

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

SIZE APPEAL OF:

USA Jet Airlines, Inc.

Appellant

Appealed from
Size Determination Nos. 4-2006-114/117

SBA No. SIZ-4969

Decided: June 18, 2008

ORDER MODIFYING SIZ-4919 UPON PETITION FOR RECONSIDERATION

On April 3, 2008, I issued my decision in *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008). There I concluded that the Small Business Administration (SBA) Office of Government Contracting, Area Office IV (Area Office) correctly found USA Jet Airlines, Inc. (Appellant) was not a small business under North American Industry Classification System (NAICS) code 481211 and for the contract arising under RFP DE-RP52-06NA25694. I thus affirmed the Area Office size determination (Case Nos. 4-2006-114 and 4-2006-117 (on remand)) and denied Appellant's appeal. I concluded that decision as follows:

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).

Size Appeal of USA Jet Airlines, Inc., SBA No. SIZ-4919, at 16 (2008).

On April 22, 2008, Appellant timely filed a Petition for Reconsideration pursuant to 13 C.F.R. § 134.227(c). Citing the SBA regulation at 13 C.F.R. § 121.1009(g)(3) and the Federal Acquisition Regulation (FAR) at 48 C.F.R. § 19.302(i), and two recent decisions of the Court of Federal Claims, Appellant asserts clear error in the application of my decision to the contract arising under RFP DE-RP52-06NA25694 because my decision was issued nineteen months after the contract was awarded to Appellant on September 1, 2006. Appellant requests that my decision be limited to future procurements.

On May 20, 2008, Ross Aviation, Inc. (Ross Aviation), the protestor in this case, filed a Response to Appellant's Petition for Reconsideration. Ross Aviation argues that Appellant's Petition for Reconsideration should be denied because Appellant has not met its burden of showing clear error of law in my decision, and because Appellant's size status remains relevant regardless of the fact that the contract arising under RFP DE-RP52-06NA25694 was awarded nineteen months ago.

The Small Business Act authorizes the SBA to determine the size status of concerns for the purposes of the Small Business Act, including eligibility for small business set-aside procurements. *See* §§ 3(a)(2), 8(b)(6), 15(a); 15 U.S.C. §§ 632(a)(2), 637(b)(6), 644(a). The small business size regulations provide:

§ 121.404 When does SBA determine the size status of a business concern?

SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price. . . .

13 C.F.R. § 121.404(a). In addition, I note that under 13 C.F.R. § 121.1004(c) timely protests apply to the procurement underlying the protest, even though the contract has already been awarded. Such a regulation permitting postaward protests by anyone necessarily contemplates that some size determinations will be issued postaward. In consequence of the foregoing, I must determine Appellant's size as of the date it self-certified its size (submitted its offer) and in consequence, that date is the effective date of whether Appellant is small or not.

Neither the Small Business Act and small business size regulations nor the FAR authorizes an OHA Judge or any other SBA official to order a contracting officer or agency to award, not to award, or to terminate an award to any concern.¹ All SBA may do is determine whether a particular concern is a small business at a particular point in time for the purposes of the Small Business Act. Accordingly, after considering the submissions of both parties, I *MODIFY Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008), to be more precise by changing the Conclusion of that decision to read as follows:

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

¹ The GAO is not so restrained. *See Alliance Detective & Security Service, Inc.*, B-299342, 2007 CPD ¶ 56.

and it is AFFIRMED and Appellant's appeal is DENIED. Therefore, Appellant is other than small under NAICS code 481211 as of July 7, 2006, the date Appellant submitted its written self-certification that it is a small business, with its offer in response to 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