

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

SIZE APPEALS OF:

Excalibur Laundries, Inc.

Appellant,

RE: Martin Edwards & Assocs., Inc.

Appealed From
Size Determination Nos. 3-2011-130 & 131

SBA No. SIZ-5317

Decided: January 12, 2012

APPEARANCES

Leslie A. Boe, Esq., Hennessy, Boe & Gondring PA, Mission, Kansas, for Appellant

Brian A. Darst, Esq., Fairfax, Virginia, for Martin Edwards & Associates, Inc.

DECISION

I. Introduction & Jurisdiction

On November 2, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued a size determination in case numbers 3-2011-130 and 3-2011-131 finding Martin Edwards & Associates, Inc. (MEA) to be an eligible small business for the procurements at issue. Excalibur Laundries, Inc. (Appellant), the original protestor, now appeals the size determination. For the reasons discussed *infra*, the consolidated¹ appeals are denied, and the size determination is affirmed.

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 appeals within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ Appellant filed two appeals of the size determination because there are two procurements at issue. Because the appeals are substantially identical, and there is only one size determination at issue, the appeals are CONSOLIDATED for purposes of decision.

II. Background

A. Solicitations and Protests

On March 9, 2011, the U.S. Department of the Army, Mission and Installation Contracting Command (Army) issued Request for Proposals No. W9124N-11-R-0027 for washer and dryer rental and maintenance at the Presidio of Monterey in Seaside, California. MEA submitted its offer and self-certified as a small business for this procurement on March 16, 2011.

On August 1, 2011, the Army issued Request for Quotations No. W91248-11-T-0027, seeking washer and dryer installation and maintenance at Fort Campbell, Kentucky. MEA submitted its offer and self-certified as a small business for this procurement on August 24, 2011.

The respective Contracting Officers (COs) set aside each procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 532210, Consumer Electronics and Appliances Rental, with a corresponding size standard of \$7 million in average annual receipts.

On September 15, 2011, Appellant, an offeror on both procurements, received notice that the Presidio contract would be awarded to MEA. On September 19, 2011, Appellant was informed that the Fort Campbell contract would be awarded to MEA. Appellant protested MEA's size for both procurements.

On September 20, 2011, Appellant filed a protest with regard to the Presidio procurement. Appellant alleged that MEA is “the fourth in a line of businesses to be started, operated and influenced by a group of individuals with ongoing business and familial relationships, as [small businesses] conducting the same and related business in the same and related industries.” (Presidio Protest 3.) Specifically, Appellant claimed that MEA is affiliated with the following six entities: DGS Contracting Services, Inc. (DGS), Tarheel Specialties, Inc. (TSI), Vortec Development, Inc. (Vortec), Mastin Baker Investments, LLC (MBI), Myers Anderson & Associates, LLC (MAA), and C&H Contracting, Inc. Appellant alleged affiliation based upon an identity of interest, the newly organized concern rule, and common management. On September 21, 2011, Appellant filed its protest with regard to the Fort Campbell procurement. The allegations are substantially identical to those in the Presidio protest, though Appellant also alleged affiliation based upon the totality of the circumstances.

On October 5, 2011, Appellant filed additional information to supplement its protests. In its letter, Appellant offers additional facts to support its claims of affiliation, including that a company called Colleton Software is owned by an entity known as Tarheel Management Group. On October 13, 2011, Appellant filed further supplemental information. In this letter, Appellant stated that “Colleton Software was purchased by [an] entity called Tarheel Medical Billing and now is a ‘d/b/a’ of Tarheel Medical Billing.”

B. Size Determination

On November 2, 2011, the Area Office issued its size determination in response to both of Appellant's protests. MEA acknowledged that it is affiliated with MAA and MBI based upon common ownership. The Area Office explained that it has previously conducted size determinations on both Vortec and TSI, and that it has knowledge of the connections between these entities. The Area Office examined the relationship between these entities and MEA and determined that MEA is affiliated with Vortec and Vortec's affiliates based upon common ownership and common investments. The Area Office aggregated MEA's receipts with those of MAA, MBI, Vortec, Ann Gurkin Realty, and Ann Gurkin Insurance, LLC.²

The Area Office also concluded that MEA's owner, Mr. Rickie Day, shares an identity of interest with Ms. Beverly Gurkin based upon their common investments. (Size Determination 8.) This identity of interest apparently did not result in affiliation with any other entities, as no other entities were included in the calculation of MEA's receipts. The Area Office ultimately concluded that the combined average annual receipts of MEA and its affiliates are within the applicable size standard.

C. Appeal Petitions

On November 17, 2011, Appellant filed two appeal petitions, contesting the size determination with regard to each procurement. As noted above, the appeals have been consolidated for decision.

Appellant claims that the Area Office failed to consider all of its protest allegations. Specifically, Appellant argues the Area Office should have investigated whether MEA is affiliated with Tarheel Medical Billing (TMB) and/or Colleton Software (Colleton). Appellant alleges that these entities are owned 50% by Mr. Daniel Gurkin, who is Ms. Beverly Gurkin's brother. Appellant contends that the Gurkin siblings share an identity of interest based upon their family relationship under 13 C.F.R § 121.103(f). Because the Area Office determined that Ms. Gurkin also shares an identity of interest with Mr. Day, Appellant reasons that MEA is affiliated with TMB and/or Colleton. Appellant also claims that Ms. Gurkin has previously held herself out as a representative of MEA. Appellant urges OHA to remand this matter to the Area Office for a new calculation of MEA's average annual receipts that includes the receipts of TMB and/or Colleton.

D. MEA's Responses

On December 5, 2011, MEA filed two responses, one in response to each appeal petition. These, too, are substantially identical. MEA disputes Appellant's "convoluted" theory that MEA is affiliated with TMB and/or Colleton, but argues that OHA should not reach the merits of that issue because Appellant's allegations were untimely. According to MEA, those allegations were not raised in Appellant's initial protest, but were introduced only in Appellant's supplemental

² The Area Office determined that the latter two companies are affiliates of Vortec.

filings, which were submitted after the protest deadlines. MEA maintains that neither the Area Office nor Appellant ever provided a copy of those supplemental filings to MEA, thereby limiting MEA's ability to meaningfully respond. Furthermore, MEA explains that the Area Office did ask it and Ms. Beverly Gurkin questions about their relationship with TMB and/or Colleton, and MEA and Ms. Gurkin answered the Area Office's questions. MEA stresses that a protestor does not have an unfettered right to raise additional issues after filing its initial protest. *See Size Appeal of South Ga. Servs. Joint Venture*, SBA No. SIZ-5024 (2009). MEA requests that OHA dismiss the appeal petitions. Alternatively, MEA argues that the size determination is reasonable, that it contains no error of fact or law, and that it should be affirmed because Appellant failed to demonstrate that there is any control between MEA and TMB and/or Colleton.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeals. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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. Analysis

SBA regulations provide that in the case of negotiated procurements, such as the two solicitations at issue here, “[a] protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.” 13 C.F.R. § 121.1004(a)(2). Furthermore, it is the protester's responsibility to submit all relevant evidence and argument with its protest. Appellant was notified that MEA was the apparent awardee for the Presidio procurement on September 15, 2011. Thus, any protest allegations and supporting evidence must have been submitted by September 22, 2011. With regard to the Fort Campbell procurement, Appellant was notified that MEA was the apparent awardee on September 19, 2011. Thus, any protest allegations and evidence were due by September 26, 2011.

The record reflects that Appellant timely submitted its protest on the Presidio procurement on September 20, 2011. However, the protest made no allegation that MEA is affiliated with TMB and/or Colleton. Appellant timely submitted its protest relative to the Fort Campbell acquisition on September 21, 2011. That protest likewise contains no assertion that MEA is affiliated with TMB and/or Colleton. It was not until October 5, 2011, that Appellant first submitted supplemental information to the Area Office alleging that MEA may be affiliated with TMB and/or Colleton. Because this information was brought to the attention of the Area Office after the protest deadline for both of the procurements at issue, it was untimely, and the Area Office was under no obligation to consider it. *See Size Appeal of Silver Enters. Assocs.*,

Inc., SBA No. SIZ-5124, at 5 (2010) (explaining the size protest process and noting that “the regulation contemplates no role for the protestor in the process after the protest is filed” and the protestor has “no further submissions to make after filing its protests”); *Size Appeal of South Ga. Servs. Joint Venture*, SBA No. SIZ-5024, at 5 (2009) (recognizing that, if a protestor were allowed to file supplemental allegations and evidence after the prescribed protest deadline, “a protestor could directly supply protest allegations to an area office up until a size determination is issued and ... [such an approach] would allow a protestor to file a new protest well beyond the five day limit. Such action violates the regulations governing the protest process.”); *Size Appeal of Kara Aerospace, Inc.*, SBA No. SIZ-4584 (2003), *recons. denied*, SBA No. SIZ-4595 (2003) (PFR) (finding that a supplemental size protest filed after the deadline set forth in the regulation was untimely).

Although Appellant's supplemental protest allegations were untimely, the Area Office nevertheless could have considered them if it wished to do so. The Area Office could have adopted the supplemental allegations as its own, and the 5-day protest deadline does not apply to any protest brought by SBA itself. 13 C.F.R. § 121.1004(b). Furthermore, SBA regulations permit an area office to base a size determination “on grounds not raised in the protest” or on “other information” that it may request from “the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.” 13 C.F.R. § 121.1009(b); *see also Size Appeal of Advanced Techs. and Labs. Int'l, Inc.*, SBA No. SIZ-4484, at 3-4 (2002) (finding a protest timely and specific where the area office considered the protestor's second protest, which alone would have been untimely, as a supplement to its original protest). Conversely, while an area office is at liberty to consider untimely protest allegations, nothing in the regulations requires the area office to do so. *Size Appeal of Frontier Applied Sci., Inc.*, SBA No. SIZ-4316, at 4 (1998) (noting that an area office treated a supplemental submission as untimely and did not consider it). In short, the Area Office is vested with the discretion to decide whether or not to investigate supplemental protest allegations filed beyond the time frame set forth in 13 C.F.R. § 121.1004.

In the instant case, the record suggests that the Area Office did review Appellant's allegation that MEA is affiliated with TMB and/or Colleton. There was email correspondence between MEA and the Area Office with regard to those entities, and the size determination specifically notes that Appellant alleged affiliation between MEA and TMB and/or Colleton.³ Ultimately, the Area Office remained silent as to whether or not MEA is affiliated with those entities. I find no error in this approach, given that the Area Office was not required to investigate the allegation at all.

Because Appellant first raised the issue of MEA's potential affiliation with TMB and/or Colleton after the protest deadline, the allegation was untimely, and it was within the Area Office's discretion whether to investigate the claim. Here, there is evidence that the Area Office did explore the possibility of affiliation between those entities. The size determination does not

³ The size determination incorrectly stated that Appellant raised these allegations “in its initial protest.” As discussed above, neither of the original protests contains any reference to TMB and/or Colleton. Only the supplemental filings on October 5, 2011, and October 13, 2011, discuss TMB and Colleton.

conclusively address the matter, but any error is harmless, as the Area Office is not required to review or investigate untimely allegations.

IV. Conclusion

Appellant failed to demonstrate that the size determination was based upon clear error of fact or law. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge