

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

SIZE APPEAL OF:

Aero-Graphics, Inc.

Appellant

RE: Airborne Solutions, Inc.

Appealed from
Size Determination No. 05-2010-083

SBA No. SIZ-5162

Decided: October 29, 2010

ORDER DISMISSING APPEAL¹

I. Background

A. The Solicitation and Protest

On July 27, 2010, the United States Geological Survey, in Denver, Colorado, issued Solicitation No. RFQ 10CRQQ0414 for Research-Grade LiDAR (Light Distance and Ranging) Data for Northern Walker Lane in California and Nevada. The Contracting Officer (CO) set the procurement aside for small business and assigned to it North American Industry Classification System (NAICS) code 541370, Surveying and Mapping (except Geophysical) Services, which has an annual receipts size standard of \$4.5 million. Quotations were due on August 3, 2010.

On August 23, 2010, the CO notified Aero-Graphics, Inc. (Appellant) that she had awarded the contract to Airborne Solutions, Inc. (ASI). On August 24, 2010, Appellant filed a size protest with the CO alleging ASI was other than small because it is a mapping broker, will not complete 51% of the work on the subject procurement, and will violate the ostensible subcontractor rule. In support, Appellant asserted that ASI has no staff pilots, aircraft, or capacity to acquire the LiDAR data; and that, because it must subcontract the data acquisition (over half the work), ASI cannot itself complete the required 51% of the work.

Appellant pointed to DigitalWorld Mapping (DigitalWorld), a firm whose Canadian address is listed in ASI's Online Representations and Certifications Application (ORCA) as a "Place of Performance" and also identified on ASI's website among "Affiliate Offices," as the subcontractor. Appellant also made much of the fact ASI's office is located in its owners' home.

¹ 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.

The CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) in Fort Worth, Texas, for a size determination.

On September 1, 2010, the Area Office informed ASI of the protest and requested certain company information and a complete breakdown of the “Team” on the instant procurement including percentage of labor costs. ASI provided the Area Office with all requested information, a copy of its proposal, and a response to the protest allegations. ASI answered additional questions by email.

These submissions show ASI was established in 2001, is owned by Jeffrey and Nancy Schramm, and itself wholly owns Airborne International Solutions, LLC (AIS). Jeffrey Schramm is also involved in a start-up company in Guyana called Survey Solutions, Inc. (SSI). The combined annual receipts of ASI, AIS, and SSI are below the \$4.5 million size standard.

As for the instant procurement, ASI identified its proposed subcontractors and submitted labor hour breakouts showing ASI (specifically, Mr. Schramm) would perform much more than 51% of the work. ASI also provided a technical services contract it has in place with one proposed subcontractor and stated it has used that proposed subcontractor’s services in the past, but has no other current project with them. ASI also provided the Area Office with a list of the equipment it owns.

B. The Size Determination

On September 14, 2010, the Area Office issued Size Determination No. 05-2010-083 (Size Determination). The Area Office found ASI is affiliated with AIS and SSI but still below the size standard.

As for the ostensible subcontractor allegations, the Area Office listed 12 “primary and vital” requirements of the instant procurement that ASI will perform, found ASI would be doing more than 51% of the contract, and concluded there was no ostensible subcontractor violation. The Area Office also noted that while ASI does not own all the equipment needed to acquire the LiDAR data, the solicitation does not require ownership. The equipment may be leased.

The Area Office also found that ASI had incorrectly used the Canadian address in the ORCA listing and will change it to reflect the correct place of performance; that the “Affiliate” list on ASI’s website was merely a list of past subcontractors; and, regarding the home office, that ASI does most of its work in the field but does have an off-site facility to store equipment and records. Thus, the Area Office concluded that there is no ostensible subcontractor rule violation and that ASI is an eligible small business under the applicable NAICS code.

Appellant received the Size Determination on September 14, 2010.

C. The Appeal

On September 17, 2010, Appellant filed its size appeal with SBA’s Office of Hearings and Appeals (OHA). Appellant repeats each of its protest allegations and the Area Office’s findings and conclusions (from the Size Determination) and then provides a detailed rebuttal to those findings and conclusions. Appellant stresses that ASI owns neither the aircraft nor the

special equipment needed to acquire the LiDAR data. In support of its contention that the data acquisition phase is more than 51% of the total work, Appellant cites Size Determination No. 6-2010-092 in which, Appellant claims, an SBA area office had made that finding.

Appellant requests that OHA reverse the Size Determination and conclude Appellant is an not an eligible small business because it violates the ostensible subcontractor rule.

ASI did not respond to the size appeal.

II. Discussion

Appellant filed the instant appeal within 15 days of receiving the Size Determination. Thus, this appeal is timely. 13 C.F.R. § 134.304(a)(1).

Nevertheless, OHA's ability to decide certain issues is limited by regulation. The applicable regulation 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 ostensible subcontractor rule. 13 C.F.R. § 121.1101(b). Thus, while an area office may consider a protest containing ostensible subcontractor allegations even after a contracting officer awards a contract, OHA is not permitted to do so.

Here, the contract was awarded in August. Appellant disputes only the Area Office's conclusion that there was no ostensible subcontractor violation. Therefore, as OHA concluded in *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007), because the contract has been awarded and the issue is the ostensible subcontractor rule, OHA lacks the authority to review this appeal. Accordingly, I must DISMISS this appeal.²

III. Conclusion

This appeal is DISMISSED as required by 13 C.F.R. § 121.1101(b). Hence, the Size Determination issued by the Area Office on September 14, 2010, remains in full effect.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

² Size Determination No. 6-2010-092, to which Appellant cites in support of its own argument, was never appealed to OHA. Thus, any conclusions reached there are not legally binding on OHA. *Size Appeal of Acepex Management Corporation*, SBA No. SIZ-4361 (1999). Further, the operative facts underlying that size determination (*i.e.*, the work required by the solicitation and the details of the proposal), are not known, and so they are not comparable to those at issue here.