

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

SIZE APPEAL OF:

Macro-Z Technology Company,

Appellant,

Appealed From
Size Determination No. 6-2012-061

SBA No. SIZ-5361

Decided: June 13, 2012

APPEARANCES

James F. Nagle, Esq., Oles Morrison Rinker & Baker LLP, Seattle, WA, for Macro-Z Technology Company

DECISION

I. Introduction and Jurisdiction

On May 7, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2012-061 finding Macro-Z Technology Company (Appellant) to be an other than small business for the procurement at issue and accompanying size standard. Appellant now appeals the decision. For the reasons discussed *infra*, the appeal is denied.

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 timely filed the instant appeal on May 11, 2012. Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the size determination finding Appellant did not meet the burden of establishing itself as a small business under the applicable size standard was based on clear error of fact or law.

II. Background

A. Solicitation and Protest

On August 15, 2011, the Contracting Officer (CO) for the Department of the Army (Army), Corps of Engineers, Seattle District, Seattle, Washington, issued Solicitation No. W-

912DW11-R-0049, seeking to procure all labor, materials, and equipment and perform all work for Fiscal Year 2012 Survival, Evasion, Resistance, & Escape (SERE) Force Support Facility, Phase 2, Fairchild Air Force Base, Spokane, Washington. The CO issued the procurement as a Small Business set-aside and designated North American Industry Classification System (NAICS) code 236220, Commercial and Industrial Building Construction, with a corresponding \$33.5 million annual receipts size standard as the appropriate code for this procurement.

On March 28, 2012, the CO issued a notice that Appellant was the apparent successful offeror. On April 2, 2012, Total Site Services LLC (Total Site) protested Appellant's small business status, claiming Appellant's online representation and certification on the Online Representations and Certifications Application (ORCA) was incomplete; Appellant's bonding capacity indicates its revenues likely exceeds the applicable size standard; and Appellant is not properly certified as a small business with the SBA.

B. Size Determination

On May 7, 2012, the Area Office issued Size Determination No. 6-2012-61, concluding that Appellant is not a small business concern for the procurement at issue. Additionally, the Area Office stated that Appellant may not certify as a small business concern on future government procurements with a size standard at or below \$33.5 million.

The Area Office notified Appellant of the size protest made against it on April 12, 2012. Appellant was instructed to provide certain documents to the Area Office, within three days, in order for the SBA to conduct a formal size determination. On April 19, 2012, the SBA received an opposition letter from Appellant, and an incomplete SBA Form 355. Furthermore, Appellant failed to provide the requested financial statements, and certain required documents regarding its affiliates.

On April 25, 2012, the Area Office granted Appellant an extension, until April 26th, to file the required documents. On April 30th the Area Office provided Appellant with a list of required information and documents that it needed in order to perform a formal size determination. These documents included tax returns, a completed SBA Form 355, financial statements, and information on entities that could be affiliated based upon joint ventures. In addition, the Area Office requested tax returns for the joint ventures in order to determine the proportional joint venture revenue of Appellant. The Area Office granted another extension, until May 1st, for Appellant to provide the required documentation.

The Area Office received a package from Appellant on May 1st, which included a still incomplete SBA Form 355. On May 7th, the Area Office received another package from Appellant which failed to properly list a known joint venture and erroneously reported gross receipts for 2009 of a second joint venture in which Appellant participated.

The Area Office stated a protested concern must submit, according to SBA regulations, a completed SBA Form 355 and all supporting material within three working days of receiving the notice of size protest. The Area Office stated it can grant extensions but that it must issue a size determination within fifteen days of receipt of protest unless the contracting agency grants an

extension. Here, the CO granted an extension until May 7, 2012.

The Area Office determined Appellant did not provide, despite numerous extensions, the requested documents and explanation of the notes to the financial statements as required. Furthermore, the Area Office states it received at least four SBA Forms 355, and none of these, including the final Form 355, were complete.

The Area Office determined that under 13 C.F.R. § 121.1008(d), it can presume that Appellant's failure to disclose the required information demonstrates Appellant is not a small concern. The Area Office found Appellant failing to meet its burden of establishing itself as a small business under the applicable size standard. The Area Office concluded Appellant cannot certify as a small business concern under the \$33.5 million size standard for NAICS code 236220, or any other size standard of \$33.5 million or less. Lastly, the Area Office directed Appellant to update its CCR and ORCA profile to report its three year average annual receipts and average number of employees for the past twelve months, which includes information for all affiliates.

C. Appeal Petition

On May 11, 2012, Appellant filed the instant appeal. Appellant asserts that the Area Office's decision was based on unreasonable, untimely, and excessive demands for additional information. Appellant alleges the information requested by the Area Office was irrelevant to the SBA's determination of the size protest filed against it.

Appellant alleges that it sent the Area Office the required documentation as was requested, including SBA Form 355. Additionally, Appellant states that it did not submit information about joint ventures it participated in because they were approved mentor-protégé agreements that are exempt from affiliation.

Appellant states it informed the Area Office the reason it could not submit its 2011 tax returns as requested was because it had filed for an extension. Further, according to the Appellant, the Area Office failed to respond to its request that the Area Office identify which notes on Appellant's financial statements required clarification. Appellant also states it requested certain documents from its CPA and was awaiting the CPA's delivery of those documents. Lastly, Appellant states it received an email from the Area Office on May 7th which required that certain information be provided within 30 minutes. The information regarded Appellant's joint ventures, which Appellant claims did not need to be listed in SBA Form 355 because they were under approved mentor protégé agreements.

Appellant argues OHA case law requires the Area Office to make requests for information in a reasonable manner. Additionally, Appellant argues the time period the Area Office allots to the challenged concern to gather the required information must be reasonable. Appellant argues the Area Office requested information about affiliates that are remote from Appellant and requested information from Appellant in a manner that made it difficult for Appellant to respond in a timely fashion. Appellant lists as examples certain situations where the Area Office requested information to be sent by the next day.

Furthermore, Appellant argues the Area Office acted unreasonably when it asked for clarification regarding footnotes on the financial statements, yet never specified which financial statements they required clarification on. Appellant further argues the Area Office acted unreasonably when it required Appellant's 2011 tax returns after Appellant informed them of the tax return extension it filed with the IRS. Appellant argues it provided a response to the Area Office's numerous requests, thus the Area Office's application of the adverse inference rule was erroneous.

Lastly, Appellant argues the Area Office acted in contravention of 13 C.F.R. § 124.520(d)(4) when it requested information from Appellant regarding mentor protégé joint ventures Appellant was a party to. Appellant argues the joint ventures were exempted from affiliation thus they were irrelevant to the size determination at issue here.

Appellant requests the size determination be overturned and Appellant considered a small business.

III. Discussion

A. Standard of Review

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

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. 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

Appellant asserts the Area Office misapplied the adverse inference rule when it requested unreasonable, untimely, and excessive additional information. I disagree. The size determination regulations provide:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

13 C.F.R. § 121.1008(d). Further:

In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

13 C.F.R. § 121.1009(d). These provisions are known as the adverse inference rule.

OHA decisions regarding the application of the adverse inference rule use a three-part test. The test requires, first, that the requested information be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Finally, the request for information must be specific. If all three criteria are met, the challenged firm or the alleged affiliate must produce the information requested by the Area Office or suffer the consequences of an adverse inference. *E.g., Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008).

In this case, the record clearly shows the Area Office made certain requests for information, through the SBA Form 355 or in follow-up requests, and Appellant repeatedly failed to provide the required information. On April 25th, the Area Office notified Appellant of deficiencies on its Form 355, particularly missing information regarding businesses owned by Appellant's principal which were referenced in the tax returns submitted. The Area Office notified Appellant that it must submit documentary materials about these affiliates, as required by question 13 of Form 355. Additionally, the Area Office notified Appellant of questions 7a and 7c of Form 355 which required additional responses. On April 30th, the Area Office notified Appellant again of certain information that remained outstanding, including a properly completed Form 355, financial statements of entities that could be affiliated based upon joint ventures, and the tax returns of the joint ventures for purposes of determining Appellant's proportional joint venture revenue.

The Area Office requested the documents be submitted by May 1st. Upon receiving a package from Appellant on May 1st, the Area Office found Form 355 to still be incomplete. After receiving notification from the Area Office about its incomplete Form 355, on May 7th Appellant failed to list a known joint venture in a resubmitted Form 355, and reported erroneous gross receipts for a 2009 joint venture. Furthermore, Appellant failed to include the correct gross receipts as reported on its tax returns for yet another joint venture.

The original request for information on Appellant for purposes of performing a size determination was issued on April 12th, with a deadline of April 18th. As of May 7th, the Area Office was still receiving an incomplete or incorrectly completed SBA Form 355, despite numerous requests by the Area Office to provide the correct information. SBA regulations require any protested concern to provide a completed SBA Form 355 and any additional information required within three working days from receiving notice of the protest. 13 C.F.R. § 121.1008(c). Here, Appellant had over two weeks to provide the required information, and yet continued to submit a defective SBA Form 355.

Appellant additionally claims the Area Office failed to provide precisely identify the financial statement notes on which it sought clarification. However, in a May 4th email, the Area Office stated that it needed clarification on Appellant's financial statement notes, specifically 2010 financials notes 16 and 17, and 2011 financials note 15. The Area Office also sought clarification on notes 1 and 16 of the 2008 financial statements. Thus, Appellant's claim that the Area Office failed to specify which notes it needed clarification on is meritless.

Appellant further argues against the Area Office's request for information regarding its joint ventures created by mentor protégé agreements. Appellant states these agreements are exempt from an affiliation finding, thus the Area Office's request regarding the joint ventures was unreasonable and excessive. It is true that two firms approved by SBA to be a mentor and protégé may form a joint venture for any Federal procurement, and are exempt from the normal rules of affiliation. 13 C.F.R. §§ 121.103(b)(6). However, in this case the Area Office was not seeking information of these joint ventures in order to determine whether affiliation existed. Rather, the Area Office was attempting to ensure that it had all the relevant information on Appellant's revenues in order to determine Appellant's annual receipts.

Any concern undergoing a size determination must include in its receipts its proportionate share of any joint venture receipts. 13 C.F.R. § 121.103(h)(5). Therefore, the purpose of the Area Office's multiple requests for information regarding Appellant's joint ventures was to determine the proportionate share of joint venture receipts required to be added to Appellant's annual receipts. The Area Office requested these joint ventures be mentioned in the spaces provided by Form 355 for affiliates because, even though they are exempt from an affiliation finding, they are still sources of revenue for Appellant. The issue here is not one of affiliation, but of what revenue Appellant received from these joint ventures, which must be included in the calculation of Appellant's annual receipts. Appellant clearly erred in assuming that it did not need to submit this information and in notifying the Area Office that it was wrong in asking Appellant to provide information on its joint ventures operating under a mentor protégé agreement.

It is not up to the Appellant to inform the Area Office as to what affiliates must be listed in Form 355. *Size Appeal of DMI Educational Training LLC*, SBA No. SIZ-5276, at 9 (2011). The Area Office must have proper information regarding all affiliated concerns and sources of revenue in order for the Area Office to issue a proper size determination. Thus, I find meritless Appellant's argument the Area Office repeatedly requested allegedly irrelevant information, leading to an incorrect application of the adverse inference rule.

Here, Appellant repeatedly failed to provide the Area Office with the requested information. The information is clearly relevant, the requests were specific, and all the information requested concerned Appellant and its sources of revenue. The adverse inference test was met, and the Area Office committed no error in drawing the adverse inference against Appellant when Appellant failed to provide the requested information. Appellant has failed to establish any error by the Area Office in this size determination, and I must deny the appeal and affirm the size determination.

IV. Conclusion

Appellant has not met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge