a protest. (*Id.*) Specifically, ACTFL believes that the April 13th email was an inquiry on how to file a protest, and not a formal protest. (*Id.*) Otherwise, Appellant would not provide another protest on April 17, 2022. (*Id.*) In support of its argument ACTFL cites to *DRI, Inc.*, SBA No. SIZ-6150, at 3 and argues that the term “protest” alone does not establish the clear intent to communicate a protest; and in this present matter, an email inquiry does not create a formal protest. (*Id.*)

ACTFL further contends that even if the April 13th email is considered a protest, it fails to meet the specificity requirements of 13 C.F.R. § 121.1007(b). (*Id.*, at 2.) ACTFL points out the email simply expresses “concern” about its status and makes vague references to may “appear” to be an unfair advantage. (*Id.*) ACTFL argues such “mere expressions” are not sufficiently specific to survive dismissal. (*Id.*, at 2, citing *Matter of Service Disabled Veteran Manufacturing & ZAMS, Inc.*, SBA No. VET-122, at 3 (2007) (statements regarding Medical products did not assert a specific concern and were thus insufficient to sustain a protest); *Size Appeal of Wilson Walton International, Inc.*, SBA No. SIZ-6031, at 2 (2019) (a mere allegation that a protested concern is affiliated with a parent company without evidence their aggregated size exceeds the applicable size standard is a non-specific protest).)

ACTFL concludes that Appellant's April 13th email alone failed to provide evidence to support its argument and therefore lacks specificity. (*Id.*)

### III. Discussion

#### A. Standard of Review and New Evidence

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

Appellant has filed and served its motion for the submission of new evidence, in accordance with the regulation. 13 C.F.R. § 134.308(a)(2). I GRANT Appellant's Motion for New Evidence. The evidence proffered is relevant to the issues on appeal, does not unduly enlarge those issues, and addresses facts pertinent to the appeal. *Size Appeal of Rocky Mountain Medical Equipment, LLC*, SBA No. SIZ-6129, at 12 (2021).

#### B. Analysis

A size protest in a negotiated procurement must be received by the CO no later than the close of business on the fifth day after the CO has notified the protestor of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2). Appellant here does not dispute that its April 20th protest, filed after the close of business, was untimely. Section II. C., *supra*. Appellant thus is not arguing that the Area Office erred in dismissing its April 20th protest as untimely. *Id.* Rather, Appellant here argues that its April 13th email, filed immediately after learning ACTFL was the prospective awardee, should be considered a timely protest, that the CO should have forwarded it to the Area Office, and the Area Office should have accepted it and conducted a size determination. *Id.*

However, to decide whether the April 13th email is a protest, I must consider whether it specific. A protest must be specific. It must provide reasonable notice of the grounds upon which

the protested concern's size is challenged. A mere allegation that the firm is not small is not sufficient. 13 C.F.R. § 121.1007(b). The regulation sets forth examples of specificity:

Example 1: An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 3: An allegation that concern X is affiliated with concern Y without setting forth any basis for the allegation is non-specific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 5: An allegation that concern X has revenues in excess of \$5 million (where \$5 million is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is \$5 million) because it received Government contracts in excess of \$5 million last year is sufficiently specific.

13 C.F.R. § 121.1007(c).

It is clear that the requirement of specificity mandates that the allegations in the protest must not merely be that the protested concern is not small, but include specific allegations of fact which, if true, would render the concern other than small. *Id.* A mere allegation of affiliation without information that the affiliation would render the concern other than small, as in Examples 3 and 4, is insufficiently specific. *See, e.g., Wilson Walton International, Inc.*, SBA No. SIZ-6031 at 2.

Here, Appellant's protest alleges affiliation between ACTFL and its non-profit parent company. Section II. C., *supra*. However, Appellant does not allege that this affiliation renders ACTFL other than small. *Id.* Rather, Appellant argues that the parent's non-profit status renders ACTFL ineligible. *Id.* Appellant appears to rely on 13 C.F.R. § 121.105(a)(1), which requires that, in order to be considered a small business eligible for SBA assistance, a concern must be "organized for profit." Appellant argues ACTFL's relationship with a nonprofit parent gives it an unfair advantage in competition with for-profit firms. *Id.*

However, OHA's longstanding precedent holds that mere affiliation with a non-profit organization does not render a small business ineligible for small business set-aside contracts. *Size Appeal of First Financial Associates, Inc.*, SBA No. SIZ-5869, at 5 (2017); *Size Appeal of*

*Corporate Research Services, Inc.*, SBA No. SIZ-4646, at 3 (2004). Therefore, the fact that ACTFL is affiliated with a non-profit parent does not make it ineligible to be a small business under SBA regulations. If Appellant's email had included an allegation about the two affiliated firms which would lead to a finding that their combined annual receipts exceeded the \$16.5 million size standard, that would have made the protest specific. However, Appellant did not do so. Therefore, Appellant's April 13th email, even if it were a protest, is non-specific, because it fails to allege any fact which, if true, would result in finding ACTFL as an other than small business.

Accordingly, Appellant has failed to establish that the Area Office erred in dismissing its protest. The April 20th protest was untimely. The substance of the April 13th protest did not allege facts which, if true, would lead to finding ACTFL as other than small, and thus was not specific. The Area Office properly dismissed the protest.

#### IV. Conclusion

Appellant has failed to establish that the Size Determination is based upon any clear error of fact or law. Accordingly, I DENY the instant appeal, and I AFFIRM the size determination. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge