

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

SIZE APPEAL OF:

Inuit Services, Inc.

Appellant

Appealed from
Size Determination No. 6-2009-096

SBA No. SIZ-5079

Decided: October 9, 2009

APPEARANCES

William K. Walker, Walker Reausaw, Washington, D.C., for Appellant.

DECISION

I. Background

On March 31, 2009, the Contracting Officer (CO) for Eielson Air Force Base, Department of the Air Force (Air Force) issued Solicitation No. FA5004-09-R-C014 (RFP) requesting proposals for military family housing maintenance services. The RFP was a HUBZone set-aside, and the CO designated North American Industry Classification System (NAICS) code No. 561210, Facilities Support Services, with a corresponding size standard of \$35.5 million in average annual receipts.

On May 7, 2009, Inuit Services, Inc. (Appellant) submitted its proposal. On June 4, 2009, the CO notified unsuccessful offerors that the contract had been awarded to Appellant. On August 10, 2009, after multiple protests were filed and the Air Force agreed to corrective action recommended by the Government Accountability Office, unsuccessful offerors were again notified that the contract had been awarded to Appellant. On August 17, 2009, DGR Associates, Inc., (DGR) filed a protest of Appellant's size, alleging a violation of the ostensible subcontractor rule.

On August 26, 2009, the Small Business Administration (SBA) San Francisco Office of Government Contracting—Area VI (Area Office) notified Appellant that its size had been protested and requested a response. On August 31, 2009, Appellant sent a letter to the Area Office, which provided in its entirety:

In the process of assembling the required information for the above stated size protest and affiliation protest, [Appellant] has discovered that the company had

been accounting for [joint venture] revenues consistent with GAAP, but inconsistent with the SBA rules. In light of this new information, [Appellant] concedes that it is not a small business for the purpose of the procurement, and must request that the Air Force withdraw our award. At the time of submittal of the proposal to the Department of the Air Force, [Appellant] was thought to be considered small for the purposes of the procurement.

On September 9, 2009, the Area Office issued Size Determination No. 6-2009-096 (Size Determination) finding Appellant other than small for purposes of the RFP based on Appellant's own admission.

On September 23, 2009, Appellant filed the instant appeal of the Size Determination with SBA's Office of Hearings and Appeals (OHA). Appellant now asserts that the information conveyed to the Area Office in its August 31, 2009, letter was incorrect. Appellant claims its joint venture calculations were in compliance with SBA regulations, and it is (and always was) small for this procurement. Appellant seeks a remand "to permit a proper size determination" based on the merits of DGR's claim due to the clear error of fact upon which the Size Determination is based—an error Appellant admits it caused. Additionally, Appellant filed a Motion for Leave to Submit New Evidence, namely a declaration of Appellant's attorney verifying these facts.

II. Discussion

Appellant filed the instant appeal within fifteen days of receiving the Area Office's dismissal, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Thus, the Administrative Judge may only overturn a size determination if Appellant proves that the area office made a patent error based on the record before it.

The only documents the Area Office considered when issuing its Size Determination were the protest and Appellant's August 31, 2009, letter admitting it is other than small. Accordingly, the Area Office could not have erred in finding Appellant other than small based on the record before it. *See Size Appeal of R. Bruce Fike & Sons Dairy, Inc.*, SBA No. SIZ-4100 (1995) (finding that appellant concern's Form 355 admission of affiliation was dispositive on the question of size, despite that appellant argued on appeal that it was not affiliated with the companies listed on its Form 355 for purposes of the solicitation at issue). Appellant does not allege that the Area Office erred based on the record it considered, nor does it assert the facts it now submits were unavailable to it at the time it sent the August 31, 2009, letter. In fact, Appellant acknowledges that it did have the information and merely made a mistake in sending the incorrect information to the Area Office.

I understand Appellant's concerns, I appreciate Appellant's candor, and Appellant is free to request recertification. However, I cannot find fault with the Area Office based on Appellant's recanting of its earlier admission. OHA's role is to determine whether the Area Office erred on the basis of the record before it. Appellant specifically admitted to the Area

Office that it was other than small for the instant procurement, and the Area Office relied on Appellant's own admission in issuing the Size Determination. Thus, based on the record before it, the Area Office could not have made a clear error of fact or law.

III. Conclusion

The Area Office's finding was not based on clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED. In light of this decision, Appellant's Motion to Submit New Evidence is DISMISSED AS MOOT.

This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge