United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:

Griswold Industries
dba CLA-VAL Company

Appellant

Appealed from
Size Determination No. 6-2011-074

SBA No. SIZ-5274

Decided: August 29, 2011

APPEARANCE

David Koeblitz, Chief Financial Officer, for Appellant.

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office made clear error in concluding that the protested concern and its affiliates, together, exceed 500 employees.

III. Background

A. The Solicitation and Protest

On November 15, 2010, the Contracting Officer (CO) for the Defense Logistics Agency, Defense Supply Center Columbus (DLA), issued Solicitation No. SPM7MX-10-R-0211 for Valve, Solenoid, NSN: 4810-01-110-6377. The CO set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 332911, Industrial Valve Manufacturing, which has a corresponding 500 employee size standard. Griswold Industries dba CLA-VAL Company (Appellant) submitted its initial offer on December 13, 2010.

On April 20, 2011, the CO notified A & B Foundry and Machining LLC (A&B), that Appellant was the apparent successful offeror. On April 25, 2011, A&B timely protested Appellant's small business size status. A&B asserted Appellant had "thousands" of employees and was operating on every continent. A&B attached as exhibits printouts from Appellant's website showing it has several business locations around the country. The CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting-Area VI (Area Office), for a size determination.

B. The Size Determination

On June 28, 2011, the Area Office issued Size Determination No. 6-2011-074 (Size Determination) concluding Appellant is not an eligible small business under the 500 employee size standard. The Area Office found Appellant was controlled by its two largest minority shareholders, David Griswold and Lois Ericson. The Area Office further found that Appellant has, and is affiliated with, four wholly-owned subsidiaries. These are CLA-VAL Canada, CLA-VAL Europe, CLA-VAL UK, and CLA-VAL France.

The Area Office examined the payroll records provided by Appellant and its affiliates. The Area Office found that the total number of Appellant's compensated employees is within the 500-employee size standard. However, the Area Office also found that that Appellant had a number of employees on its payroll records who received no compensation. These individuals were not working due to Workers' Compensation issues or were on leave under the Family and Medical Leave Act. These individuals must remain on Appellant's payroll in an unpaid status until they retire, resign, or return to work. After the Area Office included these individuals in its computation of Appellant's employees, Appellant exceeded the size standard. Accordingly, the Area Office concluded Appellant was other than small.

C. The Appeal

Appellant received the Size Determination on June 28, 2011, and filed its size appeal with the SBA Office of Hearings and Appeals (OHA) on July 7, 2011. First, Appellant asserts A&B's protest was insufficiently specific.

Appellant also asserts it has been honest in its representations to SBA and has performed its commitments while complying with SBA regulations.

Appellant argues that the Area Office erred in including in its calculations of Appellant's employees individuals who did not perform services for Appellant. Appellant asserts that the SBA regulation requires that the Area Office consider the totality of the circumstances in making its determination of the number of employees, including the criteria used by the Internal Revenue Service (IRS) for Federal income tax purposes. Appellant argues that the IRS regulations refer to "performed services" and therefore the employees who were not performing services should not be counted.

Appellant further argues that persons on Workers' Compensation, including an individual in an irreversible coma and an individual who had not worked for Appellant for four years are

not performing services and should not be counted. Appellant also asserts that summer workers should not counted, because they did not perform services during the entire period measured. Appellant argues that employees on leaves of absence should not have been counted, because they did not work during the entire period counted. Appellant further argues that because volunteers who work without compensation are not counted as employees for size purposes, other persons who do not receive compensation and do not perform services also should not be counted.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction 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. Merits of the Appeal

Appellant's assertion that A&B's protest is insufficiently specific is meritless. A size protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. 13 C.F.R. § 121.1007(b). A&B's protest asserted that Appellant had employees in excess of the size standard and widespread operations. This provided notice to Appellant of the grounds upon which its size was questioned, albeit in inflammatory language.

Appellant does not contest the Area Office's affiliation findings. Thus, the only issue in this appeal is whether the Area Office clearly erred in counting Appellant's and its affiliates' employees. The regulation governing how to calculate a concern's number of employees for size determination purposes provides:

> (a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

> (b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:
>
> (1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.
>
> (2) Part-time and temporary employees are counted the same as full-time employees.
>
> (3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.
>
> (4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

13 C.F.R. § 121.106.

When first promulgating this regulation, SBA clearly stated that its purpose was to prevent concerns from retaining small business eligibility by manipulating their payrolls. 41 Fed. Reg. 9297 (March 4, 1976). The preamble to the regulation stated quite emphatically, "[T]here should be no flexibility in the computation of a concern's number of employees." *Id.*, at 9298.

This Office's case law has followed this principle. OHA has rejected a weighting method of counting employees. *Size Appeal of Fruit Nectars, Inc.*, SBA No. SIZ-2546 (1986). Agricultural field workers billed to a member of a cooperative as if the challenged concern were a labor contractor have been counted. *Size Appeal of Orange Cove-Sanger Citrus Assoc.*, SBA No. SIZ-4377 (1999). OHA has rejected the crew-complement plus approach of the maritime industry, which would count the number of crew positions on ships rather than number of persons employed. *Size Appeal of Keystone Ocean Services, Inc*., SBA No. SIZ-4712 (2005).

Further, in a case that is particularly apposite here, OHA has held that it was error for an Area Office not to count a challenged concern's inactive employees, emphasizing that the count must include "all employees". *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125, at 13 (2010). In sum, OHA has consistently held that there is no exception to the rule that all employees must be counted, and has consistently rejected any alternative approach to the all-inclusive counting method. *Keystone Ocean Services*, at 8.

Here, the Area Office counted all of Appellant's employees, active and inactive, excluding no one, as required by the regulation and OHA precedent in *DynaLantic*. The Area Office thus followed the regulation and did not err.

Appellant's argument that inactive employees should not be counted simply flies in the face of the plain language of the regulation and the established OHA precedent. Appellant's argument that the inactive employees should not be counted because volunteers are not counted is meritless. Volunteers were never employees, never compensated, and thus are properly not counted as employees. Appellant's inactive employees were active, compensated employees at one time, and may be again. They are included on Appellant's books as employees and are properly counted.

Appellant's vague, citationless reference to IRS regulations cannot overcome the clear mandate of the regulation and case law here. Further, while the IRS regulations are replete with references to the term "performed services", this phrase can as easily refer to a former employee as to a current one. 26 C.F.R. § 1.79-0(c). While the SBA regulation does refer to the criteria in IRS regulations, Appellant points to nothing that would mandate excluding inactive employees from the count of employees.

In conclusion, SBA's regulations mandate that all of a concern's employees, of whatever nature, full-time, part time, inactive, or any other, be counted when determining a challenged concern's size. There is no flexibility in the computation of the number of a challenged concern's employees. Therefore, the Area Office did not err in including Appellant's inactive employees in its count. Appellant's number of employees exceeds the size standard, and Appellant is thus other than small.

Accordingly, based on the record before me, I find that Appellant has failed to establish that the Area Office's Size Determination was based on any error of fact or law, and I must deny the instant appeal.

III. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge