

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF:

Thomas Computer Solutions, LLC

d/b/a TCS Translations

Appellant

Solicitation No. W911W4-05-R-0006

U.S. Department of the Army

Intelligence and Security Command

Ft. Belvoir, Virginia

Docket No. SIZ-2007-01-25-02

Decided: March 9, 2007

APPEARANCES

Christopher M. Johnson, Esq., Centre Law Group, LLC, Vienna, Virginia, for Appellant.

Alison L. Doyle, Esq., and Jennifer M. Morrison, Esq., McKenna Long & Aldridge LLP, Washington, D.C., for Torres Advanced Enterprise Solutions, LLC.

Richard D. Lieberman, Esq., and Nicole S. Allen, Esq., McCarthy, Sweeney & Harkaway, P.C., Washington, D.C., for International Management Services, Inc.

DECISION

PENDER, Administrative Judge:

Introduction and Jurisdiction

This appeal stems from Request for Proposal No. W911W4-05-R-0006 (RFP) issued by the Department of the Army, Intelligence and Security Command (INSCOM) for translation and interpretation services in Afghanistan. On December 15, 2006, the Contracting Officer (CO) for INSCOM notified unsuccessful offerors that Thomas Computer Solutions, LLC, d/b/a TCS Translations (Appellant) was the apparent successful offeror. On December 19, 2006, International Management Services, Inc. (IMS), an unsuccessful offeror, filed a size protest with the CO. On December 20, 2006, two other unsuccessful offerors, Torres Advanced Enterprise Solutions, LLC (Torres) and Aegis Mission Essential Personnel, LLC (Aegis) filed a size protest with the CO. On December 21, 2006, the CO forwarded the protests to the Small Business Administration (SBA), Area II Office of Government Contracting in Philadelphia, Pennsylvania (Area Office).

On January 16, 2007, the Area Office issued Size Determination No. 2-2007-18 (the size determination), finding Appellant to be other than small for the subject procurement. Appellant received the size determination on January 18, 2007, and filed its appeal on February 2, 2007.

The U.S. Small Business Administration Office of Hearings and Appeals (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. Accordingly, this matter is properly before OHA for decision.

Issue

Whether the Area Office made a clear error of fact or law when it determined Appellant was other than small because it was unusually reliant upon the incumbent and other than small concern under the applicable NAICS code.

Facts

1. On June 29, 2006, INSCOM issued the RFP for translation and interpretation services in Afghanistan. The RFP provided INSCOM would award an Indefinite Delivery/Indefinite Quantity Contract over a five-year period during which task orders would be issued on a Cost Plus Award Fee basis. INSCOM represented the guaranteed minimum in orders would be \$10 million and the maximum \$703 million.
2. The Contracting Officer (CO) issued Amendment 01 to the RFP on July 5, 2006. In this amendment, the CO changed the nature of the procurement from full and open competition to a 100% small business set-aside.
3. In Amendment 02, issued July 28, 2006, the CO incorporated the clause found at FAR 52.204-7, Central Contractor Registration, which is consistent with his inclusion by reference of FAR 52.204-8, Annual Representations and Certifications, in the RFP. The CO also amended the size standard contained in the RFP for NAICS code 541930 from \$6 million to \$6.5 million, which is the amount stated in the version of 13 C.F.R. § 121.201 in effect on June 29, 2006.
4. Appellant submitted an offer, including price, on August 14, 2006.
5. On December 15, 2006, the CO informed the unsuccessful offerors that award had been made to Appellant, without providing pre-award notice to the offerors required by FAR 15.503(a)(2) for small business set-aside programs.
6. Three unsuccessful offers, Torres, IMS, and Aegis, filed timely protests with the CO on or before December 20, 2006.¹ All three protestors made specific allegations supported with information and documentation intended to show Appellant exceeded the size standard for the NAICS code applicable to the RFP.

¹ See 13 C.F.R. § 121.1004(a)(2). December 20, 2006 is three (3) business days after December 15, 2006.

7. On December 21, 2006, the Area Office forwarded the protests of Torres, IMS, and Aegis to Appellant. In its protest notification letter, the Area Office requested that Appellant:

(1) Respond to the protest allegations and provide supporting evidence; (2) Provide a completed SBA Form 355; and (3) Send its tax returns and financial records for the past three fiscal years preceding self-certification.

8. On January 3, 2007, the Area Office received Appellant's reply. Appellant provided a completed SBA Form 355 and the other requested information. Appellant opposed the protests and asserted that: (1) Its fiscal year ended on June 30th of each year and therefore it met the size requirement for average annual receipts for fiscal years 2003, 2004, and 2005; and (2) The protests were untimely because the protestors were referencing Appellant's 2006 revenue when the protestors accepted the relevant years for determining size as being 2003, 2004, and 2005.

9. Appellant is a sole proprietorship owned by Ms. Arlene Thomas and has been in operation prior to 2003. Ms. Thomas reports Appellant's profit or loss on Schedule C of Form 1040. Appellant provided Ms. Thomas' tax returns for 2003, 2004, and 2005. Ms. Thomas' tax returns (Form 1040, Schedule C, Lines 4 and 7) show that Appellant's average annual receipts (gross income plus costs of goods sold) for the three years preceding August 14, 2006 (Fact 4) are in excess of \$7 million.

10. Appellant also provided financial data for various fiscal years ending on June 30th (the mapping analysis). Appellant's mapping analysis is consistent with the data it filed on its IRS returns for 2003, 2004, and 2005. In addition, the mapping analysis shows that Appellant's average annual receipts, for its three fiscal years preceding its August 14, 2006 proposal (which includes fiscal year 2006 since that ended prior to Appellant submitting its proposal), still exceeds \$6.5 million (approximately \$11 million).

The Size Determination

The Area Office issued its size determination on January 8, 2007. The size determination consolidated the protests filed by Torres, IMS, and Aegis.

The Area Office determined Appellant was other than a small concern under NAICS code 541930, with a corresponding \$6.5 million size standard. The Area Office first determined that the protests were timely filed pursuant to 13 C.F.R. § 121.1004(a)(2) because they were received within five (5) business days of the protestors being notified of the award. The Area Office then determined that 13 C.F.R. § 121.104(a)(1) clearly provides that size is determined based on the numerical data listed on a concern's income tax return. Furthermore, "[n]o exception is provided for entities that choose to use more than one accounting period." Size Determination, at 3. Since Appellant had been in business for more than three fiscal years and submitted its offer on August 14, 2006, the Area Office used Appellant's income tax returns for 2003, 2004, and 2005 to determine that Appellant's average annual revenues exceeded \$7 million. *See* 13 C.F.R. §§ 121.104(b), (c)(1). Accordingly, the Area Office determined that Appellant was other than small under the \$6.5 million size standard.

The Appeal Petition

Appellant received the size determination on January 11, 2007, and filed its Appeal Petition on January 25, 2007. Appellant argues that the size determination is conclusory and plainly in error because:

1. The Area Office ignored specific information that establishes that Appellant's average revenues do not exceed the size threshold;
2. The Area Office considered only Appellant's tax returns for calendar years 2003 through 2005, which do not accurately reflect Appellant's revenues for fiscal years 2004 through 2006. Appeal Petition, at 3. The Area Office erred by relying only on tax returns when SBA may consider reliable extrinsic information to determine annual receipts. Appeal Petition, at 7 – 8 (citing *Size Appeal of SDS National, LLC*, SBA No. SIZ-4676 (2004) (*SDS National*)); and
3. The Area Office ignored Appellant's mapping analysis, which mapped Appellant's calendar year revenues to its fiscal year revenues "in order to allow SBA to determine an accurate calculation of [Appellant's] average fiscal year revenues for fiscal years 2003 to 2005." Appeal Petition, at 3. The Area Office ignored this analysis despite reviewing it and "admit[ing] that the analysis demonstrated that [Appellant's] average revenues fell below the size threshold...." Appeal Petition, at 6.

Accordingly, Appellant requests that OHA vacate and remand the size determination to allow Appellant to present evidence on its revenues for fiscal years 2004 through 2006.

Intervenors' Responses

On February 12, 2007, Torres filed its Opposition to the Appeal Petition. First, Torres asserts that the Area Office adequately set forth the basis for the size determination by discussing the applicable regulations and the arguments by Appellant and the protestors. Next, Torres argues that the Area Office correctly relied upon Appellant's tax returns to determine its size pursuant to the express direction of 13 C.F.R. § 121.104(a)(1). Torres then addresses Appellant's argument that since its fiscal years are not reflected in its tax returns, it was improper for the Area Office to rely on the tax returns instead of Appellant's "self produced mapping of fiscal year revenues to tax returns...." Torres Response, at 3. Torres counters by asserting that although the Area Office may use all information available to it in determining annual receipts, evidence other than the firm's tax returns is not controlling, *i.e.*, there is no regulatory exception for sole proprietorships that have differing fiscal years. Further, the Area Office is only required to consider information other than tax returns when there is a problem with the tax returns, which Appellant does not allege. Finally, Torres argues that Appellant exceeds the \$6.5 million size standard even if its fiscal year revenues for 2004 through 2006 are considered.

On February 16, 2007, IMS filed its Opposition to the Appeal Petition. However, this filing occurred after the close of Record and will not be considered.

Discussion

I. Introduction

Appellant's average annual receipts for the three years preceding its August 14, 2006 offer exceed \$6.5 million. Appellant exceeds the size standard because the Area Office correctly applied 13 C.F.R. § 121.104 to the applicable facts. That is, the Area Office was correct in analyzing the tax returns of Appellant's sole proprietor, Ms. Thomas, for 2003, 2004, and 2005, because those returns were for the most recently completed three fiscal years preceding Appellant's August 14, 2006 offer (the date Appellant self-certified as small).

II. Applicable Law

A. Timeliness

Appeals must be filed within 15 days of receipt of a size determination. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Upon appeal, OHA must review whether the Area Office made a clear error of fact or law when it determined Appellant to be other than a small business because its annual receipts for the three years preceding its offer under the RFP exceeded the \$6.5 million annual receipts size standard applicable to the RFP. 13 C.F.R. §§ 121.101 and 121.104. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size or the facts *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 Consulting, Inc.*, SBA No. SIZ-4775 (2006). Thus, I will only disturb an area office's size determination if I determine the area office clearly made key findings of law or fact that are mistaken.

C. Applicable Regulations

The regulation mandating how SBA calculates annual receipts is found at 13 C.F.R. § 121.104. It 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, 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.

(b) *Completed fiscal year means a taxable year including any short year. "Taxable year" and "short year" have the meanings attributed to them by the IRS.*

(c) *Period of measurement. (1) Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.*

...

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

(emphasis added).

In summary, 13 C.F.R. § 121.104 provides annual receipts shall be calculated using information from tax returns filed with the IRS, unless such tax returns do not exist. Since SBA area offices must base their annual receipts calculations upon the IRS forms for yearly reporting periods, it is irrelevant that concerns may characterize their own reporting periods differently. The policy reason for this decision is simple: it prevents SBA from having to interpret, investigate, and evaluate non-standard statements, summaries, recapitulations, or analyses. Instead, SBA area offices must consider the reporting periods represented on a concern's IRS tax returns to ensure that there is uniformity in how concerns are evaluated.²

D. OHA Decisions

Appellant cites an inapposite decision, *SDS National*, to support its position that the Area Office should have considered extrinsic evidence in calculating Appellant's size. *SDS National* interpreted 13 C.F.R. § 121.104(c) as it existed in December 2003. However, 13 C.F.R. § 121.104(c) no longer exists in our current regulations.

² See 13 C.F.R. § 121.104(a), (b), and (e).

Before SBA changed 13 C.F.R. § 121.104 in May 2004 (by omitting the text of the then-existing 13 C.F.R. § 121.104(c))³, *SDS National* addressed whether to consider extrinsic evidence when SBA had information giving it a reason to regard a concern's federal income tax returns as false. However, since OHA based this decision upon 13 C.F.R. § 121.104(c), which is no longer in effect, OHA's discussion on whether extrinsic information may be used to rebut false tax returns is irrelevant.

III. Analysis

A. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. The Area Office Must Consider Tax Returns Filed With the IRS to Determine the Size Status of a Concern

In determining the size of a challenged firm under an annual receipts size standard, SBA computes the firm's receipts by adding "gross income" (in the case of a sole proprietorship) 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). Area Offices *must* use Federal income tax returns (and any amendments) filed with the IRS on or before the date of self-certification to determine the size status of a concern. 13 C.F.R. § 121.104(a)(1). Appellant is deemed to have self-certified its size, regardless of whether it certified its size pursuant to FAR 52.219-1 or FAR 52.204-8,⁴ on the date it submitted its offer, August 14, 2006. 13 C.F.R. § 121.404(a). Therefore, the relevant date for determining which tax returns are applicable to Appellant's size is August 14, 2006, the date used by the Area Office. Size Determination, at 3.

Once the Area Office correctly chose to use August 14, 2006, as the date for Appellant's self-certification of its size, 13 C.F.R. § 121.104(b) and (c) require the Area Office to use Ms. Thomas' tax returns for 2003, 2004, and 2005 since those were the three most recently completed fiscal years (Appellant had been in business since before 2003, more than three years before the measurement date). Because the annual receipts information contained in Ms. Thomas' 2003, 2004, and 2005 tax returns for Appellant, when totaled and divided by three, exceeds \$7 million, I hold the Area Office did not make a clear error of fact or law in determining Appellant's average annual receipts. Thus, Appellant is an other than small concern under NAICS code 541930.

In making this holding, I specifically reject Appellant's specious argument that the Area Office should utilize the fiscal years applicable to Appellant, even though they are not reflected on Ms. Thomas' tax returns. The Area Office had no authority to evaluate Appellant's mapping analysis because 13 C.F.R. § 121.104(a)(1) provides that area offices must use tax returns filed

³ 69 Fed. Reg. 29192, 29203 (May 21, 2004) (final rule).

⁴ Online Representations and Certifications Application (ORCA).

with the IRS on or before Appellant's self-certification date to evaluate Appellant's size. Further, 13 C.F.R. § 121.104(b) defines a completed fiscal year as a taxable year. Accordingly, the relevant facts are:

- a. Appellant self-certified its size on August 14, 2006;
- b. The relevant tax return dates for a 2006 size self-certification are 2003, 2004, and 2005, because Appellant was in business for more than three years before its 2006 self-certification date; and
- c. Ms. Thomas filed tax returns for 2003, 2004, and 2005 that established Appellant's annual receipts were more than \$7 million.

C. Evidence Outside of Tax Returns

As mentioned above, the only exception for not basing a determination of annual receipts upon tax returns is when a concern has not filed a federal income tax return with the IRS for the fiscal year which must be included in the period of measurement. 13 C.F.R. § 121.104(a)(2). Moreover, as I also mentioned, the version of 13 C.F.R. § 121.104(c) in effect when OHA issued *SDS National* is no longer in existence. Accordingly, I find there is no authority for an area office to consider any evidence apart from tax returns (when they have been filed) when calculating a firm's average annual receipts.

Beyond the lack of authority to consider evidence contradicting tax returns and the mandate of 13 C.F.R. § 121.104(a)(1) that they must be used, it would also be problematic (even chaotic) for SBA to permit protested concerns to impeach their own tax returns. I also note that if Appellant were to prevail on its argument that information outside of tax returns should be considered by area offices, this would defeat the entire purpose of requiring decisions to be based upon tax returns, which is to ensure standardization and uniformity in the size evaluation process by relying on tax returns submitted to the IRS under well-understood rules and the penalty of perjury. Appellant's methods would introduce uncertainty into SBA's process and potentially permit concerns to submit analyses designed to obscure when receipts were received. Regardless, permitting protested concerns to submit evidence beyond tax returns is prohibited.⁵

⁵ This does not apply to an area office, the contracting officer or a protestor. If these entities have reliable and relevant evidence that information on a tax return (or other information presented by a protested concern) is false, an area office may consider it. *See* 13 C.F.R. § 121.1009(b).

D. Appellant is Other Than Small Even if Its Fiscal Year 2006 Revenue is Considered

Even if I were to apply Appellant's argument that the Area Office should calculate annual receipts based upon Appellant's fiscal year breakdown and mapping analysis, the outcome would not change. Appellant's 2006 fiscal year ended on June 30, 2006, approximately six weeks before it submitted its proposal on August 14, 2006. Appellant's fiscal year 2006 revenue would have to be included in its annual receipts calculation because the relevant three years would become 2004, 2005, and 2006. Based upon the very high dollar amount of Appellant's fiscal year 2006 receipts shown in its mapping analysis, Appellant would grossly exceed the RFP's size standard (Fact 10). Therefore, even if I were to accept Appellant's argument, the result would be the same.

E. Summary

SBA's regulations unequivocally mandate the Area Office must use tax returns filed with the IRS on or before the date of a concern's self-certification to determine a concern's size status. As of the date of Appellant's certification of its size on August 14, 2006, its annual receipts had been reported on its proprietor's tax returns for 2003, 2004, and 2005. The tax returns of Appellant's proprietor, Ms. Thomas, conclusively establish that Appellant's average annual receipts for 2003, 2004, and 2005 exceed the size standard specified in the RFP.

Further, even if I were to accept Appellant's fiscal year arguments, the Area Office would have to include fiscal year 2006 receipts in its evaluation, because Appellant's fiscal year 2006 ended June 30, 2006, six weeks before its self-certification date. This would mean SBA would have to determine average annual receipts using 2004, 2005, and 2006. Despite this, Appellant's position depends on SBA ignoring its 2006 fiscal year results. Since this would be improper under the period of measurement requirements, Appellant's fiscal year 2006 revenue contained in its mapping analysis would have to be evaluated. Therefore, Appellant would nonetheless unequivocally exceed the RFP's size requirements.

Conclusion

I have considered Appellant's Petition and the Record. The Record shows that Appellant's average annual receipts exceed the size standard. Therefore, the Area Office did not base its size determination upon a clear error of fact or law when it determined Appellant was an other than small concern under NAICS code 541930.

Therefore, the size determination is **AFFIRMED**. Appellant's appeal is **DENIED**.

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

THOMAS B. PENDER
Administrative Judge