United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Team CSI Joint Venture, LLC, Appellant RE: AccelGov, LLC Appealed From Size Determination No. 02-2024-045	SBA No. SIZ-6335 Decided: February 11, 2025

APPEARANCES

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DECISION

I. Introduction and Jurisdiction

On June 20, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2024-045, dismissing a size protest filed by Team CSI Joint Venture, LLC (Appellant) against AccelGov, LLC (AccelGov). The Area Office determined that the protest was untimely. On appeal, Appellant contends that the Area Office erroneously dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is denied.

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). 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. The RFP

On March 2, 2016, the Defense Information Systems Agency (DISA) issued a Request for Proposals (RFP) No. HC102818D0035, for ENCORE III IT Solutions, an Indefinite-Delivery/Indefinite-Quantity (ID/IQ) Multiple Award Contract (MAC).

In September 2018, the Defense Information Systems Agency (DISA) issued ENCORE III Small Business (ENCORE III SB), an Indefinite-Delivery/Indefinite-Quantity (ID/IQ) Multiple Award Contract (MAC), No. HC102818D0035, set aside entirely for small businesses. The Encore III SB sought contractors to perform information technology (IT) solutions for the development, installation, fielding, training, operation and life-cycle management of components and systems in the operational environments of Combatant Commands and their subordinate components, the military services, Defense agencies, Office of the Secretary of Defense (OSD) and other Federal agencies. (Encore III SB, at 19.)

On January 10, 2024, the Contracting Officer (CO) issued Task Order NDU EITSS, under ENCORE III SB with a Tracking No. 642369727, set-aside for small businesses. The CO assigned North American Industry Classification System (NAICS) code 541519, Other Computer Related Services, with a corresponding $34 million annual receipts size standard. Proposals were due February 9, 2024. (RFP; Protest Exhibit B, at 5-6.) AccelGov and Appellant submitted timely offers.

B. Protest

On May 1,2024, Appellant learned that AccelGov was one of the apparent awardees. (*Id.*) On May 8,2024, Appellant filed a protest challenging AccelGov's size.

In the protest, Appellant alleged that AccelGov was outside of the two-year rule and no longer deemed small, rendering it ineligible to compete for the current task order and to receive through novation the ENCORE III SB parent contract. Appellant explained that the two-year rule allows small-business and large-business partners in an Mentor Protege Joint Venture (MPJV), such as AccelGov to compete for or receive by novation new contracts as a small business for only two years after it wins its first contract. (Protest, at 7.) Appellant argued that because AccelGov won its first contract on July 14, 2021, it was outside of the two-year period and deemed an other-than-small business ineligible for the instant task order and ENCORE III SB contract when it (1) submitted an offer for the task order by February 9, 2024 and (2) was novated to the contract on August 28, 2023. (*Id.*, at 8-9.)

C. Contracting Officer's Referral

The CO forwarded the protest to the Area Office for review. Accompanying the size protest, the CO stated that the instant Task Order contemplated the award of task orders under a group of long-term contracts, ENCORE III Small Business HC1028-18-D-0035, and that "[n]o explicit size certification [was] required" for the task order. (Size Protest Intake Sheet, at 2.)

D. Size Determination

On June 5, 2024, the Area Office dismissed the protest as untimely, finding the protest was not filed in a timely manner as required by 13 C.F.R. § 121.1004(a). The Area Office explained that the subject solicitation is a Task Order under the ENCORE III SB, multiple award ID/IQ contract vehicle, which is the long-term contract. The Area Office noted the three occasions to file a size protest relating to such a contract under 13 C.F.R. § 121.1004(a)(3)(i)-(iii). First, an interested party may protest a size certification within five business days after the long-term contract is initially awarded. Second, an interested party may protest a size certification within five business days after an option is exercised. Third, an interested party may protest a size certification made "in response to a contracting officer's request for size certifications in connection with an individual order." The Area Office concluded that SBA will not entertain a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with the order. (Size Determination, at 1-2, citing *Size Appeal of EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139 (2022).)

In this case, the Area Office concluded that there was no regulatory requirement for recertification at the order level as the Encore III Small Business IDIQ is a small business set-aside multiple award contract with a single NAICS code, citing 13 C.F.R. § 121.404(a)(l)(i)(B). Thus, the Area Office found the issue is whether the CO requested recertification for the subject procurement. If the CO requested recertification, 13 C.F.R. § 121.1004(a)(3)(iii) would allow protestors to protest a challenged concern's certification in connection with the task order. Upon review of the task order, contract amendments, and information provided by the CO, the Area Office found recertification was not a requirement at the task order level. Size was determined at the basic contract level. (*Id.*, at 2.)

The Area Office therefore concluded AccelGov's size was to be determined at the time it submitted its offer, or in this case novation request, for the base contract. Thus, AccelGov was still considered a small business for this procurement. The Area Office further noted that the inclusion of language in the solicitation to indicate that the award would be limited to small businesses does not constitute a recertification requirement, and that recertification is not required simply because mandatory FAR clauses were incorporated. Consequently, the Area Office dismissed Appellant's protest as untimely. (*Id.*, at 2-3, citing *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010).)

E. Appeal

On June 20, 2024, Appellant filed the instant appeal. Appellant asserts that the Area Office committed error of law relating to the novation of the ENCORE III SB contract and OH A should therefore remand the matter to the Area Office for a new size determination on the merits. (Appeal, at 6-7.)

Appellant first contends that Appellant timely protested the size of AccelGov as it relates to the NDU EITSS task order and its parent long-term contract, ENCORE III SB. Appellant explains that the Area Office dismissed the size protest for timeliness as to the NDU EITSS task

order; however, as to the size protest against the ENCORE III SB parent contract, the Area Office merely stated that "size would be determined when AccelGov submitted its offer, or in this case novation request, for the base contract." (*Id.*, at 7, citing Size Determination at 2.) By "[e]liding the timeliness of the size protest regarding the contract, the Area Office indicated that Appellant should have submitted the protest at the time when the novation took place." (*Id.*) However, Appellant argues that it timely submitted the size protest as to the contract novation under the regulations, which require filing within five business days of the receipt of notice about the contract novation, not five business days after the novation itself. (*Id.*, at 7-8, citing 13 C.F.R. §§ 121.1004(a)(3)(i), 121.10004(a)(5).)

Thus. Appellant argues it was error for the Area Office to ignore the timeliness of (or indicate the untimeliness of) the size protest as to AccelGov's size for the novation of the ENCORE III SB contract. (*Id.*, at 8.) As the Area Office noted, AccelGov's size for this procurement would have been determined when the novation for the parent ENCORE III SB contract took place. (*Id.*) Under the regulations, the proper time for Appellant to protest AccelGov's size as to the novation would have been five business days "after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award." 13 C.F.R. § 121.1004(a)(3)(i).

Appellant states that when the ENCORE III SB novation took place, however, Appellant received no written, oral, or electronic notification of the fact. In particular, no regulation exists to require a procuring agency to make novation public or notify interested parties. As such, there is no public information that notifies any potentially interested third parties of the fact that AccelGov was awarded, or novated to, the ENCORE III SB contract. Without a notice of the novation, Appellant simply could not have submitted a size protest within five business days—or at any time close to—the novation. (*Id.*, at 8-9.)

Because there was no requirement for the Agency to provide a notice relating to the novation at any time, and Appellant did not receive such a notice, Appellant claims the applicable timeliness rule is the one governing situations in which there is no notice of award. *See* 13. C.F.R. § 121.1004(a)(5). Under such rule, where there is no requirement for award notice, the five-business-day protest period begins only upon "oral notification by the contracting officer . . . or [notification by] another means (such as public announcement or other oral communications) of the identity of the apparent successful offeror," or the novatee in this case. Here, the "public announcement" by which Appellant received notice as to the identity of AccelGov as the novatee was the Agency's May 1, 2024 notice that the NDU EITSS task order was being awarded to AccelGov. Because the task order was open only to offerors who hold an ENCORE III SB contract, the Agency's post-award notice constructively notified Team CSI JV that AccelGov held the contract. (*Id.*, at 9, citing RFP, Protest Exh. B.) It is only because of this notice that Appellant also learned through publicly available information that AccelGov obtained ENCORE III SB via novation on August 28, 2023, in violation of the Two-Year Rule. Because it was not until the Agency issued the post-award notice for the task order on May 1, 2024 that Appellant received notice of AccelGov's novation of ENCORE III SB, the proper time to protest AccelGov's size as to ENCORE III SB was within five business days of that notice, on May 8, 2024. (*Id.*)

With the timeliness of the size protest relating to the NDU EITSS task order, Appellant contends the Area Office improperly ignored the second prong of the protest relating to the novation of ENCORE III SB contract. When the novation took place, no regulation prompted the Agency to issue a notice to Appellant or any other interested party that AccelGov received the contract. Under the relevant timeliness rule, Appellant submitted a timely size protest as to the novation within five business days of notice that revealed the identity of AccelGov as the novatee. Therefore, OHA must overturn the dismissal and remand to the Area Office for a decision on the merits. (*Id.*, at 10.)

Next, Appellant argues that dismissing protests regarding novated contracts for timeliness would effectively disarm the two-year rule on Mentor Protege Joint Venture (MPJV) contracting without undergoing the proper rulemaking process. (*Id.*) Appellant maintains the Area Office's restrictive reading of the timeliness rules would effectively bar private parties from challenging the size status of MPJVs that obtain contracts by novation beyond the two-year period. This would ultimately allow MPJVs to indefinitely exploit the small business status and evade review, which is inconsistent with the stated purpose of the two-year rule to limit the purpose and duration of joint ventures between small and large businesses. Furthermore, upholding the Area Office's dismissal would mean that novations are no longer covered under the two-year rule, effectively modifying the rule without the statutorily-mandated rulemaking process.

In Appellant's view, OHA, following federal courts' rule of statutory and regulatory interpretation, must construe SBA size regulations to be "consistent with each other." (*Id.*, at 11, citing *Size Appeal of Guam Oil & Refining Co., Inc.*, SBA No. SIZ-2120 (1985) (although a rule did not require SBA to combine the production capacities of the contractor and its affiliates to determine the contractor's size, OHA ruling that the affiliates' and contractor's production capacity must be combined for consistency with other size calculation rules based on number of employees and annual receipts); *see Loui* v. *Merit Sys. Protection Bd.*, 25 F.3d 1011, 1013 (Fed. Cir. 1994) (in a case involving "the interplay between the two regulations," finding that they "must be construed to be consistent with each other"); *see also Boose v. Tri-Cnty. Metropolitan Transp. Dist. of Oregon*, 587 F.3d 997, 1004 (9th Cir. 2009) (in a case involving DOT regulations implementing the Rehabilitation Act, reading "the DOT regulations to be consistent with each other"). (*Id.*, at 11.) To change a size standard regulation such as the two-year rule, the Small Business Act requires Federal agencies including SBA to undergo the notice-and-comment rulemaking process and obtain approval of the SBA Administrator. (*Id.*, citing 15 U.S.C. § 632(a)(2)(C); *see Size Appeal of Cypher Analytics, Inc.*, SBA No. SIZ-6022 (2019) (finding that, for SBA to change a size standard rule under the Runway Extension Act, SBA needed to first undergo notice-and-comment rulemaking and approval of the SBA Administrator as required by the Small Business Act).)

Appellant argues that calculating the timeliness of protest begins with the receipt of notice about the novation, not the novation itself. Appellant further claims the Area Office's dismissal based on this erroneous reading of the timeliness rules would effectively bar challenges to the size of an MPJV that obtains new contracts through novation. If, as the Area Office suggests, size protests regarding a novation must be submitted within five business days of the novation itself even when there is no notification, then MPJVs would be free to evade the two-year rule by using novation to obtain set-aside contracts beyond the two-year period. (*Id.*, at 12,

citing 13 C.F.R. § 121.103(h).) Interested private parties would not know that a novation took place until well after the five-day clock runs and would be unable to protest the size of an MPJV receiving a contract by novation outside of the two-year period, as AccelGov did here. (*Id.*, at 12.)

Appellant submits policy arguments about the risk of prohibiting size protests against novations and allowing an unlimited number of novations for MPJVs beyond the two-year period, OHA would fundamentally revise the two-year rule to no longer cover novations, without engaging in the requisite notice-and-comment rulemaking process pursuant to the Small Business Act. (*Id.*, citing 15 U.S.C. § 632(a)(2)(C) (requiring proper rulemaking process to change a size standard rule)).

Considering that novations are also covered under the two-year rule, the Area Office's dismissal of the size protest against AccelGov's novation of ENCORE III SB effectively disarms a part of the two-year rule. Absent rulemaking by SB A, the Area Office may not improperly construe timeliness rules to be inconsistent with the existing two-year rule. As such, OHA must reverse the Area Office's dismissal and remand for decision on the merits. (*Id.*, at 14.)

F. AccelGov's Response

On July 8, 2024, AccelGov filed a response to the appeal. AccelGov maintains that the crux of the protest is that AccelGov is not small for the purpose of the base contract because its novation request was granted more than two years after AccelGov received its first contract. Specifically, Appellant alleges that AccelGov received its first contract on July 14, 2021, and the government granted AccelGov's request to novate the IDIQ contract on August 28, 2023. (AccelGov's Response, at 2.)

The rule upon which Appellant relies is that a joint venture can submit offers for two years after its first contract award and "may be awarded one or more contracts after the two-year period as long as it submitted an offer prior to the end of that two-year period." (*Id.*, citing 13 C.F.R. § 121.103(h).) This same rule applies to novations. So long as the joint venture submits the novation request prior to the end of the two-year period, the joint venture has satisfied the rule. It does not matter when the government approves the request. With this point, AccelGov offers the Example 3 to the regulation that states:

> Joint Venture XY receives a contract on December 15, year 1. On May 22, year 3 XY submits an offer for Solicitation S. On December 8, year 3, XY submits a novation package for contracting officer approval for Contract C. In January, year 4 XY is found to be the apparent successful offeror for Solicitation S and the relevant contracting officer seeks to novate Contract C to XY. Because both the offer for Solicitation S and the novation package for Contract C were submitted prior to December 15 year 3, both contract award relating to Solicitation S and novation of Contract C may occur without a finding of general affiliation.

(*Id.*, at 2-3, citing 13 C.F.R. § 121.103(h) (Example 3 to paragraph (h) introductory text).)

Here, Appellant's protest overlooks the fact that the relevant date for the purpose of this rule is the one when AccelGov submitted the novation request. Instead, it argues that AccelGov is ineligible because the novation request was granted more than two years after AccelGov's first contract award. (*Id.*, citing Size Protest at 9.) Appellant does not submit any evidence as to the date that AccelGov submitted the novation request, or even acknowledge that as the relevant date for the purpose of the two-year rule. Accordingly, Appellant's appeal should be dismissed as speculative. (*Id., citing e.g., Size Appeal of: White Hawk/Todd*, SBA No. SIZ-4888 (2008); *Size Appeal of: Addison Constr. Co.*, SBA No. SIZ-6009 (2019).)

AccelGov contends the regulations do not provide for a size protest at the time of novation. As the Area Office noted, the applicable regulation provides for a size protest under a long-term contract at only three times: within five days of receiving notice of (i) the initial award; (ii) an option's exercise; and (iii) task order award if the order's solicitation requests a size certification. (*Id.*, at 3, citing 13 C.F.R. § 121.1004(a)(3); *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016). The Area Office correctly determined that Appellant's size protest was not filed within five days of any of these occurrences, making it untimely. (*Id.*)

The Area Office's analysis focused on the whether the task order required recertification, noting that there was no requirement for recertification in the task order solicitation, so there was no basis for a size protest five days after notice of task order award to AccelGov. Neither of the other scenarios happened within five days of Appellant's size protest either. AccelGov also maintains the government originally awarded the IDIQ contract in September of 2018 (*see* Appeal Petition at 7) with a base period of five years, and now the contractors are performing in the option period. (*Id.*, at 3-4.)

AccelGov characterizes Appellant's reading of the regulation as though it contemplates a size protest in response to a novation, as well as an initial award. (*Id.*, at 4, citing Appeal at 8.) However, the regulation does not say that, and Appellant has not cited any case or other authority that has interpreted 13 C.F.R. § 121.1004(a) to allow a size protest in response to an IDIQ's novation. AccelGov adds, "[p]erhaps recognizing this insurmountable hurdle, [Appellant] attempts to create an inconsistency between the Area Office's decision and the regulation." (*Id.*(Specifically, Appellant asserts that the Area Office suggested that Appellant should have filed a size protest within five days of the IDIQ contract's novation to AccelGov. However, the Area Office did not say that. Instead, it said that "size would be determined when AccelGov submitted its offer, or in this case novation request, for the base contract." (*Id.*, citing Size Determination, at 2.) This statement is consistent with 13 C.F.R. § 121.103 and, importantly, is not a suggestion that Appellant could have filed a size protest at any time other than the three situations listed in 13 C.F.R. § 121.1004(a)(3). (*Id.*, at 4-5.)

AccelGov notes Appellant argues there is an inconsistency within the regulation it believes gives it the ability to protest a novation and the timeliness rules. AccelGov characterizes appeal as recognizing that "no regulation exists to require a procuring agency to make novation public or notify interested parties." (*Id.*, at 5, citing Appeal at 8.) However, the lack of a requirement to notify industry of a novation is perfectly consistent with the fact that the regulations do not provide a mechanism for other businesses to protest a novation. Further bolstering this point, there are regulations in place that require the government to provide notice

of the initial award of an IDIQ contract, the exercise of an option, as well as a task order award. (*Id.*, citing FAR 15.503 (contract); FAR 17.207, 52.217-9 (option) FAR. 16.505(b)(6)(i) (orders).) The fact that there is no regulation that requires notice to be published or given after a novation supports the conclusion that novation does not give rise to a protest. It does not support Appellant's assertion that companies should be permitted to protest at any time they learn of a novation. (*Id.*)

Finally, AccelGov maintains Appellant's policy arguments are misplaced, because there is no regulatory mechanism that allows Appellant to file a size protest due to a long-term contract novation. Relying on prior OHA case law, AccelGov maintains Appellant's policy arguments in support of such a rule should be made to the legislature, and not OHA. (*Id.*, at 5-6.)

For all of the reasons described above, OHA should affirm the dismissal of Appellant's size protest. (*Id.*, at 6.)

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 that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb a 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at ll (2006).

B. Analysis

Appellant has failed to show that the Area Office clearly erred in dismissing Appellant's size protest. The underlying contract here is a long-term contract under the ENCORE III Small Business (ENCORE III SB) multiple award delivery/indefinite quantity (IDIQ) contract vehicle. (Size Determination, at 1). As the Area Office correctly recognized, SBA regulations provide that a concern which is small at the time a long-term contract is awarded remains small for the duration of the contract, including for orders issued under the contract. 13 C.F.R. § 121.404(g). Further, under SBA regulations there are only three instances when a concern's size under a long-term contract may be protested: (1) within five business days after the long-term contract is initially awarded; (2) within five business days after an option is exercised; and (3) within five business days after the award of an individual order, if the CO requested recertification of size in connection with that order. 13 C.F.R. § 121.1004(a)(3)(i) -(iii).

OHA has repeatedly held that a size protest pertaining to an individual order under a long-term contact will be timely only if the CO requested recertification of size for that order. Thus, under OHA precedent, “SBA will not entertain a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with that order.” (*Id.*, quoting *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016).).

Furthermore, "SBA's longstanding rule is that a concern which represents itself as small at the time of contract award remains small for the lifetime of the contract, including orders issued under the contract." (*Id.*, quoting *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139, at 5 (2022).).

Here, there is no dispute that Encore III Small Business IDIQ is a long-term contract within the meaning of SBA regulations. There is no regulatory requirement for recertification at the order level as the Encore III Small Business IDIQ is a single NAICS small business set-aside multiple award contract. 13 C.F.R. § 121.404(a)(l)(i)(B). The dispositive issue in this case, then is whether the CO requested recertification for the subject procurement. The Area Office correctly determined that upon review of the task order, contract amendments, and information provided by the CO, recertification was **not** a requirement at the task order level. (Size Determination, at 2).

Further, Appellant does not attempt to argue that there was a request for recertification with the task order. Appellant instead attempts to argue, without support in the regulation or case law, that a novation on a contract is an occasion for a size protest. However, the regulation at 13 C.F.R. § 121.1004(a)(3)(i)-(iii) clearly provides for only three occasions for size protests on a long-term contract, and none of them are applicable here. There was no recertification request with this order. There is no provision for a size protest as of a novation. Therefore, no size protest was timely, and AccelGov is still considered a small business for this procurement. For the foregoing reasons, this size protest is untimely, and the Area Office properly dismissed it.

IV. Conclusion

The Area Office properly dismissed Appellant's size protest as untimely. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge