

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

SIZE APPEAL OF:

PRO SERVICES-Teltara Joint Venture, LLC

Appellant

Appealed from

Size Determination No. 6-2010-011

SBA No. SIZ-5115

Decided: March 18, 2010

REMAND ORDER

I. Introduction and Jurisdiction

This appeal arises from a November 24, 2009 size determination (No. 6-2010-011) finding PRO SERVICES-Teltara Joint Venture, LLC (Appellant) to be an other than small business. For the reasons discussed below, the size determination is REVERSED and the Appeal is REMANDED.

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issue

Did the Area Office made a clear error of fact or law when it drew an adverse inference from Appellant's failure to supply requested data and thereby found Appellant to be other than small? *See* 13 C.F.R. §§ 121.1008(d), 121.1009(d); 13 C.F.R. § 134.314.

III. Background

A. Findings of Fact

1. On April 29, 2009, the U.S. Army Corps of Engineers, Los Angeles District (Corps) issued Solicitation No. W912PL-09-T-0009 for custodial services at Vandenberg Air Force Base, California. The Corps set aside the procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC) and assigned to it North American Industry Classification System (NAICS) code 561720, Janitorial Services, with a corresponding \$16.5 million annual receipts size standard. Appellant submitted its offer on June 10, 2009.

2. On September 2, 2009, Valerie Lewis Janitorial (VLJ), an unsuccessful offeror, was notified that Appellant was the apparent successful offeror. On September 10, 2009, VLJ protested Appellant's size status. VLJ alleged Appellant has numerous affiliates causing it to exceed the applicable size standard. Among other matters, VLJ alleged Appellant was affiliated with Teltara, LLC (Teltara), Teltara, Inc., and Contract Acquisitions Group, LLC, which VLJ alleged were all controlled by Mr. Ralph Wahlberg. On October 8, 2009, the Corps referred the matter to the SBA's Office of Government Contracting, Area VI, in San Francisco, California (Area Office), for a size determination. The Area Office provided Appellant with a copy of VLJ's protest.

3. Appellant was originally a joint venture composed of PRO SERVICES, LLC, and Teltara, LLC. Appellant is an Arizona Limited Liability Company (LLC). PRO SERVICES, LLC, and Teltara, LLC, established Appellant as a LLC on April 10, 2008. The parties to Appellant amended their Operating Agreement on January 1, 2009, whereby PRO SERVICES, LLC withdrew as a member of the joint venture LLC. The parties substituted Mr. Ronald D. Miles for PRO SERVICES, with regard to any references, rights, powers, and/or obligations in Appellant's Operating Agreement. In addition, Mr. Miles became Appellant's 51% Member and Managing Member. Therefore, only Mr. Miles has the power to manage Appellant.

4. As the Managing Member of Appellant, Mr. Miles has the exclusive power to manage Appellant. In addition, Mr. Miles is the only Member of PRO SERVICES, LLC and Med Pro, LLC, which, in turn, means Appellant is affiliated with these two concerns because they share common management in the person of Mr. Miles. 13 C.F.R. § 121.103(e). Mr. Miles is also the Managing Member of the Med Pro – Teltara Joint Venture and of at least two other entities.

5. Teltara is a Limited Liability Corporation (LLC) established under Nevada law. According to the Operating Agreement in the Record applicable to Appellant, only Mr. Ralph B. Wahlberg has the power to manage and control Teltara (Amended and Restated Operating Agreement, 3.4, September 3, 2007). Mr. Wahlberg, along with three members of the Hass Family are the members of Teltara. Mr. Wahlberg may be removed only upon an affirmative vote of a unanimous interest of the Members of Teltara (Amended and Restated Operating Agreement, 3.3, May 1, 2007). Because Mr. Wahlberg maintains an ownership stake in Teltara, he may be removed only if he consents to his own removal. In effect, the Amended and Restated Operating Agreement deprives the Haas Family, which owns more than 50% of Teltara, of any power to control Teltara.

6. The Area Office and Appellant exchanged numerous e-mails concerning information the Area Office needed to perform the Size Determination. In addition, the Area Office exchanged numerous e-mails with Mr. Wahlberg for matters that pertained to Teltara. In a November 23, 2009 e-mail (copied to Mr. Miles), the Area Office required Mr. Wahlberg to provide complete federal income tax returns for the last three completed fiscal years for any entities that he had the power to control. Although Appellant had already provided income tax returns for Teltara, Mr. Wahlberg did not provide any additional income tax returns for any other concerns that he controlled or had the power to control.

### B. The Size Determination

On November 24, 2009, the Area Office issued Size Determination No. 6-2010-011 (Size Determination) concluding Appellant is other than small under the \$16.5 million size standard. Appellant is a limited liability company that, by itself, does not exceed the size standard. Appellant's majority owner and managing member is Ronald D. Miles, a service-disabled veteran. Appellant's only other member is Teltara, LLC (Teltara). The Area Office concluded, based on Appellant's operating agreement, that Mr. Miles controls or has the power to control Appellant.

The Area Office concluded Appellant is affiliated with Teltara. Teltara is owned by four individuals, all of whom hold minority interests in Teltara and three of whom are also members of two other concerns: Haas Investment LLC (Haas), and Merchants Building Maintenance, Inc. (MBM). The Area Office concluded Haas and MBM are affiliated with both Teltara and Appellant.

On November 16, 2009, the Area Office requested MBM's annual receipts and Federal income tax returns for its last three fiscal years, and gave Appellant a November 23, 2009 deadline for response. On November 23, 2009, Appellant responded to the Area Office that MBM's tax returns are not relevant to the size determination, and failed to provide them.

Thus, the Area Office concluded, based on an adverse inference permitted by 13 C.F.R. §§ 121.1008(d) and 121.1009(d), that Appellant is other than small "for this procurement only."

The Area Office also noted that the protestor alleged that Appellant was affiliated with Teltara II, LLC, Teltara, Inc., and Contract Acquisitions Group, LLC. The Area Office noted that Appellant explained the status of Teltara II to its satisfaction, *i.e.*, that the Teltara II name is a matter of convenience so Teltara can do business in Arizona. However, the Area Office did not address Appellant's affiliation with Teltara, Inc., LLC or Contract Acquisitions Group, LLC, other than to state that although it appears Mr. Wahlberg controls or has the power to control these entities, it decided not to explore the effect of this issue due to the adverse inference concerning the Haas Family entity, MBM.

### C. The Appeal

On December 17, 2009, Appellant appealed the Size Determination to the SBA Office of Hearings and Appeals (OHA). Appellant asserts there is no basis for the affiliation finding.

Appellant asserts the Size Determination must be reversed. Appellant's main point is that no one other than the managing member of Teltara, Mr. Wahlberg, has the power to control Teltara. This means Appellant and the Haas Family are not affiliated and thus any revenues arising from concerns controlled by the Haas Family are irrelevant.

VLJ did not respond to the appeal.

#### IV. Analysis

##### A. Timeliness

Appellant filed its appeal within 30 days of receiving the Size Determination. Thus, the appeal is timely with respect to future procurements. 13 C.F.R. §§ 134.304(a)(2), 134.304(b).

##### B. Standard of Review

The standard of review for this appeal is whether the Area Office based the 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 the 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 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. Affiliation

The *sine qua non* for finding affiliation is the power of one entity or individual to control the other entity or individual (13 C.F.R. § 121.103(a)). If an entity or person does not have the power to control as defined under one of the subparts of 13 C.F.R. § 121.103, then they are not affiliated.

In its appeal, Appellant does not dispute affiliation between Appellant and Teltara. Therefore, any affiliate of Teltara is an affiliate of Appellant. In addition, I note the Record establishes that Teltara, which Mr. Wahlberg controls, has combined with a concern controlled by Mr. Miles on more than one occasion.<sup>1</sup> I find these combinations are adequate to establish an identity of interest under 13 C.F.R. § 121.103(f). Therefore, the only significant affiliation issue remaining in this appeal is whether the Haas Family has the power to control Teltara.

The Area Office did not correctly analyze what, if any, power the Haas Family could exercise over Teltara and thus Appellant. Instead, the Area Office concluded the requirement of unanimous consent to remove Mr. Wahlberg as Teltara's Manager gave power to members of the Haas Family (Size Determination at 4). The Area Office's conclusion is incorrect. The plain meaning of the Amended and Restated Operating Agreement is that Mr. Wahlberg has complete and exclusive control of Teltara and that the Haas Family, either individually or as a family, is merely a passive investor (Fact 5).

Because the Haas Family does not have the power to control Teltara in any way, it cannot conceivably exert any control over Appellant. In effect, there is no link suggesting the Haas

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<sup>1</sup> Besides forming Appellant with Mr. Miles, Teltara also combined with Med Pro, LLC, and Disabled Veteran Healthcare Services, LLC, other entities controlled by Mr. Miles.

Family has the power to control Appellant. In consequence, the Haas Family cannot be an affiliate of Appellant through Teltara. Thus, the Area Office committed clear error in finding or inferring any affiliation between Appellant and the Haas Family.

### C. Adverse Inference

OHA applies a three-part test to determine whether an area office has properly requested information from a challenged concern about an alleged affiliate and thus is permitted to draw an adverse inference in the absence of actual information. 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 concern and the concern from which the information is requested. Third, the request for information must be specific. If these criteria are met, the challenged concern must submit the information to the area office or suffer an adverse inference that the information not furnished would have shown that the challenged concern is other than small. 13 C.F.R. §§ 121.1008(d), 121.1009(d); *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008); *Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255 (1997).

#### 1. Haas Family Negative Inference

As explained in the Size Determination, Appellant did not provide the information the Area Office required concerning a Haas Family entity, Merchants Building Maintenance (MBM) (MBM's tax returns). Instead, Appellant argued the information was irrelevant and refused to provide it. Because Appellant did not provide the information the Area Office took an adverse inference.

The Record shows there is an obvious connection between Appellant and Teltara (Facts 3 and 4). In addition, the Area Office's request for tax returns was quite specific. However, as I have already explained, the Record establishes there is no connection between Appellant and the Haas Family, as passive investors in Teltara, because Teltara's Amended and Restated Operating Agreement provides that no member of the Haas Family has any ability to control Teltara. Thus, Appellant and the Haas Family are not affiliated.

Because the Haas Family has no power to control Teltara or Appellant, the annual receipts of any Haas Family-controlled entity has no relevance to the size determination. Hence, the Area Office had no right to: (1) acquire any financial information concerning the Haas Family; or (2) take an adverse inference when it did not receive financial information concerning the Haas Family.

#### 2. The Effect of the Negative Inference

The Area Office limited the effect of its size determination to the procurement underlying the protest. This is incorrect. When a concern fails to provide information concerning its size to an area office and the matter concerns affiliation - as opposed to contract-specific issues like a violation of the ostensible subcontractor rule - then the area office shall find the concern is other than small for the NACIS code applicable to that procurement and not limit its findings to the procurement underlying its size determination.

#### D. The Unexplored Entities

In a November 23, 2009, e-mail to Mr. Wahlberg, the Area Office required Mr. Wahlberg to provide complete federal tax returns for all entities that he controlled or had the power to control (Fact 6). Based upon the September 10, 2009 protest by VLJ, Mr. Wahlberg was on notice or should have been on notice that the Area Office was requesting he provide information concerning Teltara, Inc. and Contract Acquisition Group, LLC, especially because Appellant had addressed the issue of Teltara II, LLC. Despite this notice, Mr. Wahlberg provided no further information about these concerns, but instead dwelt on why providing information about the Haas Family entity was unnecessary.

In the Size Determination, the Area Office did not explore or act upon Mr. Wahlberg's or Appellant's failure to provide any information concerning Teltara, Inc., or Contract Acquisition Group, LLC. The Area Office failed to act: (1) despite asking for federal income tax returns for companies Mr. Wahlberg controlled or had the power to control; (2) even though it found Mr. Wahlberg appears to control or has the power to control these entities (Size Determination at 4). I find the Area Office's course of action to be a clear error for, in addition to the foregoing, the Record shows the Area Office was informed that public records show that one or more Teltara entities, which Mr. Wahlberg controls, had 700 or more employees. Based upon what it knew and what it said, the Area Office was obligated to resolve the question of the whether the Wahlberg-controlled entities caused Appellant to exceed the size standard, especially after specifically insisting Appellant provide information pertaining to the Wahlberg entities (Fact 6).

#### V. Conclusion

For the above reasons, the Area Office's Size Determination is REVERSED to the extent explained in IV., C. above. This Size Determination is REMANDED so the Area Office may determine whether Mr. Wahlberg or Teltara is affiliated with Teltara, Inc. or any other concerns controlled by Mr. Wahlberg and what effect any such affiliation may have on Appellant's size. In addition, the Area Office should evaluate whether Appellant is a newly organized concern arising from Teltara or any of Teltara's affiliates. If the Area Office finds affiliation, then it shall aggregate the annual receipts of every affiliate, for size purposes, as provided by 13 C.F.R. § 121.104(d).

Based upon the foregoing, Appellant is ORDERED to provide the Area Office with: (1) relevant tax returns for the past three applicable years showing the annual receipts of Teltara Inc. and Contract Acquisition Group, LLC; (2) a complete resume showing the employment history of Mr. Miles; and (3) corporate governance and ownership documents applicable to Teltara, Inc., and Contract Acquisition Group, LLC. Appellant shall comply with this Order within two business days of its receipt.

If Appellant declines or otherwise fails to comply with this Order or the Area Office's further requests for information and the Area Office's requests meet the standard described in *Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255, at 7 (1997), then the Area Office is directed to take an adverse inference pursuant to 13 C.F.R. § 121.1008(d) and to determine any missing evidence would have demonstrated Appellant to be other than small. *See Size Appeal of*

*Colt Defense LLC*, SBA No. SIZ-4943, at 12 (2008); *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008). If the Area Office determines it should take a negative inference, then the Area Office is directed to find Appellant, PRO SERVICES, LLC, and any concern affiliated with either Mr. Miles or Mr. Wahlberg to be other than small for all NAICS codes with a size standard of \$16.5 million or less until such time as these individuals and entities have been recertified as small.

I reiterate that if the Area Office's investigation identifies other matters relevant to the Miles/Wahlberg/Teltara affiliation with Appellant, Appellant must comply with any further requests from the Area Office related to those matters.

It is so ORDERED.

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THOMAS B. PENDER  
Administrative Judge