

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

SIZE APPEAL OF:

Assessment and Training Solutions  
Consulting Corporation,

Appellant,

RE: SIMMEC Training Solutions

Appealed From  
Size Determination No. 06-2012-116

SBA No. SIZ-5421

Decided: November 23, 2012

APPEARANCES

James S. DelSordo, Esq., Argus Legal, LLC, Manassas, Virginia, for Assessment and Training Solutions Consulting Corporation

Steven M. Miyares, Esq. and R. Melissa Yatsko, Miyares & Knight, P.C., Norfolk, Virginia, for SIMMEC Training Solutions

DECISION

I. Introduction and Jurisdiction

This is a protestor's appeal of a size determination pertaining to SIMMEC Training Solutions (SIMMEC). On August 29, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2012-116, finding that SIMMEC is a small business. Assessment and Training Solutions Consulting Corporation (Appellant), which had protested SIMMEC's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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 Protest

On June 26, 2012, the U.S. Department of the Navy (Navy) issued Request for Quotations (RFQ) No. M00318-12-T-0042 seeking a contractor to provide combat trauma training for military personnel at Marine Corps Base Hawaii. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 611699, All Other Miscellaneous Schools, with a \$7 million annual receipts size standard. SIMMEC self-certified as a small business with its offer on July 10, 2012.

On August 3, 2012, the CO announced that SIMMEC had been awarded the contract. That same day, Appellant filed a size protest with the CO. Appellant alleged that SIMMEC is affiliated with Deployment Medicine Consultants, Inc. (DMI) through common management. Specifically, Appellant asserted that SIMMEC's owner, Ms. Merri Tyrrel, is also a key employee of DMI, and that Ms. Tyrrel "exercises substantial control" over both companies. (Protest at 2.) In addition, Appellant alleged that SIMMEC is affiliated with DMI under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h). Appellant maintained that SIMMEC cannot perform the instant procurement independently, and is unusually reliant upon DMI. The CO forwarded the size protest to the Area Office for a size determination.

On August 8, 2012, Appellant submitted a supplemental size protest to the CO, and the following day forwarded a copy to the Area Office. In its supplemental protest, Appellant asserted that SIMMEC's proposal does not comply with the contract's "Limitations on Subcontracting" clause, 48 C.F.R. § 52.219-14. Appellant argued that, based on information in a Dun & Bradstreet (D&B) report, SIMMEC does not have enough employees to perform at least 50% of the contract.

### B. Area Office Proceedings and Size Determination

On August 20, 2012, SIMMEC responded to the protest and submitted other requested documents to the Area Office. SIMMEC explained that it was established in April 2008, and that Ms. Tyrrel is the company's sole owner. SIMMEC denied any affiliation with DMI, and stated that Ms. Tyrrel has never worked for DMI. Asked whether SIMMEC would be subcontracting work to DMI on this procurement, and, if so, what work, SIMMEC responded, "No subcontracting." On August 27, 2012, the Area Office inquired how SIMMEC would perform the instant contract given its limited number of staff. SIMMEC responded that because this work is intermittent, SIMMEC hires independent contractors to supplement its workforce.

On August 29, 2012, the Area Office issued its size determination concluding that SIMMEC is an eligible small business. The Area Office summarized the allegations in Appellant's original protest, and noted that Appellant had furnished no supporting documentation. (Size Determination at 1.) The Area Office found that SIMMEC is not affiliated with DMI. The Area Office determined that Ms. Tyrrel "has never been employed by DMI or

any DMI affiliates”; that SIMMEC has “no relationship with DMI” and has never obtained any form of assistance from DMI; and that SIMMEC's proposal shows “no plans to use DMI or any other entity as a subcontractor” for the instant procurement. (*Id.* at 2.) The Area Office calculated SIMMEC's annual receipts for its three most recent fiscal years, and concluded that SIMMEC does not exceed the applicable \$7 million size standard.

The size determination did not address, or even acknowledge, Appellant's supplemental protest. In addition, the size determination incorrectly stated that SIMMEC was founded in 2012, instead of 2008. (*Id.*)

### C. Appeal Petition

On September 12, 2012, Appellant filed the instant appeal. After reiterating the contentions raised in its protest and supplemental protest, Appellant argues that the size determination is clearly erroneous and should be reversed. In particular, Appellant complains that the Area Office “totally ignored and failed to consider [Appellant's] argument concerning SIMMEC's violation of the ostensible subcontractor rule and the limitation on subcontractors.” (Appeal at 7.) Alternatively, Appellant maintains that, insofar as the Area Office did examine these issues, the size determination did not adequately describe the rationale for the Area Office's conclusions, and the matter should be remanded for proper analysis. (*Id.* at 8.) Appellant stresses that SIMMEC, with its limited workforce, cannot staff this contract while remaining compliant with applicable clauses and regulations.

Appellant also asserts that the Area Office factually erred in its “failure to ascertain” SIMMEC's average annual receipts. (*Id.* at 2.) Appellant observes that the size determination incorrectly indicated that SIMMEC was established in 2012; consequently, suggests Appellant, the Area Office may have mistakenly believed that SIMMEC is a new entity, and may not have considered SIMMEC's receipts for all of the years in question. (*Id.* at 7.)

### D. SIMMEC's Response and Appellant's Reply

On October 1, 2012, SIMMEC responded to the appeal. SIMMEC vigorously objects to Appellant's reliance on the supplemental protest, a document SIMMEC had not received during the Area Office proceedings and to which it could not respond. SIMMEC asserts that the issue raised in Appellant's supplemental protest and reiterated on appeal is not properly before OHA.

Also on October 1, 2012, Appellant filed a brief reply without requesting leave to do so. In the reply, Appellant restates its view that its supplemental protest was properly submitted and should be considered on appeal.<sup>1</sup>

On October 2, 2012, the CO notified OHA that the RFQ has been canceled.

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<sup>1</sup> In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Here, Appellant has not shown good cause to admit a reply, and the reply therefore is excluded from the record.

### 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. Analysis

Appellant maintains that the size determination should be reversed because the Area Office “totally ignored and failed to consider” Appellant's protest allegations concerning the Limitations on Subcontracting clause and the ostensible subcontractor rule. (Appeal at 7.) In addition, Appellant argues that, because the size determination incorrectly stated that SIMMEC was founded in 2012, the Area Office may not have examined tax return information for the appropriate years in computing SIMMEC's average annual receipts. As discussed below, neither of Appellant's arguments is meritorious. Therefore, the appeal must be denied.

Appellant is correct that the Area Office disregarded the allegation concerning the Limitations on Subcontracting clause, 48 C.F.R. § 52.219-14. It is settled law, however, that compliance with the Limitations on Subcontracting clause is a matter of contractor responsibility for the procuring agency, not SBA, to determine. 13 C.F.R. § 125.6(a) and (f); *Size Appeal of CorTrans Logistics, LLC and Central Delivery Service*, SBA No. SIZ-4691, at 10-11 (2005); *Size Appeal of SDS Int'l, Inc.*, SBA No. SIZ-4541, n.3 (2003). Accordingly, the Area Office did not err by failing to address this issue. *Cf.*, *Size Appeals of Excalibur Laundries, Inc.*, SBA No. SIZ-5317, at 5 (2012) (no reversible error when area office remained silent on issues that it was not required to review or investigate).

The Area Office did explore Appellant's ostensible subcontractor rule allegation, and found that DMI was not a subcontractor to SIMMEC for the instant procurement. *See* Section II.B, *supra*. Because there is no subcontracting relationship between the firms, SIMMEC and DMI cannot be affiliated under the ostensible subcontractor rule. *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383, at 15 (2012) (“Logically, then, if there is no subcontracting arrangement, the ostensible subcontractor rule will not apply.”); *Size Appeal of Active Deployment Sys. Inc.*, SBA No. SIZ-5230, at 8 (2011); *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098, at 7 (2009). Accordingly, the Area Office did not ignore this portion of Appellant's protest, but rather found the allegation to be meritless. Moreover, the ostensible subcontractor rule is a contract-specific issue, which is rendered moot by cancellation of the solicitation. *E.g.*, *Size Appeal of Vista Technology, Inc.*, SBA No. SIZ-4050, at 2 (1995) (dismissing appeal as moot “[b]ecause the issues raised by the appeal and the determination are contract-specific and the Contracting Officer has cancelled the solicitation.”). Pursuant to 13 C.F.R. § 134.316(c), OHA will not adjudicate issues which have become moot. Here, given that

the underlying procurement has now been cancelled, it is immaterial whether SIMMEC's proposal would have contravened the ostensible subcontractor rule.

Lastly, Appellant emphasizes that the size determination mistakenly stated that SIMMEC was formed in 2012. Appellant therefore theorizes that the Area Office may have erred in computing SIMMEC's average annual receipts. The record indicates, however, that, notwithstanding the reference to an incorrect date, the Area Office properly considered SIMMEC's last three fiscal years of receipts. Appellant has not established any substantive error in the Area Office's analysis or computations.

#### IV. 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).

KENNETH M. HYDE  
Administrative Judge