

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

SIZE APPEAL OF:

Glacier Technologies, LLC,

Appellant,

RE: Dynamo Technologies, LLC

Appealed From  
Size Determination No. 2-2023-013

SBA No. SIZ-6217

Decided: May 31, 2023

APPEARANCES

Robert K. Tompkins, Esq., Hillary J. Freund, Esq., Kelsey M. Hayes, Esq., Holland & Knight LLP, Washington, D.C., for Appellant

Noah B. Bleicher, Esq., Carla J. Weiss, Esq., Aime J. Joo, Esq., Jenner & Block LLP, Washington, D.C., for Dynamo Technologies, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On February 10, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2023-013, dismissing a size protest filed by Glacier Technologies, LLC (Appellant) against Dynamo Technologies, LLC (Dynamo). The Area Office found that the protest was untimely, because Appellant first learned that Dynamo was the apparent awardee in May 2022, several months before the size protest was filed.

On February 27, 2023, Appellant appealed Size Determination No. 2-2023-013 to SBA's Office of Hearings and Appeals (OHA). Appellant maintains that the Area Office clearly erred in dismissing its protest, and requests that OHA remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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<sup>1</sup> This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

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 15 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). A timely appeal, however, “cannot cure an untimely protest.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017).

## II. Background

### A. The RFQ

On March 2, 2022, the U.S. Department of Agriculture (USDA) issued Request for Quotations (RFQ) No. 12314422Q0019 for program and security management support services. The RFQ explained that USDA intended to award a task order through a group of Blanket Purchase Agreements (BPAs) established under the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) program. (RFQ, Section I at 1-2.) The RFQ was issued only to concerns that previously had been awarded such BPAs. (*Id.*)

The Contracting Officer (CO) set aside the task order entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541519, Other Computer Related Services, with a corresponding size standard of \$30 million average annual receipts. (RFQ, SF 1449 at 1.) The RFQ incorporated by reference Federal Acquisition Regulation (FAR) clause 52.219-6, “Notice of Total Small Business Set-Aside (NOV 2020).” (RFQ, Section II, at 14.) The RFQ contained no language expressly instructing BPA holders to certify, or re-certify, their size for the task order.

Appellant and Dynamo submitted timely quotations. On May 13, 2022, the CO awarded the order to Dynamo, and notified Appellant that Dynamo was the apparent successful offeror.

### B. Bid Protest

On May 23, 2022, Appellant filed a bid protest with the U.S. Government Accountability Office (GAO), challenging the award to Dynamo. (Size Protest at 3.) During the course of the proceedings, GAO “advised the parties that the GAO would likely sustain the protest on the basis that [USDA] failed to explain its reasoning for the confidence ratings assigned to quotations under the non-price factors.” *Matter of Glacier Techs., LLC*; B-420775, B-420775.2, B-420775.3; (Aug. 18, 2022), at 1. On August 12, 2022, USDA announced that it would undertake “limited corrective action” in an effort to resolve the pending bid protest. (Letter from A. Humphries to R. Richards (Aug. 12, 2022), at 1.) More specifically, USDA would “reconsider the confidence ratings assigned to proposals, identifying which underlying findings either increase or decrease confidence in the offeror's proposals. Based on these new confidence ratings for each offeror, the selection authority will make a new award decision.” (*Id.* at 1-2.) GAO dismissed Appellant's bid protest as academic shortly thereafter.

Performance on the task order was suspended throughout the bid protest and corrective action, but USDA did not, at any point, cancel or terminate the award to Dynamo. (Memorandum from C. Wallace (Jan. 26, 2023), at 2.) On September 16, 2022, USDA informed

Appellant that corrective action was complete and that Dynamo remained the awardee. (Size Protest at 2.)

### C. Size Protest

On September 23, 2022, Appellant filed a size protest with the CO challenging Dynamo's size. In the size protest, Appellant alleged that Dynamo will be unduly reliant upon a large business subcontractor to perform the “primary and vital requirements” of the task order. (Size Protest at 3-7.) Appellant maintained that recertification was required for the order, and that the size protest was timely filed within five business days after USDA notified Appellant of the award to Dynamo on September 16, 2022. (*Id.* at 2, 8.) Appellant acknowledged that it previously had received notice that the task order would be awarded to Dynamo in May 2022. (*Id.* at 3.) The CO forwarded the protest to the Area Office for review.

### D. Size Determination

On February 10, 2023, the Area Office dismissed Appellant's size protest as untimely. The Area Office found that, according to the CO, “explicit recertification was required at the order level.” (Size Determination at 1.) The protest was untimely, however, because the CO awarded the order to Dynamo, and notified Appellant that Dynamo was the successful offeror, on May 13, 2022. (*Id.* at 2.) The original award to Dynamo was never cancelled, so any size protest was due within five business days after Appellant first learned of the award on May 13, 2022. (*Id.*, citing *Size Appeal of Navarre Corp.*, SBA No. SIZ-5942 (2018).) Appellant's size protest, filed in September 2022, therefore was untimely. (*Id.* at 1-2.)

### E. Appeal

On February 27, 2023, Appellant filed the instant appeal with OHA, contending that the Area Office incorrectly dismissed Appellant's size protest. Appellant maintains that its protest was timely filed within five business days after USDA's post-corrective action award notification. (Size Appeal at 4.)

Appellant argues that its situation is distinguishable from other OHA decisions where size protests following corrective action were held untimely. (*Id.* at 6-9, discussing *Size Appeal of Navarre Corp.*, SBA No. SIZ-5942 (2018); *Size Appeal of Chenega Support Servs., LLC*, SBA No. SIZ-5874 (2017); *Size Appeal of K2 Group, Inc.*, SBA No. SIZ-5805 (2017); *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5460 (2013); *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4937 (2008); and *Size Appeal of SDS Int'l, Inc.*, SBA No. SIZ-4541 (2003).) In Appellant's view, these cases are inapposite because the procuring agencies did not commit to making a new award, as USDA did in its August 12, 2022 letter. (*Id.*) Some of these cases also did not involve formal bid protests, whereas others concerned multiple unsuccessful size protests. (*Id.*)

Appellant asserts that the September 16, 2022 notification was a new award that triggered Appellant's ability to file a size protest. (*Id.* at 9.) In support, Appellant points to *Size Appeal of Trident<sup>3</sup>, LLC*, SBA No. SIZ-5315 (2012). (*Id.* at 8-9.) In *Trident<sup>3</sup>*, OHA found that a new award

was made by the procuring agency notwithstanding that the agency had not canceled the original award. (*Id.* at 9.) Appellant argues that, like in *Trident*<sup>3</sup>, the September 2022 notification should have been considered a new award regardless of whether USDA cancelled the original award. (*Id.*) As a result, Appellant's size protest was timely because it was submitted within five business days of the new award notice. (*Id.*)

#### F. Dynamo's Response

On March 15, 2023, Dynamo responded to the appeal. Dynamo argues, first, that the Area Office could have dismissed the size protest on grounds that the instant RFQ did not require recertification of size. (Response at 4-5.) SBA regulations at 13 C.F.R. § 121.1004(a)(3) are applicable here because the underlying GSA Schedule is a long-term contract. (*Id.* at 5.) Pursuant to § 121.1004(a)(3), Appellant never had an opportunity to protest Dynamo's size for this task order, because recertification was not required. (*Id.* at 6-7, citing *Size Appeals of DNT Sols., LLC and Alliant Sols. Partner, LLC*, SBA No. SIZ-5962 (2018).) While the Area Office stated in the size determination that recertification was required, this is incorrect, and appears to have resulted from a miscommunication between the Area Office and the CO. (*Id.* at 6.)

Even if recertification had been required, the appeal still should be denied because Appellant filed its size protest more than four months after it first became aware of the award to Dynamo. Under OHA case precedent, there is no exception when corrective action occurs after award notification. (*Id.* at 9, citing *Size Appeal of Navarre Corp.*, SBA No. SIZ-5942 (2018).) Appellant therefore had until May 20, 2022, to file a size protest because it was notified of Dynamo's award on May 13, 2022. (*Id.*)

In response to Appellant's argument that the September 16, 2022, notice was a new award, Dynamo points to *Size Appeal of Chenega Support Servs., LLC*, SBA No. SIZ-5874 (2017). The procuring agency in *Chenega* explained that it would make a new source selection decision after a GAO protest and subsequent corrective action. (*Id.* at 10.) OHA nonetheless found the underlying protest to be untimely because it was not made within five days after the initial award and the regulations do not contemplate an exception when corrective action occurs after award notification. (*Id.*) The exact same scenario occurred here and OHA must follow its precedent. (*Id.*)

#### G. Appellant's Motion to Dismiss or to Strike

On March 22, 2022, Appellant moved to dismiss, or in the alternative to strike, portions of Dynamo's response. Appellant specifically takes issue with Dynamo's contention that the RFQ did not require recertification of size. (Motion at 1.) Because the Area Office determined that recertification was required, Appellant reasons that Dynamo is disputing the size determination and therefore should have filed its own appeal. (*Id.*) Any appeal of the size determination at this juncture would be untimely, however, so Appellant urges that Dynamo's recertification arguments should be rejected or dismissed. (*Id.* at 2.)

### III. Discussion

#### A. Appellant's Motion to Dismiss or to Strike

As a preliminary matter, Appellant's motion to dismiss, or in the alternative to strike, is unpersuasive. OHA's rules of procedure provide that only a party "adversely affected by a size determination" may bring an appeal at OHA. 13 C.F.R. § 134.302(a). Here, although Dynamo may have disagreed with certain portions of the Area Office's analysis, Dynamo was not "adversely affected" by Size Determination No. 2-2023-013; rather, Dynamo directly benefited from the size determination, as the size protest against Dynamo was dismissed in its entirety. Section II.D, *supra*. Accordingly, Dynamo would not have been able, let alone required, to file its own appeal of Size Determination No. 2-2023-013. Nor would it be sound policy for OHA to insist that any party which prevailed at the area office level must file its own appeal if that party disagrees with any portion of the area office's analysis, as doing so would create an influx of frivolous appeals from appellants who already succeeded on the merits. Appellant's motion to dismiss or to strike therefore is DENIED.

#### B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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).

#### C. Analysis

I agree with Dynamo that the Area Office correctly dismissed Appellant's size protest. As a result, this appeal must be denied.

SBA regulations provide that a size protest must be filed within five business days after the contracting officer notifies the protestor of the identity of the prospective awardee. *See* 13 C.F.R. § 121.1004(a). Furthermore, OHA has repeatedly held that these regulations do not contemplate an exception for situations when corrective action occurs after award notification. *E.g.*, *Size Appeal of Navarre Corp.*, SBA No. SIZ-5942 (2018); *Size Appeal of Chenega Support Servs., LLC*, SBA No. SIZ-5874 (2017); *Size Appeal of K2 Group, Inc.*, SBA No. SIZ-5805 (2017); *Size Appeal of EFT Architects, Inc.*, SBA No. SIZ-5460 (2013); *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4937 (2008); *Size Appeal of SDS Int'l, Inc.*, SBA No. SIZ-4541 (2003).

Here, on May 13, 2022, the CO notified Appellant that Dynamo was the apparent successful offeror, and awarded the task order to Dynamo. Section II.A, *supra*. Appellant, though, did not file a size protest at that time; rather, Appellant filed a bid protest with GAO. Sections II.B and II.C, *supra*. USDA subsequently agreed to undertake "limited corrective action" by re-evaluating portions of the proposals. Section II.B, *supra*. Importantly, however,

USDA never cancelled or terminated the original award to Dynamo, instead opting to suspend performance of the order. *Id.* It follows, then, that to have been timely, any size protest must have been filed within five business days after the original award notification on May 13, 2022. Appellant's size protest was not actually filed until September 23, 2022, more than four months later, and thus was plainly untimely. Section II.C, *supra*.

Appellant attempts to distinguish its situation from OHA's line of cases involving untimely size protests following corrective action, but these arguments are unavailing. It is true that, in rare instances, OHA has concluded that a procuring agency's corrective action was so extensive as to have nullified the original award notification. In *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-5979 (2018), for example, OHA found that a procuring agency “took numerous actions inconsistent with [the original award notification], including reopening discussions, obtaining revised proposals, and twice awarding the contract to a different company.” *Global Dynamics*, SBA No. SIZ-5979, at 4. Consequently, OHA explained, “the original award notification was invalidated by the procuring agency's subsequent actions, and there was no requirement to have filed a size protest within five days of the original award notification.” *Id.*

Here, though, Appellant points to no comparable actions by USDA that were inconsistent with the original award notification. USDA never, for example, cancelled the solicitation, terminated the award to Dynamo, or announced its intent to award the order to a firm other than Dynamo. Section II.B, *supra*. Appellant highlights that, in a August 12, 2022 letter to GAO, USDA commented that it would make a “new award decision” upon completion of the “limited corrective action.” *Id.* Read in context, though, USDA's statement merely indicated that, after re-assessing portions of offerors' proposals, USDA would, if necessary, reconsider its original award decision in light of those revised evaluations. USDA was silent as to its intended treatment of the order already awarded to Dynamo, and the letter thus may be understood to mean that the award to Dynamo would be disturbed only if the limited revised evaluations resulted in a new awardee. Accordingly, USDA's statement was not inconsistent with, and did not invalidate, the original award to Dynamo. *E.g., Chenega*, SBA No. SIZ-5874, at 2 (corrective action did not nullify the original award decision when the procuring agency specified that “if the new evaluation results in award to an offeror other than the current awardee, the [procuring agency] will terminate the contract and award to the company representing the best value to the Government.”).

*Size Appeal of Trident<sup>3</sup>, LLC*, SBA No. SIZ-5315 (2012) is the only OHA decision Appellant cites to support its contention that the September 16, 2022, notice was a new award even though the initial award was never cancelled. Section II.E, *supra*. The issue in *Trident<sup>3</sup>*, however, was whether an SBA district office had approved a joint venture agreement (JVA) before the joint venture was awarded a contract, as required by 8(a) program regulations. *Trident<sup>3</sup>*, SBA No. SIZ-5315, at 9-10. The procuring agency in *Trident<sup>3</sup>* provided notice of its initial award to all offerors on August 30, 2011. *Id.* at 1. On September 9, 2011, the CO informed offerors that the agency would re-evaluate proposals and reconsider its award decision without terminating the existing contract. *Id.* at 2. The district office approved the JVA on September 13, 2011, and the procuring agency reaffirmed the award to the joint venture on September 19, 2011. *Id.* An unsuccessful offeror filed a protest shortly thereafter challenging the

joint venture's size, and the CO adopted that protest as his own. *Id.* at 2 and n.3. On these facts, OHA determined that the district office had properly approved the JVA before the award became final, in accordance with 8(a) program requirements. *Id.* at 9-10.

*Trident*<sup>3</sup>, then, is inapposite here, as the decision did not address the question of protest timeliness following corrective action. If anything, *Trident*<sup>3</sup> suggests that the size protest likely would have been untimely absent the CO's intervention, thus further bolstering the Area Office's conclusion that Appellant's size protest was untimely.

As Dynamo correctly observes in its response to the appeal, even if OHA were to agree with Appellant that the May 13, 2022 award notification was invalidated by USDA's subsequent corrective action, the issue would be immaterial in this particular case, because Appellant's protest still would be untimely. Section II.F, *supra*. This is true because Appellant challenged Dynamo's size in conjunction with a task order, but the task order did not require recertification of size.

SBA regulations governing the time limits for filing size protests are found at 13 C.F.R. § 121.1004. Within this regulation, the portion relevant to the instant case is § 121.1004(a)(3), which pertains to size protests involving GSA Schedules and other long-term contracts.<sup>2</sup> *E.g.*, *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139 (2022).

Pursuant to § 121.1004(a)(3), an unsuccessful offeror may file a size protest relating to a long-term contract at only three junctures. First, an unsuccessful offeror may protest a size certification within five business days after the long-term contract is initially awarded. 13 C.F.R. § 121.1004(a)(3)(i). Second, an unsuccessful offeror may protest a size certification within five business days after an option is exercised. *Id.* § 121.1004(a)(3)(ii). Third, an unsuccessful offeror may protest a size certification involving an individual order, if the contracting officer requested size recertification in connection with that order. *Id.* § 121.1004(a)(3)(iii). Interpreting these provisions, OHA has repeatedly held that “SBA will not entertain a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with the order.” *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016) (quoting *Size Appeal of RX Joint Venture, LLC*, SBA No. SIZ-5683, at 3 (2015)).

Here, Appellant's size protest did not pertain to the award of the underlying GSA Schedule contract or to the exercise of an option. Accordingly, Appellant's size protest would have been timely only if it involved a task order that required recertification of size. *See* 13 C.F.R. § 121.1004(a)(3). The instant RFQ, though, did not contain language expressly instructing the BPA holders to represent, certify, or recertify their size for the task order. Section

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<sup>2</sup> The instant RFQ contemplated award of a task order under a group of BPAs which were established through the GSA Federal Supply Schedule (“GSA Schedule”) program. Section II.A, *supra*. SBA regulations stipulate, however, that a BPA “is not a contract.” 13 C.F.R. § 121.404(a)(2); *see also* 13 C.F.R. § 125.1 (defining meaning of the term “contract”). Accordingly, “a size protest on a BPA issued against a GSA Schedule contract is treated as a size protest on the GSA Schedule contract.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017).

II.A, *supra*. Although the task order was set aside for small businesses, OHA has long held that “merely setting [a] task order aside for small businesses” does not constitute a request for recertification. *RX Joint Venture*, SBA No. SIZ-5683, at 4 (quoting *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 23 (2010).) The fact that the RFQ incorporated by reference FAR clause 52.219-6, “Notice of Total Small Business Set-Aside (NOV 2020),” also is immaterial, as “recertification does not occur simply because mandatory FAR clauses were incorporated.” *Size Appeal of ReliaSource*, SBA No. SIZ-5536, at 4 (2014); *see also CodeLynx*, SBA No. SIZ-5720, at 6. The task order here, then, did not require recertification, and Appellant thus did not have the opportunity to protest Dynamo's size within five business days after award of that order.

#### IV. Conclusion

For the above reasons, the Area Office properly dismissed Appellant's size protest as untimely. The Area Office correctly concluded that Appellant did not file its protest within five business days after Appellant first learned of the award to Dynamo on May 13, 2022. Furthermore, even if the Area Office had erred on this point, Appellant's protest still would have been untimely because Appellant did not file the protest within five business days after award of an order that required recertification. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge