United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Willowheart, LLC, Appellant, Appealed From Size Determination No. 03-2013-046	SBA No. SIZ-5484 Decided: July 10, 2013

APPEARANCES

Jeffrey Weinstein, Esq., Washington, D.C., Counsel for Appellant

DECISION

I. Introduction and Jurisdiction

This is an appeal of a size determination concluding Willowheart, LLC (Appellant) is not an eligible small business for the instant procurement because Appellant is affiliated with Alpha Protective Services, Inc. (APSI). For reasons discussed below, I grant the appeal and reverse the size determination.

SBA's Office of Hearings and Appeals (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.

II. Issue

Whether the SBA's determination that Willowheart, LLC (Appellant) was affiliated with Alpha Protective Services, Inc., a firm owned by the son of Appellant's principal shareholder. was based on clear error of fact or law.

III. Background

A. Solicitation and Protest

On January 7, 2013, the U.S. Army issued Request for Proposals No. H9223-13-R-5000 for security guard services at Fort Bragg, North Carolina. The Contracting Officer (CO) set the procurement aside 100% for 8(a) concerns, and designated North American Industry Classification System code 561612, Security Guards and Patrol Services, with a corresponding

$19 million annual receipts size standard, as the appropriate code for the procurement.[1] Willowheart, LLC (Appellant) submitted its initial offer, including price, on February 25, 2013.

On March 6, 2013, the CO awarded the contract to Appellant, and issued a notice to unsuccessful offerors that Appellant was the apparent successful offeror. On March 12, 2013, Security Alliance, LLC, filed a protest with the CO alleging Appellant was other than small, due to its affiliation with Alpha Protective Services, Inc. (APSI).

B. Size Determination

On April 15, 2013, the Area Office issued Size Determination No. 03-2013-046 finding Appellant other than small.

Appellant was formed on July 30, 2008, and is a participant in SBA's 8(a) program. Theresa B. Norman was Appellant's 100% shareholder until July 29, 2011, when she transferred a 3% interest to her spouse, James A. Norman. The Normans have no interest in any other business. APSI is 100% owned by Jeffrey B. Brinson, Ms. Norman's son.

On April 12, 2012, APSI filed a Chapter 11 bankruptcy petition. On December 20, 2012, the Bankruptcy Court converted the case to a Chapter 7 proceeding. According to statements submitted with Appellant's SBA Form 355, APSI immediately closed and all APSI's employees received their termination letters on December 21, 2012. Also on December 21, 2012, the court appointed Trustee discontinued all operations of APSI, including the performance of the security guard contract at Fort Bragg. That same day, after consulting with an (unnamed) APSI employee, Fort Bragg issued an emergency 30-day bridge contract to Appellant. Appellant had no employees or equipment to perform the contract and had never had a security guard contract. Appellant hired APSI's employees and took possession of APSI's assets to perform the contract without the Bankruptcy Court's consent.

The Area Office found that as of the date Appellant submitted its initial proposal including price it was using the assets and space of APSI to perform the bridge contract. The Area Office noted the file contains an unexecuted Purchase and Lease Agreement between the Bankruptcy Trustee, Appellant and APSI.[2] The assets transferred include firearms, gear,

[1] The acquisition was posted with a $18.5 million size standard, but January 7, 2013 was the date the $19 million size standard become effective.

[2] My review of the file shows an executed Purchase and Lease Agreement between the Trustee and Appellant dated January 10, 2013, as well as the unexecuted Purchase and Lease Agreement between the Trustee and Appellant with a March date. The agreements appear to cover the same assets and liabilities of APSI to be transferred to Appellant. In addition, the file contains a complaint filed by the Bankruptcy Trustee against Appellant and Mr. Brinson, dated January 4, 2013, challenging the terms of the sale, as well as Appellant's answer, dated March 1, 2013, asserting the Trustee knew of the transfer. The file does not contain information on how, or whether, the controversy between the Trustee and Appellant and Mr. Brinson was resolved.

vehicles, office equipment and the rights under certain leases. The liabilities assumed include the duties under the leases, and debts owed on the vehicles. The agreements specifically exclude all other assets, including computers and computer equipment, cash on hand, accounts receivable, claims and causes of action, etc.

The Area Office further found that there was a close working relationship between Appellant and APSI. During 2010, 2011, and 2012 Appellant made payments to APSI and Mr. Brinson for work performed which amounted to 12% of APSI's revenues for the period. The record contains a subcontract between APSI and Appellant with Appellant as subcontractor. The Area Office further found that Appellant took over the Fort Bragg contract APSI had performed, with APSI personnel and equipment, even though Appellant had never performed a contract for similar services. The Area Office found Appellant economically dependent on APSI because Appellant could not have performed the bridge contract without APSI's assets.

The Area Office referred to the successor-in-interest rule at 13 C.F.R. § 121.105(c), providing that a firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity.

The Area Office thus found that Appellant and APSI were affiliated based upon identity of interest and the successor-in-interest rules.

The Area Office further noted that it had requested APSI's tax returns for 2010, 2011, and 2012 from Appellant, and directly from Mr. Brinson. The Area Office also attempted to secure the returns from the Bankruptcy Trustee. The Area Office never received the tax returns. The Area Office thus drew an adverse inference against Appellant, that APSI was an other than small business. The Area Office also noted that APSI is listed in System for Awards Management (SAM) as an other than small business.

The Area Office concluded that Appellant was affiliated with APSI, an other than small business, and was thus other than small.

C. Appeal Petition

Appellant filed the instant appeal on April 29, 2013.

Appellant asserts there is no identity of interest between itself and APSI. Appellant also asserts it hired APSI's workforce because it was the incumbent workforce, and this is standard practice with in Government service contracts. This enabled Appellant to provide a continuity of services with a trained and certified incumbent workforce. Mr. Norman, Appellant's minority owner, had extensive experience in security guard contracts, and thus Appellant had the management capability to perform such contracts. Appellant asserts there has been a clear fracture with APSI. Appellant further asserts Ms. Norman has cut off all communication with Mr. Brinson, based upon her doctor's advice. The two companies had separate locations. (Appellant concedes it rented space formerly occupied by APSI.) The companies have no common management, no common ownership, and no common directors.

Appellant argues the payments from Appellant to APSI under a subcontract represented a small amount of economic activity, which is not sufficient to create a commonality of interests between concerns. Appellant received no revenue from APSI and was not dependent upon it in any way.

Appellant argues that 13 C.F.R. § 121.105(c) is inapplicable because the issue is not whether the assets involved are a substantial portion of the assets of the predecessor entity, but whether a substantial portion of Appellant's assets are the same as those of a predecessor entity. Appellant has substantial assets unrelated to the equipment obtained from APSI. Appellant further asserts the Area Office erred in drawing an adverse inference because Appellant does not have the ability to control APSI or to make it comply with SBA's requests.

III. Discussion

A. Timeliness and Standard of Review

Appellant filed this appeal within 15 days of its receipt of the size determination. Therefore, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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. Merits of the Appeal

The central issue in this case is one which neither the Area Office nor Appellant addressed, the former affiliate rule.

> The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. The exclusion of annual receipts of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

13 C.F.R. § 121.104(d)(4).

A dissolved or liquidated firm, which has ceased to exist as an entity, is a former affiliate. *Size Appeal of Hallmark-Phoenix 8, LLC*, SBA No. SIZ-5046, at 4 (2009). APSI was dissolved on December 21, 2012, when the Bankruptcy Court placed it into Chapter 7, and the Trustee ceased operations and terminated the employees. At that time, even if APSI were Appellant's affiliate, it became a former affiliate. Therefore, on February 25, 2013, the date of Appellant's self-certification, APSI had been Appellant's former affiliate for over two months. Appellant's size must be determined as of the date of self-certification. 13 C.F.R. § 121.404(a). Accordingly, on the date for determining Appellant's size, APSI was, at best, a former affiliate,

and its receipts were not to be included for the purposes of determining Appellant's size.

The Area Office did base part of its determination on the successor-in-interest rule: A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size. 13 C.F.R. § 121.105(c). In the commentary to the proposed rule, SBA explained:

> A new subsection (c) would be added to make it clear that if one entity is replaced by another having the same assets and liabilities, the successor firm is not a new entity for purposes of calculating annual receipts/employees.

60 Fed. Reg. 57892, 57986 (Nov. 24, 1995) (preamble to proposed rule). The preamble to the final rule explained further:

> This new provision . . . is intended to apply to the situation where a business entity ceases and a "new" business entity emerges with basically the same assets and liabilities as the previous entity. In such a case, instead of treating the successor business entity as a "new" concern, with § 121.104 ((b)(2) or § 121.106(b)(3) applying as appropriate, the revenues or employees of the predecessor concern will be counted for the full averaging period. A business entity cannot reorganize and be able to avoid the full application of SBA's size requirements.

61 Fed. Reg. 3280, 3282 (Jan. 31, 1996) (preamble to final rule).

Therefore, it is clear that the successor-in-interest rule is meant to apply to situations where a business reorganizes, and a new entity emerges with essentially the same assets and liabilities as the old concern. That is not the case here. Appellant received only certain assets and liabilities of APSI, related to performance of the Fort Bragg contract. The agreements with the Trustee clearly state Appellant is obtaining only certain specified "firearms, gear, vehicles, office equipment and furniture", and certain identified leases. The only liabilities undertaken are the obligations under the leases and the debts owed on the vehicles. The agreements specifically exclude all other assets, including computers and computer equipment, cash on hand, accounts receivable, claims and causes of action, etc. It is not clear from the Area Office file what the legal status of this transfer is, given the two agreements, one unsigned, and the litigation between the parties. However, it is clear that it is not a wholesale transfer of all, or nearly all, of APSI's assets and liabilities, such that Appellant is now APSI under a different name, but rather just those assets and liabilities associated with the Fort Bragg contract.

OHA has held that the successor-in-interest rule applies if a challenged concern purchases such a significant portion of another concern's assets that it adds a going concern to its own assets. *Size Appeal of Midwest Ambucare, Inc. et al.*, SBA No. SIZ-4339, at 7 (1999). However, if a challenged concern is purchasing only some of the assets of a concern which has ceased operations, the rule does not apply. *Id.*; *Size Appeal of Valor Construction Management, Inc.*, SBA No. SIZ-5185, at 6 (2011).

Appellant is not APSI reborn, with all of its assets, liabilities, and employees. Rather, Appellant undertook to take over one of APSI's contracts, and bought the equipment and hired the employees associated with that one contract. Appellant's existing business remains. It is not essentially the same concern as APSI, and so the successor-in-interest rule is not applicable.

Finally, the basic issue in any case where affiliation is alleged is whether one concern controls or has the power to control another. 13 C.F.R. § 121.103(a)(1). APSI is a dissolved company. It has no power to control any other concern. Appellant has met the burden of establishing that the size determination is based on a clear error of law, and I must grant the appeal and reverse the determination.[3]

IV. Conclusion

Appellant has met its burden of proving that the size determination is based on clear error of fact or law. Accordingly, I GRANT this appeal and REVERSE the size determination. This is the final decision of the Small Business Administration.13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

[3] Under the former affiliate rule, Appellant and APSI are not affiliated; therefore, APSI's tax returns are not relevant to Appellant's size status. Thus, the Area Office erred in drawing an adverse inference based on the absence of APSI's tax returns. Further, because Appellant and APSI are not affiliated under the former affiliate rule, it is unnecessary to address the issue of whether Appellant and APSI are affiliated under the identity of interest rule.