

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

SIZE APPEAL OF:

Argus and Black, Inc.

Appellant

Appealed from Size Determination  
Nos. 3-2010-171 & 3-2010-172

SBA No. SIZ-5204

Decided: February 22, 2011

APPEARANCES

Peter B. Ford, Esq., Theodore P. Watson and Associates, LLC, Denver, Colorado, for Appellant.

George G. Booker, Jr., Esq., Michael J. Gardner, Esq., Shomari B. Wade, Esq., Troutman Sanders, LLP, Norfolk, VA, for TSO Armor and Training, Inc.

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 made clear error of fact or law in concluding that the protested concern is affiliated with a large concern though economic dependence.

III. Background

A. Solicitation, Protest, and Response

On May 6, 2010, the Fleet Industrial Supply Center in Norfolk, Virginia, issued Solicitation No. N00189-10-R-0063 for Anti-Terrorism training. The Contracting Officer (CO) set the procurement aside for small business and designated North American Industry Classification System (NAICS) code 611699, All Other Miscellaneous Schools and Instruction, with a corresponding \$7 million annual receipts size standard, as the appropriate code for this procurement. Argus and Black, Inc. (Appellant) submitted its initial offer on June 11, 2010. On September 9, 2010, a preaward notice was issued identifying Appellant as the apparent successful offeror. On September 14, 2010, protests were filed against Appellant by DMS

International and TSO Armor and Training, Inc. (TSO), alleging that Appellant was affiliated with TigerSwan, Inc. (TSI) and TigerSwan International, Inc. (TSII).

On September 23, 2010, the Small Business Administration (SBA) Office of Government Contracting – Area III in Atlanta, Georgia (Area Office), informed Appellant of the protest, and instructed Appellant to submit a reply to the protest and a completed SBA Form 355, together with certain other information. On October 1, 2010, Appellant responded to the protest.

Appellant was incorporated in 2005 by Mr. Brian Searcy and his wife, Marie, with each owning 50% of the company.

Mr. James P. Reese formed TSI in October, 2005. Mr. Reese is TSI's CEO and Director and owns 50% of the firm. Mr. Reese approached Mr. Searcy to become a partner in TSI. Mr. Searcy is TSI's President, COO, and a Director, and owns the other 50% of TSI. Mr. Searcy worked for both firms at first, but in 2007 decided to allow Appellant to become a dormant company while he worked for TSI. TSI is other than small.

In January, 2009, Mr. Reese, Mr. Searcy and Anthony Turpin incorporated TSII. Mr. Turpin is President, a Director, and holds majority ownership in the new entity. TSII conducts business in the Middle East.

TSI and TSII have no other subsidiaries. TigerSwan Iraq is a branch office, whose revenues are included in TSI's. TigerSwan Japan and other offices with the name TigerSwan are subcontractors TSI uses on an occasional basis.

In December, 2009, Mr. Searcy decided to transfer Appellant's operations and find a new partner. On March 3, 2010, Ms. Jennifer Fox purchased a 51% interest in Appellant, and TSII purchased a 49% interest. On March 4, 2010, Ms. Fox was elected Appellant's President, Secretary and sole Director. Appellant received a contract from TSI to conduct training from March to June, 2010, and which resulted in revenue of less than \$11,000.

On June 9, 2010, Ms. Fox resigned Appellant's president, and returned her stock to the company. Ms. Fox received all the funds in Appellant's bank account.

Also on June 9, 2010, Mr. Link acquired Ms. Fox's 51% interest in Appellant. Mr. Link was also elected Appellant's President, Secretary and sole Director. On June 11, 2010, Appellant submitted its initial offer, including price, for the subject procurement. Appellant's size must be determined as of that date. 13 C.F.R. § 121.404(a).

On June 18, 2010, Mr. Link incorporated The Jotas Group, Inc. Jotas is a vehicle for the receipts of payments for a settlement due Mr. Link and holds one contract. Mr. Link intends Jotas to become a dormant company.

Thorpico was incorporated on September 1, 2010, as a holding company to hold Appellant's stock. Mr. Reese is President and Chairman and owns half the firm. Mr. Searcy owns the remaining half, and is a Director. On September 10, 2010, TSII transferred its minority ownership in Appellant to Thorpico.

## B. The Size Determination

Because TSO's protest had alleged Appellant, TSI, and TSII shared an address, the Area Office turned to this question. Appellant's website lists the firm's address as 1421 East Broad Street, Suite 312, Fuquay Varina, NC. This is also a mailing address for TSI listed in an application for a Certificate of Authority and the registered office address for TSI. Appellant provided a lease with Office Suites PLUS at Weston Parkway in Cary, NC. Appellant's address is listed on the lease and on its Form 355 as 2500 Regency Parkway, Cary, NC, which is Mr. Link's primary residence. Appellant's tax returns for 2007 list 5125 Northgreen Drive, Fuquay Varina, NC, as its address, which is also the address on Appellant's Articles of Incorporation and the same address used by Mr. Reese and Mr. Searcy as a registered address in filing an application for a Certificate of Authority for TSI in October, 2005. The address of 412 Amber Dawn Lane in Raleigh, NC, is given as the address on Appellant's 2008 and 2009 Federal income tax returns. This is also the address listed in Appellant's 2009 Annual Report. TSII's Articles of Incorporation lists this as the firm's address.

Appellant informed the Area Office that the Office Suites address is a virtual office and that Mr. Link operates the firm out of his primary residence.

The Area Office concluded that this convoluted chain of address demonstrates that there is no clear line of fracture between Appellant, TSI and TSII. The Area Office emphasized that the address given on Appellant's website is the same as TSI's registered office address.

In March, 2010, Brian and Marie Searcy divested their individual ownership interests in Appellant. Nevertheless, Mr. Searcy maintains his 50% ownership in Thorpico, which has an interest in Appellant. Both Searcys are listed as prior performance points of contact in Appellant's Central Contractor Registration.

On November 19, 2010, the Area Office issued Size Determination Nos. 3-2010-171 & 3-2010-172 (Size Determination). The Area Office found that Appellant has no revenue in 2008 and 2009. In 2010, Appellant's sole revenues were from a contract from TSI to conduct courses. This results in a finding of economic dependence upon TSI. *See Size Appeal of Incisive Technology Inc.*, SBA No. SIZ-5122 (2010). In addition, Thorpico, Appellant's 49% owner, is an affiliate of TSI. The companies have a history of common ownership, the companies have had shared address, and the Searcys remain as points of contact for Appellant. Accordingly, the Area Office found Appellant was affiliated with TSI, and, because of TSI's principal's ownership of Thorpico, with Thorpico, and thus, other than small.<sup>1</sup>

## C. The Appeal

On December 3, 2010, Appellant filed the instant appeal. Appellant argues the Area Office erred in finding identity of interest based upon contractual relationships. Appellant asserts the policy behind finding firms affiliated based upon economic dependence is a concern that a small firm would be in jeopardy if it was dependent upon a single, larger firm for its income.

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<sup>1</sup> The Area Office also examined whether Appellant was in violation of the ostensible subcontractor rule, and concluded that it was not.

Appellant argues the common elements of OHA's precedents on economic dependence are the length of the relationship between the firms, the substantial amount of revenues generated as a result of the relationship between the firms, and that there are usually multiple relationships between the firms. Appellant argues the contract here lasted for only four months, generated less than \$11,000 in revenue, and that this contract is the only contract between the firms. Appellant argues that its relationship with TSI does not reach the level of economic dependence required for a finding of affiliation. Appellant further asserts that it has recently developed other sources of revenue.

Appellant further argues that a finding against it would have a "chilling effect" on start-up firms, who would be required to avoid contracting with large firms in the start-up phase of operations.

Appellant further asserts that the Area Office erred in finding Appellant had failed to establish a clear line of fracture. Appellant asserts the discrepancies in its addresses are a result of the changes in ownership. Mr. Link did not assume control of Appellant until June, 2010. Appellant asserts the Area Office erred in finding that Appellant's website lists the 1421 East Broad Street address, that the website as well as Appellant's License Agreement and SBA Form 355 all list the Regency Parkway, Cary, NC, address. The conflict in addresses is now resolved, and Mr. Link's address is Appellant's only address. Appellant argues that it has thus established a clear line of fracture with TSI.

#### D. TSO's Response

On December 21, 2010, TSO responded to the Appeal. First, TSO argues Appellant does not contest the Area Office's analysis of affiliation on the basis of stock ownership, and therefore the appeal should be denied.

Second, TSO asserts Appellant and TSI are affiliated through identity of interest based upon economic dependence, and that there is no minimum dollar threshold for establishing economic dependence.

Third, TSO asserts Appellant is affiliated with TSI and TSII due to common management. Mr. Searcy has served in management positions for Appellant, TSI and TSII, as well as Thorpico. Mr. Reese has served in management positions for TSI, TSII and Thorpico.

Fourth, TSO asserts that Appellant's argument that sustaining the Size Determination would result in a "chilling effect" is irrelevant.

#### E. Appellant's Reply to TSO's Response

On December 30, 2010, Appellant filed a Motion for Leave to Reply to TSO's Response, together with the Reply.

Appellant asserts that it did not contest the Area Office's finding of affiliation on the basis of stock ownership because the only affiliation found was with Jotas. Appellant does not

contest that affiliation, and this affiliation, by itself, does not result in a finding Appellant is other than small.

Appellant asserts it has explained the overlap in addresses reported in the documents. Appellant and TSII were incorporated by one individual, Mr. Searcy, and he assumed partial control over TSI shortly after that firm's incorporation. The firms thus shared addresses at various points. However, they are separate entities.

Appellant further argues that small size and short duration of Appellant's contract with TSI, coupled with Appellant's status as a start-up firm, does not meet the intent of the economic dependence standard, which is aimed to deter a small firm from forming an ongoing, high-revenue producing relationship with a single, larger firm such that the smaller firm's economic viability would be seriously jeopardized were the relationship suddenly cease to exist. *See Size Appeal of Incisive Technology Incorporated*, SBA No. SIZ-5122 (2010). Appellant argues its smaller, shorter contract with TSI does not meet the standard for finding affiliation due to economic dependence.

Appellant also asserts that the Area Office did not find it affiliated with TSI or TSII based upon common management.

Finally, Appellant argues that its "chilling effect" argument is relevant, citing *Size Appeal of EA Engineering, Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008), and that OHA has previously refused to affirm a size determination given the dire consequences of doing so.

#### IV. Discussion

##### A. Threshold Issues

Appellant filed the instant appeal within 15 days of receiving the Size Determination, and thus the appeal is 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 on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). 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).

A reply to a response is not permitted unless the Judge directs otherwise. 13 C.F.R. § 134.309(d). Here Appellant requested permission, and I find that its pleading does not unduly enlarge the issues, and therefore GRANT the Appellant's Motion for Leave to Reply to TSO's Response.

##### B. The Merits

Under SBA's size regulations, firms are affiliated when one firm controls, or has the power to control the other. It does not matter whether the control is exercised, so long as the

power to control exists. 13 C.F.R. § 121.103(a)(1). SBA considers factors such as ownership, management, previous relationships with or ties to other firms, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Affiliation may be based upon an identity of interest; firms that are economically dependent through contractual or other relationships may be found affiliated and treated as one party with the interest aggregated. 13 C.F.R. § 121.103(f). SBA determines a firm's size as of the date it submits its initial offer, including price, in response to a solicitation. 13 C.F.R. § 121.404(a).

Here, the Area Office erred in finding affiliation with Jotas and Thorpico. Appellant submitted its initial offer on the subject procurement on June 11, 2010. These firms did not yet exist at that point. 13 C.F.R. § 121.404(a). However, these affiliations did not render Appellant other than small. TSII was Appellant's minority shareholder at that time. However, the Area Office did not find affiliation with TSII, and there are no other indicia of affiliation which would lead to a finding Appellant was affiliated with its minority shareholder. The key question then is, whether Appellant is affiliated with TSI, an other than small firm.

The Area Office found Appellant affiliated with TSI due to economic dependence. The heart of this finding is Appellant was "completely dependent" for its revenues on TSI. Appellant was a dormant company for nearly three years before March of 2010. Then Ms. Fox acquired the company, performed one contract for TSI, and shortly after, transferred away her interest. Subsequent to that, Mr. Link acquired a majority interest in the firm. So the only source of revenue for Appellant is the contract from TSI performed under Ms. Fox's presidency.

OHA has held as a matter of law that one concern is dependent upon another concern for 70% or more of its revenue, that concern is economically dependent upon the other. *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 10 (2007). We have held 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 Incisive Technology Incorporated*, SBA No. SIZ-5122, at 4 (2010).

However, this rule was set forth in the context of long-term relationships between the concerns. The concerns in *Faison* had a five-year relationship. The concerns in *Incisive* had a six year relationship. Here, the Area Office found economic dependence on the basis of one contract of less than four months duration which generated less than \$11,000 in revenue. This is the only revenue Appellant had, because it had been dormant so long. Appellant had only just been purchased by Mr. Link at the time it submitted its offer in the instant procurement, and thus had had no time to generate revenue under him. I conclude that a mechanical application of the rule in this case would be an injustice. It places too large a significance on too small a contract. It would unduly penalize start-up operations, which may have had the chance to obtain only one or two contracts at the time they face a size determination.

Further, it is simply not true that one small contract, regardless of what proportion it represents of Appellant's revenues at the time, actually renders one firm dependent upon the other. In order to survive and prosper, Appellant must obtain a number of other contracts. If, over time, the great majority of these are with TSI or TSII, then a finding of economic dependence might be warranted. But here, where the contract by itself is not enough to sustain business operations, a finding of economic dependence based upon it is not warranted. I hold that in a case such as this, where the challenged firm has only recently begun operations either

initially or after a period of dormancy, and is dependent upon its alleged affiliate for only one small contract of short duration, which by itself could sustain a business, that a finding of economic dependence is not warranted. Accordingly, I find that the Area Office erred as a matter of law in finding Appellant economically dependent upon, and thus affiliated with, TSI, based upon its contract with TSI.

The Area Office did not formally find Appellant affiliated with TSI based upon the other factors it discussed, or upon the totality of the circumstances, and with good reason. There is no common management with TSI. The various addresses that the Area Office found for Appellant are explained by the various changes in ownership the firm has undergone in the past two years. While the Searcys are listed as POCs for Appellant, it is for past performance, not for current operations. Mr. Link is Appellant's majority shareholder, having clear ownership of 51% of the stock. Further, the Area Office explicitly found that Mr. Link has the necessary skills and experience to run the company, when it concluded that Appellant was not in violation of the ostensible subcontractor rule. The clear fracture with TSI is the sale of the majority interest in the company to Mr. Link. Since then, the only connection with TSI is the Searcys as past performance POCs. Appellant simply does not have enough connection with TSI to find the firms affiliated.

Accordingly, I find that Appellant has met its burden of establishing clear error by the Area Office in the Size Determination. Appellant is an eligible small business with other affiliates as of June 11, 2010, the date size is determined for this procurement.

#### IV. Conclusion

Appellant has met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is GRANTED, and the Size Determination is REVERSED. Appellant is an eligible small business for the applicable NAICS code 611699.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge