United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:

TPMC-Energy Solutions
Environmental Services 2009, LLC

Appellant

RE: Wastren Advantage, Inc.

Solicitation No. DE-RP05-08OR23286
U.S. Department of Energy
Oak Ridge, TN

SBA No. SIZ-5109

Decided: January 19, 2010

APPEARANCES

Steve Moore, CEO, and Tom Kaupas, CFO, for Wastren Advantage, Inc.

Pamela J. Mazza, Esq., Steven J. Koprince, Esq., and Kelly E. Buroker, Esq., Piliero Mazza, PLLC, Washington, D.C., for Appellant.

DECISION

I. Introduction & Jurisdiction

On November 19, 2009, the Small Business Administration's (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2010-6 (Size Determination) finding that Wastren Advantage, Inc. (WAI) is a small business. The Area Office found WAI is not affiliated with EnergX, LLC (EnergX), Wastren, Inc. (Wastren), or Value Added Solution, Inc. (VAS) under any of the theories alleged by the protestor, TPMC-Energy Solutions Environmental Services 2009, LLC (Appellant). Appellant protested WAI's size when WAI was selected as the successful offeror for the U.S. Department of Energy's (DOE) Solicitation No. DE-RP05-08OR23286 (RFP). Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA) on December 7, 2009.

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 its 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. For the reasons discussed below, this appeal is dismissed in part and remanded for further action

consistent with this decision.

II. Background

A. Findings of Fact

1. On April 2, 2008, DOE issued the original RFP to acquire environmental waste treatment services at its Transuranic Waste Processing Center in Oak Ridge, Tennessee. The Contracting Officer (CO) issued the RFP as a total small business set-aside and designated North American Industry Classification System (NAICS) code 562211, Hazardous Waste Treatment and Disposal, with a corresponding size standard of $11.5[1] million in average annual receipts. The due date for submission of proposals was June 2, 2008.

2. On May 8, 2009, the CO issued Amendment 10 to the RFP, which effectively replaced the original RFP by deleting and replacing nearly all the sections contained in the original RFP. Amendment 10 also added funds from the American Recovery and Reinvestment Act of 2009 to the contract.

3. Because the Amended RFP had materially changed the requirements of the RFP, WAI, on May 27, 2009, submitted a new proposal to the DOE because its original proposal had become nonresponsive to the Amended RFP.

4. On October 22, 2009, the CO notified the unsuccessful offerors, including Appellant, that WAI was the apparent successful offeror.

5. On October 27, 2009, Appellant filed a protest challenging WAI's size. Appellant's primary allegation was that EnergX is WAI's ostensible contractor. Appellant further alleged WAI is affiliated with Wastren, WAI's former parent company, and VAS.

6. On December 1, 2009, after the Area Office issued the Size Determination, the CO awarded the contract to WAI.

B. The Size Determination

On November 19, 2009, the Area Office issued its Size Determination. The Area Office first determined that WAI is affiliated with two entities through common ownership pursuant to 13 C.F.R. § 121.103(c). The Area Office then analyzed whether EnergX is WAI's ostensible contractor under 13 C.F.R. § 121.103(h)(4). The Area Office considered each of Appellant's four allegations: (1) EnergX is the other than small incumbent contractor, (2) WAI lacks the financial resources to perform the contract, (3) WAI lacks the experience to perform the contract, and (4) there are other indicia of affiliation. Ultimately, the Area Office concluded that, after considering all the relevant factors, EnergX is not WAI's ostensible subcontractor.

[1] The Area Office noted that receipts-based size standards were increased to account for inflation in August 2008 and that at the time the original solicitation was issued, the proper size standard for this NAICS code was $11.5 million.

The Area Office next discussed whether WAI is affiliated with Wastren, its former parent company, based on the totality of the circumstances. The Area Office noted that two individuals purchased WAI from Wastren in 2007. Additionally, the owners of Wastren resigned as members of WAI's Board of Directors in 2006 and have no ownership in WAI. "The mere fact that certain WAI officers were once employees of Wastren, Inc. does not, in and of itself, create any affiliation between the firms." (Size Determination, at 12.) The Area Office determined there was no other evidence of affiliation between the firms—no shared personnel, no economic dependence, only a minute amount of subcontracting between the firms, no shared facilities or equipment, no financial or technical assistance, and the firms' headquarters are located in different states. The Area Office concluded the connections between the firms were too minimal to support a finding of affiliation when considering the totality of the circumstances.

Finally, the Area Office considered whether WAI is affiliated with VAS. The VAS website indicates that VAS operated under the name VAS-Wastren, Inc. until 2007. Relying on the sworn affidavit of WAI's CEO, the Area Office found that two former employees of WAI formed VAS in 2005 but that the two firms were never affiliated. The Area Office found that nothing in the file indicates affiliation between WAI and VAS. The Area Office concluded that WAI's average annual receipts, when aggregated with those of its affiliates, do not exceed the size standard applicable to this procurement.

C. The Appeal

On December 7, 2009, Appellant filed the instant Appeal Petition. Appellant claims the Area Office committed clear errors of fact and law in finding that WAI is eligible for this procurement because WAI is affiliated with Wastren, EnergX, and other possible affiliates. Appellant begins by laying out the history of WAI and its separation from Wastren and VAS. Appellant goes on to set forth a detailed history of the RFP, including a description of EnergX's NAICS code appeal and Government Accountability Office (GAO) protest.

Appellant's first argument is that the Area Office erred by using an incorrect three-year period to calculate WAI's average annual receipts. Appellant points out that the Area Office used the three years prior to WAI's best and final offer in May 2009 (2008, 2007, 2006). However, Appellant argues that the initial offer for this RFP was due in June 2008, so the Area Office should have used receipts of the three years preceding that initial offer (2007, 2006, 2005).

Appellant next argues the Area Office failed to consider the totality of the circumstances, as required by regulation, when it determined that WAI is not affiliated with Wastren. Instead, Appellant alleges the Area Office performed "a perfunctory and superficial analysis based upon conflicting evidence." (Appeal Petition, at 10.) Appellant contends that even though the rule does not specifically apply here, the Area Office should have analyzed the factors under the newly organized concern rule (13. C.F.R. § 121.103(g)) in considering the totality of the circumstances. Appellant claims the relationship between WAI and Wastren meet a number of the criteria under that rule.

First, Appellant asserts WAI's CEO and Executive Vice President are former owners and

key employees of Wastren. Second, Appellant alleges WAI and Wastren are located in the same building and share a fax number. Third, Appellant claims there is extensive subcontracting between WAI and Wastren, as evidenced by the fact that one of WAI's owners is listed as a reference for one of Wastren's contracts ending in March 2009. Fourth, Appellant contends WAI relied upon Wastren's past performance in obtaining the instant procurement. "To adopt the position that WAI and Wastren are not affiliated, the Area Office would have to completely ignore the self-serving representation made by WAI in its proposal regarding the 'substantial and varied experience' it gleaned in its 'nearly two decades of business.'" (Appeal Petition, at 12.) Because of these factors, because WAI and Wastren are in the same line of business, and because the firms portray themselves as closely aligned, Appellant contends the totality of the circumstances indicates that the firms are affiliated.

Appellant's next argument is that the Area Office failed to properly consider WAI's other potential affiliates. Appellant briefly discusses WAI's affiliation with VAS. Appellant claims Wastren is affiliated with VAS based upon common management. Accordingly, because Appellant proved WAI is affiliated with Wastren, it is also affiliated with VAS. Appellant also alleges the Area Office failed to identify whether there is an affiliation between WAI and Tanner Stone Holsinger Donges (Tanner Stone). According to Appellant, one of the companies the Area Office found to be an affiliate of WAI's is an ongoing joint venture between WAI and Tanner Stone. Appellant claims there is a strong possibility that the entities are affiliated on this basis, and the Area Office erred in failing to investigate the possibility of such an affiliation.

Finally, Appellant contends the Area Office erred in determining that EnergX is not WAI's ostensible subcontractor. Specifically, Appellant set forth seven arguments: (1) the Area Office improperly required Appellant to prove the existence of an ostensible subcontractor relationship when the burden should have been on WAI to prove it is small; (2) the Area Office improperly considered information—a subcontracting agreement between the parties and an affidavit of WAI's CEO—provided to it by WAI and EnergX after the date of submission of WAI's best and final offer; (3) the Area Office failed to consider the teaming agreement (or any other agreements) between WAI and EnergX executed before the submission of their best and final offer; (4) the Area Office failed to properly evaluate whether EnergX would perform the primary and vital contract requirements and whether WAI would be unduly reliant on EnergX; (5) the Area Office failed to give proper weight to the fact that EnergX is the ineligible incumbent contractor; (6) the Area Office improperly determined that WAI's Project Manager had only a tenuous connection to EnergX because he is a former employee of EnergX and had been employed by WAI for only eighteen months at the time the Size Determination was issued—a time that corresponds to the due date for initial offers, June 2008; and (7) the Area Office improperly determined that WAI was capable of performing the contract. Based on these alleged errors, Appellant argues the Area Office's determination should be reversed.

D. Motion for Oral Hearing and to Enlarge Record

On December 15, Appellant filed its Motion for an Oral Hearing and Renewed Motion to Enlarge the Record. Appellant contends this case "presents numerous and substantial issues of contradictory and disputed material fact contained in documents published by WAI and its agents, some of which are sworn statements." Specifically, Appellant claims OHA needs to

resolve whether WAI is able to self-fund this project, whether WAI shares facilities with Wastren and whether WAI is unduly reliant upon EnergX. Appellant also requests permission to submit new evidence attached to both its Appeal Petition and the instant motion. The information relates to the possible affiliation between WAI and Tanner Stone as well as the employment status of WAI's proposed Project Manager, who previously worked for EnergX. In order to resolve inconsistencies in the Record, Appellant claims it is necessary for OHA to hold a hearing and enlarge the Record to permit new evidence.

E. WAI's Response to the Appeal Petition

On December 24, 2009, WAI submitted its Response to the Appeal Petition. WAI's first argument is that any portion of the appeal relating to the ostensible subcontractor rule must be dismissed because the contract has already been awarded to WAI, and OHA no longer has jurisdiction over those contract-specific claims. 13 C.F.R. § 121.1101(b). Moreover, WAI asserts, even if OHA had jurisdiction to hear the ostensible subcontractor allegations, the Area Office did not commit any error, and its determination is supported by the Record.

Next, WAI discusses Appellant's assertion that the Area Office considered WAI's size as of the wrong date. WAI points out that Appellant's protest was mainly focused on the ostensible subcontractor rule, which requires a determination of size to be made as of the date of final proposal submission. 13 C.F.R. § 121.406(d). WAI notes that it did submit a recertification as part of its final proposal, as required by DOE, and the Area Office was correct to determine size as of the date of the most recent certification. Additionally, WAI's final proposal resulted from the issuance of Amendment 10, which changed the entire solicitation. WAI was forced to submit a new proposal that included new technical and price proposals because its initial proposal was no longer responsive to the solicitation. Thus, the Area Office correctly recognized that size should be determined as of the final proposal date pursuant to 13 C.F.R. § 121.404(a), which requires recertification in cases where an initial proposal is nonresponsive even if the CO does not require it.

WAI then disputes Appellant's contention that the Area Office erred in determining that WAI is not affiliated with Wastren. As a threshold matter, WAI asserts that Appellant should not be permitted to make new claims or introduce new evidence on appeal. According to WAI, Appellant bases its allegation of affiliation on the fact that WAI was formed by Wastren employees. However, as the Area Office concluded, such a connection is not sufficient to establish affiliation because there is no element of control. The Area Office recognized this fact, but found the two entities are not affiliated because they share no personnel or resources, they are not economically interdependent, and Wastren does not provide financial assistance to WAI. Additionally, Appellant's allegations that the owners of WAI were formerly key Wastren employees is unfounded, as are the assertions that there is an extensive subcontracting relationship between the entities and that WAI relied on Wastren's past performance to obtain this contract.

Finally, WAI addresses its other alleged affiliates. With regard to VAS, WAI explains that it is not affiliated with Wastren and any common management between Wastren and VAS is immaterial to a determination of WAI's size. Even if Wastren were affiliated with VAS, as

Appellant claims, Appellant fails to demonstrate affiliation between WAI and VAS through its "string of speculations." (Response to Appeal Petition, at 19.) With regard to Tanner Stone, WAI contends its joint venture with Tanner Stone has not conducted any business or submitted any offers. Therefore, according to WAI, it would not be considered affiliated with Tanner Stone under the applicable regulations. For all these reasons, WAI concludes that OHA should deny this appeal and affirm the Area Office's Size Determination.

F. WAI's Response to Appellant's Motion

On December 24, 2009, WAI submitted its Response to Appellant's Motion for an Oral Hearing and to Enlarge the Record. WAI argues Appellant has failed to show the existence of any extraordinary circumstances to warrant a hearing. 13 C.F.R. § 134.311. "Instead, Appellant simply disagrees with the conclusions of the Area Office—a circumstances that is common in appeals, not 'extraordinary.'" (Response to Motion, at 1.) According to WAI, Appellant is merely seeking to introduce new factual allegations and to rebut the Area Office's conclusions. WAI asserts the Area Office conducted a thorough investigation of WAI's size, and a decision can be made based on the Record.

WAI also asserts Appellant has failed to show good cause for its new evidence to be admitted into the Record, as required by SBA regulations. 13 C.F.R. § 134.308. WAI argues the information Appellant seeks to admit was available to it at the time it filed its protest, and Appellant should not now be permitted to remedy defects in its protest. Moreover, WAI contends the evidence is inconsequential when compared to the evidence in the existing Record. WAI requests that the motion be denied in its entirety.

III. Analysis

A. Standard of Review

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. It is the appellant's burden to prove that the area office committed an error. *Id.* Clear error means the position of an area office lacks reason or is contradicted by the evidence in a record. Under the clear error standard, then, the Administrative Judge must affirm the judgment of an area office unless he has a definite and firm conviction the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). The Administrative Judge may not substitute his own judgment for that of an area office, regardless of whether he may have come to a different conclusion based on the existing record. The Administrative Judge may only overturn a size determination if the appellant establishes the area office made a patent error based on the record before it.

B. Motion for Oral Hearing and to Enlarge Record

Appellant has failed to establish that there are extraordinary circumstances requiring an oral hearing in this case. 13 C.F.R. § 134.311 provides: "Oral hearings . . . will be held in appeals from size determinations only upon a finding by the Judge of extraordinary

circumstances." Appellant claims a hearing is necessary to correct inconsistencies in the Record. However, based upon my disposition of this appeal, I find it unnecessary to consider an oral hearing.

I find Appellant has generally failed to establish good cause for admitting its new evidence. 13 C.F.R. § 134.308(a) provides in pertinent part: "Evidence not previously presented to the Area Office which issued the size determination being appealed will not be considered by a Judge unless: . . . A motion is filed and served establishing good cause for the submission of such evidence." Appellant claims the information is extremely important and should have been considered at the protest level. However, most of the new information presented on appeal (and especially the information obtained from websites) could have been presented at the protest level. *See Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100 (2009) (excluding evidence presented on appeal that was publicly available at the time the protest was filed) *(*citing *Size Appeals of Baldt, Inc.*, SBA No. SIZ-4987, at 7 (2008)). Furthermore, I find all of the new evidence is relevant only to the ostensible subcontractor claim that I must dismiss. (*See infra* Part III.C.) Accordingly, Appellant's motion is DENIED and Appellant's new evidence will not be considered in this appeal, though the Area Office may consider it, to the extent it may be relevant, upon remand.

C. Merits of the Appeal

1. Ostensible Subcontractor Rule

WAI is correct that Appellant's ostensible subcontractor claim must be dismissed. 13 C.F.R. § 121.1101(b) explicitly provides that "OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as compliance with the nonmanufacturer rule (*see* §121.406(b)), or joint venture or ostensible subcontractor rule (*see* §121.103(h))." The contract at issue has been awarded, and OHA does not have jurisdiction to hear ostensible subcontractor appeals at this point.

Appellant attempts to circumvent 13 C.F.R. § 1101(b) by arguing that WAI's relationship with EnergX has repercussions beyond this procurement: "If, for instance, it is true that WAI procured a bond on a contract valued far in excess of $100 million without any outside assistance, it would call into question the veracity of WAI's CCR and SBA certifications, and thus its eligibility for all set-aside contracts within its primary NAICS code." (Appeal Petition, at 8.) It is unclear what Appellant hopes to gain by this statement, as it does not even implicate WAI's relationship with EnergX. Rather, this statement bears upon WAI's credibility with regard to its own financial statements and certifications. Regardless, this allegation cannot rescue Appellant's ostensible subcontractor claim, which must be dismissed.

2. New Issue on Appeal

I must also dismiss Appellant's allegation that WAI is affiliated with Tanner Stone because Appellant may not raise a new issue for the first time on appeal (13 C.F.R. § 134.316(a)). Appellant makes no mention of Tanner Stone in its protest. Additionally, the

new evidence Appellant attempted to introduce into the Record regarding Tanner Stone was available to it at the time it filed its protest, and Appellant could have discovered it upon prudent investigation.

3. Date to Determine Size

The Area Office used the correct date to determine its size. 13 C.F.R. § 121.404(a) provides: "Where an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation." Implicit in the regulation is the idea that in such a case, size is to be determined as of the date of recertification. Here, Amendment 10 to the RFP replaced nearly the entire original solicitation. *See* RFP, Amendment 10. As Appellant itself acknowledges, "the addition of Recovery Act Funds substantially increased the DOE's estimate of the first year costs of performance from $48.9 million to $77 million." (Appeal Petition, at 5.) As a result, WAI's original proposal became nonresponsive to the RFP, and it submitted a new proposal on May 27, 2009. According to the regulation, WAI was required to recertify at that time. Thus, the Area Office properly used May 27, 2009, as the date on which to determine WAI's size.

4. Affiliation with Wastren, Inc. and VAS

The Area Office determined WAI is not affiliated with Wastren. The Area Office found: (1) there were no shared personnel between the concerns; (2) there is no dependence between the concerns; (3) there is only a minor business relationship between the concerns; (4) Wastren made no guarantees to benefit WAI; (5) the companies share no facilities; and (6) Wastren provided no technical assistance to WAI. The Area Office concluded Appellant's claim of affiliation between WAI and Wastren failed for lack of evidence. (Size Determination, at 13.)

Appellant's challenges the Area Office's determination that WAI and Wastren are not affiliated by asserting the Area Office failed to fully consider the totality of the circumstances. Appellant alleges the Area Office conducted a perfunctory and superficial analysis based upon conflicting evidence. In addition, Appellant claims the Area Office either misunderstood, misapplied, or ignored facts, to include placing undue reliance upon the affidavit of WAI's CEO.

I cannot reject Appellant's arguments because I find the Area Office's abbreviated discussion (three paragraphs in a thirteen page size determination) of affiliation between WAI and Wastren to be conclusory and thus impossible to evaluate. I find, with regard to affiliation between WAI and Wastren, that the Area Office made conclusory statements without explaining their derivation. Moreover, as Appellant alleges, the discussion is perfunctory. In addition, I find the Area Office failed to discuss potentially conflicting evidence and arguments offered by Appellant to the extent that I cannot determine whether it evaluated the evidence and arguments proffered by Appellant in its protest.

In the Summary section of the Size Determination, wherein the Area Office addressed affiliation under the ostensible subcontractor rule, it appears the Area Office transferred the burden of proof from WAI to Appellant in contravention of 13 C.F.R. § 121.1009(c). (Size

Determination, at 13.) In other words, the Area Office required Appellant to provide evidence and establish a violation of the ostensible subcontractor rule rather than requiring WAI to prove its size. Because the Area Office made this error in the ostensible subcontractor analysis of this size determination, I cannot rule out the possibility that the Area Office improperly applied 13 C.F.R. § 121.1009(c) to its analysis of affiliation between WAI and Wastren and its analysis of affiliation between WAI and VAS.[2]

Accordingly, I am remanding the issue of affiliation between Wastren and WAI for two separate reasons: (1) I find the determination is conclusory and (2) I conclude it is likely the Area Office erred in applying 13 C.F.R. § 121.1009(c) to this issue. I am remanding the issue of affiliation between WAI and VAS because I conclude it is likely the Area Office erred in applying 13 C.F.R. § 121.1009(c). Upon remand, the Area Office shall properly apply the burden of proof as set forth in 13 C.F.R. § 121.1009(c). To correct the conclusory nature of the WAI/Wastren affiliation findings, the Area Office must make specific findings, explain their derivation, and apply applicable regulations, such as 13 C.F.R. § 121.103(a)(5) and 13 C.F.R. § 121.103(f). In addition, the Area Office must consider all evidence the Appellant sought to admit in this appeal, if relevant and material, and must consider and respond to the arguments contained in Appellant's protest as well as pages 9 – 13 of Appellant's Appeal Petition.

Finally, I note that documents created before the protest are entitled to greater weight than documents created after the protest or dispute. Thus, if there is a real conflict between a document or record in existence before the protest and a document created to respond to the protest, such as an affidavit, the document or record created before protest or dispute is entitled to great, if not controlling weight. *See Size Appeal of Smart Data Solutions LLC,* SBA No. SIZ-5071, at 20 (2009).

IV. Conclusion

For the above reasons, Appellant's appeal concerning the ostensible subcontractor issue is DISMISSED. Also, for the reasons discussed above, that part of the Size Determination concerning WAI's affiliation with Wastren and with VAS is REMANDED to the Area Office for action consistent with this decision. In particular, the Area Office must support its conclusions with facts, explain potential evidentiary contradictions, and require WAI to prove it is a small concern.

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

THOMAS B. PENDER
Administrative Judge

[2] I note the Area Office disposed of this issue in two paragraphs.