

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

SIZE APPEAL OF:

YKJY, LLC,

Appellant,

Appealed From
Size Determination No. 05-2023-018

SBA No. SIZ-6220

Decided: June 13, 2023

ORDER DISMISSING APPEAL¹

I. Background

On April 28, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2023-018, sustaining a size protest filed by Semper Valens Solutions, Inc. (Semper Valens) against YKJY, LLC (Appellant). Appellant received the size determination, via e-mail, at 10:06 a.m. on May 1, 2023. (E-mail from M. Fagley (May 1, 2023).) On May 16, 2023, Appellant transmitted copies of its appeal of the size determination to other interested parties. (E-mail from V. Hansen (May 19, 2023).) However, Appellant did not submit the appeal to SBA's Office of Hearings and Appeals (OHA) until May 19, 2023. (*Id.*)

Because the appeal appeared to have been filed at OHA more than 15 calendar days after Appellant's receipt of the size determination, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. In response, Appellant asserts that “[a]lthough this appeal was correctly addressed to OHAFilings, counsel for [Appellant] unintentionally and inadvertently did not email the [a]ppeal directly to OHAFilings@sba.gov” until May 19, 2023. (Response to Order at 2.)

Appellant urges that its delay in filing the appeal should be excused. (*Id.*, citing *Alexander v. Saul*, 5 F.4th 139 (2d Cir. 2021) (considering factors such as “the danger of prejudice” to other parties; “the length of the delay and its potential impact on the proceedings”; “the reason for the delay”, and whether the delay “was within the reasonable control of the movant”; and “whether the movant acted in good faith”).)

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

In the instant case, Appellant contends, there is unlikely to be any prejudice to opposing parties should OHA consider the merits of the appeal. All other interested parties were served copies of the appeal before the appeal deadline, and the impact to OHA also would be minimal. (*Id.* at 2-3.) Appellant maintains that its failure to timely file its appeal with OHA was unintentional rather than tactical. (*Id.* at 3.) Upon discovery of the mistake, Appellant acted in good faith by promptly filing the appeal with OHA. (*Id.*)

Appellant observes that there are related status protests pending against Appellant. (*Id.*, referring to *VSBC Protests of Beshenich Muir & Associates, LLC and ELB Services LLC*, Docket Nos. VSBC-2023-03-30-183 and VSBC-2023-03-30-186.) Dismissal of this size appeal may negatively impact Appellant's position in the status proceedings. (*Id.*)

On June 6, 2023, Semper Valens submitted comments in response to OHA's Order. Semper Valens highlights that “[b]ecause the appeal was untimely filed and because [OHA] has no authority to extend or modify the filing deadline under governing regulations, [Appellant's] appeal must be dismissed.” (Semper Valens Comments at 3.)

II. Discussion

Under OHA's rules of procedure, “[s]ize appeals must be filed within 15 calendar days after receipt of the formal size determination.” 13 C.F.R. § 134.304(a). An untimely appeal must be dismissed. *Id.* § 134.304(c). An appeal petition or other pleading is considered “filed” when it is received by OHA. *Id.* § 134.204(b). In addition to filing a pleading at OHA, a party also must serve copies of that pleading to other interested parties. *Id.* § 134.204(c). However, “service of other parties — including other offices within SBA — does not satisfy the requirement for filing.” *Size Appeal of Bid Solve, Inc.*, SBA No. SIZ-5906, at 1 (2018) (quoting *Size Appeal of NiSUS Techs. Corp.*, SBA No. SIZ-5513, at 2 (2013)). Applying these rules, OHA has repeatedly held that “[a]n appeal that is properly served [to other parties] but not timely filed [at OHA] must be dismissed as an untimely filed appeal.” *Size Appeal of Rod Robertson Enters., Inc.*, SBA No. SIZ-5808, at 1 (2017); *see also RBVetCo, LLC dba Rocky Bleier Constr. Group*, SBA No. SIZ-6154 (2022); *Size Appeal of Silvergate Pharms., Inc.*, SBA No. SIZ-5418 (2012); *Size Appeal of REES Group, Inc.*, SBA No. SIZ-5387 (2012).

In the instant case, there is no dispute that Appellant received the size determination on May 1, 2023. Section I, *supra*. Although Appellant served copies of its appeal to other parties within 15 calendar days after receipt of the size determination, Appellant did not file the appeal with OHA until 18 calendar days after receipt. *Id.* As a result, the appeal is untimely and must be dismissed.

Appellant maintains that the delay in filing its appeal with OHA was inadvertent and should be excused. Section I, *supra*. Although I sympathize with Appellant, SBA regulations afford OHA no discretion to extend, or waive, the deadline for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c). Accordingly, OHA has consistently rejected “excusable neglect” as a means to overcome an otherwise untimely appeal. *See Size Appeal of Red Orange N. Am., Inc.*, SBA No. SIZ-6121 (2021), *recons. denied*, SBA No. SIZ-6136 (2021) (PFR); *Size*

Appeal of Mid-Continent Group, LLC, SBA No. SIZ-6038 (2019); *NiSUS Techs.*, SBA No. SIZ-5513, at 2; *Silvergate Pharms.*, SBA No. SIZ-5418, at 2.

III. Conclusion

For the above reasons, the instant appeal is DISMISSED as untimely. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge