

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

SIZE APPEAL OF:

KCW Design Group, LLC,

Appellant,

Appealed From
Size Determination Nos. 02-2018-304 and
-305

SBA No. SIZ-5993

Decided: March 28, 2019

APPEARANCES

Raymond C. McCann, Esq., Francis E. Purcell, Jr., Esq., Thomas O. Mason, Esq.,
Thompson Hine LLP, Washington, D.C., for Appellant

DECISION¹

I. Introduction and Jurisdiction

On October 23, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determination Nos. 02-2018-304 and 02-2018-305, concluding that KCW Design Group, LLC (Appellant) is not a small business. More specifically, because Appellant did not respond to the protest allegations and submitted incomplete information to the Area Office, the Area Office drew an adverse inference that the missing information would have shown that Appellant is not small. Appellant maintains that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is denied.

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 received the size determination on October 24, 2018, and filed the instant appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was initially 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.

II. Background

A. The Solicitation

On March 13, 2018, the U.S. Department of Veterans Affairs (VA), Orlando VA Medical Center, issued Request for Proposals (RFP) No. 36C24818R0390 for “non-emergency Special Mode Transportation (SMT) for wheelchair, stretcher and non-ambulatory (walker, scooter) VA beneficiaries.” (RFP at 13.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industrial Classification System (NAICS) code 485991, Special Needs Transportation, with a corresponding size standard of \$15 million average annual receipts. Proposals were due July 20, 2018. On August 13, 2018, the CO notified unsuccessful offerors, including KTS Solutions, Inc. (KTS) and Price Gordon Services, LLC d/b/a Veteran National Transportation (VNT), that Appellant was the apparent awardee.

B. Protests

On August 15, 2018, KTS submitted a size protest to the CO, alleging that Appellant is ineligible for award of the contract. KTS asserted that Appellant is a staffing company, not a transportation company. (KTS Protest at 1.) Further:

Based on [KTS's] understanding [Appellant] must be affiliated or partnered with another company to use their expertise and experience to be awarded this contract. . . . A small company without affiliation or sponsorship will face a major challenge to start a business in unknown territory, bring vehicles, [and] hire and train almost 30 new employees in 3-5 weeks. Not only is [Appellant] inexperienced in this industry, [Appellant is] not yet licensed, and [is] legally [un]able to operate in compliance with the contract. [Appellant] does not have a profile with the US Department of Transportation which would, in turn, mean [its] automobile liability insurance coverage is also not compliant for this contract or industry.

(*Id.*)

KTS attached to its protest a copy of Appellant's Vendor Information Page profile; a screen shot from Appellant's website identifying several concerns as Appellant's “partners”; the “About” section of Appellant's website describing Appellant as a staffing agency focusing on the Southern California and Washington, D.C. markets; and results from the U.S. Department of Transportation's search engine showing that no records were found under Appellant's name. (*Id.*, Exhibits A-C.)

On August 17, 2018, VNT filed a protest challenging Appellant's size. VNT alleged that “[Appellant] does not seem to meet the technical or size requirements of the award on multiple fronts.” (VNT Protest at 1.) More specifically, VNT asserted that, based on its research, Appellant does not have at least five years' experience providing SMT services, as was required

by the RFP. (*Id.*) VNT further alleged that Appellant's principal, Mr. Gregory Kuzniewski, owns and operates several other companies including Beyond SOF, PeopleQwest, and Cercanet, Inc. (*Id.*) In addition, VNT contended, Mr. Kuzniewski is responsible for recruitment and talent acquisition at CenturyLink Government Services, a large business. (*Id.* at 1-2.)

The CO forwarded the protests to the Area Office for review.

C. SBA Form 355

On August 24, 2018, Appellant provided the Area Office its completed SBA Form 355; financial statements and income tax returns for the years 2015 - 2017; and a copy of Appellant's Articles of Incorporation and Operating Agreement. Appellant did not respond to the protest allegations.

Appellant's SBA Form 355 indicated that Appellant is an SDVOSB and a HUBZone-certified small business. (SBA Form 355, response to question 1c.) With regard to Appellant's major products or services, Appellant asserted that, in its most recently completed fiscal year, Appellant generated all of its revenues under NAICS code 561320, Temporary Help Services, and no revenues under NAICS code 485991, Special Needs Transportation. (*Id.*, response to question 2.) Appellant identified Mr. Kuzniewski as Appellant's CEO, founder, sole member, and sole owner. (*Id.*, responses to questions 4 and 5.) Appellant's Board of Directors consists of three individuals: 1) [Individual A], former VP of Cyber Programs at [XXXX]; 2) [Individual B], COO/CFO/Board Member at [XXXX]; and 3) [Individual C], former COO/CFO of [XXXX]. (*Id.*, response to question 6.) Appellant responded “No” to the question “Is business or any person listed in questions 4, 5, or 6 the owner, partner, director, officer, member, employee or principal stockholder in another business?” (*Id.*, response to question 9a.) Appellant represented that it has only one employee, and no affiliates. (*Id.*, responses to question 10a and 13.) Appellant responded “No” to the question of whether “any owners, officers, directors, key employees or supervisors of business [has] ever been employed by or performed similar work for any of the alleged, acknowledged or possible affiliates.” (*Id.*, response to question 15.)

D. Size Determination

On October 23, 2018, the Area Office issued Size Determination Nos. 02-2018-304 and 02-2018-305 concluding that Appellant is not a small business.² The Area Office found that Appellant “failed to provide a response to the [protest] allegations,” and “submitted substantially incomplete information on its SBA Form 355.” (Size Determination at 2.) The Area Office therefore applied an adverse inference that the missing information would have shown that Appellant is not small. (*Id.* at 6.)

The Area Office explained that KTS and VNT raised specific protest allegations, based on publicly-available information concerning Appellant and Mr. Kuzniewski. (*Id.* at 3.) Appellant, though, “did not respond to any of these allegations.” (*Id.*) Under SBA regulations, if

² The size determination was issued October 23, 2018, but was mistakenly dated September 25, 2018.

the challenged concern does not submit “responses to the allegations of the protest, or other requested information within the time allowed by SBA?”, the area office may draw an adverse inference. (*Id.*, quoting 13 C.F.R. § 121.1008(d).)

The Area Office next determined that Appellant submitted “substantially incomplete information” on its SBA Form 355. (*Id.* at 4.) Appellant stated in its response to question 6 that one of its board members, [Individual B], is also COO/CFO/Board Member at [XXXX]. (*Id.*) Despite this admission, Appellant responded “No” to question 9a, which asked if any of Appellant's owners, officers or directors also holds such positions with another business. (*Id.*) The Area Office found these answers “[a]t a minimum . . . inconsistent.” (*Id.*)

The Area Office next analyzed the protest allegation that Appellant partnered with other firms to perform the instant procurement, because Appellant itself has no relevant experience. (*Id.*) Although Appellant did not respond to this allegation, the Area Office found that Appellant's SBA Form 355 and tax returns indicate that Appellant does not perform work under NAICS code 485991. (*Id.*) The Area Office found that Appellant represented in its proposal that [XXXX], but this claim is contradicted by Appellant's SBA Form 355 and tax returns. (*Id.*) When asked to clarify, Appellant stated that its proposal referred to [XXXX]. (*Id.*) The Area Office considered Appellant's proposal misleading because the proposal did not make clear that [XXXX]. (*Id.* at 5.) The Area Office contacted the CO regarding Appellant's experience, and found that the CO was “unaware that [XXXX].” (*Id.*) In addition, when the Area Office reached out to the individuals that Appellant claimed it would hire, one individual stated that he is not Appellant's paid employee, and two individuals indicated that they are directors of other firms in the SMT industry. (*Id.*) The Area Office found this evidence of additional possible affiliates that should have been disclosed on Appellant's Form 355. (*Id.* at 6.)

The Area Office reiterated that Appellant did not respond to the protest allegations, did not provide all of the information required by the SBA Form 355, and submitted inconsistent information that did not persuasively refute the protest allegations. (*Id.*) For these reasons, the Area Office applied an adverse inference that the missing information would have shown that Appellant is not a small business. (*Id.* at 6-7, citing 13 C.F.R. §§ 121.1008(d) and 121.1009(d).)

E. Appeal

On November 8, 2018, Appellant filed the instant appeal. Appellant maintains that the size determination is clearly erroneous, and requests that OHA remand the matter to the Area Office for a new size determination. (Appeal at 1-2.) According to Appellant, the Area Office improperly determined that Appellant is affiliated with other concerns despite “hard evidence to support its conclusions”; exceeded its authority by analyzing Appellant's experience and responsibility, rather than deferring to the CO; and erroneously found that Appellant's receipts combined with those of “unnamed alleged affiliates” exceed the size standard. (*Id.*)

Appellant first denies affiliation with any of the entities identified in the size protests. (*Id.* at 2.) Further, Appellant contends, there are no “indicia of affiliation” that would support a finding of affiliation with these concerns. (*Id.*) Appellant addresses the four specific alleged affiliates cited in VNT's protest: Beyond SOF; PeopleQwest; Cercanet, Inc.; and CenturyLink

Government Services. (*Id.* at 3.) None of these entities currently provides resources or other support to Appellant. (*Id.*) Appellant asserts that although Mr. Kuzniewski has “provided consulting services” to Beyond SOF, he holds no ownership interest and “does not act as an officer or director” of the company. (*Id.*) Mr. Kuzniewski severed his relationship with PeopleQwest around 2005, and currently has no ownership interest in that company. (*Id.*) Mr. Kuzniewski “helped to found” Cercanet, but left the company in 2000, and no longer has any involvement with Cercanet. (*Id.*) Further, Cercanet has since been dissolved. (*Id.*) Lastly, Mr. Kuzniewski “works as a contractor for CenturyLink” but is not an employee and “does not act as an officer or director” for the company. (*Id.*) CenturyLink has no ownership interest in Appellant, and Appellant and CenturyLink share no common employees, officers, or directors. (*Id.*) To support these assertions, Appellant offers a sworn declaration from Mr. Kuzniewski.³

Next, Appellant maintains that there is no affiliation between Appellant and the concerns with which its board members have relationships. (*Id.*) Appellant insists that “[w]hile [Appellant's SBA Form 355 response inadvertently may have failed to provide complete information regarding the company's board of directors,” there is nevertheless no basis to conclude that Appellant is affiliated with other concerns through its board members. (*Id.* at 4.) Appellant argues that a board member's mere employment with another company is not sufficient grounds to create affiliation between the companies. (*Id.*, citing *Size Appeal of US Builders Group*, SBA No. SIZ-5519 (2013).)

Appellant contends that there is no ostensible subcontractor relationship between Appellant and the individuals Appellant proposed as part of its team for the instant procurement. (*Id.* at 5.) In conducting its review, the Area Office usurped the role of the U.S. Government Accountability Office to make determinations about an offeror's compliance with solicitation terms. (*Id.*) Moreover, Appellant proposed [XXXX]. (*Id.*)

Appellant argues that “the Area Office improperly based the size determination upon issues of experience and responsibility, which are outside the size determination process.” (*Id.*) Appellant highlights that responsibility determinations lie firmly within the CO's purview. (*Id.* at 6, citing *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011).) Rather than focus on whether Appellant is affiliated with other concerns, though, the Area Office devoted much of its review to considering whether Appellant meets the experience requirements of the solicitation. That job belongs to the CO, not the Area Office, and the Area Office therefore exceeded its jurisdiction. (*Id.* at 6-7.)

Appellant's final argument is that “the Area Office improperly concluded that [Appellant] was not small based upon unspecified information.” (*Id.* at 7.) There is no dispute that Appellant's own receipts are well below the \$15 million size standard, yet the Area Office invoked an adverse inference based on Appellant's alleged failure to provide information in determining that Appellant is not small. (*Id.*) Appellant emphasizes that “at no point did the SBA

³ Appellant did not file a motion to introduce Mr. Kuzniewski's declaration as new evidence, and does not explain why the declaration was not, or could not have been, provided to the Area Office during the size review.

request tax return information from [Appellant] for any alleged affiliate that would support a conclusion that [Appellant's receipts combined with those of an alleged affiliate surpassed the \$15 million threshold.” (*Id.* at 7-8.) Because the Area Office did not request financial information regarding alleged affiliates, Appellant was unaware any additional information was necessary, thus the Area Office incorrectly applied the adverse inference. (*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. Analysis

SBA regulations require that “[t]he concern whose size is under consideration has the burden of establishing its small business size.” 13 C.F.R. § 121.1009(c). As a result, when a size protest is filed, the challenged firm is responsible for providing “its answers to the allegations contained in the protest,” together with “any supporting material.” *Id.* § 121.1008(c). In the event that the challenged firm does not submit “responses to the allegations of the protest,” or if the challenged firm provides “incomplete information,” the area office may draw an adverse inference that the missing information “would demonstrate that the concern is other than a small business.” *Id.* § 121.1008(d); *see also* § 121.1009(d). To determine whether an area office appropriately applied an adverse inference, OHA utilizes a three-part test which assesses 1) whether the requested information was relevant to an issue in the size determination, 2) whether there is a level of connection between the challenged concern and the concern(s) about which information is requested, and 3) whether the request for information was specific. *Size Appeal of Perry Johnson & Assocs., Inc.*, SBA No. SIZ-5943, at 12 (2018).

In the instant case, it is clear that all three elements of the above test are met. The Area Office determined, and Appellant does not dispute, that the protesters raised specific and credible protest allegations. Sections II.B and II.D, *supra*. Further, Appellant itself acknowledges that Appellant or its principal, Mr. Kuzniewski, have at least some connection with many, if not all, of the alleged affiliates. Section II.E, *supra*. Accordingly, a response to the protest allegations was important and directly relevant for the Area Office to fully resolve the protests. Appellant, though, did not respond to any of the protest allegations. Section II.C, *supra*. Further, although Appellant disclosed on its SBA Form 355 that one of Appellant's board members is also a director and officer of another concern, Appellant responded “No” when asked - elsewhere on the same form - whether any of its directors or officers held such positions at other companies. *Id.* These inconsistent answers cast doubt on the completeness of the information Appellant provided in its SBA Form 355. On these facts, then, the Area Office could properly conclude that Appellant did not respond to specific protest allegations, submitted conflicting

and/or incomplete information on its SBA Form 355, and did not meet its burden of establishing that it is a small business. Therefore, an adverse inference was warranted. *Size Appeal of Juliet Constr., LLC*, SBA No. SIZ-5974 (2018); *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707 (2016); *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016).

On appeal, Appellant argues that it is not, in fact, affiliated with the entities alleged in the size protests. Section II.E, *supra*. These arguments, though, are premised largely on Mr. Kuzniewski's declaration, which cannot be considered here because Appellant did not first provide the declaration to the Area Office during the size review, and because Appellant did not file the required motion demonstrating good cause to introduce new evidence on appeal. *E.g.*, *Size Appeal of Global Submit, Inc.*, SBA No. SIZ-5804, at 4 (2017). Moreover, even if OHA were now to consider Mr. Kuzniewski's declaration, this still would not establish that the Area Office erred in drawing an adverse inference. As discussed above, due to Appellant's failure to refute the protest allegations, the Area Office had proper grounds to invoke an adverse inference, and to conclude that Appellant had not persuasively shown that it is a small business.

OHA's decision in *Size Appeal of AWA Business Corporation*, SBA No. SIZ-5904 (2018) is analogous to the situation presented here. There, the challenged firm did not respond to a size protest and instead informed the area office that it had withdrawn from the underlying procurement. The area office applied an adverse inference, and OHA affirmed that decision on appeal. The challenged firm attempted to supplement the record on appeal to show that it actually was a small business, but OHA declined to consider that material, explaining that the new evidence was “irrelevant to the main issue in this case, whether the Area Office properly drew an adverse inference against [the challenged firm].” *AWA*, SBA No. SIZ-5904, at 4.

Appellant also argues that an adverse inference was improper because Appellant was unaware that the Area Office expected Appellant to produce the tax returns of each alleged affiliate. This argument fails because the Area Office did not base the adverse inference on Appellant's failure to produce tax returns. Rather, as discussed above, the Area Office appropriately based the adverse inference on Appellant's failure to respond to the protest allegations, and Appellant's submission of incomplete information.

Appellant also contends that the Area Office exceeded its authority by inquiring into Appellant's experience, but this argument too is meritless. The size protests alleged, *inter alia*, that Appellant would be obliged to rely on more experienced subcontractors to perform the contract in contravention of the ostensible subcontractor rule, and OHA has long recognized that “it is appropriate for an area office to consider the prime contractor's experience as part of an ostensible subcontractor analysis, because such matters are relevant to whether the prime contractor can perform independently from the subcontractor.” *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390, at 13 (2012). Moreover, even assuming that the Area Office should have refrained from considering Appellant's experience, such an error would be harmless here because the Area Office appropriately applied the adverse inference in any event. *E.g.*, *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017) (errors in size determination were harmless because they would not have affected the outcome).

IV. Conclusion

Appellant has not shown clear error in the size determination. As a result, 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).

KENNETH M. HYDE
Administrative Judge