

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

SIZE APPEAL OF:

D & B Homecare, Inc.

Appellant

Solicitation No. VA-247-09-RP-0169

SBA No. SIZ-5096

Decided: December 8, 2009

APPEARANCES

Frederick Dwozan, Chief Executive Officer, for Appellant, D & B Homecare, Inc.

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, P.L.C., Alexandria, Virginia, for Eagle Home Medical Corporation.

ORDER DISMISSING APPEAL

I. Background

On April 13, 2009, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs issued Solicitation No. VA-247-09-RP-0169 (RFP) seeking home oxygen services. The CO issued the RFP as a total small business set-aside and designated North American Industry Classification Code (NAICS) 532291 with a corresponding size standard of \$7 million in average annual receipts. On May 8, 2009, the CO issued Amendment 1, which designated the RFP as a total veteran-owned small business set-aside.

On October 14, 2009, the CO posted a notice to the Federal Business Opportunities website (<http://www.fbo.gov>) that the contract had been awarded to D & B Homecare, Inc. (Appellant). On October 16, 2009, Eagle Home Medical Corporation (Eagle), an unsuccessful offeror, filed a protest alleging Appellant is other than small under the applicable size standard.

On October 26, 2009, the CO forwarded the protest to the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office). On October 28, 2009, the Area Office sent a letter to Appellant notifying it of the protest and directing it to respond to the protest and to provide certain documentation—SBA Form 355, copy of the corporate charter and bylaws, complete financial statements for the last three years, etc.—to enable the Area Office to complete a formal size determination. The letter specifically stated: “All of these documents must be received by this office within three working days after receipt of this letter. *If you fail to submit the completed application along with the other material requested within the specified time, SBA may determine your company to be other than small.*”

On November 6, 2009, after having received no response to its letter, the Area Office issued Size Determination No. 3-2010-14 finding Appellant to be other than small. The Area Office noted that Appellant's response was due by November 3, 2009, and that it had received no request for an extension. Consequently, it determined Appellant is other than small pursuant to the adverse inference rule (13 C.F.R. § 121.1008(d)).

On November 19, 2009, Appellant filed its Appeal Petition with SBA's Office of Hearings and Appeals (OHA). Appellant alleges the RFP employed an alternate size standard of 500 employees pursuant to Federal Acquisition Regulation 52.212-1. Appellant further alleges it is small under that size standard.

On December 7, 2009, Eagle filed its Response to the Appeal Petition. Eagle argues the Appeal Petition should be dismissed because it seeks reversal of the Size Determination based on information not presented to the Area Office. Eagle also contends the Area Office properly applied the adverse inference rule because Appellant failed to respond to the Area Office's request for information. On this basis, Eagle concludes that the Size Determination should be affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the Area Office's Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Discussion

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Thus, the Administrative Judge may only overturn a size determination if Appellant proves that the area office made a patent error based on the record before it.

The adverse inference rule provides that if a concern whose size is at issue fails to submit a completed SBA Form 355, fails to respond to protest allegations, or fails to provide requested information within the time allowed by the Area Office, the Area Office may presume that the requested information would demonstrate that the concern is other than a small business. 13 C.F.R. § 121.1008(d). In addition, 13 C.F.R. § 121.1009(d) provides that "[i]n the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure."

When evaluating an area office's use of the adverse inference rule, OHA has applied a three part test to determine whether the rule was appropriately applied: (1) the information the area office sought must have been relevant to an issue in the size determination; (2) there must have been a level of connection between the challenged concern and the concern from which the area office sought information; and (3) the area office's request for information must have been specific. *See, e.g., Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919, at 13 (2008). "If

all of these criteria are met, the challenged business must submit the information to the area office or suffer an adverse inference that the information would show that the challenged business was other than small.” *Size Appeal of Firewatch Contracting of Fla., LLC*, SBA No. SIZ-4994, at 7 (2008) (citations omitted).

The information the Area Office sought from Appellant in this case is the most basic information required to perform a formal size determination and is requested in every size determination case. The Area Office sought the information directly from the protested concern itself, and the request for information was very specific—the Area Office listed exactly the documents that were required. This case undoubtedly presents a proper application of the adverse inference rule. In fact, it presents the clearest factual scenario possible for an application of the adverse inference rule—the protested concern failed to submit any response to the protest or any documentation at all to the Area Office. Without any information from the protested concern, the Area Office was unable to conduct a size determination and had no choice but to apply the adverse inference rule.

Appellant now claims on appeal that it is small for the purposes of this procurement. Appellant’s time to make or prove such a claim has passed. “[A]fter an Area Office has based an adverse inference on a failure to provide information on request, an Appellant cannot remedy its failure on appeal, absent a showing of good cause for the failure.” *Size Appeal of Xantrex Tech., Inc.*, SBA No. SIZ-4592 (2003) (citing *Size Appeal of Safe Workers of Am., Inc.*, SBA No. SIZ-4437, at 5 (2001)). Appellant has not shown good cause, or offered any explanation, for its failure to submit to the Area Office the specific information it requested. It was Appellant’s responsibility to submit this information, and, as a result of Appellant’s failure to do so, the Area Office properly applied the adverse inference rule. Thus, the Area Office did not commit an error of fact or law in issuing its Size Determination.

III. Conclusion

The Area Office’s determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge