

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

SIZE APPEAL OF:

Metropolitan Van and Storage, Inc.

Appellant

RE: Guardian Moving and Storage Company

Appealed from
Size Determination Nos. 2-2008-111

SBA No. SIZ-5005

Decided: September 26, 2008

APPEARANCE

Joseph G. Billings, Esq., Miles & Stockbridge, P.C., Bowie, Maryland, for Appellant.

Grace Bateman Esq., and Joshua C. Drewitz, Esq., Seyfarth Shaw LLP, Washington, D.C., for Guardian Moving and Storage Company.

DECISION AND LIMITED REMAND ORDER

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from an August 13, 2008 size determination (2-2008-111) finding Guardian Moving and Storage Company (Guardian) to be a small business for a \$23.5 million annual receipts size standard. The size determination arose from a protest filed by Metropolitan Van and Storage, Inc. (Appellant). For the reasons discussed below, the size determination is remanded for the limited purpose of including additional information pertaining to Adele Imports, Inc. (Adele) and in all other respects 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 May 8, 2008, the Military Surface Deployment and Distribution Command, in Fort Monmouth, New Jersey, issued Solicitation No. W81GYE-08-R-0006 (RFP) for non-temporary storage. The Contracting Officer (CO) issued the solicitation as a small business set-aside and designated North American Industry Classification System (NAICS) code 493110, General Warehousing and Storage, with a \$23.5 million annual receipts size standard. Offers were due on June 17, 2008.

2. On July 23, 2008, the CO notified unsuccessful offerors that Guardian was the apparent awardee. On July 30, 2008, Appellant, an unsuccessful offeror, protested Guardian's size status to the CO. Appellant alleged Guardian is affiliated with five other companies and together they have a number of large contracts. On August 1, 2008, the CO forwarded the protest to the SBA, Office of Government Contracting, Area II (Area Office).

3. On August 5, 2008, the Area Office notified Guardian of the protest. On August 7, 2008, Guardian submitted a response to the protest, its SBA Form 355, and other organizational and financial documentation. In its response, Guardian explained it is one of eight businesses owned and controlled by Eugene W. Smoot, Walter R. Smoot, Sr., and Mario Smoot. The eight companies are: (1) Guardian; (2) Guardian Services Group, Ltd. (Guardian Services); (3) SBI, Inc. (SBI); (4) Vanguard Moving and Storage Company, Inc. (Vanguard); (5) Smoot Brothers Property Management (Smoot Brothers); (6) WIT Associates (WIT); (7) Joseph R. Smoot Management Company (Smoot Management); and (8) Ossani Investments, Inc. (Ossani). On its SBA Form 355, Guardian also identified three additional companies with which Guardian acknowledges connections, but denies affiliation: Adele; Benefits Systems Management (Benefits); and Signature Health Care (Signature). Adele is 33.33% owned by Eugene W. Smoot, Guardian's President. Barry Kuhne, a Guardian Director, owns 100% of Benefits and is a 51% owner of Signature. On August 8, 2008, Guardian submitted additional information, including a tax return, articles of incorporation, and bylaws for Adele.

B. The Size Determination

On August 13, 2008, the Area Office issued its size determination finding Guardian to be a small business under the size standard assigned to the RFP. The size determination notes that Guardian indicated that it is: 50% owned by Eugene W. Smoot and 50% owned by Walter R. Smoot, Sr. The size determination indicates Guardian acknowledges it has seven affiliates: Guardian Services, SBI, Vanguard, Smoot Brothers, WIT, Smoot Management, and Ossani.

Additionally, citing 13 C.F.R. § 121.103, the Area Office found Guardian is affiliated with Adele. The Area Office noted Eugene W. Smoot owns 33.33% of Adele and Adele's three other owners, who have no ties to Guardian, own 33.33%, 18.33%, and 15%. The Area Office determined Guardian is not affiliated with Benefits or Signature. The Area Office recognized Mr. Kuhne owns and has the power to control Benefits and Signature, but the Area Office noted

Mr. Kuhne has no ownership of Guardian and there is no evidence that Mr. Kuhne has the power to control Guardian.

The Area Office relied on 13 C.F.R. § 121.104 to calculate Guardian's size. The size determination explains because Guardian submitted its offer in June 2008, the size determination is based on income for 2007, 2006, and 2005. Because Guardian had not yet filed its 2007 tax return, the Area Office used Guardian's tax returns for 2006 and 2005 and a declaration from Guardian's accountant regarding Guardian's 2007 income tax revenues. In determining Guardian's size, the Area Office also included income tax returns for 2007, 2006, and 2005 for Guardian's acknowledged affiliates and stated Adele's 2007 receipts were included.

C. The Appeal

On August 15, 2008, Appellant filed an appeal of the size determination at OHA. Appellant argues the decision is based on clear error of fact and law. Appellant requests OHA reverse and remand the size determination to the Area Office for a proper evaluation of Guardian's size.

Appellant asserts the Area Office erred in calculating Guardian's size without including the revenues of Benefit and Signature. Appellant argues that Guardian is affiliated with Benefit and Signature through Mr. Kuhne. Appellant asserts Mr. Kuhne has the power to control Benefit and Signature through majority ownership in each company and that Mr. Kuhne, as one of two directors for Guardian, exerts negative control over Guardian.

Additionally, Appellant argues the size determination failed to address annual receipts by WIT and Guardian Services. Appellant states Guardian acknowledged WIT and Guardian Services as affiliates and the facts indicate WIT and Guardian Services had substantial annual receipts from the federal government during the last three years. Appellant asserts, despite evidence of WIT's and Guardian's federal contracts and the fact WIT has 16 employees, Guardian does not acknowledge any annual receipts for WIT or Guardian Services.

Finally, Appellant states Guardian's annual receipts for Smoot Brothers and Smoot Management are too low. Appellant notes Guardian only attributes \$7,500 annual receipts for Smoot Brothers. Appellant asserts the amount is so low it must represent net income rather than total income. Appellant argues that Smoot Brothers is Guardian's landlord and that the income from the building on Light Street in Baltimore, Maryland, would generate more than \$7,500 in annual rent.

Appellant also filed a Motion to File Additional Evidence. Appellant's proffer of additional evidence includes information concerning the status of Mr. Kuhne and reports of receipts attributable to Guardian and its alleged affiliates from Dun & Bradstreet.

D. Response

On September 8, 2008, Guardian responded to Appellant's appeal.

At the outset, Guardian asserts Appellant's allegations of affiliation with Benefit and Signature are predicated on the mistaken understanding the Mr. Kuhne is one of only two Guardian directors. Guardian explains that it has four directors: Walter Smoot, Eugene Smoot, John Craten, and Mr. Kuhne. Guardian states that all four directors have equal voting rights and, thus, Mr. Kuhne, who does not have any ownership in Guardian, does not have the ability to exert positive or negative control. Guardian represents that it presented Appellant with this information and Appellant withdrew this basis for appeal.

Next, Guardian addresses Appellant's allegations that the Area Office failed to include the annual receipts of WIT and Guardian Services in the size determination. Guardian explains that all of WIT's revenue is reported in SBI's revenue totals. Guardian states it acknowledged SBI as an affiliate and the Area Office included SBI's totals in determining that Guardian is small. Additionally, Guardian acknowledged Guardian Services as an affiliate and the Area Office included the revenue for Guardian Services in calculating Guardian's size.

Guardian also responded to Appellant's allegations that Guardian's annual receipts for Smoot Brothers and Smoot Management are too low. Guardian states it acknowledged Smoot Brothers and Smoot Management as affiliates and reported their total revenue, as reported on the relevant 2005, 2006, and 2007 tax returns to SBA. Therefore, Guardian asserts Appellant's allegation concerning Smoot Brothers and Smoot Management lacks merit and argues that Smoot Brothers and Smoot Management would need annual receipts exceeding \$8 million for Guardian and its affiliates to exceed the \$23.5 million size standard.

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 Guardian'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. Admission of Additional Evidence

I decline to admit the additional evidence proffered by Appellant. First, as discussed below, information concerning Mr. Kuhne's status is irrelevant. Secondly, as a general proposition, while OHA and area offices may consider hearsay reports, like those prepared by

Dun & Bradstreet, to be sufficient to justify a protest, they are still hearsay and are not sufficient to rebut the evidence a protested concern must provide with its SBA Form 355 submission, with attendant penalties for false statements. Nor can an area office consider reports of contract award dollars in determining the size of a concern. Under 13 C.F.R. § 121.104, there is a hierarchy of evidence area offices must consider in determining size and hearsay reports, like those created by Dun & Bradstreet, are not included. Thus, when a protested concern, such as Guardian in this instance, provides tax returns or other types of evidence required by 13 C.F.R. § 121.104, an area office must rely upon this information unless the area office has probative evidence to the contrary. *Size Appeal of Hallmark-Phoenix Joint Venture*, SBA No. SIZ-4870 (2007).

D. The Merits

Appellant asserts the Area Office based the size determination on clear errors of fact or law because the Area Office failed to include the revenues for Benefit, Signature, WIT, and Guardian Services and that the revenues included for Smoot Brothers and Smoot Management are too low.

The Record demonstrates that much of what Appellant alleges to be error is based on a misunderstanding of the size determination. Appellant's assertions that Guardian is affiliated with Benefit and Signature are based on a mistaken belief that Mr. Kuhne is one of two Guardian directors and is able to exert control over Guardian. The Record demonstrates Guardian has four directors and that Mr. Kuhne has neither ownership nor the ability to exert positive or negative control over Guardian. Hence, Appellant based its arguments to the contrary upon an erroneous premise.

Appellant's arguments regarding the revenues of WIT and Guardian Services also lack merit. Guardian rebutted the allegations by demonstrating that WIT's revenues are accounted for on SBI's tax return and the revenues were included in the Area Office's size determination. Guardian also acknowledged Guardian Services as an affiliate and provided the Area Office with tax returns for Guardian Services when the Area Office was calculating Guardian's size. In relying upon the information contained in the tax returns provided by Appellant, the Area Office acted as required by 13 C.F.R. § 121.104(a)(1) and, thus, I find no error in its findings.

The Record also contradicts Appellant's assertions that the revenues included for Smoot Brothers and Smoot Management are too low. The Area Office used the revenues reported on the relevant tax returns and Appellant has failed to raise any reasons for me to question the validity of these tax returns.

I note that Guardian was forthcoming in acknowledging affiliates, provided documentation of its affiliates average annual receipts to the Area Office, and that the Area Office relied on the information in calculating Guardian's size. Although Appellant failed to establish clear error of fact or law, my review of the Record does raise one concern. The Record appears to contain only the 2006 tax return for Adele, a company incorporated on May 15, 2006. While it is likely Adele will lack the revenue to cause Guardian to exceed the size standard for this procurement, Adele's revenues for both 2006 and 2007 should be accounted for in calculating Guardian's size. Thus, it is proper to REMAND the size determination for the sole

purpose of insuring Adele's 2007 revenues are included in calculating Guardian's size.

V. Conclusion

I have considered Appellant's Appeal in light of the Record and hold, with the exception of the subject matter of the limited remand, it is without merit. Accordingly, the size determination is REMANDED so the Area Office may determine if Adele's 2007 income would have any effect on the size determination. The appeal is otherwise DENIED.

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

THOMAS B. PENDER
Administrative Judge