Cite as: *Size Appeal of Tenax Aerospace, LLC* , SBA No. SIZ-5747 (2016)

United States Small Business Administration
Office of Hearings and Appeals

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SIZE APPEAL OF: Tenax Aerospace, LLC Appellant, Appealed From Size Determination No. 03-2015-097	SBA No. SIZ-5747 Decided: June 6, 2016

ORDER REMANDING PROCEEDING[1]

I. Background

On June 17, 2015, the Department of Justice, Federal Bureau of Investigation (FBI) issued Request for Proposals (RFP) 14812 for a one-year lease of a Gulfstream 550 aircraft with four additional one-year option periods. Proposals were due July 8, 2015. Tenax Aerospace, LLC (Appellant) submitted its proposal on July 7, 2015, self-certifying as a small business. On August 25, 2015, the FBI notified unsuccessful offerors that it had awarded the contract to Appellant. On September 2, 2015, Flight Support, Inc. (FSI), an unsuccessful offeror, protested Appellant's status as a small business for the instant procurement. On September 15, 2015, Appellant responded to the protest.

On October 22, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2015-097, finding Appellant is not an eligible small business. The Area Office determined Appellant is affiliated with [a number of] entities, [the majority] of which Appellant acknowledged in its response to the protest. The three additional affiliates are Tenax-Heritage, LLC (Heritage), The Vineyards of Brandon, LLC (Vineyards), and Tri-Jet, LLC (Tri-Jet).

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[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

The Area Office then calculated the combined receipts of Appellant and its affiliates for the years 2012, 2013, and 2014, and determined Appellant exceeds the $32.5 million size standard. The Area Office noted that, although Tenax Aerospace Holdings, LLC (TAH) has income from Greenwood-Tenax, LLC (Green-T) and WGS Systems, LLC (WGS), this income should not be deducted as an inter-affiliate transaction from TAH's receipts. The Area Office maintained that the exclusion for inter-affiliate transactions "applies only if the concerns in question have a parent-subsidiary relationship and are eligible to file a consolidated tax return." *Size Appeals of G&C Fab-Con, LLC*, SBA No. SIZ-5649, at 8 (2015) (*G&C Fab-Con*). Here, TAH is not Green-T's or WGS's parent, and none of these firms files a consolidated tax return; nor are they eligible to do so. Accordingly, the Area Office concluded the amounts in question should not be excluded.

On November 6, 2015, Appellant filed its appeal of the size determination with OHA. Appellant argued the Area Office's findings of affiliation with Heritage, Vineyards, and Tri-Jet were clearly erroneous. Appellant also contested the Area Office's calculation of TAH's receipts, arguing that the calculation should not have included the income TAH received from Green-T and WGS. In Appellant's view, including this income constitutes double counting and is contrary to the plain language of the regulation, OHA precedent, and SBA policy.

On November 30, 2015, SBA responded to the appeal, arguing the size determination should be affirmed. SBA argued the Area Office's findings of affiliation between Appellant and Heritage, Vineyards and Tri-Jet were correct and should be affirmed. SBA forcefully argued that it is clear from the plain meaning of the regulation that the exclusion for inter-affiliate transactions does not apply to this case. SBA argued that by its plain language, the exception does not apply to transactions to which the challenged firm is not a party, citing *G&C Fab-Con*. Further, SBA maintained "the inter-affiliate transaction exclusion applies only if the concerns in question have a parent-subsidiary relationship and are eligible to file a consolidated tax return." *G&C Fab-Con*, at 8 (2015). As a result, because Green-T and WGS are not wholly-owned subsidiaries, they cannot be included in TAH's consolidated tax return.

SBA challenged the argument that it is SBA's policy to avoid double-counting of receipts. SBA pointed to OHA precedent which held "there is no general 'catch all' exclusion for double-counting in the regulation." *G&C Fab-Con*, at 7 (2015) (quoting *Assoc. Constr. Co.*, SBA No. SIZ-5314, at 7 (2011)); *see also Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5497 (2013).

On December 23, 2015, OHA issued *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701 (2015) (*Tenax I*), affirming the size determination and denying the appeal.[2] OHA affirmed the Area Office's findings both on the issues of affiliation and on the calculation of Appellant's annual receipts.

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[2] On November 13, 2015, I issued a Protective Order in this case. The Order remains in effect, and this Remand Order is issued under it.

On February 2, 2016, Appellant filed a Complaint in the U.S. Court of Federal Claims, arguing that *Tenax I* was arbitrary, capricious, and contrary to law. *Tenax Aerospace, LLC v. United States*, U.S. Court of Federal Claims, Docket No. 16-249 C (*Tenax II*).

On May 24, 2016, SBA issued SBA Size Policy Statement No. 3. 81 Fed. Reg. 32,635 (May 24, 2016). SBA addressed the issue of interaffiliate transactions in determining a concern's annual receipts, by stating:

> SBA will not restrict the exclusion for interaffiliate transactions to transactions between a concern and a firm with which it could file a consolidated tax return. The exclusion for interaffiliate transactions may be applied to interaffiliate transactions between a concern and a firm with which it is affiliated under the principles in 13 C.F.R. § 121.103. Where SBA is conducting a size determination, SBA requires that exclusions claimed under section 121.104(a) be specifically identified by the concern whose size is at issue and be properly documented. This policy is effective immediately.

81 Fed. Reg., at 32,636.

SBA's comments maintained the current language of 13 C.F.R. § 121.104(a) is:

> [C]lear on its face. It specifically excludes all proceeds from transactions between a concern and its affiliates, without limitation. Moreover, the regulatory history supports the position that the exclusion for interaffiliate transactions is available regardless of the manner of affiliation between a concern and its affiliate. SBA recognized that excluding interaffiliate transactions only when they are identified on a consolidated tax return often perpetuated the double-counting of receipts. ... SBA did not mean to imply that a concern and its affiliates must be able to file a consolidated tax return in order to receive the exclusion from double-counting interaffiliate transactions. Conversely, SBA was attempting to make clear that it did not support the practice of double-counting receipts between affiliates generally.

Id.

On June 1, 2016, the Court of Claims issued an Order in *Tenax II*. The Court remands the case to OHA for thirty days, to reconsider whether Appellant is a qualified small business in light of SBA Size Policy Statement No. 3.

II. Remand Order

SBA's Policy Statement, while it maintains that it is simply an interpretation of the regulation as written, is a marked change in interpretation from the positions it has vigorously advanced in a number of cases before OHA, most especially in *G&C Fab-Con* and *Tenax I*. This change, if applicable here, would require a recalculation of Appellant's size. This would necessitate a new size determination. OHA does not perform size determinations, that is the

province of the Area Offices. 13 C.F.R. § 121.1002. OHA reviews the size determinations on appeal. 13 C.F.R. §§ 121.1101, 134.102(k). The question of the meaning and applicability of the Policy Statement in the context of this case should be left, in the first instance, to the Area Office and Agency counsel advising the Area Office on the size determination. This position may then be defended before OHA.

Accordingly, I VACATE only that portion of *Tenax I* which addressed the issue of whether the transactions between Appellant, TAH, Green-T, and WGS should be excluded in calculating Appellant's annual receipts. I also VACATE those portions of the Size Determination which addressed the issue of those transactions. The portion of the decision and the size determination addressing the issue of Appellant's affiliation with Heritage, Vineyards, and Tri-Jet remains undisturbed.

I now REMAND this matter to the Area Office, for a new size determination, addressing the issue of the interaffiliate transactions in light of Size Policy Statement No. 3. The Area Office must determine whether the Size Policy Statement is applicable here, and if so, what result it mandates here. The new size determination must be issued within ten days from the date of this Order, in order to comply with the Order of the Court of Claims.

CHRISTOPHER HOLLEMAN
Administrative Judge