

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

DECISION FOR PUBLIC RELEASE

SIZE APPEALS OF:

GTA Containers, Inc. and MPC
Containment Systems, LLC,

Appellants,

RE: Avon Engineered Fabrications, Inc.

Appealed From
Size Determination Nos. 03-2016-053 and
-054

SBA No. SIZ-5760

Decided: July 7, 2016

APPEARANCES

Yatish J. Joshi, President, GTA Containers, Inc., South Bend, Indiana

Benjamin Beiler, President and Chief Executive Officer, MPC Containment Systems, LLC, Chicago, Illinois

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., Nicholas J. Surace, Esq., Smith Pachter McWhorter PLC, Tysons Corner, Virginia, and Jill M. McClune, Vice President Contracts & Federal Compliance, Avon Protection Systems, Inc., Belcamp, Maryland, for Avon Engineered Fabrications, Inc.

DECISION¹

I. Introduction and Jurisdiction

On May 24, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 03-2016-053 and -054

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. Avon indicated that it did not wish to propose redactions to the decision. OHA now issues the decision for public release.

finding that Avon Engineered Fabrications, Inc. (Avon) is a small business. On June 7, 2016, GTA Containers, Inc. (GTA), which had previously protested Avon's small business status, appealed the size determination to the SBA Office of Hearings and Appeals (OHA). The next day, OHA received an appeal from MPC Containment Systems, LLC (MPC), another protester, challenging the same size determination. Because the two appeals arise from the same size determination and present similar issues, OHA consolidated them.

GTA and MPC (collectively, “Appellants”) maintain that the size determination is flawed and should be overturned. For the reasons discussed *infra*, the appeals are granted in part, and the matter is remanded to the Area Office for further review.

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. Appellants filed the instant appeals within fifteen days of receiving the size determination, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On October 2, 2015, the U.S. Department of Defense, Defense Logistics Agency issued Request for Proposals (RFP) No. SPRDL1-15-R-0349 for collapsible fuel tanks with handles, fitting, accessories, berm liners, hose support pads, and emergency and long term repair kits. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 313320, Fabric Coating Mills, with a corresponding size standard of 1,000 employees. The RFP included the full text of Federal Acquisition Regulation (FAR) clause 52.219-28, Post-Award Small Business Program Representation (JUL 2013), which defined a “small business concern” as:

a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (c) of this clause. Such a concern is “not dominant in its field of operation” when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

(RFP § I-106.)

Avon submitted a timely proposal, self-certifying as small businesses. On April 11, 2016, the CO announced that Avon was the apparent awardee. On April 13, 2016, GTA protested Avon's size. On April 15, 2016, MPC protested Avon's size. In their protests, Appellants argued

that Avon is not an eligible small business because it is affiliated with Avon Rubber p.l.c. (AR), a publicly-traded British company with more than 500 employees. According to GTA, AR owns 15 companies on three continents. To support this claim, GTA included a screenshot from AR's website and other information.

MPC made additional allegations. Specifically, MPC maintained that a 500-employee size standard should apply because “[Avon] itself is not a manufacturer of the material used to make the flexible storage tanks the subject of the Solicitation, [so] . . . the applicable size standard for this Solicitation is 500 [employees], as [Avon] is . . . propos[ing] to furnish a product which it did not itself manufacture.” (MPC Protest at 3.) MPC alleged further that Avon is ineligible for award because Avon is dominant in its field of operation and is not independently owned and operated. (*Id.* at 3-4.) MPC also took issue with Avon's price, asserting that it may be unbalanced or unrealistically low. (*Id.* at 4.)

B. Size Determination

On May 24, 2016, the Area Office issued Size Determination Nos. 03-2016-053 and -054 finding that Avon is a small business, despite being affiliated with a number of businesses.

The Area Office explained that Avon is 100% owned by Avon Rubber and Plastics, Inc. (ARP), which also owns 100% of Avon Protection Systems, Inc. (APS). APS, Avon's sister company, owns 100% of Hudstar Systems, Inc. (Hudstar). Avon owns 50% of Flexss, LLC, an unpopulated joint venture, with the remaining 50% owned by Dynamic Shelters, Ltd. (Size Determination at 3.)

ARP, Avon's parent company, is 100%-owned by Avon Rubber Overseas Limited (ARO). In addition to ARP, ARO owns 99% of Avon Dairy America Do Sul Soluções Para Ordenha LTDA (ADA) and 75% of Avon Hi-Life, Inc. (AHL). ARP owns the remaining 25% of AHL. (*Id.*)

ARO, which owns Avon through ARP, is 100%-owned by AR. In addition to ARO, AR owns the remaining 1% of ADA and 100% of Avon Dairy Solutions (Shanghai) International Trading Company Limited (ADSI), Avon Rubber Pension Trust Limited (ARPT), Avon Rubber Italia S.R.L. (ARI) and Avon Polymer Products Limited (APP). ARI owns 100% of Interpuls S.P.A. APP owns 100% of Avon Group Limited (AGL) and Avon Protection Systems UK Limited (APSUK). (*Id.*)

The Area Office determined that AR is a widely-held company, as it is publicly traded with 31.02 million shares outstanding. The three largest blocks of stock are 4 million, 3.2 million, and 2.7 million; therefore, the Area Office determined, no single block of stock is large relative to the other blocks of voting stock. Due to AR's ownership and structure, AR's board of directors and CEO are deemed to control AR. (*Id.*, citing 13 C.F.R. § 121.103(c)(3).) AR's CEO and directors do not hold any interest in or manage any other business entity, nor do they share an identity of interest with one another such that they constitute a voting bloc. (*Id.* at 4.)

The Area Office then proceeded to calculate Avon's size as of February 5, 2016, the date Avon submitted its offer including price. The Area Office twice stated that Avon is affiliated with “AR, ARP, APS, ARI, AHL, ARO, APP, ARA, ARO, ARPT, ADSI, AGL, APSUK and ADA.” (*Id.*) In both instances, the Area Office did not include Hudstar in the list of Avon's affiliates. The Area Office determined that the combined average number of employees for Avon and its affiliates for the twelve months preceding February 5, 2016, “does not exceed the size standard for the procurement.” (*Id.*) In multiple places, the Area Office refers to the applicable size standard as 1,000 employees. (*Id.* at 1.)

The size determination is silent as to whether Avon is the manufacturer of the end items sought in the RFP.

C. GTA's Appeal

On June 7, 2016, GTA appealed the size determination to OHA. GTA argues that the size determination contains several clear errors.

GTA complains that the Area Office did not consider all of the firms included in the evidence GTA submitted or explain why it omitted them from the size determination. Specifically, the Area Office did not discuss “various Milkrite entities, Avon International Safety Instruments, Inc., Hudstar, Argus Technologies or ARTIS.” (GTA Appeal at 2.) As a result, GTA argues, the size determination is incomplete.

Next, GTA takes issue with the Area Office's calculation of employees. The “12 month look back period . . . is flawed,” GTA reasons, because “it does not take into full consideration the impact of employees added near the end of the ‘look back’ period.” (*Id.*) AR made significant acquisitions in June, August, and October 2015, so the Area Office's method for counting employees does not result in an accurate measurement.

Third, GTA avers that the Area Office used the incorrect size standard because Avon is not the manufacturer of the collapsible fuel tanks. To qualify as a nonmanufacturer, Avon and its affiliates must not exceed 500 employees. According to GTA, Avon and its affiliates cannot possibly meet a 500-employee size standard since AR disclosed that it had more than 800 employees as of September 2015. (*Id.* at 2-3.)

D. MPC's Appeal

On June 8, 2016, MPC filed its appeal of the size determination. MPC maintains the size determination is clearly erroneous and should be reversed.

MPC argues that the Area Office did not address all of its protest grounds. In addition to alleging that Avon exceeds the size standard, MPC contended that Avon does not meet the RFP's definition of a small business concern. (MPC Appeal at 2-3, citing FAR clause 52.219-28). By considering only whether Avon and its affiliates exceed the size standard, the Area Office rendered a “substantially nonresponsive” size determination. (*Id.* at 5.) MPC contends further

that Avon is dominant in its field of operations and is not independently owned and operated. (*Id.* at 8-9.)

Next, MPC takes issue with the Area Office's calculation of Avon's employees, asserting that the Area Office provided “minimal facts to support its size determination,” and “[d]id not provide any information of who was counted in that determination.” (*Id.* at 5-6.) In addition, MPC charges, the Area Office did not investigate whether Avon or its affiliates have independent contractors or whether they obtained employees through employment agencies, leasing concerns, or employee professional organizations. Such workers would not show up on tax documents, but should be counted as employees nonetheless.

MPC argues the Area Office misapplied SBA regulations in analyzing AR's stock. In MPC's view, the Area Office should have considered whether the three largest blocks of stock could act in concert to exert negative control. (*Id.* at 5-8.)

MPC contends that the Area Office also erred in assessing Avon's size under a 1,000-employee size standard. MPC claims that Avon does not qualify as the manufacturer. To be eligible as a nonmanufacturer, Avon and its affiliates must have fewer than 500 employees. (*Id.* at 10.)

E. Avon's Response

On June 24, 2016, Avon responded to the appeals. Avon insists that the appeals lack merit, so OHA should deny them and affirm the size determination.

Avon highlights that the size standard identified in the RFP was 1,000 employees, and to the extent Appellants are now alleging that a different size standard should apply, those arguments should be dismissed as untimely NAICS appeals. (Response at 5, citing *NAICS Appeal of Ash Stevens, Inc.*, SBA No. NAICS-5368 (2012).) Avon defends the use of NAICS code 313320 based on historical data of procurements for collapsible tanks, several of which were awarded to the Appellants. (*Id.* at 6-7.)

Next, Avon avers it is the manufacturer of the collapsible tanks. Although Avon does not manufacture the fabric used in constructing the collapsible tanks, this is not significant because SBA regulations do not require that the manufacturer produce all of the parts and components of an end item. (*Id.* at 8, citing 13 C.F.R. § 121.406(b)(2).)

Contrary to the Appellants' arguments, the Area Office did in fact consider all of Avon's affiliates and properly calculated Avon's size. Avon explains that Milkrite, Argus Technologies, and ARTIS are trade names used by some of Avon's affiliates, not separate legal entities. As for Hudstar, it is an existing affiliated legal entity and was included in the information Avon submitted to the Area Office. Avon International Safety Instruments, Inc. is a former affiliate that merged with APS in September 2015. (*Id.* at 14-15.)

Avon then addresses MPC's other arguments. The Area Office's alleged failure to account for independent contractors and employees obtained through employment agencies, leasing

concerns, or employee professional organizations are new arguments raised for the first time on appeal. In addition to being procedurally defective, this allegation lacks merit because Avon included any such employees in the information it submitted to the Area Office, and at no time did Avon's number of employees exceed the 1,000-employee size standard. (*Id.* at 15.)

Moreover, MPC misapplies the affiliation rules in arguing that the Area Office erred in considering the ownership of AR. Because the three largest blocks of stock are all relatively large, “no single block of stock is large as compared to all other blocks of voting stock.” (*Id.* at 16, quoting 13 C.F.R. § 121.103(c)(3).) Therefore, the CEO and board of directors are deemed to have the power to control AR, as the Area Office determined.

III. Discussion

A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellants 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

Appellants have demonstrated that the size determination is flawed in three respects. As a result, it is appropriate to remand this case for further review.

First, as Appellants emphasize, the Area Office failed to address the protest allegation that Avon is not the manufacturer of the collapsible tanks. Sections II.A and II.B, *supra*. This omission is significant because SBA regulations require that, when a procurement calls for manufactured products and the procurement is set aside for small business, the prime contractor either must be the manufacturer or producer of the end item, or must fall within certain “nonmanufacturer” exceptions. 13 C.F.R. § 121.406(a). Each of the “nonmanufacturer” exceptions requires that the firm supplying the end item have 500 or fewer employees. *Id.* § 121.406(b)-(d). Accordingly, if Avon is not the manufacturer of the collapsible tanks, then Avon must qualify under a size standard of 500 employees in order to be eligible for a “nonmanufacturer” exception, and the Area Office would have erred in assessing Avon's size solely under the 1,000-employee size standard.

Second, the Area Office's analysis of Avon's affiliates appears incomplete. In particular, the Area Office determined that Hudstar is wholly-owned by Avon's sister company, APS. Section II.B, *supra*. Based on this finding, it would seem that Hudstar and Avon would be affiliated because they are commonly owned and controlled by another company. 13 C.F.R. §§ 121.103(a)(1) and (c)(1). Nevertheless, the Area Office twice listed Avon's affiliates without including Hudstar. Section II.B, *supra*. It therefore appears that the Area Office did not consider Hudstar in computing the combined employees of Avon and its affiliates.

Third, as MPC points out, in determining whether any block of AR's stock was large relative to the others, the Area Office should have considered whether the stockholders share an identity of interest such that their interests should be aggregated. *Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 17 (2016) (remanding for further investigation as to whether there was an identity of interest among minority shareholders in a widely-held company); *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523, at 3 (2013) (“although an individual owner may not have the ability to control a firm based on his individual ownership interest, multiple owners may have the collective ability to control based on their aggregated interests.”); *see also Size Appeal of AcelRx Pharms., Inc.*, SBA No. SIZ-5501 (2013). The Area Office, though, considered only whether AR's CEO and directors shared an identity of interest, but not whether there was an identity of interest among the large shareholders. Section II.B, *supra*.

Appellants' remaining criticisms lack merit. GTA's contention that the Area Office should have discussed the Milkrite entities, Avon International Safety Instruments, Inc., Argus Technologies, and ARTIS fails because GTA's protest merely pointed the Area Office to print-offs from the internet. GTA did not specifically identify these alleged affiliates, and offered no reason to believe that Avon is affiliated with these firms. GTA therefore has not established that the Area Office had a duty to comment on these entities. Further, Avon reasonably explains that these entities are not current Avon affiliates in any event, but rather former affiliates or trade names.

GTA's complaint regarding the method for calculating employees amounts to disagreement with the process set forth in SBA regulations, and therefore should be directed to SBA policy officials not to OHA. “It is well-settled that OHA has no authority to determine the validity of the size regulations and can entertain no challenge to them.” *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664, at 11 (2015) (internal citations and quotations omitted); *Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556, at 7 (2014).

MPC's criticism that the size determination is opaque regarding the calculation of employees is similarly unavailing. SBA regulations make clear that “SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.” 13 C.F.R. § 121.1008(d). It therefore is common practice for SBA not to include confidential or proprietary information in a size determination that will be issued to a firm's competitors. Further, SBA regulations permit outside legal counsel to obtain access to sensitive information under a protective order that restricts the information's use. *Id.* § 134.205(e). Thus, if MPC wished to review the specifics of the Area Office's calculations, it could easily have done so by retaining legal counsel. *Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 9 (2015).

Lastly, MPC's contention that the Area Office should have investigated whether Avon is dominant in its field of operations is meritless. OHA has explained that SBA addresses this issue in setting the size standards. As a result, “[n]o firm which meets the applicable size standard is considered dominant in its field.” *Size Appeal of Silver Enter. Assocs., Inc.*, SBA No. SIZ-5124, at 5 (2010).

C. Remand

On remand, the Area Office should determine whether Avon is the manufacturer of the collapsible fuel tanks, and if not, whether Avon qualifies as a nonmanufacturer. The Area Office should explain whether Hudstar is affiliated with Avon, and if so include Hudstar's employees in the size calculation. In addition, the Area Office should consider whether there is an identity of interest among AR's largest shareholders such that they should be treated as one entity.

IV. Conclusion

Appellants have demonstrated that the size determination contains several material errors. Accordingly, the appeals are GRANTED to the extent discussed above, the size determination is VACATED, and the matter is REMANDED to the Area Office further review and investigation consistent with this decision.

KENNETH M. HYDE
Administrative Judge