

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

SIZE APPEAL OF:

The Emergence Group,

Appellant,

RE: Olgoonik Federal, LLC

Appealed From

Size Determination No. 6-2016-058

SBA No. SIZ-5766

Decided: July 28, 2016

ORDER DISMISSING APPEAL¹

I. Background

A. Solicitation and Protest

On February 1, 2016, the U.S. Department of State (State) issued Request for Proposals (RFP) No. SAQMMA-16-R-0086 for professional, administrative, and support services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561990, All Other Support Services, with a corresponding size standard of \$11 million in annual receipts.

On May 6, 2016, the CO announced that Olgoonik Federal, LLC (OF) was the apparent successful offeror. Three days later, The Emergence Group (Appellant), an unsuccessful offeror, protested OF's size, alleging that OF is part of the Olgoonik family of companies, which during 2015 received a combined \$200 million in federal contracting dollars.

B. Size Determination

On June 9, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 6-2016-058 denying Appellant's protest. The Area Office found that OF is a wholly-owned subsidiary of Olgoonik Development, LLC (OD), which in turn is a wholly-owned subsidiary of Olgoonik Corporation (OC), an Alaska Native Corporation (ANC). In addition to OD, OC also owns Olgoonik

¹ OHA decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

Technical Services, LLC (OTS), the incumbent on the predecessor contract. Because OC is an ANC, OF is not affiliated with its parent companies, nor is OF affiliated with any other firms owned by its parent companies based on common ownership or management. (Size Determination at 4, citing 13 C.F.R. § 121.103(b)(2)(ii).) The Area Office also found that OF is not in violation of the ostensible subcontractor rule. (*Id.* at 5-7.)

C. Appeal

On June 23, 2016, OHA received an appeal from Appellant challenging the size determination.² Appellant does not argue that the size determination contains any clear error of fact or law. Instead, Appellant insists that OF should not be awarded the contract because OF's small business status results in a “*substantial unfair competitive advantage*.” (Appeal at 2 (emphasis Appellant's).) Appellant “request[s] that [State] (including but not limited to the official [CO]) and/or the SBA, (whomever is deemed to be the “Administrator’ of [the RFP]), rule that OF benefited from ‘*a substantial unfair competitive advantage*’ as an ANC [small business] and should not be allowed to compete as a small business under the terms inherent to [the RFP]” (*Id.* at 5 (emphasis Appellant's).)

D. Response

On July 21, 2016, OF responded to the appeal. OF contends that “OHA is not the appropriate forum to re-examine firmly established federal Indian policy.” (Response at 1.) OF takes issue with Appellant's allegation of substantial unfair advantage on several counts. First, OHA lacks jurisdiction to consider it. Second, it is procedurally improper because it is being raised for the first time on appeal and was not included in Appellant's protest. Third, it lacks merit. (*Id.* at 4-10.)

II. Discussion

Under SBA regulations, concerns that are owned and controlled by an ANC are excepted from a number of SBA's affiliation regulations:

Business concerns owned and controlled by Indian Tribes, ANCs, [Native Hawaiian Organizations (NHOs)], [Community Development Corporations (CDCs)], or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

² Appellant filed its appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1).

13 C.F.R. § 121.103(b)(2)(ii). Appellant argues that OF should not be allowed to avail itself of this exception because it would result in a substantial unfair advantage. The exception Appellant refers to is found in the Small Business Act:

In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the [SBA] Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

15 U.S.C. § 636(j)(10)(J)(ii)(II).

OHA considered the issue of “substantial unfair advantage” in *Size Appeal of Revis Engineering, Inc.*, SBA No. SIZ-5080 (2009), and dismissed the appeal because it did not contend that the size determination was in error as OHA's regulations require. *Revis Eng'g*, SBA No. SIZ-5080, at 3 (citing *Size Appeal of ALROD Enters., Inc.*, SBA No. SIZ-4704 (2005)). OHA went on to explain that, “even if the appeal petition could be construed to contain an allegation of error, the Area Office could not have committed an error” because the Small Business Act “explicitly states that the Administrator must determine whether an ANC has obtained an unfair advantage.” *Id.* (citing *Size Appeal of Computer Cite*, SBA No. SIZ-5014, at 5 (2008) (“In accordance with the Small Business Act and implementing regulation, determinations of whether an ANC has obtained an unfair competitive advantage within an industry category are exclusively handled by SBA's Administrator. Accordingly, [the protester's] allegation that ANCs have an unfair competitive advantage . . . is beyond OHA's jurisdiction.”)). OHA also observed that it “has no delegation from the Administrator to decide issued raised by 15 U.S.C. § 636(j)(10)(J)(ii)(II)” and therefore “cannot grant [the protester] the relief it seeks.” *Id.*

As in *Revis Engineering*, then, OHA lacks jurisdiction to determine whether the exception to affiliation creates a substantial unfair advantage in OF's case. Because the appeal does not otherwise argue that the size determination is clearly erroneous, and OHA has no authority to grant Appellant the relief it seeks, the appeal must be dismissed.

III. Conclusion

For the above reasons, the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

KENNETH M. HYDE
Administrative Judge