

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

SIZE APPEAL OF:

DCT Incorporated

Appellant

RE: AOC Support Services, LLC

Appealed from

Size Determination Nos. 2-2008-74 & 2-2008-75

SBA No. SIZ-4996

Decided: September 12, 2008

APPEARANCES

Cheryl Bernardi, President, *Pro Se*, DCT Incorporated, McAlester, Oklahoma, for Appellant.

Joseph P. Hornyak, Esq., and Megan M. Mocho, Esq., Holland & Knight, Washington, D.C., for AOC Support Services, LLC.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a July 14, 2008 size determination (2-2008-74 & 2-2008-75) finding AOC Support Services, LLC (AOC) to be a small business for a \$32.5 million annual receipts size standard. The size determination arose from a protest filed by DCT Incorporated (Appellant) and from concerns raised by Pyramid Services, Inc. (Pyramid) which the Contracting Officer (CO) adopted in a CO size protest. For the reasons discussed below, the size determination is affirmed.

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issues

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Findings of Fact

1. On November 3, 2006, the Department of the Navy, Naval Air Facility El Centro, in El Centro, California, issued Solicitation No. N62473-06-R5501 (solicitation) for base operations support services. The CO issued the solicitation as a small business set-aside and designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a \$32.5 million annual receipts size standard. The procurement was a two-step process in which offerors were required to submit representations and certifications on December 1, 2006 and technical and price proposals were due on March 19, 2007. The procurement has a potential length of ten years and is valued at \$108 million.

2. On November 7, 2007, the solicitation was awarded to Pyramid. On November 9, 2007, DCT, an unsuccessful offeror, protested Pyramid's size status to the CO. The CO forwarded the protest to the SBA, Office of Government Contracting, Area III, which determined Pyramid to be other than small. On January 14, 2008, OHA affirmed the size determination that Pyramid was other than small when it submitted its price proposal. *Size Appeal of Pyramid Services, Inc.*, SBA No. SIZ-4879 (2008).

3. On April 8, 2008, the CO notified offerors that AOC was the apparent successful offeror. On April 9, 2008, the CO received a size protest from Appellant that contained significant supporting documentation. Appellant alleged AOC had numerous affiliates, which it listed. Among those Appellant alleged were affiliated with AOC were Owl Associates, dba Global Associates (Global Associates). Appellant alleged that AOC, with its affiliates, exceeded the \$32.5 million size standard.

4. On April 11, 2008, the CO received a size protest or information dated April 10, 2007, from Pyramid. Pyramid asserted that AOC was affiliated with several companies and that AOC and its affiliates exceeded the size standard. The CO adopted Pyramid's protest concerns in a CO size protest. The CO then forwarded DCT's and her size protests to the SBA, Office of Government Contracting, Area II (Area Office).

5. The Area Office assigned DCT's size protest No. 2-2008-74 and the CO's size protest No. 2-2008-75. The two protests were combined for purposes of rendering a formal size determination. On April 17, 2008, the Area Office notified AOC of the protest.

6. On April 22, 2008, AOC submitted a detailed response to the protest, its SBA Form 355, and other organizational and financial documentation. AOC admitted affiliation with various 20 concerns, including 7 concerns not identified by the protestors. AOC disputed that it was affiliated with AOC Edentify Services, LLC (Edentify); AOC Key Solutions, Inc.(Key); AOC Solutions, Inc. (Solutions); Severn Technologies Corporation (Severn); and Global

Associates. AOC then totaled the annual receipts of its admitted affiliates and the total was significantly less than the \$32.5 million dollar size standard.

B. The Size Determination

On July 14, 2008, the Area Office issued its size determination finding AOC to be a small business under the size standard assigned to the solicitation. The size determination notes that AOC indicated that it is: 51% owned by American Operations Corporation (American Operations); 29% owned by EMI Services (EMI); and 20% owned by Technical Design Incorporated (Technical). The size determination states AOC was organized as a joint venture for purposes of submitting an offer and performing on this procurement and AOC's officers include: L. Frank Field, CEO; Michelle V. Silvia, CFO; Robert Herndon, Vice Chairman, President; Stan Mills, Governor; and George Morgan, Governor.

The Area Office noted AOC acknowledged it had twenty affiliates; thirteen affiliates cited by the protestors and seven additional affiliates. The Area Office found AOC is not affiliated with: Edentify; Key; Solutions; Severn; and Global Associates. The size determination notes Global Associates purchased American Operations in 1992 and, in 1993, Mr. Field purchased American Operations from Global Associates. The size determination states, however, that there were no business relationships between Global Associates and American Operations for twelve years after Mr. Field's purchased American Operations. In 2006, Global Associates and American Operations entered into a joint venture AOC Global Services, LLC (AOC Global). The size determination notes, with the exception of the AOC Global joint venture that is unrelated to the instant procurement, "no relationship existed on or before AOC's submission of its offer for this procurement and/or a clear fracture has been demonstrated resulting in a finding of no affiliation" with Edentify, Key, Solutions, Severn, and Global Associates. Size Determination, at 4.

The Area Office relied on 13 C.F.R. § 121.103(h)(3) to determine AOC's size. The size determination explains because the value of this procurement is \$108 million and clearly exceeds half the size standard for the procurement, the Area Office calculated the size of each business that comprises the joint venture, American Operations, EMI, and Technical, rather than calculating the combined size of the joint venture, AOC. Size Determination, at 4-5. The Area Office noted each business that comprises the joint venture provided income tax returns for 2006, 2005, and 2004. The size determination states EMI's and Technical's average revenues for 2006, 2005, and 2004 are well below \$32.5 million and thus EMI and Technical are small for this procurement. The Area Office found American Operations, the majority owner of the joint venture, has numerous affiliates that had business activity over the three years preceding AOC's offer. However, the Area Office states the combined average revenue of all American Operations's affiliates is below the applicable \$32.5 million size standard. Accordingly, the Area Office determined AOC is a small business for this procurement.

C. The Appeal

On July 24, 2008, Appellant filed an appeal of the size determination at OHA. Appellant asserts the Area Office erred in determining AOC is not affiliated with Global Associates. Appellant argues its protest included a copy of the resume of AOC'S CEO, Mr. Field, which identifies him as serving as President and Chief Operating Officer of Global Associates. Appellant asserts this is indicative of affiliation and Global Associates's revenues should have been included in the Area Office's size determination.

Appellant acknowledged that it was not pursuing alleged affiliations included in its original protest that the Area Office determined were formed after AOC submitted a proposal for the solicitation. However, even after removing some of the alleged affiliations in its protest, Appellant asserts AOC is still other than small based on public information. Appellant includes a spreadsheet detailing all the companies that are located at the same address as AOC and share employees with AOC. Appellant's spreadsheet includes: (1) AOC Support; (2) AOC Alliant Tech; (3) AOC Global; (4) AOC World; (5) AOC GulfCoast; (6) AOC Applied Tech; (7) AOC Connect; and (8) PerformanceNet Management. Appellant asserts all eight companies are affiliates of AOC.

Moreover, Appellant explains it relied on information found in each company's Central Contractor Registration (CCR) to estimate each company's size. Appellant used the size standard for the NAICS code under which a company was no longer eligible to be considered small as an estimate for a company's average annual revenues. Using this process, Appellant argues revenues for AOC and its affiliates exceed \$101 million and therefore AOC is other than small for the \$32.5 million dollar size standard assigned to this solicitation.

D. Response

On July 31, 2008, AOC responded to Appellant's appeal. At the outset, AOC argues Appellant's Appeal Petition fails to include "full and specific" allegations of error in the size determination as required by 13 C.F.R. § 134.305 and therefore AOC asserts the Appeal Petition should be dismissed.

AOC also responded to Appellant's assertions that AOC is affiliated with Global Associates. AOC explains that Global Associates purchased American Operations, of which Mr. Field was President in 1992. AOC states on January 1, 1993, Mr. Field purchased all of American Operations stock from Global Associates and Global Associates no longer retained any interest in American Operations. AOC asserts there was complete severance between Global Associates and American Operations from January 1, 1993 until 2005. AOC states, due to a meeting at a contract services association conference in 2005, American Operations and Global Associates formed AOC Global, a joint venture, in 2006. AOC states, based on a review of AOC Global's Operating Agreement, the Area Office determined neither American Operations nor Global Associates has an ability to control the other and accordingly AOC is not affiliated with Global Associates. AOC acknowledges it is affiliated with the joint venture, AOC Global, and states AOC Global's revenues were included in the Area Office's size determination. AOC, citing 13 C.F.R. § 121.103(h)(2), asserts the Area Office correctly determined that although joint

venturers are affiliated with each other for the particular procurement for which they submitted offer, but are not generally affiliated for all procurements.

With respect to Appellant's arguments that AOC is affiliated with the eight companies on Appellant's spreadsheet, AOC does not disagree. AOC acknowledges the eight companies are affiliates and that their receipts were used by the Area Office to calculate AOC's size. AOC does question Appellant's method of calculating receipts based on CCR information. AOC challenges the logic underlying Appellant's method of calculating its total receipts, *i.e.*, drawing inferences from CCR listings, because this information does not reflect the actual receipts recorded by these companies. Moreover, AOC argues Appellant's assumptions about size based on its affiliates ineligibility for NAICS codes overlooks SBA affiliation regulations, such as exclusions for inter-company revenue, and fails to consider that an affiliate's size representation is influenced by its parent's (AOC's) size.

IV. Discussion

A. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 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 AOC'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 Consultants, 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 material findings of law or fact that are mistaken.

C. The Merits

Appellant asserts the Area Office's size determination was based on clear error of fact or law because the Area Office failed to include: (1) the average annual receipts of eight companies which operate at the same address and share staff with AOC; and (2) the average annual receipts of Global Associates. In analyzing these allegations, the Record leads me to conclude that much of what Appellant alleges to be error could have been obviated by more detailed discussion and findings within the size determination addressing Appellant's protest. A more comprehensive discussion would have enabled Appellant to better appreciate the Area Office's findings and determination. Nevertheless, Appellant's appeal is without merit.

Consistent with the preceding paragraph, I reject AOC's contention that the appeal lacks specificity under 13 C.F.R. § 121.305. Appellant, as a *pro se* litigant, did the best it could in view of the lack of detail in the size determination and the information available to it.

With regard to the eight companies Appellant alleges are affiliates of AOC, AOC recognized them as affiliates. AOC provided documentation of the eight companies' average annual receipts to the Area Office and the Area Office relied on the information in calculating AOC's size. Even though the size determination mentioned AOC acknowledged it had twenty affiliates, the Area Office did not include a complete list of AOC's affiliates in the size determination. Although such a list would have been helpful and would have preempted Appellant's arguments with respect to these eight businesses, the Area Office's decision not to name all twenty acknowledged affiliates does not constitute factual or legal error. Basically, after adding the average annual receipts of all of these concerns and AOC, AOC still does not exceed the \$32.5 million dollar size standard.¹

As to Appellant's arguments regarding Global Associates, SBA's size regulations explain that the foremost principle behind affiliation is based upon the power to control a concern. The independent bases for affiliation, those described under, 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h), depend upon facts that give one concern the ability to control another. Specifically, 13 C.F.R. § 121.103(h) addresses affiliations based on joint ventures and explains there must be an aspect to the relationship that could cause a reasonable person to conclude that one or both concerns have the power to control the other because of the joint venture.

Appellant seems to base its claim of affiliation between Global Associates and American Operations upon their joint venture AOC Global. American Operations is admittedly affiliated with the joint venture and AOC Global's revenues were included in the size determination. However, the joint venture alone is insufficient to justify a finding of affiliation with Global Associates. The joint venture Operating Agreement provides neither American Operations nor Global Associates with the ability to control the other. Rather, they simply agreed to seek and perform a contract together. While Global Associates and American Operations are affiliated with each other for the particular procurement for which they submitted an offer, they are not generally affiliated and thus AOC is not affiliated with Global Associates.

Appellant also emphasizes that Mr. Field, AOC's CEO, was President of Global Associates in 1992. Yet, his role as President over ten years ago, without more, provides no indicia of control. His tenure as President ended in January 1993 and all business ties between American Operations and Global Associates were severed for the following twelve years.

In addition to considering the matters discussed above, I have considered all other causes of affiliation recognized under 13 C.F.R. § 121.103(a)(5) and 13 C.F.R. § 121.103(c), (d), (e),

¹ I believe that had Appellant been able to see AOC's full reply to its protest, the amount of annual receipts attributable to AOC and its admitted affiliates would have been obvious. So would AOC's lack of relationship with Global Associates. At that point, I believe Appellant may well have chosen to reconsider filing an appeal. I say this because AOC's submittal was outstanding. In addition to identifying more affiliates than the protestors were aware of, AOC provided tables and charts in its reply that faithfully tracked the underlying supporting documentation and established it did not exceed the size standard for the concerns it admits it is affiliated with.

(f), (g) and (h) that had the potential to be justified by the Record. Based upon my review, I hold there are no indicia of affiliation that would cause me to find error in the size determination.

V. Conclusion

I have considered Appellant's Appeal in light of the Record. The Area Office investigated and rejected Appellant's claim of affiliation between Global Associates and American Operations. Hence, I hold the Area Office correctly did not include Global Associates's revenues in its size determination of AOC's size. Additionally, I hold the Area Office was correct to determine AOC to be a small business for a \$32.5 million annual receipts size standard. Accordingly, the Size Determination is AFFIRMED and Appellant's Appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge