

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

The Frontline Group

Appellant,

RE: DAK Resources, Inc.

Appealed From
Size Determination No. 03-2017-044

SBA No. SIZ-5860

Decided: October 24, 2017

APPEARANCES

Joseph A. Whitcomb, Esq., Whitcomb, Selinsky, McAuliffe, PC, Denver, Colorado, for Appellant

Eric S. Crusius, Esq., Elizabeth N. Jochum, Esq., Rodney M. Perry, Esq., Holland & Knight LLP, Tysons, Virginia, for DAK Resources, Inc.

DECISION¹

I. Introduction and Jurisdiction

On July 11, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2017-044, after a prior size determination was remanded by SBA's Office of Hearings and Appeals (OHA) in *Size Appeal of The Frontline Group*, SBA No. SIZ-5835 (2017) (“*Frontline P*”). On remand, the Area Office determined that DAK Resources, Inc. (DAK) and its subcontractor, Tech Systems, Inc. (TSI), are similarly situated entities and therefore exempt from compliance with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now publishes the decision in full.

On July 26, 2017, The Frontline Group (Appellant), which previously challenged DAK's size in *Frontline I*, filed the instant appeal. Appellant asserts that the Area Office clearly erred in concluding that DAK and TSI are similarly situated entities and, as a result, failed to adequately analyze whether DAK complies with the ostensible subcontractor rule. In addition, Appellant argues, the Area Office did not consider all of TSI's receipts and affiliates, particularly Tech Systems Polk, LLC (TSP). 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 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

On September 23, 2016, the U.S. Department of the Air Force (Air Force), Air Education and Training Command, issued Request for Proposals (RFP) No. FA3016-16-R-0072 for alteration and fitting of uniforms. (RFP, Attachment 3, §§ 1 and 5.) The RFP contemplated the award of a single indefinite-delivery requirements contract with a one-year base period and two one-year options. (*Id.* §§ 1.10.2 and 1.10.3.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 811490, Other Personal and Household Goods Repair and Maintenance, with a corresponding size standard of \$7.5 million average annual receipts. Proposals were due October 27, 2016. DAK and Appellant submitted timely proposals, self-certifying as small businesses. On February 2, 2017, the CO announced that DAK was the apparent awardee.

B. Prior Proceedings

On February 15, 2017, Appellant filed a size protest against DAK, alleging that DAK is in violation of the ostensible subcontractor rule. More specifically, Appellant contended that TSI will perform the contract's primary and vital requirements and that DAK is unusually reliant upon TSI. On February 17, 2017, the Area Office dismissed Appellant's protest as untimely. (Size Determination No. 3-2017-018.) The Area Director, though, adopted the protest allegations and initiated her own size investigation, pursuant to 13 C.F.R. § 121.1001(a)(1)(iii). (Letter from C. Thompson to D. Moorefield (Feb. 17, 2017).)

On March 8, 2017, the Area Office issued Size Determination No. 3-2017-019, finding that DAK is a small business for the subject procurement. (Size Determination No. 3-2017-019, at 6.) The Area Office determined that Mr. David Moorefield owns 100% of DAK and that he holds no other business interests, including any in TSI. (*Id.*, at 5.) The Area Office also found that DAK did not violate the ostensible subcontractor rule. The Area Office explained that, according to a teaming agreement between DAK and TSI, DAK will perform 51% of the work and will provide all administrative support, all quality control, as well as the onsite Contract Manager, the Lead Tailor, and the lead Sewing Machine Operator. (*Id.*) The Area Office

determined that TSI is not the incumbent contractor, does not provide financial assistance to DAK, and will provide the assistant contract manager, some tailors, and some sewing machine operators. (*Id.*)

Appellant appealed Size Determination No. 3-2017-019 to OHA, arguing that the Area Office incorrectly found that DAK is compliant with the ostensible subcontractor rule. On June 14, 2017, OHA issued its decision in *Frontline I*, granting the appeal and remanding the matter to the Area Office for further review. *Frontline I*, SBA No. SIZ-5835, at 8-9. OHA found that “[t]he record in this case is not sufficient to conclude that DAK, the prime contractor, will self-perform a majority of this contract.” *Id.* at 8. In particular, DAK's proposal was silent as to the division of labor and contractual responsibilities between itself and TSI. Further, although the teaming agreement indicated that TSI would be assigned a minority of the work, DAK undermined this representation in correspondence with the Area Office by suggesting that TSI would contribute the bulk of the contract workforce. OHA noted that the Area Office did not address whether DAK and TSI are similarly situated entities and, thereby, exempt from the ostensible subcontractor rule. *Id.* at 9. Accordingly, OHA directed the Area Office to “obtain relevant contemporaneous evidence . . . to determine the respective contributions of DAK and TSI” and to consider whether DAK and TSI are similarly situated entities. *Id.* at 9-10. OHA stated the Area Office could, in the alternative, begin by analyzing whether DAK and TSI are similarly situated entities. *Id.* at 10.

C. The Instant Size Determination

On July 11, 2017, the Area Office issued Size Determination No. 3-2017-044, finding that DAK and TSI are similarly situated entities. The Area Office, first, reexamined affiliation based on stock ownership. (Size Determination No. 3-2017-044, at 5.) The Area Office found that Mr. Moorefield controls DAK by virtue of his 100% ownership interest, and that Mr. Scotty Martin controls TSI through his 100% ownership of that company. (*Id.* at 5-6.) Mr. Moorefield, Mr. Martin, and their respective spouses hold no other business interests. (*Id.*) Therefore, the Area Office concluded, DAK and TSI are not affiliated through stock ownership. (*Id.*) The Area Office then reviewed the tax returns of DAK and TSI for the years 2013-2015, and concluded that both DAK and TSI are small businesses under a \$7.5 million size standard. (*Id.* at 6.) The Area Office observed that TSI had registered as a large business under this size standard, but agreed with DAK that this was due to administrative error. (*Id.*) “Given that this is a small business set aside procurement and both DAK and TSI are small the NAICS code 811490, DAK is exempt from compliance with the [o]stensible [subcontractor] rule.” (*Id.*)

D. Request to Reopen

After Size Determination No. 3-2017-044 was issued, Appellant asked the Area Office whether it had considered tax return information for TSP, a company formed on December 30, 2015 and which appeared to be associated with TSI. (E-mail from J. Whitcomb to K. Silvia (July 21, 2017).) Appellant requested that the Area Office “reopen the determination as to whether TSI is small and therefore similarly situated to DAK” pending resolution of this question. (*Id.*) The Area Office asked TSI about TSP, and TSI responded that “[TSP] was created and terminated in the same year with all revenues reported under TSI. All the revenues previously reported are

correct.” (E-mail from S. Martin to K. Silvia (July 21, 2017).) On July 25, 2017, the Area Office declined to reopen Size Determination No. 3-2017-044. (E-mail from K. Silvia to J. Whitcomb (July 25, 2017).)

E. Appeal

On July 26, 2017, Appellant appealed Size Determination No. 3-2017-044 to OHA. Appellant asserts that the Area Office clearly erred in finding that TSI is small and that DAK and TSI are similarly situated entities. (Appeal, at 3.) Given this, the Area Office was required to consider whether DAK violated the ostensible subcontractor rule. (*Id.* at 5-6.)

Appellant observes that SBA regulations “clearly indicate[] that firms *must* certify their size at the at the time of initial offer” and direct that “[t]he Federal income tax returns and any amendments filed with the IRS *on or before the date of self-certification must* be used to determine the size status of a concern.” (*Id.*, emphasis Appellant’s.) Here, TSI was not registered as small for any NAICS code with a size standard of \$7.5 million or less, as of October 27, 2016, the date of DAK’s proposal. (*Id.*) TSI updated its profile in December 2016, but, again, did not claim to be small for any size standard under \$7.5 million. (*Id.* at 4.) Furthermore, DAK’s proposal for the instant procurement indicated that TSI would not have been eligible to submit its own offer due to its size. (*Id.*) In light of these representations, the Area Office incorrectly found that TSI is small under a \$7.5 million size standard.

Appellant asserts that the Area Office also improperly ignored TSI’s affiliates in concluding that TSI is small. (*Id.*) Appellant highlights that it alerted the Area Office that TSI may be affiliated with TSP. (*Id.* at 5.) The Area Office should have included the receipts of TSP, and any other affiliates of TSI, in assessing whether TSI is small.

F. Supplemental Appeal

On August 21, 2017, after reviewing the record under the terms of an OHA protective order, Appellant moved to supplement its appeal. Appellant maintains that the Area Office improperly confined its analysis to tax returns, and thus “does not appear to have reviewed the ways in which a company can be considered ‘not small’ beyond the review of TSI’s tax returns.” (Supp. Appeal at 1.) Because DAK and TSI are not similarly situated entities, OHA should remand the matter “to determine whether DAK violated the ostensible subcontractor rule.” (*Id.*)

G. DAK’s Response

On August 31, 2017, DAK responded to the appeal and supplemental appeal. DAK contends that Appellant has shown no error of fact or law in the size determination. Therefore, the appeal should be denied. (Response, at 3.)

According to DAK, the mere fact that TSI was not, at the time of proposal submission, registered as small under a \$7.5 million size standard does not establish that TSI is not small. As a proposed subcontractor, TSI was not required to self-certify its size for the instant procurement. (*Id.*) Moreover, registration in the System for Award Management (SAM) is not dispositive in

determining whether a concern is small. Rather, the Area Office correctly calculated whether TSI's average annual receipts exceed the size standard, based on TSI's tax returns for 2013-2015 (*i.e.*, the three most recent fiscal years prior to proposal submission). (*Id.* at 3-4, citing 13 C.F.R. § 121.104(c)(1).) In addition, although not discussed in the size determination, the Area Office had access to other information to conduct its review, including sworn SBA Form 355s from both DAK and TSI. (*Id.* at 4.)

DAK observes that TSP was established in late December of 2015, and thus generated no significant revenues during the time period in question. (*Id.* at 5.) Because TSP's revenues for 2015 “could not have had more than a miniscule impact on [TSI's] three-year-average,” any error with regard to TSP was harmless. (*Id.*)

DAK also argues that the Area Office appropriately chose to begin its analysis by considering whether DAK and TSI are similarly situated entities. (*Id.* at 5-6.) Indeed, OHA commented in *Frontline I* that such an approach was permissible. According to DAK, the Area Office was not required to explore DAK's compliance with the ostensible subcontractor rule once it determined that DAK and TSI are similarly situated. (*Id.* at 6.)

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

Effective June 30, 2016, SBA amended the ostensible subcontractor rule to state that “[a]n ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in § 125.1 of this chapter. . . .” 13 C.F.R. § 121.103(h)(4); 81 Fed. Reg. 34,243 (May 31, 2016). Section 125.1 in turn defines a “similarly situated entity” as “a subcontractor that has the same small business program status as the prime contractor. This means that . . . for a small business set-aside, partial set-aside, or reserve a subcontractor that is a small business concern.” 13 C.F.R. § 125.1. The regulation continues, “In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.” *Id.*

In the instant case, there is no dispute that DAK, the prime contractor, is small, and no dispute that the subject procurement was set aside for small businesses. Furthermore, DAK and TSI will perform the same type of work on this procurement, and no party contends that the subcontract would be governed by a different NAICS code or size standard than the prime

contract. The sole question presented, then, is whether TSI, the proposed subcontractor, is also a small business. If so, DAK and TSI are “similarly situated entities,” and the ostensible subcontractor rule does not apply.

Appellant contends that TSI is not small because TSI did not self-certify as a small business, and because TSI was not, at the time of proposal submission, registered as small under a \$7.5 million size standard in SAM. These arguments are meritless. As DAK observes, TSI, as a proposed subcontractor, was not required to certify its size for purposes of the procurement. Moreover, OHA has recognized that information in a SAM profile may constitute valid grounds to question the size or status of a concern, but “does not, by itself, render the concern ineligible.” *Matter of Crystal Clear Techs., Inc.*, SBA No. WOSB-108, at 11 (2016) (citing *Size Appeal of OER Servs., LLC*, SBA No. SIZ-5757 (2016)). Accordingly, TSI's SAM profile does not conclusively prove that TSI is other than small under a \$7.5 million size standard. The Area Office properly conducted an analysis of TSI's size, and in doing so accepted DAK's assertion that the SAM profile was in error. Section II.C, *supra*.

Appellant's stronger argument is that the Area Office could not reasonably find TSI to be small without also considering any affiliates of TSI. I agree with Appellant that, insofar as the Area Office limited its review only to the size of TSI itself, while disregarding any affiliates of TSI, this would constitute error. Determining whether a concern is a small business necessarily involves consideration of whether that concern is “independently owned and operated” and thus affiliated with other concerns. 15 U.S.C. § 632(a). Nevertheless, the problem for Appellant here is that Appellant cannot point to any affiliates or possible affiliates of TSI that the Area Office failed to consider. As DAK highlights in its response to the appeal, the Area Office had access to TSI's sworn SBA Form 355, which indicates that TSI has no affiliates. The Area Office plainly did review this information, and noted in the size determination that TSI is wholly owned by Mr. Martin, who holds no ownership or managerial interest in any other concern. *See* Section II.C, *supra*. Further, except for TSP, Appellant did not argue to the Area Office that TSI has any affiliates, nor has Appellant identified any other possible TSI affiliates even after Appellant's counsel reviewed the record under the terms of an OHA protective order. Section II.E, *supra*. With regard to TSP, Appellant itself acknowledged that TSP was established on December 30, 2015, and thus was only briefly in existence during the three-year period utilized to calculate size. Section II.D, *supra*. Moreover, TSI represented to the Area Office that TSP's revenues are already reflected on TSI's tax returns, and Appellant offers no basis to question this assertion. *Id.* Accordingly, while I agree with Appellant that the Area Office was required to include TSI's affiliates in assessing whether TSI is small, the record does not establish that TSI has any affiliates that the Area Office did not consider.

Lastly, I find no merit to Appellant's suggestions that the Area Office should have conducted further analysis under the ostensible subcontractor rule. As OHA explained in *Frontline I*, the ostensible subcontractor rule does not apply if the prime contractor and subcontractor are similarly situated entities. Because the Area Office determined that DAK and TSI are similarly situated entities, further discussion of the ostensible subcontractor rule was unnecessary.

IV. Conclusion

Appellant has not shown clear error of fact or law in the size determination. Therefore, 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