

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

SIZE APPEAL OF:

Emergency Pest Control, Inc.,

Appellant,

RE: Klearjet, Inc. d/b/a Pestmaster
Services, Inc.

Appealed From
Size Determination No. 01-SD-2017-03

SBA No. SIZ-5797

Decided: December 13, 2016

APPEARANCE

John Sanchez, President, Emergency Pest Control, Inc., Orange, New Jersey

DECISION

I. Introduction and Jurisdiction

On October 27, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-SD-2017-03 finding that Klearjet, Inc. d/b/a Pestmaster Services, Inc. (PSI) is a small business for the subject procurement. Emergency Pest Control, Inc. (Appellant), which had previously protested PSI's size, contends that the size determination is clearly erroneous. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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 August 16, 2016, the U.S. Department of the Air Force issued Request for Quotations (RFQ) No. FA4484-16-Q-0005 for pest control services at Joint Base McGuire-Dix-Lakehurst,

New Jersey. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 561710, Exterminating and Pest Control Services, with a corresponding size standard of \$11 million average annual receipts. PSI submitted its quotation on September 6, 2016.

On September 28, 2016, the CO announced that PSI was the apparent awardee. On September 29, 2016, Appellant protested PSI's size. Appellant alleged that PSI "is not a legitimate 100% small business." (Protest at 1, internal quotations omitted.) To support this contention, Appellant asserted that PSI is a franchising company with 27 franchise operations in 14 states. However, Appellant noted, its Dun & Bradstreet DUNS number "is only associated with Pestmaster Services in Nevada," and all inquiries of PSI's New Jersey location are directed to this location. (*Id.*)

Appellant shared a few other observations. Although PSI's office location is in New Jersey, its telephone number is for New York. In addition, PSI identifies itself as a veteran-owned small business, but its certifications indicate it is not veteran-owned. Appellant stated that it "believes that under dependence by the Pestmaster Services franchisees and the Pestmaster Services' name and DUNS number exists." (*Id.*) Appellant then requested that the CO forward the protest with attachments to the Area Office "to determine [whether PSI] is in violation of 13 C.F.R. § 121.103, the Ostensible Subcontractor Rule." (*Id.* at 2.)

B. Size Investigation

In response to the protest, PSI represented that it is wholly-owned by Mr. James Godfrey, who is also PSI's sole director. Mr. Godfrey does not own or manage any other firms. (SBA Form 355.) PSI asserted that Mr. Godfrey is a veteran, and submitted documentation to that effect. (Letter from J. Godfrey to J. Fasano (Oct. 11, 2016).) PSI explained that the New York telephone number referenced in the protest is Mr. Godfrey's personal cell phone number, which he retained after moving to New Jersey, and that PSI does not intend to subcontract any portion of the instant procurement. (Emails from J. Godfrey to M. Chen (Oct. 18, 2016).)

The record also contains a letter from Pestmaster Franchise Network, Inc. (PFN), in which PFN stated:

The entire Pestmaster Franchise Network is an excellent example of franchises that operate independent of the franchisor, have the right to profit from their efforts, and bear the risk of loss commensurate with business ownership. We do NOT share: common ownership, common management, or place excessive restrictions on franchisees. . . .

(Letter from J. Van Diepen to J. Fasano, at 2-3 (Oct. 11, 2016).) PFN stated that the Area Office has previously conducted size determinations of other PFN franchisees, and found that they are not affiliated with PFN. (*Id.* at 1, citing Size Determination Nos. 01-SD-2001-18 and 01-SD-2010-025.)

C. Size Determination

On October 27, 2016, the Area Office issued Size Determination No. 01-SD-2017-03 finding that PSI is a small business. The Area Office determined that Mr. Godfrey has the power to control PSI as its sole owner and director. (Size Determination at 2, citing 13 C.F.R. § 121.103(c)(1).)

The Area Office found that PSI is a franchise of PFN. PSI and PFN, though, are not affiliated. The regulation governing affiliation based on franchise and license agreements provides:

The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

(*Id.*, quoting 13 C.F.R. § 121.103(i).) The Area Office observed that “the franchise agreement between PSI and PFN indicated that there is a financial separation between the franchisor and the franchisees and their ability to profit or loss from their separate business actions.” (*Id.*) Although the agreement does require the franchisor's written consent before the franchisee's shareholders can transfer their ownership interests, the agreement forbids the franchisor from unreasonably withholding consent. (*Id.* at 3.) Accordingly, the Area Office determined, the franchise agreement does not place excessive restrictions on the sale of ownership interests, and the relationship between PSI and PFN does not create affiliation. (*Id.*, citing *Size Appeal of Emergency Pest Control, Inc.*, SBA No. SIZ-5129 (2010); *Size Appeals of CorTrans Logistics, LLC and Central Delivery Serv.*, SBA No. SIZ-4691 (2005); and *Size Appeal of Ravinia Travel, Inc. d/b/a CEM Travel Servs.*, SBA No. SIZ-4699 (2005).)

The Area Office determined that there were no “other means” of affiliation between PSI and PFN, either. In addition to there being no excessive restrictions on the sale of franchise interest, there also is no common management or ownership. (*Id.*) Further, “there is no financial assistance, indemnification on bid or performance bonds, subcontracting, and/or sharing of facilities between PSI and PFN.” (*Id.*)

The Area Office dispatched of Appellant's ostensible subcontractor allegation, noting that PSI does not propose to subcontract any of the work from the subject contract. (*Id.*)

The Area Office proceeded to calculate PSI's size. PSI's receipts do not exceed the \$11 million size standard, so PSI is a small business. (*Id.*)

D. Appeal

On November 10, 2016, Appellant appealed the size determination and moved to introduce new evidence. Appellant argues that the Area Office erred in determining that PSI is a small business, so OHA should reverse the size determination.

Appellant states that “[PSI] and its large business affiliate through their franchise agreement with [PFN] are controlled by the franchisor.” (Appeal at 1.) Appellant identifies the franchisor as “Pestmaster Services”. (*Id.*) Appellant continues, “The close connections of these two companies are evidenced by the fact that the Franchisee and the Franchisor operate in the same line of business, share common management and have a history of subcontracting together.” (*Id.* at 1-2.)

Appellant alleges that PSI and Pestmaster Services are affiliated, so the Area Office should have investigated their ownership, management, facilities, and business relationships. (*Id.* at 4, citing 13 C.F.R. § 121.1008.) Had the Area Office conducted a proper investigation, it would have concluded that Pestmaster Services controls PSI.

Appellant contends that its protest allegations support a finding of common management, and that the Area Office's conclusions to the contrary are unsupported. For instance, Appellant alleged that PSI does not have an office in New Jersey and is therefore managed from a different state. PSI's telephone number also is from a different state. On its SBA profile, PSI lists www.pestmaster.com as its website, which is the website for the franchisor. In addition, PSI identifies its primary NAICS code as 561990, All Other Support Services, rather than 561710, Exterminating and Pest Control Services. (*Id.* at 5-6.)

Next, Appellant contends that “[t]he Area Office also committed a clear error in its identity of interest analysis.” (*Id.* at 6, citing *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351 (2012).) The fact that the Area Office found that Mr. Godfrey alone controls PSI is beside the point, Appellant maintains, because identity of interest arises not through ownership but through economic dependence. Appellant argues that PSI is controlled by its franchisor because it relies on it for its website, telephone number, and contact information, and PSI's purported address does not exist. PSI, then, cannot rebut the presumption of affiliation based on identity of interest with its franchisor. (*Id.* at 6-7.)

E. New Evidence

Accompanying its appeal, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit PSI's SBA profile, Appellant's protest, photographs of condominiums at PSI's address, printouts of PSI's webpage, and internet search results for PSI. Appellant argues that this evidence clarifies issues on appeal, so there is good cause to admit it. (Motion at 2.) Appellant states that much of this evidence “should already be contained in the record”, and notes that SBA opposes Appellant's motion. (*Id.* at 3.)

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). 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).

Appellant acknowledges that much of the evidence it proffers may already be in the record. In fact, Appellant's protest and PSI's SBA profile and webpage are in the record. Because this evidence is not new, I need not admit it. *Size Appeal of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 12 (2015). The photographs and internet search results, however, are not in the record. This evidence was available 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. The photographs and internet search results therefore are inadmissible. *Size Appeal of Quigg Bros., Inc.* SBA No. SIZ-5786, at 8 (2016).

C. Analysis

Appellant has not demonstrated that the size determination is clearly erroneous. As a result, this appeal must be denied.

I note at the outset that the appeal is confusing, as it is unclear which entities Appellant considers to be the franchisee and the franchisor. The franchise agreement is in the record, though, and it states that PSI is the franchisee, and PFN is the franchisor. (Franchise Agreement at 1.) This is consistent with the Area Office's investigation and factual findings. Sections II.B and II.C, *supra*.

To the extent Appellant contends that the Area Office should have conducted a broader review of PSI's potential affiliations, such arguments are unpersuasive. SBA regulations require that “[a] protest must include specific facts” and “must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned.” 13 C.F.R. § 121.1007(b). OHA has explained:

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.” [13 C.F.R.] § 121.1009(b). . . . 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.”).

Size Appeal of Westcott Elec. Co., SBA No. SIZ-5691, at 5 (2015). Furthermore, the protester bears the burden of being “explicit[]” and “unambiguous” in its protest allegations. *Size Appeal of EnviroServices & Training Center, LLC*, SBA No. SIZ-5517, at 4 (2013).

Here, Appellant asserted in the size protest that PSI is a franchise, that its DUNS number has only a Nevada location, that its telephone number is for New York rather than New Jersey, that its certifications indicate that it is not veteran-owned, and that Appellant “believes that under dependence by the Pestmaster Services franchisees and the Pestmaster Services' name and DUNS number exist.” Section II.A, *supra*. Appellant also requested that the Area Office review PSI's compliance with the ostensible subcontractor rule. *Id.* The Area Office construed the protest as alleging that PSI is affiliated with its franchisor under 13 C.F.R. § 121.103(i) and that PSI is in violation of the ostensible subcontractor rule. The Area Office duly investigated these claims and found them to be meritless. Sections II.B and II.C, *supra*.

On appeal, Appellant argues that the Area Office should have explored whether PSI and its franchisor are affiliated through economic dependence. Appellant, though, did not clearly raise this allegation in the underlying protest. Indeed, the only mention of the word “dependence” was Appellant's garbled contention that “under dependence by the Pestmaster Services franchisees and the Pestmaster Services' name and DUNS number exist”, and Appellant then proceeded to allege affiliation on entirely different grounds, the ostensible subcontractor rule. Accordingly, the Area Office reasonably construed the protest as alleging affiliation through the franchisee-franchisor relationship and the ostensible subcontractor rule. As discussed above, the Area Office was not required to expand the scope of its review beyond those issues stated in the protest. I therefore find no error in the Area Office's interpretation of the protest and its subsequent investigation of PSI.

In its appeal, Appellant also maintains that the Area Office should have investigated whether PSI and its franchisor share common ownership and management, and have

subcontracted together. These issues are specifically addressed in the size determination, though, and the Area Office found that PSI and PFN do not share common management or ownership, and that “there is no financial assistance, indemnification on bid or performance bonds, subcontracting, and/or sharing of facilities between PSI and PFN.” Section II.C, *supra*. Appellant has not shown any error in the Area Office's findings.

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. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge