



U.S. SMALL BUSINESS ADMINISTRATION
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OFFICE OF THE ADMINISTRATOR

December 3, 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 recent letter requesting additional information on the U.S. Small Business Administration's (SBA's) size determination (Case 3-2007-3-4-5) regarding Presidential Airways, Inc. an affiliate of Blackwater USA. Below is a response to each of your questions.

A thorough analysis of the size determination made regarding Blackwater: Based on a review of documentation provided by Presidential Airways, SBA Government Contracting Area Office had a reasonable basis for concluding that Presidential Airways was an eligible small business under the 1,500-employee size standard of the Department of the Navy, Military Sealift Command, assigned to its solicitation (N00033-05-R-1004). At issue in the size determination was whether Blackwater's security personnel were independent contractors or employees. Presidential Airways represented to SBA that Blackwater had always represented to the Internal Revenue Service (IRS) that its security personnel were independent contractors. Presidential Airways also submitted various documentation to support its argument, including a legal brief, an affidavit, portions of Blackwater's contract with the State Department, and a copy of Blackwater's independent contractor agreement which explicitly informed each signatory that he or she is an independent contractor and, consequently, responsible for all Federal employment tax obligations. The information appeared sufficient for SBA to accept without further review. It appears that Blackwater designated its security guard personnel as independent contractors based on various business considerations, and not in an effort to evade SBA's small business size regulations.

On March 30, 2007, five months after SBA's size determination, IRS advised Blackwater that it rejected the designation of one security professional as an independent contractor. It is our understanding that Blackwater has appealed that decision.

The information that was relied on in making the size determination: It is our understanding that Presidential Airways has already supplied the underlying materials to the Committee.



The Honorable John F. Kerry

The number of employees and independent contractors Blackwater and each of its affiliates or related companies listed in Size Determination Memorandum File Number 3-2007-3-4-5 were determined to have through SBA's analysis: SBA accepted Presidential Airways information concerning the number of its employees and those of its affiliates. The information Presidential Airways is providing to the Committee is the same as it had submitted to SBA for purposes of determining average number of employees.

The number (and location) of site visits that were done to confirm any information Blackwater or its affiliates provided:

SBA relies on information provided by the protesters and the protested firm, as well as information it may obtain from other sources, such as Dun & Bradstreet, in assessing a business concern's eligibility as a small business. In this particular case, Presidential Airways provided sufficient documentation on its affiliates and their number of employees to base a decision on the written record. SBA does not conduct site visits, these would be costly and largely ineffective as many businesses have multiple workplaces.

How the SBA used the Twenty Factor Common Law Test in making the size determination: In determining whether an individual is an employee of a business concern, SBA examines the "totality of the circumstances," which may include the criteria used by IRS for Federal income tax purposes (see 13 CFR § 121.106(a)). SBA considered many of the IRS' Twenty Factors in reviewing Blackwater's basis for designating security personnel as independent contractors. These factors included training, services rendered personally, hiring, supervising, paying assistants, set hours of work, doing work on employer's premises, furnishing of tools and materials, and right to terminate. Based on these factors and the "totality of the circumstances", SBA concluded these were independent contractors.

Any additional materials related to other size determinations involving Blackwater USA or any of its affiliates: Information from other size determinations involving these companies were not used for this size determination.

Whether SBA has a formal policy about how to deal with the status of workers in combat zones in future procurements: SBA has no separate policy for classifying workers in combat zones.

If you or your staff have any further questions on this matter, please contact C. E. "Tee" Rowe, Assistant Administrator for Congressional and Legislative Affairs, at (202) 205-6703.

Sincerely yours,



Steven C. Preston