

## **FOREIGN OWNERSHIP DOESN'T PRECLUDE US AFFILIATE FROM SMALL BUSINESS SET ASIDE PROGRAM**

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In a recent decision, the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) confirmed that even if a concern is a U.S. affiliate of a foreign-owned concern, it is still eligible for a small business set aside contract. *Size Appeal of A&Y Government Servs, LLC*, SBA No. SIZ-4966, Oct. 22, 2018. In that case, the Army issued a solicitation for vehicles and spare parts for a foreign sales transaction. The contracting officer set aside the procurement entirely for small business, and Bukkehave, Inc. (“BHI”) was the apparent awardee.

An unsuccessful offeror challenged the award, alleging that BHI was a foreign business concern that was dominant in its field, and therefore was ineligible for award. The SBA Area office determined that BHI was formed in 1996 in the state of Florida, and was a wholly owned subsidiary of Bukkehave Corp. A/S (“BC”), a company based in Denmark. BC in turn is wholly-owned by B1925 A/S (“BAS”), which is also based in Denmark. The combined employees of BHI and its affiliates (owners) did not exceed the size standard in this procurement, and the Area Office noted that this made them “not dominant” in their field and denied the size protest. The original protester appealed to OHA, asserting that BHI was merely a sales office owned by a foreign corporate entity, and should have been disqualified from award. The protest asserted that an award to BHI does not benefit the U.S. economy because all vehicles are manufactured in Japan and all money will go to Denmark.

OHA found no merit in the protest. It noted that SBA’s small business regulations do not bar a foreign-owned concern from participating in a small business set-aside, provided that the concern is based in the U.S., and contributes to the U.S. economy through the payment of taxes or otherwise. OHA cited 13 C.F.R. § 121.105(a)(1), which states:

Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

OHA determined that BHI is based in Florida, and that the company contributes to the U.S. economy by paying taxes. This make it eligible for a small business set-aside.

Takeaway: Even if a small business is owned by a foreign entity, if the small business is (1) located in the U.S.; (2) all of its affiliates combined do not exceed the size standard; and (3) the business contributes to the U.S. economy by paying taxes or using American products, materials or labor, then that business will be eligible for assistance or set-asides from SBA.

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