

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

SIZE APPEAL OF:

Atlantis Defense Systems

Appellant

Appealed from  
Size Determination No. 5-2008-030

SBA No. SIZ-4944

Decided: April 17, 2008

APPEARANCES

Terry Moses, President, Atlantis Defense Systems, Georgetown, Kentucky, for Appellant.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a February 28, 2008 size determination (Case No. 5-2008-030) (size determination) issued by the U.S. Small Business Administration (SBA), Office of Government Contracting, Area Office V (Area Office) finding Atlantis Defense Systems (Appellant) to be other than small for the applicable size standard of \$6.5 million.

Appellant received the size determination on February 29, 2008 and appealed the size determination to the Office Hearings and Appeals (OHA) on March 10, 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

#### A. Facts

On December 4, 2007, the U.S. Army Contracting Agency, Southern Region (Army) Contracting Officer (CO) issued Solicitation No. W91248-08-T-0004 (RFQ) for the possible award of multiple Blanket Purchase Agreements (BPA) to lease hotel rooms with conference space for the purpose of conducting Chaplain Marriage Retreats for Fort Campbell, Kentucky. The CO issued the procurement as a total small business set-aside and designated North American Industry Classification System (NAICS) code 531120, Lessors of Nonresidential Buildings, with a \$6.5 million size standard.

After issuing four BPAs against the RFQ to four other offerors, the CO protested Appellant's size to the Area Office in a letter dated January 17, 2008. The basis of the CO's protest was that Appellant: (1) appeared to be affiliated with other concerns; and (2) the State of Tennessee's Paris Landing State Park Inn (State Park) should also be considered in determining size.

The Area Office received the protest on January 31, 2008. On February 5, 2008, the Area Office provided the CO's protest to Appellant and among other things, required Appellant provide: (1) a response to the allegation that Appellant had affiliates; (2) a completed form 355; and (3) complete financial statements and Federal income tax returns for the last three complete fiscal years preceding Appellant's self-certification under the RFP for itself and each affiliate.

Appellant provided some information to the Area Office. However, the Area Office was dissatisfied with Appellant's production of information and explained it required additional information. The Area Office requested information concerning Atlantis Consulting Services (ACS) a company 100% owned by Mr. Terry Moses, the 51% owner of Appellant. The Area Office also required Appellant to delineate the division of work between Appellant and the State Park.

Appellant failed to provide information concerning ACS and offered ACS was not affiliated with it. Appellant also did not answer the Area Office's question concerning what work Appellant or the State Park would perform. Instead, Appellant explained the work it was performing was similar to other Government contracts and requested "a waiver" so it could move forward with the procurement. Appellant also argued large businesses are not required to abide by the FAR, only small businesses. Appellant and the Area Office communicate by e-mail and Appellant resisted the Area Office's requirements, including refusing to provide the personal tax forms of ACS' owner. Appellant maintained it was sufficient that it self-certify its size and attacked the Area Office for allowing large businesses to bid on similar contracts.

### B. The Size Determination

On February 28, 2008, the Area Office determined Appellant to be other than small. The Area Office detailed its efforts to gain information from Appellant and explained why it needed the information it requested. In its conclusion, the Area Office stated:

Based on its failure to submit information required by SBA to render a size determination, [Appellant] is determined to be “other than a small business” for this procurement and all other procurements subject to the same or lower size standard of \$6.5 million average annual receipts.

Size determination, at 6.

### D. The Appeal

In its appeal, Appellant requests OHA: (1) restore Appellant’s ability to utilize SDVOSB status and to conduct business; (2) overturn the determination that the State of Tennessee is or needs to be classified as a business and issue the BPA to Appellant; and (3) determine if a sworn affidavit will meet the SBA’s requirement for historical revenue in lieu of tax returns.

Appellant asserts it did its best to swiftly comply with SBA’s request for information. Appellant states it and ACS were started in 2007 and therefore neither company has filed a tax return making it impossible to provide tax returns for the three preceding years. In the three preceding years, Mr. Moses was on active duty and then consulted under his name for a year and one-half. Mr. Moses found SBA’s request for his personal returns for this time to be unreasonable and declined to produce them, but Appellant asserts Mr. Moses was willing to self-certify Appellant’s size.

Appellant agrees with SBA’s assessment in the size determination that the State Park is not a small business, but Appellant also argues it is not a large business. Appellant asserts, as a state agency, the State Park is neither large nor small and argues SBA’s determination fails to reference any law or regulation explaining how SBA determined the State Park’s size.

Appellant states it brokers hotel rooms for government entities with lodging requirements and is similar to a travel agency. Appellant provides General Services Administrations’ description of government contracting for travel and hospitality services, which includes, but is not limited to: “travel arrangement, reservation, ticketing and traveler support for air, rail, lodging, car rental and ancillary services.” Appellant concedes it is not a hotel property and therefore cannot be construed to be performing 51% of the work, but Appellant asserts similar small business set-aside contracts have been awarded to other businesses which are not hotel properties. Appellant argues, if the ostensible contractor rule and limitations on subcontracting do not apply, Appellant should be awarded the BPA. In the alternative, Appellant asserts, if the ostensible contractor rule and limitations on subcontracting do apply, Appellant requests a waiver and asks that Appellant’s concerns about the application of the regulations be forwarded within SBA to allow small businesses to compete.

In conclusion, Appellant states it is \$6.3 million dollars below the \$6.5 million dollar size standard and that Mr. Moses, Appellant's president and owner, is a 50% disabled veteran. Appellant asserts it has been wronged and financially damaged in this process and Appellant requests swift resolution in restoring its status as an SDVOSB.

#### 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 key findings of law or fact that are mistaken.

##### C. The Merits

##### 1. 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. 29,207 (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. 29,192, at 29,200. 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.*

*Id.* (emphasis added).

## 2. Application of the Three-Part Test

As noted 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*, 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.

*Id.* at 7.

I hold the information required by the Area Office is relevant. Mr. Moses owns 51% of Appellant and is affiliated with Appellant since he has the power to control Appellant pursuant to 13 C.F.R. § 121.103(c)(1). Mr. Moses is also affiliated with ACS since he owns 100% of ACS. Had Mr. Moses provided the requested tax returns, he could have established whether he, as the owner of ACS and Appellant’s 51% owner, had sufficient receipts, when aggregated with those

of ACS and Appellant to exceed the \$6.5 million in average annual receipts size standard. Thus, his tax returns are directly relevant.

The information the Area Office requested concerning distinguishing work Appellant would perform from work the State Park would perform directly pertains to whether Appellant is unusually reliant upon the State Park or whether the State Park is performing primary and vital contract requirements in violation of 13 C.F.R. § 121.103(h)(4).

The connection between Mr. Moses' tax returns, ACS, and Appellant is stark. As discussed, Mr. Moses has the power to control both Appellant and ACS. Thus Mr. Moses is affiliated with both Appellant and ACS. Thus, the affiliation between Appellant, ACS, and Mr. Moses creates a straight line connection to Mr. Moses' tax returns for resolving the income issue, for their production would have resolved whether Appellant and its affiliates, in the aggregate, exceeded the size standard.

The Area Office's request for Mr. Moses' tax returns is specific. I also note Appellant explicitly refused to comply with it by calling the tax return request "personal." Nor could Appellant have reasonably misunderstood the Area Office's request for information concerning what work Appellant and the State Park were to perform under the procurement, for it too was specific. Instead, I find Appellant purposefully evaded the Area Office's request to detail the responsibility of it and State Park in favor of arguing unfairness because various large businesses were performing this type of work under various contract vehicles, some of which were set-asides (Appeal at 4-5). Moreover, Appellant requested OHA forward its concerns and have a proper SBA entity review these types of contracts and provide small businesses an equal opportunity to compete.

### 3. Waiver

Although it is not clear which regulations Appellant is addressing, Appellant requested OHA waive the size regulations applied by the Area Office. Appellant's request is unavailing, for OHA is bound by SBA's size regulations and has no power to waive SBA's size regulations. *Size Appeal of Pacific Animal Wholesale Supply, Inc.*, SBA No. SIZ-4065 (1995); *Size Appeal of Terra-Mar, Inc.*, SBA No. SIZ-3852 (1992). Thus, like all other concerns whose size is at issue, Appellant must comply with the size regulations to have an opportunity to be awarded a contract set-aside for small businesses.

### 4. Summary

Appellant sought to benefit from a procurement set-aside for small businesses. As a firm attempting to take advantage of a federal procurement set-aside, Appellant must meet the requirements applicable to the set-aside (13 C.F.R. § 121.1009(c)) and provide relevant 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 failed to provide required information. Thus the Area Office is entitled to find the missing evidence would have proved Appellant did not meet the applicable size standard or violated the ostensible contractor rule. This means 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.

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

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THOMAS B. PENDER  
Administrative Judge