



**U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416**

OFFICE OF THE ADMINISTRATOR

October 24, 2007

The Honorable John F. Kerry
Chairman
Committee on Small Business and entrepreneurship
United States Senate
Washington, DC 20510

Dear Chairman Kerry:

Thank you for your letter of October 23, 2007, concerning the recent press articles about Blackwater USA and the employment status of its workers. My staff recently made some information available to Chairman Waxman of the House Committee on Oversight and Government Reform and I would like to share it with you in response to your inquiry.

On November 2, 2006, the U.S Small Business Administration (SBA) issued a size determination regarding Presidential Airways, an affiliate of Blackwater. This determination was in response to a size protest filed with SBA on a Department of the Navy, Military Sealift Command procurement (N00033-05-R-1004). The SBA found that Blackwater personnel in question were not employees, and therefore Presidential Airways did not exceed the applicable size standard. I have enclosed a copy of the decision.

SBA incorporates IRS tax criteria as an element in determining whether personnel are employees, in matters where the size standard is based on a concern's average number of employees. However, SBA's size determinations are solely for the purposes of ascertaining eligibility for our small business programs and have no applicability to tax liability matters.

If you or your staff have any other questions on this matter please feel free to contact C.E. "Tee" Rowe, Assistant Administrator for Congressional Affairs, at 205-6703.

Sincerely yours,

Steven C. Preston

Enclosure

**SIZE DETERMINATION MEMORANDUM
FILE NUMBER 8-2007-3-4-5**

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

PROCUREMENT: N00088-05-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
23	Raven Development Group LLC
24	Salamis Aviation Limited
25	STI Aviation, Inc.
26	Townview Properties LLC
27	Townview Properties Management, Inc.
28	Trident VIII LLC
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.

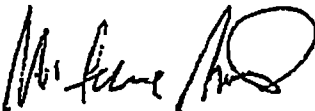
Specifically, Blackwater hires the contractor under the specific criteria determined by the Department of State (DOS) who then approves each candidate before employment is offered. Blackwater provides training then turns over the contractors to the DOS representatives in the field.

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.



Mitchell Morand
Area Director

Date Decided: 11/2/06

SIZ-4833

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEALS OF:)	
)	
Geo-Seis Helicopters, Inc.)	Docket Nos. SIZ-2006-12-21-76 (PFR)
)	SIZ-2006-11-06-64
and)	SIZ-2006-11-07-67
)	
GCH Services, LLC. d/b/a Gold Coast Helicopters)	Decided: January 25, 2007
)	
Appellants)	
)	
RE: Presidential Airways, Inc.)	
)	
Solicitation No. N00033-05-R-1004)	
Department of the Navy)	
Military Sealift Command, N1021/PM1)	
Washington Navy Yard, D.C.)	

APPEARANCES

Robert K. Stewart, Jr., Esq.
Davis Wright Tremaine LLP
for Appellant Geo-Seis Helicopters, Inc.

David C. Hammond, Esq.
John E. McCarthy, Jr., Esq.
Adelicia Cliffe Tayler, Esq.
Crowell & Moring LLP
for Presidential Airways, Inc.

DIGEST

An issue which an appellant has raised in its protest but has failed to raise in its appeal has been abandoned, and need not be considered in the adjudication of the size appeal.

This Office will not require an Appellant to explicitly and affirmatively abandon an issue on appeal that it raised in its protest in order to find unequivocal proof of abandonment. Rather, the failure to mention or refer to the issue in the appeal and the failure to attach or incorporate by

SIZ-4833

- 2 -

reference the original protest is enough to constitute unequivocal proof of abandonment of the issue.

DECISION

HOLLEMAN, Administrative Judge:

Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

I. BACKGROUND

A. The Original Decision

For the background on this case, please see the original decision in this case, *Size Appeals of Geo-Seis Helicopters, Inc. and GCH Services, d/b/a Gold Coast Helicopters*, SBA No. SIZ-4826 (2006) (*Geo-Seis I*).

Briefly, on May 20, 2005, the Department of Navy, Military Sealift Command, issued the subject solicitation for helicopter replenishment services. The Contracting Officer (CO) issued the solicitation as a 100% small business set-aside per Amendment 0005 and designated North American Industry Classification System (NAICS) code 481212, Nonscheduled Chartered Freight Air Transportation, with a corresponding 1,500 employee size standard, as the applicable NAICS code for this procurement.

On October 4, 2006, the CO notified the unsuccessful offerors that Presidential Airways, Inc. (Presidential) was the apparent successful offeror. Geo-Seis Helicopters, Inc. (Geo-Seis) and GCH Services, LLC. d/b/a Gold Coast Helicopters (GCH) filed size protests asserting that Presidential was other than small due to its affiliation with Blackwater USA (Blackwater).

In its protest, Geo-Seis asserted Presidential is other than small because it is affiliated with Blackwater. Geo-Seis asserted that Blackwater has a large number of personnel it classifies as independent contractors who are in fact employees and should be counted as such, and that including those personnel in Blackwater's count of employees would render Presidential other than small.

On November 2, 2006, the Small Business Administration (SBA) Area III Office of Government Contracting in Atlanta, Georgia (Area Office) issued Size Determination No. 3-2007-3-4-5, finding Presidential a small business for the above-captioned procurement, after finding that "Blackwater security contractors are not employees."

SIZ-4833

- 3 -

Geo-Seis and GCH both filed *pro se* appeals challenging the Size Determination. Both appeals raised the same issue, challenging the NAICS code and size standard used in the Size Determination.

Geo-Seis began its appeal stating:

Appellant originally protested the small business size of Presidential Airways, Inc. on October 7, 2006, directly to the contracting officer of Solicitation # N00033-05-R-1004. This protest was based on the Small business Size Standard of 1500 employees set forth in the solicitation under NAISC [sic] Code number 481212 that is the correct NAISC [sic] Code for this industry title.

Geo-Seis Appeal, at 1, ¶ 1.

On November 15, 2006, this Office consolidated the appeals, and set November 30, 2006, as the date the Record would close.

On November 29, 2006, counsel for Geo-Seis filed a Notice of Appearance. On November 30, 2006, Geo-Seis filed a Motion for Extension of Time; Presidential opposed this Motion as untimely filed pursuant to 13 C.F.R. § 134.211(f). On December 1, 2006, after a telephone conference, I denied the Motion and extended the close of the Record until December 1, 2006. I also determined that the issue of whether Blackwater's contractors were to be counted as employees was not an issue in this appeal, as Appellants had not raised it in their Appeal Petitions.

On December 7, 2006, I dismissed the consolidated appeals. Both appeals were based upon challenges to the NAICS codes designation in the solicitation. As such, they were untimely NAICS code appeals and this Office was required to dismiss them. *Geo-Seis I*, at 3.

B. The Petition for Reconsideration

On December 21, 2006, Geo-Seis filed the instant Petition for Reconsideration (PFR) under 13 C.F.R. § 134.227(c). Geo-Seis argues that it did in fact raise the issue of the counting of contractor personnel in its appeal. Geo-Seis quotes its appeal as stating "This protest was based on the Small business Size of 1500 employees set forth in the solicitation under NAICS Code number 481212 that is the correct NAICS Code for this industry title." Geo-Seis asserts it made no affirmative statement abandoning the issue of whether Blackwater's contractor personnel should be counted as employees. Geo-Seis argues that, since it did not explicitly state it was abandoning the argument that Blackwater's contractors were actually employees, it cannot be held to have abandoned the argument. Geo-Seis argues that this Office's recent decision in *Size Appeal of Lance Bailey & Associates*, SBA No. SIZ-4799 (2006) (*Lance Bailey*) holds that because an Appellant does not know what evidence the Area Office used to decide its protest,

SIZ-4833

- 4 -

this Office will not find abandonment if an appellant reasserts or references a previous issue on appeal. Geo-Seis did not unequivocally state that it was abandoning this issue on appeal, and therefore it must be held to have preserved it.

On January 10, 2007, Presidential filed its opposition to the PFR. Presidential argues that a sentence which generally references the findings of the Area Office is insufficient to raise a particular issue not otherwise stated and supported by arguments. Presidential argues that Geo-Seis's original appeal made it clear that it was based upon the new arguments concerning the size standard. Thus, Geo-Seis failed to raise the issue of the status of Blackwater's contractor personnel, and it was not properly before this Office.

II. DISCUSSION

Geo-Seis filed its PFR within 30 days of service of the decision, and it is thus timely. 13 C.F.R. § 134.227(c).

The standard of review for a PFR is whether the Appellant has made a clear showing that this Office based its decision upon an error of fact or law material to that decision. 13 C.F.R. § 134.227(c). That is, the PFR must support a definite and firm conviction that the Administrative Judge made an error of fact or law material to the original decision. *Lance Bailey*, at 6.

It is this Office's settled law that an issue which an appellant has raised in its protest but has failed to raise in its appeal has been abandoned, and need not be considered in the adjudication of the size appeal. 13 C.F.R. § 134.316(a); *Size Appeal of the Apex Group, Inc.*, SBA No. SIZ-4300 (1998).

In *Lance Bailey*, we expanded on the criteria for considering an issue abandoned:

[I]f an appellant reasserts or references a previous issue on appeal (even if the appellant does not discuss it as thoroughly as in the initial protest), this Office will not find abandonment. Alternatively, if an appellant appends its protest to the appeal petition and refers to it, we will not find abandonment of issues raised therein unless the appellant says it is abandoning that issue. Thus, I hold we will not find abandonment under 13 C.F.R. § 134.316(a) absent unequivocal proof of abandonment of an issue.

Lance Bailey, at 8.

Here, Geo-Seis's appeal did not refer to the issue of whether Blackwater's contractor personnel were actually employees. It did not reassert its previous position on the issue. Geo-Seis did not attach a copy of its protest to its appeal, nor did it incorporate by reference the arguments in its protest. The appeal's paragraph 1, quoted above, recites the fact that it protested

SIZ-4833

- 5 -

Presidential's size, and states that the protest was based on the 1,500 employee size standard of NAICS code 481212. This is not an incorporation by reference of the protest, merely a recitation that it took place. There is no reference whatsoever to the argument that Blackwater's contractors should be counted as employees. The only reference to a substantive issue is to the size standard that Geo-Seis will challenge in the subsequent paragraphs of its appeal. Nowhere in Geo-Seis's appeal does it address the issue of whether Blackwater's contractors are actually employees. Geo-Seis never raised the issue, except in its untimely motion of November 30th, which I denied.

Therefore, Geo-Seis's appeal does not meet any of the criteria in *Lance Bailey* for preserving an issue on appeal. This Office will not require an Appellant to explicitly and affirmatively abandon an issue on appeal that it raised in its protest in order to find unequivocal proof of abandonment. Rather, the failure to mention or refer to the issue in the appeal, and the failure to attach or incorporate by reference the original protest is enough to constitute unequivocal proof of abandonment of the issue. Accordingly, Geo-Seis's argument that it did not abandon the issue is without merit.

Therefore, I conclude that Geo-Seis has failed to establish any clear error of law or fact in the decision in *Geo-Seis I*, and I DENY the PFR.

III. CONCLUSION

For the above reasons, the Petition for Reconsideration is DENIED and this Office's decision in *Geo-Seis I* is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge