

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

SIZE APPEAL OF:

Wescott Electric Company,

Appellant,

RE: Innovative Support Solutions, Inc.

Appealed From
Size Determination No. 04-2015-058

SBA No. SIZ-5691

Decided: November 5, 2015

APPEARANCES

James P. Wescott, President, Wescott Electric Company, Aston, Pennsylvania

Pamela J. Mazza, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, D.C., for
Innovative Support Solutions, Inc.

DECISION

I. Introduction and Jurisdiction

This is a protester's appeal of a size determination pertaining to Innovative Support Solutions, Inc. (ISS). On September 28, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting Area IV (Area Office) issued Size Determination No. 04-2015-058, finding that ISS is a small business under the size standard associated with the subject procurement. Wescott Electric Company (Appellant), which had previously protested ISS's size, contends that the size determination is erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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 October 7, 2014, the U.S. General Services Administration issued Request for Proposals (RFP) No. GS-03P-15-AZ-C-5050 for replacement of the uninterruptible power supply system at the Veterans Administration Philadelphia Information Technology Center. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 238210, Electrical Contractors and Other Wiring Installation Contractors, with a corresponding size standard of \$15 million average annual receipts. ISS submitted its initial proposal on November 12, 2014, and its final proposal revisions on April 16, 2015. In its proposal, ISS identified Broadway Electric, Inc. (BEI) as a subcontractor. (ISS Proposal, Vol. II, at 2-3.) On August 26, 2015, the CO announced that ISS was the apparent awardee.

On August 31, 2015, Appellant, an unsuccessful offeror, protested the size of ISS. Appellant alleged that ISS is “in reality a Small Business front for [BEI] that will actually perform the work on this project.” (Protest at 1.) Appellant claimed that ISS “will be using BEI to finance and perform the work and assets for obtaining the required bonding.” (*Id.*) Appellant asserted that ISS and BEI shared the same address and phone numbers in 2013. (*Id.*) In addition, Appellant maintained, ISS is affiliated with BEI through common management and the newly organized concern rule. Appellant did not submit any evidence to support these allegations.

The CO forwarded Appellant's size protest to the Area Office for a size determination. On September 17, 2015, ISS responded to the protest, denying all of Appellant's allegations. ISS provided a copy of its proposal, its completed SBA Form 355, a sworn declaration from its President, and other documents.

B. Size Determination

On September 28, 2015, the Area Office issued Size Determination No. 04-2015-058 concluding that ISS is a small business under the applicable size standard. The Area Office addressed each of Appellant's protest allegations and found them to be meritless.

The Area Office determined that Mr. Benjamin P. Rush wholly owns and controls ISS. Mr. Rush is also ISS's President and the sole member of ISS's Board of Directors. Mr. Rush does not hold any ownership or managerial interest in any other concern, and as such, no other entity is affiliated with ISS through Mr. Rush. (Size Determination at 2.)

The Area Office next found that, contrary to Appellant's allegation, there is no evidence that ISS and BEI at any point shared an address or telephone number. The Area Office noted that Mr. Rush, in his sworn statement, denied that ISS and BEI had ever shared a telephone, address, or office. Conversely, Appellant offered no evidence to support this allegation. (*Id.*)

The Area Office rejected Appellant's allegations that ISS is affiliated with BEI through common management and the newly organized concern rule. The Area Office determined that

Mr. Rush is not employed by BEI, and has no role in the management or operations of BEI. “Inasmuch as [Mr. Rush] has no ownership interest in BEI (and never has), is not employed by [BEI], and does not serve as a director for it, there is no evidence that Mr. Rush has any power whatsoever over the management or operations of BEI.” (*Id.* at 4.) Similarly, Appellant failed to show that any of the elements of the newly organized concern rule are present. The fact that ISS was founded in 2004, and consequently is not a newly-formed entity, further undermines Appellant's claim. (*Id.* at 3-4.)

The Area Office proceeded to analyze whether ISS and BEI are affiliated under the ostensible subcontractor rule. After reviewing ISS's proposal and a teaming agreement between ISS and BEI, the Area Office found that ISS is solely responsible for contract management. Because the procurement is for construction, management of the effort is of paramount importance. (*Id.* at 7-8, citing *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503 (2013).) BEI will serve as a subcontractor in performance of the contract, but will provide no key employees. (*Id.* at 6.) The Area Office further found that ISS has previously performed similar contracts involving uninterruptible power supply replacement. (*Id.*) Therefore, the Area Office determined, ISS has not violated the ostensible subcontractor rule.

Lastly, the Area Office considered Appellant's remaining protest allegations. The Area Office explained that ISS and BEI are not joint venturers; rather, BEI is ISS's subcontractor. Although a constructive joint venture may be created through the ostensible subcontractor rule, the Area Office found no such violation here. (*Id.* at 10). Lastly, any bonding assistance that BEI may be providing to ISS “is not sufficient to support a finding of affiliation unless other factors are present.” (*Id.* at 11.)

The Area Office concluded that no affiliation exists between ISS and BEI, and after examining ISS's tax returns, found that ISS's average annual receipts do not exceed the size standard for this procurement. Therefore, ISS is a small business.

C. Appeal

On October 7, 2015, Appellant filed the instant appeal. Appellant complains that the Area Office's analysis “seems to have been restricted to available records on hand and obtained from [ISS and BEI] as opposed to other outside sources.” (Appeal at 1.) As a result, Appellant contends, the Area Office “failed to uncover and consider relevant information that would have shown the affiliation between [ISS and BEI].” (*Id.*) Appellant asserts that a close review of the past performance references submitted by ISS “would show the key personnel used to manage and control the listed projects were employees of BEI.” (*Id.*) Further, ISS and BEI have a long-standing business relationship in the nature of a joint venture. (*Id.* at 3.)

Accompanying its appeal, Appellant seeks to introduce new evidence to support its allegations, including information from Redfin.com, the System for Award Management, and the Federal Procurement Data System — Next Generation. Appellant alleges, based on these records, that Mr. Rush previously was employed by BEI; that ISS and BEI did share the same business address until April 2013; and that ISS and BEI together have won seven contracts in the

last two years, exceeding the limit specified by SBA's "3-in-2" rule. Appellant does not explain why it did not provide this evidence to the Area Office with the protest or during the size review.

D. ISS's Response

On October 26, 2015, ISS responded to the appeal. ISS argues that the appeal is meritless and should be denied.

ISS contends that the appeal essentially challenges the regulatory scheme, which requires a protester to come forward with specific allegations, supported by credible evidence. (Response at 1-2.) ISS argues that it was Appellant's responsibility to produce evidence to support the allegations in the protest, whereas the Area Office's role is to determine a concern's size, not to ferret out additional theories or new information to support a protest. (*Id.* at 2). Furthermore, ISS maintains, the arguments raised by Appellant in the appeal fail to show any error of fact or law in the size determination.

ISS argues that OHA should not accept the new evidence offered by Appellant, because this evidence was not previously presented to the Area Office, although it would have been publicly available at the time of the protest. In addition, Appellant did not submit the required motion to admit new evidence, and offered no explanation as to why the evidence could not have been produced with the protest. "[B]ecause [Appellant] could have submitted this information to the Area Office at the time of its protest, but failed to do so, OHA should find that [Appellant] has not shown good cause to admit the information at this late stage." (*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 that 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). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In this case, Appellant has not established good cause to admit the new evidence. As ISS observes, Appellant did not file the requisite motion to admit new evidence, and OHA has found that such an omission may be “fatal” to an attempt at introducing new evidence. *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). Moreover, all of the new evidence Appellant seeks to admit was available to Appellant at the time of the protest, and Appellant offers no rationale as to why this information could not have been provided to the Area Office. For these reasons, the new evidence is EXCLUDED from the record and has not been considered for purposes of this decision.

C. Analysis

Appellant's principal argument in this case is that the Area Office relied upon information provided by ISS, and failed to uncover evidence from “outside sources” which might have shown that ISS is not a small business. This argument, though, reflects a misunderstanding of the legal process governing size protests and size determinations. SBA regulations provide that a size protest “must include specific facts,” and that “[w]here materials supporting the protest are available, they should be submitted with the protest.” 13 C.F.R. § 121.1007(b). An area office will base its decision “primarily on the information supplied by the protester or the entity requesting the size determination and that provided by the concern whose size status is at issue.” *Id.* § 121.1009(b). In addition, “SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” *Id.* § 121.1009(d). OHA's case decisions have made clear that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012); *see also Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3-4 (2009) (“Contrary to [the protester's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.”).

Here, Appellant's protest made broad allegations unsupported by any evidence. Section II.A, *supra*. The Area Office considered these allegations, but gave greater weight to ISS's signed and sworn statements, and to the specific information set forth in ISS's proposal. Section II.B, *supra*. The Area Office was not required to, and did not, expand the scope of its review beyond the issues raised by Appellant. In short, then, the Area Office properly relied upon the sworn and specific information provided by ISS, and reasonably chose to confine its review to the issues raised in the protest. Appellant has not demonstrated that the Area Office committed any error with this approach.

Appellant also argues that new evidence attached to its appeal casts doubt upon the accuracy of certain statements in the size determination. It is unnecessary to explore these points in detail, however, because as discussed in Section III.B above, this new evidence is not admissible. Again, Appellant has not shown any valid reason to disturb the size determination.

IV. Conclusion

For the above reasons, 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