

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Crop Jet Aviation, LLC,

Appellant,

RE: Thomas Helicopters, Inc.

Appealed From
Size Determination No. 06-2018-043

SBA No. SIZ-5933

Decided: June 8, 2018

APPEARANCES

Theodore P. Watson, Esq., Watson & Associates, LLC, Aurora, Colorado, for Crop Jet Aviation, LLC

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Shane J. McCall, Esq., Koprince Law LLC, Lawrence, Kansas, for Thomas Helicopters, Inc.

DECISION¹

I. Introduction and Jurisdiction

On March 15, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area VI (Area Office) issued Size Determination No. 06-2018-043 concluding that Thomas Helicopters, Inc. (THI) is a small business under the size standard associated with the subject procurement. Crop Jet Aviation, LLC (Appellant), which had previously protested THI's size, maintains 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.

¹ This Decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the Decision, counsel for THI informed OHA of its recommended redactions. I now issue this redacted version of the Decision for public release.

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 after 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 January 31, 2018, the U.S. Department of the Interior, Bureau of Land Management, in Boise, Idaho, issued Request for Quotations No. 140L2618R0003 for the Spring 2018 Jarbidge Chemical Application. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 115112, Soil Preparation, Planting, and Cultivating, with an associated size standard of \$7.5 million average annual receipts. THI submitted its quote on February 8, 2018. On February 14, 2018, the CO notified unsuccessful offerors that THI was the apparent awardee.

On February 14, 2018, Appellant, an unsuccessful offeror, filed a size protest against THI with the CO. Appellant alleged that THI is not an eligible small business because, as of January 1, 2018, THI was affiliated with [Alleged Affiliate], a company which controls various other businesses and which performs aerial application, chemical sales, ground application, agronomy, and trucking services across 35 locations in 12 states. (Protest at 1-2.) Appellant alleged that, in addition to THI, [Alleged Affiliate] controls: [Company 1]; [Company 2] (two locations); [Company 3]; and [Company 4]. (*Id.* at 2.) Appellant based its allegations on material found on the [Alleged Affiliate], Buzzfile, USASpending.gov, and other websites. Appellant included screenshot copies of this material with its protest. Material copied from the [Alleged Affiliate] website includes THI's contact information listed on the "Trucking Services" page; Rod and Dale Thomas, the owners of THI, listed on [Alleged Affiliate]'s "Management Team" page; [Individual 1] listed as "Office Manager" and [Individual 2] listed as "Field Representative" on the same page; and THI's Gooding, Idaho address listed as [Alleged Affiliate]'s 35th location. (*Id.* at 3, 5-7.) The CO forwarded the protest to the Area Office for review.

On February 20, 2018, the CO spoke with [Individual 3] at [Alleged Affiliate] and asked him about [Alleged Affiliate]'s relationship with THI. (CO's Memo to File (Feb. 20, 2018).) [Individual 3] informed the CO that he was "on his way to Idaho", but that "nothing had been signed" yet. (*Id.*) On February 21, 2018, THI sent an email to the CO "to clear up any confusion about the future of [THI]. Today it is a company that is owned by Dale and Rod Thomas but [xxx] [Alleged Affiliate] [xxx]." (Email from R. Thomas to P. Fort (Feb. 21, 2018).)

In its March 8, 2018 response to the protest, THI stated, "[xxx] [Alleged Affiliate] [xxx]." (SBA Form 355, Answer #8.) The Area Office asked that THI "elaborate on the [xxx]" and that, if THI "is currently under contract to merge or sell assets" to submit a copy of the agreement. (Email from E. Sanchez to R. Thomas (Mar. 8, 2018).) The Area Office also asked why THI was listed on [Alleged Affiliate]'s website as one of [Alleged Affiliate]'s locations, pointing to the protest allegation, and asked what had happened on January 1, 2018, the date referenced in the protest. (*Id.*) THI responded:

[THI] is identified as a location for [Alleged Affiliate] due to an overzealous web designer. . . . [THI] and [Alleged Affiliate] [xxx]. We have no agreement or contract in place involving the merger or selling of assets. Nothing happened to [THI] on January 1, 2018.

(Letter from R. Thomas to E. Sanchez (Mar. 9, 2018).) Asked for further clarification, THI stated:

We are in talks with [Alleged Affiliate] [xxx] or work with us in some fashion. Their web folks (in anticipation of that) made some changes on their web site and started to build [THI's] site. That, as I stated before, was premature and has been taken off the [Alleged Affiliate] site at this time. . . . As you can imagine [xxx] are confidential in nature and thus far informal, very fluid and ongoing.

(Email from R. Thomas to E. Sanchez (Mar. 13, 2018).) Asked how the negotiations have been conducted, THI responded: “Almost all negotiations have been between [Individual 4] and Rod [Thomas] by phone. [The other owners] haven't even been involved.” (Email from R. Thomas to E. Sanchez (Mar. 14, 2018).)

B. The Size Determination

On March 15, 2018, the Area Office issued Size Determination No. 06-2018-043 concluding that THI is a small business. The Area Office determined that THI is owned by two brothers, Rod and Dale Thomas, who are also its only officers and directors. (Size Determination at 3.) The Thomas brothers also own [Admitted Affiliate], but are not owners, officers, or directors of any other entity. (*Id.*) Although THI and [Admitted Affiliate] are affiliated, their combined average annual receipts do not exceed the size standard. (*Id.* at 3-5.)

Regarding the protest allegation that THI is affiliated with [Alleged Affiliate], the Area Office credited THI's statements that there is no cross-ownership or cross-management between THI and [Alleged Affiliate]; that Rod and Dale Thomas are not related to the owners of the [Alleged Affiliate] companies; and that the appearance of THI on [Alleged Affiliate]'s website was premature and due to an “overzealous web designer” at [Alleged Affiliate]. (*Id.* at 4.) While THI and [Alleged Affiliate] have engaged in informal discussions about the possibility of a sale or merger, they had not reached any agreement in principle as of February 8, 2018, the date to determine size. (*Id.* at 4-5.) The Area Office cited 13 C.F.R. § 121.103(d)(2) and *Size Appeal of Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324 (2012) to conclude that THI and [Alleged Affiliate] are not affiliated under the present effect rule. (*Id.*)

C. Appeal

On March 29, 2018, Appellant filed the instant appeal. Appellant contends that the Area Office made myriad errors of fact and law in determining that THI is not affiliated with [Alleged Affiliate]. As relief, Appellant requests that OHA reverse the size determination or remand the

matter to the Area Office for further investigation of the issue of whether THI is affiliated with [Alleged Affiliate]. (Appeal at 19.)

Appellant argues that the Area Office first erred in determining the Thomas brothers have no management positions in [Alleged Affiliate], because at the time of the protest, [Alleged Affiliate]'s website listed THI as one of [Alleged Affiliate]'s companies, and identified both Thomas brothers as part of [Alleged Affiliate]'s management team. (*Id.* at 6, citing Protest at 5.) Appellant faults the Area Office for crediting THI's "overzealous web designer" explanation without corroboration from [Alleged Affiliate]. (*Id.* at 6-8.)

Next, the Area Office made a factual error in determining that [Alleged Affiliate] and THI had no agreement in principle to merge. (*Id.* at 8-9.) THI acknowledged that the two companies were actively negotiating, and the screenshots of [Alleged Affiliate]'s website demonstrate that "there were fundamental terms and specifics agreed upon between Thomas and [Alleged Affiliate]." (*Id.* at 9.)

Third, the Area Office made an error of law in determining THI's size as of a later date than its self-certification. (*Id.* at 9-10.) In particular, because THI submitted its quote on February 8, 2018, the Area Office should have considered the information on [Alleged Affiliate]'s website as of that date, rather than after that information was removed in response to the protest. (*Id.*)

Fourth, the Area Office made an error of law in failing to determine whether THI and [Alleged Affiliate] are affiliated on alternate grounds listed in 13 C.F.R. § 121.103. (*Id.* at 10-12.) Appellant contends the Area Office stopped its analysis after considering affiliation under the present effect rule and failed to consider other affiliation grounds such as common management (based on [Alleged Affiliate]'s website) and identity of interest (based on THI's admission that the two firms were engaged in discussions about a potential merger). (*Id.* at 11.)

Appellant argues that the Area Office misapplied the present effect rule. (*Id.* at 12-14.) In Appellant's view, "[i]f an agreement had not been reached, it is highly unlikely that [Alleged Affiliate] would have directed [its] web designer to add [THI] and [THI's] managers to the [Alleged Affiliate] organization." (*Id.* at 12.) The Area Office "failed to completely investigate or explore such an important aspect of the problem." (*Id.* at 12-13.) Appellant refers to the website screenshots provided with its protest as "tangible, specific evidence that an agreement in principle had been reached and that the parties were past any 'premature' discussions." (*Id.* at 13.) In support, Appellant points to *Size Appeal of Heard Construction, Inc.*, SBA No. SIZ-5461 (2013), where OHA remanded a dispute for further investigation and urges OHA to do so here. (*Id.* at 14.)

Appellant maintains that the Area Office erred by failing to consider affiliation under the totality of the circumstances under 13 C.F.R. § 121.103(a)(5), as an area office is required to do. (*Id.* at 14-15.) The size determination made no mention of this affiliation ground. (*Id.* at 15.)

Appellant contends that the Area Office failed to properly and thoroughly investigate the potential affiliation between THI and [Alleged Affiliate]. (*Id.* at 15-17.) The Area Office cited *Size Appeal of Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324 (2012) to support its decision, but the investigation there included information from the alleged affiliate as well as from the challenged firm to consider whether there was an agreement on the part of one to acquire the other. (*Id.* at 16.) Conversely, the Area Office here made no inquiries with [Alleged Affiliate], and instead “simply relied on unsubstantiated and convenient statements from [THI].” (*Id.*)

Lastly, Appellant maintains that the Area Office failed to address all of Appellant's protest allegations and thus the matter should be remanded to the Area Office. (*Id.* at 17-19.) Here Appellant cites various cases where OHA remanded matters due to an incomplete investigation or analysis or both. (*Id.*)

With its appeal, Appellant moved to introduce new evidence, and submitted the proposed new evidence, supported by an affidavit by Appellant's managing member. The new evidence consists of: (1) a February 1, 2018 letter from THI inviting customers to a February 21, 2018 dinner, and informing them that it has “joined with” [Alleged Affiliate] and that “[w]ith this partnership . . . there will be no change in management”; (2) a screenshot of a February 2, 2018 post on [Alleged Affiliate]'s Facebook about a trade show and inviting people to “Stop by our [THI] Booth to see [Individual 2]!”; (3) a March 6, 2018 photo of [Alleged Affiliate]'s airplane in THI's hangar; (4) a screenshot of a March 7, 2018 post on THI's Facebook of a safety article quoting [an Alleged Affiliate] employee; and (5) screenshots of THI's own website as of February 27, 2018, before the content was taken down. (Motion, Attachments 1-5.) Appellant asserts that this new evidence is relevant, does not unduly enlarge the issues, and clarifies the facts on appeal. (Motion at 5-8, 9-10, 10-11, 12-13, 13-15.)

D. THI's Response

On April 17, 2018, THI responded to the appeal. THI first argues that the appeal is moot because contract performance is already underway and will likely be complete before OHA's decision is issued. (Response at 6-8.)

Turning to Appellant's allegations of error, THI contends that the Area Office correctly determined that the present effect rule does not apply here, because although THI had some discussions with [Alleged Affiliate] about a potential sale or merger, no agreement in fact or principle had been reached as of February 8, 2018, the date for determining THI's size. (*Id.* at 8-9.) “At best, the evidence shows an agreement ‘to open or continue negotiations towards the possibility’” of a sale or merger at some later date, a scenario which the present effect rule explicitly states is not an agreement in principle. (*Id.* at 9, quoting 13 C.F.R. § 121.103(d)(2).) THI asserts that it described the status of its negotiations with [Alleged Affiliate] in its sworn Form 355 and in subsequent responses to the Area Office's inquiries, while the only contrary evidence offered by Appellant is [Alleged Affiliate]'s website, which was incorrect and beyond THI's control. (*Id.* at 8-9.) Thus, the weight of the evidence is that there was no agreement in principle and, therefore, no basis for applying the present effect rule to affiliate THI with [Alleged Affiliate].

Next, THI addresses Appellant's other alleged points of error. First, the Area Office properly credited THI's sworn statement that neither Thomas brother held a management position at [Alleged Affiliate], as opposed to Appellant's sole contrary evidence of [Alleged Affiliate]'s incorrect website. (*Id.* at 11-12.) Second, the Area Office correctly determined THI and [Alleged Affiliate] had no agreement, based on THI's responses to the Area Office's questions. (*Id.* at 12.) Third, the Area Office did not, as Appellant alleges, base its size determination on the fact [Alleged Affiliate]'s website was changed; to the contrary, it was reasonable for the Area Office to check the website after being told it was wrong and had been corrected, and to note that fact in the size determination, since Appellant had based much of its protest on that website. (*Id.* at 12-13.) Fourth, THI maintains that the Area Office had no obligation to investigate additional affiliation theories (such as contractual relationships) that were not raised by the protester. (*Id.* at 13-14.) The Area Office likewise was not required to investigate totality of the circumstances affiliation absent specific allegations raised in the protest. (*Id.* at 15-16.)

THI maintains that the Area Office did thoroughly investigate Appellant's protest claims, and had no reason to ask [Alleged Affiliate] to corroborate THI's statements. (*Id.* at 16 & n.2.) Further, merely doing business with another firm does not equal affiliation. (*Id.* at 16.) Finally, because the Area Office did not fail to consider whether THI and [Alleged Affiliate] are affiliated, there is no reason to remand the matter to the Area Office. (*Id.* at 17.)

Also on April 17, 2018, THI objected to Appellant's new evidence. THI maintains that Appellant's Attachments 1 and 2 were available at the time of the initial protest and should have been submitted then. (Objection at 3-5.) Appellant's Attachments 3 and 4 were created after February 8, 2018, the date for determining size, and thus are irrelevant to the size determination. (*Id.* at 5-6.) As for Attachment 5, the website screenshots, THI contends the exact time the particular content was publicly available is unclear. (*Id.* at 6.) If, however, the content was available before February 8th, Appellant should have included it with its protest, and if it were not publicly available until after that date, it would not be relevant. (*Id.*)

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. *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).

In this case, I agree with THI that Appellant has not established good cause to introduce new evidence. Appellant's Attachments 1 and 2 are not admissible because they were available at the time of the protest and therefore could have been submitted to the Area Office during the size investigation. *E.g.*, *Size Appeal of Elliott Aviation, Inc.*, SBA No. SIZ-5890, at 4 (2018). Both documents are also of questionable evidentiary value, as Attachment 1 clearly states “there will be no change in management” while Attachment 2 merely quotes [an Alleged Affiliate] employee in the context of an article on safety, without making any connection between THI and [Alleged Affiliate]. The remaining three attachments were created after February 8, 2018, the date to determine size, and thus shed no light on whether THI was affiliated with [Alleged Affiliate] as of February 8, 2018. *Size Appeal of Potomac River Group, LLC*, SBA No. SIZ-5844, at 4 (2017). Accordingly, because Appellant has not demonstrated good cause for the admission of its new evidence, the motion to admit new evidence on appeal is DENIED.

C. Analysis

The central issue in this case is whether the Area Office correctly applied SBA's “present effect” rule. The rule states, in pertinent part:

(1) In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(2) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered “agreements in principle” and are thus not given present effect.

13 C.F.R. § 121.103(d). OHA has explained that, under the present effect rule, “a merger or acquisition is effective as of the date [] that an ‘agreement in principle’ is reached, even though the merger or acquisition itself is not yet consummated.” *Size Appeal of Heard Constr., Inc.*, SBA No. SIZ-5461, at 5 (2013) (quoting *Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324, at 8 (2012)).

In the instant case, the Area Office found that, although THI and [Alleged Affiliate] did engage in discussions about the [xxx], they had not yet reached any agreement in principle as of February 8, 2018, the date to determine size. Section II.B, *supra*. As a result, the Area Office determined and [Alleged Affiliate] are not affiliated under the present effect rule. *Id.*

On appeal, Appellant argues at length that the Area Office's decision was contrary to the record before it. Appellant highlights in particular that [Alleged Affiliate]'s website contained several entries suggesting that a [xxx]. Nevertheless, the problem for Appellant is that the Area Office obtained multiple statements from THI that the two companies had not reached any [xxx] as of February 8, 2018. Section II.A, *supra*. THI's statements included its sworn SBA Form 355, submitted under penalty of perjury. *Id.* THI further represented that the entries on [Alleged Affiliate]'s website were mistaken and attributable to “an overzealous web designer” at [Alleged Affiliate], who was not fully informed as to the current status of the negotiations. *Id.* In addition, THI's representations were consistent with information earlier provided to the CO by both THI and [Alleged Affiliate]. *Id.* Because THI submitted sworn, specific statements, and offered a plausible explanation for the website entries, the Area Office could reasonably choose to credit these statements. 13 C.F.R. § 121.1009(d). Accordingly, Appellant has not demonstrated that the Area Office erred in concluding that the present effect rule was not applicable, as there was no agreement in principle for a sale or merger as of February 8, 2018.

Appellant also argues that the Area Office should have more thoroughly investigated whether THI and [Alleged Affiliate] are affiliated on alternate grounds, such as common management, identity of interest, or the totality of the circumstances. I find no merit to Appellant's arguments. Appellant's protest did not clearly allege affiliation on any of these alternate grounds, and it is well-settled 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.”). Moreover, the only evidence that might have supported Appellant's allegations were the entries on [Alleged Affiliate]'s website, which the Area Office did investigate and determined to be erroneous. Sections II.A and II.B, *supra*. Again, then, Appellant has not shown any reversible error in the size determination.

IV. Conclusion

Appellant has not proven that the size determination is clearly erroneous. Accordingly, 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