



**U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF INSPECTOR GENERAL
WASHINGTON, D.C. 20416**

MEMORANDUM

TO: Jovita Carranza
Acting Administrator
/s/ Original Signed

FROM: Eric M. Thorson
Inspector General

DATE: July 25, 2008

SUBJECT: Size Determination Regarding Blackwater Worldwide Affiliate Presidential Airways, Inc.

This is in response to a referral from former Administrator Steven Preston, dated March 10, 2008, asking our office to conduct a review requested by Congressman Henry Waxman, Chairman of the House Oversight and Government Reform Committee, of whether Blackwater Worldwide complied with federal small business laws. Enclosed with Chairman Waxman's request was a memorandum he wrote to the Committee, also dated March 10, 2008, which discussed a size determination that the Small Business Administration had issued in November, 2006. The attached memorandum contains the results of our review.

Please do not hesitate to contact me if there are any questions or if you require additional information.



U.S. SMALL BUSINESS ADMINISTRATION
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MEMORANDUM

TO: Eric M. Thorson
Inspector General
/s/ **Original Signed**

FROM: Glenn P. Harris
Counsel to the Inspector General

DATE: July 25, 2008

RE: Size Determination For Affiliate of Blackwater Worldwide

EXECUTIVE SUMMARY

On March 10, 2008, the Chairman of the House Committee on Oversight and Government Reform, Henry A. Waxman, wrote to the Small Business Administration (SBA) Administrator, Steven Preston, asking SBA to initiate an inquiry into whether Blackwater Worldwide (Blackwater) complied with federal small business laws. Chairman Waxman included with his letter a memorandum he had written to the Committee, also dated March 10, 2008, which discussed a size determination that SBA issued in November, 2006 (Waxman March 10 Memorandum). In that decision, SBA concluded that a Blackwater affiliate, Presidential Airways, Inc. (Presidential), met the criteria to be considered a small business. Administrator Preston subsequently wrote to you on March 14, 2008, asking the Office of Inspector General (OIG) to review this situation.

During the course of our review of Blackwater's submissions to SBA, we identified questions about SBA's determination that Presidential was a small business. The size determination was rendered by SBA's Office of Government Contracting Area III Office in Atlanta, Georgia (SBA Area III Office). The key issue in this decision was whether personnel hired by Blackwater to provide security services for the Department of State (DOS) and other agencies were Blackwater employees (which would have meant that Presidential was not a small business) or independent contractors. We also reviewed Federal Procurement Data System (FPDS) and USASpending.gov data to identify whether Blackwater or one of its affiliates obtained contracts that were set aside for small businesses even though the bidder may not have met applicable SBA size criteria. Our review led to the following findings:

Finding 1. Blackwater or its Affiliates May Have Obtained Numerous Contracts Set Aside for Small Businesses Even Though the Bidder Did Not Meet SBA Size Criteria. During Fiscal Years 2005 through 2007, Blackwater or an affiliated company obtained a

total of 39 contracts that were set aside for small businesses even though the bidder may not have met SBA's criteria to be considered a small business.

Finding 2. Unclear Reasoning in Decision: SBA did not adequately explain its reasons for concluding that the security personnel on the DOS contract were independent contractors.

Finding 3. Discrepancies in Employee Information Provided by Presidential and A Protestor: SBA did not follow-up on or attempt to reconcile conflicting information in its files that the total number of Blackwater employees -- even excluding the security personnel hired under federal contracts -- exceeded the applicable size standard.

Finding 4. Questionable Reasoning in Determining that Blackwater did not Supervise or Have Knowledge of the Security Personnel on the DOS Contract: SBA apparently did not consider certain contractual terms that appear to be inconsistent with the Agency's conclusion that Blackwater had little or no knowledge of the activities of the security personnel performing the contract and exercised little or no supervision over these personnel once they were deployed. SBA also apparently relied on Blackwater's claims that it had no knowledge of the activities of the security personnel once they were deployed overseas, but did not appreciate that Blackwater only made these assertions in connection with classified contracts, not the DOS and other unclassified contracts.

Finding 5. Failure to Consider Information that Blackwater Was the Employer of the Security Personnel For Purposes of the Defense Base Act. Presidential's submissions to SBA included information that Blackwater was considered to be the employer of the security personnel on the DOS contract for purposes of the Defense Base Act. However, SBA did not appear to consider this information when it rendered its size determination.

It appears likely, based on Finding 1, that Blackwater and its affiliated companies will bid on small business set-aside contracts in the future. This finding is consistent with Chairman Waxman's March 10 Memorandum, which stated that federal procurement data shows that Blackwater and its affiliated companies have obtained at least 100 small business set-aside contracts, worth over \$144 million, since 2000. Accordingly, SBA may want to examine its size decision to confirm whether it made the proper finding and determine whether it is appropriate for Blackwater affiliates to continue receiving small business set aside contracts. We have also referred the contracts discussed in Finding 5 and in Attachment A to the Offices of Inspector General for the relevant procuring agencies for their review.

BACKGROUND

A. Overview of the SBA Size Program

As authorized by the Small Business Act, SBA has established "size standards" to define whether a company is considered to be a small business. 13 C.F.R. Part 121. Based upon the North American Industry Classification System (NAICS), SBA has developed industry-by-industry size standards generally based upon either a firm's total revenues or its total employees. 13 C.F.R. §§ 121.104, 121.106. These size standards are used to determine whether a company

is eligible for a variety of Federal benefits reserved for small businesses, including government contracts that are set aside for small businesses.

For size standards based upon a company's number of employees, SBA regulations provide as follows:

In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (i.e., individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

13 C.F.R. § 121.106(a).

SBA regulations provide that determining whether a company meets the applicable employee or revenue-based size standard involves totaling all of that company's employees (or revenues) and all of the employees (or revenues) of the various firms that are affiliated with the company. 13 C.F.R. §§ 121.104, 121.106. Agency regulations state that "[t]he average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months." 13 C.F.R. § 121.106(b).

In order to obtain a small business set-aside contract, contractors self-certify themselves as "small" under the SBA size standard for the NAICS code assigned to the contract. (SBA size standards are found at 13 C.F.R. § 121.201.) Disappointed bidders that are not awarded the contract can file a protest with the contracting officer, who then forwards the protest to an SBA Area Government Contracting Office for a decision. 48 C.F.R. § 19.302. If SBA does not render a size determination within ten business days of receiving a protest, the contracting officer is authorized to award the contract if further delay would be disadvantageous to the Government. 48 C.F.R. § 19.302.

B. SBA Size Determination

On October 27, 2006, the SBA Area III Office received several protests filed in response to an announcement that the Department of Navy, Military Sealift Command (MSC) intended to award a small business set-aside contract to Presidential for helicopter services. The protests came from several disappointed bidders, Geo-Seis Helicopters, Inc. (Geo-Seis), GCH Services, LLC d/b/a Gold Coast Helicopters (GCH), and Pacific Helicopter Tours, Inc. (Pacific), which contended that Presidential and companies affiliated with it had more than 1,500 employees, the size standard for NAICS code 481212, Nonscheduled Chartered Freight Air Transportation, that applied to the MSC contract. The SBA Area III Office informed Presidential of the protests and requested information which would allow it to perform a size determination.

Presidential submitted SBA Form 355, "Application for Size Determination," and a spreadsheet showing the number of employees at the 28 different entities affiliated with

Presidential, which included Blackwater Lodge and Training Center, Inc. (Blackwater Lodge). Presidential also submitted the following additional information: a lengthy brief written by its attorney; an affidavit from the President of Blackwater Lodge, Gary Jackson; a copy of the Statement of Work for the DOS Worldwide Personal Protective Service (WPPS) contract that Blackwater had obtained for the provision of security services in Iraq and Afghanistan; corporate information for each of the Blackwater affiliates (such as articles of incorporation); a copy of Presidential's offer for the MSC contract; and a copy of a blank agreement entitled Independent Contractor Service Agreement that Presidential claimed was signed by security personnel hired under the WPPS and other contracts.

Presidential claimed that all 29 affiliated companies had a total of only 715 employees, averaged over the preceding 12 months prior to its self certification for the MSC contract in July of 2005. It further acknowledged that over 1,000 additional personnel were hired to provide security services under the WPPS and other contracts, but claimed that these individuals were independent contractors, not Blackwater employees. In essence, Presidential contended that, other than hiring and training these individuals, Blackwater had little or no control over, or knowledge of, the actions of these personnel once they were stationed in a foreign country to provide security services. (Presidential's contentions are discussed in greater detail in the Findings Section below). Therefore, Presidential contended that the total number of employees of the Blackwater affiliates was below the 1,500-employee size standard.

On November 2, 2006, the SBA Area III Office agreed, finding that the 1,000 security personnel were independent contractors, not Blackwater employees under the relevant SBA regulation (13 C.F.R. § 121.106, which is quoted above). The Office's decision is quoted below in the Findings section and attached as Attachment B.

Geo-Seis and GCH appealed this size determination to SBA's Office of Hearings and Appeals (OHA) stating that the appropriate size standard for the procurement was not the 1,500 employee size standard, but rather the NAICS code's "exception" for Offshore Marine Air Transportation Services, which uses a \$25.5 million size standard. Neither appeal petition addressed the issue of whether the security personnel were independent contractors or employees. In December of 2006, the OHA dismissed the appeals as untimely.

FINDINGS

Finding 1. Blackwater or its Affiliates May Have Obtained Numerous Contracts Set Aside for Small Businesses Even Though the Bidder May Not Have Been Small.

During Fiscal Years 2005 through 2007, Blackwater or an affiliated company obtained a total of 39 contracts that were set aside for small businesses even though the bidder may not have met SBA's criteria to be considered a small business.

Discussion: In order to determine whether Blackwater or a known affiliate of Blackwater may have improperly obtained small business set-aside contracts, we reviewed various procurement data for Fiscal Years 2005 through 2007. We reviewed data obtained from the USASpending.gov website (<http://www.usaspending.gov>), which comes from the FPDS (<https://www.fpds.gov>). The results of our review are set forth in the table attached as Attachment A.

Our review focused on two types of small business set-aside contracts that could have involved potential misrepresentations by Blackwater or its affiliated company as to their size. First, we looked at contracts with an assigned NAICS code that had a size standard of 500 or fewer employees because Presidential admitted in SBA's 2006 Size Determination that it had 715 employees (excluding the security personnel that it claimed were independent contractors). We found one small business set-aside contracts with an assigned NAICS code reflecting a standard of 500 or fewer employees, which was obtained by Blackwater Lodge and Training Center, Inc. in June of 2007 in the amount of \$25,948. Further information about this contract is contained in Attachment A.

Second, we looked at contracts with an assigned NAICS code that measures whether a company was a small business based upon a firm's revenues. There have been a number of reports about the large dollar value of contracts awarded to Blackwater and its affiliates in recent years. For example, Chairman Waxman's March 10 Memorandum notes that Blackwater has received \$1.25 billion in Federal contracts since the year 2000. As set forth in Attachment A, we found that Blackwater or an affiliate obtained 32 small business set-aside contracts in Fiscal Years 2005 through 2007 with a revenue-based size standard. On 31 of these contracts, the applicable size standard was \$6.5 million; on one of these contracts, the size standard was \$750,000. The total value of these 32 contracts was \$2,162,672.

We also found that Presidential obtained six contracts, totaling \$107,311,356, with assigned NAICS code 481212, which has a size standard of \$25.5 million in revenues except if the primary purpose of the contract is to provide Offshore Marine Air Transportation Services, in which case a 1500-employee size standard applies. It is not known whether the \$25.5 million or 1500-employee standard applied to the relevant contracts listed in Attachment A. To the extent that the revenue based standard applied to these contracts, it is possible that they involved misrepresentations as well.

In sum, our review of the USASpending.gov and FPDS data indicated that Blackwater or a known affiliate obtained a total of 33 contracts during Fiscal Years 2005 through 2007, totaling \$2,188,620, which may have involved misrepresentations to obtain the contract. On an additional six contracts, totaling \$107,311,356, which were assigned NAICS code 481212, it is possible that misrepresentation took place to obtain the contract to the extent that the primary purpose of the contracts was not for Offshore Marine Air Transportation Services so that a \$25.5 million size standard would have applied to the contracts. We have written to the Offices of Inspector General at the procuring agencies responsible for these contracts asking them to review these contracts to determine whether misrepresentations were made to obtain these contracts.

Finding 2. Unclear Reasoning in Decision: SBA did not adequately explain its reasons for concluding that the security personnel on the DOS contract were independent contractors.

Discussion: The Area Office's sole reasoning for concluding that the protective services personnel were independent contractors is quoted below and shown in italicized text (see copy of decision attached as Attachment B).

SBA reviews the following factors in determining whether an independent contractor is an employee: Who hires the employee, who pays the employee and are employment taxes

withheld and any employment benefits received, who supervises the employee and who terminates and reprimands employees for performance issues.

Specifically, Blackwater hires the contractor under the specific criteria determined by the Department of State (DOS) who then approves each candidate before employment is offered. Blackwater provides training then turns over the contractors to the DOS representatives in the field.

Blackwater pays the contractor a daily rate for each day they are deployed but does not withhold taxes or provide employment benefits.

Blackwater cannot supervise employment because of proximity (contractors are working outside this country) and contractor takes direction and orders from DOS or the government entity issuing the classified contracts.

Furthermore, Blackwater has the power to dismiss the contractor with DOS approval but must obtain DOS approval before substituting the contractor with a new person. DOS would normally initiate such personnel actions.

In applying the above standards and reviewing the criteria used by the [Internal Revenue Service (IRS)] for Federal income tax purpose, which include training, services rendered personally, hiring, supervising and paying assistants, set hours of work, doing work on employer's premises, furnishing of tools and materials, right to terminate, etc. SBA finds that Blackwater security contractors are not employees. Further, the above captioned regulatory authority [section 121.106] does not permit SBA to count independent contractors as employees. We also found no case precedents set by SBA Office of Hearing [sic] & Appeals where independent contractors were determined to be employees. Subsequently, we find that [Presidential] is small for the purposes of this size determination because [Presidential] has less than 1,500 employees under the applicable size standard.

Although the Area Office stated that it applied the IRS criteria, it provided no explanation as to how these criteria affected its conclusion that the protective services personnel were independent contractors.

With respect to the five other factors that the Area Office discussed in reaching its decision, the following table shows how these five factors appear to relate to the conclusion that

security personnel on the WPPS and other contracts were independent contractors:

<u>Factor Applied by SBA</u>	<u>Reasoning</u>	<u>OIG Interpretation of Whether Factor Favors Employee or Independent Contractor</u>
1. Who hires the employee?	Blackwater (BW) hires the contractor under the specific DOS criteria and DOS approves each candidate before employment is offered.	Employee
2. Who pays the employee?	BW pays the contractor a daily rate for each day they are deployed.	Employee
3. Are employment taxes withheld and any employment benefits received?	BW does not withhold taxes or provide employment benefits.	Independent Contractor
4. Who supervises the employee?	BW provides training then turns over the contractors to the DOS representatives in the field. BW cannot supervise employment because of proximity (contractors are working outside country) and contractor takes direction and orders from DOS or the government entity issuing the classified contracts.	Independent Contractor
5. Who terminates and reprimands employees for performance issues?	BW has the power to dismiss the contractor with DOS approval but must obtain DOS approval before substituting the contractor with a new person. DOS would normally initiate such personnel actions.	Unclear

Although two of the five factors applied by SBA indicate that an employee relationship existed, two other factors indicate that the security personnel were independent contractors. The final factor is unclear. Accordingly, the basis for the Area Office's conclusion is uncertain.

Finding 3. Discrepancies In Employee Information Provided by Presidential and A Protestor: SBA did not follow-up on or attempt to reconcile conflicting information in its files that the total number of Blackwater employees -- even excluding the security personnel hired under Federal contracts -- exceeded the applicable size standard.

Discussion: Pacific's protest provided credible evidence that the total number of employees of the Blackwater affiliates exceeded the applicable 1500 size standard, even when the security personnel which Blackwater claimed were independent contractors were excluded. Presidential, however, claimed that the total number of employees was less than half of this standard. Our review of the relevant Area Office files did not identify any record showing that SBA ever sought an explanation from Presidential as to this discrepancy.

In its protest, Pacific noted that, even excluding the number of Blackwater personnel that were classified as independent contractors, the Blackwater affiliates totaled more than 1700 employees. Pacific relied, for the most part, on Dun and Bradstreet (D&B) reports as evidence of the number of personnel employed by the Blackwater affiliates. Presidential, however, contended that, excluding the independent contractors, the total number of employees of the Blackwater affiliates was only 715.

The following chart shows the discrepancies between the number of employees reported by Presidential and the number that the D&B Reports provided by Pacific showed:

Company	Pacific Protest	Presidential Number
Prince Group, LLC	505	4
Prince Manufacturing Prince Manufacturing Corp. Oxford Prince Manufacturing de Mexico	500	444 ¹
Blackwater Lodge Blackwater Target Systems, LLC Blackwater Security Consulting, LLC Raven Development Group, LLC	575	238 ²
Aviation Worldwide Services, LLC	57	0
Presidential Airways, Inc.	50	27
STI Aviation, Inc.	6	0
Air Quest, Inc.	50	0
Company identified by Presidential, but not by Pacific	0	2
TOTALS	1743	715

Given this discrepancy in the number of persons employed by the Blackwater affiliates that were noted in the D&B reports that Pacific provided and the number of employees claimed by Presidential, it appears that SBA should have contacted Presidential to obtain an explanation.

Finding 4. Questionable Reasoning in Determining that Blackwater did not Supervise or Have Knowledge of the Security Personnel on the DOS Contract: SBA apparently did not consider certain contractual terms that appear to be inconsistent with the Agency’s conclusion that Blackwater had little or no knowledge of the activities of the security personnel performing the contract and exercised little or no supervision over these personnel once they were deployed. SBA also apparently relied on Blackwater’s claims that it had no knowledge of the activities of the security personnel once they were deployed overseas, but did not appreciate that Blackwater only made these assertions in connection with classified contracts, not the DOS and other unclassified contracts.

¹ Blackwater provided information showing cumulative employee counts for these three companies plus two other companies not identified in Pacific’s protest.

² Blackwater provided information showing cumulative employee counts for these four companies plus four other companies not identified in Pacific’s protest.

Discussion: As noted above, a central finding of the Area III Office’s analysis was that after the security personnel are hired, “Blackwater provides training then turns over the contractors to the DOS representatives in the field,” and that “Blackwater cannot supervise employment because of proximity (contractors are working outside this country) and contractor takes direction and orders from DOS or the government entity issuing the classified contracts.” SBA apparently determined that this analysis supported the conclusion that the Blackwater security personnel were independent contractors.

With respect to this conclusion, our review determined that the Agency may not have obtained all relevant information and may not have adequately considered provisions in the WPPS contract that was provided for SBA’s review. To the extent that SBA reconsiders its finding, and concludes that Blackwater did have supervisory authority, this could alter the Agency’s conclusion regarding the five factors discussed above under Finding 1, particularly, the conclusion that Blackwater lacked the ability to supervise the WPPS personnel.

A. Inconsistency Between SBA’s Conclusions and the Terms of the DOS Contract

Our review of the WPPS Statement of Work indicates that it contained a number of provisions that appeared to be inconsistent with SBA’s conclusion that Blackwater did not have knowledge about the actions of the personnel once they were deployed.

1. Requirement That Blackwater Monitor and Control the Conduct of the Security Personnel on the WPPS Contract

The WPPS Statement of Work contained the following requirements:

Section C.7.3. Contractor is to cooperate with RSO to develop a shift schedule, which accommodates the required day off (one day per week). Contractor shall provide the RSO with the weekly schedule and daily muster sheets. Contractor shall ensure that protective service personnel are available to meet urgent and compelling requirements.

Section C.13. Contractor to provide a variety of reports to DOS, including weekly reports on status of operations and significant events, activities, problems and progress; monthly reports with an assessment of performance against all requirements in active Task Orders; monthly reports with an assessment of performance against all completed and active task orders; “lessons learned reports” identifying all positive and negative aspects of all on-going or completed protective security details with recommendations for future actions; “adverse information reports” identifying and describing any issue or incident that involves failure by contractor personnel to satisfactorily complete their mission and any action that would reflect negatively upon the DOS or the United States; quarterly inventory reports; forecast reports for the next month, ongoing or planned projects and personnel rotations; and monthly cost status reports.

Attachment 15 – Standards of Conduct. Contractor is responsible for taking the following actions:

- Notify the Contracting Officer's Representative and Regional Security Officer of all misconduct incidents through an incident report within 24 hours of the incident's occurrence.
- Maintain satisfactory standards of employee competency, conduct, cleanliness, appearance and integrity.
- Take any necessary disciplinary action for its employees.
- Remove an employee when directed to do so by the DOS for failure to comply with the standards of conduct.
- Ensure that contractor personnel at all times present a neat appearance, paying particular attention to their personal hygiene, bearing clothing and equipment.
- Conduct standard medical drug screening both prior to training of contractor employees and randomly at least every three months during performance of the contract.
- Prohibit while on duty to possess, sell, consume or be under the influence of intoxicants, drugs, or substances producing similar effects
- Prohibit the use of narcotics or other controlled substances without a prescription.
- Report to the RSO any attempt by nationals of foreign countries identified by the DOS as a critical counterintelligence threat to establish recurring contact or a close personal association.

In order to be able to fulfill its obligations under the WPPS contract, it appears that Blackwater was required to do more than merely hire and train the security professionals and provide them to the DOS. The contract provisions discussed above indicate that Blackwater was required to work with the DOS in establishing shift schedules; provide a wide variety of reports to DOS about ongoing mission and performance issues; and ensure compliance with performance and standards of conduct issues by security personnel. The Area III Office, however, does not appear to have adequately considered these provisions or to have submitted follow-up questions to Blackwater about these provisions to clarify just how much knowledge Blackwater had about the activities of the security personnel after deployment.

2. Requirement That Blackwater Provide Supervisors on the WPPS Contract

Similarly, our review of the WPPS Statement of Work indicates that it contained other provisions that raised questions about SBA's conclusion that Blackwater "cannot supervise" the actions of the security personnel performing this contract.

The WPPS Statement of Work contained the following requirements:

Section C.4.2. Contractor to “Assign a dedicated in-country Contractor Project Manager, Deputy Project Manager and provide details with a [sic] designated leaders and the number of other protective security personnel as specified in the Statement of Work.

In Attachment 2 to the Statement of Work, the roles and responsibilities of the Project Manager are described as follows:

Roles: Act as overall in-country manager and focal point for all contractor provided protective service details, including all support personnel (e.g., guard force, intelligence unit, medical personnel, vehicle and equipment technicians/mechanics, etc.) with the general advice and guidance of the DS AIC [Agent in Charge].

Responsibilities. All aspects of planning, scheduling, organizing, managing and assessing performance of assigned protective service details under this contract, including, but not limited to the following:

- Ensuring that contractor provided personnel selected for protective service leadership positions are executing their responsibilities efficiently and effectively. Items of primary concern including assessing performance of protective service details and ensuring proper behavior of all contractor-provided personnel, whether on duty or off duty.
- Ensuring that all necessary contractor support of protective service details is planned, provided and maintained to allow protective service details to perform without a decrease in required performance. Items of particular concern include: On-time delivery of protective service detail support (personnel or equipment); Provision of adequate off-duty needs of protective service personnel (housing, meals, activities) to enable personnel to perform protective service detail assignments without distraction; Preclude any behavior that would reflect poorly on the USG, the Department of State, or the local Government that requested protective service support.

Section C.7.2.2. Contractor to fill the following supervisory positions in addition to the Project Manager and Deputy Project Manager: Deputy Project Manager (Regional sites),³ Detail Leader, Deputy Detail Leader, Shift Leader, Detail Leader/Guard Force Commander, Deputy Detail Leader/Deputy Guard Force Commander, Protective Security Specialist (PSS)/Senior Guard Shift Supervisor, and PSS/Senior Guard Supervisor.

Section C.7.1. A Federal Agent in Charge (AIC) will be assigned to the sites where the operational units are to perform. The “AIC will have on-site authority over the operational units” and “operational units, under the leadership of the respective [project manager supplied by the contractor] shall perform their services in accordance with this contract and under the direction of the AIC.”

The provisions of the WPPS contract required Blackwater to provide a large number of supervisory positions to oversee the security personnel. It is possible that Blackwater filled all of

³ This is identified as separate from the Deputy Project Manager.

these positions with independent contractors. It is also possible, however, that at least some of these supervisory positions, particularly the upper-echelon positions such as the Project Manager or Deputy Project Manager, were filled by undisputed Blackwater employees.

Mr. Jackson's affidavit does not unequivocally state that all of the personnel on the WPPS contract were independent contractors, only that "As a general matter, Blackwater does not station Blackwater employees in Iraq or Afghanistan." The use of the caveat "[a]s a general matter," leaves the door open to the possibility that some of the personnel on the WPPS contract were Blackwater employees. Nevertheless, our review of the file could find no information to show that SBA ever asked Blackwater to clarify this.

We believe the SBA Area III Office should have made such an inquiry since the response could have significantly impacted its conclusion that Blackwater did not have the ability to supervise the protective services personnel performing the WPPS contract. If a Blackwater employee, rather than a DOS official, was supervising the lower level personnel that performed the security details, such an arrangement could have led to the conclusion that Blackwater was performing sufficient supervision of these personnel that they should be considered employees, not independent contractors.

B. Lack of Distinction Between Supervision on Classified and Unclassified Contracts

As noted above, a central finding of the Area III Office's analysis was that after the security personnel are hired, "Blackwater provides training then turns over the contractors to the DOS representatives in the field," and that "Blackwater cannot supervise employment because of proximity (contractors are working outside this country) and contractor takes direction and orders from DOS or the government entity issuing the classified contracts."

These conclusions, however, appear to be inconsistent with the statements that Blackwater Lodge President Gary Jackson made in his affidavit, which Presidential submitted in response to SBA's request for information. Mr. Jackson did state that -- on classified contracts -- Blackwater turned the personnel over to the relevant agency and then had no information about their location or activities. However, he was less definitive with respect to unclassified contracts as to whether Blackwater was able to supervise the security personnel. According to Presidential's attorney, the WPPS contract was unclassified. (Letter at page 8 from David Hammond, Crowell and Moring, to Ivette Mesa Bascombe, SBA (Oct. 27, 2006)).

Regarding classified contracts, Mr. Jackson's affidavit was unambiguous:

21. For classified contracts, Blackwater recruits candidates for the position of security professional pursuant to a detailed set of standards dictated by the agency and trains them in accordance with agency requirements. However, after they are trained they are turned over to the agency who details them. After being deployed, Blackwater has little if any knowledge regarding the location or activities of these independent contractors. Blackwater's only real involvement is to pay the independent contractors according to arrangements established before deployment.

Mr. Jackson, however, was not as definitive about Blackwater's level of supervision on the WPPS and other unclassified contracts:

15. DOS directs the operations of the security details and Blackwater's independent contractors in Iraq and Afghanistan. In fact, DOS prescribes in detailed procedures, rules and regulation the manner in which the security professional can operate in the war zone. DOS directs the location of the independent contractor's assignments and provides detailed policies, procedures and orders concerning the manner of performing the assignments. DOS's Regional Security Officer makes all personnel evaluations and recommendations, which are further reviewed and approved within DOS.

16. DOS requests for the staffing of security missions originate with DOS' RSO. Once instructed about the assignment, the security detail leader (a Blackwater independent contractor) in coordination with the government personnel, directs the security detail in the performance of the work.

17. Because most of these security professionals are operating in a war zone, the execution of security missions is dictated by the conditions on the ground and the direction of DOS. At no time during missions do the independent contractors supplied by Blackwater receive direction from Blackwater regarding how to perform their missions.

18. Blackwater – located in North Carolina, thousands of miles from the war zones where its contractors operate – plays no role in the development or planning of the contractors' security missions or the directions on implementing them. As a general matter, Blackwater does not station Blackwater employees in Iraq or Afghanistan.

19. The security professionals, under constant danger of attacks upon convoys and personnel, must routinely draw on their own judgment, creativity and problem-solving skills in order to complete their mission without injuries or fatalities.

20. Other Blackwater contracts, operated substantially the same as the WPPS contract, such that, once deployed, the security professionals take direction regarding performance from the U.S. Government representatives, not from Blackwater.

* * *

24. As a general matter, Blackwater's independent contractors do not report to Blackwater regarding their operations in-country. Only the program manager may, on an ad hoc basis, provide to Blackwater reports about lessons learned in the field in order to ensure that the WPPS training is up to date.

Based on the analysis in SBA's decision, discussed above, it appears that the SBA Area III Office misunderstood Mr. Jackson's affidavit at paragraph 21, which only applied to classified contracts, as applying to all Blackwater contracts for the provision of security services. The affidavit does indicate that personnel under unclassified contracts, such as the WPPS contract, were under broad supervision by the DOS, had to perform their work in accordance with detailed DOS regulations and procedures, and went on missions as directed by the DOS. However, the fact that DOS provided extensive general oversight did not preclude Blackwater from also performing some level of supervision. Contractors hired to perform services contracts for Federal agencies often do so under the supervision of, and in accordance with detailed procedures and regulations issued by, that agency.

It may be the case that Blackwater did not supervise the work on the WPPS contract and other unclassified contracts. Nevertheless, the information that the company provided to SBA simply did not support the SBA Area III Office's unequivocal conclusion that "Blackwater cannot supervise employment" on these contracts.

Finding 5. Failure to Consider Information that Blackwater Was the Employer of the Security Personnel For Purposes of the Defense Base Act. Presidential's submissions to SBA included information that Blackwater was considered to be the employer of the security personnel on the WPPS contract for purposes of the Defense Base Act. However, SBA did not appear to consider this information when it rendered its size determination.

Discussion: Our review of an Independent Contractor Services Agreement that Presidential submitted to SBA determined that this Agreement plainly stated that Blackwater was the statutory employer of the security personnel for purposes of the Defense Base Act, 42 U.S.C. § 1651. However, the size determination issued by SBA did not discuss the significance of this provision in terms of whether the security personnel were independent contractors. This raises additional questions about the SBA's decision.

CONCLUSION

The SBA size determination did not, in our opinion, present a clear explanation for why the Agency concluded that the security personnel performing the WPPS contract were independent contractors. In addition, we believe that SBA should have attempted to reconcile the discrepancies between the number of employees that Presidential claimed and the number of employees shown in the D&B reports that Pacific provided with its size protest. As noted above, the D&B reports indicated that the total number of employees, even excluding the security personnel hired under the WPPS and other federal contracts, was greater than 1,500. Further, the terms and conditions of the WPPS statement of work raised questions about SBA's conclusion that Blackwater had no knowledge of the activities of the deployed personnel and was unable to exercise supervision over these personnel. The Agency's conclusion that Blackwater had no supervisory ability also appears to have been a misunderstanding of the difference between Blackwater's performance of classified contracts and unclassified contracts. Finally, the Agency's decision is questionable since it did not appear to take into consideration the language in the independent security agreement concerning the Defense Base Act.

Had SBA considered the security personnel under the WPPS and other unclassified contracts to be employees, rather than independent contractors, it is possible that Presidential and the Blackwater affiliates may collectively have exceeded the 1,500-employee size standard. However, of the more than 1,000 security personnel identified by Blackwater, it is not known how many of these worked on the WPPS and other unclassified contracts. Mr. Jackson's affidavit notes that "many" of the independent contractors at issue worked on the WPPS contract, but also states that a "significant number" of these personnel worked on classified contracts. We could find no other information in the SBA file, and it does not appear that the Area III office requested Presidential to identify how many employees worked on the WPPS and other non-classified contracts.

We note, however, that a Congressional Research Service report issued on July 11, 2007 advised that it had obtained information from the DOS showing that, for the period of July 2005 to May 2007, Blackwater was providing a total of 987 personnel under the WPPS contract.⁴ Whether this number is comparable to the number of personnel provided in the time relevant to SBA's determination, June 2004 to June 2005, is unknown. To the extent it was comparable, and to the extent that SBA had concluded that Blackwater did supervise these security personnel, SBA could have found that Presidential was not a small business.

As noted above, Blackwater and its affiliated firms have obtained numerous contracts that were set-aside for small businesses during recent years. We have referred those contracts identified in our review of Fiscal Years 2005 through 2007 to the Offices of Inspector General in the relevant procuring agency for possible action.

Further, our review of this contracting data indicated that during these fiscal years, Blackwater affiliate Presidential has obtained six other contracts, totaling \$107,311,356, with assigned NAICS code 481212, which has alternate size standards of (1) \$25.5 million in revenues, or (2) if the primary purpose of the contract is to provide offshore marine air transportation services, 1500 employees. Four of these contracts, totaling \$109,093,655, were awarded after SBA issued its size determination on November 2, 2006. We could not determine whether the primary purpose of these contract involved offshore marine air transportation services so it is unclear whether these acquisitions involved potential misrepresentations by Presidential. However, as it appears likely that one or more of the Blackwater affiliates will bid on similar small business set-aside contracts in the future, SBA may want to examine its size decision to confirm whether it made the proper finding and determine whether it is appropriate for Blackwater affiliates to continue receiving small business set aside contracts.

⁴ J. Elsea and N. Serafino, Private Security Contractors in Iraq: Background, Legal Status and Other Issues, Congressional Research Service (July 11, 2007).

ATTACHMENT A

Affiliates of Blackwater Worldwide¹ Contracts Awarded As a Small Business Set-Aside Where Affiliate May Not Have Met Applicable Size Criteria FY 2005 through FY 2007

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
1.	Blackwater Lodge and Training Center, Inc. (012418161)	Department of Army	\$25,948	06/23/2007	Yes	339999: All Other Miscellaneous Manufacturing 500	Small	None. ⁶
2.	Blackwater Lodge and Training Center, Inc. (012418161)	Dept. of Veterans Affairs	\$41,190 ⁷	12/20/2004	Yes	611710: Educational Support Services \$6.5 Million	Small	None. ⁸
3.	Blackwater Target Systems LLC (088500793)	Dept. of Navy	\$194,784	08/30/2006	Yes-Partial	111998 All Other Miscellaneous Crop Farming \$750,000	Small	None. ⁹

¹ Previously known as Blackwater USA. According to information submitted by Presidential Airways, Inc. in a 2006 Size Determination, Blackwater Worldwide is not a separate legal entity, but a DBA used by various entities. Presidential Airways, Inc. asserted at that time that it was one of 29 such affiliates.

² Negative amounts (including deallocations) are underlined.

³ Size standards taken from SBA Table of Small Business Size Standards effective March 11, 2008 and listed in **bold**.

⁴ Information in this column is from USASpending.gov. Footnotes are used to note apparent discrepancies between this information and that taken from Online Representations and Certifications Application (ORCA) (<https://orca.bpn.gov/>). ORCA is an e-Government initiative that was designed so that government contractors can provide representations and certifications, such as whether it is a small business, on-line rather than in paper form.

⁵ This column has information about the contractors' size certifications in ORCA. An entry of "None" in this column means that there is no size certification listed in the ORCA archives for this company for this NAICS code as of the date the contract was signed. Footnotes are used to indicate where the database has a certification from the contractor for that period for some other NAICS code.

⁶ Blackwater Lodge's only certification for this date listed in ORCA covered a different NAICS code (i.e., 611699, All Other Miscellaneous Schools and Instruction (\$6.5 Million)). That certification was for the period 11/29/2006 to 11/29/2007, and Blackwater Lodge represented itself as not being small.

⁷ USA Spending lists "Ultimate Contract Value" as \$96,110.

⁸ There is no ORCA entry for this contractor for this date.

⁹ ORCA has no archived certifications for Blackwater Target Systems. There is only a current certification for the period 09/26/2007 to 09/26/2008 in which Blackwater Target Systems claims to be small for two unrelated NAICS codes, 236220 (\$31 million) and 336992 (1000).

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
4.	Blackwater Target Systems LLC (088500793)	U.S. Special Operations Command	\$23,800	02/24/2005	Yes	611699 All Other Miscellaneous Schools and Instruction \$6.5 Million	Small	None. (See Footnote 8)
5.	Blackwater Target Systems LLC (088500793)	U.S. Special Operations Command	\$22,600	10/21/2004	Yes	611699 All Other Miscellaneous Schools and Instruction \$6.5 Million	Small	None. (See Footnote 8)
6.	Blackwater Target Systems LLC (088500793)	U.S. Special Operations Command	\$10,631	02/14/2005	Yes	611699 All Other Miscellaneous Schools and Instruction \$6.5 Million	Small	None. (See Footnote 8)
7.	Presidential Airways, Inc. ¹⁰ (123207164)	Dept. of Navy	\$4,111,907 -\$2,958,103	03/19/2007	Yes	481212 Nonscheduled Chartered Freight Air Transportation 1,500 Except Offshore Marine Air Transportation \$25.5 Million	Small	Small, "With Exceptions" for the period 8/3/06 to 7/7/07. See Footnote ¹¹
8.	Presidential Airways, Inc. (123207164)	Dept. of Army	\$83,650	08/02/2007	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	None. ¹²

¹⁰ USASpending.gov lists EP Investments, LLC (DUNS: 138829747) as the parent company and Presidential Airways, Inc. as the contract vendor for all the set aside contracts included in this chart.

¹¹ The relevant ORCA entry states: "NAICS code with exceptions. Vendor will provide information in Section K in the solicitation with specific offers to the Government." A more recent ORCA entry states Presidential Airways is NOT small for NAICS codes 481211 and 481212 for the period 07/07/2007 to 03/07/2008.

¹² There is no valid ORCA entry for that NAICS code on that date, but as late as 2/10/06 Presidential Airways represented it was NOT small for the same NAICS code (532411).

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
9.	Presidential Airways, Inc. (123207164)	Dept. of Navy	\$91,039,572 ¹³	02/27/2007	Yes	481212 Nonscheduled Chartered Freight Air Transportation 1,500 Except Offshore Marine Air Transportation \$25.5 Million	Small	Small, "With Exceptions, for the period 8/3/06 to 7/7/07. See Footnote 10.
10.	Presidential Airways, Inc. (123207164)	Dept. of Navy	\$0.00 ¹⁴	03/15/2007	Yes	481212 Nonscheduled Chartered Freight Air Transportation 1,500 Except Offshore Marine Air Transportation \$25.5 Million	Small	Small, "With Exceptions, for the period 8/3/06 to 7/7/07. See Footnote 10.
11.	Presidential Airways, Inc. (123207164)	Dept. of Navy	\$15,095,980 ¹⁵	09/26/2007	Yes	481212 Nonscheduled Chartered Freight Air Transportation 1,500 Except Offshore Marine Air Transportation \$25.5 Million	Small	Not small for the period 7/7/07 to 3/07/08.
12.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$299,100	10/31/2005	Yes	488190 Other Support Activities for Air Transportation \$6.5 Million	Small	Not small for the period 6/10/05 to 11/29/05.
13.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$274,100	03/09/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.

¹³ USA Spending lists "Dollars Obligated" as \$0.00, and "Ultimate Contract Value" as \$91,039,572.

¹⁴ USA Spending lists both "Dollars Obligated" and "Ultimate Contract Value" as \$0.00.

¹⁵ USA Spending lists "Dollars Obligated" as \$0.00, and "Ultimate Contract Value" as \$592,884.

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
14.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$208,950	01/30/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 11/29/05 to 2/10/06.
15.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$79,900	01/06/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 11/29/05 to 2/10/06.
16.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$42,200	03/30/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
17.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$35,650	05/05/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
18.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$29,800	02/24/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
19.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$20,400	10/28/2005	Yes	488190 Other Support Activities for Air Transportation \$6.5 Million	Small	Not small for the period 6/10/05 to 11/29/05.

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
20.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$16,000	02/22/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06
21.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$14,400	11/30/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 11/29/05 to 2/10/06.
22.	Presidential Airways, Inc. (123207164)	Department of the Army	\$12,800	03/03/2006	Yes	481211 Nonscheduled Chartered Passenger Air Transportation 1,500 Except, Offshore Marine Air Transportation Services \$25.5 Million	Small	Small "with exceptions" for the period 2/10/06 to 8/3/06.
23.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$12,400	08/16/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	None. ¹⁶

¹⁶The only ORCA certification for this period covers 481211 & 481212. In their previous certification (period ending 11/29/05) this contractor said they were NOT small for NAICS code 532411.

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
24.	Presidential Airways, Inc. (123207164)	Dept. of Navy	\$9,200	06/09/2006	Yes	481211 Nonscheduled Chartered Passenger Air Transportation 1,500 Except, Offshore Marine Air Transportation Services \$25.5 Million	Small	Small "with exceptions" for the period 2/10/06 to 8/3/06.
25.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$8,000 ¹⁷	12/14/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 11/29/05 to 2/10/06.
26.	Presidential Airways, Inc. (123207164)	Same	\$8,000	03/14/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
27.	Presidential Airways, Inc. (123207164)	Same	\$8,000	04/05/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
28.	Presidential Airways, Inc. (123207164)	Same	\$8,000	01/10/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 11/29/05 to 2/10/06.

¹⁷ This and the next three listings may be task orders on the same contract, since amount is identical, but they appear as separate contracts in the USASpending.gov database, so they are listed the same way.

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
29.	Presidential Airways, Inc. (123207164)	Same	\$8,000	02/10/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
30.	Presidential Airways, Inc. (123207164)	Same	\$7,750	06/13/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 2/10/06 to 8/3/06.
31.	Presidential Airways, Inc. (123207164)	Same	\$6,400	11/01/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 6/10/05 to 11/29/05.
32.	Presidential Airways, Inc. ¹⁸ (123207164)	Same	\$6,400	11/01/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 6/10/05 to 11/29/05.
33.	Presidential Airways, Inc. (123207164)	Same	\$6,200	08/25/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	None for this NAICS code during the relevant period (8/3/06 to 7/7/07). During previous period (2/10/06 to 8/3/06) this contractor certified as NOT small for this NAICS code.

¹⁸ This entry from USASpending.gov is a possible duplicate, since amounts, dates and NAICS codes are the same as the previous entry.

	Affiliate Name (DUNS)	Agency	Contract Amount ²	Date Signed	Small Bus. Set-aside?	NAICS ³ Code(s)	Pref(s) Claimed? ⁴	ORCA Size Cert.? ⁵
34.	Presidential Airways, Inc. (123207164)	Same	\$5,600	01/01/2006	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 11/29/05 to 2/10/06.
35.	Presidential Airways, Inc. (123207164)	Same	\$3,200	10/03/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	Not small for the period 6/10/05 to 11/29/05.
36.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$512,800	02/17/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	None for this period. During the next period (starting 6/10/05) they certified as NOT small for this NAICS code).
37.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$136,700	11/23/2004	Yes	488999 All Other Support Activities for Transportation \$6.5 Million	Small	None for this period. During the next period (starting 6/10/05) they certified as NOT small for this NAICS code).
38.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$38,000	02/09/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	None for this period. During the next period (starting 6/10/05) they certified as NOT small for this NAICS code).
39.	Presidential Airways, Inc. (123207164)	U.S. Special Operations Command	\$3,187	05/17/2005	Yes	532411 Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing \$6.5 Million	Small	None for this period. During the next period (starting 6/10/05) they certified as NOT small for this NAICS code).

ATTACHMENT B

SIZE DETERMINATION MEMORANDUM FILE NUMBER 3-2007-3-4-5

PROTESTED CONCERN: Presidential Airways, Inc. ("PA")

PROCUREMENT: N00033-05-R-1004

NAICS CODE: 481212

SIZE STANDARD: 1,500 Employees

INTRODUCTION: On October 27, 2006, the Atlanta Area III SBA Government Contracting office received a package from Presidential Airways, Inc. in response to three size protests filed by GEO-SEIS Helicopters, Inc., Fort Collins, CO (case number 3-2007-4), GCH Services, LLC dba Gold Coast Helicopter, Glendale, AZ (case number 3-2007-3) and Pacific Helicopter Tours, Inc., Kahului, HI (case number 3-2007-5). The captioned procurement was issued by the Department of the Navy, Military Sealift Command (MSC) to provide Vertical Replenishment Services on board Guam based MSC vessels. All three of the protests against PA allege that PA may be affiliated with Aviation Worldwide Services, LLC, Blackwater USA and Prince Group, LLC, along with other associates, subsidiaries and partnerships. The protestors indicated that PA is employing independent contractors who are employed with Blackwater Security Consulting owned by Blackwater USA and maybe other affiliated companies and must therefore exceed the size standard of 1,500 employees. All three protests were received within five business days after the protestors received identification of the successful offerors, and are timely.

RESPONSE: In response to the protest allegations, PA submitted SBA Form 355, *Application for Size Determination*, and other information. PA has provided all corporate documents for all possible affiliates. In reviewing the index there appear to be 29 different affiliates. Blackwater USA is not a separate legal entity, it is a name under which various Blackwater entities are doing business as (DBA).

1	Air Quest, Inc.
2	Alliance Canine Solutions LLC
3	Aviation Worldwide Services, L.L.C.
4	Blackwater Lodge and Training Center, Inc.
5	Blackwater Security Consulting LLC
6	Blackwater Target Systems LLC
7	Blackwater (UK) Limited
8	Damocles Solutions LLC
9	E & J Holdings, L.L.C.
10	E & J Leasing, L.L.C.
11	EP Aviation, LLC
12	EP Investments, L.L.C.
13	Greystone Limited
14	Greystone North America LLC
15	Presidential Airways, Inc.
16	Prince Group, LLC
17	Prince Household, L.L.C.

18	Prince Manufacturing Corporation
19	Prince Manufacturing de Mexico
20	Prince Manufacturing Corporation Indiana
21	Prince Manufacturing Corporation North Carolina
22	Prince Manufacturing Corporation Oxford
	Raven Development Group LLC
24	Salamis Aviation Limited
25	STI Aviation, Inc.
26	Townview Properties LLC
27	Townview Properties Management, Inc.
28	
29	Security Management Solutions, Inc.

PA does not dispute that the above referenced companies' affiliation. On the captioned requirement, the date of self certification was July 13, 2005. The average number of employees for Presidential and all affiliates for the fiscal year ending June 2005 is well below the 1,500 size standard. However, if the independent contractors are to be considered as "employees", then PA would exceed the 1,500 employee size standard. Therefore, the issue of more than 1,000 independent contractors working for Blackwater USA needs to be reviewed to determine if these individuals are employees.

To determine whether SBA considers an independent contractor as an employee, SBA considers the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes.

121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

SBA reviews the following factors in determining whether an independent contractor is an employee: Who hires the employee, who pays the employee and are employment taxes withheld and any employment benefits received, who supervises the employee and who terminates or reprimands employees for performance issues.

Specifically, Blackwater hires the contractor under the specific criteria determined by the Department of State (DOS) who then approves each candidate before employment is offered. Blackwater provides training then turns over the contractors to the DOS representatives in the field.

Blackwater pays the contractor a daily rate for each day they are deployed but does not withhold taxes or provide employment benefits.

Blackwater cannot supervise employment because of proximity (contractors are working outside this country) and contractor takes direction and orders from DOS or the government entity issuing the classified contracts.

Furthermore, Blackwater has the power to dismiss the contractor with DOS approval but must obtain DOS approval before substituting the contractor with a new person. DOS would normally initiate such personnel actions.

In applying the above standards and reviewing the criteria used by the IRS for Federal income tax purpose which include, training, services rendered personally, hiring, supervising, and paying assistants, set hours of work, doing work on employer's premises, furnishing of tools and materials, right to terminate etc. SBA finds that Blackwater security contractors are not employees. Further, the above captioned regulatory authority does not permit SBA to count independent contractors as employees. We also found no case precedents set by SBA Office of Hearing & Appeals where independent contractors were determined to be employees. Subsequently, we find that PA is small for the purposes of this size determination because PA has less than 1,500 employees under the applicable size standard.

[FOIA Ex 6]

Mitchell Morand
Area Director

Date Decided: 11/2/06