

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

The Underdogs Unlimited, LLC,

Appellant,

Appealed from
Size Determination Case No. 2025-178

SBA No. SIZ-6373

Decided: January 20, 2026

APPEARANCE

Ken R. Sloan, President, San Antonio, Texas, for The Underdogs Unlimited LLC.

DECISION

I. Introduction and Jurisdiction

On July 8, 2025, The U.S. Small Business Administration (SBA), Office of Government Contracting (Area Office) issued Size Determination No. 2025-178, concluding that The Underdogs Unlimited, LLC (Appellant) is not a small business for the subject procurement. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is DENIED, and the size determination is AFFIRMED.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within 15 days after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

This appeal was assigned to Administrative Law Judge Brian J. Haring on December 3, 2025, pursuant to an Interagency Agreement in effect beginning October 1, 2025, Administrative Law Judges of the U.S. Department of Health and Human Services, Office of Medicare Hearings and Appeals have been appointed by the Administrator of the U.S. Small Business Administration and are authorized to hear appeals from size determinations under 13 C.F.R. part 121 and 13 C.F.R. § 134.102(k).

II. Background

A. Solicitation

On February 24, 2025, the Department of Veterans Affairs, Network Contracting Office, NCO19 Services/Supply West, Greenwood Village Contracting Officer (CO) issued Request for Quote (RFQ) 36C25925Q0247 (the Solicitation) to provide elevator maintenance services at the Salt Lake City, Utah, VA Medical Center (VAMC).

The CO designated this acquisition as a 100% Service-Disabled Veteran Owned Small Business (SDVOSB) set-aside under North American Industry Classification System (NAICS) 238290 (Technological Technology Services), with a corresponding \$22 million annual receipts size standard at the time VA issued the Solicitation. (Solicitation at 1.)

Both the Appellant and Veteran Elevated Solutions, LLC (VES) submitted proposals.

Appellant was selected as the apparent successful offeror. VES was not eliminated from the competition for any procurement-related reasons.

On May 1, 2025, the CO awarded the contract to Appellant assigning contract number 36C25925P0523. VA posted award notification on SAM.gov on May 2, 2025.

B. Protest

On May 9, 2025, VES, a disappointed offeror and interested party, filed a timely protest¹ challenging Appellant's size.

In its protest, VES alleged Appellant is not a small business providing services for elevator repair or maintenance. Specifically, VES alleges Appellant "is a sole proprietorship that primarily provides extermination and pest control services, janitorial services, solid waste collection, and laundry services to the federal government." VES asserted Appellant's line of business will require Appellant to "rely on a subcontractor, likely Otis Elevators ("Otis"), a large business, to perform the primary and vital requirements of the Solicitation." Therefore, VES alleged Appellant's reliance on an other than a small business subcontractor violates the ostensible subcontractor rule rendering the Appellant ineligible to receive award from the instant solicitation. (Protest at 1.)

The CO forwarded the VES size protest to the Area Office for review. On June 18, 2025, the Area Office notified Appellant of the protest and requested that Appellant provide:

- A detailed description of what primary activities are performed by each of the subcontractors/vendors for the subject procurement, along with annotating the business classifications (i.e. large business (LB), small business (SB), small

¹ In addition to the size protest, VES also filed a SDVOSB status protest, which is separately decided by OHA.

disadvantaged business (SDB), women-owned small business (WOSB), etc. for each of the supplier(s)/subcontractor(s)).

- A detailed price build-up of Appellant's proposed price which also includes a breakdown of the cost from each of your subcontractors/vendors; and [sic]

On June 24, 2025, Appellant responded and included the following: a business size and operations statement; Article of Formation; copy of the contract award (36C25925P0523); a completed SBA Form 355; tax returns; and Appellant's proposal in response to the Solicitation. In its response, Appellant did not provide the detailed price-buildup of their proposal and did not identify its suppliers or subcontractors. Instead, Appellant provided the following statement describing how Appellant would perform the contract:

Ken Sloan, as managing member of The Underdogs Unlimited, LLC, is committed to maintaining compliance with SBA regulations and upholding the standards of performance expected from federal contractors. Our business continues to grow responsibly and ethically, prioritizing value, accountability, and results in every contract we pursue.

The plan for the elevator contract was to have our employee Kerry Rhodes who has been employed by The Underdogs Unlimited, LLC since 2018 is certified NAESA (National Association of Elevator Safety Authorities International. We had a plan for boots on the ground for this solicitation. . . .”

On June 25, 2025, the Area Office sent Appellant a letter requesting the missing information. Additionally, the Area Office asked Appellant to provide a statement with supporting documents to demonstrate Appellant had the capability to perform the primary and vital requirement (elevator repair) of the Solicitation with its own employees. The Area Office gave Appellant a deadline of June 27, 2025 to provide this supplemental information.

On June 25, 2025, Mr. Sloan responded to SBA's request for additional information:

We don't have an agreement. These are claims. We already have a Repair Technician on the team. That is what we turned in on a written letter. We also turned in the pricing sheet. The pricing sheet has nothing to do with a size determination of my company.

To ensure Appellant understood the basis for the requested information, the Size Specialist provided the explanation to Mr. Sloan by telephone call on June 26, 2025. During the call, Mr. Sloan insisted Appellant would perform the contract with its employees. Mr. Sloan claimed Appellant's qualifications for performing the elevator maintenance services were previously provided to and examined by the CO. At the end of the call, the Size Specialist asked Appellant to provide the licenses/certificates to demonstrate Appellant had qualified employees to perform the contract. Additionally, the Size Specialist asked Appellant to state the percentage of the contract which Appellant would perform with its own employees.

On July 1, 2025, SBA reminded Appellant via email that the requested information was overdue and the deadline to accept Appellant's information would expire at the close of business that same day. In response, Appellant reiterated it was qualified as a small business under FAR 19.102, 13 C.F.R. § 121.201 and 13 C.F.R. § 121.104.

C. Size Determination

On July 8, 2025, the Area Office issued Size Determination No. SIZ-2025-178 (Size Determination). The Area Office found that:

[D]espite multiple attempts made by the SBA to get the necessary information for this size determination, Underdogs failed to submit the requested information by the due date. Based on 13 CFR 121.1008(d) and 13 CFR 121.1009 (d), and the missing data SBA may presume that disclosure of the missing information will demonstrate that Underdogs is likely not performing the work and is unusually reliant on its subcontractor. Also, without the requested information it is not possible to determine who the subcontractor is, its percentage of performance and whether it is or not a similarly situated entity; thereby SBA concludes that Underdogs violates the ostensible subcontractor rule and is affiliated with its subcontractor.

(Size Determination at p. 7)

The Area Office concluded Appellant was other than small due to Appellant and its affiliate likely exceeding the small business size standard of \$22 million in annual receipts for the SDVOSB set-aside under NAICS code 238290. (*Id.*)

D. Appeal

On July 22, 2025, Appellant filed the instant appeal (Appeal). Appellant argues that under FAR 19.102 and 13 C.F.R. § 121.201 a business concern qualifies as small based upon the size standard assigned to its primary NAICS code. Appellant asserts it is a small business based on the applicable size standard for NAICS Code 238220.² Appellant argues it demonstrated itself to be a small business through documenting its annual receipts, as well as through documenting its total number of employees. Appellant argues the Area Office improperly sought licensing/certification documentation of its employees because nothing “in FAR 19.102 or 13 C.F.R. § 121.201 requires a business to demonstrate worker-specific certifications as a prerequisite for small business status.” Appellant clarified that worker certification requirements pertain to contract performance and technical responsibility, not eligibility for qualification as a small business under any SBA size standard. Appellant emphasizes the small business size standards are intended to evaluate the organizational structure and economic size of the applying entity, not the operational readiness for specific contract work at the time of certifying a proposal for a solicitation. (Appeal at 1-2)

² Appellant argued it also meets the size standard for NAICS Code 561210.

Accordingly, Appellant believes that the Size Determination being based on the absence of an elevator repair certification, misconstrues the regulatory criteria for small business size qualification. Appellant respectfully requests its proposal be reevaluated in accordance with the definitions and guidance established by FAR 19.102 and 13 C.F.R. § 121.201. (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314.

OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant has not demonstrated the Area Office clearly erred in applying an adverse inference against Appellant rendering Appellant other than small and ineligible for award of VA Contract No. 36C25925P0523. As a result, I must deny this appeal.

When a concern's small business status is protested, “[t]he concern whose size is under consideration has the burden of establishing its small business size.” 13 C.F.R. § 121.1009(c).

SBA regulations establish an adverse inference rule, that if a concern whose size status is at issue fails to submit requested information within the time allowed by SBA, 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 C.F.R. § 121.1008(d); *see also* 13 C.F.R. § 121.1009(d).

OHA has developed a three-factor test to determine whether an area office appropriately applied the adverse inference rule: “(1) the information sought by the area office is relevant to an issue in the size determination; (2) there is a level of connection between the entity being protested and the entity the area office is seeking information from; and (3) the area office's request for information was specific.” When all three criteria are satisfied, “the challenged business must submit the information to the area office or suffer an adverse inference that the information would show that the challenged business was other than small.” *Size Appeal of Portacool, LLC*, SBA No. SIZ-6251, at 8 (2023) (quoting *Size Appeal of Firewatch Contracting of Florida, LLC*, SBA No. SIZ-4994, at 6 (2008)).

Here, the information the Area Office sought was relevant to the issue in the size determination, whether Appellant was compliant with the ostensible subcontractor rule, or was its subcontractor performing the primary and vital requirements of the contract or was it

unusually reliant upon its subcontractor. Under the ostensible subcontractor rule a contractor and its ostensible subcontractor are treated as joint venturers and thus affiliated for size determination purposes. 13 C.F.R. § 121.103(h)(3). The entity from which the area office was seeking information was the entity being protested. Finally, the request was very specific, and Appellant failed to meet it. Appellant's failure to document it had qualified employees to perform the primary and vital requirement of the Solicitation (elevator repair), failure to provide information concerning the size of any necessary subcontractor, and failure to document planned price build-ups to any necessary subcontractor allows SBA to adversely infer Appellant utilized an ostensible subcontractor in a joint venture rendering Appellant other than small and/or exceeding the limitations on subcontracting pursuant to 13 C.F.R. § 125.6.

Accordingly, the Area Office was not in error in drawing the adverse inference that Appellant and its ostensible subcontractor were other than small for this procurement.

Appellant argues that it meets the applicable size standard, and that should be end of SBA's inquiry into its size. Appellant's assignment of error asserts that by having provided the Area Office a response which specifies that it would comply with the limitations on subcontracting set forth in 13 C.F.R. § 125.6, it has overcome VES' protest allegations. Appellant argues the Size Determination inappropriately conflates Appellant's contract performance with the small business size standard applicable to the Solicitation.

However, the issue raised by the protest was whether Appellant was in compliance with the ostensible subcontractor rule, and Appellant failed to address that issue with the Area Office, which left the Area Office no choice but to apply the adverse inference rule.

Here, VES sufficiently called into question Appellant's ability to perform the primary and vital requirements of the Solicitation in the absence of a subcontractor and sufficiently identified the absence of any subcontractors within Appellant's proposal. Subsequently, the Area Office requested Appellant provide documentation (licensure/certification) to demonstrate it could perform the primary and vital requirements of the contract in the absence of using a subcontractor. The Area Office further requested information from Appellant to evaluate Appellant's use of any subcontractors under the ostensible subcontractor rule and limitations on subcontracting under 13 C.F.R. § 125.6. Appellant did not provide the requested information or documentation and relied upon its assertion that it would comply with all subcontracting requirements.

Appellant has failed to establish the Size Determination was based upon error of fact or law. Accordingly, I must deny this appeal.

IV. Conclusion

Appellant has not shown the Area Office's size determination was based upon any error of fact or law. Accordingly, I DENY this appeal and AFFIRM the size determination.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

BRIAN J. HARING
Administrative Law Judge