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

SIZE APPEAL OF:	)	
Doyon Properties, Inc.	)	Docket No. SIZ-2006-12-12-73
Appellant	)	
Request for Proposal No. SP0600-05-0024 U.S. Department of the Army Defense Logistics Agency Defense Energy Support Center Fort Belvoir, VA	)	Decided: February 12, 2007

APPEARANCES

Antonio R. Franco, Esq. and Jonathan T. Williams, Esq., Piliero Mazza, PLLC, Washington, D.C., for Appellant.

Laura Mann Eyester, Esq., Office of the General Counsel, U.S. Small Business Administration.

DECISION

PENDER, Administrative Judge:

Introduction and Jurisdiction

This appeal stems from Request for Proposal No. SP0600-05-0024 (RFP) issued by the Defense Energy Support Center (DESC) for privatization of electric power, power generation, natural gas, water, and wastewater distribution systems at major U.S. Army facilities in Alaska. After its initial approval of a joint venture between Doyon Properties, Inc. (Appellant), a current 8(a) Business Development program participant, and Fairbanks Sewer & Water, Inc. (FSW) to perform the work of the RFP, the Alaska District Office (DO), of the Small Business Administration (SBA) reassessed its approval. Thereafter the DO requested the Office of Government Contracting, Area Office VI (the Area Office), to review the small business size status of Appellant and the joint venture (Doyon Utilities, LLC) to determine its eligibility.

On November 22, 2006, the Area Office issued Size Determination No. 06-2007-007 (the size determination), finding Appellant to be other than small under North American Industry Classification System (NAICS) codes 221112 and 221122. The Area Office also determined the joint venture was other than small under the size standard for NAICS codes 221310 and 221320. Appellant received the size determination on November 27, 2006 and filed its appeal on December 12, 2006.

The U.S. Small Business Administration 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. Accordingly, this matter is properly before OHA for decision.

Issues

Whether the Area Office made a clear error of fact or law by applying the additional size requirement in 13 C.F.R. § 121.201, Footnote 1, to the instant procurement.

Whether the Area Office improperly modified the RFP by considering the additional size requirement in 13 C.F.R. § 121.201, Footnote 1, when the RFP omitted this requirement.

Whether the doctrine of equitable estoppel should be applied to prevent the SBA from reevaluating its earlier approval of a joint venture's size.

Facts

1. DESC issued the RFP on March 31, 2005. DESC described the acquisition as being for the privatization of utility systems at major U.S. Army facilities in Alaska. DESC explained that the Army wanted to divest and transfer its utility systems to a non-Governmental entity. Section B of the RFP provided that offerors would submit offers for: (1) electrical, natural gas, and water distributions systems; (2) wastewater collection systems; and (3) central heat, power plant, and heat distribution systems at various locations.

2. The RFP contains Contract Line Items (CLINs) for various kinds of utility requirements at the various Army installations. Offerors were not required to submit proposals for all of the work that could be performed under the RFP.

3. On the cover sheet for the procurement, the DESC Contracting Officer (CO) checked the box indicating the procurement was restricted to firms eligible under Section 8(a) of the Small Business Act. DESC also included FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns (June 2003), on page 46 of the RFP.

4. In Section K of the RFP, DESC included FAR 52.219-1, Small Business Program Representations (APR 2002). The text relevant to this appeal states:

(a)(1) The North American Industry Classification System (NAICS) code for this

acquisition is 221122 electric, 221112 fossil fuel power generation, 221210 natural gas, 221310 water, 221320 wastewater: http://www.sba.gov/size/sizetable2002.html

(2) The small business size standard for electric is 4 Million megawatt hours, natural gas is 500 employees, and for water and wastewater is $6.0 Million.

5. Appellant, a current 8(a) BD program participant, is a wholly-owned subsidiary of Doyon Limited (Doyon), an Alaska Native Corporation (ANC). Appellant was incorporated in 1997 to manage and develop real estate. In addition, Appellant performs Government construction contracts (Note 1 to October 31, 2004 and 2005 Financial Statements; SBA Form 355).

6. On August 27, 2005, Appellant, along with FSW, submitted a proposal as a joint venture called Doyon Utilities, LLC (joint venture) under the RFP. The joint venture certified it was a small business (Appeal Petition at 2).

7. On November 1, 2005, the joint venture requested SBA approve the joint venture between Appellant and FSW "in accordance with 13 C.F.R. Section 124.513" (Appeal Petition at 2).

8. On April 17, 2006, SBA's Alaska District Office (DO) approved the joint venture for NAICS codes 221122, Electric Power Distribution, 221210, Natural Gas Distribution, and 221112, Fossil Fuel Electrical Power Generation, for the express purpose of submitting an offer under the RFP (Appeal Petition at 2; SBA Letter of September 7, 2006).

9. Shortly after sending a letter to Appellant and FSW discussing the joint venture requirements, the DO realized it may have erred in approving the joint venture (SBA Response at 2; size determination at 2). Specifically, the DO realized it had not considered the requirement in Footnote 1 of 13 C.F.R. § 121.201 (Footnote 1) that required firms to be "primarily engaged in the generation, transmission, and/or distribution of electric energy for sale" along with the 4 million megawatt limitation. Accordingly, on September 13, 2006, the DO sent an e-mail asking if Appellant had "produced any power generation prior to submitting their bid for the Utilities Privatization 8a competitive requirement."

10. On September 13, 2006, Appellant replied to the DO's e-mail and stated it had not produced power (generated electricity) before submitting its bid for the RFP.

11. On October 2, 2006, the DO informed the joint venture that it had completed a programmatic review of the eligibility of Appellant and FSW to submit an offer under the RFP. The Area Office explained that in accordance with 13 C.F.R. § 124.513(b), "a joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement." Based upon the fact that Appellant is not primarily engaged in the generation of electricity and FSW is not small under the $6 million size standards for NAICS codes 221310 and 221320, the DO found the joint

venture ineligible under NAICS codes 221112, 221122, 221310, and 221320, but eligible under NAICS code 221210. The DO invited the joint venture to respond.

12. Appellant and the JV responded on October 5, 2006. Counsel for the joint venture contested SBA's right to rescind its approval of the joint venture once granted and its interpretation of 13 C.F.R. § 121.201, Footnote 1 Appellant disagreed with the DO's interpretation of Footnote 1 as it applied to NAICS codes 221112 or 221122. Appellant argued it was a small business under the 4 million megawatt threshold. In addition, Appellant expressed disappointment with the "late-in-process reversal of the [previous] eligibility determination."

13. On October 6, 2006, the DO responded to Appellant's October 5, 2006 letter. In this letter, the DO reiterated that it had based its findings of non-eligibility on Appellant's admission that it has not generated or produced power before submitting the joint venture's 8(a) competitive offer. The DO then explained it was referring the matter to Area Office VI for a formal size determination with respect to the joint venture's small business size status for the NAICS codes assigned to the RFP.

14. The DO referred the question of the size of the joint venture to Area Office VI in an October 10, 2006 letter.

15. On November 3, 2006, Appellant submitted SBA Form 355s for itself and FSW. Appellant's SBA Form 355 indicated that 88% of its sales or receipts were attributable to construction under NAICS code 237990 and the remaining 12% of its receipts were due to its activities as "Lessors of Non-Residential Buildings" under NAICS code 531120. Appellant also listed NAICS code 221112, Fossil Fuel Electric Power Generation, as a product or service it offered, but attributed no revenue or sales to this NAICS code.

16. On November 3, 2006, Appellant's counsel submitted an explanation of why Appellant was small under the NAICS codes relevant to the RFP. Counsel averred it was small under the terms of the solicitation because it has never exceeded the 4 million megawatt hour threshold and that the language in Footnote 1 was not intended to apply to the utility codes.

17. The Corporate Income Tax Returns (IRS Form 1120) submitted by FSW show its average annual receipts for the three years preceding August 27, 2005, greatly exceed $6 million.

18. DESC removed the RFP from the 8(a) program on December 14, 2006.

The Size Determination

The Area Office issued the size determination on November 22, 2007. The Area Office determined Appellant and FSW, when combined to form the joint venture, were other than small under the size standard for NAICS codes 221112 and 221122 because Appellant was not primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. The Area Office also determined that the joint venture was other than small for the $6 million

size standard applicable to NAICS codes 221310 and 221320 since FSW's average annual receipts exceeded $6 million.

In making its determination, the Area Office declined to consider the electrical generation and distribution capabilities of Doyon Drilling, Inc. (DD) so that Appellant could meet the requirement to be primarily engaged in the generation and transmission, and/or distribution of electrical energy for sale. The Area Office explained that DD, like Appellant, is a wholly-owned subsidiary of Doyon, an ANC. Thus, the Area Office explained it could not consider DD to be an affiliate of Appellant for the purpose Appellant advocated, because ANC-owned concerns are not considered to be affiliated with other concerns owned by that ANC.[1]

The Appeal Petition

Appellant filed its Appeal Petition on December 12, 2006. Appellant presented facts that are generally consistent with those found above. Appellant argues that it was erroneously found other than small under NAICS codes 221112 (Electrical Power Distribution) and 221122 (Fossil Fuel Electrical Power Generation) (Utility Codes) because of an erroneous application of the "primarily engaged" requirement in Footnote 1. Appellant did not challenge the Area Office's determination that FSW is other than small for NAICS codes 221310 and 221320.

Appellant argues the Area Office's size determination is plainly in error because the "primarily engaged" requirement in Footnote 1:

(1) Disqualifies newly organized concerns and other small businesses that meet the definition of small by any other measure; and

(2) Was not intended to be a component of SBA's procurement programs, but only its loan and financial assistance programs.

1. Applicability of 13 C.F.R. § 121.201, Footnote 1 to Procurements

Appellant alleges that there is nothing in SBA's regulations that suggests the Utility Codes "are subject to eligibility criteria beyond the 4 million megawatt hour threshold" (Appeal Petition at 10). Appellant also argues that there are no other size standards requiring a small business to be primarily engaged in an industry in order to qualify as small. Therefore, since the term "primarily engaged" is not defined, it can be interpreted as being merely an introductory statement.

Appellant's principal argument concerning the language "primarily engaged" in Footnote 1 of 13 C.F.R. § 121.201 is that it was never intended to apply to procurements (Appeal Petition at 10 - 13). Appellant argues that the old code that is congruent to the present NAICS codes did not include this language. Moreover, it argues the regulatory history applicable to the size

[1] *See* 13 C.F.R. § 121.103(b)(2)(i) and (ii); 13 C.F.R. § 124.109(c)(2)(iii).

standard contains no indication that SBA intended to impose additional requirements for procurement programs. Rather, Appellant asserts there is an indication the restriction was meant to apply to financial assistance programs and that when the language was used in the past, SBA did not apply the definition to procurement programs. Thus, Appellant asserts Footnote 1 has no application to procurements.

Appellant further asserts that treating procurement programs the same as financial assistance programs would achieve unintended results. Appellant argues that the SBA's 8(a) joint venture regulations for a revenue-based size standard require at least one 8(a) participant that is less than one-half the size standard applicable to the NAICS code and for the procurement to exceed half of the applicable size standard (Appeal Petition at 12). *See* 13 C.F.R. § 124.513(b). While not challenging the 4 million megawatt requirement of Footnote 1, Appellant avers that application of the "primarily engaged" language to the RFP would mean SBA would have to determine whether Appellant is less than one-half of the size standard corresponding to the NAICS code. This, Appellant alleges, would mean that the qualified 8(a) joint venturer would have to be "less than primarily engaged" in the electrical power generation industry and generate less than 2 million megawatt hours. This, Appellant alleges, would produce an improper result.

2. Modification of the RFP Size Standard

Appellant argues the Area Office improperly modified the size standards applicable to the RFP, *i.e.*, the size standards the CO specified and included in the RFP as required by 13 C.F.R. § 121.402(a). Since the CO only specified the requirement that offerors not supply more than 4 million megawatt hours, the Area Office improperly modified the RFP by evaluating Appellant's size using the "primarily engaged" requirement in Footnote 1.

Appellant alleges the "[o]fferors were never advised of an additional 'primarily engaged' component to the threshold." This lack of notice also made the Area Office's "after-the-fact modification" of the RFP's size requirement improper (Appeal Petition at 13-14).

Appellant's last point under this argument is that OHA should give deference to the size standards the CO assigned to the RFP. Appellant bases this argument on the unique nature of the RFP, the fact that no offeror objected to the standards, and SBA's approval of joint ventures based upon those standards.

3. Effect of the District Office's Approval of the Joint Venture

Appellant's final argument focuses on the inequities that would result from SBA's change of course after approving the JV, which is akin to an estoppel argument (Appeal Petition at 14 - 15). Specifically, Appellant claims the Government (DESC) and it have been harmed by SBA's decision to change course. In addition, it avers that the size determination will undermine the intent of the 8(a) program by reducing the number of future opportunities available for DOD procurements.

SBA's Response to the Appeal Petition

SBA's Office of General Counsel filed a comprehensive response to the Appeal Petition. In general, it adopted the facts alleged by Appellant.

1. The Size Standard Applicable for NAICS codes 221112 and 221122 Require Eligibility Criteria Beyond the 4 Million Megawatt Hour Threshold

SBA begins its analysis by explaining that 15 U.S.C. § 632(a)(1), (a)(2), and (a)(2)(B) permit SBA's Administrator to define a small business concern by using various detailed definitions and standards. SBA argues definitions and standards can include the number of employees, information pertaining to income or net worth or "a combination of these factors or even other factors, and must vary from industry to industry" (SBA Response at 3-4). This statute means SBA's Administrator has broad discretion to establish standards to determine whether a concern is a small business and while the statute appears to favor employee-based standards for manufacturing concerns and receipt-based standards for service concerns, it does allow the Administrator to establish standards based upon "other appropriate factors." *See* 15 U.S.C. § 632(a)(2)(B).

SBA next argues the legislative history of the applicable legislation supports its position. It quotes language that explains that Congress will not include detailed definitions of what constitutes a small business because of the variation between business groups. Thus, the applicable legislative history states the Administrator is authorized to determine which concerns are to be designated small within an industry. *See* H.R. Rep. No. 494, 83d Cong., 1st Sess. 3 (1953).

SBA avers the SBA may thus promulgate size standards, such as Footnote 1 to 13 C.F.R. § 121.201, because the contents therein are "appropriate factors." This is permitted by the plain language of 15 U.S.C. § 632 and its legislative history. According to 13 C.F.R. § 121.201, it applies to all SBA programs, unless otherwise specified, and expresses the size standards in either number of employees or annual receipts, unless otherwise specified. These standards indicate the criteria under which a concern and its affiliates will be considered small.

SBA argues the size standards for NAICS codes 221111, 221112, 221113, 221119, 221121, and 221122 were promulgated in accordance with the law. The standard for these NAICS codes states a firm will be considered small if:

> including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

13 C.F.R. § 121.201 n.1. SBA alleges the meaning of this language is clear and thus businesses must be "primarily engaged" in the listed activities to be considered small. Further, SBA avers

that when it created Footnote 1, it informed the public that some changes would be more than a simple transference of code from one system of numbers to another. This was especially true for NAICS codes that correspond to more than one Standard Industrial Classification (SIC) code, like the codes at issue in this appeal.

SBA avers that Appellant's allegation that Footnote 1 does not apply to procurements is unsupported. Rather, the language in 13 C.F.R. § 121.201 makes it clear it applies to all programs unless otherwise specified.

SBA also replies to Appellant's allegation that Footnote 1 is not meant to apply to procurement programs because it would conflict with 13 C.F.R. § 124.513(b). SBA avers that Appellant's logic fails because 13 C.F.R. § 124.513(b)(1)(ii)(A) and (B) apply only to revenue or employee-based size standards. Thus, since none of the NAICS codes at issue are based upon revenue or the number of employees, Appellant's argument is inapposite.

SBA also challenges Appellant's assertion that it is relevant that SBA does not define "primarily engaged." SBA asserts that 13 C.F.R. § 121.107 provides a definition for "primary industry" and that definition may be used.

2. The Area Office Properly Modified the NAICS Code Specified in the Solicitation

SBA states the regulations expressly permit SBA to clarify, complete, or supply "[a]n unclear, *incomplete* or missing NAICS code designation or size standard in the solicitation…." 13 C.F.R. § 121.402(d) (emphasis added). Accordingly, the Area Office had the authority to consider the entire size standard when evaluating Appellant's status under the NAICS codes at issue.

3. The Size Determination is Proper and Will Not Undermine the Intent of the 8(a) Program

SBA avers that since DESC removed the RFP from the 8(a) program (Fact 18), Appellant's point is moot. Notwithstanding its position, SBA offers argument on this point.

SBA contests Appellant's argument that SBA is bound by the DO's erroneous determination that Appellant was small under the NAICS codes applicable to the RFP. SBA asserts the DO acted to cure an error once discovered and that was the proper course of action and in accordance with the applicable regulations.

SBA contends Appellant is essentially arguing SBA should be estopped from properly applying its size regulations. SBA offers that those seeking to invoke estoppel against the Government bear a heavy burden. SBA cites law applicable to estoppel, the impact of which is that estoppel does not lie against the United States when it correctly applies its regulations.

Discussion

I. Introduction

The *sine qua non* of Appellant's Appeal Petition is that:

1. The first sentence of 13 C.F.R. § 121.201 either does not mean what it says or should be ignored; and

2. Footnote 1 to 13 C.F.R. § 121.201 either does not mean what it says or it has no meaning.

In addition, Appellant argues: (1) the Area Office improperly modified the size standard placed in the RFP by the CO; and (2) SBA is estopped from correcting an improper application of 13 C.F.R. § 121.201, Footnote 1. As I will explain below, the SBA established that Appellant's arguments are at variance with the law.

II. Applicable Law

A. Timeliness

Appeals must be filed within 15 days of receipt of a size determination. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Upon appeal, OHA must review whether the Area Office made a clear error of fact or law when it determined Appellant to be other than a small business because it did not meet the requirements of 13 C.F.R. § 121.201, Footnote 1. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size or the facts *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006). Thus, I will only disturb an area office's size determination if I determine the area office clearly made key findings of law or fact that are mistaken.

C. The Applicable Size Standard

1. The Basis of 13 C.F.R. § 121.201, Footnote 1

In its response, SBA offers that 15 U.S.C. § 632(a)(1) and (a)(2)(B) authorize SBA's Administrator to promulgate size standards that went beyond revenue and employee counts. Accordingly, SBA states this statutory language is the statutory basis for the provision in 13 C.F.R. § 121.201 that requires a concern to be "primarily engaged" in the generation, transmission, and/or distribution of electrical energy for sale. SBA's argument is based on its

reasoning that Appellant is challenging the validity or scope of the "primarily engaged" requirement in its Appeal Petition. I agree with SBA, for this is precisely what Appellant has done.

OHA is not the appropriate forum to challenge the validity of SBA's size regulations. *Size Appeal of Mathews Construction Company*, SBA No. SIZ-3592, at 10 (1992). Rather, OHA's jurisdiction upon the filing of a size appeal is to review the record and evaluate the area office's application of the regulations and law to the facts (13 C.F.R. § 134.314). Nonetheless, Appellant has presented a glimmer of an argument. Specifically, if Appellant can prove the regulations are inconsistent with the controlling statute, it can arguably establish the Area Office issued a size determination based upon a clear error of law, regardless of any deference due the agency in the promulgation of its regulations. Therefore, I will discuss why 13 C.F.R. § 121.201, Footnote 1, is fully consistent with the controlling statute.

The portions of the Small Business Act relevant to the promulgation of size standards for determining when a concern is small (15 U.S.C. § 632) are as follows:

> § 632. Small-business concern
>
> a) Criteria
>
> (2) Establishment of size standards.—
> (A) In general**.—** In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act.
> **(**B) Additional criteria**.—** The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or *other appropriate factors*.
> (C) Requirements**.—** Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—
> (i) is proposed after an opportunity for public notice and comment;
> (ii) provides for determining—
> (I**)** the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;
> (II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years;
> (III) the size of other business concerns on the basis of data over a period of not less than 3 years; or
> (IV) *other appropriate factors*; and
> (iii) is approved by the Administrator.

> (3) When establishing or approving any size standard pursuant to paragraph (2), the Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and *consider other factors deemed to be relevant by the Administrator*.

(emphasis added).

This language establishes that Congress granted SBA's Administrator broad discretion to promulgate size standards based upon "number of employees, dollar volume of business, net worth, net income, a combination thereof, or *other appropriate factors."* 15 U.S.C. § 632(a)(2)(B) (emphasis added). Moreover, Congress reiterated the broad discretion it granted SBA's Administrator when it required the Administrator to "ensure that the size standard varies from industry to industry to the extent necessary to reflect differing characteristics of the various industries and *consider other factors deemed to be relevant by the Administrator*." 15 U.S.C. § 632(a)(3) (emphasis added). The use of the primarily engaged and megawatt hours requirements in Footnote 1 to establish size standards for electric power generation and distribution constitute "appropriate factors" and "other factors deemed to be relevant by the Administrator" and are thus authorized as being within the broad discretion granted SBA's Administrator in 15 U.S.C. § 632(a).

SBA is entitled to deference in its promulgation of regulations pursuant to statutes under its purview. Properly promulgated regulations are entitled to deference from judicial bodies. The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of regulations. These regulations are given controlling weight if they represent a permissible construction of the statute, and are not arbitrary, capricious or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). I note that Appellant has made no allegations of arbitrary and capricious behavior by the SBA in the promulgation of 13 C.F.R. § 121.201, Footnote 1.

2. The Scope of 13 C.F.R. § 121.201 and Footnote 1

Appellant argues 13 C.F.R. § 121.201, Footnote 1, does not pertain to procurements. Rather, Appellant argues that the "primarily engaged" language was meant to apply to SBA's financial assistance programs. In support, Appellant offers that regulatory history supports its argument. The SBA's position is that the available regulatory history proves the opposite.

Despite the parties' arguments, I am more mindful of the well-known axiom that when the language is clear on its face, it is unnecessary to review its regulatory history to discern its meaning and scope. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978). Consequently, legislative or regulatory history is relevant only if the legislation or regulations are unclear. *See Lamie v. U.S. Trustee*, 540 U.S. 526 (2004); *Meredith v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987).

Therefore, the staring point is the text of 13 C.F.R. § 121.201. It states:

> § 121.201 What size standards has SBA identified by North American Industry Classification System codes?
>
> *The size standards described in this section apply to all SBA programs unless otherwise specified in this part.* The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.

(emphasis added). The plain meaning of the regulation is that it applies to all SBA programs, unless otherwise specified. Since there is no exception specified, the size standard applies to all procurements.

3. The Meaning of "Primarily Engaged"

Footnote 1 states:

> NAICS codes 221111, 221112, 221113, 221119, 221121, and 221122--A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

13 C.F.R. § 121.201 n.1.

SBA's contention, that OHA should look to the definition of "primary industry" in 13 C.F.R. § 121.107 to help define the meaning of the term "primarily engaged," is attractive. It is also consistent with the maxim that when a term or word is not defined, courts will look to standard dictionary definitions and other pertinent regulations. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 477 (1992); *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992). However, SBA's suggestion is ultimately unavailing, for 13 C.F.R. § 121.107 does not define "primarily engaged." Rather, it lists factors the SBA may consider in determining a concern's "primary industry." Thus, I hold that while 13 C.F.R. § 121.107 is illustrative of factors SBA should consider when determining whether a concern is "primarily engaged" under Footnote 1 of 13 C.F.R. § 121.201, it does not include a usable definition.

When a term is not defined in a regulation, it is up to OHA to derive a meaning by looking to the common everyday meaning of the term or words. The dictionary defines "primarily" as "first of all" or "in the first place" and "engaged" as "occupied, employed." *Webster's Third New Int'l Dictionary, Unabridged,* 1800; 751 (3d ed. 1993). From these definitions, the plain meaning of "primarily engaged" in the context of Footnote 1 is that a

concern's main purpose as a business entity, or first occupation, must be to generate, transmit, and/or distribute electrical energy for sale.

4. The Relevance of 13 C.F.R. § 124.513

Appellant alleges that if the entire text of 13 C.F.R. § 121.201, Footnote 1, were applied to procurements, it would achieve an improper result when combined with the requirements of 13 C.F.R. § 124.513(b). Appellant is consequently alleging the existence of a conflict between the "primarily engaged" language of Footnote 1 and 13 C.F.R. § 124.513(b). Thus, Appellant alleges that OHA should give no effect to the "primarily engaged" language in Footnote 1, but should give effect to the 4 million megawatt requirement. However, Appellant ignores a basic canon of regulatory and statutory interpretation, which is that courts will give meaning to all parts of a regulation or statute, and avoid conflicts whenever possible.

In any case, the starting point to any analysis is the regulation itself. Thus, in relevant part, 13 C.F.R. § 124.513(b) states:

> Size of concerns to an 8(a) joint venture. (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:
>
> (i) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the SIC code assigned to the contract; *and*
>
> (ii)(A) For a procurement having a *revenue-based size standard*, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or
>
> (B) For a procurement having an *employee-based size standard*, the procurement exceeds $10 million;

(emphasis added).

By the express terms of this regulation and because of the conjunctive term "and" between (b)(1)(i) and (b)(1)(ii)(A) in 13 C.F.R. § 124.513, I find that (b)(1)(i) and (b)(1)(ii)(A) and (B) are irrelevant to the NAICS codes named in Footnote 1. Therefore, I hold (b)(1)(i) and (b)(1)(ii)(A) and (B) do not apply to the NAICS codes named in Footnote 1.

D. The Area Office's Authority Under 13 C.F.R. § 121.402

Appellant has challenged the Area Office's authority to require it to meet size standard requirements stated in Footnote 1 of 13 C.F.R. § 121.201, but not included by the CO in the RFP. Specifically, Appellant correctly notes the CO did not make any reference to the "primarily engaged" phrase in the contract (Fact 4). However, SBA succinctly argues the SBA (the Area Office) has the authority to complete incomplete size standards under 13 C.F.R. § 121.402(d), which states:

> An unclear, incomplete or missing NAICS code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in connection with a formal size determination or size appeal.

This language unequivocally gives SBA the authority to clarify, complete, or supply NAICS code designations or size standards in any solicitation in connection with a size determination or appeal.

Nor do contracting officers have the authority to supply partial, improper, or incomplete size standards in a solicitation. Instead, 13 C.F.R. § 121.402(b), in relevant part, requires:

> The procuring agency contracting officer, or authorized representative, designates the *proper* NAICS code and size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. . . .

(emphasis added). In this context, the word "proper" means complete. Hence, contracting officers do not have the authority to insert part of a size standard or to alter the standard found in 13 C.F.R. § 121.201. Accordingly, I hold no concern may rely upon an improper, incomplete, or otherwise erroneous size standard inserted in a solicitation by a contracting officer.

E. Estoppel

OHA will not consider an argument of equitable estoppel against SBA absent an allegation of affirmative misconduct. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4799 (2006) (citing *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000); *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003)). Moreover, I hold that the existence of affirmative misconduct necessarily requires the Government to have acted in bad faith.

OHA has held:

> [P]arties must recognize that OHA presumes all SBA employees act in good faith in the performance of their duties. I hold the presumption that SBA acted in good faith in issuing a size determination can only be overcome by clear and

> convincing evidence of personal animus, prejudice, or other irregular conduct. The reason I hold the clear and convincing evidence standard is applicable in this instance is because the Court of Appeals for the Federal Circuit held the clear and convincing standard 'most appropriately describes the burden of proof applicable to the presumption of the government's good faith.' *Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). This burden of proof is appropriate, for Appellant is essentially accusing the Area Office of acting in bad faith in issuing the size determination.

Size Appeal of Faison Office Products, LLC, SBA No. SIZ-4834, at 13 (2007). Therefore, I hold that invoking estoppel against SBA requires proof by clear and convincing evidence of affirmative misconduct involving actions related to size determinations and joint venture approvals.

III. Analysis

A. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. The Size Standard

1. Basis of 13 C.F.R. § 121.201, Footnote 1

The size standard contained in Footnote 1 of 13 C.F.R. § 121.201 identifies factors beyond income or employee count, *i.e.*, "primarily engaged" in electric power generation and the number of megawatt hours generated. Footnote 1 is a published regulation subject to public comment. Moreover, Footnote 1 is uniquely directed at NAICS codes that do not require the manufacturing or the provision of services. Rather the codes involve the provision of electricity. Accordingly, I hold, consistent with what I have found above, that the use of the "primarily engaged" and megawatt hours requirements in Footnote 1 constitute "appropriate factors" and "other factors deemed to be relevant by the Administrator" and are thus authorized as being within the broad discretion granted SBA's Administrator in 15 U.S.C. § 632(a).

2. 13 C.F.R. § 121.201, Footnote 1, Applies to Procurements

Since 13 C.F.R. § 121.201 states it applies "to all SBA programs unless otherwise specified in this part," it is not necessary to address legislative or regulatory history to determine whether it applies to procurements because its plain meaning could not be more clear. Similarly, since Footnote 1 provides no exception for procurements (or anything else), I hold it applies to procurements. Hence, 13 C.F.R. § 121.201, Footnote 1 applies to Appellant's size for the NAICS codes reflected in Footnote 1 and thus this RFP.

3. Application of 13 C.F.R. § 121.201, Footnote 1, to Appellant

Appellant admits and the facts show that it has never been engaged in the generation, transmission, and/or distribution of electric energy for sale. Rather, the facts show Appellant is primarily a construction company that does some real estate business (Facts 5, 11, and 14). Thus, Appellant's principal endeavor as a business concern has nothing to do with the subject matter of NAICS codes 221112, Fossil Fuel Electric Power Generation, or NAICS code 221122, Electric Power Distribution. Therefore, I hold, as a matter of law, that it cannot be said that Appellant is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. Under this principle, the Area Office did not make a clear error of fact or law in finding that Appellant is other than small under those NAICS codes.

C. The Area Office Has the Authority to Complete an Incomplete Size Standard

The CO did not include the entire size standard for NAICS codes 221112 and 221122 in the RFP. Instead, the CO only recited the 4 million megawatt ceiling (Fact 4). Therefore, the size standard in the RFP is incomplete.

Pursuant to 13 C.F.R. § 121.402(d), the Area Office had the authority to complete the size standard. The Area Office did complete the size standard and held Appellant accountable to the complete size standard stated in 13 C.F.R. § 121.201, Footnote 1, most notably to the language following the phrase "primarily engaged." Thus, I hold the Area Office acted correctly as a matter of law. Moreover, consistent with my holding concerning the authority of contracting officers to designate a proper NAICS code and standard, I further hold that Appellant had no expectation that it could rely upon an incomplete NAICS code or standard.

D. SBA Is Not Estopped From Correcting Erroneous Determinations

In its Appeal Petition, Appellant has made no allegation that the Government committed an act of affirmative misconduct or acted in bad faith in the performance of its duties. Nor is there any proof in the Record that either the District Office or the Area Office committed an act of affirmative misconduct or acted in bad faith in any of the actions underlying this appeal. Instead, the Record shows that SBA corrected a mistake by determining Appellant was not a small concern under Footnote 1 of 13 C.F.R. § 121.201 (Facts 9 - 17).

Appellant's failure to allege affirmative misconduct or bad faith is fatal to its request for estoppel relief. Notwithstanding, even if Appellant had made such an allegation, I hold that since the Record is devoid of proof of either misconduct or bad faith, Appellant's request for estoppel relief would fail.

E. Summary

The facts in the Record before me are not in dispute. Rather, Appellant: (1) Disputed the authority of SBA to promulgate 13 C.F.R. § 121.201, Footnote 1; (2) Contested the application

of 13 C.F.R. § 121.201, Footnote 1, to procurements; (3) Alleged 13 C.F.R. § 121.201, Footnote 1 conflicts with 13 C.F.R. § 124.513(b); (4) Challenged the authority of the Area Office to complete incomplete size standards; and (5) Made allegations that amount to estoppel.

Consistent with SBA's cogent Response, I find no merit in any of Appellant's points. Rather, I find Appellant's request that I reverse the size determination would require me to: (1) Ignore statutory authority granted SBA's Administrator to establish appropriate factors in promulgating size standards; (2) Give no meaning to the first sentence of 13 C.F.R. § 121.201; (3) Give no meaning to 13 C.F.R. § 121.201, Footnote 1; (4) Overlook limiting language in 13 C.F.R. § 124.513(b); (5) Ignore 13 C.F.R. § 121.402(b) and (d); and (6) Overlook that estoppel is not generally available against the Government. Plainly, to act as Appellant requests would be error on my part and, therefore, I decline to find clear error of fact or law in the size determination.

Conclusion

I have considered Appellant's Petition and the Record. The Record shows that Appellant is not primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. Therefore, the Area Office did not base its size determination upon a clear error of fact or law when it determined Appellant is other than a small concern under NAICS codes 221112 and 221122. Therefore, the size determination is AFFIRMED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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THOMAS B. PENDER
Administrative Judge