

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

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SIZE APPEAL OF:)
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Columbus Technologies and Services, Inc.	Docket No. SIZ-2006-11-06-65)
)
Appellant	Decided: January 16, 2007)
)
Solicitation No. W91CRB-06-R-0005)
Department of the Army)
RDECOM Acquisition Center)
Aberdeen Proving Ground, MD)
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APPEARANCE

Pamela J. Mazza, Esq., Jennifer L. Andrews, Esq., Piliero Mazza PLLC,
Washington, D.C., for Appellant, Columbus Technologies and Services, Inc.

DECISION

PENDER, Administrative Judge:

Jurisdiction

This appeal arises from an October 13, 2006 size determination (Case No. 6-2007-005) (size determination) finding Columbus Technologies and Services, Inc. (Appellant) to be other than a small business. The size determination stems from an October 2, 2006 protest by R&D Training & Technical Services, Inc. (R&D or Protestor). The Area Office determined Appellant to be other than small for the subject solicitation and any future Government procurements subject to a size standard of average annual receipts of \$6.5 million.

Appellant filed its Appeal Petition on November 6, 2006, to SBA's Office of Hearings and Appeals (OHA). 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.

Issue

Whether the Area Office made a clear error of fact or law when it failed to exclude from Appellant's 2004 annual receipts a gain from the purchase of Appellant's subsidiary, concluding that such gain did not qualify for the exclusion in 13 C.F.R. § 121.104(a) for "proceeds from transactions between a concern" and its affiliates.

Facts

1. On February 28, 2006, the Department of the Army, RDECOM Acquisition Center (Army) in Aberdeen, Maryland, issued Solicitation No. W91CRB-06-R-0005 (the RFP). The RFP is for Professional, Technical, and Administrative Services for Cooperative Administrative Support Unit (CASU). The RFP was assigned North American Industry Classification System (NAICS) code 541990 for Contract Line Item Numbers (CLIN) 0001 and 0002, with an unrestricted size standard. CLIN 0003 was assigned NAICS code 561110, with a corresponding \$6 million size standard.¹ Amendment 3 to the RFP established May 10, 2006, as the deadline for initial proposals.

2. Appellant submitted a proposal under the RFP on May 4, 2006 and self-certified as a small business under NAICS code 561110.

3. On September 20, 2006, the Army notified unsuccessful offerors, via U.S. Postal Service priority mail, that one of the four apparent successful offerors for CLIN 0003 was Appellant. The Army did not send the notifications in a manner that provided for verification of receipt by the unsuccessful offerors.

4. On October 2, 2006, R&D filed a protest challenging Appellant's small business size status.

5. On October 5, 2006, the Contracting Officer (CO) forwarded R&D's protest of Appellant's size status to the Small Business Administration (SBA), Area VI Office of Government Contracting in San Francisco, California (Area Office). The Area Office determined that the protest was timely based on R&D's assertion in their protest that it received the notification to unsuccessful offerors on September 25, 2006.

6. On October 5, 2006, the Area Office informed Appellant of the need to submit information in response to the size protest. On October 9, 2006, Appellant submitted its response, a completed SBA Form 355, IRS Form 4506, Appellant's Articles of Incorporation and By-Laws, Appellant and its affiliates last annual statement to

¹ The SBA published an interim final rule on December 6, 2005, adjusting revenue-based size standards for inflation. 70 Fed. Reg. 72577 (2005). For federal procurements, the new size standards became effective January 5, 2006. Since this procurement was issued on February 28, 2006, after the effective date for the inflation adjustment, the new size standard of \$6.5 million was used to determine Appellant's size status.

shareholders, and Appellant's complete financial statements and income tax returns for the last three fiscal years preceding Appellant's self-certification as small.

7. In its written response to the protest Appellant asserted:
 - a. Its revenues for the years 2003, 2004, and 2005 were \$17,325, \$7,426,960, and \$12,036,934 respectively. These revenues average over three years to \$6,493,740, which is less than the \$6.5 million size standard; and
 - b. The Protestor incorrectly concluded that company size can be determined from awarded contract values and number of office locations and employees.

Accordingly, Appellant argued that it is a small concern under the applicable \$6.5 million size standard.

The Size Determination

The Area Office issued size determination 6-2007-005 on October 13, 2006. Since Appellant self-certified as a small business concern on May 4, 2006, the Area Office determined Appellant's size status using fiscal years 2005, 2004, and 2003. *See* 13 C.F.R. §§ 121.104(c), 121.404(a). Since the SBA defines "receipts" as "cost of goods sold" plus "total income" as reported on IRS tax return forms (13 C.F.R. § 121.104(a)), the Area Office combined Line 2 (Cost of Goods Sold) and Line 6 (Total Income) on Appellant's IRS Form 1120S (for S Corporations) for the applicable years and found that the average annual receipts exceeded the \$6.5 million size standard for the purposes of the subject solicitation and all future Government procurements with a \$6.5 million size standard.

On October 17, 2006, Appellant filed a Request to Reopen its Size Determination for the same reasons set forth in its appeal (see below). On October 20, 2006, the Area Office denied Appellant's Request to Reopen the Size Determination because there was "no clear administrative error or mistake of fact." Specifically, the Area Office asserted that the "exclusion of inter-affiliate transitions [sic] is intended to prevent 'double counting' of receipts received by both a parent company and its subsidiary" and that the income from Appellant's inter-affiliate transaction does not fit the exception because those dollars have not been double counted.

The Appeal

The Area Office faxed Appellant the size determination on October 13, 2006. Appellant filed its Appeal Petition on November 6, 2006. Appellant alleges that the Area Office made a clear error of law when it failed to exclude Appellant's gain of \$40,818 from the purchase of its subsidiary, Columbus Space and Science, Inc. (CSS), from its 2004 annual receipts. *See* 13 C.F.R. § 121.104(a). Specifically, on Appellant's 2004 tax return, it reported a total of \$44,969 of "other income" (Line 5), of which \$40,818 was a gain on the purchase of its subsidiary, CSS. Appeal Petition, at 4. Appellant asserts that

this does not represent revenue but was “purely a balance sheet transaction.” Appeal Petition, at 4-5. Pursuant to 13 C.F.R. § 121.104(a), Appellant contends that proceeds from inter-affiliate transactions should be excluded from the calculation of annual receipts. Accordingly, if the Area Office had excluded these proceeds, only \$4,151, not \$44,969, in “other income” would have been considered in calculating Appellant’s 2004 receipts. *Id.* at 5. Therefore, Appellant asserts that the annual receipts for 2004 should be \$7,431,111, not \$7,471,929, bringing Appellant’s average annual receipts for the last three years to \$6,495,199.67, below the \$6.5 million size standard.

Discussion

I. Introduction

This appeal turns on the meaning of the exclusion in 13 C.F.R. § 121.104(a) for receipts from “proceeds from transactions between a concern and its domestic or foreign affiliates.” Specifically, whether the Area Office incorrectly failed to exclude \$40,818 attributable to Appellant’s acquisition of its subsidiary from its calculation of Appellant’s 2004 receipts on Appellant’s IRS 1120S Tax Return, Line 5.

When Appellant challenged the Area Office about its inclusion of the \$40,818 in its 2004 receipts, the Area Office explained the purpose of the exclusion is to prevent double counting of receipts received by both a parent company and its subsidiary. Since double counting did not occur, the Area Office felt its position was correct. As I will explain later, the Area Office’s logic is correct and in accord with the plain meaning of 13 C.F.R. § 121.104(a). Accordingly, the Area Office did not make a clear error of fact or law in its size determination.

II. Applicable Law

A. Timeliness

The time for filing size appeals with OHA is governed by 13 C.F.R. § 134.304, which, in relevant part, states:

§ 134.304 Commencement of appeals from size determinations and NAICS code designations.

(a) Appeals from size determinations and NAICS code designations must be commenced by filing and serving an appeal petition as follows:

(1) If the appeal is from a size determination in a pending procurement or pending Government property sale, then the appeal petition must be filed and served within 15 days after appellant receives the size determination;

(2) If the appeal is from a size determination other than one in a pending procurement or pending Government property sale, then the appeal petition must be filed and served within 30 days after appellant

receives the size determination;

...

(b) An untimely appeal will be dismissed. However, an appeal which is untimely under paragraph (a)(1) of this section, with respect to a pending procurement or sale, may, if timely under paragraph (a)(2) of this section, proceed with respect to future procurements or sales.

In *Size Appeal of Blaine Larsen Farms, Inc.*, SBA SIZ No. 4743 (2005) at 5-6 (*Blaine Larsen*), OHA explained the meaning of “pending procurement” in 13 C.F.R. § 134.304 in light of FAR 2.101. OHA held that as long as there is a continuing procurement action to meet the Federal Government’s needs, there is a pending procurement, even if there has been award of the contract. All active solicitations or contracts are thus encompassed by this definition.²

B. Standard of Review

The standard of review for size appeals is whether the Area Office based its size determination upon a clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant’s size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. (*See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review.) Consequently, I will disturb the Area Office’s size determination only if I have a definite and firm conviction the Area Office erred in making a key finding of fact or law. Thus, I must evaluate whether the Area Office: (1) Properly considered available and relevant facts; (2) Evaluated the arguments of the parties; and (3) Correctly applied the regulations and law to the relevant facts in making its size determination.

C. 13 C.F.R. § 121.104(a) and Applicable Regulatory History

Section 121.104(a) provides, in relevant part:

(a) Receipts means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income,

² Although unlikely to occur, it would also apply to a procurement with a termination for default.

such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; *proceeds from transactions between a concern and its domestic or foreign affiliates*; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

(emphasis added).

While 13 C.F.R. § 121.104(a) is not unclear, its history explains why the Area Office stated that its purpose was to prevent double counting of receipts.

In 2004, SBA revised 13 C.F.R. § 121.104(a) by removing the requirement that there be a consolidated return for the claiming of an exclusion for interaffiliate transactions. 69 Fed. Reg. 29192, 29196 (May 21, 2004). In its commentary, SBA explained that it understood that not all firms file consolidated returns, but that these amounts should nonetheless still be excluded. This is because the filing of a consolidated return should have no bearing on whether properly documented interaffiliate transactions should be excluded from annual receipts because “[t]o do otherwise would be to count such amounts twice.” 69 Fed. Reg. 29192, 29197 (May 21, 2004).

III. Analysis of the Merits

A. Timeliness

The Area Office issued its size determination on October 13, 2006, and faxed the size determination to Appellant on the same date. Appellant filed its appeal on November 6, 2006. For the reasons explained in *Blaine Larsen*, I hold the instant procurement was pending as of the date of the Area Office's size determination.

An appeal from a size determination in a pending procurement must be filed

within 15 days after an appellant receives the size determination. 13 C.F.R. § 134.304(a)(1). Appellant filed the instant appeal more than 15 days, but less than 30 days after receiving the size determination. Under these facts, I hold the instant appeal is not timely for the RFP and is DISMISSED. Hence, the Area Office's size determination stands for this procurement. However, Appellant's appeal is timely for future procurements. 13 C.F.R. § 134.304(a)(1), (a)(2), and (b). Therefore, what follows is my analysis of the merits of the instant appeal that apply to future procurements only.

B. Did the Area Office Correctly Include \$40,818 in Appellant's 2004 Receipts?

While the Area Office's recitation of the policy reason for exclusions in 13 C.F.R. § 121.104(a) is correct, the plain meaning of the regulation is not applicable to the \$40,818 gain reported on Line 5 of Appellant's 2004 tax return. Specifically, the exclusion addresses "proceeds from *transactions between* a concern" and its affiliates. 13 C.F.R. § 121.104(a) (emphasis added).

The language "transactions between a concern" and its affiliates does not apply to the one-way reassignment of assets from a subsidiary to the books of its parent. Gains or income from an acquisition of a subsidiary are not proceeds from *transactions between* the parent and its subsidiary. That is, the gain on Line 5 does not involve, for example, a parent company purchasing an item manufactured by its subsidiary and then reselling the item to a third party, which is the kind of transaction 13 C.F.R. § 121.104(a) addresses. In short, the gain represented by the \$40,818 on Line 5 of Appellant's 2004 tax return is not the kind of gain that is susceptible to double counting as anticipated by the regulation.

In consideration of the foregoing, I cannot hold that the Area Office made either a clear error of law or fact in finding that \$40,818 is not excluded from Appellant's 2004 receipts under 13 C.F.R. § 121.104(a).

Summary

Appellant filed its appeal too late to have any effect on the instant procurement. In addition, the Area Office correctly included the \$40,818 in 2004 income that Appellant disputes. Accordingly, I hold that the Area Office's determination that Appellant is an other than small concern under NAICS code 561110 is not based upon a clear error of law or fact.

Conclusion

The instant appeal is DISMISSED insofar as it applies to the instant RFP. With regard to future procurements, the appeal is DENIED and the Area Office's size determination is AFFIRMED.

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

THOMAS B. PENDER
Administrative Judge