

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

SIZE APPEAL OF:

American Blanching Company,

Appellant,

Appealed From
Size Determination No. 3-2013-018

SBA No. SIZ-5430

Decided: December 20, 2012

DECISION

I. Introduction and Jurisdiction

On October 25, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting Area III (Area Office) issued Size Determination No. 3-2012-018 finding American Blanching Company (Appellant) to be other than a small business. Appellant now appeals the decision. For the reasons discussed below, the appeal is DENIED.

SBA's Office of Hearings and Appeals (OHA) decides size 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 fifteen days of receiving the Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the Size Determination finding Appellant to be other than a small business pursuant to the adverse inference rule was based on clear error of fact or law.

III. Background

On September 5, 2012, the Contracting Officer for the U.S. Department of Agriculture, Farm Service Agency, Kansas City Commodity Office (CO), issued Invitation for Bid No. 2000001280 (IFB) for peanut products. The IFB was partially set aside for small business and was designated North American Industry Classification Code (NAICS) 311911, Roasted Nuts and Peanut Butter Manufacturing, with a corresponding 500 employees size standard. Bids were due on September 11, 2012.

On September 13, 2012, the CO awarded a contract to Appellant. On October 16, 2012, the CO filed his own protest alleging that Appellant is other than a small business because it is

owned by Ironwood Capital (Ironwood).

The CO forwarded the protest to the Area Office. On October 18, 2012, the Area Office sent a letter to Appellant notifying it of the protest and directing it to respond to the protest and to provide certain documentation—SBA Form 355, copy of the corporate charter and bylaws, complete financial statements for the last three years, etc.—to enable the Area Office to complete a formal size determination. The letter specifically stated: “*All of these documents must be received by this office within three working days after receipt of this letter. If you fail to submit the completed application along with the other material requested within the specified time, SBA may determine your company to be other than a small business.*” Oct. 18, 2012, Letter at 6-7.

On October 25, 2012, after having received no response to its letter, the Area Office issued Size Determination No. 3-2013-18 finding Appellant to be other than small because it had failed to respond to the Area Office's request for information. The Area Office noted that Appellant had received the letter on October 19, 2012, that the response was due by October 24, 2012, and that the Area Office had received no request for an extension. Consequently, it determined Appellant is other than small pursuant to the adverse inference rule, 13 C.F.R. § 121.1008(d).

On November 7, 2012, Appellant appealed the Size Determination to OHA. Appellant asserts that it is a small business pursuant to the Small Business Investment Company (SBIC) exception to affiliation at 13 C.F.R. § 121.103(b)(1). Alternatively, Appellant asserts it is small because Ironwood's ownership percentage is very small and it does not control the board of directors. Appellant asserts its failure to respond to SBA should be excused because this was its first encounter with SBA, and because it believed it had answered all pertinent questions about its affiliation in exchanges with the CO. Appellant also filed a Motion to Admit New Evidence, together with the new evidence.

IV. Discussion

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 overturn a size determination only if the appellant proves that the area office made a patent error based on the record before it.

Appellant seeks to admit into the record new evidence not before the Area Office. 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).

In this case, I find Appellant has not shown good cause to admit the new evidence. The new evidence does not go the issue of whether the Area Office properly drew an adverse inference because Appellant had failed to respond to its requests for information, and this issue is

dispositive here. Accordingly, I DENY Appellant's Motion and EXCLUDE the new evidence accompanying the appeal petition.

The adverse inference rule provides that if a concern whose size is at issue fails to submit a completed SBA Form 355, fails to respond to protest allegations, or fails to provide requested information within the time allowed by the area office, the area office may presume that the requested information would demonstrate that the concern is other than a small business. 13 C.F.R. § 121.1008(d). Further, “[i]n the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.” 13 C.F.R. § 121.1009(d).

When evaluating an area office's use of the adverse inference rule, OHA has applied a three part test to determine whether the rule was appropriately applied: (1) the information the area office sought must have been relevant to an issue in the size determination; (2) there must have been a level of connection between the challenged concern and the concern from which the area office sought information; and (3) the area office's request for information must have been specific. *See, e.g., Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919, at 13 (2008). “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.” *Size Appeal of Firewatch Contracting of Florida, LLC*, SBA No. SIZ-4994, at 7 (2008) (citations omitted).

The information the Area Office sought from Appellant in this case is the most basic information required to perform a formal size determination and is requested in every size determination case. The Area Office sought the information directly from the protested concern itself, and the request for information was very specific—the Area Office listed exactly the documents that were required. This case undoubtedly presents a proper application of the adverse inference rule. In fact, it presents the clearest factual scenario possible for an application of the adverse inference rule—the protested concern failed to submit any response to the protest or any documentation at all to the Area Office. Without any information from the protested concern, the Area Office was unable to conduct a size determination and had no choice but to apply the adverse inference rule.

Appellant now claims on appeal that it is small; however, Appellant's time to make or prove such a claim has passed. “[A]fter an Area Office has based an adverse inference on a failure to provide information on request, an Appellant cannot remedy its failure on appeal, absent a showing of good cause for the failure.” *Size Appeal of Xantrex Tech., Inc.*, SBA No. SIZ-4592 (2003) (citing *Size Appeal of Safe Workers of America, Inc.*, SBA No. SIZ-4437, at 5 (2001)). Appellant has not shown good cause for its failure to submit to the Area Office the specific information it requested. It was Appellant's responsibility to submit this information, and, as a result of Appellant's failure to do so, the Area Office properly applied the adverse inference rule. Appellant's argument its failure to respond should be excused is meritless. The regulation clearly requires that the protested concern communicate with SBA, and there is no second bite at the apple for a concern that did not take the trouble to understand the regulation the first time. Thus, the Area Office did not commit an error of fact or law in issuing its Size Determination.

V. Conclusion

The Size Determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge