

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

SIZE APPEAL OF:

A&Y Government Services, LLC,

Appellant,

RE: Bukkehave, Inc.

Appealed From
Size Determination No. 03-2018-072

SBA No. SIZ-5966

Decided: October 22, 2018

APPEARANCE

Saad Al-Salihi, Esq., London, England, for Appellant

DECISION

I. Introduction and Jurisdiction

On September 17, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2018-072, concluding that Bukkehave, Inc. (BHI) is an eligible small business for the procurement at issue. A&Y Government Services, LLC (Appellant), which had previously protested BHI's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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 timely filed the appeal within fifteen days of receiving the size determination. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation, Award, and Protest

On March 21, 2018, the U.S. Department of the Army (Army), Army Contracting Command, issued Request for Proposals (RFP) No. W56HZV-18-R-0065 for vehicles and spare parts for a foreign sales transaction. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 336112, Light Truck and Utility Vehicle Manufacturing, with a corresponding size standard of 1,500 employees. Proposals were due April 23, 2018.

On August 9, 2018, the CO announced that BHI was the apparent awardee. Appellant, an unsuccessful offeror, filed a size protest with the CO challenging BHI's size. The protest alleged that BHI is a foreign business concern that is dominant in its field, and therefore is ineligible for award. The CO forwarded Appellant's protest to the Area Office for review.

B. Size Determination

On September 17, 2018, the Area Office issued Size Determination No. 03-2018-072, concluding that BHI is an eligible small business for this procurement.

The Area Office found that BHI was formed in 1996 in the state of Florida, and is a wholly-owned subsidiary of Bukkehave Corporation A/S (BC), a company based in Denmark. (Size Determination at 3.) BC in turn is wholly-owned by B1925 A/S (BAS), also based in Denmark. (*Id.*) Mr. Christian Haar owns 99.78% of BAS and is BAS's Chairman. (*Id.* at 4.) The Area Office found that BHI is affiliated with BC and BAS, and also is affiliated with seven other concerns owned and controlled by BC, BAS, or Mr. Haar: BUK PNG Ltd.; Pippo Ejendomme ApS; Bukkehave Distribution ApS; Bukkehave Nigeria Ltd.; The Olive Lab, Inc.; The Olive Lab of Italia; and Bukkehave Japan Ltd. (*Id.* at 3-4.) However, the combined employees of BHI and its affiliates do not exceed the 1,500-employee size standard. (*Id.* at 4.)

The Area Office rejected Appellant's protest allegation that BHI is dominant in its field. A firm is not dominant if it qualifies as a small business under the applicable size standard. (*Id.*, citing *Size Appeal of Silver Enterprises Associates, Inc.*, SBA No. SIZ-5124 (2010).) Thus, “if [the Area Office] determines that BHI meets the subject size standard, BHI cannot also be found to be dominant in its field.” (*Id.*)

C. Appeal

On September 19, 2018, Appellant filed the instant appeal. Appellant asserts that BHI “is merely a sales office owed by a FOREIGN corporate entity” and should have been disqualified from award. (Appeal at 2 (emphasis Appellant's).) An award to BHI does not benefit the U.S. economy, Appellant argues, because “[t]he [vehicles] are manufactured in Japan, [and] the money is from and will go to Denmark.” (*Id.* at 3.) Appellant observes that BC's 2015 annual report refers to a “Bukkehave International” as its ultimate parent company, yet there is no mention of this entity in the size determination. (*Id.* at 2.) Further, the size determination failed to

describe how the Area Office determined that BHI and its affiliates have fewer than 1,500 employees. (*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. Analysis

I find no merit to this appeal. Appellant's principal argument is that BHI is owned by a foreign entity, and as such, should be ineligible for a small business set-aside. SBA regulations, though, do not bar a foreign-owned concern from participating in a small business set-aside, provided that the concern is based in the U.S. and contributes to the U.S. economy through the payment of taxes or otherwise. 13 C.F.R. § 121.105(a)(1); *Size Appeal of Global Submit, Inc.*, SBA No. SIZ-5804 (2017). Here, the Area Office determined, and Appellant does not dispute, that BHI is a corporation based in the state of Florida, and that BHI contributes to the U.S. economy by paying taxes. I therefore see no basis to conclude that BHI is ineligible for this procurement.

Appellant's remaining arguments are equally meritless. Citing an annual report from 2015, Appellant argues that “Bukkehave International” should have been addressed in the size determination, but “Bukkehave International” appears to be another name for BAS, which is discussed in the size determination. Moreover, BHI's size must be examined as of April 23, 2018, the date of its self-certification for the instant procurement. 13 C.F.R. § 121.404(a). It therefore is immaterial to explore how BHI and its parent companies may have been structured during 2015. The notion that the Area Office should have detailed its calculations in the size determination is also unavailing. SBA regulations make clear that SBA will not disclose information obtained in the course of a size investigation except as permitted by Federal law. 13 C.F.R. § 121.1008(d). It therefore is “common practice for SBA not to include confidential or proprietary information in a size determination that will be issued to a firm's competitors.” *Size Appeals of GTA Containers, Inc., et al.*, SBA No. SIZ-5760, at 7 (2016). Further, SBA regulations permit outside legal counsel to obtain access to sensitive information under a protective order that restricts the information's use. 13 C.F.R. § 134.205(e). Thus, had Appellant wished to review the specifics of the Area Office's calculations, Appellant could have done so using this process.

IV. Conclusion

Appellant has not demonstrated 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 U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge