

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

SIZE APPEAL OF:

Heard Construction, Inc.

Appellant,

RE: Waterfront Marine Construction, Inc.

Appealed From
Size Determination No. 2-2013-04

SBA No. SIZ-5461

Decided: April 3, 2013

APPEARANCES

Grady A. Palmer, Esq., Wooten & Shaddock, PLC, Chesapeake, Virginia, for Appellant

Dirk D. Haire, Esq., Jessica V. Perro, Esq., Benjamin J. Kussman, Esq., Fox Rothschild LLP, Washington, D.C., for Waterfront Marine Construction, Inc.

DECISION

I. Introduction and Jurisdiction

On January 16, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination 2-2013- 04, finding that Waterfront Marine Construction, Inc. (Waterfront) is a small business under the size standard associated with the instant procurement. Heard Construction, Inc. (Appellant), which had previously protested Waterfront's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed infra, the appeal is granted, and the size determination is remanded for further review and investigation.

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. 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). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On August 24, 2012, the U.S. Department of the Navy issued Invitation for Bids (IFB) No. N40085-12-B-7005 seeking a contractor to replace a boat ramp at Joint Expeditionary Base Little Creek-Fort Story in Norfolk, Virginia. The procurement was conducted under full and open competition and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$33.5 million in average annual receipts.

On September 30, 2012, the Contracting Officer awarded the contract to Waterfront. On October 2, 2012, Appellant, a disappointed bidder, protested Waterfront's size. Appellant alleged that it is "common knowledge" that Waterfront had recently been acquired by Joseph B. Fay Company (JBFC), a large business located in Pittsburgh, Pennsylvania. (Protest at 2.) In addition, because Appellant is a Historically Underutilized Business Zone (HUBZone) small business, Appellant should have been entitled to a price evaluation preference relative to Waterfront, which might have altered the result of the competition. (*Id.*) In support of its protest, Appellant attached a copy of a document indicating that Waterfront had recently changed registered agents in the state of Virginia.

B. Size Determination

On January 16, 2013, the Area Office issued its determination finding that Waterfront is a small business under the \$33.5 million size standard.

The Area Office explained that Waterfront had provided the Area Office with a written response to the protest allegations, a completed SBA Form 355, a copy of Waterfront's articles of incorporation and bylaws, financial statements and tax returns, and other documentation. (Size Determination, at 1-2.) Waterfront acknowledged affiliation with Advance Hauling, Inc. (AHI), a wholly-owned subsidiary of Waterfront.

The Area Office found that, after reviewing the information provided, "[t]here is no evidence in the record to suggest that Waterfront is affiliated with [JBFC]." (*Id.* at 2.) Waterfront's response to the protest indicated that the company is owned by two individuals, who are not themselves officers, directors, or owners of JBFC. (*Id.*) Waterfront's tax records confirm that the same two individuals have owned Waterfront for the past three years. (*Id.* at 2) Further, Waterfront "stated [in response to the protest] that it is not owned by [JBFC], and that it has not recently been sold to the firm." (*Id.*)

The Area Office then aggregated Appellant's average annual receipts with those of AHI, and determined that their combined average annual receipts do not exceed the applicable size standard. As a result, Waterfront is a small business.

C. Appeal

On January 31, 2013, Appellant filed the instant appeal with OHA. Appellant contends that the size determination is clearly erroneous and should be reversed or remanded.

Appellant argues that the Area Office relied upon the information submitted by Waterfront on October 22, 2012, to find that Waterfront was owned by two individuals and was not affiliated with JBFC. However, "[b]ased on new information that was apparently released on or after October 26, [2]012, this key finding was in error." (Appeal at 2.)

Appellant seeks to introduce a copy of a newsletter, dated October 26, 2012, from the Associated General Contractors of Virginia, Inc. The newsletter reports that Waterfront "is pleased to announce [its] merger with I+Icon USA of Pittsburgh, PA. Except for ownership changing hands, very little will change. . . ." (Appeal, Ex. A at 1.) Appellant argues that the newsletter supports the protest allegation that Waterfront has been acquired by a large business concern.

Next, Appellant seeks to introduce an article from the Pittsburgh Business Times entitled "i+iconUSA oversees Joseph B. Fay, looks for acquisitions." The article states that FdG Associates, a private equity firm which "bought Joseph B. Fay Co. in 2009," has formed i+iconUSA (i+icon) "to oversee it and acquire other construction companies." (Appeal, Ex. B at 1.) Lastly, as proof that i+icon is not itself a small business, Appellant provides a printout from i+icon's website, which identifies i+icon as a privately-held "family of diversified heavy/civil construction companies" with more than 500 employees. (Appeal, Ex. C at 1.)

Appellant contends that the new evidence is relevant, does not enlarge the issues on appeal, and was not available at the time Appellant submitted its protest. Therefore, OHA should admit the evidence and grant the appeal.

D. Waterfront's Response

On February 15, 2013, Waterfront responded to the appeal. Waterfront contends that Appellant's new evidence should be rejected, and the appeal should be dismissed. (Response, at 1.) Waterfront observes that OHA ordinarily does not accept new evidence that was not first presented to an area office during the size review.

Waterfront insists that the new evidence is irrelevant because Waterfront did not merge with i+icon, as Appellant asserts in the appeal. Rather, Waterfront merged with a different concern, Infrastructure Constructors, Inc. (ICI). (*Id.* at 2 n.1.) Moreover, according to Waterfront, "the acquisition occurred after the time of the bid and after the time of self-certification." (*Id.*, emphasis in original.) As a result, in Waterfront's view, the ICI merger has no bearing on whether Waterfront was a small business on September 26, 2012, the date Waterfront submitted its bid for the instant procurement.

Next, Waterfront argues Appellant's Exhibit B is irrelevant because the protest never alleged affiliation between FdG Associates and Waterfront. Further, Waterfront maintains that Exhibits B and C should be excluded because they relate to information which was publicly available when Appellant filed its size protest. (*Id.*)

Waterfront argues that the Area Office was not required to examine Waterfront's post-certification activities, and reiterates that Waterfront had not yet merged with another concern at the time Waterfront self-certified as a small business. "At the time of self-certification [Waterfront] was a small business and [Appellant] is incorrect in stating that it was clear error for the Area Office not to consider a post-certification merger." (*Id.* at 4.) Waterfront concludes that the appeal is meritless and should be dismissed. (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant 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

I find it appropriate to remand the instant case for further review.

Based on Appellant's protest and the information submitted by Waterfront, the Area Office determined that Waterfront was owned by two individuals, and that there was no evidence that Waterfront had been acquired by JBFC. In its response to the appeal, though, Waterfront acknowledges that it did recently merge with another concern, ICI. See Section II.D, *supra*. Waterfront volunteers little information about the merger, and does not attempt to explain whether ICI has any connection with JBFC. Accordingly, the record is not sufficiently developed for OHA to determine whether Appellant's protest may have been meritorious -- i.e., whether Waterfront may have been acquired by JBFC, or an entity closely associated with JBFC.

Waterfront contends that the Area Office properly found the ICI merger to be insignificant, because that merger occurred after the self-certification date of September 26, 2012. This argument fails for two reasons. First, the ICI merger is not addressed in the size determination, and it appears that Waterfront did not disclose the ICI merger to the Area Office. See Section II.B, *supra*. Thus, the Area Office did not disregard the ICI merger, but rather was unaware that the merger had occurred.

Second, it is not evident from the record before OHA that Waterfront's merger with ICI occurred only after September 26, 2012. Waterfront does not provide the specific date of the merger, or offer any supporting documentation to establish exactly when the merger occurred.

Moreover, under SBA's "present effect" rule, SBA considers agreements to merge (including agreements in principle) as having a present effect on the power to control a concern. 13 C.F.R. § 121.103(d)(1). As a result, "for size purposes, a merger or acquisition is effective as of the date of that an 'agreement in principle' is reached, even though the merger or acquisition itself is not yet consummated." *Size Appeal of Nuclear Fuel Services, Inc.*, SBA SIZ-5324, at 8 (2012). Thus, even accepting, as Waterfront asserts, that the merger with ICI was not formally completed until after September 26, 2012, the Area Office could still determine that the merger was effective prior to September 26, 2012, through application of 13 C.F.R. § 121.103(d)(1).

IV. Conclusion

Waterfront's merger with ICI was an issue potentially within the scope of Appellant's protest, which alleged that Waterfront was affiliated with JBFC due to a recent merger. The Area Office has not yet had an opportunity to examine the question, or to consider the effective date of the merger. Accordingly, the matter is REMANDED to the Area Office for further review. In light of this outcome, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *Size Appeal of Patriot Construction, Inc.*, SBA No. SIZ-5439, at 5 (2013); *Size Appeal of Hardie's Fruit & Vegetable Co. South, LP*, SBA No. SIZ-5347, at 15 (2012).

KENNETH M. HYDE
Administrative Judge