

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

SIZE APPEAL OF:

Magnolia Contracted Services,

Appellant,

RE: FreightWaves, Inc.

Appealed From  
Size Determination No. 03-2024-013

SBA No. SIZ-6296

Decided: July 16, 2024

APPEARANCES

Jennifer Malanga, Managing-Member, Magnolia Contracted Services, Crestview, Florida

Darwin A. Hindman III, Esq., Kseniya “Nicole” Kuprovskaya, Esq., Baker, Donelson,  
Bearman, Caldwell & Berkowitz, PC, Washington, D.C., for FreightWaves, Inc.

DECISION

I. Introduction and Jurisdiction

On May 24, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 03-2024-013, dismissing a protest filed by Magnolia Contracted Services (Appellant) against FreightWaves, Inc. (FreightWaves). The Area Office found that the protest was not specific. On May 30, 2024, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in dismissing the protest, and requests that SBA's Office of Hearings and Appeal (OHA) remand the matter for a new size determination. 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 15 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. The Solicitation

On April 26, 2024, the Federal Emergency Management Agency (FEMA) issued Request for Proposals (RFP) No. 70FA4024R00000010 for web-based software that analyzes global freight market conditions and trends. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and designated North American Industry Classification System (NAICS) code 513210, Software Publishers, with a corresponding size standard of \$47 million average annual receipts. (RFP, SF 1449.) Appellant and FreightWaves submitted timely offers. On May 15, 2024, FEMA notified unsuccessful offerors, including Appellant, that FreightWaves was the apparent awardee.

### B. Protest

On May 16, 2024, Appellant filed a protest with the CO. In its protest, Appellant complained about “the integrity of the procurement process” and asserted that FreightWaves is not small under the relevant size standard. (Protest at 1.)

Appellant argued, first, that FEMA's evaluation of Appellant's proposal was flawed. (*Id.*) Appellant should have received a rating of “Neutral” for Past Performance. (*Id.*) FEMA's confidence rating of Appellant's technical proposal likewise was inaccurate. (*Id.* at 1-2.)

With regard to FreightWaves, Appellant posited that FreightWaves likely exceeds the size standard of \$47 million. (*Id.* at 2.) In support, Appellant maintained that “FreightWaves has publicly reported revenue estimates in excess of \$49 million annually and has raised over \$90 million in venture capital.” (*Id.*)

### C. Size Determination

The CO forwarded Appellant's protest to the Area Office for review. On May 24, 2024, the Area Office issued Size Determination No. 03-2024-013, dismissing Appellant's protest as nonspecific. (Size Determination at 1.)

The Area Office found that Appellant's protest did “not include any information indicating how [FreightWaves] exceeds the size standard associated with the subject requirement.” (*Id.*) While Appellant asserted that FreightWaves' “publicly reported revenue estimates” exceed the size standard, Appellant offered no supporting evidence or specific facts to substantiate this claim. (*Id.*) As a result, the protest was nonspecific under 13 C.F.R. § 121.1007. (*Id.*) The Area Office declined to address Appellant's concerns with regard to FEMA's evaluation of proposals, explaining that a size determination is not the proper forum for such matters. (*Id.*)

### D. Appeal

On May 30, 2024, Appellant filed the instant appeal. Appellant acknowledges that it “failed to include documents in support of [its] position” with its size protest, but maintains that

the Area Office should have considered publicly-available evidence showing that FreightWaves is ineligible for award. (Appeal at 1.)

Appellant contends that its protest presented sufficient information to initiate a size determination. (*Id.* at 2.) Even though Appellant did not offer any supporting evidence or documentation, the applicable regulation — 13 C.F.R. § 121.1007(b) — does not necessarily require that a protestor do so. (*Id.*) Regardless, Appellant proffers an article describing FreightWaves' significant revenue growth, with 2022 fourth-quarter revenue amounting to \$13 million. (*Id.*) Assuming this is representative of other quarters, Appellant argues that FreightWaves likely exceeds the \$47 million size standard. (*Id.*) Another article asserts that FreightWaves is on track to generate \$50 million in revenue in 2024. (*Id.*) Lastly, Appellant notes and provides evidence that FreightWaves has raised over \$90 million in venture capital. (*Id.* at 3.) Appellant requests reversal of the size determination due to the newly-provided supporting documentation. (*Id.*)

#### E. FreightWaves' Motion

On June 28, 2024, approximately two weeks after the close of record, FreightWaves moved for leave to submit a late Response. There is good cause for OHA to permit a belated Response, FreightWaves maintains, because of “confusion caused by Appellant filing a duplicative size protest immediately prior to filing the subject appeal” and “lapses in communication due to email address misspelling and retirement of Freightwaves' Chief Legal Officer and record point of contact.” (Motion at 1.) FreightWaves did not include a proposed Response with the motion.

FreightWaves explains that, after the Area Office issued Size Determination No. 03-2024-013, Appellant submitted a renewed protest with more detailed allegations. (*Id.* at 3.) The Area Office dismissed the second protest as untimely. (*Id.*) Furthermore, FreightWaves did not receive either dismissal because both size determinations were directed to an incorrect e-mail address. (*Id.* at 3-4.) FreightWaves' Chief Legal Officer also was in the process of leaving FreightWaves, which hampered FreightWaves' ability to respond to the appeal. (*Id.* at 4.)

Appellant opposes FreightWaves' request, claiming that entertaining a belated Response would contravene OHA's rules of procedure, lack any justifiable cause, and prejudice Appellant. (Opp. at 1-3.)

I find that FreightWaves has not shown good cause to reopen the record and permit a belated Response. Notably, FreightWaves does not provide a proposed Response with its motion, but merely seeks leave to submit a Response in the future. Nor does FreightWaves' internal confusion about the two size protests justify reopening the record. Although FreightWaves maintains that it did not actually receive either dismissal, the record appears to indicate that Size Determination No. 03-2024-013 was, in fact, transmitted to FreightWaves' preferred e-mail address. (E-mail from G. Heard to D. Caputo (May 24, 2024).) Accordingly, FreightWaves' motion to reopen the record and permit a belated Response is DENIED.

### 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 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

SBA regulations require that a size protest must be specific, so as to provide reasonable notice of the grounds upon which the protested concern's size is challenged. 13 C.F.R. § 121.1007(b). A mere “alleg[ation] that the protested concern is not small” does not suffice. *Id.* The regulations set forth several examples of specific and nonspecific protests, including the following:

*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).

Based on the examples, it is clear that a proper size protest must not merely assert that the challenged concern is not small, but rather must present specific supporting facts which, if true, would render the concern other-than-small. As in Example 5, a bare allegation that a concern exceeds a revenue-based size standard, without any supporting basis or rationale, is insufficiently specific.

Here, Appellant's protest asserted, in conclusory form, that “FreightWaves has publicly reported revenue estimates in excess of \$49 million annually and has raised over \$90 million in venture capital.” Section II.B, *supra*. This allegation, though, lacked any supporting evidence or explanation, as in Example 5 discussed above. Nor did Appellant specify the time period to which its allegations pertained, or identify any source(s) that formed the basis for the allegations. Thus, the Area Office correctly dismissed the protest as nonspecific. *See, e.g., Size Appeal of Wilson Walton Int'l, Inc.*, SBA No. SIZ-6031 (2019) (affirming dismissal for lack of specificity when a protestor obliquely referred to “published information” but failed to identify its sources); *Size Appeal of JEQ & Co., LLC*, SBA No. SIZ-5932, at 2 (2018) (“Because [the] protest merely alleged that [the challenged firm] is not a small business without any supporting evidence or explanation, the Area Office correctly dismissed the protest as nonspecific.”).

On appeal, Appellant maintains that, had the Area Office conducted a more thorough review, the Area Office may have found FreightWaves to be other-than-small. Section II.D, *supra*. It is well-settled law, however, that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Bukkehave, Inc.*, SBA No. SIZ-5981, at 7 (2019) (quoting *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012)). Appellant's protest claimed that FreightWaves' “publicly reported revenue estimates” exceed the size standard, but Appellant failed to elaborate or to identify in its protest any specific evidence to support this claim. A nonspecific protest must be dismissed, and the Area Office was under no obligation to adopt Appellant's protest, or to launch an investigation in search of facts that might tend to corroborate Appellant's nonspecific protest. 13 C.F.R. § 121.1007(c); *Size Appeal of FreeAlliance.com, LLC*, SBA No. SIZ-6064 (2020).

Lastly, accompanying its appeal, Appellant offers more detailed information to support its original protest claims. Section II.D, *supra*. Appellant's attempt to cure its defective protest at this late juncture is fruitless. OHA cannot consider new evidence not first presented to the Area Office. 13 C.F.R. § 134.308(a); *Size Appeal of Herren Assocs., Inc.*, SBA No. SIZ-6282, at 3 (2024). Furthermore, given that Appellant, by its own admission, failed to provide the information in question to the Area Office, the Area Office could not have erred by not considering such information.

#### IV. Conclusion

Appellant has not shown that the Area Office committed any error in dismissing Appellant's protest as nonspecific. 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