United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: VMX International, LLC, Appellant, Appealed From Size Determination No. 4-2012-61 Solicitation No. FA2835-12-R-0013	SBA No. SIZ-5427 Decided: December 18, 2012

APPEARANCES

William A. Shook, Esq., and G. Matthew Koehl, Esq., The Law Offices of William A. Shook PLLC, Washington, D.C., for VMX International, LLC

Joseph M. Goldstein, Esq., Shutts & Bowen LLP, Fort Lauderdale, Florida, for Onopa Services, LLC

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DECISION[1]

I. Introduction and Jurisdiction

On August 28, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2012-61 finding that VMX International, LLC (Appellant) is not a small business under the size standard associated with Solicitation No. FA2835-12-R-0013.[2] Specifically, the Area Office determined that Appellant is affiliated with Waste Management, Inc. (WM) through identity of interest, 13

[1] This decision was initially issued on December 11, 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.

[2] The solicitation was originally issued as FA2835-12-R-0015 but was later renumbered.

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 conclude that Appellant is a small business. 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. The record reflects that the size determination was issued August 28, 2012, but not received by Appellant until September 10, 2012. 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 May 16, 2012, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA2835-12-R-0013 (RFP) seeking refuse collection and disposal services at Hanscom Air Force Base, Massachusetts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of $12.5 million average annual receipts.

On July 19, 2012, the CO announced that Appellant was the apparent awardee. On July 26, 2012, Onopa Services, LLC (Onopa), a disappointed offeror, protested Appellant's size. The protest alleged that Appellant is economically dependent upon WM, a large business. In addition, Onopa contended that Appellant and WM are affiliated under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

B. Size Determination

On August 28, 2012, the Area Office issued its size determination finding that Appellant is not a small business. The Area Office rejected Onopa's protest allegations regarding the ostensible subcontractor rule, but determined that Appellant is affiliated with WM through economic dependence.

The Area Office found that Ms. Vickie J. Lewis owns a majority of Appellant, and therefore has the power to control the company under 13 C.F.R. § 121.103(c)(1). (Size Determination at 2.) Ms. Lewis also holds a majority interest in a Curves Fitness Center (Curves). Because Ms. Lewis has the power to control both Appellant and Curves, the entities are affiliated under 13 C.F.R. § 121.103(a)(1).

The Area Office next examined potential affiliation between Appellant and WM. The Area Office found that, based on data furnished by Appellant itself, WM accounted for [XX]%

of Appellant's income in 2008; [XX]% in 2009; [XX]% in 2010, and [XX]% in 2011. (*Id.*) The Area Office explained that, according to OHA precedent, economic dependence exists as a matter of law when one firm derives 70% or more of its revenues from another. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007). The Area Office also noted that WM acts as Appellant's subcontractor in [***] of Appellant's 13 Federal waste collection contracts. (Size Determination at 4.) Based on its findings, the Area Office determined that Appellant and WM are affiliated under 13 C.F.R. § 121.103(f). (*Id.* at 2-4.)

The Area Office next considered Onopa's claim that Appellant and WM are affiliated under the ostensible subcontractor rule, and found no such affiliation. The Area Office determined that Appellant will perform the primary and vital requirements of the instant contract, and that Appellant is not unusually reliant on WM. As a result, the firms are not affiliated under the ostensible subcontractor rule. (*Id.* at 4-7.)

The Area Office concluded that Appellant's average annual receipts, when aggregated with those of WM, exceed the applicable size standard, thereby rendering Appellant other than small. (*Id.* at 8.)

C. Prior Size Determination

The Area Office previously issued another size determination (4-2012-42) to Appellant on May 3, 2012, in conjunction with a different procurement. The prior size determination stemmed from a CO's protest against a planned sole-source award to Appellant.

In the prior determination, the Area Office found that Appellant was not affiliated with WM under the ostensible subcontractor rule. (Size Determination 4-2012-42, at 2-5.) The Area Office also addressed the issue of economic dependence, stating:

> The fact that [Appellant] earns income from [WM], even significant income, does not establish the existence of ostensible subcontracting. . . . [Appellant] has satisfactorily and convincingly explained to [the] Area [Office] why [[Appellant] is not economically dependent upon [WM]. [Appellant] has provided a sufficiently persuasive argument that the loss of [WM] as a customer would not result in long-term harm to [Appellant].

Id. at 1-2, n.1.

Size Determination 4-2012-42 was not appealed to OHA.

D. Appeal

On September 18, 2012, Appellant filed an appeal of the instant size determination with OHA. Appellant maintains that the determination is clearly erroneous and should be reversed.

Appellant first argues that the Area Office erred by disregarding Size Determination 4-2012-42, which had found no identity of interest between Appellant and WM. (Appeal at 13.)

According to Appellant, the prior determination specifically concluded that Appellant was not economically dependent upon WM, based on the same operative facts that are currently at issue. (*Id.* at 14.) Appellant insists that the concept of *res judicata* must apply, and that the prior determination must be given binding effect. Appellant quotes extensively from *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5344 (2012), *recons. denied*, SBA No. SIZ-5394 (2012) (PFR), in which OHA held that an area office clearly erred by reexamining issues that OHA had previously adjudicated.

Next, Appellant maintains that the Area Office erred in basing its determination partly on the fact that WM is Appellant's subcontractor in [[***] of 13 Federal contracts. (*Id.*) Appellant argues that the fact that Appellant subcontracts to WM cannot support a finding that Appellant is economically dependent upon WM. Lastly, Appellant states that it uses other concerns, which are competitors of WM, as subcontractors on other contracts. Appellant contends this shows it is not economically dependent upon WM for its survival. Appellant argues it does not share an identity of interest with WM, as contemplated by 13 C.F.R. 121.103(f), and as such there is no affiliation between the firms.

Accompanying its appeal petition, Appellant moves to supplement the record with two additional documents: Size Determination 4-2012-42, and a letter sent by Appellant to the Area Office during the earlier size review, indicating that Appellant derived a large portion of its revenues from WM during 2008, 2009, 2010, and 2011.

E. SBA Response

On October 10, 2012, the day after the close of record, SBA timely intervened[3] and filed its response to the appeal petition. SBA argues that Appellant's request to enjoin the instant size determination based on *res judicata* should be denied. SBA seeks to introduce new evidence in the form of the protest which led to Size Determination 4-2012-42, and a copy of the Area Office's letter notifying Appellant of that protest.

SBA observes that Appellant did not raise *res judicata* to the Area Office as a defense to Onopa's protest. (Response at 3.) Based on this failure, SBA argues that Appellant should be barred from asserting *res judicata* for the first time on appeal. (*Id.*) SBA contends that Appellant was provided a copy of Onopa's protest, which alleged that Appellant was economically dependent upon WM. Because Appellant chose not to raise *res judicata* despite knowledge of the allegations, SBA maintains that Appellant cannot now rely on *res judicata* as a defense. (*Id.*)

SBA goes on to argue that the instant appeal is actually premised on the doctrine of collateral estoppel, not *res judicata*. SBA asserts that, under collateral estoppel, only an issue of fact or law which was previously litigated and decided can be conclusive in a subsequent action between the parties. (*Id.* at 4.) SBA recites a four-part test must be met in order for collateral estoppel to apply: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of

[3] "SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first." 13 C.F.R. § 134.210(a).

the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. (*Id.* citing *I.A. Durbin, Inc., v. Jefferson National Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986)).

SBA contends that Appellant has not established any of the elements of the collateral estoppel test. SBA asserts that the first element is not satisfied because Size Determination 4-2012-42 was based on a protest which alleged affiliation under the ostensible subcontractor rule, not economic dependence. Thus, according to SBA, the issues presented in the two size determinations are not identical, nor was the issue of economic dependence actually litigated in Size Determination 4-2012-42. (*Id.* at 6.) Further, SBA argues that Size Determination 4-2012-42 predominantly involved an ostensible subcontractor allegation. Therefore, reasons SBA, any incidental commentary pertaining to economic dependence could not have been a "critical and necessary" part of the size determination. In addition, SBA observes that Onopa was not a party to Size Determination 4-2012-42, so the fourth element of the test is not met.

Lastly, SBA argues that applying *res judicata* or collateral estoppel to size determinations would be inconsistent with13 C.F.R. § 121.404, which instructs that a firm's size is to be determined as of the date of its self-certification. However, "[i]f size determinations from protests were given preclusive effect in future protests, th[e]n the time at which size was determined would no longer be the time of offer on the solicitation being protested, but [the] time [of] offer on a previous solicitation." (*Id.* at 9.) SBA states that, although "there should be a concern about inconsistent determinations from Area Offices," applying *res judicata* or collateral estoppel is not the appropriate remedy. (*Id.* at 10.)

F. Appellant's Reply

Appellant requested, and was granted, leave to reply to SBA's response, and on October 23, 2012, filed its reply. Appellant reiterates its view that size determinations which are not appealed are final decisions of the SBA, and that the finding in Size Determination 4-2012-42 that no economic dependence exists between Appellant and WM is controlling.

Appellant observes that, under 13 C.F.R. § 121.1009(h), "[o]nce the agency has issued a final decision (either a formal size determination that is not timely appealed or an appellate decision), SBA cannot reopen the size determination." Thus, Appellant reasons, a size determination is final if not appealed. (Reply at 1-2.) Appellant maintains that, because Size Determination 4-2012-42 found that Appellant is not economically dependent upon WM, and that determination was not appealed, the Area Office is now barred from reaching any contrary conclusion. (*Id.*)

Appellant disputes SBA's contention that Onopa was not a party to Size Determination 4-2012-42, which results in one of the elements of the collateral estoppel test not being met. Appellant states that Onopa initiated litigation with regard to the prior procurement, and prompted the CO to file the earlier size protest, thereby making Onopa a party to the earlier size determination. (*Id.*)

Appellant asserts that the Area Office, prior to issuing Size Determination 4-2012-42, requested that Appellant provide information regarding the amount of revenue it received from WM from 2008 to 2011. (*Id.* at 4-5.) Appellant argues this request could only be relevant to an analysis of affiliation through economic dependence. Appellant argues that Size Determination 4-2012-42 found no economic dependence upon WM, so it is apparent that the Area Office examined and decided this issue. (*Id.*)

Next, Appellant stresses that the circumstances presented here meet all the requirements of collateral estoppel. Appellant argues the elements of collateral estoppel are met because the same facts were at issue in Size Determination 4-2012-42, and the Area Office had made a final decision that Appellant is not economically dependent upon WM. (*Id.* at 6.) Appellant maintains that Onopa was a party to the previous size determination, and as such, "had the opportunity to litigate the specific issue of [Appellant's] affiliation with [WM] through economic dependence." (*Id.* at 7.)

Lastly, Appellant contends that it raised the issues of *res judicata* and collateral estoppel in a timely manner. Appellant argues that the Federal Rules of Civil Procedure do not apply at the Area Office level, so there was no requirement that Appellant raise affirmative defenses to the Area Office. (*Id.*) Further, the same Area Office issued both size determinations, so Appellant could reasonably assume that the Area Office was already aware of Size Determination 4-2012-42.

G. Appellant's Second Motion to Supplement the Record

Accompanying its reply, Appellant moves to introduce four additional pieces of evidence: a letter dismissing a size protest filed by Onopa against Appellant on the earlier procurement; a bid protest filed by Onopa at the U.S. Government Accountability Office (GAO) challenging the prior award to Appellant; the GAO decision dismissing Onopa's bid protest after the procuring agency represented that it planned to "verify with the SBA that [Appellant] is an eligible small business"; Appellant's letter to the Area Office dated August 28, 2012, describing its relationship with WM.

Appellant argues this evidence shows that the SBA is wrong in its argument that Onopa was not a party to Size Determination 4-2012-42. (Motion, at 2.) On the contrary, maintains Appellant, Onopa commenced the litigation that resulted in Size Determination 4-2012-42, and therefore was an interested party that could have appealed Size Determination 4-2012-42. (*Id.*)

Lastly, Appellant argues that its letter of August 28, 2012, contains the same information Appellant provided in an earlier letter that Appellant sent to the same Area Office on April 26, 2012, in connection with Size Determination 4-2012-42. Appellant argues the letter shows that the Area Office considered the issue of economic dependence in Size Determination 4-2012-42. Appellant argues that this evidence is directly relevant and necessary to the issues here, and should be admitted. (*Id.* at 3.)

H. Onopa's Sur-Reply

Onopa requested, and was granted, leave to sur-reply to Appellant's reply, and on October 28, 2012 filed its sur-reply. Onopa contends that it was not a party to Size Determination 4-2012-42, and could not have appealed that determination to OHA. Onopa argues that it lacked standing to appeal Size Determination 4-2012-42 because the underlying procurement was awarded to Appellant on a sole-source basis. Onopa emphasizes that it attempted to file its own size protest against Appellant, but that protest was dismissed for lack of standing.

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 Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, both Appellant and SBA move to supplement the record with documents pertaining to Size Determination 4-2012-42. These documents were previously presented to the Area Office (albeit in conjunction with the earlier size determination), and several of the documents were authored by the Area Office itself. The documents, especially Size Determination 4-2012-42, are relevant to the questions of *res judicata* and collateral estoppel now raised on appeal. Further, no party has objected to the introduction of new evidence. Accordingly, the motions are GRANTED and the new evidence is ADMITTED into the record.

C. Analysis

1. *Res Judicata* and Collateral Estoppel

Appellant's principal contention is that the Area Office should be barred from concluding that Appellant is economically dependent upon WM, because the Area Office previously reached the opposite conclusion only a few months earlier. In particular, Appellant insists that Size Determination 4-2012-42 — which stated that "[Appellant] has satisfactorily and convincingly explained to [the] Area [[Office] why [Appellant] is not economically dependent upon [WM]" — should be given binding effect under the principles of *res judicata* and collateral estoppel. Appellant emphasizes that the same area office made both size determinations, based on the same information, and that the earlier size determination was never appealed.

The doctrines of *res judicata* and collateral estoppel provide that a final judgment on the merits precludes re-litigation of the same cause of action, or the same issues, that were decided in a prior case involving the same parties. *See generally Size Appeal of BR Construction, LLC*, SBA No. SIZ-5327, at 2 (2012). These legal doctrines, however, are commonly understood to apply only to final judgments rendered by a court or an administrative tribunal. Restatement (Second) Judgments § 1, comment b (1982) ("The rules of this Chapter apply to federal and state courts, to courts of general jurisdiction and to ones of limited or restricted jurisdiction, and ... to administrative tribunals engaged in adjudication."). Area offices are not courts or administrative tribunals, so the doctrines of *res judicata* and collateral estoppel do not extend to determinations issued by such offices. Indeed, OHA has repeatedly reached this conclusion in other cases, explaining that "a prior size determination is not binding on either an Area Office or OHA." *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 7 (2009); *see also Size Appeal of The MayaTech Corp.*, SBA No. SIZ-5269, at 7 (2011) (finding "no authority for [the] proposition that [an] Area Office must follow its earlier size determination"); *Size Appeal of Coastal Management Solutions, Inc.*, SBA No. SIZ-5281, at 5 (2011) (prior size determination which had reached different conclusion was "not dispositive"); *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 11 (2012) ("Size determinations not appealed to OHA are not binding precedent, and are not controlling in any other case.").

Consequently, I must reject Appellant's contention that the doctrines of *res judicata* and collateral estoppel apply to the May 2012 size determination. Rather, in accordance with the well-established precedent referenced above, I find that the May 2012 determination did not bar the Area Office from subsequently concluding that Appellant is economically dependent upon WM.

As SBA observes in its response to the appeal, this result is consistent with the underlying structure and purpose of the size review process. Area Offices conduct size determinations to assess whether a concern is small as of a particular date. 13 C.F.R. § 121.404. A concern's size may change over time, so granting preclusive effect to prior size determinations would undermine SBA's ability to examine size as of the appropriate date. Further, size reviews must often be conducted in short time frames based on limited information, and involve parties that may not have had an opportunity to retain legal counsel. Thus, a size determination is not in

the nature of a complete "adjudication" comparable to that of a court or administrative tribunal.

Appellant's reliance upon *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5344 (2012), *recons. denied*, SBA No. SIZ-5394 (2012) (PFR) is misplaced. In that case, OHA found that an area office improperly disregarded a prior OHA decision which had already ruled on certain issues. Thus, *Chu & Gassman* confirms that decisions of OHA (an administrative tribunal) are legally binding, but does not indicate that the same effect extends to size determinations issued by area offices.

2. Economic Dependence

Because the doctrines of *res judicata* and collateral estoppel do not apply to Size Determination 4-2012-42, I will now consider the issue of economic dependence.

Pursuant to 13 C.F.R. § 121.103(f), affiliation may arise when firms are "economically dependent through contractual or other relationships." In interpreting this provision, OHA has held, as a matter of law, that one firm is economically dependent upon another if it derives 70% or more of its revenue from that firm. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007); *see also Size Appeal of Norris Prof'l Servs., Inc.*, SBA No. SIZ-5289 (2011); *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 5 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). OHA has recognized that "affiliation through contractual relationships may be based on findings from a single fiscal year." *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 14 (2011) (quoting *Size Appeal of Supreme-Tech., Inc.*, SBA No. SIZ-4092, at 5 (1995)). Furthermore, "a contractual relationship between two concerns with one heavily dependent for its revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms." *Size Appeal of Incisive Tech. Inc.*, SBA No. SIZ-5122, at 4 (2010).

Here, the Area Office determined that Appellant and WM share an identity of interest through economic dependence. The Area Office based its conclusion on the fact that Appellant derived more than 70% of its revenues from WM in 2008, 2009, and 2010. *See* Section II.B, *supra*. The Area Office recognized that this percentage slipped to [XX]% in 2011, but noted that WM still accounted for "nearly [***] of [Appellant's] income." (Size Determination at 2.)

These facts amply support the Area Office's conclusion that Appellant is economically dependent upon WM. Appellant's revenues, over multiple years, depended heavily upon WM. Although WM accounted for [***] less than [XX]% of Appellant's 2011 revenues, OHA precedent is clear that affiliation may be found when a firm derives more than 70% of receipts from another in even one fiscal year. *TPG*, SBA No. SIZ-5306, at 14. Thus, affiliation through economic dependence could reasonably be found based on activity prior to 2011. Accordingly, I find no error in the Area Office's determination that Appellant and WM are affiliated under the identity of interest based on Appellant's economic dependence upon WM over multiple years.

Appellant does not dispute that it derived more than 70% of its revenues from WM in 2008, 2009, and 2010. Rather, Appellant maintains that the Area Office erred in basing its determination, in part, on the fact that Appellant engaged WM as a subcontractor on several

Federal contracts. Appellant observes that, under OHA precedent, 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).

I find no merit to Appellant's argument. It is true that the mere fact that Appellant subcontracts to WM could not support a finding that Appellant is economically dependent upon WM. The Area Office, however, did not base its determination solely on this finding, but rather upon its determination that Appellant is dependent upon WM for the overwhelming majority of Appellant's revenues. Further, the subcontracting arrangements between Appellant and WM are not wholly irrelevant to the issue of economic dependence, as they are indicative of ongoing and significant ties between the two companies.

IV. Conclusion

The Area Office determined that Appellant is affiliated with WM through economic dependence. Appellant has not shown that the size determination is clearly erroneous. I therefore DENY this appeal and AFFIRM the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge