

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

SIZE APPEAL OF:

Canal Wood, LLC

Appellant

Appealed from
Size Determination No. 3-2007-43

SBA No. SIZ-4852

Decided: May 23, 2007

APPEARANCES

Christopher L. Risetto, Esq., Leigh T. Hansson, Esq., Gregory S. Jacobs, Esq., Reed Smith LLP, Washington, D.C., for Appellant.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

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.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On March 2, 2007, the Forest Service of the Department of Agriculture issued a Timber Sale Prospectus for land in the Francis Marion National Forest. The sale was set aside for small businesses. The size standard for timber sales is 500 employees (13 C.F.R. § 121.507(a)(2)). Bid opening was on April 3, 2007. The high bidder was Canal Wood, LLC (Appellant).

On April 9, 2007, an official of Log Creek Timber Company, another bidder, telephoned the Contracting Officer (CO) and informed him that Appellant was associated with New South

Lumber Co., Inc. (New South), a large business. The CO contacted Appellant, and received some information about the firm. Nevertheless, on April 10, 2007, the CO requested that the Small Business Administration (SBA) Area Office of Government Contracting - Area III (Area Office) in Atlanta, Georgia, perform a size determination on Appellant.

B. Size Determination No. 3-2007-43

On April 13, 2007, the Area Office notified Appellant of the protest, and requested that it provide a response to the protest allegation, a completed SBA Form 355, and certain other information (the April 13th letter). The letter informed Appellant it had three working days from receipt of the letter to respond. The letter was sent via Federal Express, and received by Appellant on April 16, 2007. Appellant failed to respond to the April 13th letter.

On April 20, 2007, the Area Office issued a size determination finding Appellant other than small. The Area Office stated that Appellant's failure to respond to the April 13th letter by the April 19, 2007 deadline permitted SBA to presume that the information not provided would demonstrate Appellant was other than small. On April 20, 2007, Appellant received the size determination.

C. The Appeal

On April 25, 2007, Appellant filed the instant appeal. Appellant asserts the basis of its appeal is that it was found small solely based on the fact that it did not timely submit the requested information. Appellant asserts it ended its relationship with New South on September 15, 2000. Appellant attaches its completed SBA Form 355, corporate documents, payroll information, and other documentation to its appeal.

On May 11, 2007, Appellant filed a Motion for Consideration of Additional Evidence. Included with the evidence are sworn declarations of Appellant's President, William A. McCall (Attachment C); its Human Resources Manager, Kimberly Courtney (Attachment F); and its Greenwood Regional Manager, David Castle (Attachment E). Appellant also includes a copy of its Contact page from its website. (Attachment N, *See also* www.canalwood.com/contact.html.) Appellant argues that, based upon these documents, it has established good cause for the submission of new evidence.

Appellant asserts that it has a number of office locations. Appellant's headquarters are located in Conway, South Carolina, where Ms. Courtney works. Mr. Allen states, "It is understood within the Company that matters relating to human resources, accounting, and the Small Business Administration (SBA) are to be handled at our headquarters in Conway, SC." These matters are directed to Ms. Courtney's attention. Mr. Allen further states, "I often work out of an administrative office located in Florence, SC."

Mr. Castle states that, after the CO notified Appellant there was a question as to its size, Mr. Castle spoke to the CO and told him that any SBA communications should be directed to Ms. Courtney at Appellant's Conway office. However, the Area Office directed the April 13th letter to the Florence office. Mr. McCall states that he received the April 13th letter at the

Florence office on April 16th, but because he was not accustomed to receiving procurement correspondence at this office, he was unaware of the requirement that he respond within three days.

Mr. McCall further states that he received the size determination on April 20, 2007, which was also addressed to Appellant's Florence office. On the next business day, Mr. McCall directed Ms. Courtney to submit the requested information to SBA. Ms. Courtney states that she contacted the Area Office, and was told to submit the information to this Office. Ms. Courtney also asserts that when she inquired of the Area Office why the April 13th letter was sent to Appellant's Florence office, she was informed the Area Office obtained the address from Appellant's website. A review of Appellant's website lists the Florence Office under Corporate Offices, with Mr. McCall's name, and the Conway office under Administrative Offices, which caption has a slightly larger font (Attachment N). Appellant argues that these declarations establish good cause for the consideration of new evidence.

Appellant cites to *Size Appeal of T/J Technologies, Inc.*, SBA No. SIZ-4832 (2007) (*T/J Technologies*) in support of its position that there is good cause for this Office to permit the submission of new evidence where the Area Office request for information is misrouted.

Appellant argues in the alternative that its failure to respond to the Area Office should be treated as excusable neglect. Mr. McCall had no reason to expect that any communication from SBA requiring his immediate attention and action would be sent to the Florence office.

Appellant also included in its May 11th submission an argument on the merits, relying on the proffered new evidence, asserting that it is an eligible small business.

IV. Discussion

A. Timeliness

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

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). This Office will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

C. New Evidence

The heart of this appeal is Appellant's motion for submission of new evidence. If it is denied, then there is no basis for finding any error of fact or law by the Area Office. If it is granted, then the matter must be remanded to the Area Office for a new size determination which would consider the new evidence. *Size Appeal of E.D. Etnyre & Co.*, SBA No. SIZ-4596 (2003).

This Office's procedural regulations establish a clear rule: new evidence may not be submitted on appeal unless the Judge orders it *sua sponte* or a motion is filed and served establishing good cause for the submission of the new evidence. 13 C.F.R. § 134.308(a). This Office has found good cause when the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal. *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4434 (2001).

In order to evaluate Appellant's argument that there is good cause to permit the submission of new evidence, I must ADMIT into the record its Attachments C, E, F, and N.

Here, Appellant pleads good cause, but its arguments are unpersuasive. The Area Office directed the April 13th notification of protest letter to an office listed at Appellant's website under "Corporate Offices". Appellant's president admits he received the letter on April 16th. The letter plainly states that a protest has been filed against Appellant, gives the basis of the protest, requests a response to the protest and other information from Appellant, and explicitly states there is a three-day deadline for the response. Appellant's contention that Mr. McCall did not expect this correspondence at this office is no excuse for failing to read and respond to the correspondence which he actually received. Businesses frequently receive unexpected communications, to which they must respond. The rest of the world cannot be on notice of Appellant's internal directions as to which of its offices performs which function. Mr. McCall is Appellant's president. He must be charged with knowledge of correspondence he receives at his office, whether he expects to see it there or not. Mr. McCall was perfectly capable of forwarding the April 13th letter to Ms. Courtney for action. It is noteworthy that when Mr. McCall received the size determination, which was also sent to the Florence office, he forwarded it to Ms. Courtney for action within one business day. The actions of Appellant's president, as described in his own sworn statement, establish that he received the April 13th letter and could have acted on it, even if only to refer it to Ms. Courtney and request an extension of time to respond. These actions far outweigh the statements by the other employees that the April 13th letter should have been directed to Conway.

Appellant's argument based on *T/J Technologies* is inapposite. In that case, the area office itself erred in making email transmissions to a nonexistent address. The challenged firm in that case never received the Area Office's requests for information due to the Area Office's error. Were that the case here, if, say, the Area Office had directed the April 13th letter to an address where Appellant no longer had any offices, the result might be different. However, the Area Office sent the April 13th letter to the listed address of Appellant's Corporate Offices, where Appellant's president received it. Appellant failed to respond to the letter or request an extension within the three-day deadline. The Area Office thus drew the inference that the information, if provided, would demonstrate that the firm was an other than small business. 13

C.F.R. § 121.1008(d). There is nothing in this series of events which demonstrates excusable neglect by Appellant, or demonstrates error by the Area Office. Further, this Office's precedent is clear: an Appellant may not cure on appeal its failure to present evidence to the Area Office at the protest level. *Size Appeal of Creative Recycling Systems, Inc.*, SBA No. SIZ-4757 (2006).

Accordingly, Appellant's motion for submission of new evidence is DENIED.

D. The Merits of the Appeal

The Area Office here was faced with a challenged firm which had made no response whatsoever. The regulation clearly states that under these circumstances, the Area Office may presume the disclosure of the required information would demonstrate that the concern is an other than small business. 13 C.F.R. § 121.1008(d). This Office has held that such a presumption is justified when: (1) the requested information is relevant to some issue in the size determination; (2) there is some level of connection between the challenged firm and the firm about which the information is requested; and (3) The request for information is specific. *Size Appeal of Cellegy Pharmaceuticals, Inc.*, SBA No. SIZ-4439 (2001). Here, the Area Office specifically requested the information about Appellant itself that was necessary to make the size determination. The test is clearly met. The Area Office was justified in drawing the inference, and finding Appellant other than small. Appellant has failed to establish any error by the Area Office. Accordingly, I AFFIRM the size determination, and DENY the appeal.

V. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DENY the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge