

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

SIZE APPEAL OF:

Osprey Technology Solutions, Inc.,

Appellant,

RE: Junius Dion d/b/a Risen Video
Production

Appealed From
Size Determination No. 06-2021-046

SBA No. SIZ-6102

Decided: June 9, 2021

APPEARANCES

Jason W. Moy, Esq., Carol A. Thompson, Esq., Federal Practice Group, Washington, D.C., for the Appellant

DECISION

I. Introduction and Jurisdiction

On April 12, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2021-046, dismissing a size protest filed by Osprey Technology Solutions, Inc. (Appellant) against Junius Dion d/b/a Risen Video Production (Risen). The Area Office concluded that the protest was untimely. On appeal, Appellant maintains that the deadline for filing a size protest should be extended, because the procuring agency took actions suggesting that the award decision was being reconsidered. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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 fifteen days after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). A timely appeal, however, “cannot cure an untimely protest.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017).

II. Background

A. Solicitation and Protest

On January 27, 2021, the U.S. Department of the Army (Army) issued Request for Quotations (RFQ) No. W81K0021Q0047 for Intraoperative Neurophysiological Monitoring Services at Brooke Army Medical Center, Fort Sam Houston, Texas. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 622110, General Medical and Surgical Hospitals, with a corresponding size standard of \$41.5 million in average annual receipts. Quotations were due March 1, 2021. Appellant and Risen submitted timely quotations.

By letter dated March 25, 2021, the CO informed Appellant that Risen had been awarded the contract. On April 7, 2021, Appellant filed a size protest against Risen with the CO. The protest alleged that Risen is affiliated with a subcontractor under the ostensible subcontractor rule, and therefore does not qualify as a small business. (Protest at 3-7.) In the protest, Appellant acknowledged that a size protest ordinarily “must be filed within 5 business days of the unsuccessful offeror being notified of the awardee's identity.” (*Id.* at 2, citing 13 C.F.R. § 121.1004(a)(2).) Such time limits, though, would not apply to a protest brought by the CO. Appellant requested that the CO adopt the protest. (*Id.*) The CO forwarded the protest to the Area Office for review.

B. Size Determination

On April 12, 2021, the Area Office issued Size Determination No. 06-2021-046, dismissing Appellant's protest as untimely pursuant to 13 C.F.R. § 121.1004. The Area Office found that Appellant learned that Risen was the awardee on March 26, 2021. (Size Determination at 2.) Appellant's size protest was due within five business days, by April 2, 2021. (*Id.*) The protest was not actually filed until April 7, 2021, and therefore was untimely. (*Id.*)

C. Appeal

On April 27, 2021, Appellant filed the instant appeal. Appellant contends that the Area Office erred in dismissing the size protest as untimely, because the Army took actions after award notification which were inconsistent with the award notification. (Appeal at 5.)

Appellant asserts that, on March 30, 2021, the CO opened discussions with Appellant about a sole-source bridge contract. (*Id.* at 4.) On April 14, 2021, Appellant was awarded a bridge contract covering the month of April 2021 with an option to continue through May 2021. (*Id.*) On April 15, 2021, the CO confirmed that the Army intended to exercise the May 2021 option. (*Id.*) The dates of the bridge contract are within the period of performance of the contract awarded to Risen. (*Id.*)

Appellant contends that awarding a bridge contract to Appellant is inconsistent with the award to Risen, because it suggests that the Army's evaluation of quotations was not yet complete. (*Id.* at 5.) An award notification will not trigger the deadline for filing a size protest

when “the procuring agency subsequently takes actions that are inconsistent with that award notification.” (*Id.*, quoting *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-5979, at 4 (2018).) Appellant posits that the Army offered a bridge contract to Appellant because Risen lacks the necessary personnel to perform the contract. (*Id.*)

With the appeal, Appellant filed a motion to introduce new evidence concerning the bridge contract. (*Id.* at 6.) There is good cause for OHA to accept the new evidence, Appellant maintains, because the bridge contract was awarded to Appellant on April 14, 2021, after Appellant's size protest already had been dismissed. Appellant thus could not have presented the new evidence to the Area Office. Furthermore, the new evidence is relevant to the question of protest timeliness, because it shows that the Army took actions after award notification which were inconsistent with that award. (*Id.*)

III. Discussion

I find no merit to this appeal. The Area Office determined — and Appellant does not dispute — that Appellant learned that Risen was the awardee of the instant contract on March 26, 2021. Sections II.A and II.B, *supra*. Appellant's size protest was due within five business days, by April 2, 2021. 13 C.F.R. § 121.1004(a)(2). Appellant did not actually file its protest until April 7, 2021, and the Area Office therefore correctly dismissed the protest as untimely.

On appeal, Appellant maintains that, by awarding a short-term bridge contract to Appellant, the Army took actions inconsistent with an award to Risen, and thereby extended the deadline to bring a size protest. This argument fails for two reasons. First, contrary to Appellant's claims, it is unclear that Appellant could not have voiced this argument to the Area Office. Indeed, Appellant itself acknowledges that the Army contacted Appellant about a bridge contract on March 30, 2021, well before Appellant's protest was filed. Section II.C, *supra*. Appellant, though, did not mention the bridge contract in its protest, nor did Appellant otherwise advance any argument about the bridge contract to the Area Office. Section II.A, *supra*. By regulation, OHA cannot adjudicate issues that could have been, but were not, raised during the size review. 13 C.F.R. § 134.316(c); *see also Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 13 (2016). It thus appears questionable whether Appellant's argument concerning the bridge contract is properly before OHA.

Second, and more fundamentally, the award of a bridge contract to Appellant does not by itself connote that the Army must have been reconsidering the award to Risen. The purpose of a bridge contract is simply to avoid a lapse in service caused by a delay in awarding a subsequent contract. *See generally* 10 U.S.C. § 2329(g). Such delays may be occasioned by any number of factors, and it therefore does not follow that the procuring agency necessarily is revisiting an award decision. Notably, in prior cases where OHA has concluded that a procuring agency's actions were inconsistent with an award notification, the procuring agency took unequivocal steps such as canceling the award, obtaining new proposals, or reopening discussions. *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-5979 (2018); *Size Appeal of Hale Laulima, LLC*, SBA No. SIZ-5750 (2016). Appellant has not pointed to any comparable actions by the Army in the instant case.

IV. Conclusion

Appellant has not established any error of fact or law in the size determination. Accordingly, I DENY the instant appeal and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge