

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

SIZE APPEAL OF:

Perry Management, Inc.

Appellant

RE: DTW Services, LLC

Solicitation No. W9124L-09-T-0009

SBA No. SIZ-5100

Decided: December 11, 2009

APPEARANCES

Jonathan M. Bailey, Esq., Bailey & Pailey, P.C., San Antonio, TX, for Perry Management, Inc., the Appellant.

Doug P. Hibshman, Esq., Smith, Currie & Hancock, LLP, Washington, DC, for DTW Services, LLC.

ORDER DISMISSING APPEAL

HOLLEMAN, Administrative Judge:

I. Background

A. Solicitation and Protest

On August 13, 2009, the Contracting Officer (CO) for the U.S. Department of the Army, Mission and Installation Contracting Command in Fort Sill, OK, issued Solicitation No. W9124L-09-T-0009 seeking refuse services. The CO issued the solicitation as a total Historically Underutilized Business Zone (HUBZone) set-aside and designated North American Industry Classification System (NAICS) Code 562111, Solid Waste Collection, with a corresponding size standard of \$12.5 million in average annual receipts.

On September 17, 2009, the CO awarded the contract to DTW Services, LLC (DTW). On September 24, 2009, Perry Management, Inc. (Appellant) filed a protest alleging DTW's average annual receipts exceed the applicable size standard due to violations of the newly organized concern rule (13 C.F.R. § 121.103(g)) and the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)), and based on the totality of the circumstances (13 C.F.R. § 121.103(a)(5)).

Specifically, Appellant asserted DTW is affiliated with Mark Dunning Industries, Inc. (MDI), its subcontractor for the instant contract.

**B. Size Determination**

On October 22, 2009, the Small Business Administration's (SBA) Office of Government Contracting—Area III (Area Office) issued Size Determination No. 3-2009-84. The Area Office determined that DTW and MDI do not share an identity of interest and did not violate the newly organized concern rule. However, the Area Office found that DTW and MDI did violate the ostensible subcontractor rule with regard to the instant procurement. Specifically, the Area Office concluded that MDI would be performing the primary and vital contract requirements and that DTW would be unduly reliant upon MDI in performing the contract. However, the Area Office also concluded that DTW is small for this solicitation because even after MDI's annual receipts were combined with DTW's annual receipts, the aggregated average annual receipts of the two companies were still below the applicable \$12.5 million size standard.

**C. Appeal Petition and Motion to Submit Additional Evidence**

On November 6, 2009, Appellant filed its appeal of the Size Determination with the SBA Office of Hearings and Appeals (OHA). Appellant does not challenge the Area Office's findings that DTW did not violate that identity of interest rule or the newly organized concern rule. Nor does Appellant challenge the Area Office's determination that the aggregated receipts of DTW and MDI alone fall within the applicable size standard. Rather, DTW alleges the Area Office erred in failing to investigate whether MDI had other affiliates and whether the receipts of those affiliates should have been included in determining MDI's size.

To support its allegations of error, Appellant filed with its Appeal Petition a Motion to Submit Additional Evidence. Appellant seeks to admit evidence from the Alabama Secretary of State website indicating that Mr. Mark Dunning is affiliated with fifteen other business concerns. Appellant argues its evidence should be admitted because the information therein "did not become apparent to Appellant until certain non-public facts were revealed in the Area Office's determination that is the subject of this appeal." Appellant alleges it first learned from the Size Determination that DTW leases its office space from another company owned by Mr. Dunning, and this fact caused Appellant to conduct further research into the other entities owned by Mr. Dunning.

**D. DTW's Response**

On November 23, 2009, DTW filed its response to the Appeal Petition. DTW first argues that Appellant is improperly raising a new substantive argument for the first time on appeal. DTW contends that Appellant could have raised the allegations regarding MDI's purported affiliates in its protest and should not be permitted to do so at this late stage. Further, DTW points out that all of Appellant's new exhibits were publicly available at the time Appellant filed its protest. DTW also argues that even if Appellant is allowed to raise this new argument, it should not be found affiliated with all of MDI's alleged affiliates indirectly simply because it is affiliated with MDI for this procurement. Such a definition of affiliation, according to DTW,

would be far too broad. DTW claims there is no common ownership or control between DTW and MDI, and there is no common ownership or control between these other entities and either DTW or MDI. DTW asserts it has no business relationship with any of these other concerns except that it rents its office space from one of them. Absent any common ownership or control, DTW argues it cannot be found affiliated with these other concerns.

## II. Discussion

### A. Jurisdiction & Standard of Review

Size determination appeals are decided by OHA pursuant to 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 dismissal, so the appeal is timely. 13 C.F.R. § 134.304(a)(2). Accordingly, this matter is properly before OHA for decision.

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). Furthermore, it is Appellant's burden to prove, by a preponderance of the evidence, that the Area Office committed an error. 13 C.F.R. § 134.314. Thus, the Administrative Judge may only overturn a size determination if Appellant establishes the Area Office made a patent error based on the record before it.

### B. Analysis

New evidence not in the Record before the Area Office will not be considered on appeal unless the party seeking to admit the evidence files a motion establishing good cause for its submission. 13 C.F.R. § 134.308(a). After reviewing Appellant's motion, as well as the new evidence Appellant seeks to admit, I conclude that Appellant has failed to establish good cause for its admission. As DTW argues, the information from the Alabama Secretary of State website was publicly available at the time Appellant filed its protest. *See Size Appeals of Baldt, Inc.*, SBA No. SIZ-4987, at 7 (2008) (excluding evidence presented on appeal that was publicly available at the time the protest was filed). Appellant's argument that the relevance of Mr. Dunning's other ownership interests was not apparent before the Size Determination was issued is without merit. Appellant protested DTW's size on the basis of affiliation. Clearly, it would have been prudent for Appellant to determine all of DTW's potential affiliates at the time it filed its protest. Accordingly, the new evidence accompanying Appellant's Appeal Petition is EXCLUDED.

Furthermore, OHA may not consider substantive arguments raised for the first time on appeal. 13 C.F.R. § 134.316(a); *see also Size Appeal of C&C International Computers and Consultants, Inc.*, SBA No. SIZ-4970, at 6, 8 (2008) (dismissing multiple issues because they were raised for the first time on appeal). Appellant alleges for the first time in its Appeal Petition that MDI (and, therefore, DTW) is affiliated with fifteen separate concerns on the basis of common ownership or common management. It was Appellant's responsibility to present all relevant evidence and arguments to the Area Office when it submitted its protest. Contrary to Appellant's assertion, it was not the responsibility of the Area Office to investigate all of DTW's

possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by Appellant's protest. The Area Office sufficiently fulfilled its responsibilities in this matter. The new issue of affiliation based on common management or ownership is the only issue raised by Appellant's appeal. Because I am prohibited from considering this issue, I must dismiss this appeal.

### III. Conclusion

13 C.F.R. § 134.316(a) forbids me from deciding a substantive issue raised for the first time on appeal. Accordingly, this appeal is DISMISSED.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge