

UNITED STATES OF AMERICA
 SMALL BUSINESS ADMINISTRATION
 OFFICE OF HEARINGS AND APPEALS
 WASHINGTON, D.C.

SIZE APPEAL OF:)	
)	
T/J Technologies, Inc.)	Docket No. SIZ-2006-11-16-70
Appellant)	Decided: January 24, 2007
)	
Solicitation No. N00164-06-C-6037)	
Department of the Navy, Crane Division)	
Naval Surface Warfare Center)	
Crane, IN)	

ORDER REMANDING SIZE DETERMINATION¹

Facts

The Solicitation

On August 1, 2005, the Contracting Officer (CO) for the Department of the Navy, Naval Surface Warfare Center, issued the above-referenced solicitation under the Small Business Innovation Research (SBIR) program. The applicable size standard for the SBIR program, including affiliates, is 500 employees. 13 C.F.R. § 121.702(b). On September 8, 2006, the SBIR contract was awarded to T/J Technologies, Inc. (Appellant). On September 21, 2006, the CO notified unsuccessful offerors of the identity of the apparent successful offeror. On September 26, 2006, Optodot Corporation protested Appellant's size status with the CO. On October 4, 2006, the CO forwarded the protest to the Small Business Administration (SBA), Area IV Office of Government Contracting in Chicago, Illinois (Area Office).

On October 13, 2006, Appellant responded to the protest and provided the Area Office with a partially completed SBA Form 355, which failed to respond to Part IV addressing "alleged, acknowledged, or possible affiliates." Appellant stated that "[o]utside shareholders and directors are not obligated to provide this information" and that it would "continue to attempt" to provide this information "if deemed necessary." On October 17, 2006, the Area Office emailed Appellant stating that the information in Part IV relating to possible affiliates was required and

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.

that 13 C.F.R. § 121.1008(d) provides that the Area Office may draw an adverse inference that Appellant is other than small from Appellant's failure to provide the required information.

On October 23, 2006, after not receiving a response, the Area Office resent the email to the same address, which was returned with an error message stating that “[d]elivery to the following recipients failed.” That same day (October 23, 2006), the Area Office resent the email to an address listed on Appellant's website. However, Appellant did not receive these email requests for information relating to potential affiliates because (a) the October 17th and the first October 23rd email were sent to an incorrect email address as the Area Office inadvertently mistyped the address listed on Appellant's SBA Form 355; and (b) the October 23rd follow-up email sent to the address listed on Appellant's website was lost because Appellant was “in the process of changing the servers used to process its incoming e-mail” and it was “routed to a different mailbox.” Declaration of Maria A. Thompson, at ¶ 6.

The Size Determination

On October 24, 2006, after not receiving any of the requested information from Appellant, the Area Office issued Size Determination No. 4-2007-2 against Appellant finding it to be other than small under the minority shareholder rule at 13 C.F.R. § 121.103(c)(2). The Area Office found that Appellant is owned and controlled by A123 Systems, Inc. (A123). Based on the information listed on A123's website, the Area Office found that two of A123's principal shareholders are Motorola, Inc. (Motorola) and Qualcomm Incorporated (Qualcomm), recognized large concerns, and therefore Motorola and Qualcomm “must be deemed to control or have the power to control” A123 under 13 C.F.R. § 121.103(c)(2). Accordingly, the Area Office found Appellant affiliated with A123, Motorola, and Qualcomm, and aggregated their number of employees to find Appellant exceeded the size standard of 500 employees. In addition, the Area Office stated that it may presume that disclosure of the missing information would demonstrate that Appellant is other than a small concern pursuant to 13 C.F.R. § 121.1008(d).

The Appeal

Appellant received the Area Office's size determination on November 1, 2006, and appealed the size determination on November 16, 2006. Appellant requests that the size determination be vacated and the matter remanded to the Area Office for a new size determination.

Appellant contends that the Area Office denied Appellant due process by conclusively presuming control by minority shareholders under 13 C.F.R. § 121.103(c)(2) without acknowledging evidence in the record rebutting that presumption or affording Appellant a fair opportunity to rebut that presumption. In addition, Appellant argues that the Area Office erroneously applied the minority shareholder rule to the holdings of Qualcomm and Motorola, by improperly characterizing their holdings as equal or approximately equal in size to the holdings of larger shareholders. Appellant further asserts that the Area Office denied it due process to the extent that an adverse inference was drawn based on Appellant's failure to provide the requested

information. Appellant states that it did not receive the various email requests from the Area Office for the reasons set forth above (incorrect email address and change of servers) and that due process requires that before the Area Office can take an adverse inference, it must be able to demonstrate that the requests for the missing information were actually received by the protested concern. Appellant asserts that it has “compiled the information requested by the Area Office and stands ready to submit it for consideration by the Area Office when this matter is remanded....” Appeal Petition, at 7.

Appellant also filed a Motion to Admit New Evidence. Appellant requested that the Declaration of Maria A. Thompson and a copy of an e-mail supporting her declaration be included in the Record to explain the reason for Appellant’s failure to respond to the Area Office’s request for information. Since this information clarifies the facts on the issue of Appellant’s failure to respond to requested information and thus whether the application of the adverse inference was proper, Appellant’s Motion to Admit New Evidence is GRANTED and the evidence is ADMITTED to the Administrative Record.

Discussion

As required by 13 C.F.R. § 134.304(a)(1), Appellant filed the instant appeal within 15 days of receiving the size determination. Therefore, the appeal is timely.

Given that Appellant only failed to respond to the requested information about its affiliates because of the Area Office’s inadvertent transmission error, I find that Appellant should be given the opportunity to submit its compiled information about its affiliates for the Area Office to review. In addition, I find that to the extent the Area Office drew an adverse inference from Appellant’s failure to provide the requested information, this was improper because Appellant’s failure was caused by the Area Office’s inadvertent transmission error.

Because of the inadvertent transmission error, which was followed by a technical breakdown, I find the Area Office did not sufficiently analyze the percentage of ownership of Motorola and Qualcomm in A123 to support its application of the minority shareholder rule. Upon remand, the Area Office should consider the information Appellant submits and act accordingly.

I also note that Appellant’s size status should be determined as of the date of the SBIR award. 13 C.F.R. § 121.704.

Conclusion

Accordingly, the Area Office's October 24, 2006 size determination is VACATED and REMANDED. Upon remand, Appellant is ORDERED to provide the Area Office with the information it has compiled regarding its affiliates, specifically Qualcomm’s and Motorola’s respective percentage of ownership in A123. The Area Office is ORDERED to address the specific percentage of Qualcomm’s and Motorola’s ownership in A123 in its analysis of whether

Motorola and Qualcomm are affiliated with A123, and thus Appellant.

THOMAS B. PENDER
Administrative Judge