

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

SIZE APPEAL OF:

Corporate Training and Development, Inc.

Appellant

RE: CSM Solutions, Inc.

Appealed from
Size Determination No. 3-2007-40

SBA No. SIZ-4849

Decided: May 7, 2007

ORDER REMANDING SIZE DETERMINATION

I. Introduction and Jurisdiction

On April 26, 2007, Corporate Training and Development, Inc. (Appellant) filed an Appeal of Size Determination No. 3-2007-40 (size determination) dated April 13, 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 CSM Solutions, Inc. (CSM) to be a small business under North American Industry Classification System (NAICS) code 561320, Temporary Help Services. NAICS code 561320 has a \$12.5 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, we determine 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.

As a result of this appeal and my examination of the size determination, I have determined the Area Office failed to issue a size determination that I can review for the existence of clear error.

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. Issue

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.

III. Facts

A. Findings of Fact

1. On February 26, 2007, the Department of Army, Fort Lewis Directorate of Contracting (Army) issued Solicitation No. W911S8-07-R-0011. The solicitation provided the procurement would be set-aside for veteran-owned small businesses and identified NAICS code 561320, Temporary Help Services, with a \$12.5 million size standard,¹ as the applicable size standard. Offers were due on March 12, 2007.²
2. On March 15, 2007, the Contracting Officer (CO) awarded the contract to CSM.
3. On March 16, 2007, the Army notified all unsuccessful offerors of award to CSM.
4. On March 23, 2007, Appellant filed a timely protest³ alleging affiliation between CSM and Russian and East European Partnership, Inc. dba Operational Support Services (REEP dba OSS).
5. On March 27, 2007, the CO forwarded Appellant's protest to the Area Office.
6. On March 28, 2007, the Area Office notified CSM of the size protest and requested it respond. The Area Office asked CSM to provide: (1) a statement responding to the allegations and any supporting evidence; (2) a completed SBA Form 355; (3) a copy of CSM's corporate charter and bylaws; (4) CSM 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.

¹ The solicitation misidentifies the size standard for NAICS code 561320 as \$15.5 million. This is a harmless typographical error. The area office applied the appropriate \$12.5 million size standard.

² Amendment No. 3 changed the proposal due date from March 9, 2007 to March 12, 2007.

³ A protestor has five days, exclusive of Saturdays, Sundays, and holidays, after receipt of notification from the CO of the prospective awardee to file a protest with the CO. 13 C.F.R. § 121.1004(a)(2).

7. On April 9, 2007, the CO granted the Area Office an extension until April 13, 2007 to complete the size determination.
8. On April 12, 2007, the Area Office received CSM's response.

B. The Size Determination

On April 13, 2007, the Area Office issued Size Determination No. 3-2007-40 finding CSM to be "small" for the \$12.5 million size standard. In the size determination, the Area Office recites Appellant's allegation that CSM exceeds the applicable size standard due to affiliation with REEP dba OSS. Then, the Area Office cites the portion of the affiliation regulation pertaining to general principles of affiliation and affiliation based on identity of interest. Following its citation to the identity of interest regulation, the Area Office summarizes CSM's response to the protest and recounts ownership as indicated by CSM's SBA Form 355. The size determination also notes that CSM and REEP dba OSS have engaged in a prime/subcontractor relationship, but CSM asserts that not more than 50% of CSM's receipts for 2005, 2006, and current 2007 sales have been invoiced to or from REEP dba OSS.

Near the close of the size determination the Area Office concludes that "[n]o evidence has been presented to show that CSM and REEP dba OSS are affiliated by ownership, shared employees and identity of interest." However, the size determination acknowledges CSM and REEP dba OSS have maintained an ongoing prime/subcontractor relationship and recounts CSM's president's twenty-three years of experience with the United States Army. The size determination concludes, "No evidence exists except for the above mentioned subcontracting arrangements of any current business relationships between the two firms and affiliation among two or more persons with an identity of interest."

In substance, the size determination is less than two pages long. The size determination does not analyze relevant evidence with applicable regulations to determine if affiliation does or does not exist due to joint ownership, shared employees, identity of interest, or the totality of the circumstances.

C. The Appeal

Appellant filed its appeal with OHA on April 26, 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). Appellant argued the size determination is erroneous as a matter of fact and law and defective because the Area Office "failed to discuss all relevant facts or analyze them in light of applicable regulation or case precedent, and therefore failed in its obligation to state the legal and regulatory basis for its findings and conclusions." Appeal, at 2 (citing 13 C.F.R. § 121.1009(e)). Appellant argued the size determination must be reversed or remanded for a proper size determination to be issued. Appellant also moved to submit new evidence in accordance with 13 C.F.R. § 134.308(a)(2).

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.

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

Due to the disposition of this appeal, it is unnecessary to rule on Appellant's motion to admit new evidence. I note the Area Office is obligated to consider this information in preparing a size determination.

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 as required by 13 C.F.R. § 121.1009(b) through (e) and as OHA has held. *See Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4540, at 8 (2003); *Size Appeal of ASEE Services Corporation*, SBA No. SIZ-4250, at 7 (1997).

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 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. 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 only briefly summarizes the protestor's allegations, cites only portions of some of the affiliation regulation, recites CSM's response, and includes a brief conclusory discussion that fails to identify relevant facts or to analyze facts in light of the applicable regulations.

4. Guidance Concerning the Size Determination

As configured, the size determination is defective. The size determination fails to identify relevant evidence or apply applicable size regulations, *e.g.*, 13 C.F.R. § 121.103(e), (f), (g), and (h) to the facts. The size determination provides no indication of the actual analysis of CSM's size or the size of its potential affiliates. Instead, the Area Office limited its discussion to

the percentage of CSM's receipts attributed to REEP dba OSS in the preceding three years of their ongoing prime/subcontractor relationship.

In failing to find facts or apply applicable regulations, the Area Office made it impossible for it and thus OHA to analyze the affiliation rules made relevant by the protest and the facts. For example, even though the protest and the material in the Record reasonably raised affiliation under several theories, the Area Office did not discuss affiliation based on: (1) totality of the circumstances (13 C.F.R. § 121.103(a)(5)); (2) common management (13 C.F.R. § 121.103(e)); (3) identity of interest (13 C.F.R. § 121.103(f)); (4) the newly organized concern rule (13 C.F.R. § 121.103(g)); or (5) the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). Further, the Area Office provided no indication of how it determined CSM's size. *See* 13 C.F.R. § 121.103(a)(6); 13 C.F.R. § 121.104.

In holding the size determination is *per se* inadequate, I am not determining that CSM is other than small. Rather, I am holding there is no way for me to review the size determination as written. However, I am mindful that the Appeal Petition noted many, if not all, of the inadequacies in the size determination I hold to exist. What is more, the Appeal Petition makes cogent allegations that merit serious consideration by the Area Office and a thoughtful reply by CSM.

I also recommend the Area Office carefully consider the following decisions: *Size Appeal of Faison Office Products LLC*, SBA No. SIZ-4834 (2007); *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006); and *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, (2006). These decisions directly address matters that appear to be relevant to issues evident from the Record in this appeal and should prove beneficial.

The Area Office should 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 in its appeal. 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 13, 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