

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

SIZE APPEAL OF:

Outdoor Venture Corporation

Appellant

Appealed from
Size Determination No. 3-2011-49

SBA No. SIZ-5232

Decided: May 17, 2011

ORDER DISMISSING UNTIMELY APPEAL¹

I. Background

On June 7, 2009, the Defense Supply Center Philadelphia issued Solicitation No. SPM1C1-09-R-041 (solicitation) for the manufacture and delivery of tents. The solicitation was a total small business set-aside. The solicitation was assigned North American Industry Classification System (NAICS) code 314912, Canvas and Related Product Mills, with a corresponding 500 employee size standard. On December 2, 2010, Outdoor Venture Corporation (Appellant) was awarded the contract.

On March 2, 2011, the Contracting Officer (CO) submitted a protest to the Small Business Administration (SBA) Office of Government Contracting, Area III, in Atlanta, Georgia (Area Office). On April 6, 2011, the Area Office issued Size Determination No. 3-2011-49 (size determination), which found Appellant to be other than small for the solicitation.

On April 26, 2011, the SBA Office of Hearings and Appeals (OHA) received a copy of Appellant's appeal petition, which disputed the Area Office's size determination. Because the appeal appeared to be untimely, I ordered Appellant to show cause why the appeal petition should not be dismissed.

On May 6, 2011, Appellant responded. Appellant explained that on April 21, 2011, it attempted to file the appeal via email, but initial efforts were unsuccessful due to the size of the file, which exceeded 200 pages.² Appellant then divided the appeal into three smaller emails, and received no indication of any transmission failure. On April 25, 2011, Appellant contacted OHA and learned that the appeal petition had not been received. Appellant then attempted to re-

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.

² By regulation, appeal petitions are limited to 20 pages, excluding attachments. 13 C.F.R. § 134.203(d)(2).

transmit one of the April 21, 2011 emails to OHA, which again was unsuccessful. Appellant also sent a "test" email to OHA, without any attachments, which was successful. Appellant then sent a paper copy of the appeal via overnight delivery to OHA, which was received April 26, 2011.

In arguing that the appeal should not be dismissed, Appellant emphasizes that it made a good-faith effort to submit the appeal within the fifteen-day deadline. Appellant further states that subsequent email exchanges between Appellant and OHA demonstrate that there is no inherent communication problem between the computer systems.

II. Discussion

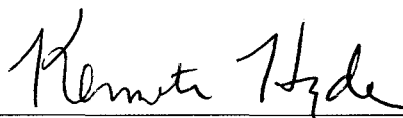
A party may appeal a size determination to OHA within fifteen calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on April 6, 2011. The fifteen-day deadline for filing an appeal was April 21, 2011. OHA received the instant appeal, via overnight delivery, on April 26, 2011, five days after the deadline. According to regulation, an appeal petition is not filed until it is actually received at OHA. 13 C.F.R. § 134.204(b). Therefore, the appeal is plainly untimely.

Appellant emphasizes that it attempted to submit the appeal by email before the deadline. Furthermore, although Appellant's attempted email transmissions were unsuccessful, Appellant states that it did not receive notice of transmission failure. While I sympathize with Appellant's situation, OHA has no discretion to waive the time limit for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c); *Size Appeal of Applied Tech., Inc.*, SBA No. SIZ-4682 (2005). Furthermore, when a filing is submitted by email, "[t]he sender is responsible for ensuring...a successful, virus-free transmission." 13 C.F.R. § 134.204(a)(1). Thus, by choosing to send its appeal by email, Appellant was responsible for ensuring successful delivery.

III. Conclusion

For the above reasons, I DISMISS the instant appeal as untimely.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).



KENNETH M. HYDE
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that, on May 17, 2011, I served the foregoing, by email upon the following:

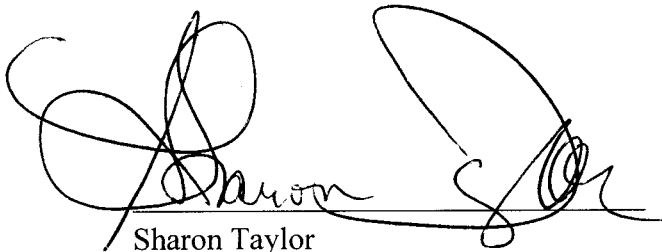
John Klein Esq.
Assoc. GC for Procurement Law
U.S. Small Business Administration
OPLService@sba.gov

Mitchell Morand, Area Director
Dina Inhulsen
U.S. Small Business Administration
Office of Government Contracting, Area III
Mitchell.Morand@sba.gov
Dina.Inhulsen@sba.gov

Maria Sesso-Punzo, Contracting Officer
Defense Logistics Agency
Maria.Sesso-Punzo@dla.mil

Joseph Weidenburner
Office of Counsel
Defense Logistics Agency
Joseph.Weidenburner@dla.mil

Marc Lamer
Kostos and Lamer, P.C.
Counsel for Outdoor Venture Corporation
Kostos_Lamer@msn.com

A handwritten signature in black ink, appearing to read "Sharon Taylor", written over a horizontal line. The signature is stylized and cursive.

Sharon Taylor
Office of Hearings and Appeals