United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Taylor Consultants, Inc.	SBA No. SIZ-5049
Appellant	Decided: July 1, 2009
Re: Veteran Enterprise Technology Solutions	
Appealed from Size Determination No. 2-2009-30	

APPEARANCE

Bryant S. Banes, Esq., Neel, Hooper & Banes, P.C., Houston, Texas, for Appellant.

DECISION

I. Introduction and Jurisdiction

On December 12, 2008, the Department of Army, National Guard Bureau (National Guard) issued Request for Proposals W9133L-09-R-0007 (RFP), which required the successful offeror to provide child and youth training for National Guard Child and Youth Development. The Contracting Officer (CO), set the RFP aside for service-disabled veteran-owned small businesses and assigned North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, with a corresponding $7 million average annual receipts size standard. All offers were due on January 5, 2009. On January 24, 2009, the CO awarded the contract to Taylor Consultants, Inc. (Appellant).

On January 30, 2009, an unsuccessful offeror, Veteran Enterprise Technology Services, LLC (VETS) filed a size protest alleging Appellant is other than small because it is affiliated with Military Personnel Services Corporation (MPSC). VETS stated that the Small Business Administration (SBA) determined that Appellant and MPSC were affiliated in a size determination issued on January 26, 2006 and that the determination was upheld by the Office of Hearings and Appeals (OHA) in *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006). VETS asserted Appellant did not update its Central Contractor Registration profile after the 2006 size determination to reflect the other than small business size status. VETS alleged, based on publicly available information, Appellant's average revenues exceed the size standard for the RFP and that MPSC is also other than small for the size standard.

On February 2, 2009, the CO requested the SBA Office of Government Contracting, Area Office II (Area Office), determine Appellant's size regarding the RFP. On April 28, 2009, the Area Office issued Size Determination No. 02-2009-30 (size determination), concluding that Appellant is other than small for the annual receipts size standard designated for the RFP. For the reasons discussed below, the size determination is affirmed.

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. Issue

Did the Area Office make a clear error of fact or law in finding Appellant is affiliated with MPSC, an other than small concern? *See* 13 C.F.R. § 134.314.

III. Facts

1. Mr. Thomas Taylor owns Appellant and is Appellant's President and Chief Executive Officer (CEO).

2. Mr. Taylor is one of four owners who equally share a 25% interest in MPSC and he is an employee of MPSC.

3. MPSC is other than small for all revenue-based sized standards and thus ineligible to make an offer for the RFP.

4. MPSC and Appellant are parties to active subcontracting agreements.

5. Appellant's proposal for the RFP identified seven key personnel and included their resumes. Two of the individuals Appellant listed are employees of MPSC. The other five are employees of a subcontractor, Dare Mighty Things.

6. In 2005, Appellant and MPSC teamed for a National Guard contract for Family Assistance Center Services at locations throughout the United States. After award, Appellant's size was challenged and, on January 26, 2006, SBA determined Appellant and MPSC were affiliated (the 2006 size determination) because MPSC had the power to control Appellant under general affiliation principles, operation of the newly organized concern rule, and operation of the ostensible subcontractor rule. OHA affirmed this decision in a final agency decision that Appellant did not challenge. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775.

B. The Size Determination

On April 28, 2009, the Area Office issued the size determination concluding that Appellant is other than small for the RFP.

The Area Office states Appellant incorrectly interpreted C.F.R. § 121.1010 to determine Appellant did not need to recertify its size after being found other than small in the 2006 size

determination. The Area Office states the 2006 size determination had future effect because Appellant was found to be affiliated with MPSC based on the newly organized concern rule and under general rules of affiliation. The Area Office concedes the 2006 size determination states "for this procurement" and "for the subject procurement," however, the Area Office asserts any ambiguity was clarified by the OHA decision which states "Appellant is thus other than small for this procurement and as an entity." *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 17. The Area Office states the OHA decision was the final decision of SBA and Appellant was required to request recertification.

The Area Office notes that some of the factors present in the 2006 size determination are evident in this case. The Area Office states Thomas Taylor, 100% stockholder of Appellant, had a 16% ownership interest in MPSC in 2006 and Mr. Taylor increased his MPSC ownership interest to 25% in 2009. The Area Office indicates Mr. Taylor continues to have employment with MPSC. The Area Office also noted that Appellant stated that two MPSC employees were listed as key employees for the RFP; one of whom is returning to Appellant as a program manager for the RFP. Accordingly, the Area Office states that clear fracture has not been established between Appellant and MPSC.

Because Appellant has been affiliated with MPSC since the 2006 size determination, the Area Office combined Appellant's and MPSC's revenues for size determination purposes. The Area Office noted MPSC's average revenues exceed all applicable revenue size standards and, when Appellant's average revenues are combined with MPSC's average revenues, Appellant exceeds all applicable revenue based size standards.

The Area Office denied Appellant's request for recertification in the size determination. The Area Office explained recertification would have no impact on Appellant's size for the RFP because size is determined as of the date of the initial offer, not at the time of the start of work. Additionally, the Area Office cited 13 C.F.R. § 121.1010 and stated Appellant has moved its corporate headquarters to Florida which is outside the coverage area of the Area Office. The Area Office processed the size determination because the address provided for Appellant was its Virginia satellite office.

C. The Appeal

On May 12, 2009, Appellant appealed the size determination. Appellant enumerates a list of the Area Office's size determination's clear errors of fact and law, including: (1) finding that Appellant is precluded from self-certifying as small because of the adverse 2006 size determination; (2) ignoring that the size standard for the RFP is $1 million larger than the size standard for the 2006 size determination; (3) declining to allow Appellant to self-certify as small for a larger size standard, in accordance with 13 C.F.R. § 121.1009(g)(5); (4) declining to follow or address OHA case law which sets forth specific factors required to preclude self-certification after an adverse size determination, *Size Appeal of DTH Management JV,* SBA No. SIZ-4379 (1999); (5) failing to address the size standard issue in the size determination; (6) ignoring due process obligations; (7) holding the 2006 size determination was not limited to that procurement; (8) declining to allow Appellant to self-certify after an adverse size determination limited to the procurement at issue, 13 C.F.R. § 121.1010(b); (9) incorrectly applying the 2006 size

determination; (10) exceeding its authority by expanding the scope of the 2006 determination; (11) ignoring undisputed evidence of fracture between Appellant and MPSC; (12) finding affiliation based solely on Appellant's owner's 25% stock holdings in MPSC and two of Appellant's 175 employees being employees of MPSC; (13) exercising jurisdiction over the size determination even though Appellant is headquartered outside the coverage area; (14) taking two months to issue the size determination; and (15) showing bias against Appellant.

Appellant asserts it is uncontroverted that it is small for the RFP, as evidenced by its tax returns and financial data submitted to the Area Office. Appellant argues, in spite of this fact, the Area Office found Appellant to be other than small based solely on the 2006 size determination. Appellant states it has demonstrated clear fracture with MPSC: (1) Appellant moved its headquarters in 2007; (2) Appellant was not reliant on MPSC for the predecessor contract; (3) MPSC is not involved in the subject procurement; (4) although Mr. Taylor is still and employee of MPSC, he is not a key employee; (5) Appellant has generated substantial revenues since 2005; (6) only two of the seven members of the management team for the RFP are MPSC employee; and (7) Appellant and MPSC are in different businesses and MPSC does not have the proper NAICS code to bid on the RFP.

Appellant argues the newly organized concern rule is the only basis remaining under which the 2006 size determination could control a finding of affiliation, but the newly organized concern rule is not rational in light of the totality of the circumstances. Appellant states it is the incumbent on the procurement and has three years relevant work experience. Additionally, Appellant notes, "MPSC is not involved at all in the 2009 procurement, and Mr. Taylor has not been a principal of MPSC since February." Appeal, at 9. Appellant asserts the Area Office supports its determination of affiliation with two legally insufficient facts: (1) Mr. Taylor owns 25% of MPSC and (2) Mr. Taylor and an employee of Appellant are employees of MPSC. Appellant argues these facts are insufficient to find affiliation or control.

On May 18, 2009, Appellant supplemented its appeal. Appellant asserts the Area Office's dismissal of Appellant's allegation that VETS was not an interested party is a violation of procedural due process and demonstrates undue favoritism to VETS. Appellant states its due process rights were further violated when SBA determined Appellant was not an interested party in its subsequent size protest of VETS, which was awarded the subject contract after Appellant was deemed other than small.

IV. Analysis

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)(2).

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 Appellant'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 key findings of law or fact that are mistaken.

C. Protestor's Standing as an Interested Party

Appellant alleges VETS is not an interested party and thus cannot protest Appellant's size status. VETS right to file a size protest in this instance is governed by 13 C.F.R. § 121.1001(a)(i). The text of 13 C.F.R. § 121.1001(a)(i) specifically states, "Any offeror whom the contracting officer has not eliminated for reasons unrelated to size" may file a size protest in connection with a particular procurement.

It is undisputed that VETS was an unsuccessful offeror under this RFP at the time VETS submitted its protest. There is no evidence in the Record to suggest VETS was eliminated from the competition for the RFP for reasons unrelated to its size. Accordingly, I hold VETS had the right to protest Appellant's size under 13 C.F.R. § 121.1001(a)(i).

I also note that it is irrelevant whether VETS is a responsible offeror in Appellant's opinion. OHA does not have the jurisdiction to decide whether VETS is a responsible offeror for that determination vests exclusively within the purview of the CO. *See* FAR 9.105-2.

D. The Merits

1. The Effect of the 2006 Size Determination

The 2006 size determination finding Appellant to be other than small has future effect. In addition to finding a violation of the ostensible subcontractor rule, the determination was based on general affiliation principles and the newly organized concern rule and was affirmed on appeal. 13 C.F.R. § 121.1010(b); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775. The future effect was made abundantly clear in *Size Appeal of Taylor Consultants, Inc.*, which affirms the size determination and specifically states, "Appellant is thus other than small for this procurement and as an entity." *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 17. Appellant's arguments to the contrary are specious.

In accordance with 13 C.F.R. § 121.1009(g)(5):

> (5) A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to § 121.1010 or OHA reverses the adverse size determination. After an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA. If a concern

> does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as small on a pending procurement or on an application for SBA assistance, the concern must immediately inform the officials responsible for the pending procurement or requested assistance of the adverse size determination.

Based upon 13 C.F.R. § 121.1009(g)(5), despite the adverse 2006 size determination, Appellant was not required to obtain recertification prior to bidding on this RFP. This is because the $7 million size standard for the RFP is larger than the $6 million size standard applicable to the NAICS code used in the 2006 size determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 2.

2. Basis of the Area Office's Size Determination

Even though Appellant was not required to obtain recertification before submitting an offer under the RFP, the 2006 size determination remains valid. If the facts underlying the 2006 size determination which found Appellant and MPSC were affiliated still exist, the Area Office can rely upon the 2006 size determination to again find affiliation between Appellant and MPSC.

The factual basis of the Area Office's size determination is evident. The Area Office relied upon facts beyond those that existed in 2006 to find affiliation. That is, the Area Office based its finding of affiliation upon: Mr. Taylor's 25% ownership in MPSC, which increased from 16% in 2006; Mr. Taylor's continued status as an MPSC employee and that of another MPSC employee as a key employee for Appellant, and the continuing business relationship between Appellant and MPSC. Considering these findings and the Record, I find the Area Office did not make a clear error of fact or law in finding Appellant affiliated with MPSC. The size determination is supported by: (1) the totality of the circumstances, 13 C.F.R. § 121.103(a)(5); (2) stock ownership, 13 C.F.R. § 121.103(c)(2); and (3) identity of interest, 13 C.F.R. § 121.103(f).

i. Affiliation Based Upon the Totality of the Circumstances

In *Size Appeal of Lance Bailey and Associates*, SBA No. SIZ-4817 (2006), at 13-14, the issue of affiliation under the totality of the circumstances was comprehensively discussed, to wit:

> For size determination purposes, two businesses are affiliated when one business either controls or has the power to control the other business, or a third party (or parties) either controls or has the power to control both. 13 C.F.R. §121.103(a)(1). In determining whether affiliation exists, the SBA examines the business's ownership, the management, ties to other businesses, and contractual relationships. 13 C.F.R. §121.103(a)(2).
>
> Affiliation through the totality of the circumstances is found at 13 C.F.R. § 121.103(a)(5). As partially explained in *TKC*, [*Size Appeal of TKC Technology Solutions, LLC*, SBA No. SIZ-4783 (2006)] totality of the circumstances is not an independent basis of affiliation. The specific independent bases of affiliation, *i.e.*,

> those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h) are the nucleus of a finding of affiliation through the totality of the circumstances.
>
> Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor (13 C.F.R. § 121.103(c), (d), (e), (f), or (g)), the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates. 13 C.F.R. §121.103(a)(5); *Size Appeal of A.M. Kinney Associates*, SBA No. SIZ-4401, at 5-8 (2000); *Size Appeal of Inland Dredging Company*, LLC, SBA No. SIZ-4350, at 6 (1999); *Size Appeal of Field Support Services, Inc*., SBA No. SIZ-4176, at 10 (1996). In making this kind of determination, the SBA must evaluate all factors and regulatory criteria in determining whether affiliation is present. *Size Appeal of First American Tax Valuation, Inc*., SBA No. SIZ-4206, at 5 (1996). Thus, while the evidence in the record may not establish affiliation under one of the specific factors enumerated in 13 C.F.R. § 121.103(a), (b), (c), (d), (e), (f), (g), or (h), an area office's review of the totality of circumstances may lead it to conclude one business has the power to control another and, thus, both are affiliated. This means affiliation can arise where business or personal ties, combinations, or relationships, leads an area office to a reasonable conclusion that businesses are affiliates.

Although the preference is that area offices find affiliation based upon the specific factors enumerated in 13 C.F.R. § 121.103, *i.e.*, 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h), it is clear that the evidence, even if insufficient to establish affiliation under a specific factor, is more than sufficient to establish evidence of affiliation between Appellant and MPSC under the totality of the circumstances.

The Record shows that since 2006 there continues to be affiliation between Appellant and MPSC. Several factors suggest a continuing relationship between Appellant and MPSC which buttresses the finding of affiliation between them based upon the totality of the circumstances. Hence, it is worthwhile to review ownership, management, previous relationships, and contractual relationships between Appellant and MPSC and consider 13 C.F.R. § 121.103(a)(2) during this review.

First, in 2006, SBA determined Appellant and MPSC were affiliated because MPSC had the power to control Appellant under general affiliation principles, operation of the newly organized concern rule, and operation of the ostensible subcontractor rule. Although Appellant asserts "extensive efforts after the 2006 Decision to establish fracture between itself and MPSC," Appeal, at 9, the evidence in the Record demonstrates continued involvement between the firms, including the two companies work together on a National Guard contract.

Second, Appellant's sole owner and president and CEO, Mr. Taylor, is a part owner of MPSC. In fact, Mr. Taylor has increased his holdings of MPSC from 16% in 2006 to 25% in 2009. Mr. Taylor also continues as an employee of MPSC. In his resume included with the proposal for the RFP, for recent work experience, Mr. Taylor indicates "Director, Education and

Training" for MPSC. Although Appellant asserts Mr. Taylor is no longer a principal of MPSC and Appellant's SBA Form 335 identifies him as an Education and Training Consultant, the Record is not clear when Mr. Taylor left his position as Director for MPSC. Appellant's appeal indicates "Mr. Taylor has not been a principal of MPSC since February," Appeal, at 9, which was after VETS filed a size protest, but May 9, 2006 MPSC board minutes seem to indicate an earlier departure from the position. In any event Mr. Taylor has served as a principal for MPSC in the three years preceding the size determination and has increased his ownership stake. This is evidence of control through ownership and a shared identity of interest between Mr. Taylor and MPSC.

Third, Appellant's proposal for the RFP identifies seven key personnel, including Mr. Taylor. The only other employee of Appellant identified in the proposal, Ms. Janet Marquis, is, like Mr. Taylor, a current MPSC employee. Additionally, before joining MPSC in 2008, Ms. Marquis worked for Appellant. The other five key employees work for a subcontractor.

Finally, in addition to a previous determination of affiliation, Appellant's owner's increased MPSC stock holdings, and Appellant's and MPSC's shared employees, the Record demonstrates Appellant and MPSC have signed more than twenty-five subcontract agreements since the 2006 size determination. The subcontract agreements cover periods from December 1, 2007 to November 30, 2009 with a wide range of costs up to $469,368. Such practices cannot be dismissed and do serve as evidence of close business connections or an identity of interest.

I find the proof in the Record is more than sufficient to sustain the Area Office's size determination that Appellant and MPSC are affiliated based on the totality of the circumstances as described in 13 C.F.R. § 121.103(a)(5). The relationship between Appellant and MPSC represents a clear case of affiliation, and Appellant's arguments to the contrary ignore the intent of SBA's size regulations and the very existence of Mr. Taylor.

ii. Affiliation Based Upon Stock Ownership

The Record establishes that Mr. Taylor, who completely owns and manages Appellant, Fact 1, and thus controls Appellant, also has the power to control MPSC pursuant to 13 C.F.R. § 121.103(c)(2), which provides:

> If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

Specifically, Mr. Taylor is one of four individuals who each own a 25% interest in Appellant. Fact 2. Based upon the plain meaning of 13 C.F.R. § 121.103(c)(2), SBA presumes each of these four individuals has the power to control MPSC. Moreover, there is no evidence in the Record that tends to rebut the presumption that Mr. Taylor can control MPSC. Therefore, while it would have been preferable for the Area Office to have specifically referenced 13 C.F.R. § 121.103(c)(2), I hold the Area Office committed no error in determining Appellant and MPSC are affiliated.

iii. Affiliation Based Upon Identity of Interest

Affiliation based upon identity of interest is regulated by 13 C.F.R. § 121.103(f), which provides:

> Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

Under the facts of this appeal, the Area Office had evidence of an identity of interest. That evidence consists of the continued, substantial, and even increasing relationship between Appellant, Appellant's owner, and MPSC.

More specifically, the relationship between Appellant and MPSC is exemplified by their continuing contractual relationships, the continued employment of Mr. Taylor by MPSC, the listing of MPSC employees as key by Appellant, and Mr. Taylor's substantial and increasing ownership stake (financial interest) in MPSC (apart from his ability to control MPSC). Facts 1, 2, 4, 5, and 6. Therefore, while it would have been preferable for the Area Office to have referenced 13 C.F.R. § 121.103(f) in its determination, I hold that based upon the foregoing facts, it would not have been clear error for the Area Office to conclude Appellant and MPSC were affiliated pursuant to 13 C.F.R. § 121.103(f), for it is very hard to determine how Mr. Taylor's interests diverge from MPSC.

3. Summary

Since MPSC's revenues exceed all revenue-based size standards, the Area Office's size determination means Appellant is an other than small concern as an entity under all NAICS codes based upon yearly revenue. Accordingly, before submitting an offer for any procurement set-aside for small businesses with revenue based NAICS codes, Appellant must seek recertification based upon facts different from those presented in this appeal. Appellant cannot seek to shield itself from the consequences of its affiliation with MPSC by arguing the technical language of 13 C.F.R. § 121.1009(g)(5) as it did in this instance.

I have considered all the cases cited by Appellant and all of its arguments, whether or not discussed in this decision. As a rule, the cases cited by Appellant were inapposite or irrelevant. The only relevant issue in this appeal is whether Appellant is affiliated with MPSC.

I also note Appellant's complaint about the delayed issuance of the size determination and Appellant's claim the wrong Area Office processed the size determination. These arguments are specious. Although the goal is to promptly issue size determinations, and it is unfortunate when that does not occur, even the regulation recognizes a quick turn around is not always possible. 13 C.F.R. § 121.1009(a). Moreover, it is immaterial which area office processes a size determination. Processing size determinations by area office boundaries is for the convenience of the SBA and cannot confer any substantive right upon any party. In point of fact, depending upon workload, it is not unheard of for one area office to assist another.

With regard to due process, I am at a loss to comprehend Appellant's arguments. I find no indication Appellant was treated unfairly or that it was deprived of any rights provided for protested concerns in SBA's regulations. Rather, I find Appellant's arguments to be unconvincing and not based upon evidence in the Record or any applicable law or regulation.

With regard to Appellant's claim of disparate treatment by the contracting office and SBA, I note that OHA has no jurisdiction to consider these matters. Nor do any of these accusations have anything to do with Appellant's size in this appeal. I also note, for Appellant's edification, that federal employees are presumed to act in good faith and in accordance with laws and regulations and this would apply to its accusations of favoritism against Appellant, since this is illegal conduct. Only clear and convincing evidence is sufficient to rebut this presumption. *Am-Pro Protective Agency, Inc., v. U.S.*, 281 F.3rd 1234 (Fed.Cir. 2002). Mere accusations fall well short of clear and convincing evidence and that is all Appellant has provided.

Appellant's concerns regarding the Area Office's dismissal of Appellant's subsequent size protest of VETS will be addressed in Appellant's pending appeal on that specific issue.

V. Conclusion

Appellant is affiliated with MPSC and is other than small under the $7 million average annual size standard. Moreover, based upon the Record, Appellant's affiliation with MPSC means Appellant is other than small concern for all revenue based NAICS codes. The Area Office's size determination is AFFIRMED; the 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