

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

SIZE APPEAL OF:

Millennium Health & Fitness, Inc.

Appellant

Re: Aquila Fitness Consulting Systems, Ltd.

Appealed from
Size Determination No. 3-2008-10

SBA No. SIZ-4877

Decided: January 4, 2008

APPEARANCE

Sherry Morton, President, Millennium Health & Fitness, Inc., for Appellant.

DECISION

PENDER, 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 Area Office size determination dismissing Appellant's size protest as not containing specific facts pursuant to 13 C.F.R. § 121.1007(b) was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Facts

On May 17, 2007, the Department of the Navy, Naval Undersea Warfare Center Division, Newport, in Rhode Island (Navy), issued Solicitation No. N66604-07-R-2761 to staff and operate a fitness center. The Navy set the procurement aside for small businesses and classified it under North American Industry Classification System (NAICS) code 713940, with a

small business size standard of \$6 Million.¹ Initial proposals were due on June 27, 2007, and final proposal revisions were due on October 22, 2007.

On November 19, 2007, the Contracting Officer (CO) notified offerors that Aquila Fitness Consulting Systems, Ltd. (Aquila), was the apparent successful offeror. On November 20, 2007, Millennium Health & Fitness, Inc. (Appellant), an unsuccessful offeror, protested Aquila's size status to the CO. The size protest stated:

The small business size status is derived from the revenues and/or number of employees entered by the vendor. Aquila NAICS codes classify that their revenues be limited to \$6.5 million to qualify as a small business. On August 27, 2007, Dun & Bradstreet contacted Aquila's CEO requesting that financials be submitted to the company's profile. At that time, the CEO refused to do so. Thus, denied access to this information makes it impossible for Millennium Health & Fitness, Inc. to have a fair advantage of challenging the accuracy of Aquila's small business status.

On November 20, 2007, the CO referred the size protest to the Small Business Administration's (SBA) Office of Government Contracting, Area III, in Atlanta, Georgia (Area Office), for a size determination. On November 27, 2007, the Area Office issued Size Determination No. 3-2008-10 (size determination) dismissing the protest as non-specific.

Appellant received the size determination on November 27, 2007, and filed its size appeal on December 10, 2007. After mentioning the Area Office's dismissal of its size protest and noting Appellant still challenges Aquila's size status, Appellant provides some information it obtained from Aquila's website: a list of health, fitness, and management services that Aquila offers, and a list of seven locations. Then Appellant states:

Upon reviewing this information leads to the belief that a company offering such a multitude of expertise to an array of clients would without a doubt yield revenues greater than \$6.5 million. A comparison company, Hummer Whole Health, offering similar services as Aquila, report annual revenues to be between \$10M-50M. Given that the small business size status is derived from the revenues and/or number of employees entered by the vendor, Millennium attempted to gather additional financial information on Aquila through Dun and Bradstreet. We were informed by Dun and Bradstreet that on August 27, 2007, Aquila's CEO was contacted and asked to submit Aquila's financials to the company's profile. At that time, the CEO refused to do so. Thus, denied access to this information necessitates Millennium's action to challenge the accuracy of Aquila's small business status.

As of December 28, 2007, the day the appeal record in this matter closed, Aquila has not responded to the appeal.

¹ Effective December 6, 2005, NAICS code 713940 has a size standard of \$6.5 Million. 70 Fed. Reg. 72577, 72583 (Dec. 6, 2005).

IV. Discussion

A. Timeliness

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

B. 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.

C. Analysis

The regulations governing the SBA's size determination program require a size protest to include specific facts. A size protest "must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given." 13 C.F.R. § 121.1007(b). Further, "A protest merely alleging that the protested concern is not small . . . does not specify adequate grounds for the protest." *Id.* Among the several examples provided, "An allegation that concern X has revenues in excess of \$5 million (where \$5 million is the applicable size standard) without setting forth a basis for the allegation is non-specific." 13 C.F.R. § 121.1007(c) (Example 5).

The regulation also states SBA will dismiss protests which do not contain sufficient specificity. 13 C.F.R. § 121.1007(c). OHA will affirm such dismissals. *Size Appeal of Jacob-Reliable Enterprises*, SBA No. SIZ-4836 (2007).

Here, Appellant's protest, quoted above, does no more than mention the size standard and recount that Aquila declined to provide its financial information to Dun & Bradstreet on a particular date. The protest includes no evidence at all of Aquila's receipts and, in fact, complains of the unavailability of that evidence. Like Example 5, Appellant's protest is just a bald allegation that the protested concern's receipts exceed a particular dollar size standard, without any supporting evidence. Thus, because Appellant's protest is an exemplar of an inadequate protest, I must conclude that the size protest presents no basis for the allegation that Aquila exceeds the size standard, and that the Area Office correctly dismissed the size protest as insufficiently specific.

Accordingly, because I cannot conclude that the Area Office's dismissal of Appellant's size protest was based on a clear error of fact or law, I must deny the instant appeal.² See 13 C.F.R. § 134.314; *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006).

V. Conclusion

For the above-mentioned reasons, the Area Office's size determination dismissing Appellant's protest is AFFIRMED and the instant appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge

² On appeal, Appellant presents some information about Aquila, and also alleges that a "comparison company" that offers "similar services" as Aquila, exceeds the size standard. Even if this speculative allegation were included in the size protest, the protest still would not have been specific enough to avoid dismissal and to require the Area Office to investigate Aquila's size status.