

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

SIZE APPEAL OF:

Incisive Technology Incorporated

Appellant

Appealed from  
Size Determination No. 2-2010-32

SBA No. SIZ-5122

Decided: April 2, 2010

APPEARANCES

William T. Welch, Esq., J. Patrick McMahon, Esq., Brandon S. Okes, Esq., General Counsel, PC, McLean, Virginia, for Appellant.

DECISION

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 determination that Appellant was affiliated with a firm responsible for the larger portion of Appellant's business was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Request for a Size Determination

Incisive Technology Incorporated (Appellant) is an applicant for the Small Business Administration (SBA) 8(a) Business Development program. Appellant's primary North American Industry Classification System code is 541511, Custom Computer Programming Services, with a corresponding \$25 million annual receipts size standard.

On November 25, 2009, SBA's Division of Program Certification and Eligibility requested that SBA's Office of Government Contracting, Area II, in King of Prussia,

Pennsylvania (Area Office), perform a size determination on Appellant, to determine whether Appellant is affiliated with Lockheed Martin Corporation (Lockheed).

B. The Size Determination

On January 22, 2010, the Area Office issued Size Determination No. 2-2010-32 (Size Determination) concluding Appellant is other than small.

The Area Office found Michael Daniels is Appellant's president and 100% shareholder. Appellant is, by itself, a small business.

Lockheed is one of four prime contractors on an indefinite delivery indefinite quantity (IDIQ) contract used to provide rapid response to government customer need. Appellant is a subcontractor under this contract. Appellant markets its services directly to the government customer, and uses the contract to facilitate business arrangements. Appellant asserted to the Area Office it had an offer to subcontract with one of the other primes but declined because Lockheed requested that it stay on through the contract completion this year.

There are no leasing or other financial agreements between Appellant and Lockheed. There is no evidence Appellant receives any assistance from Lockheed including equipment, facilities, or financing. Appellant has had four other paying customers since January 1, 2004, in addition to Lockheed. Appellant markets its services to other potential customers.

The Area Office found that since January 1, 2004, 92% of Appellant's revenues have come from Lockheed. Appellant has received the following percentage of its annual revenues from its work as Lockheed's subcontractor:

2004 - 73%  
2005 - 86%  
2006 - 95%  
2007 - 96%  
2008 - 100%  
2009 - 100%

The Area Office noted that Appellant had asserted that it could switch to another prime contractor under the contract at any time. However, Appellant has not done so.

The Area Office concluded Appellant would not be a viable business without contract support from Lockheed, and is thus financially dependent upon Lockheed. The Area Office further concluded Lockheed has the ability to control Appellant and therefore Appellant is affiliated with Lockheed. The Area Office thus determined Appellant was other than small.

### C. The Appeal

On February 24, 2010, Appellant appealed the Size Determination to SBA's Office of Hearings and Appeals (OHA).

Appellant asserts it markets its services directly to the government, not to the prime contractor. The prime contractors are not involved in Appellant's independent marketing. In many cases the agencies direct the prime contractors to use agency-selected subcontractors. The IDIQ contract is merely a convenient marketing vehicle, under which the government can quickly obtain specialized support. The contract expressly forbids any exclusive relationship between a prime and a subcontractor. A subcontractor may freely change the prime contractor that serves as an intermediary when it undertakes a new task order.

Appellant asserts this contract is a procurement vehicle for intelligence agencies, which claim an exemption from the requirements of the Small Business Act. Thus, this contract is not structured with small business certification as a consideration. Appellant should not be penalized for working for agencies which do not facilitate cleaner small business relationships.

Appellant asserts the Area Office erred in finding it would not be a viable business without Lockheed. Appellant could receive subcontracts from any one of the four prime contractors (Lockheed, General Dynamics, Northrop Grumman, or Science Applications International Corporation (SAIC)). Appellant asserts it could go forward today and never receive another Lockheed contract. Appellant owes no contractual allegiance to Lockheed and is not dependent on it. Appellant is an independent subcontractor not dependent on any one particular prime contractor for its work. Thus, the contract prevents Lockheed from controlling Appellant. That Lockheed chooses to use Appellant is irrelevant. The relevant fact is that Appellant has a choice of prime contractors to offer its services to.

Further, Appellant asserts that OHA precedent requires a finding of at least one other indicia of affiliation in addition to contractual relationships to find firms affiliated. There are no such indicia of affiliation here.

### IV. Discussion

#### A. Timeliness and Standard of Review

Appellant filed the instant appeal within 30 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(2).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, 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 11 (2006).

## B. The Merits

Here, there is no question Appellant is, by itself, a small concern. The question here is whether Appellant's contractual relationship with Lockheed renders it affiliated with that large firm and thus, other than small. Under the size regulations, firms which are economically dependent through contractual or other relationships are affiliated under the identity of interest rule and may be treated as one party with the interests aggregated. 13 C.F.R. § 121.103(f).

OHA has held that "[I]f an area office finds a concern depends on another concern for a high percentage of its revenue, then the area office can reasonably determine the two concerns are affiliated because of economic dependence, *i.e.*, that they share an identity of interest." *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 10 (2007). Further, if one concern is dependent upon another for 70% or more of its revenue, the firms are affiliated as a matter of law. *Id.* Appellant's contention that additional indicia of affiliation are needed to support a finding of affiliation is in error. Other factors may well be present to support the finding of affiliation. *Id.* However, a contractual relationship between two concerns with one heavily dependent for its revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms. *Size Appeal of J&R Logging*, SBA No. SIZ-4426 (2001); *Size Appeal of Metropolitan Area Contractors*, SBA No. SIZ-4229 (1996).

Appellant's argument on appeal rests primarily on a contract that was not provided to the Area Office, and is not proffered on appeal. All of Appellant's arguments are thus unsupported assertions. Further, even assuming Appellant's assertions are correct, what Appellant states is that while it could be subcontracting for other firms, it has chosen to subcontract almost exclusively for Lockheed. Appellant has elected to work for Lockheed, and to receive nearly all of its revenue from Lockheed. Appellant has thus chosen to be dependent upon, and thus to have an identity of interest with, Lockheed.

Appellant's argument that it could elect to subcontract for other prime contractors in the future is meritless here. Appellant's size must be determined as of the date of its application to be certified as a participant in the 8(a) program. 13 C.F.R. § 121.404(b). That Appellant might be less dependent on Lockheed at some unspecified later time is irrelevant.

Accordingly, I conclude that Appellant is almost entirely dependent for its revenues upon the proceeds of its subcontracts for Lockheed. Appellant thus has an identity of interest with, and is affiliated with, Lockheed, a large business. Appellant has failed to establish any error of law or fact in the Area Office's determination and that determination must be, and is, affirmed.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge