

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

SIZE APPEAL OF:	)	
	)	
ASRC Airfield and Range Services, Inc.	)	Docket No. SIZ-2006-12-14-75
	)	
Appellant	)	Decided: February 1, 2007
	)	
Solicitation No. NNH06112926R	)	
NASA/Goddard Space Flight Ctr.	)	
Greenbelt, MD	)	
	)	

APPEARANCES

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for Appellant

DIGEST

The proper period of measurement of a challenged firm's annual receipts, if the firm has been in business for three or more fiscal years, is the last three completed fiscal years immediately preceding self-certification, even when the challenged firm did not receive a contract during one of the three preceding years.

When an Area Office has made a size determination using the wrong fiscal years, the case will be remanded to the Area Office for a new size determination.

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.

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Issue

Whether the proper period of measurement of a challenged firm's annual receipts is the last three completed fiscal years immediately preceding self-certification, even if the firm did not receive a contract in one of the three fiscal years preceding self-certification.

Whether, when an Area Office has made a size determination using the wrong fiscal years, the Office of Hearings and Appeals will remand the case to the Area Office for a new size determination.

I. BACKGROUNDA. The Solicitation

On March 24, 2006, the NASA/Goddard Space Flight Center (NASA) issued Solicitation No. NNH06112926R for operational support services at NASA Headquarters in Washington, D.C. The procurement is a 100% set-aside for 8(a) Business Development small businesses. The designated North American Industry Classification System (NAICS) code is 561210, Facilities Support Services, with a corresponding \$32.5 million annual receipts size standard. On April 20, 2006, the Contracting Officer (CO) issued Amendment 2, which extended the proposal due date until May 1, 2006. On September 29, 2006, the CO awarded the contract to ASRC Airfield and Range Services, Inc. (Appellant) with an effective date of March 1, 2007. On October 2, 2006, the CO notified unsuccessful offerors that award had been made to Appellant.

B. The Protest

On October 6, 2006, Proxtronics, Inc. (Protestor) filed a size protest against Appellant. The Protestor alleged that based on data from the Federal Procurement Data System (FPDS) and Appellant's Pro-Net Profile, Appellant has received aggregated contract dollars that exceed \$324 million, and therefore exceeds the applicable size standard.

On October 11, 2006, the CO forwarded the protest to the Small Business Administration (SBA), Area II Office of Government Contracting in Philadelphia, Pennsylvania (Area II Office). However, due to the volume of size protests received by the Area II Office, the case was forwarded to the Area I Office of Government Contracting in Melville, New York (Area Office). On October 13, 2006, the Area II Office informed Appellant of the protest and requested it submit a response, a completed SBA Form 355, IRS Form 4506, and certain other information.

On October 18, 2006, Appellant responded to the protest. Appellant asserted the FPDS data that the Protestor relied upon only listed "the total potential amounts for the designated Federal awards, not necessarily the actual revenue or funding which resulted from these actions." Response to Protest, at 2. In addition, some of the awards were never funded

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to the amount indicated on the list and some of the contract periods extended over several years. *Id.*

Appellant also asserted that they are a subsidiary of Arctic Slope Regional Corporation (ASRC), the largest of the Alaska Native Corporations (ANC) chartered and organized under the Alaska Native Claims Settlement Act of 1971. *Id.* Appellant argued that pursuant to 13 C.F.R. § 124.109(c)(2)(iii), ANC-owned 8(a) companies are not deemed to be affiliated with the ANC by virtue of their common ownership and management by the ANC. *Id.* Therefore, Appellant contended that their size status must be based solely on Appellant's revenues and not the revenues of their affiliates. *Id.* Based solely on Appellant's revenues, Appellant stated that it has a revenue-based size of \$28,140,568, which is below the \$32.5 million size standard for the instant procurement. *Id.* at 3.

### C. Size Determination No. 1-SD-2007-009

On November 27, 2006, the Area Office issued Size Determination No. 1-SD-2007-009 (Size Determination) finding Appellant to be other than small for the instant procurement. The Area Office found that Appellant is an ANC and, as such, is exempt from the general affiliation rules. *See* 13 C.F.R. § 121.103(b)(2).

Appellant was incorporated in May of 2002 and submitted its bid on May 1, 2006. Size Determination, at 4. Accordingly, the Area Office determined that the applicable three completed fiscal years for determining Appellant's size should have been 2003, 2004, and 2005. *Id.* However, since Appellant did not start earning revenue until 2004, the Area Office found that Appellant was not in business until 2004. *Id.* (citing *Size Appeal of K-Mar Industries, Inc.*, SBA No. SIZ-3926 (1994)).<sup>1</sup> Therefore, the Area Office calculated Appellant's average annual receipts based on the method described in 13 C.F.R. § 121.104(c)(2) for firms that have been in business less than three complete fiscal years. Size Determination, at 4. Pursuant to 13 C.F.R. § 121.104(c)(2), the annual receipts of a concern that has been in business for less than three complete fiscal years is calculated by dividing the total receipts for the period the concern has been in business by the number of weeks in business, and then multiplying by 52. *Id.* Based on this methodology, the Area Office found that Appellant's average annual receipts exceeded the \$32.5 million size standard and that Appellant was other than small for this procurement. *Id.*

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<sup>1</sup> *Size Appeal of K-Mar Industries, Inc.*, and the cases decided before 1996 apply an earlier version of the regulation; although the regulation was redesignated, the substance of the relevant regulation was not altered. 13 C.F.R. § 121.402 (1994); 13 C.F.R. § 121.104 (2006).

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#### D. The Appeal

On November 16, 2006, Appellant filed the instant appeal. Appellant asserts that the Area Office failed to properly calculate Appellant's annual receipts using the method prescribed in 13 C.F.R. § 121.104(c)(1) for businesses that have completed at least three fiscal years immediately prior to a size determination. Appeal Petition, at 3, 7-9, 16. Appellant states that it presented the Area Office with tax returns from 2003, 2004, and 2005, which, in accordance with IRS regulations, demonstrate those were completed, taxable fiscal years. *Id.* Appellant argues, since it has three completed fiscal years, it was plain error for the Area Office to apply 13 C.F.R. § 121.104(c)(2), the method for calculating annual receipts of firms with less than three completed fiscal years. *Id.* at 4, 8-9, 16-17.

Appellant states it was incorporated and 8(a) certified in 2002. *Id.* at 4-5, 9-10. Appellant asserts it heavily invested in business development in 2002 and 2003, including recruiting a president, marketing, and advertising. *Id.* Appellant argues that although these efforts did not materialize into a contract until 2004, Appellant was in business. *Id.* Appellant asserts SBA regulations do not require a small business to generate revenues to qualify as a small business and, thus, 2003 should have been used to calculate Appellant's size. *Id.* Appellant argues its position is supported by law, precedent, and regulation and that the Area Office should not have veered from the regulation to rely on *Size Appeal of K-Mar Industries, Inc.*, SBA No. SIZ-3926 (1994). Appeal Petition, at 4, 10-17.

#### E. Motion for Admission of New Evidence

On November 16, 2006, Appellant also filed a motion for the admission of new evidence (Motion). Appellant argues the new evidence it submits with its Appeal Petition is relevant to its arguments on appeal and does not unduly enlarge the issues in the instant case. Motion, at 2. Appellant moves for the admission of the Affidavit of Kevin T. Slattery, Appellant's President, to clarify and to elaborate on Appellant's business activities in 2003. *Id.*

### II. DISCUSSION

#### A. Timeliness of Appeal

Appellant filed the instant appeal within 15 days of receiving the Size Determination and, thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

#### B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). I will disturb the Area Office's Size Determination only if, after reviewing the record and pleadings, I have a definite and firm conviction the Area Office

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erred in key findings of law or fact. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

### C. Analysis

In determining the size of a challenged firm under an annual receipts size standard, SBA computes the firm's receipts by adding "total income" plus "cost of goods sold" as those terms are defined on the firm's Federal income tax returns. 13 C.F.R. § 121.104(a); *Size Appeal of SDS National, LLC*, SBA No. SIZ-4676, at 5 (2004). The period of measurement for a firm's receipts is the total of its receipts over its three most recently completed fiscal years, divided by three. 13 C.F.R. § 121.104(c)(1); *Size Appeal of Illinois Ululani Rosario*, SBA No. SIZ-3289 (1990). A firm's size is determined as of the date of its submission of its self-certification that it is small with its initial offer, including price. 13 C.F.R. § 121.404(a); *Size Appeal of Triple P Services, Inc.*, SBA No. SIZ-4480, at 6 (2002). Therefore, a firm's annual receipts are computed by averaging the figures from its federal income tax returns from its last three fiscal years completed before the date of its self-certification. *Size Appeal of USA Asbestos Removal Co., Inc.*, SBA No. SIZ-4382, at 4 (1999).

SBA will determine a challenged firm's receipts using those tax returns filed on or before the date of self-certification. 13 C.F.R. § 121.104(a)(1). If the Area Office uses the incorrect period to determine a challenged firm's size, this Office will remand the proceeding to the Area Office for a new size determination using the correct years. *Triple P Services, Inc.*, SBA No. SIZ-4480, at 6 (citing *Size Appeal of Dun-Well Services, Inc.*, SBA No. SIZ-3941, at 4-5 (1994)).

Here, Appellant self-certified on May 1, 2006. Therefore, the appropriate fiscal years to use to measure Appellant's size are 2003, 2004, and 2005. The period of measurement is not altered simply because the firm did not receive a contract in a specific year or was not profitable. In fact, the regulation imposes no requirements with regards to revenue or profitability. 13 C.F.R. § 121.104.

In the instant case, the Area Office determined Appellant's size as of its May 1, 2006 self-certification. 13 C.F.R. § 121.404. Although Appellant presented the Area Office with completed tax returns for the three preceding fiscal years, 2003, 2004, and 2005, the Area Office did not consider Appellant "in business" in 2003 since Appellant did not secure a contract until 2004. Thus, the Area Office relied on the methodology used for firms that have not been in business for three years to calculate Appellant's size. 13 C.F.R. § 121.104(C)(2). Consequently, the issue here is whether a complete fiscal year is considered when determining a firm's size, even if the firm does not generate revenue during that year.

The Area Office based the instant size determination upon *Size Appeal of K-Mar Industries, Inc.*, SBA No. SIZ-3926 (1994). *K-Mar* upheld an area office's method of calculating a firm's receipts based on the period during which the firm was actually earning revenues. In *K-Mar* the presiding judge cited K-Mar's own evidence as indicative that an

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acknowledged affiliate was dormant and inactive for many years prior to and including the year in question. Based on the affiliate's dormancy, the judge endorsed the area office's method of disregarding the years when the affiliate was in existence, but not "in business."

While this Office has never explicitly overruled *K-Mar*, it remains an anomalous precedent that has not been followed in any subsequent cases. Further, the factual situation addressed in *K-Mar* is much different than the one confronted here.

I decline to apply *K-Mar* for the above reasons, but especially because of its analytical defects: specifically, its reliance on a nebulous concept of "in business," not based in the statute or regulation. *K-Mar* created a distinction between a firm being in existence and being "in business" based on creating revenues.<sup>2</sup> I am not willing to make such a distinction, nor, am I willing to declare that a firm is not "in business" for a given year, simply because it was not profitable that year. Such a distinction goes beyond the requirements of the statute and enacting regulations, and could easily hurt the very businesses seeking SBA assistance.

Indeed, if—as it appears—the *K-Mar* concept of being "in business" requires earning revenues, then *K-Mar* introduces a standard not found in 13 C.F.R § 121.104, which merely turns on whether a firm has "three or more completed fiscal years." A firm, especially a start-up firm like Appellant, may easily be "in business" in the sense of being organized, electing officers, hiring employees, opening an office, and seeking business, all without actually obtaining contracts or generating a significant revenue stream. A small business's early years are often precarious as it attempts to establish itself. The lack of revenue for a start-up cannot be construed as not being "in business."

Accordingly, I partially OVERRULE *K-Mar*, insofar as it requires SBA to consider profitability as a factor in determining the period of measurement, in accordance with 13 C.F.R § 121.104(c).

For firms that have completed three or more fiscal years, the regulation clearly requires the use of receipts for the three fiscal years preceding self-certification to determine size. Here, even though the firm did not generate revenue in 2003, it should be included to determine Appellant's size under 13 C.F.R § 121.104(c).

Therefore, I find that although the Area Office based its reasoning on this Office's precedent, the Area Office erred in ignoring Appellant's 2003 fiscal year when determining Appellant's size. The case will be remanded to the Area Office for a new size determination. Accordingly, I need not rule on the motion concerning new evidence, as it can be submitted to the Area Office.

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<sup>2</sup> Even if I were to retain *K-Mar*'s criteria for being "in business," it would be appropriate to distinguish between a long-dormant firm, such as the affiliate discussed in *K-Mar*, and a start-up, such as Appellant.

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III. CONCLUSION

For the above reasons, I VACATE the Area Office's Size Determination and REMAND the instant appeal for a size determination in accordance with 13 C.F.R § 121.104(c)(1).

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge