

INFORMATION FROM A WEBSITE IN A SIZE PROTEST

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A recent appeal of a size protest at the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) demonstrates how important it is to use information mandated by the relevant regulations rather than data on a website when there is a discrepancy in a size protest. OHA determined that the SBA area office’s reliance upon website evidence in preference to Appellant’s written submissions was clear error, and reversed the initial size determination. *Vorago Technologies, Inc.*, SBA No. SIZ-6242, August 29, 2023.

In Vorago, the SBA Area Office held that New Science Ventures (“NSV”) was not small under a 500 employee size standard for the Small Business Innovation Research (“SBIR”) program. The ownership requirements for the SBIR program, found at 13 CFR §121,702(a), require that an SBIR awardee must be more than 50 percent directly owned by at least one individual or by other small business concerns if the concerns are each more than 50 percent owned and controlled by individuals who are US citizens or permanent resident aliens. Further, only one layer of separation between the SBIR is allowed. The Area Office found that NSV was identified on its website as a venture capital firm and NSV referred to other companies as “our companies” and concluded that NSV added an additional level of ownership, which was not permitted.

NSV contended that it is more than 50 percent directly owned and controlled by U.S. individuals and limited partnerships that are majority owned directly by U.S. individuals. Vorago asserts that the size determination was based on an incorrect and consistently refuted premise (in documents furnished to the Area Office) that NSV does not own a controlling interest in Vorago.

OHA held that when the Area Office had found that Vorago failed to meet the requirements of the regulation (that NSV owned a majority interest in Vorago), this conclusion was based on a clear error. Vorago’s submissions to the Area Office, beginning with the required SBA form, made it clear that Appellant Vorago was owned either directly by individuals or by limited partnerships. Nothing Vorago submitted identified NSV as a majority shareholder, or indeed, as one of Vorago’s shareholders.

OHA’s ruling stated that the “Area Office’s reliance upon website evidence in preference to Appellant’s written submissions was clear error. The regulations state that SBA must give greater weight to specific, signed factual evidence than to general unsupported allegations of opinions. 13 CFR § 121.1009(d). The website relied upon was ambiguous at best, and the holding of the Area Office was a clear error, as was the failure of the Area Office to give Vorago an opportunity to comment upon it. OHA granted the appeal and remanded the matter to the Area Office.

Takeaway. Also check website information against actual facts when there appear to be discrepancies. Vorago and NSV should have clarified its website, and it did so only after the protest was made. This type of error should have been corrected before the protest, but the Area Office should have examined the actual facts (submissions) and corrected it while considering the protest.

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