

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

SIZE APPEAL OF:

Bosco Constructors, Inc.,

Appellant,

RE: Roundhouse PBN, LLC

Appealed From  
Size Determination No. 05-2012-78

SBA No. SIZ-5412

Decided: October 31, 2012

APPEARANCES

James W. Bain, Esq., Benjamin, Bain, Howard & Cohen, LLC, Greenwood Village, Colorado, for Appellant

Pamela J. Mazza, Esq., Isaias “Cy” Alba, IV, Esq., Kelly A. DiGrado, Esq., PilieroMazza PLLC, Washington D.C., for Roundhouse PBN, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

This appeal involves a size determination of Roundhouse PBN, LLC (Roundhouse). Roundhouse is wholly owned by Tepa, LLC (Tepa), which in turn is owned by the Paskenta Band of Nomlaki Indians (Tribe), a Federally recognized Indian Tribe. In addition to Roundhouse, Tepa wholly owns seven other companies, including Tepa EC, LLC (Tepa EC), Komada, LLC (Komada), and Torix General Contractors, LLC (Torix).<sup>2</sup>

On September 7, 2012, the U.S. Small Business Administration (SBA) Office of

---

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

<sup>2</sup> The Tribe has novated all Torix's contracts to Komada and has ceased running any revenue through Torix. Torix “is essentially a dormant and non-operating business concern.”

Government Contracting, Area V (Area Office) issued Size Determination No. 5-2012-078, finding Roundhouse to be an eligible small business under the size standard associated with Solicitation No. W912LC-11-R-0006. Bosco Constructors, Inc. (Appellant) contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse, and determine Roundhouse is not a small business due to its affiliation with Tapa, Tapa EC, Komada, and Torix. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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 Protests

On July 12, 2011, the U.S. Department of the Army and Air Force, National Guard Bureau (National Guard) issued Solicitation No. W912LC-11-R-0006 (RFP) for the construction of the North Colorado Springs Readiness Center. The Contracting Officer (CO) set aside the procurement exclusively for small businesses and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a \$33.5 million average annual receipts size standard. Proposals were due August 12, 2011. Appellant, Roundhouse, and nine other offerors submitted timely proposals. On March 9, 2012, the CO notified Appellant that Roundhouse was the apparent awardee.

On March 16, 2012, Appellant initiated a size protest of Roundhouse. Appellant alleged Roundhouse was not an eligible small business due to its affiliation with Tapa and Tapa's subsidiaries.

On March 20, 2012, the Area Office issued Size Determination No. 05-2012-33, dismissing the protest pursuant to 13 C.F.R. § 121.1001(a)(1)(i). The Area Office determined Appellant “was eliminated [from the competition] for reasons unrelated to size” and therefore lacked standing to protest. In *Size Appeal of Bosco Constructors, Inc.*, SBA No. SIZ-5345 (2012), OHA determined the Area Office erred on this point, as Appellant was not in fact eliminated for reasons unrelated to size. Nevertheless, OHA dismissed the appeal for mootness, because the National Guard was reexamining its decision to award the contract to Roundhouse. *Bosco Constructors*, SBA No. SIZ-5345, at 3.

The same day the Area Office dismissed Appellant's protest, the Area Director initiated its own size protest of Roundhouse, pursuant to 13 C.F.R. § 121.1001(a). On April 20, 2012, the Area Office issued Size Determination No. 05-2012-034, finding Roundhouse had exceeded the size standard due to its ostensible subcontractor relationship and general affiliation with Tapa EC, Komada, and Torix. Roundhouse filed a timely appeal of the size determination with OHA. On July 20, 2012, OHA reversed the size determination. *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012).

In a debriefing letter dated August 8, 2012, the CO informed Appellant and other disappointed offerors that, after reexamining its decision, it would still award the contract to Roundhouse. On August 10, 2012, Appellant protested this award, alleging Roundhouse was affiliated with its sister companies by virtue of common ownership, management, and offices.

#### B. Size Determination

On September 7, 2012, the Area Office issued a size determination based on Appellant's second protest. Size Determination No. 05-2012-078. The Area Office determined the protest was timely because Appellant did not learn until August 8, 2012 that Roundhouse was again the apparent successful offeror.

The Area Office determined Roundhouse is not affiliated with its sister companies and is therefore an eligible small business.<sup>3</sup> In reaching this determination, the Area Office noted the affiliation exemption for tribally owned concerns allows for common ownership, management, and performance of administrative services between business concerns owned and controlled by Indian tribes and their subsidiaries. 13 C.F.R. § 121.103(b)(2). The Area Office observed that Roundhouse and its sister companies are all owned by the Paskenta Band of Nomlaki Indians, a Federally recognized Indian tribe. The Area Office then reasoned the affiliation exemption for tribally owned concerns exempts Roundhouse from affiliation on all theories Appellant alleged. As a result, concluded the Area Office, Roundhouse is not affiliated with its parent or sister companies.

The Area Office also noted Roundhouse's denial that it shares common office space or a phone number with Tapa, but reasoned it was likely Tapa and its subsidiaries have office spaces in close proximity. Even so, determined the Area Office, that is not a basis for finding affiliation among tribally owned entities.

The Area Office then considered Appellant's allegation that Roundhouse's primary NAICS code is 237110, Water and Sewer Line and Related Construction. The Area Office confirmed that, according to Roundhouse's SBA Form 355, Roundhouse received all its revenue under NAICS code 237110. However, explained the Area Office, a concern is not precluded from placing an offer on a contract with a NAICS code different from that under which it has received its prior revenue. To be an eligible small business, the offeror must not exceed the size standard for the NAICS code assigned in the solicitation. Because Roundhouse was small for the instant procurement, it was irrelevant that Roundhouse did not have prior revenue from contracts under the designated NAICS code, 236220, Commercial and Institutional Building Construction.

---

<sup>3</sup> Because the previous size determination, 05-2012-034, involved several other theories of affiliation, which OHA ruled on in *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012), the Area Office declined to consider theories beyond those alleged in the protest.

### C. Appeal

On September 18, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains the size determination is clearly erroneous and should be overturned.

Appellant first contends the Area Office “effectively negated its ability to appeal through various procedural mechanisms.” Appeal at 2. Appellant argues it should have the opportunity to challenge Roundhouse's versions of the facts and relevant law. To make its case, Appellant requests unredacted versions of Size Determination No. 5-2012-034 and OHA's decision in *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012), as well as the opportunity to file a supplemental appeal based on this redacted information.

Next, Appellant contends Roundhouse lacks the experience to perform the contract and is therefore unduly reliant on its parent and sister companies. Appellant emphasizes that Roundhouse constructs water and sewer lines, not buildings. Appellant highlights OHA's determination that, “Tepa assisted Roundhouse in estimating the costs for the proposal, bonded the contract (sic), and signed the proposal.” Appeal at 3 (citing *Roundhouse*, SBA No. SIZ-5383, at 6). OHA also noted the Area Office's determination that, “Roundhouse had no previous experience in this NAICS code (236220) or equivalent contract of this magnitude.” *Id.*

Appellant argues OHA's decision in *Roundhouse* effectively eliminates any size restrictions for Indian tribes, because such tribes can create new small businesses that can rely on the parent and sister companies for experience, bonding, and personnel. Moreover, the parent company can shift personnel among its subsidiaries without size consequences. Appellant contends this interpretation of SBA regulations is inherently unfair and flies in the face of the purposes and goals of the Small Business Act (the Act).

Appellant then submits new evidence to challenge Roundhouse's denial that it shares a common address or phone number with Tepa. According to this information, argues Appellant, Roundhouse has reported inconsistent telephone numbers. Appellant concludes this evidence shows “Roundhouse is ‘working the system’ to obtain small business set asides even though it is part of a larger enterprise.” Appeal at 6.

On October 4, 2012, Appellant submitted a supplement to the appeal.<sup>4</sup> Appellant argues the Area Office erred in dismissing Appellant's protest, Size Determination No. 05-2012-33, and urges OHA to remand the case back to the Area Office.

Appellant argues the Area Office's dismissal in Size Determination No. 05-2012-33 denied Appellant the opportunity to participate in Size Determination No. 05-2012-034, intervene in *Roundhouse*, or seek reconsideration. Given the chance to intervene, Appellant

---

<sup>4</sup> OHA received the supplement at 8:30 p.m. on October 3, 2012. “Any submission received after 5 p.m. eastern time is considered filed the next business day.” 13 C.F.R. § 134.204(b)(2). Therefore, OHA considers the supplement filed on October 4, 2012.

could have obtained discovery, 13 C.F.R. § 134.213, and explored Roundhouse's statements and assertions. As a result of the dismissal, Appellant argues it now faces a higher burden of proof. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (OHA can reverse the size determination only if a “definite and firm conviction” exists that the Area Office “made key findings of law or fact that are mistaken.”). Appellant also contends that, had it been a party to Size Determination No. 05-2012-034 or *Roundhouse*, it would have received unredacted versions of the corresponding decisions.

Appellant goes on to argue the Area Office failed to fully investigate Roundhouse's affiliation with its sister companies. Despite the exemption to affiliation, Appellant points out “affiliation may be found for other reasons.” 13 C.F.R. § 121.103(b)(2)(ii). In Appellant's view, the Area Office did not address whether these “other reasons” exist. Appellant argues the fact that Tepa pooled its subsidiaries' experience, employees, financing, and expertise is sufficient reason to find affiliation.

Appellant maintains the exemption for common ownership does not permit a tribally owned concern to provide experience, essential services, or assistance with estimating and financing. Moreover, argues Appellant, the exemption applies only if adequate payment is provided for those services. Appellant contends the Area Office made no findings as to whether Roundhouse made adequate payment.

Appellant points out 15 U.S.C. § 636(j)(10)(J)(ii) exempts Indian tribes unless they obtain “a substantially unfair competitive advantage within an industry category.” According to Appellant, Roundhouse obtained such an unfair advantage by using its sister companies for their experience and financing without having to subcontract with them. However, argues Appellant, the Area Office made no findings on this issue.

According to Appellant, Roundhouse argued it was “protected by the Mentor Protégé Size Exemption in 13 C.F.R. § 121.103(b)(2)(ii).” Appellant contends Roundhouse provided no proof that Tepa or any of its entities were in that program. Appeal at 7.

Next, Appellant argues Roundhouse was unduly reliant on its sister companies to perform the contract. Appellant emphasizes Roundhouse was formed on May 11, 2010, as Tepa's wholly owned subsidiary. Roundhouse had four employees, and all its revenues were from contracts under NAICS Code 237110, Water and Sewer Line and Related Construction. Roundhouse had never constructed a large building. The only relevant experience it could point to was underground design and construction.

Appellant casts doubt on Roundhouse's representation that it will perform the minimum 15% of the labor costs. Reiterating this is a \$17 million construction contract that Roundhouse would have to perform with its four employees, Appellant calculates each of Roundhouse's four employees will charge \$637,500 to reach that amount.

Appellant cites sections of the RFP and contends Roundhouse lacked the experience to perform those requirements. In Appellant's view, the only way the National Guard could deem Roundhouse qualified would be if the National Guard accepted the experience of Tepa and its

subsidiaries.

Appellant contends the licensed geologist and superintendent Roundhouse proposed come from Tapa. Appellant also contends Tapa provided financial and technical assistance by bonding the contract and performing the cost estimates. Appellant argues the proposal's erroneous reference to one of Roundhouse's sister companies rather than Roundhouse is evidence that Tapa uses its subsidiaries interchangeably.

Appellant argues Roundhouse is a newly organized concern. In Appellant's view, the exemption for common ownership does not allow a company to create spin-off companies so as to still qualify for small business set asides.

Appellant goes on to argue Tapa and its subsidiaries have identical business interests because they are all owned by the Paskenta Band of Nomlaki Indians, Tapa transfers employees between subsidiaries, and the subsidiaries operate in the same line of work. Appellant contends this case is similar to *Size Appeal of Blue Court Construction*, SBA No. SIZ-5077 (2009), in which OHA affirmed the finding of identity of interest.

Appellant contends, although Roundhouse did not subcontract with its sister companies, Roundhouse violates the spirit of the ostensible subcontractor rule. In this regard, Appellant urges OHA to consider substance over form and find Roundhouse did in fact violate the ostensible subcontractor rule.

Appellant next argues Roundhouse, Tapa, and Tapa's other subsidiaries are de facto joint venturers, 13 C.F.R. § 121.103(h). Appellant describes the facts of *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011), but does not explain why that case is similar to the instant one.

Finally, Appellant contends Tapa, Roundhouse, and Tapa's other subsidiaries are affiliated under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). To support this argument, Appellant reiterates the arguments above.

#### D. Response

On October 12, 2012, Roundhouse responded to Appellant's supplement to the appeal. Roundhouse argues there is no clear error of law or fact in the Area Office's determination that Roundhouse is a small business for the instant procurement.

Roundhouse first argues Appellant was not deprived of remedies or discoverable information by either the Area Office's dismissal of its protest or Appellant's exclusion from Size Determination No. 05-2012-034. Roundhouse argues Appellant could have participated in that size determination by intervening under 13 C.F.R. § 134.309(a). Roundhouse also argues Appellant could have appealed the dismissal of its first size protest.<sup>5</sup> Roundhouse contends

---

<sup>5</sup> As indicated above, Appellant appealed that dismissal. At that time, however, the protest was moot. *Bosco Constructors*, SBA No. SIZ-5345.

Appellant should have made the arguments on appeal in the second protest.

Next, Roundhouse addresses Appellant's contention that Appellant should receive unredacted versions of the relevant size determinations and OHA decisions. Roundhouse emphasizes its proposal is absolutely exempted from disclosure under the Freedom of Information Act (FOIA). 41 U.S.C. § 4702(b)(2); 48 C.F.R. § 24.202. Other redacted information is proprietary and confidential, and its release would cause Roundhouse competitive harm; thus, it is protected under FOIA, 5 U.S.C. § 552, and the Trade Secrets Act, 18 U.S.C. § 1905. As a result, even if Appellant participated in the prior proceedings, Appellant would not have had access to unredacted copies of the pleadings or decisions.

Roundhouse then addresses Appellant's contention that Tepa, Roundhouse, and the other subsidiaries are affiliated for “other reasons.” According to Roundhouse, the “other reasons” Appellant argues are the newly organized concern rule, the identity of interest rule, the ostensible subcontractor rule, the totality of the circumstances, shared administrative services, and an “unfair comparative advantage.”<sup>6</sup> Roundhouse contends it was reasonable that the Area Office did not consider these theories of affiliation, as the second protest did not raise these issues. Rather, the second protest alleged affiliation based on common management, ownership, and offices. Roundhouse contends, “An area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012). Rather, it “is vested with the discretion to decide whether or not it will examine additional issues beyond those raised in the protest.” *Size Appeal of TFab Mfg., LLC*, SBA No. SIZ-5379, at 8 (2012). Moreover, argues Roundhouse, because Appellant raises these “other reasons” for the first time on appeal, those issues are not properly before OHA. 13 C.F.R. § 134.316(c).

Roundhouse goes on to argue that even assuming Appellant raised these new arguments in the protest, the Area Office correctly deferred to OHA's precedent in *Roundhouse. Size Appeal of Uniband Enters.*, SBA No. SIZ-4529, at 7 n.9 (2003) (noting an area office's disregard of OHA's decisional law is a “clearly erroneous basis for its decision”). In *Roundhouse*, OHA held there was no violation of the ostensible subcontractor rule because there was no agreement to subcontract. *Roundhouse*, SBA No. SIZ-5383, at 15. Due to the tribal exemption, Roundhouse and Tepa EC were not affiliated based on the newly organized concern rule, and— despite common ownership and management— affiliation did not exist based on identity of interest or the totality of the circumstances. *Id.* at 17-19.

To the extent Appellant is arguing to overturn OHA's previous decision, Roundhouse contends such an action would be contrary to the plain language of the Act's affiliation exemption for tribal entities. *See* 15 U.S.C. § 636(j)(10)(J)(ii)(II). Roundhouse insists Appellant has not provided a compelling reason as to why the exemption does not apply here. As such, there is no basis for overturning Size Determination 05-2012-078.

---

<sup>6</sup> Roundhouse argues the mention of the Mentor-Protégé exemption in Size Determination No. 05-2012-078 is an insignificant typographical error. Rather, the Area Office intended the general tribal exemption.

Roundhouse concludes Appellant's protests and appeals evince a fundamental misunderstanding of the relevant law. Roundhouse emphasizes SBA's size regulations provide a blanket exemption from affiliation for wholly owned entities of Indian tribes and concerns owned by those entities. In Roundhouse's view, Appellant is wasting judicial time and resources for no reason other than its objection to the protections the Act confers on tribal entities.

## II. 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

Appellant attached to its appeal new publicly available evidence to demonstrate that Roundhouse and Tapa do in fact share office space. Appellant did not move to submit this evidence or argue there is good cause to do so.

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).

Here, I find Appellant has not shown good cause to admit the new evidence. Appellant did not file and serve a motion to admit this evidence, nor does Appellant argue there is good cause to admit it. Although this evidence is relevant to whether Tapa and Roundhouse share an office, Appellant provides no explanation as to why this information was not presented to the Area Office. 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”). For these reasons, Appellant's new evidence is EXCLUDED.

### C. Analysis

Appellant is a wholly owned subsidiary of Tapa, which also wholly owns seven other companies. Further, the companies all share common officers and directors. Thus, under ordinary circumstances, Appellant plainly would be affiliated with its parent and sister companies by virtue of their common ownership and management. 13 C.F.R. § 121.103(c) and (e).

As the Area Office recognized, however, Tapa is owned by the Tribe, and SBA regulation authorizes an exception from affiliation for tribally-owned concerns. Specifically, the exception provides:

- (i) Business concerns owned and controlled by Indian Tribes ... or wholly-owned entities of Indian Tribes ... are not considered affiliates of such entities.
- (ii) Business concerns owned and controlled by Indian Tribes ... or wholly-owned entities of Indian Tribes ... are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

13 C.F.R. § 121.103(b)(2). The Area Office concluded that this exemption shielded Roundhouse from Appellant's protest allegations of common ownership and management. I find no error in this determination. The regulation clearly permits common ownership and management among tribally owned concerns. Nor do I find error in the Area Office's determination that Roundhouse and Tapa do not share office space. The record indicates Roundhouse leases this space from Tapa.

Appellant's argument that it should have access to unredacted copies of OHA's decision in *Roundhouse* and Size Determination No. 5-2012-034 is also meritless, as it is contrary to law. The information redacted in those decisions is pertinent to Roundhouse's proposal. Release of that information is explicitly barred. 41 U.S.C. § 4702(b)(2); 48 C.F.R. § 24.202. The release of any other redacted information would cause Roundhouse competitive harm; thus, it is proprietary and confidential under FOIA, 5 U.S.C § 552, and the Trade Secrets Act, 18 U.S.C. § 1905.

Appellant argues for the first time on appeal that Tapa provided key personnel and financial and technical assistance; Roundhouse is a newly organized concern; Roundhouse, Tapa, and its subsidiaries are affiliated based on an identity of interest and the totality of the circumstances; and Roundhouse violates the ostensible subcontractor rule. Because Appellant did not include these arguments in its protest, they are not properly before OHA. *Size Appeal of Fort Carson Support Servs.*, SBA No. SIZ-4740, at 3 (2005). Besides, OHA already decided these issues in *Roundhouse*.

Appellant argues the Area Office should have investigated whether there were “other reasons” to find Roundhouse affiliated with the other tribal entities under 13 C.F.R. § 121.103(b)(2)(ii). Appellant also contends the size determination is clearly erroneous because the Area Office made no determination as to whether Roundhouse made adequate payment for the common administrative services or whether Roundhouse receives a substantially unfair advantage. These arguments are unpersuasive because “an area office is vested with the discretion to decide whether or not it will examine additional issues beyond those raised in the protest.” *Tfab*, SBA No. SIZ-5379, at 8. Because Appellant did not allege these other reasons in the protest, the Area Office was not required to, and reasonably chose not to, investigate them.

Appellant argues OHA's decision in *Roundhouse* effectively eliminates size restrictions for Indian tribes. Appellant should note that this exception is rooted in the Act. *See* 15 U.S.C. § 636(j)(10)(J)(ii)(II). Therefore, to the extent Appellant disagrees with the exception itself, OHA is not the appropriate forum for such arguments.

Appellant argues the Area Office made no determination as to whether Roundhouse was in the mentor-protégé program. This argument is based on a typographical error in the size determination. This error is especially apparent in light of the facts that (1) there has been no mention of the mentor-protégé program in this case, and (2) the regulation following this mention refers to the general tribal exemption.

### III. Conclusion

For the reasons discussed above, 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