

AFFIDAVITS ARE GENERALLY ACCEPTABLE IN SIZE APPEALS

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The following saga of two appeals demonstrates the importance of sworn affidavits in size protests and size appeals. In the first appeal, *CoSTAR Services, Inc.*, SBA No. SIZ-5745 (2016), the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) considered two protests that Mark Dunning Industries, Inc. was not small because of affiliation with 24 different entities. The protesters (CoSTAR and Inuit) alleged that affiliation was based on family identity of interest, common investments, common ownership and common management. OHA held that there was no affiliation based on most of the allegations, but remanded the case to the Area Office to render a more complete analysis on whether there was affiliation between two individuals (Mr. Dunning and Mr. White) based on common investment.

On remand, the Area Office found no common investment, and found Dunning Industries to be small for the second time. The ruling was again protested at OHA, on the grounds that the record did not show evidence of Mr. Dunning’s resignation of management and member positions in any companies owned by Mr. White. *CoSTAR Services, Inc.*, SBA No. SIZ-5765, July 27, 2016. The key to the OHA analysis were two affidavits submitted by Mr. Dunning, one explaining the transfer of his interests, and the other stating that he was never an owner, officer, employee or had any connection with two of the alleged affiliates.

The protester urged OHA not to rely on these affidavits of Mr. Dunning, and sought further documentation. However, OHA rejected these arguments, noting that there was no proof that further documents existed, that Dunning Industries had submitted documents showing no common investments, and the affidavits established that there were no common investments, other than “a hunting cabin.” OHA held that “Mr. Dunning’s sworn statements were adequate to establish that there was no affiliation” between Dunning and other companies alleged in the protest.

OHA’s opinion is important, because it notes that the SBA regulations provide that SBA must “give greater weight to specific, signed, factual evidence than to general unsupported allegations or opinions.” 13 C.F.R. § 121.1009(d). The opinion further notes that the Area Office was under no duty to independently verify the affidavits because “given the time constraints associated with size reviews, it would be unrealistic and unduly burdensome to impose such a requirement.” OHA found that the documentation in the record, coupled with the Dunning affidavits, were sufficient to establish non-affiliation, and deny the protest.

Tips: (1) While affidavits are normally sworn before a notary and notarized, Federal law permits the substitution of non-notarized “Declarations.” See 28 U.S.C. § 1746, which permits unsworn declarations wherever a law, rule or other requirement of the United States requires a sworn affidavit. If you wish to use a non-notarized Declaration, the statute indicates that you should conclude it with the following: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).”

- (2) Finally, keep in mind that in a size protest or size appeal, an affidavit or declaration is far more important than statements made in a simple letter, as shown in *CoSTAR*.