

SIZE APPEAL OF: OXYHEAL MEDICAL SYSTEMS, INC., APPELLANT

SBA No. SIZ-5707, 2016
2016 WL 692818
January 19, 2016

SBA No. SIZ-5707, 2016 (S.B.A.), 2016 WL 692818

Small Business Administration (S.B.A.)

Office of Hearings and Appeals
[Size Appeal]

***1** SIZE APPEAL OF: OXYHEAL MEDICAL SYSTEMS, INC., APPELLANT

***1**
SBA No. SIZ-5707

***1**
Appealed from Size Determination No. 06-2016-015
***1** January 19, 2016

Appearances

- *1** Jessica C. Abrahams, Esq.
- *1** Jeniffer Roberts, Esq.
- *1** Katherine L. Veeder, Esq.
- *1** Dentons US LLP
- *1** Washington, D.C.
- *1** For Appellant
- *1** David F. Barton, Esq.
- *1** Gardner Law
- *1** San Antonio, Texas
- *1** For Rohmann Services, Inc.

REDACTED DECISION FOR PUBLIC RELEASE

DECISION¹

I. Introduction and Jurisdiction

***1** On November 12, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2016-015 finding that OxyHeal Medical Systems, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains 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 denied, and the size determination is affirmed.

***1** 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

***1** On September 1, 2015, the U.S. Department of the Air Force issued Request for Quotations (RFQ) No. FA3047-0828 for hyperbaric chamber maintenance support services. The Contracting Officer (CO) set the procurement aside entirely for small businesses and assigned North American Industry Classification System (NAICS) code 811219, Other Electronic and Precision Equipment Repair and Maintenance, with a corresponding \$20.5 million size standard.

***1** On October 5, 2015, the CO awarded the contract to Appellant and notified unsuccessful offerors of this award. On October 7, 2015, Rohmann Services, Inc. (RSI), an unsuccessful offeror and the incumbent contractor, protested Appellant's size. RSI alleged Appellant was not a small business due to its affiliation with OxyHealth Group, Inc. (OHGI). RSI asserted that OHGI was above the \$35.5 million annual receipts size standard for NAICS codes 541330 and 611519 according to System for Award Management (SAM) and Dynamic Small Business Search. Appellant and OHGI are affiliated, RSI asserted, because they share a headquarters, a parent DUNS number, and the same contact person under SAM, [Employee 1]. On October 6, 2015, the CO forwarded RSI's protest to the Area Office for consideration.

B. Area Office Proceedings

***2** On October 27, 2015, SBA notified Appellant by United Parcel Service (UPS) Next-Day mail and by email about its intention to conduct a size investigation of Appellant. The Area Office requested a response to RSI's allegations, a completed SBA Form 355, a copy of Appellant's articles of incorporation and bylaws, a completed Internal Revenue Service (IRS) Form 4506-T, annual statements to shareholders, and complete financial statements and tax returns for the three years preceding Appellant's self-certification as small. The Area Office requested these documents no later than November 2, 2015. (Letter from E. Sanchez to [Employee 1] (Oct. 27, 2015).)

***2** On October 27, 2015, the Area Office, through its email tracking system, received confirmation that [Employee 1] had received and read SBA's email of the size protest notification letter. UPS tracking information indicated Appellant received the size protest notification letter on October 28, 2015. The Area Office also received UPS confirmation of delivery of the protest letter to Appellant.

***2** On November 3, 2015, the Area Office corresponded with [Employee 1] by email. The Area Office stated, "Your response was due at this office COB yesterday. If I don't receive your response by 3 p.m. today, I will assume your firm is not responding to the protest" (Letter from E. Sanchez to [Employee 1] (Nov. 3, 2015).) The Area Office warned Appellant, "If the protested concern fails to submit requested information regarding its size within the time allowed by SBA, the Agency may presume that missing information would demonstrate that the concern is other than a small business." (*Id.*, citing 13 C.F.R. § 121.1008 (d).)

***2** On November 12, 2015, the Area Office issued its size determination. The Area Office "presume[d] that missing information demonstrates that [Appellant] is an other-than-small business." (Size Determination at 2, citing 13 C.F.R. § 121.1008(d).)

***2** Upon receiving the size determination, Appellant contacted the Area Office and attempted to cure its failure to timely submit the requested information. (Letter from [Employee 2] to J. Gambardella (Nov. 12, 2015).) The Area Office replied that same day it had promptly notified Appellant of the protest and had documented these notifications. The Area Office suggested Appellant appeal to OHA. (Letter from J. Gambardella to [Employee 2] (Nov. 12, 2015).) The next day, Appellant responded that it had received no such notifications. (Letter from [Employee 2] to J. Gambardella (Nov. 13, 2015).)

***2** On November 16, 2015, the Area Office sent Appellant documentation of its attempts to contact Appellant. These included copies of: (1) the protest notification letter dated October 27, 2015, sent both as an email attachment and by UPS Next Day Air; (2) a UPS Air Bill documenting the Area Office sent the protest letter to Appellant's address; (3) an email receipt, dated October 27, 2015, showing delivery to [Employee 1], which included a copy of the protest letter; (4) an email receipt, dated October 27, 2015, documenting [[Employee 1] read the email which included the protest letter; (5) an email receipt, dated November 12, 2015, documenting [Employee 1] read the email which included the size determination, (6) an email receipt, dated October 27, 2015, documenting [Employee 1] read the email informing her of the correct identifier for the size determination; and (7) a UPS confirmation of delivery of the protest letter to Appellant on October 28, 2015 at 10:22 am. (Letter from J. Gambardella to [Employee 2] (Nov. 16, 2015).)

C. Appeal Petition

***3** On November 25, 2015, Appellant filed this appeal. Appellant argues the Area Office should have dismissed the protest and should not have applied the adverse inference rule. As a result, OHA should overturn the size determination.

***3** The Area Office should have dismissed the protest, Appellant argues, because it was untimely and nonspecific. It was untimely because it was filed more than five business days after RSI received notification that Appellant was the awardee. Appellant believes RSI received this notice on September 23, 2015, the date Appellant submitted its quote and received oral notification it was the apparent low bidder. As the incumbent contractor, RSI likely received a similar oral notification that day too. RSI's protest was therefore due five business days from September 23, 2015. Because RSI did not file its protest until October 7, 2015, the protest is untimely. (Appeal at 11.)

***3** The protest is nonspecific because RSI merely asserted Appellant exceeds the size standard. In support of this allegation, RSI provided a link to OHGI's SBA profile page where OHGI responds "No" to the question of whether it was small under the size standards associated with NAICS codes 541330, Engineering Services, and 611519, Other Technical and Trade Schools. These certifications do not support RSI's allegation, Appellant maintains, for two reasons. First, the size standard associated with those NAICS codes is \$15 million, not \$35.5 million as RSI represented, so it does not follow that Appellant would not be a small business under the \$20.5 million size standard associated with the subject RFQ just because it is not small under those codes. Second, Appellant made the representations on March 4, 2015, months before the date for determining size, so these representations should not be the basis of a size protest. (*Id.* at 12.) As for RSI's allegation that Appellant is affiliated with OHGI, Appellant argues this assertion is not sufficient because the mere existence of affiliation does not establish a valid basis for a protest. (*Id.* at 13, citing *Size Appeal of Jenn-Kans Disposal Serv.*, SBA No. SIZ-5549 (2014).) RSI needed to go further and explain why Appellant's affiliation with OHGI caused it to be ineligible for the contract, which RSI did not do. (*Id.*)

***3** Next, Appellant explains why it did not receive the Area Office's communications, and contends the Area Office should not have applied the adverse inference rule. On September 29, 2015, the Air Force informed Appellant that there was a concern regarding its size status, and requested certain information, which Appellant sent the same day. Then, on October 2, 2015, the Air Force sent Appellant a copy of the contract, so Appellant believed the concerns about its size were resolved. On October 7, 2015, the Air Force informed Appellant that an interested party had filed a size protest, but did not transmit a copy of the protest to Appellant. At this time, [Employee 3], Appellant's Vice President of Regulatory Affairs, contacted the Air Force to determine what it should submit to defend its small business status. The Air Force requested no information, and did not communicate further with Appellant regarding the protest. (Appeal at 7-8.)

***4** During this time, [Employee 1], Director of Finance for Appellant and OGHl, was also serving as Appellant's Accounting Manager and

Human Resources Manager, due to recent vacancies in those positions. Important work had been left undone by her predecessors, and quarterly payroll tax reports were due at this time. [Employee 1] was frantically busy, and was only skimming emails sent to the three accounts for the three full-time positions she held. [Employee 1] took action only on those emails which were flagged as “high importance.” Appellant asserts it had listed two other individuals in SAM as Points of Contact (POCs) and “intended to ensure that all three would be contacted with urgent and time-sensitive requests for information.” (*Id.* at 5.)

***4** Appellant argues the Area Office erred in not reaching out to the other POCs when it received no response from [Employee 1]. Appellant also notes the CO was copied in the Area Office's emails. Appellant is especially critical of the Air Force, which did not timely forward the protest to the Area Office,² and took no action even though it was copied on the Area Office communications. (*Id.* at 15-16.)

***4** Appellant argues fundamental principles of notice and due process required the Area Office to take additional steps to ensure Appellant had received the emails and that its officials were aware of the size investigation. Appellant argues it should not be penalized for a failure in communication by the Area Office. Any notice from the Area Office to a challenged firm requiring the firm to take further action must be received by the firm. (*Id.* at 13, citing *Size Appeal of Addison Constr. & Maint. Corp.*, SBA No. SIZ-4418 (2000).) Technical difficulties which prevent a firm from receiving email are insufficient grounds on which to draw an adverse inference. (*Id.* at 14, citing *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540 (2014).) Appellant also argues that technical difficulties by a small business concern, such as an email which was never received, are also insufficient grounds for an adverse inference. (*Id.*, citing *Size Appeal of T/J Techs., Inc.*, SBA No. SIZ-4832 (2007).) Had Appellant's appropriate official known in time, Appellant would have responded to the Area Office's request for information. (*Id.* at 18.)

***4** Finally, Appellant argues that, when its receipts are combined with those of its affiliates, Appellant does not exceed the \$20.5 million size standard. (*Id.* at 18-19.)

***4** In its appeal, Appellant requested that OHA issue a protective order in this matter to prevent disclosure of its confidential and proprietary business information. Appellant also moved to submit new evidence and included it with the motion. This evidence, which Appellant argues establishes it is a small business, contains confidential and proprietary business information.

D. Motion for Summary Decision and Protective Order

***5** On November 30, 2015, RSI intervened and moved for summary decision.³ RSI's counsel, David Barton, also applied for admission under the protective order. On November 30, 2015, I issued a protective order and admitted Mr. Barton under it.

***5** On December 3, 2015, RSI opposed Appellant's motion to admit new evidence, and included as an exhibit Appellant's unredacted motion, which included protected material. RSI also requested that OHA clarify the briefing schedule. That same day, I ordered that responses to RSI's motion for summary decision be due on December 15, 2015, and denied Appellant's motion to submit new evidence.

E. Response to Motion for Summary Decision

***5** On December 15, 2015, Appellant responded to the motion for summary decision. Appellant reiterates the protest was untimely. The timeline for filing a size protest, Appellant argues, is triggered not by notice of actual contract award, but by notice of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2)(i); *Size Appeal of Al-Razaq Computing Servs.*, SBA No. SIZ-5612 (2014). Where, as here, there is no requirement for written pre-award notice or notice of award, the time for filing a protest begins upon oral notification by the CO or authorized representative or another means of the identity of the successful offeror. 13 C.F.R. § 121.1004(a)(5); *Size Appeal of Jardon and Howard Techs., Inc.*, SBA No. SIZ-4770 (2006). Here, the Air Force informed Appellant on September 23, 2015, that Appellant was the apparent low bidder. Two days later RSI conducted an SBA profile search of Appellant. Appellant infers from this timing that RSI knew Appellant was the prospective awardee when it conducted its profile search. RSI did not file its size protest until October 6, 2015, more than five business days after RSI received notification that Appellant was the prospective awardee. (Response at 3-4.)

***5** As further support of RSI's earlier knowledge that Appellant was the apparent awardee, Appellant argues RSI was the party that raised the concern about Appellant's size to the CO. This makes sense, Appellant contends, given that RSI was the incumbent contractor and therefore had direct access to the contracting office. Because the CO communicated this concern to Appellant on September 29, 2015, more than five business days before RSI filed the protest, RSI's protest is not timely under this scenario either. (*Id.* at 4-6.)

***5** Appellant then reasserts its argument the protest lacked specificity. Appellant argues RSI did not allege any particular violation of SBA's affiliation rules. (*Id.* at 6-7.)

***5** Appellant goes on to repeat its argument that the Area Office was not justified in drawing an adverse inference, and faults the Area Office for violating its own rules. Specifically, the Area Office waited 20 days to notify Appellant of the protest and did not communicate its requests to the appropriate individuals or in an appropriate manner. The Area Office's email communication to Appellant failed to request any action in its cover email, or to flag the email as of ““high importance,” or to move on to another POC when [Employee 1] did not respond. (*Id.* at 8-9.) Appellant repeats its criticisms of the Air Force, too, arguing it “lulled” Appellant into thinking that issues regarding its size were resolved. (*Id.* at 10.)

***6** On December 21, 2015, RSI replied to Appellant's response. RSI incorrectly maintained that this pleading was based upon publicly available information. In fact, the reply included protected material from Appellant's pleadings and exhibits.

F. Violation of the Protective Order

***6** On December 22, 2015, counsel for Appellant contacted OHA, alleging violations of the protective order. According to the certificates of

service accompanying the pleadings filed by RSI on December 3, 2015 and December 21, 2015, Mr. Barton served these pleadings on RSI. The pleadings contained Appellant's confidential and proprietary information.

***6** The next day, I convened a conference call to address the issue. In the call, Mr. Barton admitted error in the dispatch of these pleadings to his client and stated it was the result of mistakes in his office. Mr. Barton displayed a distressingly casual attitude to the matter. However, he agreed to ensure that all copies of protected material were retrieved, destroyed, and that he would account for them in writing. He further agreed to execute a nondisclosure agreement.

***6** On December 28, 2015, Mr. Barton filed a statement. He represented that he had had no intention of violating the protective order. He viewed the protective order as “sacrosanct,” recognized his duty to enforce it, and was unable to explain his mistake other than through lack of vigilance. He explained that, after completing his pleadings, he turned them over to his experienced law clerk for finalization and service. Unfortunately, another legal assistant in his office who would ordinarily have checked these pleadings was absent due to health reasons. Mr. Barton himself has health issues, and the firm itself was under year-end administrative stress. Mr. Barton asserts both he and his law clerk made a mistake in including RSI's President on the service list. Mr. Barton essentially admits to negligence, but denies any malicious intent. He points to his 38 years of devotion to duty as an attorney and maintains no tribunal has ever rebuked him.

***6** On December 29, 2015, I convened a follow-up conference. Appellant's counsel was distressed at the lack of documentation Mr. Barton had submitted. Mr. Barton did not submit an affidavit himself, but from four individuals who worked for RSI: Mr. Dale Patenaude, Ms. Donna Mendoza, Mr. Ronald Boone, and Mr. Dave Borski. These affidavits were very general, and did not go into detail concerning the measures taken to ensure the protected material was completely removed from RSI's computer systems. Further, it was clear from the affidavits that Mr. Patenaude had an email address at a firm other than RSI. Upon further investigation, it became clear that this individual was also employed by Rothe Development, Inc. (Rothe), and his email address was on Rothe's mail server. As a result, a third company's servers had also received the protected material.

***6** Appellant's counsel requested three remedies. First, OHA should dismiss RSI's size protest or, alternatively, vacate the size determination. Second, OHA should order RSI to pay the legal fees Appellant incurred as a result of the breach of the protective order. Third, Appellant requested other sanctions as appropriate, including striking RSI's pleadings.

***7** I directed Mr. Barton to be more responsive to Appellant's needs for remedial action, and adjourned the conference.

***7** On January 6, 2016, I convened another conference, at which counsel agreed they were close to resolving the remediation issues. I informed Mr. Barton that I thought his conduct warranted sanctions; however, he could mitigate any sanctions I might impose if he could arrange for payment of Appellant's legal fees connected with his violation of the protective order. I requested an answer from Mr. Barton by January 11, 2016. On January 12, 2016, Appellant's counsel informed OHA Mr. Barton would not be paying Appellant's legal fees.

***7** On January 11, 2016, Mr. Barton filed with OHA copies of the documents executed to remediate the violation of the protective order. These included affidavits of himself, Mr. Patenaude, Ms. Mendoza, Mr. Boone, and Mr. Borski. The affidavits document the destruction protocols followed by the individuals who received protected material. The submission also included nondisclosure agreements executed by RSI and Rothe. The affiants agree to be bound by the nondisclosure agreements. Mr. Barton represented Appellant's counsel was satisfied with the documents.

***7** Nevertheless, Mr. Barton has violated the protective order. This is a very serious matter. Parties appearing before OHA are entitled to protection of their confidential information, to avoid harm which might result from its disclosure. Further, this protection enables the full disclosure before the area offices necessary for full and fair adjudication of size protests and appeals. Although the regulation on sanctions does not give me the authority to impose the payment of attorney fees, I am imposing sanctions authorized by regulation. I herewith STRIKE FROM THE RECORD all of RSI's pleadings in this matter. 13 C.F.R. § 134.219(b)(1). Further, Mr. Barton is SUSPENDED FROM PRACTICE BEFORE OHA FOR THE PERIOD OF ONE YEAR from the date of this decision. 13 C.F.R. § 134.219(b)(3). I will not report Mr. Barton to the State Bar of Texas, because I do not believe that his violation was deliberate or in any way malicious. 13 C.F.R. § 134.219(b)(4).

III. Discussion

A. Standard of Review

***7** 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. New Evidence

***8** OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

*8 Here, I previously excluded Appellant's submission of new evidence for just these reasons. Appellant had failed to submit it to the Area Office, and thus it is not admissible here. This evidence is also irrelevant to the main issue in this case, whether the Area Office properly drew an adverse inference against Appellant. If the adverse inference was proper, the size determination must be sustained. If the inference was improper, then the appropriate remedy would be to remand the case to the Area Office for a new size determination, not for OHA to attempt to conduct a size determination. *E.g., Size Appeal of DefTec Corp.*, SBA No. SIZ-5540 (2014).

C. Analysis

*8 Appellant argues that the size determination should be vacated because the initial protest was untimely and not specific. However, Appellant raises these issues for the first time on appeal, and OHA will not decide issues raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5678 (2015). Had Appellant read and responded to the Area Office's communications, it could have raised the issues of timeliness and nonspecificity before the Area Office. Having failed to so do then, it cannot do so now.

*8 Appellant relies on *Size Appeal of Jardon and Howard Technologies, Inc.*, SBA No. SIZ-4770 (2006), which vacated a size determination because the underlying protest was untimely, and *Size Appeal of Al-Razaq Computing Servs.*, SBA No. SIZ-5612 (2014), which affirmed an area office's dismissal of an untimely protest. These cases, however, do not stand for the proposition that a challenged firm may allege defects in the protest for the first time on appeal. In *Jardon and Howard*, the size determination was made on the merits, which is not the case here, so the challenged firm had provided arguments to the area office during the size investigation. As a result, OHA did not address whether the challenge to the timeliness of the protest was being made for the first time on appeal. *Al-Razaq* is inapposite, too, because there the area office dismissed the protest as untimely, so there too the issue was not raised for the first time on appeal.

*9 The main issue in this case is whether the Area Office properly drew an adverse inference against Appellant when it received no response to its communications.

*9 SBA regulations provide that:

*9 If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

*9 13 C.F.R. § 121.1008(d). Further:

*9 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.

*9 *Id.* § 121.1009(d).

*9 OHA has established a three-part test for assessing whether an adverse inference is appropriate. First, the requested information must be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Finally, the request for information must be specific. If all three criteria are met, the challenged concern must produce the requested information or suffer the consequences of an adverse inference. *E.g., Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9-10 (2013). Here, the first element is met because the requested information was necessary to perform a size determination on Appellant. The second and third elements are met because the information requested pertained to the challenged firm itself and referenced specific documents. Accordingly, the Area Office's application of the adverse inference rule meets the three-part test.

*9 Nevertheless, Appellant argues, the Area Office erred in applying the adverse inference rule. When the Area Office received no response to the communications directed to [Employee 1], Appellant argues the Area Office had an obligation to contact Appellant's other officers. OHA has considered similar arguments and rejected them. In *Size Appeal of Canal Wood, LLC*, SBA No. SIZ-4852 (2007), a challenged concern had multiple offices and failed to respond to an area office's request because it assumed correspondence would be directed to one particular office. OHA rejected this argument holding “the rest of the world cannot be on notice of [the challenged concern's] internal directions as to which of its offices performs which function.” *Canal Wood, LLC*, SIZ-4852, at 4. Similarly, OHA has held an Area Office cannot be charged with contacting other officers when one officer does not respond. *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704, at 7 (2016) (finding it “unreasonable to expect the Area Office ... to be on notice of Appellant's internal directions as to who is to receive communications, especially when those points of contact change without the Area Office's knowledge.”). Here, too, the Area Office cannot be on notice of Appellant's staffing difficulties, or the fact [Employee 1] was overwhelmed with work.

*10 Appellant's reliance on the line of cases where OHA has remanded adverse inference determinations is misplaced. In those cases, the challenged concern's failure to respond was due to some error by the area office, which is not the case here. In *Size Appeal of Addison Construction & Maintenance, Corp.*, SBA No. SIZ-4418 (2000), the area office drew an adverse inference when it received no response to the notice of the size investigation. When the challenged concern maintained it had never received the notice, and the area office could not produce evidence it had, OHA found it was error to draw the adverse inference and remanded the case. Here, there is no question Appellant received the Area Office's communications. The problem was that [Employee 1] was too overwhelmed to review and respond to them. In *Size Appeal of T/J Technologies, Inc.*, SBA No. SIZ-4832 (2007), the challenged concern did not receive the email in question because the

area office incorrectly typed the email address, so OHA concluded it was the area office's fault that the challenged concern did not receive the email. Here, again, Appellant did in fact receive communications, and they were directed to the proper address. In *Size Appeal of DefTec Corporation*, SBA No. SIZ-5540 (2014), the challenged concern concluded its response to a request for information with a statement that it assumed the issue was closed. The area office in that case did not respond, but drew an adverse inference in the size determination. OHA remanded the case, finding the challenged firm reasonably believed the area office no longer sought the information in question, and that it was error to draw an adverse inference. Here, by contrast, there was no response from Appellant to the Area Office, and no reason for Appellant to believe the Area Office had closed the matter. Appellant argues it thought it had disposed of the size issue by communicating with the Air Force, but these communications are irrelevant because it is SBA which adjudicates size protests and appeals, not the contracting agency. 13 C.F.R. §§ 121.1002 and 121.1003.

***10** Appellant's argument that the Area Office should have done more is also wrong as a policy matter. It is worth emphasizing that the Area Office properly addressed its communications to Appellant, and Appellant received them. To hold that the Area Office erred here would be to require area offices to go on extended rounds of contacting official after official at challenged concerns when they do not receive a response to their communications. This is neither required by due process nor practical. The real error here was Appellant's, in failing to properly monitor its communications. See *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016).

***11** It is true that the Area Office's taking 20 days from receiving the protest to contact Appellant contravenes SBA regulation requiring it to issue a formal size determination within 15 days, if possible. 13 C.F.R. § 121.1009(a)(1). However, the consequence of this failure is not to overturn the size determination eventually issued. Rather, the Area Office's delay means the CO may award the contract, if he determines waiting to make the award would be disadvantageous to the Government. 13 C.F.R. § 121.1009(a)(3). Notwithstanding such a determination, the provisions of 13 C.F.R. § 121.1009(g), detailing the results of a size determination, still apply to the procurement. *Id.* The regulation thus does not provide that a delay by the Area Office in issuing a size determination is grounds for vacating it.

***11** Similarly, the actions of the Air Force may have unfortunately confused Appellant. However, they cannot be charged to the Area Office, and are not grounds for overturning the size determination.

***11** Appellant has failed to establish any error of law or fact in the size determination, so I must affirm it. Appellant may seek recertification as a small business by filing an application for recertification with the Area Office. 13 C.F.R. § 121.1010(a). The application must include a current completed SBA Form 355. *Id.*

IV. Conclusion

***11** Appellant has not established any error of law or fact in the Area Office's determination. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

***11** Christopher Holleman

***11** Administrative Judge

Footnotes

- 1** This decision was originally issued under a protective order. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.
- 2** The record establishes that the Air Force did in fact forward the protest to the Area Office in a timely manner. As Appellant notes in its Response to Motion to Summary Decision, Section II.E., *infra*, the delay occurred between when the Area Office received the protest and when it initiated the size investigation.
- 3** As discussed in Section II.F., *infra*, I am striking RSI's pleadings from the record because counsel for RSI violated the terms of the protective order. Accordingly, because RSI's pleadings provide no basis for this decision, no further discussion of them is necessary.

SBA No. SIZ-5707, 2016 (S.B.A.), 2016 WL 692818