

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

SIZE APPEAL OF:

AWA Business Corporation,

Appellant,

Appealed From
Size Determination No. 04-2018-021

SBA No. SIZ-5904

Decided: May 3, 2018

APPEARANCES

Suzanne Sumner, Esq., Erin R. Davis, Esq., Taft Stettinius & Hollister LLP, Dayton, Ohio, for AWA Business Corporation.

DECISION

I. Introduction and Jurisdiction

On March 12, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area II (Area Office) issued Size Determination No. 04-2018-021, concluding that AWA Business Corporation (Appellant) is not a small business. Appellant contends that the Area Office erred, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter to the Area Office for a new size determination. 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, and so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

On February 22, 2018, the Department of the Air Force sent a formal offering letter to the SBA's Columbus District Office (DO). The letter offered to the SBA's 8(a) program a contract for repair of an office at Wright-Patterson Air Force Base. The applicable North American Industry Classification System (NAICS) code was 236220, Commercial and Institutional Building Construction, with a corresponding \$36.5 million annual receipts size standard. The Air Force proposed a sole source award under the 8(a) program to Appellant. (Letter, A. Dunbar to SBA Columbus DO, Feb. 22, 2018.)

On February 23, 2018, the Acting District Director (ADD) of the SBA Columbus DO recommended that SBA's Acting Associate Administrator for Business Development (AAA/BD) request a formal size determination on Appellant. The ADD made this request because Appellant is 51% owner of Mege-AWA 2, LLC, JV, a joint venture recently found other than small in Size Determination No. 04-2017-021, affirmed in *Size Appeal of Mege-AWA 2, LLC*, SBA No. SIZ-5845 (2017) (*Mege-AWA 2*). On February 28, 2018, the AAA/BD sent the request for a size determination to the Area Office. (Memo, S. Hardin to A. Sinha, Feb. 23, 2018.)

On that same day, the Area Office notified Appellant of the request via UPS overnight mail, and instructed it to submit a response to the allegations of the request letter with supporting evidence, a completed SBA Form 355, a completed IRS Form 4506-T, its Articles of Organization and By-Laws, its annual statements, and complete financial statements and Federal income tax returns for the last three fiscal years. (Letter, D. Gordon to Appellant, Feb. 28, 2018.) The UPS package was misdelivered, and Appellant did not receive it until March 6th. The Area Office granted Appellant an extension to respond until March 9th.

On March 9, 2018, Appellant informed the Area Office that there had been “a new development in the referenced procurement” and that it would not be able to submit the requested documents. (Email, B. Nwankwo to D. Gordon, Mar. 9, 2018.) On March 12, 2018, the Air Force notified the Area Office that AWA no longer wished to be considered for this award. (Email, K. Parks to D. Gordon, Mar. 12, 2018.)

On March 12, 2018, the Area Office issued Size Determination No. 04-2018-021, concluding Appellant is not a small business. The Area Office concluded that because it undertook to perform a size determination at the request of the AAA/BD, Appellant's decision to withdraw from the procurement did not affect the determination. The AAA/BD requested a formal size determination under 13 C.F.R. § 121.1001(b)(2)(i)(B), which authorizes him to request a formal size determination to address concerns about a firm's continuing eligibility to participate in the 8(a) program. (Size Determination at 1.) The Area Office noted that Appellant had failed to respond to the request for information by the acknowledged deadline. Then, because Appellant had failed to furnish the requested information within the required time period, the Area Office drew an adverse inference that disclosure of the information would be contrary to Appellant's interest. (*Id.* at 2-3.) Accordingly, the Area Office determined that Appellant was other than small.

On March 26, 2018, Appellant filed the instant appeal. Appellant noted this Office's decision in *Mege-AWA 2*, and that the decision is on appeal at the U.S. Court of Federal Claims. Appellant maintains that there has never been any question that it is a small business concern. (Appeal at 1.) Appellant explains that, due to other business commitments and its appeal at the U.S. Court of Federal Claims, it elected to withdraw from consideration for the subject procurement. Appellant notified SBA of this, and believed it no longer needed to submit the subject information. (*Id.* at 2.)

Appellant seeks to submit with its appeal the information the Area Office requested, and maintains that it is a small business. (*Id.* at 2.) Appellant continues to maintain that the decision in *Megen-AWA 2* was in error. (*Id.* at 2-7.)

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. Analysis

The size regulations provide:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business.

13 C.F.R. § 121.1008(d). Further,

In the case of refusal or failure to furnish the requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make the disclosure.

13 C.F.R. § 121.1009(d). These regulations constitute the adverse inference rule, which OHA has applied consistently over the years with a three-part test.

First, the requested information must be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Finally, the request for information must be specific. If all three criteria are met, the challenged concern must produce the requested information or suffer the consequences of an adverse inference. *E.g.*, *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9-10 (2013).

Size Appeal of OxyHeal Medical Systems, Inc., SBA No. SIZ-5707, at 9 (2016) (*OxyHeal*).

In *OxyHeal* a mistake by a challenged concern's employee led to the concern's completely failing to respond to the Area Office's request for information. On appeal, OHA concluded that because that concern's failure to respond was not based on any error by the Area Office, but on the concern's failure to properly monitor its communications, that concern had no excuse for failing to respond. *OxyHeal* at 9-10. Further, the three part test was met, and thus OHA upheld the Area Office's decision to apply the adverse inference. (*Id.*)

Here, the three part test is also met. The first element is met because the requested information was necessary to perform a size determination on Appellant. The second and third elements are met because the information requested pertained to Appellant itself and referenced specific documents. Accordingly, the Area Office's application of the adverse inference rule meets the three-part test, and there is no error in the size determination on this point.¹

Appellant attempted to short-circuit the process by withdrawing from the procurement, but this size determination was not based upon an unsuccessful offeror's protest, because this was a sole-source 8(a) procurement. The AAA/BD had requested the size determination under 13 C.F.R. § 121.1001(b)(2)(i)(B), regarding Appellant's continued 8(a) eligibility. This regulation does not require that the concern be under consideration for an 8(a) contract, and the request and resulting size determination are valid even if the concern is not being considered for a contract award. The purpose of the size determination is to examine Appellant's continued eligibility for the program, not merely for this one procurement, but with a view toward protecting the integrity of the Federal procurement process. *See* 13 C.F.R. § 121.1001(b)(9). The Area Office thus did not err in completing the size determination after Appellant's withdrawal from consideration for the Air Force contract.

Finally, Appellant's attempt to submit on appeal the documentation it should have submitted in response to the Area Office's request is futile. This is new evidence which Appellant failed to submit to the Area Office. 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 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).

Here, Appellant has failed to submit the required motion, and has failed to establish good cause for its failure to submit this evidence to the Area Office. Further, as in *OxyHeal*, this

¹ The initial misdelivery of the Area Office's request is irrelevant, because the Area Office granted Appellant an extension of time to respond due to another party's mistake.

evidence is also irrelevant to the main issue in this case, whether the Area Office properly drew an adverse inference against Appellant. If the adverse inference was proper, the size determination must be sustained. If the inference was improper, then the appropriate remedy would be to remand the case to the Area Office for a new size determination, not for OHA to attempt to conduct a size determination. *Size Appeal of OxyHeal Medical Systems, Inc.*, SBA No. SIZ-5707, at 8-9 (2016).

IV. Conclusion

Appellant has not established any error of law or fact in the Area Office's determination. Accordingly, 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).

CHRISTOPHER HOLLEMAN
Administrative Judge