

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

SIZE APPEAL OF:

HBC Management Services, Inc.,

Appellant,

RE: Action Facilities Management, Inc.

Appealed From

Size Determination No. 2-2012-181

SBA No. SIZ-5409

Decided: October 19, 2012

APPEARANCES

Brad S. Miller, Esq., Cooper Morrison & Associates, LLC, Philadelphia, Pennsylvania,
for Appellant

Hopewell H. Darneille III, Esq., Katherine A. Calogero, Esq., J. Eric Whytsell, Esq.,
Jackson Kelly PLLC, Washington, D.C., for Action Facilities Management, Inc.

DECISION¹

I. Introduction and Jurisdiction

On September 11, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-181, finding Action Facilities Management, Inc. (AFM) to be an eligible small business under the size standard associated with Solicitation N40085-12-R-2205. The Area Office found AFM was not affiliated with AJ Solutions (AJS) under common management, 13 C.F.R. § 121.103(e), or identity of interest, 13 C.F.R. § 121.103(f).

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find AFM to be an ineligible small business. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

¹ This decision was initially issued on October 17, 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 withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

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 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 April 2, 2012, the U.S. Department of the Navy issued Solicitation N40085-12-R-2205 (RFP) seeking armed security guard services. The Contracting Officer (CO) set aside the procurement exclusively for participants in the 8(a) Business Development Program, and assigned North American Industry Classification System (NAICS) code 561612, Security Guards and Control Services, with a corresponding \$18.5 million average annual receipts size standard. Offers were due May 17, 2012.

On July 27, 2012, the CO notified unsuccessful offerors that AFM was selected for award. Appellant, an unsuccessful offeror, protested the award on August 1, 2012, alleging AFM's average receipts from 2009 to 2011 exceed the size standard. Specifically, alleged Appellant, AFM received nearly \$25 million from prime government contracts during this three-year period.

B. Size Determination

On September 11, 2012, the Area Office issued its size determination finding AFM is not affiliated with AJS, and is therefore an eligible small business.

The Area Office first considered whether AFM was affiliated with AJS under the common management rule. Under this rule, firms are affiliated “where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.” 13 C.F.R. § 121.103(e). In reaching its determination, the Area Office observed that AFM's secretary, Mr. Donald Hill, is also President of AJS. Mr. Hill is a minority stockholder in AJS but has no stock ownership interest in AFM. AFM's bylaws show its board of directors, and not its secretary, has the ability to control AFM. Ms. Diane Lewis is the sole member of AFM's board of directors and owns 100% of its stock. The Area Office reasoned that Mr. Hill does not have the ability to control AFM; thus, AFM and AJS are not affiliated under common management.

The Area Office then considered whether AFM and AJS are affiliated based on identity of interest. Under this theory of affiliation, individuals or firms with identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. *Id.* § 121.103(f). Where SBA determines such interests should be aggregated, an individual or firm may rebut that

determination with evidence showing that the interests deemed to be one are in fact separate. *Id.* The Area Office noted neither Mr. Hill nor Ms. Lewis has an ownership interest in another firm. Thus, AFM and AJS were not affiliated through common investments. The Area Office noted further that AJS provides consulting services to AFM, and that AJS derived 38% of its 2011 revenue from these subcontracts with AFM. The Area Office reasoned this economic activity did not amount to economic dependence because the 38% share of revenue was substantially less than 70%. *Size Appeal of Faison Office Prods.*, SBA No. SIZ-4834 (2007) (holding a firm is economically dependent on another, as a matter of law, when it receives 70% of its revenues from another firm).

Having found AFM was not affiliated with AJS, the Area Office went on to calculate the average annual receipts of AFM. The Area Office observed AFM self-certified as small in May 2012, and thus considered AFM's annual receipts for the years 2009, 2010, and 2011. According to AFM's tax returns and financial statements, its annual receipts were less than \$18.5 million.

C. Appeal Petition and New Evidence

On September 26, 2012, Appellant filed its appeal of the size determination with OHA. Appellant argues the size determination is clearly erroneous and should be reversed. This argument, however, is based on evidence not before the Area Office.

Appellant argues the Area Office should have found AFM and AJS affiliated because Ms. Lewis is Mr. Hill's mother.² Moreover, Mr. Hill is not just AFM's corporate secretary, but also its CFO. Appellant moves to submit publicly available new evidence to prove these assertions. Appellant contends it did not know of AJS prior to the size determination, so it lacked the opportunity to submit this evidence to the Area Office. Because this evidence responds specifically to the allegations in the size determination, will not enlarge the issues before OHA, and will not result in unfair prejudice to any party, Appellant argues there is good cause to admit it. *See, e.g., Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324 (2012); 13 C.F.R. § 134.308(a)(2).

Appellant argues AFM and AJS are affiliated under common management because, as CFO of AFM and President of AJS, Mr. Hill can control both companies.

Appellant contends AFM and AJS are affiliated under identity of interest based on Mr. Hill's and Ms. Lewis's mother-son relationship. Appellant argues this relationship creates a

² AFM concedes this relationship. Response at 5, n.6. AFM's completed Form 355 did not alert the Area Office to this matter because Question 21 of the Form 355 asks, "Does any family member of an owner, partner, officer, director, member or principal stockholder of business have any ownership interest in any of the *alleged or acknowledged* affiliates?" SBA Form 355 (emphasis added). In this case, Appellant did not allege affiliation in its protest, and AFM did not acknowledge affiliation. Protest Response, Exh. 1 at 7. Therefore, technically speaking, the Area Office never asked AFM whether Mr. Hill and Ms. Lewis are related, so AFM made no misrepresentation.

rebuttable presumption of affiliation. *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351 (2012). Appellant contends AFM has not rebutted this presumption.

Appellant also argues AJS is affiliated with K-Ray, Inc. (K-Ray). To support this argument, Appellant offers publicly available new evidence.

D. Response

On October 11, 2012, AFM responded to the appeal and motion to admit new evidence. AFM contends the motion to admit new evidence is without merit because Appellant could have submitted that information to the Area Office if Appellant had only looked for it. This failure to exercise due diligence, AFM argues, does not amount to good cause. *See, e.g., Size Appeal of Perry Mgmt, Inc.*, SBA No. SIZ-5100 (2009); *see also* 13 C.F.R. § 134.308(a).

AFM contends the appeal is procedurally improper and must be dismissed, because it presents new issues based on new evidence, neither of which Appellant presented to the Area Office. *See* 13 C.F.R. § 134.316(c). AFM points out Appellant did not protest AFM's size based on affiliation with AJS, but now on appeal Appellant contends the Area Office erred by not finding AFM and AJS affiliated. AFM contends it is “[the protester's] responsibility to present all relevant evidence and arguments to the Area Office when [the protester] submitted its protest.” *Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3.

Even assuming the firms are affiliated, AFM argues the appeal lacks substantive merit, as the firms' combined average annual receipts still fall within the \$18.5 million size standard. AFM argues the record before the Area Office establishes as much.

As for the allegation of affiliation with K-Ray, AFM points out the record contains information establishing K-Ray was dissolved and terminated five months prior to AFM's proposal submission; thus, K-Ray is a former affiliate. *Size Appeal of Hallmark-Phoenix 8, LLC*, SBA No. SIZ-5046, at 3 (2009). Appellant contends this former affiliation is irrelevant to the size determination because “annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size.” 13 C.F.R. § 121.104(d)(4).

IV. 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. Analysis

Appellant's arguments are based entirely on new evidence. However, OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Id.* at 10-11. 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, I find Appellant has not shown good cause to admit the new evidence. The evidence Appellant seeks to admit was publicly available at the time Appellant submitted its protest. *See Size Appeals of Baldt, Inc.*, SBA No. SIZ-4987, at 7 (2008) (excluding evidence presented on appeal that was publicly available at the time the protest was filed). Thus, if Appellant wished to have the new evidence considered, Appellant could, and should, have produced it to the Area Office during the size review. *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which “sets forth factual information that could have been communicated to the Area Office”); *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 17 (2010) (rejecting new evidence because “Appellant knew its relationship with [the alleged affiliate] was at issue and should have presented this information to the Area Office”). Accordingly, the new evidence accompanying the appeal petition is EXCLUDED.

Without this evidence, the appeal collapses. But even if OHA were to accept this evidence, the appeal would still fail. As AFM notes, AFM is still an eligible small business for the subject procurement if its receipts are combined with AJS's. Thus, even if the Area Office erred in this regard, such error is harmless.

As for K-Ray, the record clearly demonstrates it is a former affiliate of AFM. Nevertheless, Appellant raises this argument for the first time on appeal, which Appellant may not do. *Size Appeal of Fort Carson Support Servs.*, SBA No. SIZ-4740, at 3 (2005).

V. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. 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).

CHRISTOPHER HOLLEMAN
Administrative Judge