

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

SIZE APPEAL OF:

Continental Solutions, Inc.,

Appellant,

Appealed From
Size Determination No. 2-2013-136

SBA No. SIZ-5508

Decided: October 30, 2013

ORDER DISMISSING APPEAL¹

I. Background

On December 31, 2012, the Department of Defense, National Guard Bureau issued Solicitation W9133L-13-R-006 for janitorial services at the Air National Readiness Center in Maryland. The Contracting Officer (CO) set aside the procurement entirely for participants in the U.S. Small Business Administration (SBA) 8(a) Business Development program, and designated North American Industry Classification System code 561720, Janitorial Services, with a corresponding \$16.5 annual receipts million size standard.

Offers were due February 15, 2013. The CO notified unsuccessful offerors between July 29, 2013 and August 1, 2013, that Continental Solutions, Inc. (Appellant) was the apparent successful offeror. On August 2, 2013, Spotless Janitorial Services, Inc. (Spotless), an unsuccessful offeror, protested Appellant's size. Spotless alleged that Appellant was affiliated with TK Services, Inc. (TK) and that Appellant had no experience performing custodial services.

On September 13, 2013, SBA's Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-136 by email. The Area Office found Appellant was affiliated with TK based on the ostensible subcontractor rule. Although Appellant's average annual receipts were within the size standard, TK's receipts "clearly exceeded" the \$16.5 million size standard. Therefore, when Appellant's annual receipts were combined with those of TK, Appellant was not an eligible small business. The Area Office also sent a copy of the size determination via U.S. Mail.

On October 11, 2013, the SBA Office of Hearings and Appeals (OHA) received Appellant's appeal of the size determination. The regulations governing size appeals require that

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.

an appeal must be filed within 15 days after an appellant receives the size determination. 13 C.F.R. § 134.304(a). Appellant represented it received the size determination by U.S. Mail on September 27, 2013, but did not indicate when it received the email. Because the appeal was filed at OHA 28 days after the Area Office emailed the size determination to Appellant, the appeal appeared untimely. Accordingly, on October 22, 2013, OHA directed Appellant to show why the appeal should not be dismissed as untimely.

Appellant responded to the Order to Show Cause on October 25, 2013. Appellant argues it did not receive the size determination prior to September 27, 2013. Thus, the appeal was timely filed.

II. Discussion

The instant appeal is untimely and must be dismissed. In accordance with 13 C.F.R. § 134.304(a), a size appeal must be filed at OHA within fifteen days of receipt of the size determination. Here, the record clearly demonstrates that the Area Office transmitted the size determination to Appellant by email on September 13, 2013. The record contains confirmation of completed email delivery to Mr. Shin Kim, Appellant's president, at the same email address to which OHA sent the Order to Show Cause. In light of this evidence, it is reasonable to infer that Appellant received the size determination on September 13, 2013. *See In the Matter of Handan Container Servs., Inc.*, SBA No. EDWOSB-101, at 4 (2012) (holding that, although there was no definitive proof that the applicant received SBA's fax, confirmation that the fax was successfully transmitted to the applicant meant the applicant was deemed to have received it). Accordingly, Appellant's statement that it did not receive the size determination prior to September 27, 2013, is not credible, and the appeal is untimely. OHA has no discretion to waive, or extend, the deadline for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c); *Size Appeal of Autonomic Resources, LLC*, SBA No. SIZ-5453 (2013).

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).

CHRISTOPHER HOLLEMAN
Administrative Judge