

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

SIZE APPEAL OF:

Management Support Technology, Inc.

Appellant

Appealed from
Size Determination Case No. 2-2008-35

SBA No. SIZ-4976

Decided: July 23, 2008

APPEARANCE

Norris C. Middleton, President/COO, Management Support Technology, Inc., Fairfax, Virginia, 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 September 29, 2006, the General Services Administration issued Solicitation No. TQM2006MCB0002, known as the Alliant Small Business (SB) Government-Wide Acquisition Contract (GWAC). The SB GWAC is a total small business set-aside for information technology services. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding \$23 million annual receipts size standard. Final revised proposals were due on December 6, 2006. The solicitation required offerors to use Online Representations and Certifications Application (ORCA) and the Centralized Contractor Registration (CCR) site in lieu of written representations and certifications. Management Support Technology, Inc.

(Appellant) Contract Team Agreement, a joint venture (JV), submitted its initial offer including price on December 6, 2006. On December 17, 2007, the CO notified unsuccessful offerors using FedBizOpps.

On January 3, 2008,¹ the CO filed a size protest with the Small Business Administration's Office of Government Contracting, Area II (Area Office), in Philadelphia, Pennsylvania. The CO informed the Area Office that he questioned Appellant's JV's size because a member of Appellant's JV, PE Systems, Inc. (PE), was identified as "other than small" for the applicable NAICS code on both ORCA and CCR.

B. The Size Determination

On April 24, 2008, the Area Office issued Size Determination No. 2-2008-35 (size determination) finding Appellant's JV to be other than small under the relevant size standard.

The Area Office stated that in response to the CO's size protest Appellant failed to provide the requested information for PE. The Area Office noted that Appellant simply informed the Area Office that PE was removed as a JV partner. The Area Office stated that, despite PE's removal, the Area Office calculates size based on the offer evaluated by the CO, which included PE as a member of Appellant's JV. Because PE's information was not provided as requested, the Area Office relied on 13 C.F.R. § 121.1008(d) and presumed disclosure of the missing information would demonstrate PE is other than a small business. Thus, the Area Office found that because PE did not qualify as a small business and it was a member of Appellant's JV, Appellant's JV was also other than small.

C. Appeal

On May 1, 2008, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts it removed PE from the JV after receiving the size protest because Appellant believed PE's current size was in question. Appellant states it now understands that the size determination is based on PE's size at the time the proposal was submitted. Appellant asserts PE was a Small Disadvantaged Business (SDB) when the proposal was submitted. Appellant includes a copy of a letter, dated May 3, 2006, from SBA's Washington Metropolitan Area District Office to PE recognizing PE as an SDB. The letter indicates PE's SDB status will expire on April 21, 2008.

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).

¹ The CO's protest is misdated, December 3, 2008, but it is clear from the documents attached to the protest that the correct date is January 3, 2008.

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

C. New Evidence

In accordance with 13 C.F.R. § 134.308(a), new evidence may not be submitted on appeal unless the judge orders it *sua sponte* or a motion is filed and served establishing good cause for the submission of the new evidence. OHA has found good cause when the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts of the issues on appeal. *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4434 (2001).

With its Appeal, Appellant submitted a letter from SBA's Washington Metropolitan Area District Office to PE recognizing PE as an SDB. Appellant asserts the letter demonstrates PE was a small business eligible to participate in Appellant's JV. However, Appellant cannot submit evidence on appeal it neglected to submit at the protest stage. *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430 (2001). Appellant was responsible for presenting all evidence to the Area Office. 13 C.F.R. 121.1009(b). Moreover, Appellant has not established good cause to enlarge the record to incorporate the proffered letter. Therefore, the motion for submission of new evidence is DENIED and I EXCLUDE Appellant's letter from the record.

D. Adverse Inference

The Area Office concluded that Appellant's JV is not a small business under the instant NAICS code and size standard. The Area Office noted that PE was a member of Appellant's JV and the information requested for PE was not submitted to the Area Office. Thus, relying on 13 C.F.R. § 121.1008(d), the Area Office drew the inference that full disclosure of the information requested would show PE is not a small business and, consequently, neither is Appellant's JV.

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, PE was a partner in Appellant's JV. Thus, the Area Office needed PE's information, in addition to the information received regarding Appellant's size, to calculate the size of Appellant's JV.

Further, the requested information was relevant to the size determination. A business's size is determined by adding its average annual receipts with those of its affiliates, 13 C.F.R. § 121.104(d), and PE, as a joint venture partner, was affiliated with Appellant's JV, 13 C.F.R. § 121.103(h).

Finally, the Area Office's request for information was specific. The Area Office'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 states it misunderstood the relevant period for determining PE's size. Appellant asserts it removed PE from Appellant's JV and did not submit PE's information because Appellant believed the Area Office was reviewing PE's current size. However, Appellant cannot remedy on appeal its failure to provide the requested information to the Area Office. The Area Office is responsible for calculating size and determines what information is relevant, *Size Appeal of Xantrex Technology, Inc.*, SBA No. SIZ-4592 (2003). Appellant bore the burden of establishing that its JV was small, 13 C.F.R. § 121.1009(c), and, by failing to submit the information requested for PE, Appellant failed to meet its burden. Accordingly, the Area Office was justified in drawing an adverse inference that the information, if disclosed, would show that Appellant's JV is other than small.

Further, Appellant's actions here do not engender confidence in its integrity. Appellant submitted its offer with PE. Once PE's size was challenged, Appellant attempted to remove PE from Appellant's joint venture and have Appellant's size determined alone, even though to do so would be contrary to the regulation, as the joint venture with PE was part of Appellant's initial offer. How Appellant's jettisoning of its joint venturer would allow Appellant to perform the contract is unclear. Now Appellant attempts to argue, too late, that PE is small after all. These successive inconsistent submissions are confusing at best and suspicious at worst. The Area Office was completely correct in drawing an adverse inference after Appellant failed to provide the requested information and I find no error whatsoever in the Area Office's doing so.

Thus, the Area Office properly drew an adverse inference against Appellant's JV and found Appellant's JV other than small. Appellant's JV did not produce relevant information from PE, 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 the Area Office and the appeal must be DISMISSED.

V. Conclusion

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

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

CHRISTOPHER HOLLEMAN
Administrative Judge