

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

SIZE APPEAL OF:

Southeastern Protective Services, Inc.

SBA No. SIZ-5152

Appellant

Decided: September 3, 2010

Appealed from
Size Determination No. 3-2010-126

APPEARANCE

Charles W. Payne Jr., Esq., Hirschler Fleischer PC, Fredericksburg, VA, for Appellant.

DECISION

I. Introduction and Jurisdiction

On July 15, 2010, the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2010-126 (Size Determination) finding that Southeastern Protective Services, Inc. (Appellant) is other than a small concern under the size standard applicable to the firm's primary North American Industry Classification System (NAICS) code. On August 12, 2010, Appellant filed the instant appeal of the Size Determination with the SBA Office of Hearings and Appeals (OHA). For the reasons discussed below, this appeal is denied, and the Size Determination is 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 its appeal within thirty days of receiving the Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(2).¹ Accordingly, this matter is properly before OHA for decision.

¹ On August 16, 2010, I issued an Order to Show Cause directing Appellant to show cause why its appeal should not be dismissed as untimely because it was not filed within fifteen days of receipt of the Size Determination. 13 C.F.R. § 134.304(a)(1). Appellant responded promptly on August 18, 2010, explaining that the Size Determination does not relate to a pending procurement, and, therefore, it is 13 C.F.R. § 134.304(a)(2) that governs the timeliness of this appeal. Appellant is correct. I now review the merits of this appeal because Appellant established good cause that its appeal should not be dismissed as untimely.

II. Background

A. Facts

I find the Record establishes the following facts by the preponderance of the evidence:

1. On June 18, 2010, the SBA Assistant Administrator for the Division of Program Certification requested that a size determination be performed on Appellant to determine its continued eligibility in the 8(a) Business Development (BD) program because information in Appellant's June 4, 2010, Certificate of Competency (COC) application indicated it may be other than a small concern under the firm's primary NAICS code.

2. Appellant's primary NAICS code is 561612, Security Guards and Patrol Services, with a corresponding size standard of \$18.5 million in average annual receipts.

3. Appellant had an 8(a) BD program-approved mentor-protégé agreement with Paragon Systems, Inc. (Paragon) from August 2, 2005, through August 4, 2006.

4. Appellant currently has an 8(a) BD program-approved mentor-protégé agreement with Pinkerton Government Services, Inc. (Pinkerton), which was executed between the firms on September 18, 2006, and approved by the SBA on June 4, 2007.

5. No formal joint venture agreement was executed between Appellant and Pinkerton, but a subcontract agreement was executed between the firms for the performance of a U.S. Air Force (USAF) contract. Appellant is the prime contractor, and Pinkerton is the subcontractor for the USAF contract.

6. Appellant explicitly indicated to the Area Office that it is not engaged in a joint venture with Pinkerton. Email from Robert Hendrix to Ivette Mesa Bascumbe (July 14, 2010); Email from Jennifer Brandon to Ivette Mesa Bascumbe (July 7, 2010).

B. Size Determination

On July 15, 2010, the Area Office issued its Size Determination concluding Appellant is other than small. The Area Office first discussed Southeastern Paragon Joint Venture (SPJV), a joint venture between Appellant and Paragon established in 2006 to submit offers for state government security service contracts. Appellant owns 51% of SPJV, and Paragon owns 49%. On the basis of Appellant's financial statements, which indicate that SPJV is to terminate with the completion of the contracts awarded it, the Area Office found that Appellant and Paragon combined their efforts not on a continuing basis but only for a limited purpose. Therefore, the Area Office concluded that SPJV is a proper joint venture, and the proportionate share of SPJV's revenues should be added to Appellant's receipts. 13 C.F.R. § 121.103(h).

Next, the Area Office discussed Appellant's relationship with Pinkerton. Appellant and Pinkerton have been parties to an 8(a) BD program-approved mentor-protégé agreement since June 4, 2007. Information provided by Appellant to the Area Office indicated that Appellant and Pinkerton have submitted five joint offers, and one of those offers was accepted by the USAF. Appellant explained that it has not received any profit from its subcontract with Pinkerton for the USAF contract. Appellant also indicated via email that it is not engaged in a joint venture with

Pinkerton. Based on these facts, the Area Office concluded that although Appellant and Pinkerton have a mentor-protégé agreement, there is no formal joint venture relationship between the firms.

Finally, the Area Office calculated Appellant's average annual receipts based on its federal income tax returns for the years 2007, 2008, and 2009. 13 C.F.R. § 121.104(c)(1). The Area Office also included in Appellant's receipts 51% of SPJV's revenues based on Appellant's 51% ownership of SPJV. 13 C.F.R. § 121.103(h)(5). The Area Office concluded that the combined average receipts of Appellant and SPJV exceed the applicable size standard, and Appellant is other than a small concern under its primary NAICS code.

C. The Appeal Petition

On August 12, 2010, Appellant filed the instant size appeal with SBA's Office of Hearings and Appeals (OHA) claiming the Area Office erroneously concluded that it is other than small. Appellant argues: "The basis for the Area Office's determination is primarily due to the Appellant and Pinkerton prime and subcontract relationship for one (1) U.S. Air Force 8(a) BD set-aside contract, and further found that no formal joint venture existed between Appellant and Pinkerton." (Appeal Petition 3.) Appellant reiterates that it received no profit from this USAF contract and contends that to include gross revenues from that contract in Appellant's average annual receipts "would be a misrepresentation of how services and proceeds were actually divided among the contracting parties." (Appeal Petition 3.)

Appellant further asserts that despite the Area Office's conclusion, and regardless of whether Appellant entered into a formal joint venture agreement with Pinkerton, the relationship between the firms is a true joint venture relationship. 13 C.F.R. §§ 121.103(b)(6), 121.103(h), 121.103(h)(3)(B)(1)(iii), 124.520. Thus, Appellant concludes, it was clear error for the Area Office to include the gross proceeds from the USAF contract in its calculation of Appellant's average annual receipts. Instead, Appellant claims, the Area Office should have included only the receipts actually retained by Appellant, as provided in its Exhibit F, a chart that Appellant attaches to its Appeal Petition. Appellant requests that OHA reverse the Size Determination.

III. 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). 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.

At the outset, I must note that the arguments set forth in Appellant's Appeal Petition are far from clear and unambiguous. I thus decide this appeal on the basis of what I perceive to be the most reasonable interpretation of the Appeal Petition.

Appellant alleges that the Size Determination is based primarily on the prime and subcontract relationship between it and Pinkerton for the USAF contract. Appellant claims the Area Office erred by including gross revenues from the USAF contract in its calculation of Appellant's average annual receipts. Appellant also challenges the Area Office's conclusion that Appellant and Pinkerton were not engaged in a joint venture.

From these contentions, it appears that Appellant argues, though it certainly fails to explicitly state its position, that the gross receipts from the USAF contract were reported on Appellant's federal tax returns (because Appellant is the prime contractor), but should not be included in Appellant's average annual receipts. The only basis Appellant sets forth for this argument is its Exhibit F, a chart of Appellant's analysis of its own income. According to Exhibit F, Appellant subtracted from its receipts, as reported on its tax returns: (1) its commercial/non 8(a) BD program revenue and (2) the revenues from the USAF contract generated by Pinkerton. Appellant then added 51% of the SPJV revenues to reach its total average annual receipts, which, according to Appellant's calculations, fall within the applicable size standard.

Appellant also disputes the Area Office's conclusion that it is not engaged in a joint venture relationship with Pinkerton. Apparently, based on Exhibit F (though, again, Appellant utterly fails to explain itself), Appellant believes if it is engaged in a joint venture with Pinkerton, much of the USAF contract revenue will be excluded from Appellant's average annual receipts. However, Appellant fails to offer any valid argument on the subject. The Area Office concluded that Appellant and Pinkerton are not engaged in a formal joint venture under 13 C.F.R.

§ 121.103(h) because Appellant explicitly stated it was not engaged in a joint venture with Pinkerton and because the parties never executed a joint venture agreement, but instead executed a subcontract. Appellant's admission (Fact 6) that it did not enter into a joint venture agreement with Pinkerton is dispositive of the issue. In addition, the existence of a subcontractor agreement between Appellant and Pinkerton is equally probative of their relationship and Appellant manifestly cannot sustain its position. Therefore, the Area Office articulated a completely reasonable basis for its conclusion and I hold the Area Office committed no error in determining that Appellant and Pinkerton are not engaged in a joint venture under 13 C.F.R. § 121.103(h).

Accordingly, Appellant's calculations in Exhibit F are erroneous. The regulations governing the calculation of a firm's size are clear. Appellant's size must be determined by adding its "total income" to its "cost of goods sold" as reported on the firm's federal tax returns (in this case, IRS Form 1120S). 13 C.F.R. § 121.104(a). The Area Office may not exclude income reported on a firm's tax returns from the firm's average annual receipts simply because the firm claims it did not retain the income. If the income is on the tax returns, it must be included in the calculation of a firm's average annual receipts, excepting only the particular excludable receipts outlined in 13 C.F.R. § 121.104(a); *see also Size Appeal of J.M. Waller Associates, Inc.*, SBA No. SIZ-5108 (2010). Neither "commercial/non8(a)" receipts nor subcontractor receipts fall within these specifically delineated exclusions. In fact, the regulation plainly provides that subcontractor costs "may not be excluded from receipts." *Id.*

Thus, although Appellant attempts to prove its case through Exhibit F, that chart only confirms that the Area Office's determination was correct. Appellant's average annual receipts, as reported on its federal income tax returns, fall outside the applicable \$18.5 million size standard. The receipts Appellant attempts to exclude from its average annual receipts are not excludable under the applicable regulation. Therefore, the Area Office correctly determined that Appellant is other than a small concern under the \$18.5 million size standard.

IV. Conclusion

Appellant failed to prove that the Area Office committed any clear error of fact or law. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED.

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

THOMAS B. PENDER
Administrative Judge