United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Jackson and Tull, Appellant, RE: ASRC Federal Space and Defense, Inc. Appealed From Size Determination Nos. 2-2013-93, -94	SBA No. SIZ-5492 Decided: August 13, 2013

APPEARANCES

Thomas P. Barletta, Esq., Michael J. Navarre, Esq., Anthony Rapa, Esq., Steptoe & Johnson LLP, Washington, D.C., for Appellant

Fernand A. Lavallee, Esq., Samuel B. Knowles, Esq., DLA Piper LLP, Washington, D.C., for Science Systems & Applications, Inc.

DECISION[1]

I. Introduction and Jurisdiction

This appeal involves Atlantic Slope Regional Corporation (ASRC), an Alaska Native Corporation (ANC), and its subsidiaries. ASRC owns ASRC Federal Holding Co., LLC (AFHC), which owns 100% of ASRC Federal Space and Defense, Inc. (AS&D). AFHC also owns eight other companies.[2]

On June 27, 2013, the U.S. Small Business Administration (SBA) Office of Government

[1] This decision was initially issued under a protective order on August 13, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded AS&D the opportunity to file a request for redactions if it desired to have any information withheld from the published decision. AS&D responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

[2] These companies are InuTeq, LLC; Arctic Slope Mission Services, Inc.; Arctic Slope Technical Services, Inc.; Primus Solutions, Inc.; Mission Solutions, LLC; ASRC Communications, Ltd.; Analytical Services, Inc.; and ASRC Research & Technology Solutions, LLC.

Contracting, Area II (Area Office) issued Size Determination Nos. 2-2013-93 and -94, finding AS&D to be an eligible small business under the size standard associated with Solicitation NNG11375927R. Specifically, the Area Office found AS&D was not affiliated with ASRC or its subsidiaries under the newly organized concern rule, 13 C.F.R. § 121.103(g), identity of interest, 13 C.F.R. § 121.103(f), or the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Nor was AS&D affiliated with ASRC Aerospace Corporation (AAC) under the present effect rule, 13 C.F.R. § 121.103(d)(1).

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 AS&D to be an ineligible 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. 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 January 13, 2012, the National Aeronautics and Space Administration (NASA) Goddard Space Flight Center issued Solicitation NNG11375927R (RFP) seeking electrical systems engineering support services. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding 1,000-employee size standard.[3] Initial offers were due February 13, 2012. The first final proposed revisions (FPRs) were due October 5, 2012, and the second FPRs were due February 26, 2013. Appellant, AS&D, and Science Systems & Applications, Inc. (SSAI) submitted timely offers self-certifying as small businesses.

On April 17, 2013, the CO notified unsuccessful offerors that AS&D was selected for award. Two days later, Appellant, an unsuccessful offeror, protested AS&D's size. On April 22, 2013, SSAI, another unsuccessful offeror, also protested AS&D's size. Appellant and SSAI alleged AS&D exceeds the size standard, and noted that AS&D was formed as a result of a merger between AAC and ASRC Management Services, Inc. (AMS). Publicly available information showed that, taken together, AAC and AMS had more than 1,000 employees.

[3] NAICS code 541712 provides for two exceptions that have a size standard of 1,000 employees: (1) Aircraft Parts, and Auxiliary Equipment, and Aircraft Engine Parts; and (2) Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts. The RFP does not indicate whether one of these exceptions was designated, and if so, which one. This matter was not brought before OHA in the form of a timely NAICS appeal. Thus, the designated NAICS code and size standard are final. 13 C.F.R. §§ 121.402(c) and 121.1103(b); FAR 19.303(c).

The protesters also alleged AS&D is affiliated with ASRC and its subsidiaries. Appellant contended that AS&D relied on the past performance of ASRC Research & Technology Solutions, LLC to qualify for the subject procurement. SSAI alleged AS&D is unduly reliant on ASRC and its subsidiaries for contract performance, and AS&D has an identity of interest with ASRC and its subsidiaries.

B. Response to the Protests

In its response to the protests, AS&D explained that it is the same entity as AMS. AS&D legally changed its name on December 7, 2012. Subsequent to the name change, on December 31, 2012, AS&D merged with AAC.

AS&D asserted that, for the twelve months preceding its February 13, 2012 self-certification as a small business, its average number of employees was fewer than 1,000. To support this assertion, AS&D submitted its payroll information as well as a sworn affidavit from its president and treasurer attesting to the accuracy of the number of average employees.

AS&D argued it was not affiliated with ASRC and its subsidiaries because SBA regulations provide an exception for ANCs. Under 13 C.F.R. § 121.103(b)(2)(ii), entities owned or controlled by the same ANC cannot be found to be affiliated with one another based on their common ownership, management, or sharing of paid-for administrative services. Under this exception, then, AS&D is not affiliated with ASRC or its subsidiaries based on an identity of interest.

AS&D addressed the allegation that it was reliant on ASRC and its subsidiaries for past performance and contract performance. AS&D explained that it submitted two references of past performance under its former name, AMS. AS&D asserted it would perform 75% of the total contract, and only one of its proposed subcontractors, Analytical Services, Inc. (ASI), is controlled by ASRC. Because ASI's involvement in contract performance is contingent upon the task orders AS&D receives, AS&D did not include ASI in its cost proposal. AS&D represented, however, that even if it used ASI to the maximum extent, ASI's contribution would not exceed .01% of the total effort.

C. Size Determination

On June 27, 2013, the Area Office issued its size determination finding AS&D an eligible small business. The Area Office determined AS&D was not affiliated with ASRC under the newly organized concern rule, the identity of interest rule, the ostensible subcontractor rule, or the present effect rule.

The Area Office determined the newly organized concern rule does not apply because AS&D is not “newly organized.” The Area Office emphasized that, although under a different name, AS&D has been in existence since September 2002. Size Determination at 4.

The Area Office determined the identity of interest rule did not apply because entities

owned or controlled by the same ANC cannot be affiliated based on their common ownership or management. 13 C.F.R. § 121.103(b)(2)(ii); *Size Appeal of Cherokee Nation Healthcare Servs., Inc.*, SBA No. SIZ-5343 (2012) (finding that identity of interest based on common ownership and management cannot serve as grounds for affiliation among concerns owned by the Indian tribe).

The Area Office then determined there was no violation of the ostensible subcontractor rule. The Area Office noted that ASRC entities performed none of the contracts that AS&D submitted for significant subcontractors. As for contract performance, the Area Office emphasized that, of the work to be performed, ASI would perform at most .01% and AS&D would perform 75%. Size Determination at 4-5.

The Area Office applied the present effect rule to AS&D's merger with AAC, and determined that AAC's employees should not be aggregated with those of AS&D because the date for determining size precedes the agreement to merge. The Area Office explained that SBA treats agreements to merge as having a present effect on the power to control a concern. For size purposes, then, a merger is effective as of the date an agreement in principle is reached, even though the merger has not yet taken place. Here, the Area Office determined the earliest date of the agreement to merge was November 2012, well after Appellant self-certified as small on February 13, 2013. To support this conclusion, the Area Office noted that the boards of directors for AAC and AS&D took joint unanimous action to merge on November 30, 2012, and December 1, 2012, respectively. The plan of merger filed with the State of Alaska was executed on December 3, 2012. *Id.* at 6-7.

D. Appeal Petition

On July 12, 2013, Appellant filed its appeal of the size determination with OHA. Appellant argues the Area Office did not properly determine the identity of the apparent awardee,[4] and requests that OHA remand this matter to the Area Office to reconsider which firm is the relevant entity for award and whether that firm is an eligible small business.

Appellant challenges the Area Office's determination that the newly organized concern rule does not apply because AS&D had existed under its prior name, AMS, since 2002. According to the Alaska Department of Commerce, Appellant contends, AMS changed its name to AS and D, Inc., and AAS was merged into AS and D, Inc., not AS&D. Moreover, AS and D, Inc. is a registered government contractor in the System for Award Management (SAM), but AS&D is not. For these reasons, Appellant questions whether AS&D is a continuation of AMS, and thus doubts the finding that AS&D is not newly organized. Appeal at 3-6.

Appellant argues the uncertainty surrounding AMS's name change calls into question the

[4] Appellant explains that, at the time of submitting its appeal, Appellant had not had access to the information the Area Office considered. To gain access to the Area Office file, Appellant requested that a protective order be issued. I admitted Appellant's counsel on July 18, 2013, and they reviewed the file the next day. Having viewed the file, Appellant did not file an amended supplemental appeal, as 13 C.F.R. § 134.307 permits.

determination that AS&D is not in violation of the ostensible subcontractor rule. *Id.* at 6.

Appellant contends the Area Office insufficiently examined when AMS and AAC reached an agreement to merge. In Appellant's view, the filing of a Plan of Merger is the final step in consummating a merger. Appellant argues that records from the Alaska Commerce Department show AMS and AAC engaged in "several corporate actions in the 17 months preceding the November 30, 2012 Plan of Merger." *Id.* at 8.

Appellant also proffers evidence from the Alaska Commerce Department that is not in the record. Appellant asserts this evidence shows (1) AMS and AAC filed a notice of change in officers and directors on June 7, 2011, appointing Ronald Fouse as Secretary for both companies, and (2) AMS's principal mailing address in 2011 became AAC's principal mailing address in 2012. *Id.* Appellant requests that OHA take judicial notice of this new evidence, as it is publicly available information from a Government website. Fed. R. Evid. 201; *Size Appeal of Military Constr. Corp.*, SBA No SIZ-4456 (2001). Alternatively, Appellant argues OHA should admit this new evidence into the record because it is relevant to the issues Appellant presents in its size protest and appeal. Appeal at 10.

Appellant argues the uncertainty regarding AMS's name change also casts doubt on the size calculation. Appellant points out that on April 22, 2013, SAM stated that AS&D met the 1,500 employee size standard but "had 'N' entries next to the 1,000 employee size standard." *Id.* at 8.

E. Response

On July 30, 2013, AS&D responded to the appeal. AS&D argues it is a small business concern under the 1,000-employee size standard. Accordingly, OHA should affirm the size determination. Response at 1.

AS&D clarifies that on December 7, 2012, while the instant procurement was pending, AMS underwent a legal name change to become "AS and D, Inc." Dun and Bradstreet reports and documents from the State of Alaska confirm this name change. AS&D notified NASA of this change on February 26, 2013, in its revised proposal, and referred to itself as ASRC Federal Space and Defense (AS&D). Appellant argues the Area Office understood that "AS and D, Inc." and ASRC Federal Space and Defense (AS&D)" referred to the same thing. AS&D emphasizes that it retained the same DUNS number and CAGE code as it had when it was AMS, and the filings with the State of Alaska confirm that AS&D/AS and D, Inc. is the same entity as AMS. *Id.* at 4-6.

AS&D argues it is not "new" and therefore cannot be deemed a newly organized concern. *Size Appeal of Coastal Mgmt. Solutions, Inc.*, SBA No. SIZ-5281, at 5 (2011) ("[a firm that has been in existence for] six years clearly is not new." AMS began operating in 2002. Thus, because AMS and AS&D are the same legal entity, the entity is not new. AS&D has been in operation for over a decade, albeit under a different name, so it is not a newly organized concern. Response at 4-6.

Next, AS&D argues it does not rely on any other company to perform the subject contract, and its proposal demonstrates this fact. Appellant emphasizes that ASI's contribution would not exceed .01% of the total effort. Accordingly, Appellant did not price ASI into the proposal because "these tasks are a very small sub-element of the ESES II statement of work, and ultimately may not be required during contract performance." *Id.* at 7. Thus, Appellant argues, its subcontract with ASI is for discrete tasks and does not trigger the ostensible subcontractor rule. *Size Appeal of McKissack & McKissack*, SBA No. SIZ-5093, at 7 (2009).

AS&D argues AMS and AAC reached an agreement in principle in November/December 2012. AS&D echoes the Area Office's findings on this issue and argues that "[t] here was no prior Letter of Intent, Memorandum of Understanding, or any other merger-related agreements between the parties that could reasonably be construed as an agreement in principle under the controlling authorities." Response at 9.

AS&D argues that neither Mr. Fouse's roles in AMS and AAC nor the firms' address support finding an earlier date of agreement in principle. AS&D argues these factors are evidence of a permissible arrangement, and emphasizes that AS&D and AAC are ultimately owned by the same ANC parent, ASRC. Under 13 C.F.R. § 121.103(b)(2)(ii), common management and shared administrative services may not be used to find AMS/AS&D affiliated with AAC. *Id.*

AS&D argues the determination that it met the 1,000 employee size standard is supported by "documented, sworn, and verified payroll evidence." *Id.* at 10. AS&D argues SAM entries have no bearing on size calculations. In any event, the April 22, 2013 SAM entry is irrelevant because AS&D's size is determined as of February 13, 2013. *Id.* at 10 n.13.

Finally, AS&D opposes Appellant's request to admit new evidence. AS&D argues there is not good cause to admit this evidence because it was available to Appellant at the time Appellant submitted the protest. *Id.* at 11. Accordingly, Appellant "could, and should, have produced it to the Area Office." *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456, at 8 (2013).

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. 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, some of this information Appellant seeks to admit is already in the record[5] and therefore does not constitute new evidence. I find, however, that Appellant has not shown good cause to admit the evidence that is not in the record,[6] because this information was publicly available at the time Appellant submitted its protest. Accordingly, if Appellant wished to have this information considered, Appellant could, and should, have produced it to Area Office during the size review. *Size Appeal of Prof'l Project Servs., Inc.*, SBA No. SIZ-5411, at 7 (2012) ("OHA has repeatedly declined to accept new evidence when the proponent did not first submit the material to the Area Office during the size review.")

C. Analysis

I find this appeal completely meritless. The crux of Appellant's argument is that it is questionable whether the apparent awardee and the subject of the size determination are the same concern. The Area Office record is replete with references demonstrating that AS&D and AS and D, Inc. are different iterations of the same entity. In its response to the RFP, AS&D referred to itself as "AS and D, Inc. (AS and D)." On the payroll information that AS&D submitted to the Area Office, the document entitled "AS and D, Inc. Paychecks Issued by Pay Period Details" is then followed with "Example of AS&D Actual paychecks paid by pay period detail." Moreover, the sworn statement from AS&D's president refers to AS&D as "AS and D, Inc., formerly named as ASRC Management Services, Inc. ("AS&D"). Therefore, the premise underpinning the size determination—that AS and D, Inc. and AS&D are interchangeable names for the challenged firm—is clearly supported by the record.

Aside from questioning whether AS and D, Inc. is AS&D, Appellant assigns no error to the Area Office's determination that AS&D is not a newly organized concern and does not violate the ostensible subcontractor rule. Accordingly, I affirm these findings.

Similarly, Appellant has not met its burden of proving the Area Office committed clear error in finding an agreement in principle in late November 2012 for the AMS/AAC merger. AS&D's size must be determined as of February 13, 2012, the date of its self-certification as small with its initial offer, including price. 13 C.F.R. § 121.404(a). Here, the because the parties reached agreement in principle to merge after that date, the Area Office properly did not consider the merger in making the size determination. In contrast, Appellant does not advocate a specific

[5] These exhibits were attached to the appeal as Attachments A-D and I.

[6] These exhibits were attached to the appeal as Attachments E-H.

earlier date for the agreement, let alone prove such a date with support from the record. Rather, Appellant merely argues that the Area Office did not adequately consider this matter. The only evidence in the record Appellant cites on this issue is that AMS and AAC had prior dealings in 2011. Because Appellant does not demonstrate that these dealings led to an earlier agreement in principle, Appellant's argument is incomplete and therefore unavailing.

Appellant does not challenge the Area Office's finding that there is not affiliation based on identity of interest. Therefore, I do not disturb this finding.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge