

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

SIZE APPEAL OF:

Taylor Consultants, Inc.

Appellant

Appealed from
Size Determination No. 3-2009-50

SBA No. SIZ-5074

Decided: October 1, 2009

APPEARANCE

Paul T. Gregory, Esq., Neel, Hooper & Banes, P.C., Houston, Texas, for Appellant.

DECISION

I. Introduction and Jurisdiction

On July 1, 2009, I issued *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049 (2009). The decision affirmed the Small Business Administration (SBA) Office of Government Contracting, Area Office II's Size Determination No. 2-2009-30 (April 28, 2009 Size Determination) finding Taylor Consultants, Inc. (Appellant) to be other than small.

On July 23, 2009, the SBA Office of Government Contracting, Area Office III (Area Office), received a request for recertification from Appellant. Appellant explained the request for recertification was in response to two size determinations, the April 28, 2009 Size Determination and Size Determination No. 2-2006-24 & 25 (January 26, 2006 Size Determination), which found Appellant to be other than small. Appellant indicated in its request for recertification that the April 28, 2009 Size Determination was on appeal with the Office of Hearings and Appeals (OHA). Appellant stated regardless of how the appeal is decided, recertification is appropriate because the April 28, 2009 Size Determination is based solely on the January 26, 2006 Size Determination and Appellant has established clear fracture with Military Personnel Services Corporation (MPSC) since the January 26, 2006 Size Determination.

On August 11, 2009, the Area Office issued Size Determination No. 03-2009-59 (August 11, 2009 Size Determination) concluding that Appellant is other than small for 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. For the reasons discussed below, this decision 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 to be an other than small concern on recertification? *See* 13 C.F.R. § 134.314.

III. Facts

A. The Size Determination

As a result of Appellant's request for recertification, the Area Office issued the August 11, 2009 Size Determination concluding that Appellant is other than small for NAICS code 541990. In the August 11, 2009 Size Determination, the Area Office discussed the information Appellant submitted in its application for recertification and the regulations covering identity of interest, 13 C.F.R. § 121.103(f); stock ownership, 13 C.F.R. § 121.103(c)(2); and totality of the circumstances, 13 C.F.R. § 121.103(a)(5).

With respect to identity of interest, the Area Office notes Mr. Tom Taylor, Appellant's President, and MPSC were found to be affiliated under identity of interest due to contractual relationships, Mr. Taylor's continued employment by MPSC, and Mr. Taylor's increasing ownership stake in MPSC. The Area Office states Appellant's application for recertification provides no evidence that any of those factors have changed since being found other than small. The Area Office notes the SBA Form 355 Appellant submitted with its request for recertification is a copy and the documentation submitted seems to be the same information submitted for the April 28, 2009 Size Determination.

Similarly, the Area Office states Appellant did not submit any evidence to demonstrate that Mr. Taylor's stock ownership has changed since the April 28, 2009 Size Determination. The Area Office notes Mr. Taylor is one of four individual's who own 25% of the stock in MPSC and SBA presumes each of these four individuals has the power to control MPSC. The Area Office indicates Mr. Taylor still owns 25% of the stock in MPSC and there is no evidence that any other shareholders' ownership has changed.

Finally, the Area Office considers Appellant's request for reconsideration in light of the totality of the circumstances. The Area Office states Appellant maintains a continuing relationship with MSPC. The Area Office cites that Mr. Taylor owns 25% of MPSC and works as an Education and Training Consultant for MPSC, as well as the fact that there are twenty-seven subcontract agreements between Appellant and MPSC.

The Area Office states Appellant did not base its request for recertification on evidence different from what was relied on in the April 28, 2009 Size Determination. Based on the record, the Area Office determined Appellant is dependent upon MPSC and affiliated due to identity of interest, stock ownership, and totality of the circumstances.

B. The Appeal

On September 8, 2009, Appellant appealed the August 11, 2009 Size Determination. On September 14, 2009, Appellant filed an amended appeal.

Appellant states the Area Office denied its request for recertification and simply affirmed the April 28, 2009 and January 26, 2006 Size Determinations. Appellant asserts the Area Office “failed to recognize the vastly different circumstances under which” Appellant now operates and, accordingly, committed a clear error of law. Amended Appeal, at 1. Appellant enumerates a list of the August 11, 2009 Size Determination’s clear errors of fact and law, including: (1) the denial on recertification did not consider whether Appellant was small on the day the recertification request was made, but simply affirmed two prior size determinations; (2) MPSC neither controls nor has the right to control Appellant; (3) Appellant is not dependent on MPSC and functions separately from MPSC; (4) MPSC and Appellant do not have an identity of interest and do not use the same NAICS codes; (5) Mr. Taylor, Appellant’s president, is not a key employee of MPSC or a member of MPSC’s management; (6) Mr. Taylor’s MPSC stock does not give him control of MPSC even when combined with the shares of another stockholder; (7) Mr. Taylor is incapable of altering his position of powerlessness with respect to MPSC; and (8) the totality of the circumstances demonstrates that Appellant and MPSC are not affiliated. Appellant also submitted copies of information provided to the Area Office.

Appellant asserts it is uncontroverted that it is small and argues it has demonstrated clear fracture with MPSC. Appellant states it moved its headquarters and reincorporated in Florida in 2007 and that Mr. Taylor has owned and controlled Appellant since its inception. Appellant notes MPSC does not own any interest in Appellant and Appellant does not own any interest in MPSC. Appellant asserts Mr. Taylor owns 25% of MPSC. Appellant states Mr. Taylor is not an officer, director, key employee, or manager of MPSC, but a consultant. Additionally, Appellant states Mr. Taylor is unable to change his powerless status and Appellant argues it is not dependent on MPSC. Finally, Appellant asserts the January 26, 2006 Size Determination has no future applicability.

Appellant repeatedly cites *Size Appeal of Vanguard Resources Corp.*, SBA No. SIZ-4761 (2006), to support its assertion that the Area Office committed clear error. Appellant relies on language in the *Vanguard* decision that “the size determination is flawed to the extent it contains any discussion of” an earlier size determination. *Id.* at 2. Appellant argues the Area Office’s size determination is factually and legally erroneous and compounds errors made in earlier size determinations.

IV. Analysis

A. Timeliness

Appellant filed its appeal within 30 days of receiving the August 11, 2009 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 August 11, 2009 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. The Merits

On July 1, 2009, I affirmed Area Office II's April 28, 2009 Size Determination finding Appellant to be other than small in *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049 (2009). I noted the April 28, 2009 Size Determination indicated affiliation based 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. *Id.* at 6. I stated the April 28, 2009 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). *Id.*

Twenty-two days later, Appellant submitted a request for recertification to Area Office III. The request referenced the earlier April 28, 2009 and January 26, 2006 Size Determinations. The request also erroneously represented that an appeal of the April 28, 2009 Size Determination was still pending at OHA, even though OHA decided the appeal three weeks earlier. Appellant attached thirteen documents to its request for recertification: (1) the January 26, 2006 Size Determination; (2) the April 28, 2009 Size Determination; (3) Central Contractor Registry information, dated February 16, 2009; (4) articles of incorporation, dated October 17, 2007, and an annual report, dated July 10, 2008; (5) a 2005 tax return; (6) a 2006 tax return; (7) a 2007 tax return; (8) a table of PASS Contracts, dated February 17, 2009; (9) MPSC Board of Directors Minutes, dated May 9, 2006; (10) a memorandum for record, dated May 10, 2006; (11) Appellant's proposal for National Guard Bureau Solicitation No. W9133L-06-R-0041, dated September 13, 2006; (12) Appellant's contract award for National Guard Bureau Solicitation No. W9133L-06-R-0041, dated September 18, 2006; and (13) Appellant's SBA Form 355, dated February 18, 2009. None of the information submitted with Appellant's application for recertification demonstrates a change in the factors relied on in the April 28, 2009 Size Determination and affirmed on appeal. In fact, all the information provided predates the April 28, 2009 Size Determination and appeal.

Despite Appellant's arguments to the contrary, the Record supports the Area Office's August 11, 2009 Size Determination, denying recertification. In accordance with 13 C.F.R. § 121.1010(a), to successfully recertify as a small business: "the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as

a small concern.” Appellant’s application for recertification did not include either and was insufficient to support a different conclusion than the April 28, 2009 Size Determination, which was affirmed on appeal on July 1, 2009, *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049 (2009).

It is inexplicable why Appellant based the request for recertification underlying the August 11, 2009 Size Determination on the same information Area Office II relied upon to determine Appellant was other than small on April 28, 2009. Similarly, Appellant’s inclusion of its proposal for National Guard Bureau Solicitation W9133L-06-R-0041 to support its request for recertification is irrelevant. This proposal serves to demonstrate a continued relationship between MPSC and Appellant even after the first adverse size determination.

Appellant’s reliance on *Size Appeal of Vanguard Resources Corp.*, SBA No. SIZ-4761 (2006), is misplaced. In *Vanguard Resources*, the area office’s size determination finding Vanguard Resources Corporation (Vanguard) to be other than small on recertification included significant discussion of a size determination on Vanguard issued ten years earlier, despite the fact the earlier size determination was not in the record. Here, the earlier size determinations are a part of the Record. The April 28, 2009 Size Determination was issued less than three months before the request for recertification, was affirmed on appeal weeks before the request for recertification, and was largely based on the same information Appellant submitted with its request for recertification. Thus, where the Vanguard size determination’s discussion of a size determination performed ten years earlier was “gratuitous and irrelevant,” in Appellant’s case, the Area Office’s reference to the April 28, 2009 Size Determination was appropriate and necessary because Appellant failed to provide evidence of “a significant change in its ownership, management, or other factors bearing on its status as a small concern” in the weeks intervening the April 28, 2009 Size Determination and the July 23, 2009 request for recertification.

V. Conclusion

Based upon the Record, the Area Office’s size determination is AFFIRMED and 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