United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
USA Jet Airlines, Inc.	SBA No. SIZ-4919
Appellant	Decided: April 3, 2008
Appealed from Size Determination Nos. 4-2006-114/117	

APPEARANCES

Stephen S. Kaye, Esq., William E. Olson, Esq., Bryan Cave LLP, Washington, D.C., for Appellant.

Carolyn Callaway, Esq., Albuquerque, New Mexico, for Ross Aviation, Inc.

Kenneth Dodds, Esq., Office of the General Counsel, U.S. Small Business Administration.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a January 15, 2008 size determination (Case Nos. 4-2006-114 and 4-2006-117 (on remand)) (size determination) issued by the U.S. Small Business Administration (SBA), Office of Government Contracting, Area Office IV (Area Office) finding USA Jet Airlines, Inc. (Appellant) to be other than small for the applicable size standard of 1,500 employees. The size determination followed a Decision and Remand Order issued by SBA's Office of Hearings and Appeals (OHA) on October 22, 2007. *See Size Appeal of USA Jet Airlines, Inc.,* SBA No. SIZ-4867 (2007) (Remand Order).

Appellant received the size determination on January 17, 2008 and appealed the size determination to OHA on February 1, 2008. 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.

II. Issue

Whether the Area Office's application of an adverse inference in determining Appellant was an other than small concern is based upon a clear error of fact or law. *See* 13 C.F.R. §§ 121.1008(d), 134.314.

III. Background

This appeal follows a remand order. Therefore, familiarity with the Remand Order is presumed. All facts set out in the Remand Order are incorporated by reference herein, unless the reiteration of a fact is necessary for clarity.

A. Pertinent Directions in the Remand Order

The Record supporting the size determination underlying the Remand Order was so incomplete that, in the Remand Order, I noted:

> [I]t is a matter of significant concern to me that the Record is still incomplete. The Schedules to the Operating Agreements for Fifth and Sixth Berkshire are missing and the Record does not contain the Agreement of Limited Partnership for Fund V and Fund VI. In addition, Appellant has asserted, more than once, that four of the managing members of Fifth Berkshire control a majority of the voting rights of Fifth Berkshire, and that these individuals do not hold a majority of the voting rights of Sixth Berkshire as of July 7, 2006. These assertions, including the Small Declaration, in addition to being self-serving, state legal conclusions or opinions rather than facts. Moreover, they are missing the predicate that would give them weight, *i.e.*, a reference to a document proving the truth of the matter alleged.
>
> The Record indicates that principals (Managing Directors) of Berkshire Partners, who may be presumed to share an identity of interest as managers of Berkshire Partners and of the general partners of the Funds, have the power to control Appellant through their roles in the general partners of Berkshire US Fund V and possibly Fund VI. Further, as alleged by Ross, the limited partners' ownership of the Funds is irrelevant, for it is the identity of interest shared by the managers of the general partners controlling the Funds and who are also Managing Directors of Berkshire Partners that matters. This is because, based on the contents of the Operating Agreement for Berkshire US Fund V and applicable Massachusetts law, the power to manage the Funds rests exclusively with the general partners. Thus, the investors or owners (limited partners of the Funds themselves) have no control.

(Remand Order at 20) (Part IV.C.1. Introduction).

Further on, I reiterated:

> [T]he Record does not contain sufficient or reliable evidence to support Appellant's proposition that the "controlling elements" of Fifth Berkshire and Sixth Berkshire are sufficiently different that "common management" affiliation cannot be found and, thus, that Berkshire US Fund V and Fund VI are not affiliated. I also observe that, at the Area Office level, there may have been confusion as to what evidence was required.

(Remand Order at 23) (Part IV.C.3.a. Common Management). Therefore, I ordered:

> Appellant and/or Berkshire Partners to provide to the Area Office documents specifying the "Voting Interest" of each managing member (and special member) of Fifth Berkshire and Sixth Berkshire, along with brief analysis in support of Appellant's proposition that the "controlling elements" of each firm are sufficiently different that "common management" affiliation cannot be found. These documents may be accompanied by any necessary explanation from a competent witness in the form of a Declaration, and must be received by the Area Office not later than November 1, 2007. Appellant bears the burden of proof in this matter. *See* 13 C.F.R. §§ 121.1008(d); 134.308(b).

(Remand Order at 23) (Further Factual Development and Argument).

> Near the close of the Remand Order I noted the Record also lacked:
>
> 1. The Agreement of Limited Partnership for Berkshire Fund V and Fund VI (including schedules and exhibits);
>
> 2. Exhibit B and Schedules to the Agreement of Limited Partnership for Berkshire US Fund V; and
>
> 3. The Schedules to the Operating Agreements for Fifth and Sixth Berkshire.

(Remand Order at 25) (Part IV.C.3.c. Further Factual Development). Because of the missing documents identified immediately above and elsewhere in the Remand Order, I directed:

> a. Appellant or Berkshire Partners shall provide to the Area Office complete copies of the documents noted above and any management contracts not included as exhibits to those documents (including fee schedules) that involve the Berkshire V family of funds or Fund VI;
>
> b. Because the submissions already in the record strongly suggest (and as the Area Office concluded) that Berkshire Fund V and/or Fund VI control certain portfolio companies through their ownership interests (and, thus, that they are affiliated with Active Aero), Appellant or Berkshire Partners shall provide to

the Area Office additional evidence of the ownership and control structure of the following companies: Amscan, Advanced Drainage Systems, American Tire Distributors, Aritzia, Bare Escentuals, Bartlett Holdings, Casella Waste Systems, Citizens of Humanity, EMD, National Vision, Tinnerman Palnut, Vi-Jon, and Waterworks. This evidence (including but not limited to: corporate charters, bylaws, shareholder agreements, meeting minutes, and lists of directors and shareholders by class), may support Appellant's assertion that these Funds do not have the power to control these companies. Alternatively, Appellant or Berkshire Partners may concede that a fund or funds have the power to control a particular portfolio company; and

c. Appellant will address the issue of whether there is an identity of interest or common management because of the identity of interest between Berkshire Partners and Fifth and Sixth Berkshire, either through operation of various contracts (e.g., partnership agreements) or a common economic interest (Berkshire Partners or common investments in portfolio companies).

Appellant or Berkshire Partners is ORDERED to comply with these instructions on or before November 1, 2007. Failing compliance, the Area Office is ORDERED to determine: (1) The Fifth Berkshire family of funds or Sixth Berkshire has the power to control Amscan, Advanced Drainage Systems, American Tire Distributors, Aritzia, Bare Escentuals, Bartlett Holdings, Casella Waste Systems, Citizens of Humanity, EMD, National Vision, Tinnerman Palnut, Vi-Jon, and Waterworks; and (2) Fifth and Sixth Berkshire are affiliated.

The Area Office is further ORDERED that if the Fund VI Agreement of Limited Partnership contains provisions similar to those found in Fact 7, *e.g.*, Sections 6.1, 6.2, 6.6, and 7.1, and the management contracts relevant to Berkshire US Fund V and Fund VI are similar, that it should find affiliation between Berkshire US Fund V and Fund VI because the managers or general partners of these funds have common controlling elements and can be said to share an identity of interest through both contractual and economic factors relevant to Berkshire Partners.

The Area Office is also ORDERED to examine the Berkshire Fund V family of funds controlled by Fifth Berkshire as general partner, *e.g.*, Berkshire Fund V, Berkshire Fund V Coinvestment Fund, Berkshire US Fund V, and Berkshire Foreign Fund V. The Area Office should determine whether the various funds have the power to control the various portfolio companies. If the Area Office concludes one of the Berkshire V family of funds has the power to control and thus is affiliated with a portfolio company, then the Area Office should count the total number of employees employed by that portfolio company. Then the Area Office should aggregate employees controlled by the Berkshire V Fund family of funds with those of Active Aero because they are all subject to the common control of Fifth Berkshire.

(Remand Order at 25-26).

B. Appellant's November 2007 Submissions

On November 7, 2007, Appellant submitted to the Area Office its response to the Remand Order including its cover letter, several documents, and the Declaration of Robert J. Small (Small Declaration). The documents included the Third Amended and Restated Agreement of Limited Partnership of Berkshire Fund VI, L.P. (Fund VI Agreement) and the Tenth Amended and Restated Agreement of Limited Partnership of Berkshire Fund V, L.P. (Fund V Agreement). Neither the Fund VI Agreement nor the Fund V Agreement contains the names of the limited partners, which are blocked out. Also, for both documents, Schedule 1--Capital Commitments contains the dollar amounts but not the names of the corresponding limited partners, which are blocked out, and Schedule 2--Side Letter Agreements lists only the first two agreements, with the remainder blocked out. Exhibit A--Investment Guidelines and Restrictions and Exhibit B--Management Contract are complete.

As for Berkshire (US) Fund V, L.P. (US Fund V), the submission included Schedule I--Capital Commitments. Schedule I contains the dollar amounts but not the names of the corresponding limited partners, which are blocked out. The cover letter explained that Schedule II--Side Letter Agreements could not be found but should not be materially different from that for the Fund V Agreement. Further, US Fund V has no separate Management Contract because that fund is also party to Fund V's Management Contract.

Also included in the submission were Schedules I-IV to the Operating Agreements of Sixth Berkshire Associates LLC (Sixth Berkshire) and Fifth Berkshire Associates LLC (Fifth Berkshire). In both cases, Schedule I--Capital Contributions and Schedule II--Allocation of Units, the names of the individuals are included, but the amounts are blocked out. Also in both cases, in Schedule III--Calculation of Reserved Interests and Schedule IV--Coninvestment Percentages, the names of the individuals are included, but the amounts are blocked out.

In Fact 7 of the Remand Order I identified the members of Fifth Berkshire. On page 35 of the Fund VI Agreement, Sixth Berkshire is identified as Fund VI's general partner. The individuals named as members of Sixth Berkshire are: Bradley M. Bloom, Jane Brock-Wilson, Kevin T. Callaghan, J. Christopher Clifford, Carl Ferenbach, Garth H. Greimann, Ross M. Jones, Richard K. Lubin, D. Randolph Peeler, and Robert J. Small. Fifth Berkshire contains only one individual, Mr. Russell L. Epker, who is not listed on page 35 of the Fund VI Agreement as being part of Sixth Berkshire. All of the individuals listed in the Fund VI Agreement, except Mr. Greimann, are also Managing Directors of Berkshire Partners.

Paragraph 8 of the Small Declaration states:

> The ownership and voting percentages of the members of the limited liability companies that serve as general partners of the Berkshire funds are specifically considered to be highly confidential. Because of this concern, the Schedules to the 5th Berkshire Associates Operating Agreement and the Sixth Berkshire Associates LLC Operating Agreement are being provided in redacted form. The redacted schedules disclose the identities of the members of each limited liability company, but not their specific ownership and voting percentages.

C. The Size Determination

The Area Office first reviewed the procedural history and quoted the Remand Order's directive that Appellant "provide the Area Office documents specifying the 'voting interest' of each managing member (and special member) of Fifth Berkshire and Sixth Berkshire." The Area Office next asserted that Appellant had ignored OHA's order and instead provided separate lists of names and percentages but refused to tie the lists together. The Area Office quoted Appellant's reason for redacting the identifying information for the managing members' voting interests, that Appellant "does not believe that any of the redactions should have an effect on your analysis." Further, "Berkshire considers the ownership and voting percentages of the members of the LLCs that serve as general partners of the funds to be highly confidential. Accordingly, it has redacted that information…." The Area Office also noted Appellant offered to revisit the matter with Berkshire if the Area Office disagreed, but did not promise compliance.

The Area Office next explained that the requested documents were needed, pursuant to the Remand Order, to find who has the "majority of voting interest" in and, thus, control of Fifth Berkshire and Sixth Berkshire. That finding was essential to determining whether there was common management affiliation between Fifth Berkshire and Sixth Berkshire.

After determining that Appellant had refused to provide this essential information, the Area Office quoted 13 C.F.R. §§ 121.1008(d) and 1009(d), which set out the consequences for the failure to submit requested information. Citing those regulatory provisions, the Area Office concluded that "the ordered information would result in a finding contrary to its interests. In other words, the disclosure would demonstrate the existence of previously contested affiliations and those affiliations would make clear that [Appellant] is not a small business concern." Therefore, the Area Office concluded, Fifth Berkshire shares common management with Sixth Berkshire and 15 other entities, which it listed.

The Area Office next addressed Appellant's failure to comply with the portion of the Remand Order pertaining to control and ownership structures of 13 named portfolio companies. Specifically, Appellant was required to submit evidence (corporate charters, etc.) to enable the Area Office to determine whether, as Appellant asserted, Berkshire Fund V and Fund VI do not control those companies, or whether they are affiliates. The Area Office noted Appellant's assertion that neither Appellant nor Berkshire Partners had the requested information, but still concluded that Appellant's non-compliance with OHA's directive triggered that part of the Remand Order that required the Area Office to find affiliation between Fund V and Fund VI , Fifth and Sixth Berkshire, and the 13 portfolio companies.

Based upon the foregoing, the Area Office found Fifth and Sixth Berkshire were affiliated and that Appellant was therefore affiliated with a wide range of companies with an aggregate employee count well in excess of 1,500. Hence, the Area Office determined Appellant to be other than small under North American Industry Classification System (NAICS) code 481211, with a size standard of 1,500 employees.

D. The Appeal

Appellant asserts the Area Office failed to find specific facts and reference them to matters established in the Record as required by the Remand Order. Instead, the Area Office issued a perfunctory decision finding Appellant to be other than small by "invoking two adverse presumptions based on a supposed failure by [Appellant] to provide evidence." Appellant also argues the Area Office invoked the adverse presumption without considering evidence Appellant did provide.

Next, Appellant recapped portions of the Remand Order, noting that "OHA directed [Appellant] or Berkshire Partners to provide the Area Office with documents specifying the voting interest of the members of Fifth Berkshire and Sixth Berkshire."

Appellant alleges the Area Office's findings of affiliation between Appellant and various Sixth Berkshire controlled entities, findings which arose from the Area Office's application of the adverse presumptions authorized by 13 C.F.R. §§ 121.1008(d) and 1009(d),

> [C]ompletely ignored the information [Appellant] did provide and failed to explain why that information was insufficient for it to make the determination that there was no basis for finding affiliation between Fifth and Sixth Berkshire. It mindlessly applied a presumption that contradicted the information it had been given.

(Appeal Petition at 5).

Appellant disputes the Area Office's characterization of it as having "refused" to provide information and argues further that much of the information was unknown to it. Appellant asserts that where Berkshire was willing to share information with the Area Office but not with Appellant, it arranged for information to be sent directly to the Area Office. Appellant explained that all of the information at issue (sought by the SBA) concerned the inner details of Berkshire entities, which the entities considered proprietary. Appellant reiterated that Mr. Small, a managing member of Fifth Berkshire, explained (in his declaration) that some of the information requested in the Remand Order was highly confidential and despite OHA's Protective Order, Mr. Small stated Berkshire was not certain the information would be protected. Thus, Appellant argued it had provided all the information available to it.

Appellant asserts the information and documents provided were sufficient for the Area Office to determine whether there was common management between Fifth and Sixth Berkshire. Specifically, Appellant noted that Mr. Small's declaration stated:

> 9. Because of this confidentiality concern, I have assigned letters to each individual who is a member of both [Fifth and Sixth Berkshire].
>
> 10. Members A, B, C, and D have sufficient voting interest in the aggregate to control 5th Berkshire Associates, which in turn can control the Fund V family of funds.

> 11. Members A, B, C, and D do not have sufficient voting interest, in the aggregate, to control 6th Berkshire Associates. Another member would have to vote with members A, B, C, and D to control 6th Berkshire Associates, which then could control Berkshire Fund VI.

Appellant admits the information was not disclosed by name and percentage. However, it alleges this omission was immaterial and that Mr. Small provided enough information for the Area Office to determine that those who controlled Fifth Berkshire could not control Sixth Berkshire. (Appeal Petition at 6-7)

Appellant also alleges the Area Office ignored the evidence, presumably Mr. Small's Declaration, and did not explain why the evidence was inadequate before finding it was impossible to determine whether Fifth and Sixth Berkshire shared common management. Appellant argues that its evidence shows the four individuals that can control Fifth Berkshire cannot control Sixth Berkshire.

Appellant next alleges OHA's three-part test for adverse inferences is inapplicable. Instead, Appellant argues it gave sworn testimony, in the Small Declaration that the Area Office should have credited as rebutting the adverse presumption. (Appeal Petition at 8)

Appellant also challenges the connection between the adverse "presumption" being used to find affiliation between Fifth and Sixth Berkshire and the Area Office's finding of affiliation with 15 other Berkshire entities. Appellant complains that the Area Office withdrew its January 11, 2008 request to Appellant for the voting interests for all members of nine Berkshire entities on January 14, 2008. Thus, the Area Office should not have taken an inference based upon information it did not request. (Appeal Petition at 8-9)

Appellant's final complaint is that the Area Office should not have applied the adverse inference to find affiliation between Appellant and numerous portfolio companies of Fund V and Fund VI. Appellant again avers it did not refuse to comply with the Area Office's request for documents. Appellant asserts it conceded material points of affiliation, such as that Fund VI controlled AAH Holdings/Amscan, but that the key issue before the Area Office remained whether there is affiliation between Fund V and Fund VI (and their general partners, Fifth and Sixth Berkshire). Accordingly, since affiliation with Sixth Berkshire meant affiliation with either Electro Motive Diesel or AAH Holdings/Amscan and that affiliation alone would make Appellant other than small, there was no reason to make the other findings with the other concerns.

E. Protestor's Response to the Appeal

Ross Aviation Inc. (Ross Aviation), one of the original protestors in this matter, responded to the appeal in support of the Area Office's size determination. I find many of Ross Aviation's arguments to be persuasive. Consequently, I do not summarize these arguments here.

F. SBA's Response to the Appeal

SBA supports the Area Office's decision to invoke the adverse inference. Following its discussion of the facts, SBA reviews regulations applicable to Appellant's appeal. SBA notes Appellant had to prove clear error by the Area Office (13 C.F.R. § 134.314) and that Appellant had the burden of proof to establish it was a small business concern when it submitted its offer. 13 C.F.R. §§ 121.404(a), 121.1009(c). Next SBA discusses adverse inferences authorized by 13 C.F.R. §§ 121.1008(d) and 121.1009(d) and contends that since Appellant conceded it furnished incomplete information and failed to furnish required information, Appellant's claim that it provided "enough" information fails as a matter of law. (SBA Response at 5)

SBA asserts Appellant's "enough" information argument must fail as a matter of law because 13 C.F.R. §§ 121.1008(d) and 1009(d) establish the Area Office is entitled to all requested information notwithstanding claims of confidentiality or privacy. These regulations permit SBA to presume the undisclosed information would be contrary to the challenged concern's interest.

SBA's next point is that OHA has *never* overturned an area office's adverse inference on the grounds that the concern submitted enough information for the Area Office to make a formal size determination and SBA argues such a decision would be a "terrible precedent." Instead, SBA argues OHA should only overturn an adverse inference determination if the area office's request for information was improper under the three-part test. (SBA Response at 5)

SBA rejects Appellant's claim that the Area Office made a clear error by not accepting Appellant's conclusions concerning the ability of certain persons to control Fifth and Sixth Berkshire. SBA notes that control of a concern based on common management, *i.e.*, voting interest, is a fact-specific determination. If a group of individuals or entities with common investments own a large, non-majority block of voting membership and that block is large compared to other voting memberships, then the block may be found to control a concern. 13 C.F.R. § 121.103(c); *Size Appeal of McLane Advanced Technologies, LLC*, SBA No. SIZ-4746 (2005) (ownership rules do apply to limited liability companies). Thus, if a group of individuals who control the management of one concern also control the management of another concern, the two firms are affiliated. 13 C.F.R. § 121.103(e).

SBA asserts the only way the Area Office could make a rational determination about who controls Fifth and Sixth Berkshire, was for the Area Office to be able to examine each individual's specific voting interest in each of these concerns. Consequently, the Area Office was under no legal obligation to make a size determination based upon incomplete information. "In fact, it would have been a clear error for the Area Office to have done so." (SBA Response at 6-7)

SBA avers the Small Declaration is not necessarily congruent with the facts of Record and that these discrepancies are unexplained. Specifically, SBA notes that 11 of the 12 managing directors of Berkshire Partners are members of Sixth Berkshire and all 12 managing directors of Berkshire Partners are members of Fifth Berkshire, not merely the four Mr. Small "cryptically" refers to in his declaration as A, B, C, and D. Since Appellant had the burden of

proving it was small (that individuals with the power to control Fifth Berkshire cannot control Sixth Berkshire and vice versa), pursuant to 13 C.F.R. § 121.1009(c), SBA contends it was legally impossible for the Area Office to conclude that Appellant had established its small business size status without knowing the exact voting interest of each voting member/owner of Fifth and Sixth Berkshire. (SBA Response at 7)

SBA then discusses Appellant's failure to provide the Area Office with information concerning ownership and control of specific entities, and that OHA ordered the Area Office to find affiliation if Appellant failed to provide the information. Because Appellant failed to provide the information, and it is immaterial why it failed to provide that information, the Area Office had to make affiliation findings regarding these concerns.

SBA also rejects as unsupported Appellant's assertion that much of the requested information was not in the control of "USA Jet or Berkshire Partners." All of the information Appellant was ordered to provide in the Remand Order is within the control of concerns with a relationship to Appellant, *e.g.*, 11 of the 12 Berkshire Partners managing directors are members of both Fifth and Sixth Berkshire.

SBA contends no regulation provides a timeframe for an area office to issue a decision on remand or to request additional information if its initial submission was incomplete. Appellant had two opportunities to demonstrate its small business status to the Area Office and has failed to do so, while performing a contract awarded under a set-aside. Appellant has the incentive to be evasive if it is permitted to delay the submission of relevant evidence after being ordered to supply it. This incentive occurs because the longer Appellant's size is in question, the less likely a final SBA size decision will have any effect on the underlying procurement, except to deny the Department of Energy the right to count the procurement for its small business contracting goals.[1] This would embolden ineligible concerns to be evasive.

IV. Discussion

A. Timeliness

Appellant timely filed its appeal within 15 days after it received the size determination. 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

[1] *But see Alliance Detective & Security Service*, Inc., B-299342, April 13, 2007.

key findings of law or fact that are mistaken.

C. The Merits

1. Introduction

Appellant is correct to assert the most important issue in this appeal is whether Fifth Berkshire is affiliated with Sixth Berkshire. The Area Office also recognized this, for the logic underlying the Area Office's size determination is based upon the following sequence:

1. Determination of whether there is affiliation between Fifth and Sixth Berkshire is required for the Area Office's size determination;

2. To determine affiliation between Fifth and Sixth Berkshire, the Area Office must be able to view documentation establishing the voting interests of their members; and

3. Appellant's failure to provide the documentation establishing the voting interests of Fifth and Sixth Berkshire's members deprived the Area Office of information essential for the Area Office to determine whether there is affiliation between Fifth and Sixth Berkshire.

Regardless of Appellant's reasons for not providing the documentation, the Area Office concluded it could not make the specific findings mandated in the Remand Order without that documentation. Thus, the Area Office concluded it must take an adverse inference and determine Fifth Berkshire is affiliated with Sixth Berkshire.

As I will discuss below, the information SBA requested and that Appellant failed to provide is: (1) Relevant; (2) Connected to Appellant; and (3) Specific. Therefore, consistent with Appellant's burden of proof to establish its size status, Appellant was required to provide the requested information and its failure to do so led to a predictable result.

In addition, I note the premise underlying the Introduction to Appellant's Appeal Petition and thus ultimately to the entire Appeal Petition, is unsound. Specifically, Appellant admitted it failed to provide the data ordered in the Remand Order and even argued it would or could not produce the information required by the Remand Order due to a claim of confidentiality. Hence, there was no "supposed failure" to provide evidence. Second, Appellant's attempt to blame the lack of detailed findings on the Area Office amounts to *chutzpah*, for it was Appellant's failure to provide information that triggered the adverse inference. Thus, the Area Office was correct to find Appellant was at the root of the Area Office's inability to make specific findings of fact.

2. The Basis for the Adverse Inference Rule

The regulations governing size determination procedures before SBA area offices provide:

> If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information

> within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

13 C.F.R. § 121.1008(d). The last sentence, pertaining to affiliates' information, was added in 2004. 69 Fed. Reg. 29207 (May 21, 2004). In issuing this revision, SBA stated in the preamble:

> The proposed rule amended § 121.1008(d) by adding a sentence requiring a concern whose size status is at issue to furnish information about its alleged affiliates to the SBA, notwithstanding any third party claims of privacy or confidentiality, because the SBA does not disclose information obtained in the course of a size determination except as permitted by Federal law. One commenter opposed any rule that would require a concern to provide information concerning an alleged third party affiliate because there is no means to force an alleged affiliated third party to produce the information. In addition, although the SBA does not ''disclose'' the information, it allegedly ''misplaces'' the information. The SBA notes that this rule codifies several OHA rulings and therefore remains as proposed. *See, e.g., Size Appeal of Donovan Travel, Inc., d/b/a Carlson Wagonlit Travel,* SBA No. SIZ-4270 (1997); *Size Appeal of Quantrad Sensor, Inc.,* SBA No. SIZ-4255 (1997).

69 Fed. Reg. 29192, 29200. 13 C.F.R. § 121.1009(c) places the burden of persuasion on the concern whose size is under consideration. Then, 13 C.F.R. § 121.1009(d) provides:

> *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.*

(emphasis added).

Neither 13 C.F.R. § 121.1008(d) nor § 121.1009(d) requires that the business concern intend to deny information to an area office. Instead, the regulation provides an area office may take an adverse inference if a concern merely *fails* to submit information within the time allowed or submits incomplete information. In the present appeal, I find Appellant failed to comply with the Remand Order and thus failed to provide the information to the Area Office it was directed to provide. Moreover, as argued by both Ross Aviation and SBA, Appellant admitted it failed to submit the required information by claiming the reason it did not provide the information was to protect the confidentiality of that information.

3. Application of the Three-Part Test

As suggested in the preamble to the most recent change to 13 C.F.R. § 121.1008(d), codifying OHA's holdings, OHA has long decided cases concerning the taking of adverse inferences. *See Size Appeal of Donovan Travel, Inc., d/b/a Carlson Wagonlit Travel,* SBA No. SIZ-4270 (1997) (*Donovan*); *Size Appeal of Quantrad Sensor, Inc.,* SBA No. SIZ-4255 (1997) (*Quantrad*). In deciding these cases, OHA applied a three-part test, which, as explained in *Quantrad*, at 7, is as follows:

> The three-part test requires, first, that the requested information be relevant. In other words, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the challenged firm and the concern about which the information is requested. Finally, the request for information must be specific. If all of these criteria are met, the challenged firm or the alleged affiliate must produce the information requested by the Area Office.

As both Ross Aviation and SBA argue, identification of all members of Fifth and Sixth Berkshire and the amount of each member's voting interest is relevant. Specifically, voting interest is critical to the issue of whether Fifth and Sixth Berkshire are affiliated, an issue critical to the size determination, as Appellant concedes. It is only by knowing the precise voting interest that the Area Office can reliably determine whether there is common management and whether there is an identity of interest sufficient to cause affiliation between the entities. For this reason my Remand Order required Appellant to submit this information to the Area Office.

There is a strong connection between Appellant, Fifth Berkshire, and Sixth Berkshire. The following facts prove the connection:

1. Fifth Berkshire has the power to control Appellant's parent;

2. Fifth Berkshire and Sixth Berkshire share the same managers, with one exception and all of these individuals are also Managing Members of Berkshire Partners; and

3. Members of Fifth and Sixth Berkshire share common investments.

The directive for information contained in the Remand Order was specific. Appellant and Berkshire understood it, for instead of complying with the directive to provide information concerning membership and voting shares, Appellant/Berkshire asserted the information requested was confidential and thus failed to provide it. Instead, Appellant chose to obscure the primary evidence with redactions that rendered it unusable for the Area Office to determine the necessary affiliation issues.

Based upon the foregoing, I find the facts of this case serve as a quintessential example of the applicability of the three-part test for an adverse inference.

4. The Issue of Sufficiency

Mr. Small's Declaration does not provide the voting interests of the members of Fifth and Sixth Berkshire. Instead, Mr. Small's Declaration is conclusory hearsay and thus unreliable. Hence, I find the Declaration to be particularly unreliable, especially since the primary evidence is available. Moreover, as suggested by Ross Aviation in citing *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939), Appellant's production of weak evidence (the Declaration) when strong evidence is available (the complete unredacted documents) would justify the taking of an adverse inference even absent 13 C.F.R. § 121.1008(d).

Contrary to Appellant's argument, the information in the Record, including Mr. Small's Declaration, was not sufficient for the Area Office to act. Merely because A, B, C, and D can control Fifth Berkshire, does not mean that A, B, and D, plus E, F, and G cannot also act in concert to exercise control of Fifth or Sixth Berkshire or that A, B, D, E, F, G, etc., cannot act to control Sixth Berkshire. Mr. Small's Declaration suggests too many permutations or unanswered questions. Thus, the overriding defect in Mr. Small's Declaration concerns what it does not say, for it leaves too many questions unanswered and that is why the Area Office was correct to judge it inadequate.

The SBA's analysis of the three-part test in its Response is correct. Specifically, the Area Office is allowed to draw the adverse inference regardless of whether there may be sufficient evidence elsewhere in the Record if information requested is missing or incomplete. An area office can then infer the specific evidence it does not have contradicts weak or ambiguous evidence, *e.g.*, the Small Declaration, it does have. This is especially true here, when the primary evidence was available.

I agree with the Area Office that Appellant's proffer of the Small Declaration is both insufficient and in violation of the Remand Order. Nor did Appellant's proffer of the Small Declaration cure the deficiencies I noted in the Remand Order. Instead, the Small Declaration was only sufficient for the Area Office to guess at whether there is common management between two entities.

Appellant does not get to dictate to the Area Office how much evidence is sufficient for the Area Office. It is for an area office to determine whether the applicant has complied with regulatory requirements, *i.e.*, 13 C.F.R. §§ 121.1008(d), 121.1009(c), (d). Absent clear error in applying the three-part test, OHA will not reverse an area office determination. In sum, the situation evident in this appeal is precisely the circumstance 13 C.F.R. §§ 121.1008(d), 121.1009(c), (d) were intended to prevent.

5. The Issue of Confidentiality

OHA has held that privacy (confidentiality) is not an excuse (*Donovan* at 7). First, as provided in 13 C.F.R. § 121.1008(d), SBA will not release information obtained in the course of a size determination except as permitted by Federal law. Second, SBA is aware of the provisions of 28 U.S.C. § 1905 (The Trade Secrets Act), which prohibit SBA's employees from releasing

proprietary or confidential information contained in a firm's submissions.[2] Third, there is an exemption to the Freedom of Information Act (FOIA) for this information. Specifically, the FOIA provides, in relevant part: "This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. § 552(b)(4)). Based upon the foregoing, Appellant's concern that SBA would release such information is unfounded.

6. The Effect of the Inference

I do not agree the Area Office was obligated to consider the weak evidence in the Record as being more probative than the adverse inference and conclude Fifth and Sixth Berkshire were not affiliated. Instead, I find it more than reasonable for the Area Office to conclude the specific and probably dispositive evidence Appellant failed to provide would have established Fifth and Sixth Berkshire were subject to common management and, thus, were affiliated. This seems to me the classic point of why adverse inferences exist.

7. Remaining Issues

It is irrelevant the Area Office withdrew its request for the documents Appellant failed to timely supply and that it knew it had been directed to provide by the Remand Order. *See Size Appeal of Xantrex Technology*, SBA No. SIZ-4592 (2003). The Area Office's action had nothing to do with Appellant's failure to provide the required information and ultimately, as SBA suggests, Appellant had more than enough time to provide the information.

As every party in this appeal agrees, the main issue is whether Fifth and Sixth Berkshire are affiliated. The Area Office found they were and proceeded to find that other concerns, beyond Electro Motive Diesel (EMD), were affiliated with Appellant. I find nothing wrong with the Area Office's logic, but even if the Area Office's logic were flawed, it would be irrelevant and harmless, for affiliation between Fifth and Sixth Berkshire also creates an affiliation with Greenbriar Equity Capital and EMD and is thus sufficient to make Appellant other than small for almost any procurement.

8. Summary

Appellant sought to benefit from a procurement set-aside for small businesses. Therefore, Appellant, as a firm attempting to take advantage of a federal procurement set-aside, must meet the requirements applicable to a set-aside, including proving its size status as a small business (13 C.F.R. § 121.1009(c)) and providing information when requested (13 C.F.R. § 121.1008(d)). *See Size Appeal of Apex Group, Inc.*, SBA No. SIZ-4300, at 6 (1998). However, Appellant did not meet the requirements applicable to proving its size and failed to

[2] The relevant portion of the statute states: "which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof . . . ."

provide required information. Thus, Appellant is not entitled to enjoy the benefits of a procurement set-aside for small business concerns. To hold otherwise would permit concerns to stonewall SBA and guarantee chaos in the size determination process.

V. Conclusion

Based upon the foregoing, I hold the Area Office was correct to apply the adverse inference. Accordingly, the size determination was not based upon a clear error of fact or law and it is AFFIRMED and Appellant's appeal is DENIED. Therefore, Appellant is other than small under NAICS code 481211 and for the contract arising under RFP DE-RP52-06NA25694.

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

THOMAS B. PENDER
Administrative Judge