

ADVERSE INFERENCE

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The fifth amendment to the U.S. Constitution states that “[no person] shall be compelled in any criminal case to be a witness against himself...” The Supreme Court has stated that “the rule against drawing adverse inferences from a defendant’s silence in criminal proceedings, including sentencing, is of proven utility,” noting that too many view this privilege as a shelter for wrongdoers—they too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. *Mitchell v. United States*, 526 U.S. 314 (1999). The *Mitchell* decision also notes that “the layman’s natural first suggestion would probably be that the resort to privilege in each instance is a clear confession.” So, the Supreme Court has held that a jury in a criminal case is not permitted to draw an adverse inference from a defendant’s refusal to testify at trial.

But in Small Business Administration (“SBA”) size protests (a civil proceeding) there is a very clear cut rule that permits adverse inferences as follows:

If a concern whose size status is at issue fails to submit a completed SBA Form 355 [information for small business size determination], 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.

13 CFR § 121.1008(d). The decision of the Office of Hearings and Appeals in *The Onyx-Urban Collaborative Joint Venture*, SBA No. SIZ-6157, May 31, 2002 is a good example of the adverse inference rule.

In *Onyx*, the appellant was selected for award in 2021 but the contracting officer filed a protest challenging its size in the \$8 million receipts category, concerned that the appellant might be affiliated as a joint venture for small business programs. The SBA area office requested that because the appellant self-certified for this procurement, that it provide income tax returns for 3 or five years through the year 2020, the last year before the certification, citing 13 CFR 121.104(c). (Appellant used the calendar year as its fiscal year, so regardless of whether 3 or 5 years was used, the period of measurement included 2020.) Appellant refused to provide its 2020 tax return (stating that it hadn’t been filed yet) or providing “other available information” for 2020 pursuant to 13 CFR 121.104(a)(2). The area office and the Office of Hearings and Appeals drew an adverse inference that the concern was other than small.

OHA noted that the adverse inference test involves three elements:

- (1) The requested information was relevant to the size determination;
- (2) The information was appellants ow and within Appellant’s possession; and
- (3) The Area Office clearly communicated to Appellant what specific information was being requested.

Takeaway: If you do not want SBA to draw an adverse inference about your company's size, you must have a compelling reason for denying specifically requested and available information.

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