

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

SIZE APPEAL OF:

Radiant Infotech, LLC,

Appellant,

RE: Softrams, LLC

Appealed From
Size Determination No. 02-2024-019

SBA No. SIZ-6279

Decided: April 23, 2024

APPEARANCES

Michael Bhargava, Esq., Sam Van Kopp, Esq., Nichols Liu LLP, Washington, D.C., for Radiant Infotech, LLC

David B. Dixon, Esq., Toghrul M. Shukurlu, Esq., Aleksey R. Dabbs, Esq., Pillsbury Winthrop Shaw Pittman, LLP, McLean, Virginia, for Softrams, LLC

DECISION¹

I. Introduction and Jurisdiction

On February 7, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determination No. 02-2024-019, dismissing a size protest filed by Radiant Infotech, LLC (Appellant) against Softrams, LLC (Softrams). The Area Office found that Appellant lacked standing to protest. On appeal, Appellant contends that the Area Office improperly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand 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 received the size determination on February 9, 2024, and filed the instant appeal within 15 days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

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.

II. Background

A. Procurement and Protest

On November 8, 2023, the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) invited Softrams to submit a proposal for “a Firm Fixed Price sole-source contract under the SBA 8(a) program.” (Letter from Y. Kelly to A. Kanthamani (Nov. 8, 2023), at 1.) On December 20, 2023, CMS awarded Contact No. 75FCMC24C0008 to Softrams.

On January 16, 2024, Appellant filed a size protest against Softrams, alleging that Softrams is not small under a \$34 million size standard. Appellant explained that it previously had been awarded a contract for similar services in March 2022. (Protest at 2.) In October 2023, however, CMS informed Appellant that CMS did not intend to exercise the options on Appellant's contract. (*Id.*) Subsequently, “[o]n January 3, 2024, [Appellant] learned that the apparent reason [CMS] declined to exercise its option period was because [CMS] had instead sole-sourced that same work to another 8(a) company, Softrams.” (*Id.*)

Appellant acknowledged that “SBA's regulations do not contemplate size protests by 8(a) small business concerns, like [Appellant], challenging the size of an awardee of an 8(a) sole source contract.” (*Id.* at 1.) Nevertheless, the Contracting Officer (CO) and certain SBA officials have authority to bring such a challenge. (*Id.*, citing Federal Acquisition Regulation (FAR) 19.814 and 13 C.F.R. § 121.1001(b)(2)(ii).) Appellant urged that the CO should “lodge a size protest against Softrams; adopt [Appellant's] protest grounds as [her] own; and supplement [her] size protest with information from Softrams's response to the sole source solicitation (its proposal) and any other information, which will assist the SBA in making a timely determination and ensure the integrity of the procurement process.” (*Id.*) “SBA should likewise lodge its own size protest of Softrams and adopt [Appellant's] protest grounds as well.” (*Id.*)

On January 17, 2024, the CO forwarded Appellant's protest to the Area Office for review. The CO highlighted that the contract was awarded to Softrams on a sole-source basis through the 8(a) program. (Memo from Y. Kelly, at 1.) The CO did not adopt Appellant's size protest, nor initiate her own size protest against Softrams.

B. Size Determination

On February 7, 2024, the Area Office issued Size Determination No. 02-2024-019, dismissing Appellant's size protest for lack of standing. The Area Office found that, according to SBA regulations, “[t]he size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.” (Size Determination at 1, quoting 13 C.F.R. § 124.517(b).) Similar language is repeated at FAR 19.813(b) and 13 C.F.R. § 121.1001(b)(2)(ii). (*Id.* at 2.) Furthermore, “OHA case law has been clear that other firms may not [challenge] the size status of a firm selected for an 8(a) sole source award.” (*Id.*, citing *Size Appeal of GovSmart, Inc.*, SBA No. SIZ-5894 (2018).)

C. Appeal

On February 23, 2024, Appellant filed the instant appeal. Appellant complains that the Area Office dismissed Appellant's protest "without examining Softrams' size eligibility for the 8(a) sole source award." (Appeal at 5.) In Appellant's view, "the SBA's (and the [CO's]) decision not to lodge a size protest, or adopt [Appellant's] protest letter, amounts to an abuse of discretion." (*Id.*)

Appellant renews its protest contention that, based on publicly-available information, Softrams is "a large business" which "greatly exceeds" the applicable \$34 million size standard. (*Id.* at 3.) Indeed, in its protest, Appellant included "a chart showing government data front and center, demonstrating Softrams' total prime contract funding obligations - *i.e.*, excluding subcontract and other revenues - for the preceding five fiscal years in question surpassed \$259,793,972." (*Id.* at 6.) This data "placed Softrams' five-year average annual receipts, at minimum, at \$51,958,794,40." (*Id.*) Furthermore, Appellant forwarded copies of its protest to several SBA officials in addition to the CO. (*Id.* at 3 fn.1.) Because Appellant's protest put the CO and SBA and "on clear and unequivocal notice" that Softrams is not small, OHA should conclude that they "abused their discretion by not lodging (or adopting) a size protest against" Softrams. (*Id.* at 7.)

Appellant asserts that the CO and SBA enjoy "broad - but not unfettered - discretion" in deciding whether to protest the size of an 8(a) sole-source awardee. (*Id.* at 8 fn.3.) In support, Appellant points to OHA's decision in *Size Appeal of Cabrini Medical Center*, SBA No. SIZ-4610 (2004). Appellant reasons:

In [*Cabrini*], OHA determined there was not a "clear error or abuse of discretion" where it recognized that the agency exercised discretion in applying the existing size standards to all disaster loan applicants. In making that finding, OHA stated that the fact that "there is permissive language in [the underlying regulation] which broadens the Agency's discretion in applying size standards weakens rather than strengthens Appellant's case." That is not the case here. As explained above, while the SBA's regulations under Title 13 of the Code of Regulations give SBA (and the [CO]) the authority to lodge - and to adopt - a size protest against a putative sole source awardee, that language necessarily is cabined by the Small Business Act, which provides that set-aside sole source contracts *must* go to small business concerns. 15 U.S.C. § 637(a)(16)(A).

(*Id.* at 7-8 (internal citation omitted) (emphasis Appellant's).) Accordingly, SBA's and the CO's inaction "were clearly erroneous or amounted to an abuse of discretion, or both." (*Id.* at 9.)

D. Softrams' Response

On March 12, 2024, Softrams responded to the appeal. Softrams contends that the appeal is meritless for three principal reasons. First, Appellant does not dispute the Area Office's finding that Appellant lacked standing to protest the size of an 8(a) sole-source awardee, nor does Appellant attempt to explain how it would have standing. (Response at 2-3.) In Softrams' view,

Appellant's lack of standing is “indisputable.” (*Id.* at 3, citing *Size Appeal of GovSmart, Inc.*, SBA No. SIZ-5894 (2018).) Appellant's size protest could also have been dismissed as untimely, because Appellant concedes that it first learned of the award to Softrams on January 3, 2024 yet Appellant did not file its size protest within five business days. (*Id.*)

Second, OHA has no jurisdiction to review a decision by SBA officials or the CO not to initiate a size protest. (*Id.* at 4.) Such matters are not addressed in the instant size determination, nor included in 13 C.F.R. § 134.102, which sets forth “[t]he exclusive list of the types of proceedings that OHA has jurisdiction to conduct.” (*Id.*) Furthermore, in *Size Appeal of FreeAlliance.com, LLC*, SBA No. SIZ-6064 (2020), OHA rejected the argument that an area office “should have adopted” a size protest because its “inaction could result in a large business obtaining a contract intended for small businesses.” (*Id.* at 5-6.) OHA emphasized that “the decision to bring, or adopt, a size protest is *reserved* to the discretion of the area office.” (*Id.* at 6, quoting *FreeAlliance.com*, SBA No. SIZ-6064, at 8 (emphasis added by Softrams).)

Lastly, and contrary to the premise of the appeal, Appellant has not shown that refusal to bring a size protest against Softrams was “clearly erroneous” or even unreasonable. (*Id.* at 6-8.) Softrams maintains:

[Appellant's] Size Protest made the fatal mistake of equating “obligations” under Softrams' prime contracts with Softrams' actual “receipts.” Just because \$259,793,972 was obligated to Softrams' prime contracts between 2018 and 2023, however, does not mean that Softrams recognized \$259,793,972 in revenue from these contracts between 2018 and 2023. It simply means that the agencies of the Federal Government allocated \$259,793,972 to these contracts between 2018 and 2023. . . . The fact that money is obligated in a given year does not prove, or even imply, that a company recognized that funding as revenue in the same year. Indeed, Softrams may never recognize some of the obligations as actual revenue, as funding is routinely deobligated from prime contracts because it is not spent.

(*Id.* at 7.)

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

As Appellant itself conceded in its size protest, SBA regulations do not permit a private party, such as Appellant, to challenge the size of the awardee of an 8(a) sole source contract. SBA regulations thus stipulate that “[t]he size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.” 13 C.F.R. § 124.517(b). Similar language is repeated at FAR 19.813(b). Furthermore, regulations applicable to size protests instruct that, for an 8(a) sole-source award, only the CO, certain SBA officials, and the 8(a) awardee itself are authorized to request a size determination. 13 C.F.R. § 121.1001(b)(2)(ii); FAR 19.814(a).

In the instant case, the procurement in question was a sole-source award to Softrams through the 8(a) program. Section II.A, *supra*. The Area Office therefore correctly dismissed Appellant's protest for lack of standing. *Size Appeal of GovSmart, Inc.*, SBA No. SIZ-5894, at 5-6 (2018).

On appeal, Appellant does not dispute that it lacked standing to protest Softrams' size. Section II.C, *supra*. Instead, Appellant maintains that the CO and/or SBA should have initiated their own size protests against Softrams, or should have adopted Appellant's size protest. *Id.* This line of argument, however, is unpersuasive for several reasons. First, contrary to Appellant's suggestions, the decision to request a size determination of an 8(a) sole-source awardee is wholly discretionary. The applicable regulations thus indicate that the CO and certain SBA officials “may” choose to file such a request, but have no obligation to do so. 13 C.F.R. § 121.1001(b)(2)(ii); FAR 19.814(a). Second, although Appellant contends that the CO and SBA abused their discretion by electing not to file a size protest against Softrams, Appellant has not demonstrated that such a choice was clearly erroneous or even unreasonable. As Softrams correctly observes, mere reference to the value of contracts awarded to Softrams over the period 2018-2022 does not establish that Softrams generated actual receipts corresponding to these totals. Section II.D, *supra*. Third and finally, Appellant has not shown that an OHA size appeal is the appropriate mechanism to review allegations of abuse of discretion by the CO or by SBA officials responsible for administering the 8(a) program. Although OHA does have jurisdiction to adjudicate “[a]ppeals from size determinations . . . under part 121 of this chapter” pursuant to 13 C.F.R. § 134.102(k), the alleged abuse of discretion by the CO or by 8(a) program officials is not an issue addressed in the instant size determination, nor an issue over which an SBA Area Office has any control. Notably, SBA Area Directors are not among those SBA officials authorized to request a size determination of an 8(a) sole-source awardee. 13 C.F.R. § 121.1001(b)(2)(ii); FAR 19.814(a).

IV. Conclusion

Appellant has not demonstrated any error in the size determination. 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