

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

SIZE APPEAL OF:

Sure-Way Systems, Inc.

Appellant

Appealed from

Size Determination Case No. 6-2008-062

SBA No. SIZ-4972

Decided: July 11, 2008

APPEARANCE

Bruce H. Collins, P.E., Southwest Regional Manager, Sure-Way Systems, Inc., Phoenix, Arizona, 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. The Procurement and Protest

On January 19, 2007, the Department of Veterans Affairs, Southern Arizona Health Care System (VA) in Tucson, Arizona, issued Solicitation No. VA678-07-RP-0010 as a total small business set-aside for Biohazard Waste Removal and Sharps Container Management. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 562112, Hazardous Waste Collection, with a corresponding \$11.5 million annual receipts size standard. Final revised proposals were due on March 30, 2007.

On September 7, 2007, the CO notified the unsuccessful offeror, Sure-Way Systems, Inc. (Appellant), that Environmental Protection Certification Company, Inc. (EPCC) was the apparent successful offeror.

On September 27, 2007, Appellant protested EPCC's size with the CO. Appellant asserted EPCC was unduly reliant on its subcontractor, Stericycle, Inc. (Stericycle). On October 15, 2008, the CO forwarded the protest to the Small Business Administration's Office of Government Contracting, Area II (Area Office II), in Philadelphia, Pennsylvania. On February 8, 2008, Area Office II issued Size Determination No. 2-2008-03, finding EPCC other than small for the procurement due to affiliation with Stericycle.

Appellant was determined to be the next successful offeror. The VA requested a formal size determination on Appellant because Appellant was acquired by a large business based in Canada, Quantum MRI, Inc., formerly known as Sharps Elimination Technologies, Inc. (SET).

B. The Size Determination

On May 9, 2008, the Small Business Administration's Office of Government Contracting, Area VI (Area Office VI), in San Francisco, California, issued Size Determination No. 6-2008-062 (size determination) finding Appellant to be other than small under the relevant size standard.

With regards to the VA's concerns about Appellant's ties to SET, the size determination notes Appellant held talks with SET about a reverse merger, but Appellant never held any interest in SET and SET management or shareholders never held interest in Appellant. The size determination calculated average annual receipts for Appellant and its acknowledged affiliate, Sure-Way Transportation, Inc. (SWT), a shell which holds the company's public service transportation permit for Montana. Based on Federal income tax returns for 2004, 2005, and 2006, Area Office VI determined the average annual receipts for Appellant and SWT are below the applicable \$11.5 million size standard.

In addition to the issue raised by the VA, Area Office VI investigated the ostensible subcontractor rule based on Appellant's proposal. Based on Appellant's proposal, Area Office VI was concerned Appellant is unusually reliant on its subcontractors, Milum Textile Services, Inc. (MTS), and American Medical Waste Management, Inc. (AMWM). Appellant's proposal identifies MTS and AMWM as part of its team, but does not delineate which company will perform which tasks, with the exception that MTS will provide transportation and waste processing at its medical waste treatment facility in Phoenix. The size determination states an addendum to the proposal specifies MTS will sterilize both sharps and biohazardous wastes and Appellant will use the Chambers County incinerator in Texas for the primary destruction for chemotherapy and pathological medical wastes disposal services; the addendum also states the Stericycle facility in Salt Lake City, Utah, will serve as a backup facility.

Area Office VI was unable to discern the amount of work being completed by each teaming partner since there was no cost proposal identifying how much work each business would perform. The size determination notes Appellant's proposal does not "include or clarify

any teaming/subcontracting arrangements or other agreements with MTS, AMWM or Stericycle.” In the size determination, Area Office VI remarks on the lack of Appellant’s past performance history in the proposal. The size determination notes when Area Office VI requested evidence of past contract performance for biohazardous waste removal, chemotherapy waste removal, and sharp container waste removal, Appellant disputed the relevance past contracts would have in determining Appellant’s size.

Appellant’s proposal does not identify the tasks to be performed by Appellant and the tasks to be performed by MTS and AMWM, and the Area Office was unable to unravel the extent of commingling based on the information Appellant provided. Area Office VI determined MTS’s and AMWM’s experience and requisite licenses were necessary for Appellant to be awarded the contract and, with only four employees, Appellant could not perform the required services without reliance on its proposed subcontractors. Additionally, Area Office VI concluded MTS has the ability to control Appellant based on a non-compete clause in a Plant/Office Lease Agreement.

Based on Appellant’s reliance on MTS and AMWM, Area Office VI found them to be Appellant’s affiliates, in accordance with 13 C.F.R. § 121.103(h)(4). Therefore, Area Office VI needed to calculate Appellant’s and each affiliate’s average annual receipts to determine Appellant’s size. However, because Appellant failed to supply a completed SBA Form 355 and copies of Federal income tax returns and financial statements for AMWM as requested, under 13 C.F.R. § 121.1008(d), Area Office VI drew the inference that disclosure of the information would tend to indicate Appellant is other than small.

Accordingly, Area Office VI found Appellant to be other than small because it failed to submit the requested information.

B. Appeal

On June 5, 2008, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant asserted its Appeal “is a basic response to the gross mismanagement of the VA decision of award of the subject project in violation of the FAR Regulations and to issue a notice to proceed when that decision was still subject to a protest which was eventually upheld.” Appellant states that due to the “extensive” length of time for the initial protest to be processed and upheld, AMWM withdrew from partnering with Appellant on this procurement. Appellant explains this is why AMWM’s SBA Form 355 and related information was not submitted when requested. Therefore, Appellant requests that SBA corrects its size determination and approves Appellant as a small business with MTS, while excluding AMWM from the calculation. Moreover, Appellant asks that the contract be terminated and re-awarded to Appellant.

Additionally, Appellant asserts that Appellant and MTS are “not a legal joint venture and are affiliated only for the purpose of executing the services required of this project” under Appellant’s management. Appellant states it will be the prime contractor. Appellant argues that the CO has minimized the significance of the sharps reusable container management element of

this contract. Furthermore, Appellant asserts it is the only small business capable of performing the sharps disposal tasks required for this contract.

IV. Discussion

A. Timeliness

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

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 Area Office VI's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. I will disturb Area Office VI's size determination only if, after reviewing the record and pleadings, I have a definite and firm conviction Area Office VI erred in key findings of law or fact. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

C. Adverse Inference

Area Office VI concluded that Appellant is not a small business under the instant NAICS code and size standard. Area Office VI noted Appellant is affiliated with two businesses, MTS and AMWM, and failed to submit the requested information for AMWM. Thus, relying on 13 C.F.R. § 121.1008(d), Area Office VI drew the inference that full disclosure of the information requested would show Appellant is not a small business.

OHA applies a three-part test to determine whether an area office has properly requested information from a challenged business and thus is permitted to draw an adverse inference in its absence. First, the requested information must be relevant to an issue in the size determination. Second, there must be a level of connection between the challenged business and the business from which the information is requested. Third, the request for information must be specific. If all of these criteria are met, the challenged business must submit the information to the area office or suffer an adverse inference that the information would show that the challenged business was other than small. 13 C.F.R. § 121.1008(d); *Size Appeal of Diversa Corporation*, SBA No. SIZ-4672 (2004).

In this case, Area Office VI found Appellant affiliated with its proposed subcontractors, MTS and AMWM, based on undue reliance, 13 C.F.R. § 121.103(h)(4). Area Office VI determined Appellant needed MTS and AMWM to qualify for this procurement because MTS and AMWM have the requisite licenses, experience, and own the necessary facilities and equipment to perform this biohazardous waste disposal contract.

Further, the requested information was relevant to the size determination, because a business's size is determined by adding its average annual receipts with those of its affiliates. 13 C.F.R. § 121.104(d). Moreover, the information requested was crucial to the size determination.

Finally, Area Office VI's request for information was specific. Area Office VI's communications asked for specific information and provided forms to be filled out in full. These communications and forms constitute specific requests.

In its appeal, Appellant argues that the requested information for AMWM was not provided because AMWM withdrew from Appellant's consortium for this procurement. However, Appellant's reason on appeal differs from Appellant's email communications with the size specialist requesting the information. According to emails in Area Office VI's file, Appellant states AMWM is not providing the information to SBA because they did not receive adequate time, are small, and would have to remove a driver off the road to complete the paperwork. In another email, Appellant states AMWM will not complete the paperwork because they believe it is invasive and Appellant suggests SBA exclude AMWM. The size specialist informed Appellant that she was incapable of removing AMWM from Appellant's best and final offer to the VA and AMWM's information must be included or SBA may presume disclosure would demonstrate the concern is other than small.

Although Appellant wants AMWM excluded from the size determination, size is determined based on Appellant's initial offer for the VA solicitation which includes AMWM. 13 C.F.R. § 121.404(a). The size specialist was correct in attempting to collect AMWM's information to accurately assess Appellant's size. An area office determines what information is relevant, *Size Appeal of Xantrex Technology, Inc.*, SBA No. SIZ-4592 (2003), and a challenged firm bears the burden of establishing that it is small. 13 C.F.R. § 121.1009(c). By failing to submit the requested information, Appellant failed to meet its burden. Accordingly, Area Office VI was justified in drawing an adverse inference that the information, if disclosed, would show that Appellant, together with its affiliates, is other than small.

Thus, Area Office VI properly drew an adverse inference against Appellant and found Appellant other than small. Appellant did not produce relevant information from one of its affiliates to allow the size specialist to make an accurate size determination. Appellant has failed to meet its burden of demonstrating clear error on the part of Area Office VI and the appeal must be DISMISSED.

V. Conclusion

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

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

CHRISTOPHER HOLLEMAN
Administrative Judge