

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

SIZE APPEAL OF:

Bull Moose Energy Ventures, LLC,

Appellant,

Appealed From
Size Determination No. 6-2014-040

SBA No. SIZ-5542

Decided: March 24, 2014

APPEARANCES

Scott M. Heimberg, Esq., Andrea T. Vavonese, Esq., Joseph W. Whitehead, Esq., Akin
Gump Strauss Hauer & Feld LLP, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On February 11, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2014-040 concluding that Bull Moose Energy Ventures, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the size determination is flawed and should be reversed. For the reasons discussed infra, the appeal is denied.

The SBA Office of Hearings and Appeals (OHA) decides appeals of size determinations 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 this 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 Certificate of Competency

On July 30, 2012, the U.S. Army Corps of Engineers (Corps) issued Request for Proposals (RFP) No. W912DY-11-R-0036 seeking contractors to provide locally-generated renewable and alternative energy at military installations. According to the RFP, the Corps planned to award multiple Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. Although the RFP was unrestricted, certain task orders would be reserved for small businesses. The CO

assigned North American Industry Classification System (NAICS) code 221119, Other Electric Power Generation. At the time the RFP was issued, the size standard for this NAICS code stated that “[a] firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”¹ The Corps determined that Appellant was non-responsible and requested that SBA perform a Certificate of Competency (COC) review. Appellant submitted its application for the COC on January 14, 2014.

B. Size Determination

On February 11, 2014, the Area Office issued Size Determination No. 06-2014-040 finding that Appellant is not a small business. The Area Office determined that neither Appellant nor any of its affiliates is primarily engaged in the generation, transmission, or distribution of electric energy. Indeed, according to the Area Office, “there is no evidence indicating [Appellant] generated revenues from generating, transmitting, or distributing electric energy.” (Size Determination at 4.) The Area Office explained that, since becoming an active concern in 2013, Appellant has earned \$210,000 in revenue, all of which was derived from consulting services. The Area Office determined, however, that such work does not constitute “the primary activities required under NAICS code 221119.” (*Id.*)

The Area Office then examined Appellant's affiliates. The Area Office explained that Ms. Amanda Martinez wholly owns and operates Appellant and Bull Moose Energy Ventures NG, LLC (BMEVNG). In addition, Ms. Martinez is the majority owner of Bull Moose Energy, LLC (BME) and Bull Moose Energy of San Diego, LLC (BMESD). (*Id.* at 3-4.) As a result of Ms. Martinez's common ownership, the Area Office concluded, Appellant is affiliated with these three firms. 13 C.F.R. § 121.103(c)(1).

The Area Office then considered the primary work performed by Appellant's affiliates. Ms. Martinez stated that BMEVNG was “set up to pursue the development of natural gas projects,” but has not generated, transmitted, or distributed any electric energy. (*Id.* at 4.) Similarly, BME and BMESD are “development entities,” neither of which has projects that are producing electric energy. (*Id.* at 3.) The Area Office concluded that none of Appellant's affiliates is primarily engaged in the generation, transmission, or distribution of electric energy. (*Id.* at 6.)

¹ 13 C.F.R. § 121.201 n.1 (2012). A new version of the NAICS Manual was subsequently issued, and Other Electric Power Generation is now assigned to NAICS code 221118. In addition, effective January 22, 2014, SBA changed the size standard for NAICS code 221118 to 250 employees, and eliminated the requirement that a concern and its affiliates be primarily engaged in electrical power generation, transmission, and/or distribution. *See* 78 Fed. Reg. 77, 343 (Dec. 23, 2013). Nevertheless, the earlier size standard applies in this case. SBA regulations stipulate that, for an unrestricted procurement, size is determined as of the date a COC applicant submits its application to SBA. 13 C.F.R. § 121.404(c). Here, Appellant applied on January 14, 2014, before the new standard became effective.

The Area Office also noted that Ms. Martinez operates Appellant from a residential condominium. Appellant owns no equipment or facilities for producing electrical power, and has only one employee. (*Id.* at 4.) Furthermore, to obtain financing, Appellant will rely on the credit of its subcontractors. (*Id.* at 5.) The Area Office concluded that, because Appellant lacks the necessary infrastructure, financing, corporate experience, and employees, Appellant would be heavily dependent upon its subcontractors for contract performance. (*Id.* at 6.) Therefore, if Appellant were to be awarded a contract, the Area Office might find a violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (*Id.* at 4-6.)

C. Appeal

On February 26, 2014, Appellant filed its appeal of the size determination with OHA. Appellant argues that the Area Office erred in excluding Appellant's consulting/development work when finding that Appellant is not primarily engaged in the generation and sale of electric energy. Appellant argues this work falls within the scope of NAICS code 221119 because it is "essential to the operation of a power generating facility." (Appeal at 8.) In Appellant's view, if NAICS code 221119 is narrowly interpreted to include only the acts of generating and distributing electrical power, and excludes other activities associated with operating a power generating facility, then NAICS code 221119 was not the proper NAICS code for this RFP. (*Id.* at 7-9.)

Appellant takes issue with the fact that the Area Office noted Appellant's limited workforce and lack of infrastructure. Appellant argues these factors are not relevant in determining whether a firm is primarily engaged in electric power generation and distribution. Rather, the Area Office should have focused on "whether a company's annual receipts are derived primarily from the industry, not the sufficiency of its infrastructure and employees." (*Id.* at 9-10.)

Appellant then argues that, according to their aggregated receipts, Appellant and its affiliates are primarily engaged in generating, transmitting, or distributing electric energy. On this point, Appellant explains that BMESD has an operational interconnection to the electrical grid, none of BME's development projects are active, and BMEVNG has no receipts. (*Id.* at 10.)

Finally, Appellant contends that it is not affiliated with its subcontractors. To support this argument, Appellant applies the seven-factors test. (*Id.* at 10-12.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its 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 the 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

This appeal lacks merit and must be denied. In seeking to overturn the size determination, Appellant first argues that its consulting services and development activities should have been considered in assessing whether Appellant is “primarily engaged in the generation, transmission, and/or distribution of electric energy for sale” under NAICS code 221119 and 13 C.F.R. § 121.201 note 1 (2012).

According to the version of the *NAICS Manual*² in effect at the time the RFP was issued, NAICS industry 221119, “Other Electric Power Generation,” is comprised of:

establishments primarily engaged in operating electric power generation facilities (except hydroelectric, fossil fuel, nuclear). These facilities convert other forms of energy, such as solar, wind, or tidal power, into electrical energy. The electric energy produced in these establishments is provided to electric power transmission systems or to electric power distribution systems.

NAICS Manual at 164.

The *NAICS Manual* further indicates that NAICS code 221119 falls within the “Utilities” sector, and subsector 2211 “Electric Power Generation, Transmission, and Distribution.” The NAICS Manual defines subsector 2211 as follows:

This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.

NAICS Manual at 163.

Based on these descriptions, it is evident that NAICS industry 221119 includes only firms which operate electrical power generation facilities, or which transmit and distribute such power. The placement of NAICS code 221119 within the “Utilities” sector further confirms that the industry is composed of concerns which generate and distribute energy. Thus, ancillary functions—such as the consulting and development activities at issue here—are not within the scope of NAICS code 221119, notwithstanding that such efforts may ultimately support power generation. I find, therefore, that the Area Office properly did not consider consulting/

² Executive Office of the President, Office of Management and Budget, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2007), available at [http:// www.census.gov/eos/www/naics/](http://www.census.gov/eos/www/naics/) (hereinafter NAICS Manual).

development work to constitute “the generation, transmission, and or/distribution of electric energy for sale.” As a result, Appellant is not primarily engaged in the generation and sale of electricity.

Appellant asserts that, if power plant development activities fall outside the scope of NAICS code 221119, then the CO selected the wrong NAICS code for this RFP. This argument too is flawed. Appellant was required to file any challenge to the assigned NAICS code within ten days of the issuance of the solicitation or an amendment affecting the NAICS code. 13 C.F.R. § 134.304(b). Because the time limit for challenging the CO's choice of NAICS code 221119 has expired, the NAICS code is now final. *Id.* § 121.402(c); 48 C.F.R. § 19.303(c). Accordingly, it is too late for Appellant to complain about the NAICS code assigned to the RFP.

Appellant also argues unconvincingly that, when viewing the affiliated firms' receipts in aggregate, Appellant meets the requirement that Appellant and its affiliates be primarily engaged in the generation and sale of electricity. In interpreting 13 C.F.R. § 121.201 note 1 (2012), OHA has indicated that:

(1) the majority of the receipts of the challenged concern itself must be derived from the generation, transmission, and/or distribution of electric energy, and (2) the majority of the aggregated receipts of the challenged concern and its affiliates must be derived from the generation, transmission, and/or distribution of electric energy. If not, the concern is not eligible under Footnote 1, and other than small. If so, then the Area Office must apply the 4 million megawatt standard to determine whether the concern is small.

Size Appeal of Hui O Aina, LLC, SBA No. SIZ-5262, at 10 (2011) (PFR) (emphasis in original). Here, as discussed above, Appellant plainly fails the first part of this test, even if Appellant and its affiliates collectively meet the second element. Thus, Appellant is not a small business under 13 C.F.R. § 121.201 note 1 (2012).

Finally, I find Appellant's argument that it is not affiliated with its subcontractors premature. The Area Office did not find a violation of the ostensible subcontractor rule; rather, the Area Office remarked that, if Appellant were to be awarded a contract, Appellant may then be in violation of the ostensible subcontractor rule due to Appellant's heavy reliance upon its subcontractors. *See* Section II.B, *supra*. Thus, the Area Office's comments did not affect whether Appellant qualifies as a small business under 13 C.F.R. § 121.201 note 1 (2012).³

³ For the record, I note that Appellant's argument is also based on outdated case law, as OHA no longer applies the seven-factors test in an ostensible subcontractor analysis. *Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082, at 12-13 (2009).

IV. Conclusion

For the above reasons, the appeal is DENIED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge