

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

SIZE APPEAL OF:

Red Orange LLC,

Appellant,

Appealed From  
Size Determination No. 02-2024-036

SBA No. SIZ-6290

Decided: June 6, 2024

**APPEARANCES**

Jon A. Thielen, Esq., Company Counsel LLC, Bala Cynwyd, Pennsylvania, for Red Orange LLC

Jennifer M. Samela, Contracting Officer, U.S. Army Corps of Engineers, Concord, Massachusetts

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

**DECISION**

**I. Introduction and Jurisdiction**

On April 16, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2024-036, concluding that Red Orange LLC (Appellant) is not a small business under the size standard associated with the subject procurement. The Area Office found that Appellant failed to respond to the Area Office's requests for information, and therefore drew an adverse inference that the missing information would have shown that Appellant is not small. On appeal, Appellant contends that the Area Office improperly directed the requests to an e-mail address that is not monitored by its managerial staff, and urges 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 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 15 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 RFQ

On February 13, 2024, the U.S. Army Corps of Engineers (USACE) issued Request for Quotations (RFQ) No. W912WJ24Q0055 for garbage collection and recycling services at the Hop Brook Lake Project Office and Recreation Area in Middlebury, Connecticut. (RFQ at 8.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of \$47 million in average annual receipts. (RFQ, SF 1449.) Appellant submitted its quotation on February 28, 2024. On March 1, 2024, USACE notified Appellant that, because Appellant appeared to be associated with several other concerns, USACE planned to request a formal size determination of Appellant, unless Appellant withdrew its quotation. (E-mail from A. LaCrosse to K. Mangione (Mar. 1, 2024).) Appellant responded, “We understand.” (E-mail from K. Mangione to A. LaCrosse (Mar. 1, 2024).)

### B. Protest and Area Office Proceedings

On March 27, 2024, the CO filed a protest challenging Appellant's size. The protest explained that, after conducting a review in SAM.gov, the CO discovered that Appellant appears to be associated with several other entities, thus potentially impacting whether Appellant qualifies as small. (Protest at 1.) In particular, the CO questioned whether Appellant may be affiliated with the following concerns, which have similar names, mailing addresses, and/or points of contact as Appellant:

1. Red Orange North America Inc.
2. Red Orange International L.L.C.
3. Red Orange International Limited
4. Red Orange North America
5. Redorange General Trading & Contracting
6. Redorange General Trading Private Limited
7. Redorange General Supplies Africa Limited
8. RedOrange Qatar Contracting WL
9. Red Orange Gen Trading LLC
10. Red Orange General Trading
11. Red Orange General Trading (L.L.C.)
12. Red Orange Logistics Services Co.
13. Red Orange Import and Export Co.
14. Red Orange Export and Import Offices Co.
15. Red Orange Design LLC

(*Id.* at 1-2.) In her referral memorandum, the CO identified Appellant's President, Mr. Lalith J. Paulus, as Appellant's “primary point of contact.” (CO's Memo at 1.) The CO further specified “ar@redorange.com” as Mr. Paulus's e-mail address. (*Id.*)

On March 28, 2024, the Area Office transmitted a letter, addressed to Mr. Paulus, to the e-mail ar@redorange.com. (E-mail from H. Goza to ar @redorange.com (Mar. 28, 2024).) The e-mail notified Appellant of the CO's protest and attached a copy of the protest for Appellant's review. In the letter to Mr. Paulus, the Area Office instructed Appellant to submit a completed SBA Form 355, as well as financial statements and federal income tax returns for the five most recently completed fiscal years preceding Appellant's self-certification for the instant procurement. (Letter from H. Goza to L. Paulus (Mar. 28, 2024), at 2.) The letter cautioned that “[i]f you fail to submit the completed [SBA Form 355] along with the other material requested within the specified time or obtain an extension, [the Area Office] may determine your business to be other than small.” (*Id.* at 3.) On April 1, 2024, the Area Office received, by e-mail, a read-receipt confirmation from an employee of Appellant, Ms. Geethu Mohan. (E-mail from G. Mohan to H. Goza (Apr. 1, 2024).)

Appellant did not respond to the protest or to the Area Office's March 28, 2024 letter and e-mail. On April 3, 2024, the CO asked the Area Office whether any response had been received. (E-mail from A. Lacrosse to H. Goza (Apr. 3, 2024).) The Area Office then re-transmitted its earlier e-mail, with attachments, again to the e-mail address ar@redorange.com. (E-mail from H. Goza to ar@redorange.com (Apr. 3, 2024).) In the e-mail, the Area Office stated:

[Appellant's] response [to the protest] was due yesterday. [The Area Office] ha{s} received neither a request for an extension nor any of the requested materials from your firm; [the Area Office] did receive a read receipt from someone at your firm for the [] email [ar@redorange.com]. Please respond to this email by COB today indicating whether you intend to provide the requested materials or not. If you indicate that you intend to provide these materials, {the Area Office} will allow until COB of April 05, 2024 for you to provide this information. If you indicate that you do not intend to provide these materials, or if you do not provide them by the due date, please be aware that SBA regulations at 13 C.F.R. § 121.1008(d) provide that [the Area Office may draw an adverse inference].

(*Id.*) On April 4, 2024, the Area Office received another read-receipt from Ms. Mohan pertaining to the Area Office's e-mail of April 3, 2024. (E-mail from G. Mohan to H. Goza (Apr. 4, 2024).) Appellant did not offer any response to the protest and did not submit the requested information.

### C. Size Determination

On April 16, 2024, the Area Office issued Size Determination No. 02-2024-036, concluding that Appellant is not a small business under a \$47 million size standard. Because Appellant failed to respond to the Area Office's requests for information, the Area Office drew an adverse inference that the missing information would have shown that Appellant is not small. (Size Determination at 6.) The Area Office sent the size determination to Appellant via e-mail at the address ar@redorange.com. (E-mail from H. Goza to ar@redorange.com (Apr. 19, 2024).)

In the size determination, the Area Office explained that, pursuant to 13 C.F.R. § 121.1008, Appellant was required to return a completed SBA Form 355 and other relevant

information within three business days after being notified of the size protest. (Size Determination at 4-5.) As Appellant did not do so, the Area Office could properly draw an adverse inference that disclosure would have shown that Appellant is other than small. (*Id.* at 5.) The Area Office noted that OHA has established a three-part test to determine whether an adverse inference is warranted: “(1) whether the information sought by the Area Office was relevant to an issue in the size determination, (2) whether there was a level of connection the entity being protested and the entity the Area Office is seeking information from, and (3) if the Area Office's request for information was specific.” (*Id.*, citing *Size Appeal of D & B Homecare, Inc.*, SBA No. SIZ-5096, at 2 (2009).)

The Area Office found all three elements of the test are met here. (*Id.* at 5-6.) The requested information was relevant as it is necessary to assess Appellant's size and affiliates. (*Id.* at 5, citing 13 C.F.R. § 121.104(a).) The requested information pertained directly to Appellant and/or Appellant's alleged affiliates. (*Id.* at 6.) Lastly, the Area Office's e-mails set forth detailed and specific instructions that Appellant complete an SBA Form 355 and submit tax returns and financial records. (*Id.*) Thus, the Area Office concluded, an adverse inference is justified. (*Id.*)

#### D. Appeal

On April 23, 2024, Appellant appealed Size Determination No. 02-2024-036 to OHA. Appellant complains that, during the size investigation, the Area Office directed communications to ar@redorange.com, “which is not an email that is monitored by members of the management staff.” (Appeal at 2.) Rather, this e-mail is used for Appellant's accounts receivable. (*Id.* at 1.)

Appellant acknowledges that USACE informed Appellant on March 1, 2024 that a size protest would be forthcoming. (*Id.* at 2.) However, Appellant maintains, Appellant did not become aware of the Area Office's communications of March 28, 2024 and April 3, 2024 until April 19, 2024, when its accounts receivable department “forwarded” a copy of Size Determination No. 02-2024-036 to Mr. Paulus. (*Id.* at 1-2.) Appellant denies affiliation with “most” of the entities identified in the CO's protest. (*Id.*) Appellant adds that, during an earlier size review in November 2023, the Area Office had “no issues reaching out to our company.” (*Id.* at 3.)

#### E. CO's Response

On May 8, 2024, the CO responded to the appeal. The CO disputes Appellant's contention that no one on Appellant's management team knew, or should have known, of the Area Office's requests for information. (CO's Response at 1.)

According to the CO, the e-mail address utilized by the Area Office, ar @redorange.com, is listed on SAM.gov as the e-mail for Appellant's primary point-of-contact, Mr. Paulus. (*Id.*) Furthermore, Size Determination No. 02-2024-036 was transmitted to this same e-mail address on April 19, 2024, and an employee of Appellant, Mr. Saju Pillai, then forwarded the size determination to Mr. Paulus approximately 30 minutes later. (*Id.*) The CO contends that this shows “sufficient access and monitoring of the ar@redorange.com e-mail address.” (*Id.*) Lastly,

on April 9, 2024, USACE provided Appellant the contact information for the Area Office. (*Id.*) Appellant thus had ample opportunity to respond to the Area Office's requests, or to reach out to the Area Office with questions. (*Id.*)

#### F. SBA's Response

On May 9, 2024, SBA responded to the appeal. SBA contends that the Area Office justifiably drew an adverse inference. (SBA's Response at 2.)

OHA has long held that an area office may apply an adverse inference when “(1) the requested information was relevant to the size determination, as it was essential for assessing [the protested concern's] size; (2) the information was [the protested concern's] own financial information or the financial information of [the protested concern's] acknowledged affiliates; and (3) the Area Office clearly communicated to [the protested concern] what specific information was required.” (*Id.*, quoting *Size Appeal of Rigid Constructors, LLC*, SBA No. SIZ-6193, at 9 (2023).) Here, according to SBA, each element of the test is met. (*Id.*) The Area Office clearly delineated what information was needed from Appellant. (*Id.*) Furthermore, Appellant and its affiliates have been subject to prior size determinations, and Appellant therefore should have been familiar with the size determination process. (*Id.*) After sending its requests, the Area Office received read receipt confirmations from an employee of Appellant. (*Id.*) Appellant's failure to offer any response to the Area Office's communications warrants a finding that an adverse inference was appropriate. (*Id.* at 3, citing *Size Appeal of Canal Wood, LLC*, SBA No. SIZ-4852, at 4 (2007).)

SBA asserts that Appellant's arguments on appeal do not show that the Area Office committed any error of fact or law. (*Id.*) Although Appellant contends that the e-mail address used by the Area Office is not “monitored” by its managerial staff, Appellant nevertheless received the Area Office's communications, and the e-mail address in question was provided to the Area Office by the CO. (*Id.* at 4.) Having received no response to its inquiries, the Area Office was not expected to seek out additional contact information for Appellant. (*Id.*, citing *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707, at 10 (2016).)

SBA argues that Appellant also has a history of being less than candid in disclosing its affiliates. (*Id.* at 5.) SBA observes that, in the appeal, Appellant appears to acknowledge affiliation with Red Orange North America, Inc. (RONA). (*Id.*) However, less than a year ago in Size Determination No. 02-2024-007, Appellant did not disclose this affiliation. (*Id.*) Due to such inconsistencies, Appellant's arguments are not credible. (*Id.*)

#### G. Motion to Reply

On May 17, 2024, eight days after the close of record, Appellant moved for leave to reply to SBA's Response. Appellant reiterates its contention that Mr. Paulus does not personally monitor the e-mail address ar@redorange.com. (Motion at 1-2.) Furthermore, although Ms. Mohan, an employee of Appellant, may have received and been aware of the Area Office's requests, she has “nothing to do with SBA matters” and “did not communicate the same to [Mr. Paulus] in a timely manner.” (*Id.*)

Under OHA's rules of procedure, a reply to a response generally is not permitted unless OHA so directs. 13 C.F.R. §§ 134.206(e) and 134.309(d). Furthermore, OHA will not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct Appellant to reply, and the proposed Reply, which was filed after the close of record, elaborates upon arguments that Appellant raised, or could have raised, in its original appeal. Accordingly, Appellant's motion for leave to reply is DENIED and the proposed Reply is EXCLUDED from the record. *Size Appeal of Fed. Performance Mgmt. Sols., LLC*, SBA No. SIZ-6246, at 8 (2023); *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188, at 15 (2023).

### 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

Appellant has not demonstrated that the Area Office clearly erred in applying an adverse inference against Appellant. As a result, this appeal must be denied.

Pursuant to SBA regulations, when a concern's small business status is protested, “[t]he concern whose size is under consideration has the burden of establishing its small business size.” 13 C.F.R. § 121.1009(c). Furthermore:

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.

*Id.* § 121.1008(d); *see also* § 121.1009(d). OHA has developed a three-factor test to determine whether an area office may appropriately impose an adverse inference: “(1) the information sought by the area office is relevant to an issue in the size determination; (2) there is a level of connection between the entity being protested and the entity the area office is seeking information from; and (3) the area office's request for information was specific.” *Size Appeal of Portacool, LLC*, SBA No. SIZ-6251, at 8 (2023). “If all of these criteria are met, the challenged business must submit the information to the area office or suffer an adverse inference that the information would show that the challenged business was other than small.” *Id.* (quoting *Size Appeal of Firewatch Contracting of Florida, LLC*, SBA No. SIZ-4994, at 6 (2008)).

Here, all three elements of the above test are met. The Area Office found, and Appellant does not dispute, that the CO raised specific and credible protest allegations, *i.e.*, that Appellant may be affiliated with various other concerns, which have similar names, mailing addresses, and/or points of contact as Appellant. Section II.B, *supra*. Under SBA regulations, then, Appellant was required to produce a “completed SBA Form 355” and “responses to the allegations of the protest,” and to address the Area Office's other requests for information. 13 C.F.R. § 121.1008(c). Appellant did not do so, and the Area Office therefore correctly drew an adverse inference. Sections II.B and II.C, *supra*.

On appeal, Appellant maintains that the adverse inference was improper because, in communications with Appellant, the Area Office utilized the e-mail address “ar@redorange.com.” Appellant asserts that this e-mail is intended only for Appellant's accounts receivable and is not “monitored” by its managerial staff. Section II.D, *supra*. I find Appellant's argument unavailing for several reasons.

First, although Appellant may have subjectively intended that the e-mail ar@redorange.com should be used only for matters pertaining to accounts receivable, Appellant nevertheless listed ar@redorange.com on SAM.gov as the e-mail for Appellant's primary point-of-contact, Mr. Paulus. Sections II.E and II.F, *supra*. Appellant, thus, publicly represented ar@redorange.com as an appropriate method for contacting Appellant. As a result, the Area Office did not err in directing its communications to this e-mail address. *E.g.*, *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707 (2016) (area office appropriately drew an adverse inference after receiving no response to e-mails that had been sent to the challenged concern's “contact person under SAM”). Nor does Appellant offer any rationale as to how, or why, the Area Office might have understood that Appellant intended the e-mail ar@redorange.com should be limited to accounts receivable matters. OHA has recognized that it is “unreasonable to expect the Area Office . . . to be on notice of [the challenged concern's] internal directions as to who is to receive communications, especially when those points of contact change without the Area Office's knowledge.” *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704, at 7 (2016).

Second, although it may be true that Mr. Paulus does not personally monitor the e-mail ar@redorange.com, the record reflects that the e-mail nonetheless is monitored by other employees of Appellant. The Area Office thus received confirmations that an employee of Appellant, Ms. Mohan, received the Area Office's inquiries of March 28, 2024 and April 3, 2024. Section II.B, *supra*. Furthermore, after the size determination was transmitted to the e-mail ar@redorange.com, a different employee of Appellant, Mr. Pillai, relayed the size determination directly to Mr. Paulus approximately 30 minutes later. Section II.E, *supra*. Under OHA precedent, a concern is “charged with receipt” of information that “one of [its] employees received.” *Size Appeal of Red Orange N. Am., Inc.*, SBA No. SIZ-6136, at 3 (2021) (PFR). Accordingly, Appellant is deemed to have received the Area Office's inquiries of March 28, 2024 and April 3, 2024, and responsibility for Appellant's failure to respond to those requests lies squarely with Appellant itself, not with the Area Office. Indeed, Appellant appears to concede that Ms. Mohan “did not communicate” the Area Office's requests to Mr. Paulus “in a timely manner.” Section II.G, *supra*.

Lastly, it is worth noting that Appellant was notified on March 1, 2024 that USACE intended to file a size protest against Appellant. Section II.A, *supra*. Subsequently, on April 9, 2024, USACE confirmed that a protest was pending before the Area Office, and provided Appellant contact information for the Area Office. Section II.E, *supra*. Appellant, then, had an opportunity, prior to issuance of the size determination on April 16, 2024, to have contacted the Area Office with any questions or concerns. Appellant chose not to do so, and this inaction further undermines any claim that the Area Office is at fault for Appellant's failure to respond to the Area Office's requests for information. *Erickson*, SBA No. SIZ-5704, at 7.

#### IV. Conclusion

Appellant has not demonstrated clear error of fact or law in the size determination. The record reflects that Appellant received, and should have been aware of, the Area Office's requests for information. As Appellant did not submit the requested information, and did not respond to the protest allegations, the Area Office properly drew an adverse inference that Appellant is not small. The appeal therefore 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