

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

SIZE APPEAL OF:

FlowSense Building Services, Inc.

Appellant

Re: Versacon, Inc.

Appealed from  
Size Determination No. 4-2009-52

SBA No. SIZ-5072

Decided: October 6, 2009

APPEARANCES

Ralph C. Thomas III, Esq., Barton Baker Thomas & Tolle, LLP, McLean, Virginia, for Appellant FlowSense Building Services, Inc.

Patrick J. Lee-O'Halloran, Esq., and Gary C. Eidson, Esq., Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota, for Versacon, Inc.

ORDER REMANDING PROCEEDING

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 Area Office's dismissal of Appellant's size protest as insufficiently specific was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On April 21, 2009, the Department of Veterans Affairs issued Solicitation No. VA-263-09-RP-0140 for fire alarm upgrades. The Contracting Officer (CO) set the procurement aside 100% for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industry Classification System (NAICS) code 238210, Electrical

Contractors and Other Wiring Installation Contractors, with a corresponding \$14 million annual receipts size standard to the procurement. On June 17, 2009, the CO announced award to Versacon, Inc. (Versacon).

On June 22, 2009, FlowSense, LLC (Appellant) filed a protest against the award to Versacon. Appellant challenged Versacon's size status, alleging Versacon other than small due to affiliation with Meyer Contracting, Inc. (Meyer), through identity of interest due to family relationships and common management.<sup>1</sup> Appellant's protest made no explicit allegation as to Meyer's size. However, Appellant submitted supporting documentation with its protest from Versacon's and Meyer's websites. The documentation included information from Meyer's website that Meyer's volume had increased twenty-fold since Paul Meyer, Versacon's Vice President and Meyer's Vice President and Senior Project Manager, had joined Meyer in 2000 and that Paul Meyer managed \$35 million worth of work in the previous year. The documentation also included evidence, in the form of business cards, that a number of individuals held positions in both firms.

On July 13, 2009, the Small Business Administration (SBA) Office of Government Contracting, Area IV in Chicago, Illinois (Area Office) dismissed Appellant's protest as insufficiently specific. The Area Office stated the protest merely alleged Versacon was other than small due to its affiliation with Meyer. The Area Office found that the protest made no specific allegation Appellant was other than small because there was no allegation as to Meyer's size. On July 20, 2009, Appellant received the size determination.

### B. The Appeal

On August 4, 2009, Appellant filed the instant appeal. Appellant argues that the information it submitted about contacts between Versacon and Meyer was sufficiently specific to support an allegation that the firms are affiliated. Appellant further argues that the documentation from Meyer's website claiming annual sales of at least \$35 million is sufficiently specific. Appellant asserts the Area Office's failure to consider the supporting documentation is clear error.

### C. Response

On August 11, 2009, Versacon responded to the appeal. Versacon asserts that a vague protest cannot be rendered specific by attached documents. Versacon addresses cases relied on by Appellant. Versacon states that *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430 (2001), supports an area office finding of specificity and is inapposite here. Versacon asserts *Size Appeal of ELR Consultants, Inc.*, SBA No. SIZ-4875 (2007), is inapposite because the case involved specific allegations tying alleged affiliates to evidence showing that the firms exceeded the size standard and that is not true here. In *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4888 (2008), Versacon asserts the case turned on two points, whether the protest provided notice of the grounds of the challenge and whether factual

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<sup>1</sup> Appellant's protest letter also protested Versacon's SDVO SBC status. On July 24, 2009, the Small Business Administration's Acting Director of Government Contracting denied Appellant's SDVO SBC protest of Versacon's status.

allegations to support the allegation were included, even if inaccurate. Versacon asserts Appellant made no specific factual allegations to sustain a protest.<sup>2</sup>

Versacon further asserts the attachments to Appellant's protest do not establish a basis for a protest. Versacon argues Appellant's case hangs on a single phrase in the attachments, which Appellant only referred to in connection with its SDVO SBC protest. Versacon argues that nothing in the protest letter gave the Area Office notice that it should consider the evidence in connection with the size protest. Versacon also asserts the evidence is merely a brief comment in Paul Meyer's biography and is too vague to be useful in a size determination. Versacon asserts the comment does not suggest that Meyer performed the work or even that Meyer earned that volume of revenue. Further, the comment does not prove that Meyer and Versacon are other than small.

Finally, Versacon asserts that even if it were found affiliated with Meyer, it would still be a small business. To support its assertions, Versacon attaches exhibits to its Response.

On August 18, 2009, Appellant filed a Motion for Leave to file a Reply to Versacon's Response, together with the Reply. On August 20, 2009, Versacon opposed Appellant's motion.

#### IV. Discussion

##### A. Timeliness and New Evidence

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).

Versacon attempts to submit new evidence on appeal concerning its size. That evidence is not relevant to the issues here and is EXCLUDED. 13 C.F.R. § 134.308(a).

Appellant's a Motion for Leave to file a Reply to Versacon's Response is DENIED. 13 C.F.R. § 134.309(d).

##### 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.

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<sup>2</sup> Versacon correctly notes that *White Hawk/Todd* was vacated on jurisdictional grounds. *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950 (2008).

### C. The Merits

Here, Versacon's size is not at issue. The only question is whether the Area Office erred in dismissing Appellant's protest as insufficiently specific. The regulation requires:

*A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for the protest. Where materials supporting the protest are available, they should be submitted with the protest.

13 C.F.R. § 121.1007(b). The Area Office must dismiss insufficiently specific protests. 13 C.F.R. § 121.1007(c).

Appellant's protest clearly alleged Versacon was other than small due to affiliation with Meyer. Appellant also attached supporting documentation, showing individuals holding positions in both firms. Appellant did not explicitly state that Meyer was other than small; however, the supporting documentation includes a statement that Meyer's Vice President Paul Meyer joined Meyer in 2000 and in the previous year he managed \$35 million worth of work.

It is clear that this protest met the requirements of the regulation. The protest alleged Versacon was other than small, and gave a reason, its alleged affiliation with Meyer. The regulation does not require that the protest state the alleged affiliate is other than small. Indeed, the alleged affiliate need not be other than small. It is enough that the two firms, taken together, are other than small if they are found to be affiliated.

The regulation does rule out as insufficiently specific protests which merely allege the challenged firm as other than small, or allege unnamed affiliates. However, that is not the case here. Appellant alleged Versacon was other than small, and named an affiliate. Appellant also provided information that Versacon and Meyer had common management.

Versacon is correct that this does not prove Meyer is other than small. However, there is no need for a size protest to prove that a challenged firm is other than small. The protest need only provide specific basis for the belief that the challenged firm is other than small. A thorough size investigation may well reveal that the two firms are not affiliated, or that the combined firms' annual receipts are within the size standard, but the statement in the protest is enough to warrant an investigation.

The fact that the protest letter itself did not allege Meyer was other than small is not fatal. It does allege Versacon is other than small due to its affiliation with Meyer. That is sufficiently specific to meet the requirements of the regulation.

Accordingly, I find I must VACATE the size determination and REMAND this case to

the Area Office for a new size determination.

V. Conclusion

For these reasons, the Area Office's size determination is VACATED and REMANDED.

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CHRISTOPHER HOLLEMAN  
Administrative Judge