

ADVERSE INFERENCE IN SIZE APPEALS

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The Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) has a very clear-cut set of guidelines for deciding appeals of contractor’s size protests in connection with set-asides or other size issues. In response to a size protest, an Area Office of SBA requests the protested concern to submit an SBA Form 355 (detailed information on the protested concern) and other information, including a response to a protest. Contractors are required to respond or are likely to suffer from their nonresponse. *Size Appeal of Apogee Engineering, LLC*, SBA No. SIZ-6078, Nov. 5, 2020 is an excellent example of the fate of a protested concern that failed to respond, and was unable to successfully defend against a size appeal because of adverse inference.

Apogee held a General Services Administration indefinite delivery, indefinite quantity contract for integrated office services. This contract had a \$15 million annual receipts size standard. The contract was a multiple award of more than five years duration, and the regulation requires that awardees of such contracts re-represent their size status 60 to 120 days prior to the end of the first year of the contract and prior to exercising an option. FAR 52.219-8. Apogee was required to recertify its size between Feb. 19, 2019 and April 19, 2019. On August 17, 2020, Wittenberg Weiner Consulting filed a size protest alleging that Apogee was other than small.

On September 3, 2020, the SBA Area Director initiated a size protest against Apogee, and directed the company to submit a completed SBA Form 355, and certain other information. On September 11, 2020, Apogee’s Vice President for Finance informed the SBA Area Office “Apogee ...agree[s] we are considered other than small based on this request.” Apogee made no further submission to the Area Office in response to the protest.

On appeal to OHA of the Area Office finding that Apogee was not small, OHA began by noting that Apogee had declined to furnish a Form 355 and the other information requested. Apogee had further stated that it agreed that it was not small. OHA noted that when a protested concern fails to complete SBA Form 355 or respond to an Area Office request for information, the Area office may draw an adverse inference and presume that the information would demonstrate that the concern was other than small. 13 C.F.R §121.1008(d). OHA also examined whether the Area office had correctly applied the required three-part test for adverse inference determinations. This test, and OHA’s findings are below:

1. The requested information must be relevant to an issue in the size determination
 - a. OHA held that the information requested was definitely relevant and indeed was essential information needed to calculate the size of Apogee.
2. There must be a level of connection between the protested concern and the firm from which the information was requested.
 - a. OHA held that the information was Apogee’s own information, so there was not only a connection but an identity between Apogee and its size standard calculation
3. The request for information must be specific.

- a. OHA held that the Area Office had specifically requested a complete SBA Form 355 and Apogee's response to the protest.

OHA concluded that when a challenged concern makes no response whatsoever to an area Office's request for information necessary to make the size determination, the test is met and the Area Office is fully empowered to draw an adverse inference—which it did. And OHA concluded that the Area Office's conclusion that the information, had it been submitted, would have demonstrated that Apogee was other than small. Thus, drawing an adverse inference was appropriate.

Takeaway. (1) Always respond to SBA requests (such as for form 355) when your company's size has been protested. Give a full and complete response.

(2) It is not advisable to send letters or emails to the SBA stating that "this company is not small." That's a judgment to be made after all the evidence is available.

(3) If you fail to respond to an SBA request for information, and the three-part test (above) applies, the SBA will likely draw an adverse inference against you, and likely will find that you are "not small."

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