

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

SIZE APPEAL OF:

HAL-PE Associates Engineering Services,
Inc.

Appellant,

RE: Legends Construction, LLC,

Appealed From
Size Determination No. 2-2012-091

SBA No. SIZ-5391

Decided: August 15, 2012

APPEARANCES

Robert C. Ziegler, Esq., Ziegler & Schneider, P.S.C., Covington, Kentucky, for Appellant

Jason D. Tonne, Esq., Frost Brown Todd LLC, Cincinnati, Ohio, for Legends
Construction, LLC.

ORDER DISMISSING APPEAL

I. Introduction

On June 27, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination 3-2012-091, finding that Legends Construction, LLC (Legends) is a small business under the size standard associated with Solicitation VA250-12-B-0260. HAL-PE Associates Engineering Services, Inc. (Appellant), which had originally protested Legend's size, contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and determine that Legends is not a small business. For the reasons discussed *infra*, the appeal is dismissed.

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 July 16, 2012.¹

II. Background

A. Solicitation and Protest

On April 27, 2012, the U.S. Department of Veterans Affairs (VA) issued Solicitation VA250-12-B-0260 seeking a contractor to install a new chiller, replace cooling towers, provide an economizer, and upgrade electrical lines to the chiller plant at the VA Medical Center in Cincinnati, Ohio. The scope of the procurement included general construction, alterations, drainage, mechanical and electrical work, utility systems, and removal of existing structures to prepare for construction, as well as related services such as demolition, temporary fire and work barriers, and general plumbing, mechanical, and electrical construction. The Contracting Officer (CO) set aside the acquisition exclusively for Service Disabled Veteran Owned Small Business Concerns (SDVO SBCs) and assigned North American Industry Classification System (NAICS) code 238220, Plumbing, Heating, and Air-Conditioning Contractors, with a corresponding size standard of \$14 million in average annual receipts. Bids were due May 30, 2012.

On May 30, 2012, the CO announced that Legends was the low bidder. On June 6, 2012, Appellant protested Legend's size, contending that Legends was not a small business due to affiliation with Schrudde & Zimmerman, Inc. (S&Z) on the basis of common management, 13 C.F.R. § 121.103(e), the newly organized concern rule, 13 C.F.R. § 121.103(g), identity of interest, 13 C.F.R. § 121.103(f), and the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant also protested Legends' status as an SDVO SBC, arguing that Mr. Mark Zimmerman's role in the company enables him to control Legends. Because Mr. Zimmerman is not a service disabled veteran, Appellant asserted Legends is not an eligible SDVO SBC under 13 C.F.R. § 125.10.

B. Size Determination

The CO referred Appellant's protest to the Area Office. On June 27, 2012, the Area Office issued its size determination finding that Legends is a small business.

The Area Office found that Mr. Edward Mason is Legends' CEO and Managing Member and owns 51% of the firm. (Size Determination at 2.) Mr. Zimmerman owns the remaining 49% interest and also serves as a member. (*Id.*) The Area Office found that Mr. Mason has the power to control Legends by virtue of his ownership interest.

The Area Office next considered whether Legends was affiliated with S&Z or other

¹ Ordinarily, an appeal petition must be filed within fifteen calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). In this case, Appellant represents that it received the size determination on June 29, 2012. Fifteen calendar days after June 29, 2012 was July 14, 2012. Because July 14, 2012 was a Saturday, the appeal petition was due on the next business day: Monday, July 16, 2012. 13 C.F.R. § 134.202(d).

concerns. The Area Office found that Mr. Mason holds no interest in any other business. However, Mr. Zimmerman has ownership interest in three other companies, including S&Z. Mr. Zimmerman owns 48% of S&Z, with his father owning the remaining 52%. The Area Office found that both Mr. Zimmerman and his father have the power to control S&Z based on familial identity of interest.

The Area Office observed that Legends has subcontracted work to S&Z in the past and the companies have engaged in intercompany transactions. However, the Area Office determined that the dollar value of the subcontracts was not sufficient to give rise to economic dependence between the two concerns. Additionally, the Area Office noted that Legends does not lease office space, property or equipment from S&Z. Based on these findings, the Area Office reasoned that Mr. Mason has no familial or economic interest in S&Z, and thus no affiliation exists based on 13 C.F.R. 121.103(f). (*Id.* at 5.)

The Area Office next examined the newly organized concern rule, and found it to be inapplicable. The Area Office stated that Mr. Mason is not a former employee, officer, director, or owner of S&Z. Further, Legends does not receive any contracts, financial or technical assistance, indemnification on bid or performance bonds, or facilities from S&Z. (*Id.*) Although Legends and S&Z operate in the same industry, the Area Office found that Legends maintains separate books, office space, and bonding and does not share employees with S&Z. (*Id.* at 6.) Thus, the Area Office determined no affiliation exists between Legends and S&Z under the newly organized concern rule. (*Id.*)

Next, the Area Office examined affiliation under common management. Because Mr. Mason solely controls Legends, and he has no other business interests, the Area Office found no affiliation through common management. (*Id.*)

Lastly, the Area Office addressed Appellant's ostensible subcontractor allegation. The Area Office determined that S&Z was not a subcontractor to Legends for the instant procurement, therefore the ostensible subcontractor rule was inapplicable. (*Id.*)

The Area Office found Legends' average annual receipts for fiscal years 2009, 2010, and 2011 do not exceed the applicable size standard. (*Id.* at 7.) Further, even if Legends were affiliated with S&Z and the other two companies in which Mr. Zimmerman holds an interest, the annual receipts of all the companies combined would not exceed the applicable size standard. (*Id.*)

C. Appeal Petition

On July 16, 2012, Appellant filed the instant appeal. Appellant complains the Area Office failed to address the portion of Appellant's protest pertaining to Legends' status as an SDVO SBC. Appellant insists that Legends is not eligible to receive SDVO SBC set-aside contracts.

Appellant argues that Mr. Zimmerman — not Mr. Mason — manages Legends' day to day operations, and is in charge of the firm's long term decision making. (Appeal at 3.) Appellant supports its claim by stating that Mr. Zimmerman filed Legends' annual reports, is listed as

Legends' sole point of contact in the Central Contractor Registration (CCR) registry, and has greater experience in the construction field than does Mr. Mason. (*Id.*) Appellant asserts that Legends relies on Mr. Zimmerman's expertise to operate effectively.

Appellant further argues that Mr. Mason lacks the experience required by 13 C.F.R. § 125.10(b). (*Id.* at 4.) Appellant asserts Mr. Mason has no experience in the construction field beyond his work at Legends. Appellant argues Mr. Mason could not operate Legends without the assistance of Mr. Zimmerman.

D. VA OSDBU Determination

On July 17, 2012, the VA's Office of Small and Disadvantaged Business Utilization (OSDBU) issued a decision sustaining Appellant's protest that Legends is not an eligible SDVO SBC. The decision states that Legends "does not meet the [eligibility] criteria for an SDVOSB as set forth in VA's [regulations] at 38 C.F.R. Part 74." (Decision at 4.) As a result, Legends is not eligible to be awarded the instant procurement.

E. Legends' Response

On August 2, 2012, Legends filed its response to the instant appeal. Legends argues that Appellant has not challenged or requested any relief from the size determination. Legends further contends the appeal is based entirely on the question of Legends' status as an SDVO SBC, which the Area Office properly did not consider. Thus, argues Legends, the appeal should be dismissed. In the event the appeal is not dismissed, Legends alternatively advances several arguments as to why Legends is an eligible SDVO SBC, and is not affiliated with S&Z. Legends asserts that Appellant failed to establish clear error of fact or law in the Area Office's decision and requests the size determination be affirmed.

III. Discussion

I agree with Legends that the instant appeal must be dismissed. Pursuant to SBA regulations, an appeal petition must set forth "[a] full and specific statement as to why the size determination . . . is alleged to be in error, together with argument supporting such allegations." 13 C.F.R. § 134.305(a)(3). Here, Appellant has not alleged errors of fact or law in the size determination, nor disputed any of the findings made by the Area Office. The Area Office determined that Legends would not exceed the applicable size standard even if Legends were affiliated with S&Z and the other companies in which Mr. Zimmerman holds an interest, and Appellant has not attempted to challenge this conclusion. Accordingly, the instant appeal is defective as it fails to state a valid claim. *Size Appeal of Allegheny Wood Products, Inc.*, SBA No. SIZ-5366 (2012); *Size Appeal of SB Technologies, LLC*, SBA No. SIZ-5298 (2011).

The only argument raised by Appellant in its appeal is that the Area Office ignored the portions of Appellant's protest alleging that Legends is not an eligible SDVO SBC. Appellant is correct that the size determination was silent on these matters. As OHA has explained in prior case decisions, however, under current law any SDVO status protest arising out of a VA solicitation will be decided by the VA OSDBU. *Matter of Airborne Construction Services, LLC*,

SBA No. VET-203 (2010); *Matter of Reese Goel JV*, SBA No. VET-199 (2010). This is true because, in 2009, VA promulgated a regulation granting the Executive Director of VA's OSDDBU the authority and jurisdiction to decide any status protest regarding an SDVO SBC arising from a VA solicitation. 48 C.F.R. § 819.307. The regulation indicates that this process will remain in place until an agreement is reached between VA and SBA to allow SBA to decide these protests. *Id.* An agreement has yet to be executed, however, so VA OSDDBU presently retains sole jurisdiction over SDVO status protests arising out of VA solicitations. Accordingly, the Area Office did not err by not addressing Legends' status as an SDVO SBC.² Further, although VA OSDDBU has now rendered a decision on Legends' status, OHA has no jurisdiction to entertain appeals from such determinations. Rather, “[t]he result of [48 C.F.R. § 819.307] is that VA has created its own SDVO status protest process with which neither SBA nor OHA may interfere.” *Reese Goel*, SBA No. VET-199, at 4.

IV. Conclusion

The instant appeal does not allege any error of fact or law in the size determination. Although the appeal does argue that the Area Office should have investigated Legends' status as an SDVO SBC, the Area Office properly did not do so. Under current law, SBA and OHA lack jurisdiction to decide any SDVO status protest regarding a VA solicitation. Accordingly, this appeal is DISMISSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

² SBA regulations stipulate that for non-VA procurements, the Director of SBA's Office of Government Contracting, not an area office, decides an SDVO SBC status protest. 13 C.F.R. § 125.25.