

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

SIZE APPEAL OF:

Ecotope Environmental Services, Ltd.

Appellant

Size Determination No. 01-SD-2011-004

SBA No. SIZ-5173

Decided: December 6, 2010

APPEARANCES

Norman G. Orodener, Esq., Providence, R.I., for Appellant.

Tony Lowe, Vice President, for Shoreline Services, Inc.

ORDER DENYING APPEAL¹

I. Background

On August 31, 2010, the Contracting Officer (CO) for the U.S. Department of the Navy issued Solicitation No. N66604-10-R-4469 (RFP) for recycling services. The CO issued it as a total small business set-aside and designated it under North American Industry Classification System (NAICS) code 562111, with an annual receipts size standard of \$12.5 million. Offers were due on September 17, 2010.

On September 28, 2010, the CO informed Shoreline Services, Inc. (Shoreline), an unsuccessful offeror, that award was made to Ecotope Environmental Services, Ltd. (Appellant). On October 4, 2010, Shoreline filed with the CO a protest alleging Appellant is other than small. On October 7, 2010, the CO forwarded the protest to the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area I (Area Office).

On October 8, 2010, the Area Office sent a letter to Appellant notifying it of the protest and directing it to respond to the protest and to provide a completed SBA Form 355, a copy of the corporate documents, and its financial statements and tax returns for the last three completed fiscal years. The Area Office file contains a copy of the October 8, 2010, letter. It states: "All of these documents must be received by this office within three working days after receipt of this

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.

letter. If you fail to submit the completed application along with the other material requested within the specified time, SBA may determine your company to be other than a small business.” The Area Office file contains a United Parcel Service Proof of Delivery indicating the letter was delivered to Appellant on October 12, 2010, at 8:15 a.m.

On October 19, 2010, the Area Office issued Size Determination No. 01-SD-2011-004 (Size Determination) concluding Appellant is other than a small business. The Area Office noted it had received no response to its October 8th letter and cited the adverse inference rule (13 C.F.R. § 121.1008(d)), as the basis for its conclusion. Appellant received the Size Determination on October 19, 2010.

On November 3, 2010, Appellant filed its Appeal Petition with SBA’s Office of Hearings and Appeals (OHA). Appellant states it received and signed for the letter containing the Size Determination on October 12, 2010, but Mr. Bernard White, to whom it was addressed, was away. Due to an administrative mistake, a secretary then placed the letter in Mr. White’s mailbox, and he did not pick it up until October 18, 2010. As relief, Appellant requests the Size Determination be rescinded.

On November 8, 2010, Shoreline responded to the Appeal Petition, commenting only on the Appellant’s size status.

II. Discussion

A. Timeliness and Standard of Review

Appellant filed the appeal within 15 days of receiving the Size Determination. Thus, the appeal is timely. *See* 13 C.F.R. § 134.304(a)(1).

OHA reviews a size determination issued by an SBA area office to determine whether it is “based on clear error of fact or law.” 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Thus, the Administrative Judge may overturn a size determination only if an appellant proves that the area office made a patent error based on the record before it.

B. Adverse Inference Rule

The SBA’s size regulations provide that if a concern whose size is at issue fails to submit a completed SBA Form 355, fails to respond to protest allegations, or fails to provide requested information within the time allowed by the Area Office, the Area Office may presume that disclosure of the requested information would demonstrate that the concern is other than a small business. 13 C.F.R. § 121.1008(d). Also, in the case of “refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.” 13 C.F.R. § 121.1009(d). These provisions are generally referred to as the adverse inference rule.

When determining whether an area office properly invoked the adverse inference rule, OHA applies a three-part test: (1) the information sought must have been relevant to an issue in the size determination; (2) there must have been a level of connection between the protested concern and the concern from which the area office sought information; and (3) the request for information must have been specific. *See, e.g., Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255 (1997). If all three criteria are met, the concern 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. *Id.*

The information the Area Office sought from Appellant in this case is the most basic information required to perform a formal size determination and is requested in every size determination case with a receipts-based size standard. The Area Office sought the information directly from the protested concern itself, and the request was very specific; the Area Office listed exactly the documents that were required. This case presents the clearest factual scenario possible for an application of the adverse inference rule—the protested concern failed to submit any response to the protest or any documentation at all to the Area Office. Without any information from the protested concern, the Area Office was unable to conduct a size determination and had no choice but to apply the adverse inference rule.

On appeal, Appellant has not shown good cause for its failure to submit to the Area Office the specific information it requested. It was Appellant's responsibility to open its mail, and either to submit the requested information or at least to inform the Area Office why it could not and to request from the Area Office an extension of time. As a result of Appellant's failure to do anything in response to the Area Office's request for information, the Area Office properly invoked the adverse inference rule. Thus, the Area Office did not commit an error of fact or law in issuing its Size Determination concluding Appellant was other than small.

Appellant has failed to meet its burden of demonstrating clear error on the part of the Area Office. Therefore, the appeal must be denied.

III. Conclusion

The Area Office's Size Determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge