

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

SIZE APPEAL OF:

Alutiiq Education & Training, LLC,

Appellant,

Appealed From
Size Determination No. 6-2011-009

SBA No. SIZ-5182

Decided: January 10, 2011

ORDER DISMISSING APPEAL

I. Background

On January 6, 2010, the Contracting Officer (CO) for the U.S. Department of Labor, Office of Assistant Secretary for Administration and Management issued Solicitation No. DOLJ11UA00037 (RFP) for the continued operation of the Turner Job Corps Center in Albany, Georgia. The CO set the RFP totally aside for small business and designated North American Industry Classification System (NAICS) code 611519, Job Corps Centers, with a corresponding size standard of \$35.5 million in average annual receipts.

On October 22, 2010, the CO notified unsuccessful offerors that Alutiiq Education & Training, LLC (Appellant) was the apparent successful offeror. On October 28, 2010, Foxmar, Inc. d/b/a Education & Training Resources (ETR) filed a protest alleging Appellant is other than small due to its affiliation with its large subcontractor, ResCare, Inc. (ResCare).

On November 24, 2010, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2011-009 finding Appellant other than small under the size standard applicable to this procurement because its relationship with ResCare violates the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). Specifically, the Area Office concluded, based upon its analysis of all aspects of the relationship between the firms, that Appellant would be unusually reliant upon ResCare to perform the instant contract. Accordingly, the Area Office aggregated Appellant's average annual receipts with those of ResCare and determined Appellant is other than small for purposes of the procurement at issue.

On December 7, 2010, Appellant filed the instant appeal claiming the size determination is based upon factual and legal errors. Appellant claims it has the experience necessary to perform this contract, and the Area Office's conclusion that it is unusually reliant upon ResCare is unsupported by the record and clearly erroneous. Appellant contends the Area Office failed to evaluate all aspects of the relationship between the firms and asserts the Area Office should not substitute its judgment for that of the CO.

On January 7, 2011, the CO submitted documentation to OHA indicating that the procurement at issue was awarded to ETR on December 8, 2010.

II. Discussion

SBA's Office of Hearings and Appeals (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 the instant appeal within fifteen days of receiving the size determination. Thus, the appeal was timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314.

Nevertheless, OHA's authority to decide certain issues is limited by regulation. 13 C.F.R. § 121.1101(b) provides: "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))." Accordingly, OHA lacks the authority to review an appeal where the contract has been awarded and the only issue is an alleged violation of the ostensible subcontractor rule. *Size Appeal of Malouf Group, LLC*, SBA No. SIZ-5102 (2009); *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4881 (2008); *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007). The contract at issue has been awarded to ETR, and the Area Office's finding of affiliation between Appellant and ResCare was based solely upon the ostensible subcontractor rule. Therefore, I have no choice but to dismiss this appeal.

III. Conclusion

I have considered Appellant's petition, the applicable law, and the record. It is clear the contract has been awarded, and the size determination is predicated upon a violation of the ostensible subcontractor rule. Consequently, this appeal is DISMISSED pursuant to 13 C.F.R. § 121.1101(b), and Size Determination No. 6-2011-009 remains in effect.

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

CHRISTOPHER HOLLEMAN
Administrative Judge