

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

SIZE APPEAL OF:

Phoenix Environmental Design, Inc.,

Appellant,

RE: Timberland Silvicultural Services, Inc.

Appealed From  
Size Determination No. 03-2014-068

SBA No. SIZ-5595

Decided: September 11, 2014

DECISION

I. Introduction and Jurisdiction

On July 24, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2014-068, finding Timberland Silvicultural Services, Inc. is an eligible small business for Department of Agriculture, Forest Service, Solicitation No. AG-4146-S-14-0013.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determinations and find Appellant to be a small business for the instant procurement. 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 17, 2014, the Department of Agriculture (USDA), Forest Service, issued Solicitation No. AG-4146-S-14-0013 (RFQ) seeking to purchase herbicides for the Talladega National Forest in Heflin, AL. The Contracting Officer (CO) designated this procurement as a 100% small business set-aside, firm fixed price contract under North American Industry Classification System (NAICS) code 325320, Pesticide and Other Agricultural Chemical Manufacturing, with a corresponding 500 employee size standard.

On June 30, 2014, the CO issued a notice that Timberland Silvicultural Services, Inc. (TSSI) was the apparent successful offeror. On July 1, 2014, Phoenix Environmental Design, Inc. (Appellant), an unsuccessful offeror, filed a protest with the CO, alleging TSSI was not an eligible small business concern because it was affiliated with Timberland Enterprises, Inc. (TEI) and Aqua Center, Inc. (ACI).

#### B. Size Determinations

On July 24, 2014, the Area Office issued its size determination finding TSSI is a small business concern for the solicitation at issue.

The Area Office found Mr. Sam Fish, TSSI's President, owns 85% of TSSI's stock, with his son, Samuel C. Fish, owning the remaining 15%. The Area Office found Mr. Fish and his son had the power to control TSSI based on their stock ownership and roles as members of TSSI's board of directors. Size Determination, at 2-3. Based on their familial identity of interest, Messrs. Fish may be treated as one party and their business interests are deemed to be one and the same. The Area Office noted that when TSSI was first created, TEI was a stock owner, as they financially assisted Mr. Fish during TSSI's infancy. In 2007, TEI sold its stock in TSSI to Mr. Fish and Mr. Gordon Armistead. In 2011, Mr. Armistead retired and sold his share of the stock to Mr. Fish, who subsequently sold 15% to his son in 2012. *Id.* at 2.

In making the size determination, the Area Office reviewed the SBA form 355 submitted by TSSI. The Area Office found no other parties had any financial interest in TSSI, nor the board of directors contained any other members besides Messrs. Fish. Further, the Area Office found Messrs. Fish did not have any other business interests beyond TSSI. Consequently, the Area Office found that TSSI is not affiliated with TEI or ACI and TSSI's combined average number of employees is less than 500, and as such, is a small business concern for the solicitation at issue. *Id.* at 3.

#### C. Appeal Petition

On July 24, 2014, Appellant filed its appeal of the size determinations with OHA. Appellant argues the Area Office erred in not finding affiliation between TSSI and TEI.

Appellant states the address for TSSI found in the System for Award Management (SAM) is different from that found in TSSI's 2014 Business Entity Report with the Alabama Secretary of State. Additionally, the same Business Entity Report shows that TSSI's phone number is the same as the listed number for TEI. Appellant further claims that a 2011 Business Entity Report for TSSI shows Mr. Armistead as TSSI's President and Mr. Wayne Owen as its Secretary. According to Appellant, Mr. Owen is the President and Owner of TEI. Appeal, at 1- 2.

Appellant contends that, according to records from the Alabama Secretary of State, Mr. Fish established a different TSSI in 2012, separate from the TSSI formed in 1996 by Mr. Fish, Mr. Armistead and TEI. Appellant maintains that TSSI did not properly give all pertinent information to the Area Office regarding TSSI's formation in 1996. Particularly, TEI and Mr.

Owen's involvement in TSSI at the time it was formed and information regarding Mr. Armistead's role at TSSI. Appellant argues that affiliation existed between TSSI, TEI and Crop Production Services, Inc. (CPS) at the time of TSI's formation. *Id.* at 3. Appellant concludes that TSSI is a subsidiary of TEI because current or former officers and/or employees of TEI, who still serve as TSSI's officers, directors, member or key employees, formed it. *Id.* at 5.

### 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 Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). Here, Appellant's submitted new evidence is either documentation already in the record, or information previously available that could have been submitted to the Area Office, and were not. I therefore EXCLUDE the proffered new evidence.

#### C. Analysis

Here, Appellant claims that affiliation exists between TSSI and TEI based on common management, identity of interest and the newly organized concern rule. 13 C.F.R. § 121.103(e), (f) and (g). However, Appellant failed to explain how TSSI is in violation of these regulations, and failed to provide any information that would lead to a reversal of the Area Office's determination.

Appellant maintains Mr. Owens and Mr. Armistead's role as founding members of TSSI establishes affiliation exists between TSSI and TEI. Further, Appellant states that business records from 2011 show that Mr. Owens and Mr. Armistead hold an ownership interest in TSSI. What Appellant failed to note is that since the date of those records, Mr. Fish, and his son, together hold all ownership of TSSI.

13 C.F.R. § 121.103(f) states that affiliation may arise when firms are “economically dependent through contractual or other relationships.” In the past, 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 record does not show that TSSI and TEI have a contractual relationship or that TSSI is economically dependent on TEI for 70% of its revenues. In addition, Appellant did not provide any information that would warrant a finding to the contrary. The facts amply support the Area Office's determination that no economic dependence exists between TSSI and TEI, ACI, or CPS.

Next, Appellant alleges that TSSI and TEI are affiliated through common management. SBA regulation regarding common management states that “[a]ffiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of another concern.” 13 C.F.R. § 121.103(e). Interpreting this rule, “OHA has recognized that [c]ommon management affiliation does not require total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations.” *Size Appeal of Env'tl. Quality Mgmt., Inc.*, SBA No. SIZ-5429, at 4 (2012) (quoting *DMI*, SBA No. SIZ-5275, at 9). In the instant case, the Area Office investigated this claim but found no evidence of common management between TSSI and TEI because Mr. Fish, and his son, together control TSSI and have no ownership or managerial interest in TEI. Therefore, there is no common management between TSSI and TEI.

Appellant further argues that TSSI and TEI are affiliated under the newly organized concern rule. The newly organized concern rule consists of four required elements:

- (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern;
- (2) the new concern is in the same or related industry or field of operation;
- (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and
- (4) the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise.

13 C.F.R. § 121.103(g); *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403, at 6 (2012). Here,

Appellant seems to misinterpret SBA's regulations. In order for the newly organized concern rule to apply, a new concern must have been created. That is not the case here. TSSI was formed in 1996, with Mr. Fish, Armistead, and TEI having control over it. In 2007, TEI sold its stock in TSSI and Mr. Fish and Mr. Armistead evenly split 100% of TSSI's stock. In 2011, Mr. Armistead sold his 50% share of TSSI to Mr. Fish, who then became the sole owner of TSSI's stock. In 2012, Mr. Fish sold 15% of TSSI's stock to his son, who now, together with Mr. Fish, has the power to control TSSI.

After reviewing the record it is clear that, ever since 2011, Mr. Fish has owned and controlled TSSI. TEI no longer has any ownership interest in TSSI, nor do the concerns have an active contractual relationship that creates an economic dependence between the concerns and they don't share any common management or employees. Thus, I find TSSI does not have any affiliates, and given their number of employees is well below the 500 employee size standard, I conclude TSSI is a small business concern for the procurement at issue here.

#### 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