

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

IN THE MATTER OF:

Innovative Construction &
Management Services, LLC

Appellant

Size Determination No. 4-2011-8

SBA No. SIZ-5202

Decided: February 18, 2011

APPEARANCES

Antonio R. Franco, Esq., and Steven J. Koprince, Esq., Piliero Mazza PLLC,
Washington, D.C., for Appellant Innovative Construction & Management Services, LLC.

Kenneth Dodds, Esq., Office of General Counsel, Washington, D.C., for the Small
Business Administration.

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 a clear error of fact or law in determining the size of an
applicant to the 8(a) Business Development (BD) program as of the date of its application and
the date the applicant firm received notice that its size was challenged.

III. Background

A. The DPCE Referral

Innovative Construction & Management Services, LLC (Appellant) was founded in 2008.
On June 22, 2009, Appellant applied for admission into the Small Business Administration
(SBA) 8(a) BD program. On April 29, 2010, SBA's Division of Program Certification and
Eligibility (DPCE) denied Appellant's application. On June 8, 2010, Appellant filed a request
for reconsideration.

On July 9, 2010, SBA's Assistant Administrator (AA) of the Division of Certification and Eligibility requested that the SBA Office of Government Contracting perform a size determination on Appellant in connection with Appellant's application for admission to SBA's 8(a) BD program. The AA identified the principal issue as whether Appellant was affiliated with Foulger-Pratt Companies (FPC). The letter listed six items being forwarded with the letter. These were: SBA's decline letter and original worksheet; Appellant's response letter; copies of cancelled checks evidencing payment to FPC; a chart representing Appellant's revenues; current copies of contracts and invoices; and Appellant's 2009 corporate tax returns.

On November 3, 2010, SBA's Office of Government Contracting – Area IV, in Chicago, Illinois (Area Office) contacted Appellant and informed Appellant that its size had been questioned in connection with its application for participation in the HUBZone program, and requested Appellant complete an SBA Form 355, together with certain other information. The Area Office informed Appellant it would use North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding \$35.5 million annual receipts size standard, to determine Appellant's size.

On November 4, 2010, the Area Office corrected itself in an email to Appellant. The Area Office recognized that the size determination was in connection with an 8(a) BD application, not a HUBZone Appeal, and that the correct NAICS code was 541611, Administrative Management and General Management Consulting Services, with a corresponding \$7 million annual receipts size standard. On November 9, 2010, Appellant submitted the requested information to the Area Office.

B. The Size Determination

On November 30, 2010, the Area Office issued the subject size determination, finding Appellant other than small. The Area Office noted that the regulation requires the size of an applicant to the 8(a) BD program be determined as of the date of its application for admission and as of the date of certification by SBA. 13 C.F.R. § 121.404(b). Because there was no date of certification due to DPCE's denial of Appellant's application, the Area Office decided that it would determine Appellant's size as of the date of its application and the date Appellant was notified its size was at issue. The date the Area Office chose for the size determination was November 5, 2010. The Area Office based this decision on an assumption Appellant would be certified if determined to be small.

The Area Office found that Hamlet Lopez, Appellant's majority shareholder, controls the firm and that there are no other entities affiliated with Appellant through him. The Area Office further examined whether other firms might exercise control over Appellant.

1. Appellant's Size as of the Date of Its Application

On June 22, 2009, Appellant certified itself as small to SBA as part of its application for admission to the 8(a) BD program. There were no financial data at that point which established that Appellant was economically dependent on FPC or any other firm. Appellant did borrow \$200,000 from FPC because of Appellant's difficulty in obtaining funds elsewhere. The loan is

not on unusually favorable terms. The Area Office found that the mere fact of a promissory note did not establish control, and that the amount of the loan, in comparison to Appellant's eventual 2009 revenues, is a below-average debt ratio.

The Area Office further noted that neither FPC nor any of its shareholders, officers, or directors has any ownership interest in Appellant. There is no common management, no family relationships between the owners of the two firms, and the firms are not in the same or similar line of business. The Area Office found that FPC is Appellant's landlord, but that the lease appears to be an ordinary arm's-length transaction, and does not lead to a finding of control. The Area Office thus concluded that, as of June 22, 2009, the date of Appellant's application to the 8(a) BD program, Appellant was an eligible small business.

2. Appellant's Size as of the Date of the Determination

The Area Office found that FPC was responsible for 40.2% of Appellant's 2009 revenues. Another firm, SAIC, was responsible for 47.3% of Appellant's 2009 revenues. Three other clients accounted for the balance of Appellant's 2009 income, none more than 10%. However, in the first ten months of 2010, FPC accounts for 55% of Appellant's revenues, and SAIC only 3.5%. The Area Office noted that Appellant has more customers, but FPC is accounting for a much larger share of the firm's business. The Area Office thus found Appellant affiliated with FPC based upon economic dependence upon FPC.

The Area Office also found Appellant affiliated with FPC based upon the totality of the circumstances. Appellant relied upon FPC for critical financing, for office space, for a substantial portion of its revenue, and, further, Appellant's minority shareholder, Michael Costas, is a former senior FPC employee. The Area Office determined that although none of these factors, taken alone, is sufficient to establish affiliation, taken together, all of these factors, establish that Appellant is affiliated with FPC, and is thus other than small.

C. The Appeal

On December 6, 2010, Appellant received the size determination. On January 3, 2011, Appellant filed the instant size appeal.

Appellant asserts first, that the Area Office erred in determining size as of the date of the size determination. The regulation calls for an 8(a) BD applicant to be determined to be a small business as of the date of its application and the date of its certification. The second requirement of the regulation applies only to certified 8(a) BD firms.

Appellant asserts the size of a firm that has applied to the 8(a) BD program, but has not been admitted, must be determined as of the date of its application and no other. The date of certification has not yet occurred, and therefore cannot be used to determine size. Appellant asserts that Area Office has impermissibly rewritten the regulation to add an additional date for determining size.

Appellant further asserts that it is not economically dependent upon FPC.

D. Appellant's Motions

On January 10, 2011, I issued a Notice and Order setting the close of Record as January 25, 2011. On January 25, 2011, Appellant filed a series of motions. The first is a motion to admit new evidence on appeal and require the Area Office to provide the entire case file to OHA.

Appellant begins by describing its experiences with SBA as "Kafkaesque." Appellant alleges various administrative mishaps in the processing of its 8(a) BD application.

Appellant alleges that the Area Office file submitted to OHA is not the complete file in this matter. Appellant asserts that it provided a large volume of documents to SBA's DPCE as part of its 8(a) BD application. Appellant asserts there are many documents relevant to the issue of its size which were included in its submissions to the DPCE but are not included in the Area Office file.

Appellant seeks to submit a number of documents as new evidence which it asserts demonstrates Appellant's lack of dependence upon FPC. Appellant seeks to submit a letter from a bank, confirming a loan to Appellant, two promissory notes to relatives of Hamlet Lopez, Appellant's principal shareholder, and a bank statement establishing that Mr. Lopez provided \$200,000 of his own start-up capital to Appellant. Appellant asserts these documents establish its lack of financial dependence upon FPC.

Appellant further seeks to submit a narrative of its relationship with FPC. Appellant also seeks to submit its financial projections for 2008 to 2012, and a series of letters of reference. Appellant asserts these documents establish that Appellant's income will rise and that it is well able to obtain contracts independent of FPC.

Appellant further asserts that the DPCE's July 9th letter states that it is sending to the Area Office copies of cancelled checks, and copies of Appellant's contracts and invoices. The Area Office file does not contain these documents, and they should be part of the record before OHA.

Appellant asserts that this is not new evidence, but evidence which was in SBA's possession prior to the initiation of the size determination, and which Appellant assumed was transmitted by DPCE to the Area Office. Appellant asserts it does not seek to introduce evidence it had not already provided SBA as part of its 8(a) BD application.

Appellant asserts the admission of this evidence will not unduly enlarge the issues in this appeal, as all of these documents go to the issue of Appellant's affiliation with FPC.

Appellant further asserts that OHA should require the Area Office to submit the entire case file to OHA, as required by regulation.

Appellant's second motion is for an enlargement of time, for the Area Office to provide the entire case file to OHA, after the scheduled close of record on January 25th.

Appellant's third motion is to suspend the size determination. Appellant asserts that the size determination is fundamentally flawed. Appellant argues that OHA should use its inherent authority under 13 C.F.R. § 134.218(b) to suspend the effect of the size determination, citing *Matter of Samuel L. Wright Gen. Constr., Inc.*, SBA No. MSB-586 (1997), and allow Appellant to self-certify as a small business pending its appeal.

E. Agency Opposition

On February 8, 2011, SBA filed an opposition to Appellant's motions. First, SBA asserts that OHA has no authority to suspend a formal size determination while an appeal is pending.

Second, SBA asserts that an applicant firm must be small at the time of its certification into the 8(a) BD program, citing 13 C.F.R. § 121.404(b). The Area Office thus reasonably determined Appellant's size as of the date of the notice to Appellant that its size was in question.

Third, SBA attaches an affidavit from David Gordon, the Area Office's Size Program Manager. Mr. Gordon asserts that he forwarded to OHA the entire file he relied upon in making the size determination, and that he has no documents in his possession that concern this case.

Fourth, SBA urges OHA not to produce any information DPCE referenced in its transmittal memorandum that was not in the file before OHA. SBA asserts that the information is irrelevant, and cannot alter the fact that Appellant derived 40% of its revenue from FPC in 2009 and 55% of its revenue from FPC through the first ten months of 2010. Appellant's complaint about the lack of cancelled checks, contracts, and invoices to back up the admitted facts would lead to a waste of time and resources for OHA and the parties. The information would support the size determination, not the appeal.

Fifth, SBA asserts that Appellant bore the burden of proof in the size determination. 13 C.F.R. § 121.1009(c). All the additional information Appellant seeks to include in the record was available at the time Appellant responded to the Area Office's request for information. SBA asserts there is no good cause for this late submission in Appellant's mistaken belief that merely because it submitted information to DPCE to support its 8(a) BD application, that it would be in the record before the Area Office. A formal size determination is a completely separate and distinct determination from an 8(a) BD eligibility determination, made by a different office. Most of the information submitted to DPCE is irrelevant to the question of a firm's size, and should not be in the record for a size determination. The Area Office gave Appellant the opportunity to respond to the request for a size determination, and all of this information was in Appellant's possession at that time, and should have been submitted then.

Finally, SBA asserts the information Appellant seeks to submit is irrelevant. Financial projections are speculative in nature, and these and letters of reference from customers are irrelevant to the question of whether Appellant was affiliated with FPC in November, 2010.

F. Appellant's Reply

On February 17, 2011, Appellant replied to the Agency response to its motions. Appellant's reply largely restates its arguments that the Area Office used the wrong date of certification, and made the size determination without the benefit of a number of relevant documents Appellant had submitted to DPCE. The evidence Appellant seeks to submit is not new, but has been in SBA's possession all along, and is highly relevant. Further, SBA has failed to explain why DPCE did not provide this evidence to the Area Office.

G. The Record

An examination of the Area Office file establishes that Appellant is correct, and that it does not contain the cancelled checks and the copies of Appellant's contracts and invoices, which the DPCE memo stated were transmitted to the Area Office.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within 30 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(2). The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the area office based its size determination upon a clear error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

B. Appellant's Motion to Suspend is Denied

Appellant seeks to have me suspend the size determination based upon OHA's inherent authority under 13 C.F.R. § 134.218(b), which provides:

Except as otherwise limited by this part, or by statute or other regulation, a Judge has the authority to take all appropriate action to ensure the efficient, prompt, and fair determination of a case, including, but not limited to, the authority to administer oaths and affirmations and to subpoena and examine witnesses.

This is a general regulatory provision, giving OHA judges the authority to conduct a case. The regulation specifically mentions procedural matters pertaining to witnesses. It does not give OHA any authority to suspend any decision under review while an appeal is pending. Further, the case Appellant relies upon, *Matter of Samuel L. Wright Gen. Constr., Inc.*, SBA No. MSB-586 (1997), declines to find in the regulation the power to reconsider a decision. The case actually undercuts Appellant's argument that 13 C.F.R. § 134.218(b) may give OHA judges power not otherwise delegated by the regulations.

Conversely, the size regulation is very specific as to the effect of a size determination:

A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by OHA.

13 C.F.R. § 121.1009(g)(1).

A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to § 121.1010 or OHA reverses the size determination.

13 C.F.R. § 121.1009(g)(5).

The regulation is thus clear and specific that a size determination, once issued, is in effect immediately. The only events that may disturb that size determination are recertification, or OHA's reversal of the determination. The power to suspend a determination while an appeal is pending is not mentioned. It is only with a reversal, after a full consideration of the record resulting in a finding of clear error, that OHA may disturb a size determination.

Accordingly, Appellant's motion to suspend the size determination is DENIED.

C. The Date of the Size Determination

The regulation requires that an 8(a) BD applicant concern must be certified as small as of the date of its application and as of the date of its certification by SBA. 13 C.F.R. § 121.404(b). Here, the Area Office considered Appellant's size as of the date of its application, and found it small as of that date. Appellant had not yet been certified as an 8(a) BD concern. The Area Office therefore considered Appellant's size as of the date of the notice to Appellant that its size was in question, because had the firm been found small it would likely have been admitted to the program.

SBA's size regulations set the date as of which a concern's size is determined. In the case of procurements, it is the date a concern submits its initial offer, including price. 13 C.F.R. § 121.404(a). The precise date is important. A firm's size may vary over time. The number of employees or annual receipts may grow or diminish. Relationships with other firms may change in a manner that strengthens or weakens affiliation. The date chosen for the determination may determine the outcome of the case. Therefore, the date must be selected with precision.

The size regulation's language is plain. An applicant concern "must qualify as a small business for its primary industry certification as of the date of its application and the date of certification by SBA." 13 C.F.R. § 121.404(b). The regulation only establishes two dates, the date of the concern's application and the date of certification. The regulation does not say the size determination is to be performed as part of the certification process, but as of the date of certification. The regulation states that the date of certification has a specific meaning. "[T]he

date of the approval letter is the date of program certification ...” 13 C.F.R. § 124.204(f). An 8(a) BD firm’s term runs from the date of the approval letter certifying admission into the program. 13 C.F.R. § 124.2. The regulation thus mandates the use of a specific date for the size determination.

Here, however, SBA did not use the specific date required by the regulation. Rather, SBA arbitrarily chose a date, assuming that certification would occur thereafter. That second assumption was speculative at best, given the tortuous path Appellant’s application has followed. More importantly, the date chosen was not the date mandated by the regulation. The date of certification, even if it did occur, would have been some time later than the date selected by the Area Office.

OHA has always insisted that SBA conduct its size determination using the correct date. In *Size Appeal of FLIR Systems, Inc.*, SBA No. SIZ-4325 (1998), the procuring agency required offerors to submit recertifications of size with their revised offers. The area office determined size as of the recertification date. OHA reversed the size determination, because the regulation mandated that size be determined as of the date of the concern’s initial offer, including price. *Size Appeal of Bend Research, Inc.*, SBA No. SIZ-4369 (1999), concerned a firm which received a Small Business Innovation Research award. The regulation required that size be determined as of the date of the award. 13 C.F.R. § 121.704. The area office made a size determination of as the date of the size protest. OHA reversed the size determination, because the regulation specifically required that the determination be made as of the date of award.

Here I find that I must reverse the size determination, because the Area Office used an arbitrarily chosen date to make the size determination, rather than the date mandated by the regulation. This was a clear error of law. Appellant was found small as of the date of its application, a date set by the regulation. The second date, the date of Appellant’s certification, has not yet occurred. The Area Office erred in choosing to determine Appellant’s size as of the date of the notice to Appellant its size was in question, as the regulation did not permit the Area Office to use that date. That portion of the size determination which found Appellant other than small must be reversed, while the determination Appellant was small of as the date of its application must stand. Therefore, Appellant must be found to be a small business.*

* I need not rule on Appellant’s motions on evidence, because I am reversing the size determination on grounds not related to that evidence. This decision may result in Appellant’s certification, and a new size determination being performed as of that date. If so, I urge SBA and Appellant to ensure that the record before the Area Office is complete. It is clear that some documents which DPCE stated it was transmitting to the Area Office were not entered into the record, and should have been. The other documents Appellant seeks to have admitted appear to have relevance to the question of its dependence upon FPC. The Area Office might have profited from examination of these documents because it found affiliation on such slender grounds. All of this information should be in the record if a new size determination is performed.

V. Conclusion

Appellant met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is GRANTED, and the Size Determination is REVERSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge