

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

SIZE APPEAL OF:

Bukkehave, Inc.,

Appellant,

RE: TGS USA, LLC

Appealed From
Size Determination No. 02-2018-314

SBA No. SIZ-5981

Decided: February 1, 2019

APPEARANCES

Pamela J. Mazza, Esq., Patrick T. Rothwell, Esq., Julia Di Vito, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant

John R. Prairie, Esq., George E. Petel, Esq., Wiley Rein LLP, Washington, D.C., for TGS USA, LLC

DECISION¹

I. Introduction and Jurisdiction

On October 11, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2018-314, concluding that TGS USA, LLC (TGS) is a small business under the size standard associated with the subject procurement. Bukkehave, Inc. (Appellant), which had previously protested TGS'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.

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

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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. The Solicitation

On July 20, 2018, the U.S. Army Contracting Command issued Request for Proposals (RFP) No. W56HZV-17-R-0092, seeking a contractor to provide Toyota Land Cruiser vehicles and spare parts over a three-year ordering period. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industrial Classification System (NAICS) code 336112, Light Truck and Utility Vehicle Manufacturing, with a corresponding size standard of 1,500 employees. The RFP stated that “[t]he small business size standard for a concern which submits an offer in its own name . . . but which proposes to furnish a product which it did not itself manufacture, is 500 employees.” (RFP at 73.) Proposals were due August 3, 2018. On September 17, 2018, the CO informed Appellant that TGS was the apparent successful offeror.

B. Protest and Response

On September 18, 2018, Appellant filed a size protest with the CO challenging TGS's size. Appellant alleged that TGS “has affiliation with a range of companies and cannot meet the 500 employees minimum as required in the solicitation.” (Protest at 1.) In particular, Appellant asserted, TGS is affiliated with at least six concerns: Toyota Motors Corporation of Japan (TMC); Toyota Motors Europe NV/SA (TME); Toyota Gibraltar Stockholdings, Ltd. (TGSL); Bassadone Automotive Nordic Oy; Auto Verkkokauppa; and Africa Automotive Distribution Services Limited (AADS). (*Id.*) Appellant maintained that this list of alleged affiliates was “not intended to be exhaustive,” as TGS could have other affiliates unknown to Appellant. (*Id.*) Appellant further asserted that, according to TGS's website, TGS is “[a] crucial part of the Toyota Direct Sales Scheme,” and “the stocking arm of Toyota's Direct Sales Scheme.” (*Id.*) On September 19, 2018, Appellant submitted an addendum to its protest, contending that TGS also is affiliated with Bassadone Motors. (Addendum at 1.) The CO forwarded Appellant's protest to the Area Office for review.

On September 25, 2018, TGS responded to the protest and submitted its completed SBA Form 355, a “Breakdown of Employees for [TGS] and Affiliates,” and other records. (Letter from [Individual A] to H. Goza (Sept. 25, 2018), at 1.) TGS stated that it was unable to provide IRS Form 941s to document employee counts because TGS itself has no employees, and TGS's affiliates are foreign companies that do not file an IRS Form 941. (*Id.*) The protest response was prepared by WTB International Development, Inc. (WTB), a company that provides management and consulting services to TGS. (*Id.*, Attach. 1, at 1 n.1.) TGS noted that “[n]either [TGS] nor any of its any affiliates owns any interest in WTB.” (*Id.*)

In response to the protest allegations, TGS denied affiliation with TMC and TME, explaining:

TGS is not affiliated with TMC or TME. Neither TMC nor TME (nor any other TMC-related party) has any ownership interest in TGS, representation on the TGS Board of Directors, or management control over the operations of TGS.

(*Id.* at 1-2.) TGS acknowledged affiliation with various other concerns, including TGSL, Bassadone Automotive Nordic Oy, Auto Verkkokauppa, and AADS. (*Id.* at 1.) TGS is wholly-owned by TGSL, which in turn is owned by Mr. George Alfred Charles Bassadone. TGS stated that its affiliates also are 100% owned and controlled by Mr. Bassadone. (*Id.*, Attach. 4, at 1.)

C. Size Determination

On October 11, 2018, the Area Office issued Size Determination No. 02-2018-314, concluding that TGS is a small business.

The Area Office first addressed Appellant's contention that TGS is affiliated with TMC and TME. (Size Determination at 2-3.) The Area Office agreed with TGS that “TGS is just one of thousands of authorized Toyota dealers worldwide” and that “participation as an authorized dealer does not create affiliation between [TGS] and Toyota itself [*i.e.*, TMC].” (*Id.* at 3.) Further, it is common practice for an authorized Toyota dealer to use “Toyota” in its name, and this does not connote any ownership or control, only that the dealer is authorized to sell Toyota vehicles and parts. (*Id.* at 3.)

Based on TGS's sworn SBA Form 355 and the other information provided by TGS, the Area Office found that TGS and its affiliates have fewer than 500 employees, “well below the 1,500 employee size standard.” (*Id.* at 4.) The Area Office noted that it was required to give greater weight to specific and sworn statements over mere unsupported allegations. (*Id.* at 2, citing *Size Appeal of Dorado Servs., Inc.*, SBA No. SIZ-5515 (2013) and *Size Appeal of Public Commc'ns Servs., Inc.*, SBA No. SIZ-5008 (2008).)

D. Appeal

On October 26, 2018, Appellant appealed Size Determination No. 02-2018-314 to OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed or remanded.

Appellant first argues that the Area Office “ignored critical information that called into question the accuracy of [TGS's] calculation of its own size.” (Appeal at 6.) In particular, Appellant's protest observed that TGS's parent company, TGSL, does not represent itself as a small business in the System for Award Management (SAM). (*Id.*) Appellant questions how TGS “could be a small business when its sole owner is not.” (*Id.* at 2.)

Next, Appellant maintains that the Area Office failed to consider whether TGS will comply with the nonmanufacturer rule. (*Id.* at 8.) Although a class waiver is applicable to the instant procurement, TGS still must meet the requirements of the nonmanufacturer rule other than the requirement to furnish a product made by a small business. (*Id.*, citing *Size Appeals of GTA Containers, Inc. et al.*, SBA No. SIZ-5760 (2016).) The Area Office should have examined

whether TGS is primarily engaged in the retail or wholesale trade, and whether TGS will take ownership of the vehicles in a manner consistent with industry practice. (*Id.* at 9, citing 13 C.F.R. § 121.406(b)(1)(ii) and (iii).)

Appellant contends that the Area Office did not properly analyze whether TGS is affiliated with TMC and TME. Appellant's protest alleged that TGS is not merely an authorized dealer of Toyota products, but the stocking arm of "Toyota's Direct Sales Scheme." (*Id.* at 9-10.) Appellant posits that TGS could not continue to operate absent participation in the "Toyota Direct Sales Scheme," so a remand is appropriate to investigate TGS's economic dependence on TMC and TME. (*Id.* at 10-11.)

Appellant also argues that, given that TGS acknowledged affiliation with TGSL, TGS also is affiliated with other concerns associated with TGSL and Mr. Bassadone. According to research conducted by Appellant, Mr. Bassadone owns and controls "at least 46 entities." (*Id.* at 11.) Appellant asserts that "[w]hen combined, the total number of employees of these companies is around 560 individuals, but could be significantly more." (*Id.* at 12.)

E. New Evidence

With its appeal, Appellant moved to supplement the record with additional evidence. Specifically, Appellant seeks to introduce the SAM profiles of TGS and TGSL, along with information related to the "Toyota Direct Sales Scheme." Appellant maintains that the "Toyota Direct Sales Scheme" establishes that TGS is economically dependent upon TMC and TME. (Motion at 1-2.) Appellant also seeks to admit information concerning the 46 companies purportedly owned and controlled by Mr. Bassadone. (*Id.* at 2.) Appellant explains that this information could not realistically have been provided to the Area Office with Appellant's protest because the information "had to be obtained through more thorough research that was not available prior to the deadline for filing the [s]ize [p]rotest." (*Id.* at 3.)

The new evidence is relevant, Appellant argues, because it shows that TGS did not accurately complete its SBA Form 355; that the Area Office did not fully analyze affiliation between TGS, TMC, and TME; and that TGS has other affiliates beyond those discussed in the size determination. (*Id.* at 6-9.)

F. TGS's Response

On November 13, 2018, TGS responded to the appeal. TGS argues that the Area Office conducted a thorough review and correctly concluded that TGS is a small business. (Response at 1.) Further, OHA should reject Appellant's motion to supplement the record as "a belated attempt to introduce a mountain of new, publicly-available evidence that [Appellant] could have obtained and included with its size protest." (*Id.*)

TGS first addresses Appellant's motion to introduce new evidence. According to TGS, the new evidence was publicly-available at the time of Appellant's protest, but was not provided to the Area Office, and thus is not admissible at OHA. (*Id.* at 2-3.) In addition, some of the proffered information about Mr. Bassadone's business interests is inaccurate, outdated, and

misleading. (*Id.* at 4-5.) TGS argues that Appellant made the poor strategic decision to file a size protest based on scant research, and should not now be rewarded for such “gamesmanship.” (*Id.* at 6.) In the event that OHA nevertheless accepts Appellant's new evidence, TGS moves to introduce a rebuttal declaration from Mr. Bassadone. (*Id.* at 7.)

TGS insists that Appellant's appeal has no merit and should be denied. First, contrary to Appellant's suggestions, the Area Office expressly considered TGSL in conducting its review. (*Id.* at 8.) TGSL's SAM profile does not prove that TGSL is a large business, and the Area Office instead properly relied upon sworn information about TGSL's size and employee count. (*Id.* at 8-9, citing *Matter of Crystal Clear Techs., Inc.* SBA No. WOSB-108 (2016).)

Next, TGS argues that the Area Office correctly applied the 1,500-employee size standard associated with NAICS code 336112. (*Id.* at 9-10.) Appellant's protest did not mention the nonmanufacturer rule, and this new allegation cannot be raised for the first time on appeal. (*Id.* at 11, citing *Size Appeal of Elliott Aviation, Inc.*, SBA No. SIZ-5890 (2018).) Further, even supposing that the Area Office should have explored the nonmanufacturer rule on its own initiative, any such error was harmless because the Area Office determined that TGS and its affiliates together have fewer than 500 employees. (*Id.* at 10, citing *Size Appeal of Long Island Jet Center, Inc.*, SBA No. SIZ-4606 (2004).)

TGS disputes Appellant's claim that the Area Office did not adequately investigate whether TGS is affiliated with TMC and TME. (*Id.* at 12.) TGS offered a detailed response to this allegation, highlighting that neither TMC nor TME has any ownership interest or control over TGS or TGSL. (*Id.* at 12-13.) While TGS and TGSL do sell Toyota vehicles, this alone does not create affiliation. (*Id.* at 13, citing *Size Appeal of All Around Access, LLC*, SBA No. SIZ-5656 (2015).) According to TGS, there also is no possible basis to find affiliation through economic dependence. (*Id.* at 14.) TGS observes that TGS and TGSL do not rely upon TMC or TME for 70% or more of their revenues. Instead, “TGS and [TGSL] receive revenues from the buyers of the vehicles . . . , not Toyota.” (*Id.*)

Lastly, TGS argues that OHA should reject the notion that TGS may be affiliated with additional concerns beyond those addressed in the size determination. Appellant's new evidence on this point is not admissible, and “[w]ithout this new evidence, [Appellant] has no valid basis to challenge the [size determination].” (*Id.* at 16.) Furthermore, even if the new evidence is admitted, it merely bolsters the Area Office's ultimate conclusion that TGS is small. (*Id.* at 16-17.)

G. Supplemental Appeal and Second Motion to Admit New Evidence

On November 13, 2018, after reviewing the record under the terms of an OHA protective order, Appellant moved to supplement its appeal. OHA routinely permits a party to supplement its pleadings after its attorney has viewed file material for the first time under an OHA protective order. *E.g.*, *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, at 8 (2018). Appellant's motion to supplement its appeal therefore is GRANTED.

In the supplemental appeal, Appellant contends that the Area Office did not take into consideration whether TGS is affiliated with concerns owned and controlled by [Individual A], who serves as the Manager of TGS and the registered agent of WTB. (Supp. Appeal at 2.) Appellant renews arguments from its initial appeal, including that the Area Office ignored the nonmanufacturer rule, and that the Area Office failed to verify the employee counts of TGS and its affiliates. (*Id.* at 4-12.) Appellant also contends that TGS's SBA Form 355 was incomplete because TGS disclosed only those affiliates that are 100% owned by Mr. Bassadone and “did not disclose other entities in which he ultimately held less than a 100% interest.” (*Id.* at 2.)

Accompanying the supplemental appeal, Appellant filed a second motion to introduce new evidence. Appellant seeks to admit evidence that [Individual A] is the Manager of TGS and the registered agent of WTB. (Second Motion at 1-2.) Appellant argues that there is good cause to consider the new evidence, because Appellant did not learn of [Individual A]'s role until Appellant had the opportunity to review the record. (*Id.*) Further, the new evidence clarifies issues on appeal and demonstrates that the Area Office performed an erroneous and incomplete analysis of TGS's size.

H. Supplemental Response

On November 16, 2018, TGS responded to the supplemental appeal and to Appellant's second motion to introduce new evidence. TGS highlights that the supplemental appeal is silent as to TGS's alleged affiliation with TMC and TME. Therefore, TGS urges, Appellant should be deemed to have abandoned these allegations. (Supp. Response at 3 n.1.)

TGS insists that its protest response did not state or otherwise suggest that TGS was not disclosing affiliates that are less than 100% owned by Mr. Bassadone. Rather, TGS disclosed all affiliates but commented that each of these affiliates is wholly-owned and controlled by Mr. Bassadone. (*Id.* at 5.) TGS reiterates its prior responses to other arguments raised in the supplemental appeal. (*Id.* at 3-7.) TGS also denies any affiliation with WTB. (*Id.* at 7.) According to TGS, WTB is an independent consultant to TGS; [Individual A] is the sole owner of WTB; [Individual A] is not an owner, partner, director, officer, member, employee, or principal stockholder in another business; WTB performs services for multiple customers unrelated to TGS; and WTB has derived [XXXXXXX] of its revenues from TGS over the past three years. (*Id.* at 7-8.) On these facts, there is no basis to conclude that TGS is affiliated with WTB. With its supplemental response, TGS offers a declaration from [Individual A] describing the relationship between TGS and WTB. TGS argues that there is good cause for OHA to consider [Individual A]'s declaration because it is a limited and direct rebuttal to a new issue raised in the supplemental appeal. (*Id.* at 2-3, citing *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803 (2017).)

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. *Taylor Consultants*, SBA No. SIZ-4775, at 10-11. As a result, evidence that was not previously presented to the Area Office generally is 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 the instant case, I agree with TGS that Appellant has not established good cause to introduce the new evidence provided with Appellant's first motion to supplement the record. Appellant itself acknowledges that the new information was publicly-available at the time of its protest. *See* Section II.E, *supra*. Accordingly, the new evidence could have been submitted to the Area Office, and is not now admissible before OHA. *E.g.*, *Size Appeal of Crop Jet Aviation, LLC*, SBA No. SIZ-5933, at 7 (2018); *Size Appeal of Global Native Servs., Inc.*, SBA No. SIZ-5865, at 4 (2017). Although Appellant contends that it could not realistically have completed its research within the five business days allotted to file a size protest, an SBA area office is not precluded from considering additional information filed after the initial size protest. 13 C.F.R. §§ 121.1004(b) and 121.1009(b). Accordingly, any difficulty that Appellant may have had in completing its initial research within five business days does not explain why Appellant could not have provided the new evidence to the Area Office later in the size review process. For these reasons, Appellant's first motion to supplement the record is DENIED.

Appellant's second motion to supplement the record also fails, because the documents in question are not probative of any issue in this case. In its second motion, Appellant seeks to introduce additional information about WTB and [Individual A]. Section II.G, *supra*. Based on TGS's response to the protest, though, the Area Office would already have been aware that WTB serves as a consultant to TGS and that the firms share no common ownership or management. *See* Section II.B, *supra*. The mere fact that the Area Office did not comment specifically on the relationship between TGS and WTB does not establish that the Area Office failed to consider that arrangement or that the Area Office committed any error. *E.g.*, *Size Appeals of Real Estate Resource Servs., Inc., et al.*, SBA No. SIZ-5522, at 9 (2013). Accordingly, Appellant's second motion to supplement the record is DENIED.

Because Appellant's motions to supplement the record are denied, TGS's motions to introduce rebuttal declarations from Mr. Bassadone and [Individual A] are moot. TGS's motions therefore are also DENIED.

C. Analysis

Appellant has not shown that the Area Office committed any clear error of fact or law in the size determination. Therefore, this appeal must be denied.

In its appeal and supplemental appeal, Appellant contends that the Area Office should have explored whether TGS is compliant with the nonmanufacturer rule, 13 C.F.R. § 121.406(b). Appellant's protest, though, was silent with regard to the nonmanufacturer rule, and it is well-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). Accordingly, the Area Office was not required to consider TGS's compliance with the nonmanufacturer rule, and the Area Office's failure to do so is not valid grounds to disturb the size determination. *Size Appeal of Crop Jet Aviation, LLC*, SBA No. SIZ-5933, at 8 (2018); *Size Appeal of Elliott Aviation, Inc.*, SBA No. SIZ-5890, at 4 (2018); *Size Appeal of Int'l Filter Mfg. Corp.*, SBA No. SIZ-5711, at 4 (2016). Nor may OHA now review the nonmanufacturer rule 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 K4 Solutions, Inc.*, SBA No. SIZ-5775, at 4 (2016); *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.”).

Appellant's arguments that TGS provided inaccurate or incomplete information to the Area Office are equally unfounded. As discussed above, while Appellant offers new evidence on appeal about the purported business interests of Mr. Bassadone, this new evidence is not admissible because Appellant did not first provide it to the Area Office during the size review. Section III.B, *supra*. Consequently, there is no evidence in the record to contradict TGS's sworn representations as to its affiliates and employee counts, and the Area Office properly credited TGS's signed and sworn statements over Appellant's general and unsupported allegations. 13 C.F.R. § 121.1009(d); *Size Appeal of Dorado Servs., Inc.*, SBA No. SIZ-5515, at 5 (2013); *Size Appeal of Silver Enterprises Assocs., Inc.*, SBA No. SIZ-5124, at 5 (2010). Appellant further contends that TGS disclosed only those affiliates that are 100%-owned by Mr. Bassadone, but the record does not support this conclusion. Rather, TGS indicated that it was disclosing all affiliates, but that each of those affiliates is fully-owned by Mr. Bassadone. *See* Section II.B, *supra*. Such statements do not suggest that TGS withheld other affiliates in which Mr. Bassadone holds less than a 100% interest. In addition, Appellant complains that the Area Office should have verified TGS's employee counts with tax records. TGS reasonably explained in its protest response, though, that IRS Form 941s could not be provided because neither TGS nor its affiliates are required to file such forms. (*Id.*) Under these circumstances, then, the Area Office conducted an appropriate review based on the information available.

Lastly, I see no merit to Appellant's contention that TGS is affiliated with TMC and TME. As TGS observes, Appellant did not address this issue in its supplemental appeal, and thus appears to have abandoned the allegation. Pursuant to 13 C.F.R. § 134.316(c), OHA will not

decide issues that have been abandoned. Even if not abandoned, though, the allegation is meritless. The Area Office found that TGS is merely an authorized dealer of Toyota vehicles, and such an arrangement does not, by itself, create affiliation with TMC or TME, the entities whose products TGS sells. Appellant also suggests that TGS may be affiliated with TMC and TME through economic dependence. The underlying regulation, however, contemplates that affiliation through economic dependence may arise when “the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years.” 13 C.F.R. § 121.103(f)(2). There is no indication here that TGS derives so large a percentage of its revenues from TMC and/or TME.

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