

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

SIZE APPEAL OF:

Tiger Enterprises, Inc.

Appellant

RE: Vortec Development, Inc.

Appealed from
Size Determination No. 3-2007-33

SBA No. SIZ-4848

Decided: May 1, 2007

ORDER REMANDING SIZE DETERMINATION

I. Introduction and Jurisdiction

On April 17, 2007, Tiger Enterprises, Inc. (Appellant) filed an Appeal of Size Determination No. 3-2007-33 (size determination) dated April 2, 2007 with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). In this size determination, SBA's Office of Government Contracting, Area Office III (Area Office), found Vortec Development, Inc. (Vortec) to be a business that is "small" under North American Industry Classification System (NAICS) code 532210,¹ Consumer Electronics and Appliances Rental. NAICS code 532210 has a \$6.5 million size standard.

In deciding an appeal, OHA must be able to determine if a size determination is based upon a clear error of fact or law, 13 C.F.R. § 134.314. The predicate for evaluating a size determination is that it contains enough detail and analysis so OHA can evaluate whether it was based upon a clear error of fact or law. Hence, OHA will *sua sponte* remand a size determination if upon appeal, it determines an area office, within the size determination:

- a. Fails to discuss the protest;
- b. Fails to address the response of the protested concern; and/or
- c. Fails to apply the applicable regulations to the evidence in the record to analyze whether a concern meets or exceeds the size standard.

In addition, OHA will remand or reverse a size determination, depending upon how material an error is to the size determination, if an area office:

¹ The size determination misidentifies the NAICS code as 523310. This is a harmless typographical error. The area office did apply the appropriate \$6.5 million size standard.

- a. Misstates or misapplies regulations or law, *e.g.*, if an area office applies the burden of proof to the wrong party;
- b. Makes clear errors of fact in the size determination; or
- c. Incorrectly applies the law to the facts in the size determination.

As a result of this appeal, I have determined the Area Office failed to issue a size determination that I can review for the existence of clear error. In addition, I find the Area Office made at least one significant error of law justifying an automatic remand of the size determination.

OHA decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issues

Whether the Area Office size determination sufficiently addressed issues of decisional significance, acknowledged relevant evidence, and identified evidence relied upon to allow OHA to conduct an appropriate review for clear error of fact or law and to provide adequate notice to interested parties of the basis for the decision.

Whether the size determination must be automatically remanded because the Area Office misstated applicable regulations when it found the protesting concern bore the burden of proving Vortec employees previously held key positions in an allegedly affiliated concern.

III. Facts

A. Findings of Fact

1. On January 30, 2007, the Department of Army Fort Bragg Directorate of Contracting (Army) issued solicitation No. W91247-07-R-A001. The solicitation provided the procurement would be set-aside for Small Business and identified NAICS code 532210, Consumer Electronics and Appliances Rental, with a \$6.5 million size standard, as the applicable size standard. Offers were due on February 9, 2007.
2. On February 16, 2007, the Contracting Officer (CO) awarded the contract to Vortec.
3. On March 2, 2007, the Army notified Appellant of award to Vortec. On March 7, 2007, Appellant filed a protest alleging affiliation between Vortec and Tarheel Specialties, Inc. (TSI) and its affiliates. The CO adopted Appellant's protest.

4. On March 13, 2007,² the CO forwarded Appellant's protest to the Area Office.

5. On March 21, 2007, the Area Office notified Vortec of the size protest and requested it respond. The Area Office asked Vortec to provide: (1) a statement responding to the allegations and any supporting evidence; (2) a completed SBA Form 355; (3) a copy of Vortec's corporate charter and bylaws; (4) Vortec's and its affiliates last annual statement to shareholders; (5) tax returns; (6) IRS Form 4506; (7) copies of technical and cost proposals; and (8) copies of agreements with subcontractors.

6. On March 29, 2007, the Area Office received Vortec's response. Vortec's response included declarations from Vortec's principals. Both declarants represent, under penalty of perjury, they started working at Vortec on February 5, 2005, which is inconsistent with the time they claimed they were working for TSI. In addition, Ms. Day's declaration is undated and therefore ineffective.

B. The Size Determination

On April 2, 2007, the Area Office issued Size Determination No. 3-2007-33 finding Vortec to be "small" for the \$6.5 million size standard. Within the size determination, the Area Office recounts Appellant's allegations in a bulleted list and notes Appellant's twenty-three supporting exhibits. The size determination also discusses Vortec's response to the allegations. However, the size determination does not identify applicable affiliation regulations, the specific evidence relied upon, or explain how the law applied to the record renders Vortec small.

The size determination concludes that the crux of the protest rests on Vortec and its acknowledged affiliates being affiliated with TSI and its acknowledged affiliates. However, the Area Office also stated:

The protest implies that Ms. Gurkin and Ms. Day were key employees of T [TSI], but, by omitting the other management positions in its diagram and allegations, *complainant failed to prove* that they held key positions in T [TSI]. To the contrary, the depositions³ of Ms. Gurkin and Ms. Day attesting to serving T [TSI] at the will of management, and not being key persons

(emphasis added).

The size determination also summarily dismisses concerns raised in the protest. The Area Office determined there are no indicia of business relationships and the size determination does not discuss the contracts between Vortec and TSI. The size determination shelves Appellant's Exhibit 1 as an incomplete organizational chart of TSI meant to overstate the former

² The size determination notes the protest was received on March 21, 2007, but it appears from the record it was received by the Area Office on March 16, 2007.

³ There are no depositions in the Record (Fact 6). There are declarations, which purport to be submitted under 28 U.S.C. § 1746.

employment of Vortec's two principals, Ms. Gurkin and Ms. Day, with TSI. The Area Office states, "when the missing organizational levels of [TSI's] management at the time Ms. Day and Ms. Gurkin were employed there are factored back in, it becomes clear that the protest is self serving by not presenting the organizational structure." The size determination does not indicate what evidence it is relying on to arrive at this conclusion. The size determination abruptly concludes blood relation and occupying the same residence are not indicative of commonality of control and that Vortec successfully rebutted the presumption of power to control. The Area Office states Appellant "failed to prove" that the principals of Vortec held key positions with TSI and that the protest did not present evidence that Vortec had aggregated receipts over \$6.5 million other than affiliation with TSI.

C. The Appeal and Motion to Submit New Evidence

Appellant filed its appeal with OHA on April 17, 2007. In its Appeal Petition, Appellant correctly asserted its appeal was not moot, even though award of the contract had been made. *See Size Appeal of Ross Aviation*, SBA No. SIZ-4840 (2007). In presenting its analysis, Appellant cited to applicable regulations and asserted the size determination contained numerous errors and misstatements of fact.

After submitting its Appeal Petition Appellant also moved to submit new evidence in accordance with 13 C.F.R. § 134.308(a)(2). Specifically, Appellant proffered a Deed of Trust between a TSI affiliate and the principals of TSI and Vortec that was registered with the Harnett County, North Carolina Register of Deeds on January 17, 2007. Appellant asserted the Deed of Trust is evidence of an ongoing relationship between Vortec, TSI, and their various principals.

D. Vortec's Response and Objection to New Evidence

On May 1, 2007, Vortec filed a response arguing Appellant's appeal is without merit and should be dismissed or denied.

On May 1, 2007, Vortec also filed its objection to Appellant's motion to admit new evidence. Vortec argues Appellant's new evidence is irrelevant and untimely. Vortec offers a corrected filing registered with the Harnett County, North Carolina Register of Deeds on April 23, 2007. Vortec also includes a letter from the attorney who prepared the deed explaining the real estate transaction.

IV. Discussion

A. Applicable Law and Regulations

1. Timeliness

Appeals must be filed and served at OHA within 15 days after an appellant receives a size determination. 13 C.F.R. § 134.304(a)(1).

2. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *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), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

3. Procedures for Size Determination

Area offices are charged with issuing size determinations in accordance with 13 C.F.R. § 121.1009. The specific portion of 13 C.F.R. § 121.1009 relevant to this appeal provides:

(b) Basis for determination. The size determination will be based primarily on information supplied by the protestor or the entity requesting the size determination and the subject concern. The determination, however, may also be based on other grounds not raised in the protest or request for size determination. SBA may utilize other information in its files and may make inquiries including requests to the protestor, the protested concern and any alleged affiliates, or other persons for additional specific information.

(c) *Burden of persuasion.* *The concern whose size is under consideration has the burden of establishing its small business size.*

(d) Weight of evidence. SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(e) Formal size determination. The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(emphasis added).

B. Analysis

1. Timeliness

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

2. New Evidence

Pursuant to 13 C.F.R. § 134.308(a)(2), I may admit new evidence when a motion has been filed that establishes good cause for the submission of such evidence. In this instance, Appellant timely served a copy of a recent Deed of Trust that on its face may be probative of the issue of fracture (and thus affiliation) between Vortec, TSI, and their various principals. Thus, I find Appellant has shown good cause for its proffer of the evidence to be admitted to the Record. However, I note that given my disposition of this appeal, the Area Office would be obligated to consider this Deed of Trust even if I had not found good cause to admit it to the Record. Similarly, the Area Office must consider the information provided by Vortec in its opposition to Appellant's motion to admit new evidence.

3. Sufficiency of Size Determination

Size determinations are generally based on information supplied by the protestor and the protested business. Nevertheless, an area office is not limited to the information presented by the protestor and protested business. An area office should make its own inquiries to gain additional information to deduce an accurate understanding of the size of the protested business.

It is important to note that the protested business bears the burden of establishing its small business size. The protestor is not required to "prove" the size of the protested concern. This is logical, for protests must, by necessity, raise allegations based on little information since the protested concerns necessarily have the best access to information about themselves. Area offices are charged with using the initial information to commence a further investigation which culminates with a size determination that should include a fuller understanding of the facts involved.

In completing inquiries, area offices give greater weight to sworn, factual evidence than opinions and arguments. Ultimately, the size determination is based on the complete record and includes citations to the evidence relied upon to reach the determination.

The size determination completed in this case fails to meet regulatory requirements. The size determination recounts Appellant's allegations and notes Appellant's supporting exhibits. The size determination also discusses Vortec's response to the allegations. However, the size determination fails to find relevant facts or to analyze them in light of the applicable regulations.

The size determination (at 6) also states the burden of persuasion rests with the protestor, which is contrary to regulation and therefore a clear error of law. 13 C.F.R. § 121.1009. Moreover, in a record which raises numerous allegations of potential affiliation and is filled with conflicting arguments from the parties, the size determination fails to discuss what evidence (or the source of the evidence) it relies on in reaching its determination.

In the same paragraph where the Area Office discussed Appellant's burden of persuasion, the Area Office also made two other significant errors. These include: (1) Calling a declaration a

deposition; and (2) Stating that the fact that a person could be dismissed at the will of management means they cannot be a key employee.

Immediately following that paragraph the Area Office continued the problematic nature of the size determination. For example, the Area Office failed to address that the blood relationship between one of Vortec's owners and an owner of TSI creates a presumption of an identity of interest. Moreover, the Area Office also made no discussion of the clear fracture needed to overcome the presumption or make this relationship irrelevant under 13 C.F.R. § 121.103(f). See *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003) (quoting *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 6 (1998); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899, at 7 (1984)). This is important, for the Record shows a pattern of business relationships and when I consider the Record with Appellant's proffer of a January 2007 loan document, affiliation seems plausible.

I am also concerned by the Area Office's unjustified and unexplained characterization of Appellant's Appeal Petition as being self-serving. I think far better examples of self-serving submittals are the two declarations submitted by Vortec.

The size determination dismisses Appellant's Exhibit 1 as an incomplete organizational chart of TSI meant to overstate the former employment of Vortec's two principals, Ms. Gurkin and Ms. Day, with TSI. However, the size determination does not indicate what information it is relying on to deduce that the organizational chart misrepresents management at TSI. Neither Ms. Gurkin nor Ms. Day's declarations reference the organizational chart. The record does not appear to contain a more accurate chart. It appears the Area Office relied solely upon Vortec's legal argument that the exhibit be stricken as outdated and that it excludes four other areas of the business which also report directly to the two owners. Further, the size determination does not acknowledge that Vortec submitted a nearly identical chart as part of Vortec's proposal for the subject solicitation (the chart for Vortec has Ms. Gurkin and Ms. Day serving the same roles as when they were employed by TSI).

The size determination states there is no evidence of control or power to control by TSI or its affiliates "either at the date of self-certification, or at present." However, it is insufficient to look only at the time of self-certification and continuing forward. The Area Office must look at evidence preceding the self-certification.

4. Guidance Concerning the Size Determination

As configured, the size determination is confusing. Rather than identify potentially applicable size regulations, *e.g.*, 13 C.F.R. § 121.103(e), (f) and (g), the size determination unnecessarily quotes the text from 13 C.F.R. § 121.1004.

While it is important to summarize the protest, the Area Office dedicated too much space to summarizing the protest and not enough space on finding and analyzing relevant facts in light of the applicable regulations. Specifically, the Area Office did not find facts or summarize the information that it could have gained from Vortec's SBA Form 355, which would permit it to

identify the *dramatis personae* and their relationships. Based upon this, it appears that the Area Office was confused by the protest allegations and therefore did not find facts.

In failing to find facts, the Area Office made it impractical for it and thus OHA to analyze the affiliation rules made relevant by the protest and the facts. For example, the Area Office did not discuss affiliation based on; (1) common management (13 C.F.R. § 121.103(e)); (2) Identity of Interest (13 C.F.R. § 121.103(f)); (3) the newly organized concern rule; or (4) the totality of the circumstances (13 C.F.R. § 121.103(a)(5)), because it did not discuss the elements applicable to affiliation under these rules and apply applicable facts to these elements.

Considering the foregoing, I recommend the Area Office review the information before it and consider whether it needs more information or clarification from the interested parties. In addition, in making its new size determination, I hold the Area Office must consider the new evidence proffered by Appellant to OHA. The Area Office must also: (1) find facts and summarize available evidence from all sources, paying particular attention to relationships and individual roles; (2) summarize the protest; (3) identify potentially applicable affiliation regulations and their elements; (4) analyze the facts and apply the elements of relevant affiliation regulations to the facts it finds; and (5) determine whether affiliation exists consistent with its analysis of the facts and law.

V. Conclusion

For these reasons, the Area Office's April 2, 2007 size determination is VACATED and REMANDED. Upon remand, the Area Office is ORDERED to specifically identify issues of decisional significance, address the relevant evidence, and acknowledge the evidence upon which the Area Office relies in making its determination. The size determination should reference specific provisions of the affiliation regulation. The Area Office is also ORDERED to consider Appellant's proffered new evidence and the instructions and comments contained in this Order.

THOMAS B. PENDER
Administrative Judge