

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

SIZE APPEAL OF:

Elliott Aviation, Inc.,

Appellant,

RE: ASES, LLC, d/b/a Field Aerospace

Appealed From  
Size Determination No. 05-2018-019

SBA No. SIZ-5890

Decided: March 14, 2018

APPEARANCE

Mark Wilken, Vice President, Elliott Aviation, Inc., Milan, Illinois

DECISION

I. Introduction and Jurisdiction

On January 5, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area V (Area Office) issued Size Determination No. 05-2018-019, dismissing a size protest filed by Elliott Aviation, Inc. (Appellant) against ASES, LLC d/b/a Field Aerospace (Field Aerospace). Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. 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 August 10, 2016, the U.S. Department of the Air Force, Air Force Materiel Command, issued Request for Proposals (RFP) No. FA8106-16-R-0004 for the T-1A Avionics Modification Program (AMP). The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 336411, Aircraft Manufacturing, with a corresponding 1,500 employee size standard. RFP

Amendment 003, issued November 3, 2016, extended the deadline for initial offers until November 21, 2016. Final proposal revisions were due November 16, 2017.

On December 21, 2017, the CO notified Appellant that Field Aerospace was the apparent successful offeror. On December 24, 2017, Appellant filed a size protest with the CO alleging that Field Aerospace is not a small business. Appellant stated:

The basis for our challenge is that Field Aerospace, Field Aviation, and ASES LLC are either (i) a single corporate entity or (ii) affiliated companies such that their combined size exceeds the small business size limitation of 500 employees, therefore Field Aerospace does not qualify as a small business for this contract.

(Protest at 1.) The protest noted that Federal Acquisition Regulation (FAR) clause 52.204-8, ANNUAL REPRESENTATIONS AND CERTIFICATIONS (APR 2016), refers to a 500 employee size standard. (*Id.* at 1-2.) In addition, pointing to information on Field Aerospace's website and entries for Field Aviation Company, Inc. and ASES LLC in the System for Award Management (SAM), Appellant stated:

The certifications and registrations in SAM clearly show that Field Aerospace, Field Aviation, and ASES LLC are a single entity as shown in the "owned by" section of the registration.

The two Field Aviation certifications clearly state both locations ARE NOT a small business. The Field Aerospace Company website states they have over 500 employees across their four locations.

(*Id.* at 3 (emphasis in original).) The CO forwarded Appellant's protest to the Area Office for review.

#### B. Size Determination

On January 5, 2018, the Area Office issued Size Determination No. 05-2018-019 dismissing Appellant's protest pursuant to 13 C.F.R. § 121.1007(b). The Area Office found that the size standard for the RFP is 1,500 employees, not 500 employees as Appellant had asserted. The Area Office explained:

[Y]ou are misreading that the [RFP] indicates that the 500-employee size standard is applicable. The applicable size standard for NAICS [code] 336411 is 1500 employees. The only reason the 500-employee size standard would be applicable is if Field Aerospace is not the manufacturer. 13 CFR 121.406 explains this in detail.

(Size Determination at 2.)

The Area Office dismissed the protest because Appellant had presented no basis to find that Field Aerospace is not the manufacturer of the end items being procured, nor any grounds to conclude that Field Aerospace exceeds the 1,500 employee size standard. (*Id.*) The Area Office also noted that Field Aerospace's SAM registration (under ASES, LLC) does show that it is a small business under NAICS code 336411. (*Id.*)

### C. Appeal

On January 18, 2018, Appellant filed the instant appeal. Appellant maintains that the Area Office erred in determining that (1) the applicable size standard is 1,500 employees instead of 500 employees, and (2) Field Aerospace is an eligible small business for this procurement. (Appeal at 1.) After reiterating arguments originally made in its protest, Appellant contends, for the first time, that Field Aerospace is not the manufacturer of the T-1A AMP that is the subject of this procurement. (*Id.* at 3.) Appellant also requests an investigation into additional entities which, it claims, are affiliated with Field Aerospace through its chairman. (*Id.* at 6.)

In support of its contentions, Appellant offers new information gathered from Dun & Bradstreet, Bloomberg, and Field Aerospace's website. Appellant did not submit a motion to supplement the record, and does not explain why the new information was not, or could not have been, provided to the Area Office during the size review.

Field Aerospace did not respond to the appeal.

## 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 first 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 appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 5 (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).

Here, Appellant has not filed the requisite motion to admit new evidence, and OHA has held that such an omission may be “fatal” to an attempt at introducing new evidence. *Size Appeal of Quigg Bros., Inc.*, SBA No. SIZ-5786, at 8 (2016). 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 then 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. *Size Appeal of Megen-AWA 2, LLC*, SBA No. SIZ-5845, at 7 (2017) (declining to accept new evidence “because this evidence was not initially accompanied by a motion to admit it, and because it is information which could have been submitted to the Area Office”).

### C. Analysis

Appellant has not shown that the Area Office erred in dismissing Appellant's size protest. Although Appellant contended in its protest that Field Aerospace and its affiliates have more than 500 employees, this allegation was not a valid basis to find Field Aerospace other than small, because the applicable size standard is 1,500 employees. Sections II.A and II.B, *supra*. On appeal, Appellant argues that Field Aerospace is not the manufacturer of the T-1A AMP, and does not qualify under the nonmanufacturer rule. These issues, though, were not raised in Appellant's size protest, and it is settled law 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 size protest made no allegation whatsoever relating to manufacturing. Section II.A, *supra*. As a result, the Area Office was not obliged to investigate whether Field Aerospace is the manufacturer of the T-1A AMP, or to determine whether the nonmanufacturer rule and its 500 employee size standard should be applied in lieu of the 1,500 employee size standard associated with NAICS code 336411. *E.g.*, *Size Appeal of Fin. & Realty Servs., LLC*, SBA No. SIZ-5719, at 4 (2016); *Size Appeal of Int'l Filter Mfg. Corp.*, SBA No. SIZ-5711, at 4 (2016); *Size Appeal of Wescott Elec. Co.*, SBA No. SIZ-5691, at 5 (2015). Nor can OHA now decide these questions in the first instance, as SBA regulations preclude OHA from adjudicating new issues presented for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Global Native Servs., Inc.*, SBA No. SIZ-5865, at 4 (2017); *Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 13 (2016) (“OHA will not consider an issue that was neither raised to, nor investigated by, the Area Office.”). Accordingly, Appellant has not established that the Area Office erred in dismissing the protest.

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