

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

SIZE APPEAL OF:

Axxon International, LLC,

Appellant,

Appealed From  
Size Determination No. 3-2014-070

SBA No. SIZ-5602

Decided: September 25, 2014

APPEARANCE

Art Ward, Contract Manager, Axxon International, LLC, Rock Hill, South Carolina

DECISION

I. Introduction and Jurisdiction

On August 5, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2014-070 concluding that Axxon International, LLC (Appellant) is not a small business. The Area Office drew an adverse inference about Appellant's size status because Appellant failed to produce required information by the designated deadline. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. 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 May 8, 2014, the U.S. Department of the Army, Army Contracting Command Rock Island, Illinois (Army), issued Request for Quotations (RFQ) No. W52P1J-14-T-3013 for the

acquisition of fiber drums. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 322219, Other Paperboard Container Manufacturing, with a corresponding size standard of 750 employees. On July 2, 2014, the CO announced that Appellant was the awardee. On July 8, 2014 B&H International (B&H), an unsuccessful offeror, protested Appellant's size and compliance with the nonmanufacturer rule, 13 C.F.R. § 121.406. The CO forwarded B&H's protest to the Area Office for review.

### B. Area Office Proceedings

By letter of July 17, 2014, the Area Office notified Appellant of B&H's protest and requested a response to the allegations within three working days (*i.e.*, by July 23, 2014). The notification letter stated that:

The following information is *required*: (1) your statement in answer to the allegations of the protest letter with any supporting evidence; (2) SBA Form 355 (enclosed) fully completed in duplicate; (3) a copy of your corporate charter and bylaws; (4) your firm's and affiliates' last annual statements to shareholders; (5) a breakdown of the number of persons employed on a full-time, part-time, temporary, or other basis during each of the pay periods for the 12 months preceding your certification; (6) provide a detail[ed] step by step statement how you intend to provide end item outline[d] in the solicitation, including the equipment used and ownership of equipment; identify subcontractors; (7) please indicate relationship of all officers and group owners that are related by blood, marriage, civil union or adoption; (8) an organization chart (or equivalent) detailing the relationships, if any, between the concern and any other affiliated or subsidiary companies; (9) indicate owners' business interest in any other business not already listed. Please make sure all the ownership interest adds up to 100%; (10) complete financial statements and income tax returns for the last three fiscal years preceding your self-certification on this procurement for your company and all affiliates including joint ventures; (11) provide joint venture agreements, lease agreements, teaming agreements, promissory notes and any contractual agreements your company may have; [and] (12) resumes of officers and all key employees.

(Notification letter at 5-6, emphasis in original). The letter further warned that “*If you fail to submit the completed application along with the other material requested within the specified time, SBA may determine your company to be other than a small business.*” (*Id.* at 6, emphasis in original.)

By July 29, 2014, the Area Office had not received any response from Appellant. The size specialist contacted Appellant by telephone and was informed that Appellant had transmitted a package of documents by regular U.S. mail. That same day, the size specialist emailed the Army's contract specialist to request an “extension in the deadline for the completion of the size determination of at least a week due to [Appellant's] failure to deliver [its] response package.” (Email from D. Gerard to S. Keegan (July 29, 2014).) The size specialist explained that, if an

extension were not granted, and if the Area Office did not complete the size determination by August 8, 2014, the Army could proceed with award to a different offeror. (*Id.*) The contract specialist responded that she could not authorize an extension without consulting with the CO. (Email from S. Keegan to D. Gerard (July 29, 2014).)

On July 30, 2014, the Area Office received Appellant's response package, which consisted of a letter denying the protest allegations and printouts of records from the System for Award Management. Upon review, the size specialist telephoned Appellant, stating that the package was incomplete as it did not contain the SBA Form 355 and other required information. The size specialist instructed Appellant to submit a revised package by July 31, 2014. Appellant did not comply with this new deadline.

As of August 4, 2014, the Area Office had not received any revised package from Appellant. At 4:13 p.m., Appellant emailed the Area Office a portion of its revised response and indicated that a complete package would be transmitted by overnight mail for delivery the following day. The size specialist replied that this information would not be considered because "the deadline for receiving your package has passed." (Email from D. Gerard to A. Ward (Aug. 4, 2014).)

On August 5, 2014, the Area Office issued Size Determination No. 3-2014-070 finding that Appellant is not a small business. The Area Office observed that Appellant had failed to comply with the original response deadline of July 23, 2014, and that the response received on July 30, 2014 was deficient. (Size Determination at 1.) In addition, although the Area Office permitted Appellant a final opportunity to submit the requisite information by July 31, 2014, "[t]he protest response package was not received by the [Area Office] as of July 31, 2014 and had still not been received as of August 4, 2014." (*Id.*) As a result, the Area Office drew an adverse inference that the missing information would have shown that Appellant is not a small business. (*Id.* at 2.)

Also on August 5, 2014, the Area Office received Appellant's new package of information. The Area Director declined to reopen the case because the Area Office "did not make any error or mistake in issuing its size determination as [Appellant] acknowledges that it did not send its response package until August 4, 2014." (Letter from C. Thompson (Aug. 5, 2014), at 1.)

### C. Appeal

On August 7, 2014, Appellant filed the instant appeal with OHA. Appellant contends that the Area Office improperly applied the adverse inference. Accordingly, OHA should reverse or remand the size determination.

Appellant states that, based upon its conversation with the size specialist on July 30, 2014, Appellant understood that an extension would be available if authorized by the Army. As a result, Appellant inquired with the Army, and on August 1, 2014, received an email from the contract specialist that the Army was amenable to granting such an extension. Appellant attaches an email from the contract specialist stating that the Army would "allow[] an extension for [[the

size specialist] to complete his determination regarding the protest.” (Email from S. Keegan to A. Ward (Aug. 1, 2014).) Appellant argues that its failure to meet the July 31, 2014 deadline should be excused because Appellant submitted the requested information on August 5, 2014, “less than 2 business days after the extension was rendered.” (Appeal at 2.) Further, in light of the extension, it was unreasonable for the Area Office to adhere to the July 31, 2014 deadline. (*Id.*)

### 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

SBA regulations provide that:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business.

13 C.F.R. § 121.1008(d). Further:

In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

13 C.F.R. § 121.1009(d).

In this case, Appellant does not dispute that Appellant did not submit the required information to the Area Office by the original deadline of July 23, 2014, or by the revised deadline of July 31, 2014. Rather, Appellant argues, it was not necessary for Appellant to comply with these deadlines because Appellant was granted an extension by the procuring agency.

Appellant's argument reflects a misunderstanding of the size protest process. Pursuant to 13 C.F.R. § 121.1009(a)(3) and 48 C.F.R. § 19.302(g)(2), a procuring agency may proceed with contract award if a size determination is not issued within 15 business days of a size protest,

unless SBA requests an extension and that extension is granted. By contrast, the deadline for a challenged firm to submit information to SBA is determined by SBA, not by the procuring agency. *See* 13 C.F.R. § 121.1008(d) (noting that the challenged firm must provide information “within the time allowed by SBA”). Thus, whether or not the procuring agency extends the timeframe for issuing the size determination does not alter the challenged firm's deadline to submit information to SBA.

Appellant also argues that, in light of the Army's willingness to grant an extension, it was unreasonable for the Area Office to adhere to the July 31, 2014 deadline. It is true that OHA has, in rare circumstances, overturned an adverse inference when an area office did not permit the challenged firm an adequate opportunity to respond. *E.g., Size Appeal of Sterling Foods, Ltd.*, SBA No. SIZ-4556 (2003). In the instant case, though, the July 31, 2014 deadline can hardly be said to be unreasonable, given that Appellant's response was originally due July 23, 2014, and given that the Area Office was seeking information routinely required for size reviews. Thus, the July 31, 2014 deadline already represented an extension of more than a week for Appellant to submit basic data. Further, Appellant did not object to the July 23, 2014 deadline or to the July 31, 2014 deadline, further undermining any claim that these deadlines were unreasonable.

#### IV. Conclusion

Appellant has not demonstrated that the Area Office erred in applying the adverse inference. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge