

SIZE APPEAL OF:)	
)	
Continuant, Inc.)	Docket No. SIZ-2007-01-25-03
)	
Appellant)	Decided: February 16, 2007
)	
Solicitation No. W912LN-07-T-0002)	
Department of the Army & Air Force)	
Vermont Army National Guard)	
Colchester, Vermont)	
)	

I. BACKGROUND

A. The Solicitation and Protest

On November 17, 2006, Department of the Army and Air Force, U.S. Property and Fiscal Office of Vermont, Colchester, Vermont issued Solicitation No. W912LN-07-T-0002 for communication equipment repair and maintenance. The Contracting Officer (CO) designated the solicitation a 100% Service-Disabled Veteran-Owned Small Business set-aside. The CO further designated North American Industry Classification System (NAICS) code 811213 (Communication Equipment Repair and Maintenance) with a corresponding \$6.5 million annual receipts size standard. On December 14, 2006, Continuant, Inc. (Appellant) was awarded the contract. On December 15, 2006, the unsuccessful offeror Definitive D&V, Inc. (Definitive) was notified of the award by email.

On December 20, 2006, Definitive filed a size protest with the CO. On the same day the CO forwarded Definitive's protest to the Small Business Administration (SBA), Area VI, Office of Government Contracting in Seattle, Washington (Area Office). Definitive alleged that Appellant was other than small because in March 2006 Appellant's employees were excited to have achieved the one million dollar a month level for all their maintenance contracts.

B. Size Determination No. 6-2007-028

On December 21, 2006, the Area Office wrote Appellant, informing it of the protest and requesting it respond, and also that it complete an SBA Form 355, provide copies of its Articles of Incorporation and by-laws, and copies of tax returns and financial statements, for itself and its

¹ 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.

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affiliates for the last three years, and its and its affiliates last annual statements. Appellant received this letter on December 22nd.

On December 29, 2006, the Area Office granted Appellant an extension to respond to the protest. On January 3, 2007, Appellant responded. Appellant did not complete SBA Form 355 and did not provide financial and corporate documentation for its affiliates. On January 4, 2007, the Area Office contacted Appellant by telephone and explained the application was incomplete. Appellant informed the Area Office that Appellant did not intend to submit additional information and that the Area Office should proceed with its determination.

On January 9, 2007, the Area Office issued Size Determination No. 6-2007-028 finding Appellant to be other than small. Based on the incomplete information, SBA determined that Appellant's President's majority stock ownership in three other business concerns (73% of Telecom Labs, Inc., 100% of D&S International, Inc., and 70% of Team TLI Corporation) combined with his 62% interest in Appellant deemed the businesses affiliates for size determination pursuant to 13 C.F.R. §121.103(c)(1). SBA found the average annual receipts for Appellant together with the three affiliates exceed the \$6.5 million size standard. Moreover, because Appellant provided incomplete information, SBA presumed that disclosure of the missing information would demonstrate that Appellant is other than small in accordance with 13 C.F.R. § 121.1008(d).

C. The Appeal

On January 25, 2007, Appellant filed the instant appeal. Appellant argues that its annual receipts are well below the \$6.5 million size standard.

Appellant asserts: the protest was made by an unsuccessful bidder, the protest is not relevant to the issue of whether Appellant is small when its receipts are averaged over three years, and the protest is not specific. Appellant acknowledges it is a rapidly growing company, but states its average annual receipts for the last three fiscal years are well within the size standard.

Appellant asserts that it has been forthright in its presentation of the facts and did not include affiliate financial and corporate documentation because the affiliate companies are separate businesses, with separate ownership groups, and separate decision-making agendas. Appellant asserts its affiliates are not relevant to the work performed in this procurement, and therefore it did not think information on its affiliates was relevant to the size determination.

II. DISCUSSION

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

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B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office 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). I will disturb the Area Office's Size Determination only if, after reviewing the record and pleadings, I have a definite and firm conviction the Area Office erred in key findings of law or fact. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

C. The Protest

Appellant's argument that the protest was not sufficiently specific is meritless. Definitive identified Appellant and gave a specific reason why it believed the firm was other than small. Appellant was on notice of the grounds upon which its size was questioned. This is sufficient to meet the criteria for a specific protest.² 13 C.F.R. § 1007(b); *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006).

D. The Area Office's Adverse Inference

The Area Office's Size Determination concluded that Appellant is not a small business under the instant NAICS code and size standard. The Area Office noted Appellant is affiliated with three other businesses and failed to submit the requested information. Thus, relying on 13 C.F.R. § 121.1008(d), the Area Office presumed a full disclosure of the information requested would show Appellant is not a small business.

This Office applies a three-part test to determine whether an Area Office has properly requested information from a challenged business and thus is permitted to draw an adverse inference in its absence. First, the requested information must be relevant to an issue in the size determination. Second, there must be a level of connection between the challenged business and the businesses from which the information is requested. Third, the request for information must be specific. 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. 13 C.F.R. § 121.1008(d); *Size Appeal of Diversa Corporation*, SBA No. SIZ-4672 (2004).

In this case, the Area Office found Appellant affiliated with three other companies based on stock ownership. The Area Office had established a level of connection between Appellant and the affiliates through Appellant's President's majority ownership interest in the companies. 13 C.F.R. § 121.103(c)(1). Appellant does not dispute this finding of affiliation.

² Appellant's attempt to attach a pejorative connotation to Definitive's being "a disappointed bidder" is also meritless. These parties are specifically given standing to file size protests. 13 C.F.R. § 121.1001(a)(1)(i).

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Further, the requested information was relevant to the size determination, because a firm's size is determined by adding its annual receipts to those of its affiliates. 13 C.F.R. § 121.104(d). The information requested was crucial to the size determination. *Size Appeal of Temp Systems, Inc.*, SBA No. SIZ-4802 (2006).

Finally, the Area Office's request for information was specific. The Area Office's communications asked for specific information, and provided forms to be filled out in full. These communications and forms constituted specific requests. Appellant withheld the information because, in its judgment, the information was not relevant. However, it is the Area Office which determines what information is relevant, not the challenged firm, otherwise, firms would only submit that information favorable to themselves. *Size Appeal of Xantrex Technology, Inc.*, SBA No. SIZ-4592 (2003). It is the challenged firm which bears the burden of establishing that it is small. 13 C.F.R. § 121.1009(c). By declining to submit the requested information, Appellant failed to meet that burden. Accordingly, the Area Office was justified in drawing the adverse inference that the information, if disclosed, would show that Appellant, together with its affiliates, is other than small.

Therefore, the Area Office properly drew an adverse inference against Appellant and found it other than small. According to the information in the record available to the Area Office, Appellant's annual receipts, when combined with those of its affiliates, exceed the size standard, and it is thus other than small. Appellant has failed to meet its burden of demonstrating clear error on the part of the Area Office, and the appeal must be DISMISSED.

III. CONCLUSION

For the above reasons, I DISMISS 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(b).

CHRISTOPHER HOLLEMAN
Administrative Judge