United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Hallmark-Phoenix 8, LLC	SBA No. SIZ-5046
Appellant	Decided: June 22, 2009
Appealed from Size Determination No. 05-2009-047	

APPEARANCES

David C. Bowman, Esq., Johnathan M. Bailey, Esq., Bailey & Bailey, P.C., San Antonio, Texas, for Appellant Hallmark-Phoenix 8, LLC.

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 a firm which is still conducting some business operations, and has not filed the final documents for its dissolution, may be treated as a former affiliate of the challenged firm.

III. Background

A. Solicitation and Protest

On November 20, 2008, the U.S. Department of the Air Force, Lackland AFB, Texas, issued the subject solicitation (RFP No. FA-3047-09-R-0001) for taxi and aircrew transportation services. This procurement is an 8(a) competitive procurement and is designated under North American Industry Classification System (NAICS) code 485113, Bus and Other Motor Vehicle Transit Systems, with a corresponding $7 million annual receipts size standard. Offers originally were due on December 15, 2008, but the Contracting Officer (CO) later extended it to December

23, 2008. Hallmark-Phoenix 8, LLC (Appellant) self-certified as a small business with its December 23, 2008, offer.

On April 3, 2009, LOGMET, LLC (LOGMET), another offeror, was notified that Appellant was the apparent successful offeror. On April 10, 2009, LOGMET filed a protest alleging that Appellant is not a small business concern. On April 13, 2009, the CO forwarded the protest to the U.S. Small Business Administration (SBA) Office of Government Contracting - Area V in Fort Worth, Texas (Area Office), for a size determination.

On April 14, 2009, the Area Office notified Appellant of the protest and requested Appellant to submit a completed SBA Form 355, a response to the protest allegations, and certain other information. On April 17, 2009, Appellant responded.

B. The Size Determination

On May 15, 2009, the Area Office issued Size Determination No. 05-2009-047 (Size Determination) finding Appellant other than small.

The Area Office noted Appellant is a joint venture between Hallmark Capital Group LLC (HCG), an 8(a) firm and the 51% owner, and Phoenix Management, Inc. (PMI) a large firm and the 49% owner. HCG is owned by Jason Freeman (60%) and PMI (40%). PMI is owned by Marj and Leonard Strickland.

Three other concerns share a common address with HCG: Hallmark Synergy Group, LLC (HSG) (100% owned by Mr. Freeman); 5 Westside Group (Westside) (a wholly owned subsidiary of HCG); and Hallmark Restoration Group, LLC (HRC) (100% owned by Monique Freeman, Mr. Freeman's spouse). The Area Office concluded that all three firms were affiliated with HCG, HSG and Westside through common ownership and common management, and HRC through identity of interest.

HCG and PMI entered into an SBA 8(a) Mentor/Protégé agreement in July, 2006. The agreement is for one year and may be extended for six additional years upon mutual agreement. The Area Office determined SBA had approved the agreement.

The Area Office noted that under an approved Mentor/Protégé Agreement, a protégé and its mentor may joint venture for a small business contract provided the protégé is small for the procurement. HCG must thus be a small business in order for Appellant to be eligible for this contract.

Appellant is one of 9 joint ventures HCG and PMI have entered into. These include Hallmark-Phoenix, LLC, Government Support Services, Inc., and Hallmark-Phoenix 3 through 9. None of these joint ventures has more than three contracts. In determining HCG's size, the Area Office found it had to include the revenue of all HCG's affiliates, including its proportionate share of the receipts of the joint ventures.

Appellant submitted its initial offer, including price, on December 23, 2008. Therefore its last three completed fiscal years are 2005, 2006, and 2007. Westside and HRC have no revenue.

HSG was established September 19, 2007. HCG submitted a "Unanimous Written Consent of Members" resolving HSG be dissolved November 5, 2008 or as soon thereafter as possible. The Area Office noted HSG's Federal Tax Return, dated May 12, 2009, shows its tax year running from January 1, 2008 to November 5, 2008. The Area Office found that this return was inadmissible because it was created after the date the size determination was initiated.[1] The Area Office further found that HSG had not filed a Form 651, Certificate of Termination of Domestic Entity, as required by the Texas Secretary of State. In addition Mr. Freeman stated to the Area Office that HSG was still collecting accounts receivable and performing other actions necessary to wind down the business, although it had earned no new revenue after November 5, 2008. The Area Office found that HSG was not a closed business, and thus not a former affiliate of HCG, but a current affiliate for the purposes of the size determination.

HSG had not been in business for three full fiscal years. To determine HSG's receipts, the Area Office relied on HSG's 2007 tax return and financial statements for 2008. Appellant later submitted a revised 2007 return and a 2008 Federal Tax Return for HSG, dated May 12, 2009. The Area Office found these were inadmissible because they were created after the initiation of the size determination. (see fn. 1.)

Taking into account the revenue from all HCG's affiliates and its proportionate share of the joint venture, the Area Office found HCG exceeded the size standard, and was thus other than small. Accordingly, Appellant is other than small because its 8(a) participant is not a small business.

C. The Appeal

On May 15, 2009, Appellant received the size determination. On May 29, 2009, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). On June 1st, Appellant submitted a corrected appeal, and did so again on June 3rd.

Appellant argues that HSG's receipts should not have been included in the calculation of HCG's receipts. Appellant asserts HSG is a former affiliate whose receipts should not have been included. Appellant asserts SBA's regulations provide that unless otherwise defined, the terms in the regulation on the calculation of annual receipts shall have the meaning attributed to them by the IRS. 13 C.F.R. § 121.104(e). Appellant asserts, without citation, that a concern ceases business operations when it files a "final tax return", IRS Form 1065. HSG filed its final tax

[1] The Area Office states that the returns are dated May 13, 2008. However, while this is what is written next to Mr. Freeman's signature, it is clearly a mistake. Appellant submitted the returns as revisions during the size determination process. The preparer's signature is dated May 12, 2009, and the returns were clearly prepared for May, 2009, and thus after the initiation of the size determination. The Area office thus properly did not consider these returns, as they were filed after the initiation of the size determination. 13 C.F.R. § 121.104(a)(1).

return on May 12, 2009. This document was submitted to the Area Office not for the financial information on it, but to establish that a final tax return had been filed. Accordingly, HSG ceased business operation prior to the self-certification date of December 23, 2008 because a corporate resolution was passed dissolving HSG on November 1, 2008. Accordingly, Appellant asserts HSG is a former affiliate of HCG and, under 13 C.F.R. § 121.104(d)(4), its receipts should not be counted in calculating HCG's annual receipts.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

B. The Merits

A concern's size is determined as of its self-certification that it is small, submitted with its initial offer, including price. 13 C.F.R. § 121.404(a). In determining a concern's size, SBA aggregates the employees (or receipts) of the challenged firm and all of its domestic and foreign affiliates. 13 C.F.R. § 121.103(a)(6). Affiliation exists when one concern controls or has the power to control another, or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). SBA considers factors such as ownership and management in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Concerns are affiliated when one owns or has the power to control 50 percent or more of the other concern's voting stock. 13 C.F.R. § 121.103(c)(1).

The annual receipts of a former affiliate are not included if affiliation ceased before the date for determining size. 13 C.F.R. § 121.104(d)(4). A firm such as a dissolved or liquidated firm, which has ceased to exist as an entity, is a former affiliate. *Size Appeal of Service Engineering, Co.*, SBA No. SIZ-2660, at 9-10 (1987). However, if the liquidation or dissolution was not completed prior to the date as of which size is determined, the firm is not a former affiliate, and its receipts must be counted when determining size. *Size Appeal of Fruit Nectars, Inc.*, SBA No. SIZ-2546 (1986).

Here, HCG's size must be determined as of December 23, 2008, the date of Appellant's self-certification. Appellant's own evidence establishes that HSG had not filed the final documents signaling dissolution of the company, and was still collecting accounts receivable and performing other actions to wind down the business on December 23rd. The final tax return upon which Appellant relies as concluding HSG's business was filed May 13, 2009, long past

the self-certification date. Accordingly, HSG was not fully dissolved as of the date of Appellant's self-certification and the Area Office properly did not treat it as a former affiliate and included HSG's receipts in its calculation of HCG's annual receipts.[2]

In conclusion, I find no clear error on the part of the Area Office in this case, and I therefore must affirm the size determination and deny the appeal.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

[2] I note that because HSG had not been in business three full fiscal years, the Area Office properly computed its size by taking the total receipts for the period HSG was in business, divided by the number of weeks HSG was in business, multiplied by 52. 13 C.F.R. § 121.104(c)(2). Because figures from full fiscal years were not available, the Area Office properly considered receipts from the whole period of time HSG was in business, up to the self-certification date of December 23rd. *Size Appeal of Pacific Marine Yacht Charters, LLC*, SBA No. SIZ-4537, at 4 (2003); *Size Appeals of Big D Construction Corp. and Amarok Corporation*, SBA No. SIZ-2816 (1988).