United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Willow Environmental, Inc., Appellant, Appealed From Size Determination No. 2-2012-94	SBA No. SIZ-5403 Decided: September 27, 2012

APPEARANCES

Scott D. Cessar, Esq., and Audrey K. Kwak, Esq., Eckert Seamans Cherin & Mellot, LLC Pittsburgh, Pennsylvania, for Appellant

DECISION[1]

I. Introduction and Jurisdiction

On June 25, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-94 finding that Willow Environmental, Inc. (Appellant) is not a small business under the size standard for the instant procurement. The Area Office determined that Appellant is affiliated with American Environmental Services, Inc. (AES) under the newly organized concern rule, 13 C.F.R. § 121.103(g), and identity of interest, 13 C.F.R. § 121.103(f).

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and determine that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

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

[1] This decision was initially issued on September 19, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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.

II. Background

A. Solicitation and Protest

On July 21, 2011, the Defense Logistics Agency (DLA) issued Request for Proposals (RFP) No. SP4500-11-R-0006 seeking the transportation and disposal of hazardous waste from various military installations. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562211, Hazardous Waste Treatment and Disposal, with an associated size standard of $12.5 million average annual receipts. Appellant self-certified as a small business on August 22, 2011.

On March 6, 2012, the CO announced that Appellant was the apparent awardee. On March 12, 2012, an unsuccessful offeror, MJ Associates, Inc. d/b/a EnviroKleen (EnviroKleen), protested Appellant's size. EnviroKleen alleged that Appellant is not a small business because it is affiliated with AES, a large business. EnviroKleen further contended that Appellant is acting as a front to enable AES to compete for small business set-asides.

B. Size Determination

On June 25, 2012, the Area Office issued Size Determination No. 2-2012-094, concluding that Appellant is not a small business concern. The Area Office found that Appellant, by itself, is a small business, but that Appellant is other that small due to affiliation with AES. (Size Determination at 3, 6.)

The Area Office determined that Appellant was formed in June 2008 by Ms. Erin Waclawski, who is 100% owner, President, and sole Director of Appellant. (*Id.* at 2.) Before forming Appellant, Ms. Waclawski was employed by AES as its Government Services Manager. (*Id.*) Appellant performs consulting services for AES, and leases office space from AES in order to perform those services. (*Id.*) The Area Office stated that the following facts were "not in dispute":

> 1) [Ms.] Waclawski is a former employee of AES;
> 2) Ms. Waclawski established a firm [*i.e.*, Appellant] in 2008 that is in a similar line of business as that of AES;
> 3) AES acts as a mentor to [Appellant];
> 4) [Appellant] performs consulting services for AES and [Appellant] stated that this provides a stable source of revenue for [Appellant];
> 5) [Appellant] subcontracts services to AES; and
> 6) AES provides a line of credit to [Appellant]. As of December 2010, [[Appellant] owed in excess of $*** to AES.

(*Id.* at 3-4.)

The Area Office next found affiliation between Appellant and AES under the newly organized concern rule, 13 C.F.R. 121.103(g). The Area Office determined that Ms. Waclawski was a former "key employee" of AES because her position as Government Services Manager allowed her to influence or control AES, even though she was subordinate to more senior company officials. (*Id.* at 5.) The Area Office determined that the remaining elements of the newly organized concern rule also were met, observing that Appellant and AES operate in similar lines of business, that Appellant and AES have had a continuing relationship since Appellant's establishment, and that AES provides assistance to Appellant in the form of "a line of credit, mentoring, and contracts." (*Id.*) The Area Office found no clear line of fracture between Appellant and AES, so the companies are affiliated under the newly organized concern rule.

The Area Office also determined that Appellant and AES were affiliated through identity of interest, 13 C.F.R. 121.103(f). The Area Office found that Appellant's economic viability would be in jeopardy if not for its relationship with AES. (*Id.* at 6.) As evidence of Appellant's economic dependence on AES, the Area Office cited Ms. Waclawski's role as AES's former Government Services Manager, Appellant's line of credit from AES, and subcontracts from AES which provide Appellant with a steady stream of income. (*Id.*) Based on economic dependence, the Area Office found that Appellant and AES share an identity of interest and are affiliated. (*Id.*)

C. Appeal Petition

On July 9, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant states that the size determination is marred by significant factual errors. In particular, Appellant contends that many of the facts that the Area Office considered to be undisputed are "simply wrong." (Appeal at 11.) Appellant asserts that it no longer performs consulting services for AES, and no longer leases office space from AES. In addition, Appellant only receives favorable credit terms from AES, not a line of credit as stated by the Area Office. (*Id.* at 4.)

Appellant next argues that the Area Office erred in finding affiliation based on the newly organized concern rule. Appellant maintains that Ms. Waclawski was never an officer, director, stockholder, or managing member of AES, and should not be considered a former "key employee" of AES. (*Id.* at 6.) Appellant argues that Ms. Waclawski's duties were limited to AES's government contracts, which accounted for no more than 40% of AES's total revenues. (*Id.*) Appellant further argues that Ms. Waclawski was not authorized to make substantive decisions affecting AES. Appellant asserts that Ms. Waclawski had no authority to select the projects for which AES would compete; to determine staffing requirements; to make pricing decisions; to borrow money on AES's behalf; or to negotiate vendor contracts. (*Id.*) Appellant further argues Ms. Waclawski was not indispensable to AES, noting that she took two 3-month maternity leaves during her tenure while other AES personnel performed her duties. (*Id.*)

Appellant argues that Ms. Waclawski's role at AES was limited to carrying out management's decisions, and that she had no critical influence or substantive control over AES. Based on Ms. Waclawski's role at AES, Appellant argues her functions do not rise to the level of a key employee. (*Id.* at 7.)

Additionally, Appellant contends that there is a clear fracture between itself and AES. Appellant emphasizes that AES holds no ownership interest in Appellant, and provides no loans or line of credit to Appellant. (*Id.* at 8.) Appellant argues that the subcontract arrangements it has had in the past with AES were arms-length transactions, and were necessitated by a limited pool of available firms. (*Id.*) Appellant further argues any assistance or resources received from AES were a result of a mentor-protégé agreement between the two concerns. (*Id.*) Appellant acknowledges that this mentor-protégé arrangement has not been approved by SBA. Nevertheless, Appellant argues the agreement protects it from a finding of affiliation based on the assistance it received from AES, because the agreement was executed consistent with SBA's policy regarding mentor-protégé agreements. (*Id.*)

Appellant distinguishes *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466 (2001), a case cited by the Area Office, from the situation here. Appellant observes that AES holds no ownership interest in Appellant, whereas in *Pointe Precision*, the affiliated concern had a 26% interest in the new concern. Further, in *Pointe Precision*, the three employees who formed the new concern all were former managers of key divisions, the affiliated concern retained power over important decisions of the new concern, and the new concern received financial guarantees from the affiliated concern. The instant case presents no similar circumstances.

Next, Appellant argues the Area Office erred in finding affiliation based on identity of interest. Appellant insists that the Area Office erred in concluding that Appellant's economic viability would be in danger if not for AES's involvement. (*Id.* at 11.) Appellant again asserts that AES does not provide a line of credit to Appellant and the Area Office's finding in this regard is factually incorrect. Appellant states that AES merely provides favorable credit terms with regard to payment for AES's work on subcontracts. (*Id.*)

Appellant further argues that it does not receive any contracts *from* AES; on the contrary, Appellant subcontracts work *to* AES. (*Id.*) Appellant asserts it has subcontracted limited portions of contracts it has received from DLA to AES. Appellant maintains that the only situation where AES paid Appellant was for consulting services, which amounted to approximately $*** in 2009, 2010, and 2011. Appellant asserts this compensation constituted only 5.2% of its gross revenues in 2009, and 1.1% in 2010, and thus does not establish economic dependence. Lastly, Appellant states that it no longer performs consulting services for AES, and thus it should not be considered an ongoing source of revenue. (*Id.* at 12.)

Appellant goes on to argue that the fact it has awarded subcontracts to AES does not establish Appellant's economic reliance on AES. (*Id.*) Appellant argues that, based on OHA precedent, a concern cannot be dependent on an affiliate for a contract directly awarded to it by the government, even if the affiliate is performing subcontract work. (*Id.* citing *Size Appeal of Diverse Construction Group, LLC*, SBA No. SIZ-5112 (2010).) Appellant also argues that AES is not the only vendor that Appellant subcontracts with, stating that it has over 60 vendors with

which it does business. (*Id.* at 13.)

Lastly, Appellant argues that it has no identical or substantially identical business or economic interests with AES that would support affiliation based on identity of interest. Appellant asserts there are no common investments between the two entities, AES does not own any interest in Appellant, AES provides no financial guarantees for Appellant, and AES does not provide any indemnification, loans or other financial support for Appellant. (*Id.*) Appellant asserts that it is a completely independent concern that makes its own business decisions. Thus, Appellant argues the Area Office erred in concluding that Appellant is economically dependent upon AES.

D. Motion to Supplement the Record

Accompanying its appeal petition, Appellant moved to introduce declarations from Ms. Waclawski and two AES officials concerning Ms. Waclawski's employment at AES, and the contractual relationships between the two companies; documents evidencing the credit terms between AES and Appellant; promissory notes pertaining to Appellant's line of credit with its bank; spreadsheets illustrating the vendors used by Appellant besides AES; and the mentor-protégé agreement between Appellant and AES. Appellant argues that there is good cause to admit this evidence because it "bear[s] directly on whether the newly-organized concern rule and/or the identity of interest rule support the Area Office's finding of an affiliation between AES and [Appellant]." (Motion at 3.) Appellant maintains that EnviroKleen's protest did not allege affiliation between Appellant and AES under the newly organized concern rule or identity of interest, nor did the Area Office ask Appellant to address these issues. As a result, Appellant asserts that it "could not have known that the determination of whether [Ms. Waclawski] had been a 'key employee' of AES and/or whether [Appellant] was 'economically dependent' on AES would be critical [issues in] the Area Office's size determination." (*Id.* at 2.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents

the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, Appellant has shown good cause to admit the new evidence. This evidence is relevant to the issues on appeal — such as the nature of Ms. Waclawski's responsibilities at AES — and will not unduly enlarge the issues at hand. Furthermore, Appellant has established that it could not have offered this evidence to the Area Office at an earlier time, because the evidence pertains to issues that Appellant learned of, for the first time, in the size determination. *Cf., Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 8-9 (2011) (finding good cause to admit rebuttal evidence when the challenged firm was not previously asked about facts central to the size determination). For these reasons, Appellant's motion is GRANTED and the new evidence is admitted into the record.

C. Analysis

The Area Office in this case found Appellant affiliated with AES on two grounds: the newly organized concern rule and identity of interest. As discussed *infra*, Appellant has successfully demonstrated that both theories are fundamentally flawed. Consequently, the appeal must be granted.

1. Newly Organized Concern Rule

The newly organized concern rule, 13 C.F.R. § 121.103(g), provides that concerns are affiliated if four required elements are met: (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010). In this case, Appellant focuses its attention on the first element, emphasizing that Ms. Waclawski was never an officer, director, stockholder, or managing member of AES. Accordingly, unless Ms. Waclawski is a former "key employee" of AES, the first element of the test fails, and there can be no violation of the newly organized concern rule. *Size Appeal of CJW Construction, Inc.*, SBA No. SIZ-5254, at 8 (2011) (reversing size determination when the first element of the newly organized concern rule was not met); *Size Appeal of J.W. Mills Mgmt.*, SBA No. SIZ-4909, at 5 (2008) ("If the challenged firm was not formed by shareholders, officers, or key employees of the large firm, it is unnecessary to examine the other requirements of 13 C.F.R. § 121.103(g).").

The Area Office determined that Ms. Waclawski's role as AES's Government Services

Manager made her a "key employee" of AES. (Size Determination at 5.) The Area Office recognized that Ms. Waclawski reported to higher-level management at AES, but considered this to be insignificant, because even very senior personnel typically work under the direction of other officials. (*Id.*) In addition, the Area Office found that AES evidently viewed Ms. Waclawski as indispensable, observing that AES later chose to reinstate her as a contractor, performing similar duties. (*Id.*)

I agree with Appellant that the Area Office's findings are insufficient to conclude that Ms. Waclawski is a former key employee of AES. Pursuant to SBA regulation, a "key employee" is an individual with "critical influence in or substantive control over the operations or management" of the concern. 13 C.F.R. § 121.103(g). In this case, the record does not demonstrate that Ms. Waclawski, as Government Services Manager, could exert such influence or control over AES. Rather, the sworn declarations submitted by Appellant make clear that Ms. Waclawski had no actual authority to engage in substantive decision-making for AES. The CEO and President of AES, Mr. David Torrence, attests that Ms. Waclawski "primarily served a data-gathering function for AES;" that she was "not authorized to make any decisions on behalf of AES;" that she had "no substantive influence or control over the government contracts work that AES performed;" that she was not involved at all in AES's private sector work, which accounted for the large majority of the firm's revenues; that other AES employees competently performed her duties during Ms. Waclawski's two 3-month leaves of absence; and that her compensation was comparable to that of an AES sales representative, not a senior manager. (Torrence Decl. at ¶¶ 8 - 14.) The declarations of Ms. Waclawski herself and her supervisor at AES, Mr. Matthew Stauber, likewise emphasize that Ms. Waclawski had no authority to make substantive decisions for AES, even with respect to Government contracting matters. Instead, such authority rested with Mr. Stauber or higher-level AES officials. I find, therefore, that Ms. Waclawski was not a key employee of AES, because she did not wield critical influence in or substantive control over the operations or management of the company.

The two cases cited by the Area Office are readily distinguishable from the instant case. In *Size Appeal of Sabre88, LLC,* SBA No. SIZ-5161 (2010), OHA found that that a former Vice President for Government Affairs was a "key employee." Beyond this title, however, the individual in question managed 33 employees, reported directly to the concern's owners, and had unique and substantive responsibilities within the company. *Sabre88*, SBA No. SIZ-5161, at 8. By contrast, Ms. Waclawski had no similar authority or responsibilities within AES. In *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466 (2001), there were three former key employees at issue, and OHA held that these individuals could be considered key employees even though they were subordinate to other company officials. *Pointe Precision*, SBA No. SIZ-4466, at 12. By contrast, Appellant in this case does not attempt to argue that Ms. Waclawski cannot be a key employee merely because she reported to higher-level management at AES. Rather, Appellant has persuasively shown that Ms. Waclawski lacked substantive authority and control at AES.

For these reasons, the first element of the newly organized concern rule is not met, and Appellant and AES are not affiliated under that rule.

2. Identity of Interest

The Area Office also determined that Appellant and AES share an identity of interest, and therefore are affiliated under13 C.F.R. § 121.103(f). Specifically, the Area Office stated that AES provides Appellant with a steady source of revenue and a line of credit, and that Appellant is economically dependent upon AES. (Size Determination at 6.) The Area Office questioned whether Appellant could remain a viable business without AES's assistance.

The Area Office's analysis is flawed due to factual inaccuracies in these findings. First, the Area Office erroneously mistook the favorable credit terms Appellant receives from AES to mean that a line of credit had been issued from AES to Appellant. These credit terms, however, apply only when payment is made to AES for work that Appellant has subcontracted to AES. (Torrence Decl. at ¶ 19.) Thus, the credit terms are not in the nature of an all-purpose loan or line of credit. There is no indication that Appellant receives any direct financial support or assistance — such as loans, indemnification, or financial guarantees — from AES.

There is likewise no evidence that Appellant depends on revenue from AES to remain economically viable. While Appellant concedes that it earned some income from AES for consulting services during the time period under review, these services amounted to approximately 5.2% of Appellant's revenues in 2009 and 1.1% in 2010. (Waclawski Decl. at ¶ 10.) Such limited amounts do not establish that Appellant is economically dependent upon AES, and certainly are not so extensive as to jeopardize Appellant's economic viability. *Rio Vista*, SBA No. SIZ-5316, at 10 (no economic dependence when the challenged firm derived only 8% - 27% of revenues from the alleged affiliate during the time period under review); *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307, at 7 (2011) ("a small amount of economic activity is not sufficient to create a commonality of interests to make the firms act in concert or as one."). Appellant also subcontracts work to AES. However, as Appellant points out, it is settled law that firms which subcontract work *to* alleged affiliates are not economically dependent upon those subcontractors. *Size Appeal of Accent Service Co.*, SBA No. SIZ-5237, at 6 (2011) ("That a challenged concern grants subcontracts to another concern is not evidence of dependence upon the second concern."); *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 7 (2010).

Here, it is clear that Appellant and AES have a contractual relationship that has spanned several years. Nevertheless, this contractual relationship does not create a level of economic dependence between the firms that would lead to a finding of affiliation. Accordingly, the Area Office erred in finding that Appellant and AES share an identity of interest.

IV. Conclusion

Appellant has shown that it is not affiliated with AES under the newly organized concern rule or identity of interest, and the size determination recognized that Appellant, by itself, is a small business. Accordingly, the appeal is GRANTED and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge