

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

SIZE APPEAL OF:

Allegheny Science & Technology
Corporation,

Appellant,

RE: Energy Technology Alliance LLC

Appealed From
Size Determination No. 06-2023-028

SBA No. SIZ-6241

Decided: August 29, 2023

APPEARANCES

Gordon Griffin, Esq., Hillary J. Freund, Esq., Kelsey M. Hayes, Esq., Richard Ariel, Esq., Holland & Knight LLP, Washington, D.C., for Appellant

Kenneth B. Weckstein, Esq., Shlomo D. Katz, Esq., Brown Rudnick LLP, Washington, D.C., for Energy Technology Alliance LLC

DECISION¹

I. Introduction and Jurisdiction

On June 7, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2023-028, dismissing a size protest filed by Allegheny Science & Technology Corporation (Appellant) against Energy Technology Alliance LLC (ETA). The Area Office determined that the protest was untimely. On appeal, Appellant contends that the Area Office erroneously dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is denied.

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

¹ 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.

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 December 28, 2022, the U.S. Department of Energy (DOE) issued Request for Quotations (RFQ) No. 89243423QEE000093 for scientific, engineering, and technical support services. The RFQ stated that DOE intended to award a single Blanket Purchase Agreement (BPA) under the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) program. (RFQ, SF 1449 at 1.)

The Contracting Officer (CO) set aside the procurement entirely for Women-Owned Small Businesses (WOSBs), and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with the exception for engineering services awarded under the National Energy Policy Act of 1992. (*Id.*) The RFQ contained no language expressly instructing offerors to certify, or re-certify, their size for the procurement.

On January 10, 2023, the CO issued RFQ Amendment 0002, which included a Questions and Answers (Q&A) document. The Q&A stated:

Q - To meet the certification requirements under [13 C.F.R.] § 121.404(g)(3)(iv), and ensure that only WOSBs that are under the \$41.5 million size standard are eligible for award will DOE require all companies to re-certify their small business size at the time of proposal submittal for NAICS Code 541330 with EPACT exception with a size standard of \$41.5 million?

A - Size representation will be verified by the acquisition team prior to evaluation of quote.

(Amendment 0002, Q&A at 3.)

Appellant and ETA submitted timely quotations. On May 16, 2023, the CO awarded the BPA to ETA.

B. Protest

On May 22, 2023, Appellant filed a protest with the CO challenging ETA's size. Appellant observed that ETA is a joint venture between Lindahl Reed, Inc. and Boston Government Services, LLC (BGS). (Protest at 5.) Lindahl Reed is an Economically Disadvantaged Women-Owned Small Business (EDWOSB), and BGS is Lindahl Reed's SBA-approved mentor under the All-Small Mentor-Protégé Program (ASMPP). (*Id.* at 6-7.)

Appellant alleged that ETA is not in compliance with ASMPP requirements. (*Id.* at 8-11.) More specifically, Appellant argued, ETA's joint venture agreement (JVA) likely does not

comport with 13 C.F.R. §§ 125.8 and 127.506. (*Id.* at 8.) Appellant maintained that ETA may have proposed a BGS employee as the responsible manager for the instant procurement. (*Id.* at 9.) Furthermore, Lindahl Reed, the protégé member of ETA, likely is unable to perform at least 40% of the substantive work done by the joint venture. (*Id.* at 9-10.) If the JVA does not meet SBA requirements, Lindahl Reed and BGS are affiliated for this procurement. As BGC is a large business, the combined receipts of Lindahl Reed and BGS exceed the size standard. (*Id.* at 11.)

C. Size Determination

On June 7, 2023, the Area Office issued Size Determination No. 06-2023-028, dismissing Appellant's size protest as untimely. The Area Office found that the underlying procurement contemplated the award of a BPA under a long-term contract, GSA Schedule contract 47QRAA22D0\$\$ G. (Size Determination at 2.) SBA regulations permit that a size protest may be filed only at three points during the life of a long-term contract: (1) within five business days after the long-term contract is initially awarded; (2) within five business days after an option is exercised; and (3) within five business days after the award of an individual order, if the CO requested recertification of size in connection with that order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3).)

Here, the CO confirmed to the Area Office that recertification was not required by the RFQ. (*Id.* at 3.) Therefore, Appellant's protest “is treated as a protest of the GSA FSS contract.” (*Id.*) ETA was awarded the contract in question on September 7, 2022. (*Id.*) To have been timely, then, any size protest was due by September 14, 2022. (*Id.*) Appellant did not actually file its protest until May 22, 2023, so the protest was untimely. (*Id.*)

D. Appeal

On June 22, 2023, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred in dismissing its protest as untimely because “the plain language of the [RFQ] required offerors to recertify their size status.” (Appeal at 2.)

Appellant maintains that the relevant provisions of a solicitation must be considered in determining whether recertification was required. (*Id.* at 6, citing *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022).) Although the CO's views are pertinent to the determination, they are not dispositive. (*Id.*) Here, the Area Office erred by relying solely on the CO's opinion without independently examining the relevant provisions of the RFQ. (*Id.* at 7.)

Appellant points to several provisions in the RFQ to support its contention that recertification was required. (*Id.*) First, the RFQ stated that “[t]o be considered for this requirement, the GSA Schedule Contractor must: 1) be a [WOSB], 2) have an active GSA schedule under NAICS Code 54133\$\$MI, *and* 3) be listed under the SBA's Exception #2 — Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992.” (*Id.*, quoting RFQ at 35 (emphasis added by Appellant).) Appellant argues that these conditions collectively required offerors to recertify. (*Id.*)

Furthermore, the RFQ required offerors to provide “[d]ocumentation verifying Schedule Contractor's and any of its team members, subcontractors, or consultants meet the small business size standard of the NAICS code, as applicable.” (*Id.*, quoting RFQ at 38.) According to Appellant, if DOE merely sought confirmation that an offeror was small at the contract level, then it would be redundant to ask for further documentation. (*Id.* at 8.) Appellant also considers the use of the word “meet” to suggest that offerors were required to demonstrate that they presently do not exceed the size standard, or in other words, to recertify. (*Id.*)

Lastly, Appellant highlights a DOE response in the Q&A document. (*Id.* at 9.) When asked a question about recertification, DOE stated that “[s]ize representation will be verified by the acquisition team prior to evaluation of quote.” (*Id.*, quoting Q&A at 3.) Appellant considers this response to be additional confirmation that recertification was required. (*Id.*)

Appellant concedes that the words “certify” or “recertify” did not appear in the RFQ, but maintains that the RFQ nonetheless required recertification. (*Id.*) Appellant points to *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013), where OHA found that a solicitation did not explicitly require recertification, but “included both a Schedule-level representation and also incorporated a requirement for current size into the Solicitation language.” (*Id.* at 9-10.) OHA should find that the instant RFQ likewise required recertification.

E. ETA's Response

On July 12, 2023, ETA responded to the appeal. ETA maintains that Appellant's size protest was correctly dismissed, because the RFQ was for a BPA against a GSA Schedule contract that was awarded eight months prior to Appellant's protest. (ETA's Response at 1.) Alternatively, ETA argues that Appellant's protest could have been dismissed as non-specific because it was “based entirely on unfounded speculation.” (*Id.*)

ETA, first, maintains that Appellant's size protest was untimely under SBA regulations. For long-term contracts, such as a GSA Schedule contract, a size protest may be filed at three junctures:

(i) Protests regarding size certifications made for contracts must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(ii) Protests regarding size certifications made for an option period must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the size certification made by the protested concern

(iii) Protests relating to size certifications made in response to a contracting officer's request for size certifications in connection with an individual order must

be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(*Id.* at 5-6, quoting 13 C.F.R. § 121.1004(a)(3).) Under this rule, a size protest may be timely filed only “when an agency has awarded a ‘contract’ or exercised an ‘option,’ or when a contracting officer has requested a size certification ‘in connection with an individual order.’” (*Id.* at 6.) OHA has held that a BPA is not a contract, an option, or an order. (*Id.*, citing *Size Appeal of Advanced Mgmt. Strategies Group, Inc./Reefpoint Group, LLC*, SBA No. SIZ-5905 (2018).) Rather, a size protest of a BPA issued against a GSA Schedule contract is considered a size protest of the underlying GSA Schedule contract. (*Id.*) It was public knowledge by September 8, 2022, that ETA had been awarded the GSA Schedule contract. (*Id.* at 2.) Thus, any size protest involving that award should have been filed no later than September 15, 2022. (*Id.*)

ETA disputes Appellant's claim that the instant RFQ required recertification. (*Id.* at 6.) The issue is immaterial, though, “because the reference to ‘recertification’ in SBA's timelines rules refers to ‘a contracting officer's request for size certifications *in connection with an individual order.*” (*Id.*, quoting 13 C.F.R. § 121.1004(a)(3)(iii) (emphasis added by ETA).) BPAs are not orders, so § 121.1004(a)(3)(iii) does not apply here. (*Id.*)

As for the cases relied upon by Appellant, ETA contends that these further show the Area Office did not err in its determination. In *Avenge*, unlike the instant case, the CO did request recertification for a task order, and the area office agreed with the CO that recertification was required. (*Id.* at 7.) *Metters* is distinguishable because that case involved an order rather than a BPA. (*Id.*)

Lastly, ETA argues that Appellant's protest could have been dismissed for lack of specificity. (*Id.* at 8.) SBA regulations require that a protestor must provide some basis for its allegations in its protest. (*Id.*, citing 13 C.F.R. § 121.1007(b).) Here, in ETA's view, Appellant's protest was based on nothing more than “gut feelings and unsourced rumors.” (*Id.*) Appellant merely speculated as to purported deficiencies in ETA's JVA without any supporting evidence. (*Id.*)

F. Supplemental Appeal

On July 13, 2023, the date of the close of record, Appellant supplemented its appeal with additional argument. Appellant reiterates its position that the RFQ required recertification. (Supp. Appeal at 3-4.) Appellant adds that recertification was required because the RFQ incorporated by reference Federal Acquisition Regulation (FAR) clause 52.212-1. (*Id.* at 4.) This provision instructs an offeror to include representations and certifications with its offer. (*Id.* at 5.)

Appellant maintains that its protest properly alleged that ETA's JVA does not comply with SBA regulations. (*Id.* at 6.) In particular, Appellant's protest was sufficiently specific by alleging that “(1) ETA proposed [a named BGS employee] as the Contract Manager in violation of 13 C.F.R. § 125.8(b)(2)(ii)(B) and (2) ETA cannot meet the performance [of] work

requirements in 13 C.F.R. § 125.8(c), because Lindahl Reed has no requisite substantive experience.” (*Id.*)

III. Discussion

A. 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).

B. Analysis

Appellant has not shown that the Area Office erred in dismissing Appellant's size protest as untimely. As a result, this appeal must be denied.

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. *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 within five business days after any of three events: (1) when the long-term contract is initially award; (2) when an option is exercised; or (3) upon award of a task or delivery order that required recertification.

In the instant case, there is no dispute that the RFQ called for the award of a BPA against a GSA Schedule contract. Section II.A, *supra*. As ETA emphasizes in its response to the appeal, OHA has long held that a BPA is not a “contract,” an “option,” or an “order.” *Size Appeal of Advanced Mgmt. Strategies Group, Inc./Reefpoint Group, LLC*, SBA No. SIZ-5905, at 5 (2018). Therefore, “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).

Because Appellant's size protest challenged the award of a BPA under the GSA Schedule program, the protest is treated as a protest of the underlying GSA Schedule contract. ETA was awarded its GSA Schedule contract in September 2022. Section II.E, *supra*. Appellant's size protest was not filed until May 2023, and thus was plainly untimely.

IV. Conclusion

The Area Office properly dismissed Appellant's size protest as untimely. 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