

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

SIZE APPEAL OF:

Pacific Lighting Management, Inc.,

Appellant,

Appealed From
Size Determination No. 06-2022-047

SBA No. SIZ-6169

Decided: August 31, 2022

APPEARANCES

Brad Rinehart, CEO, Pacific Lighting Management Inc., Santa Ana, California,

Luis D. MacDonald, President, AutoFlex, Inc., Baltimore, Maryland

Vanessa L. Lechón, Contracting Officer, U.S. Department of Transportation, Federal Highway Administration, Washington, D.C.

DECISION

I. Introduction and Jurisdiction

On July 8, 2022, Pacific Lighting Management, Inc. (Appellant) filed the above-captioned appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). In its appeal, Appellant challenges Size Determination No. 06-2022-047, in which SBA's Office of Government Contracting — Area VI (Area Office) sustained a size protest filed by AutoFlex, Inc. (AutoFlex) and concluded that Appellant is not small under the size standard associated with the subject procurement. For the reasons discussed *infra*, the Area Office should have dismissed AutoFlex's size protest as untimely. Accordingly, the appeal is granted and Size Determination No. 06-2022-047 is vacated.

OHA adjudicates 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 after 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. Request for Quotations

On April 29, 2022, the U.S. Department of Transportation, Federal Highway Administration (FHWA) issued Request for Quotations (RFQ) No. 693JJ322Q000032, for electric vehicle charging stations. (RFQ at 6-7.) The RFQ contemplated the award of a task/delivery order under the U.S. General Services Administration (GSA) Federal Supply Schedules, pursuant to Federal Acquisition Regulation (FAR) subpart 8.4. (*Id.* at 5-6.)

The Contracting Officer (CO) set aside the order entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 336320, Motor Vehicle Electrical and Electronic Equipment Manufacturing, with a corresponding size standard of 1,000 employees. (*Id.* at 5.) The RFQ did not contain language requesting, or requiring, that offerors recertify their size for the order. Quotations were due May 6, 2022. (RFQ, Amendment 0001.) Appellant and AutoFlex submitted timely quotations.

B. Protest

On May 23, 2022, the CO informed AutoFlex that Appellant was the apparent awardee. On May 24, 2022, AutoFlex filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant is a subsidiary of Solar Integrated Roofing Corporation (SIRC), a publicly-traded company. (Protest at 1.) Specifically, SIRC's website identifies Appellant as one of SIRC's twelve "brands." (*Id.*)

The CO forwarded the protest to the Area Office for review. In her referral letter, the CO noted that AutoFlex's protest pertained to the award of an order under the "GSA Multiple Award Schedule 3361E Electronic and Autonomous Vehicles and Accessories contract." (Letter from V. Lechón (May 27, 2022), at 1.)

C. Size Determination and Appeal

On July 6, 2022, the Area Office issued Size Determination No. 06-2022-047, concluding that Appellant is not a small business. The Area Office found that Appellant did not submit all required information, and the Area Office therefore drew an adverse inference that the missing information would have shown that Appellant is not small. (Size Determination at 4-10.) The Area Office further determined that AutoFlex's protest was timely filed, because the protest was submitted to the CO "within 5 business days after notification of award" of the task/delivery order. (*Id.* at 2 n.1, citing 13 C.F.R. § 121.1004.)

On July 8, 2022, Appellant filed the instant appeal. Appellant maintains that, when its own employees are combined with those of SIRC, the companies together have well under 1,000 employees. (Appeal at 1.)

D. Request for Comments

On August 11, 2022, OHA requested that the parties address whether AutoFlex's size protest should have been dismissed as untimely. (Request for Comments at 2.) OHA explained that applicable regulations permit a size protest to be filed within five business days after award of task/delivery order, but only “if the [CO] requested a size recertification in connection with that order.” (*Id.* at 1, quoting 13 C.F.R. § 121.1004(a)(2)(ii).) In the instant case, the RFQ called for the award of a task/delivery order under a GSA Schedule contract, but there was no indication that the CO requested recertification of size in conjunction with the order. (*Id.*) OHA further noted that, when a size protest should have been dismissed as untimely, but the Area Office nevertheless proceeded to issue a size determination on the merits, OHA must vacate the size determination. (*Id.*) In *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011), for example, OHA vacated “a size determination that should have been dismissed as untimely because the CO did not request size recertification for an individual order.” (*Id.*)

E. Appellant's Comments

On August 19, 2022, Appellant submitted comments in response to OHA's request. Appellant renews its claim that:

[Appellant] is a small business. We have supplied documentation showing we are far beneath 1000 employees.

(Appellant's Comments, at 1.)

F. AutoFlex's Comments

On August 19, 2022, AutoFlex submitted comments in response to OHA's request. AutoFlex highlights that the instant RFQ was set aside for small businesses. (AutoFlex Comments, at 1.) Furthermore, in the size determination, the Area Office concluded that AutoFlex's size protest was timely. (*Id.*)

G. CO's Comments

On August 26, 2022, the CO submitted comments in response to OHA's request. The CO states that she “did not request any additional re-certification of size” for this RFQ. (CO's Comments at 1.)

III. Discussion

The dispositive issue in this case is whether AutoFlex's size protest was timely filed. As explained in OHA's request for comments, the issue is critical because SBA regulations require that an untimely size protest must be dismissed. 13 C.F.R. § 121.1004(d). Accordingly, if AutoFlex's protest was not timely, the size determination must be vacated.

SBA's long-standing approach to assessing size for task and delivery order contracts has been that a prime contractor that is small at the time of contract award remains small for all orders issued under the contract, unless the CO, in his or her sole discretion, chooses to request recertification on an individual order-by-order basis. 13 C.F.R. § 121.404(a); *Size Appeal of Odyssey Sys. Consulting Group, Ltd.*, SBA No. SIZ-6135, at 19 (2021). It follows that, when a size protest pertains to the award of a task/delivery order, but the CO did not request recertification in conjunction with that order, the size protest is untimely. 13 C.F.R. § 121.1004(a)(2)(ii) and (a)(3)(iii).

In the instant case, the RFQ contemplated the award of a task/delivery order under a GSA Schedule contract. Section II.A, *supra*. The RFQ did not, however, contain language requesting, or requiring, that offerors recertify their size for the order. *Id.* Further, the CO has confirmed that she “did not request any additional re-certification of size” for this RFQ. Section II.G, *supra*.

Because the CO did not request recertification for this particular order, AutoFlex's protest was not timely filed within five business days after award of an order that required recertification. The Area Office thus should have dismissed the size protest as untimely, and Size Determination No. 06-2022-047 must be vacated. *Size Appeals of DNT Solutions, LLC and Alliant Solutions Partner, LLC*, SBA No. SIZ-5962 (2018); *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011).

IV. Conclusion

For the above reasons, the appeal is GRANTED and Size Determination No. 06-2022-047 is VACATED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge