Cite as: *Size Appeal of Crown Moving & Storage Company d/b/a Crown Worldwide Moving and Storage*, SBA No. SIZ-4872 (2007)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Crown Moving & Storage Company d/b/a Crown Worldwide Moving and Storage Appellant Appealed from Size Determination No. 6-2007-094	SBA No. SIZ-4872 Decided: November 7, 2007

APPEARANCE

Peter Vargus, Account Executive, San Leandro, California, for Appellant.

DECISION

PENDER, Administrative Judge:

I. 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.

II. Issue

Whether the Area Office committed clear error in calculating Appellant's receipts under 13 C.F.R. § 121.104(a). *See* 13 C.F.R. § 134.314.

III. Background

On September 7, 2007, the Department of the Treasury, Internal Revenue Service (IRS) issued Solicitation No. D-7-D9-18-SE-T85 as a total small business set-aside. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) Code 484210, Used Household and Office Goods Moving, with a corresponding $23.5 million size standard. On September 21, 2007, the CO notified unsuccessful offerors of award to Crown Moving & Storage Company d/b/a Crown Worldwide Moving and Storage (Appellant). Appellant is currently performing the contract.

On September 21, 2007, Double Day Office Services, Inc. filed a size protest alleging that Appellant exceeded the size standard based on a Dun & Bradstreet report of Appellant's sales forecast. On September 24, 2007, the CO forwarded the protest to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area Office VI (Area Office).

On September 25, 2007, the Area Office notified Appellant of the size protest and requested it submit its SBA Form 355, a response to the allegations in the protest, and Appellant and its affiliates' complete financial statements and income tax returns for the last three fiscal years preceding Appellant's self-certification as small. On October 5, 2007, Appellant responded to the size protest and provided the requested information.

A. The Size Determination

On October 17, 2007, the Area Office issued Size Determination No. 6-2007-094 finding Appellant other than small under the $23.5 million size standard.

The Area Office used fiscal years 2006, 2005, and 2004 to calculate Appellant's size because Appellant self-certified as a small concern on September 14, 2007, and its fiscal year ends December 31st. 13 C.F.R. § 121.104(c). The Area Office found Appellant is:

a. Owned and controlled by Tom Doyle, Bob Bowen, and Salvatore Ferrante;

b. Affiliated with CW Moving & Storage Company, LLC (CW Moving) because Appellant is the majority owner of CW Moving; and

c. Affiliated with Five Star Investment LLP (Five Star) because Appellant, Mr. Doyle, and Mr. Bowen are members of Five Star.

Based on the combined average annual receipts of Appellant and its affiliates (CW Moving and Five Star), the Area Office found that Appellant exceeded the applicable size standard.

B. The Appeal

On October 22, 2007, Appellant filed the instant appeal. Appellant contends its "revenues, as indicated on the 2004-2007 revenues on those year's Corporate Tax Returns is below that threshold [$23.5 million size standard]." On October 31, 2007, Appellant filed a "letter of explanation from [Appellant's] accounting firm…." Appellant's accounting firm contends that the average annual receipts of Crown and CW Moving are $23,191,588, below the applicable $23.5 million size standard. With regard to Five Star, Appellant's accounting firm maintains that Five Star:

> [G]enerates all of its rental income by leasing its…property to its partner, [Appellant]. Thus, rental income for Five Star Investment LLP should not be included in the gross receipts test because it is an intercompany account that

> would be eliminated upon consolidation. In accordance with generally accepted accounting principles ("GAAP"), intercompany sales are eliminated. If intercompany sales were not eliminated, the effect on one balance sheet would be to overstate gross sales….

Letter, at 1-2.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon 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 Consulting, 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 made key findings of law or fact that are mistaken.

C. Preliminary Matters

In response to the Area Office's October 11, 2007 inquiry into Appellant's relationship with Five Star, "including any contracts/subcontracts/lease agreements/etc.," Appellant informed the Area Office that it "pays rent to Five Star." The Area Office does not appear to have made any further inquiry as to what this statement meant. However, one week after submitting its appeal petition, Appellant filed a letter from its accounting firm explaining that the lease receipts shown on Five Star's Income Tax Returns were actually attributable to lease payments from Appellant.

As a threshold matter, I ADMIT Appellant's accounting firm's letter into the Record. This is permissible because the letter clarifies Appellant's October 11, 2007 response to the Area Office.

D. The Merits

The only contested issue on appeal is whether the average annual receipts of Appellant's admitted affiliate, Five Star, should be combined with Appellant's receipts. Appellant neither disputes its affiliation with CW Moving nor the Area Office's calculation of Appellant and CW Moving's average annual receipts.

In examining the Record, I find probative evidence of affiliation between Appellant and Five Star. Thus, unless there is some exception to including Five Star's receipts, Appellant would be other than small. Conversely, if Five Star's receipts are excluded, Appellant would be small under the $23.5 million size standard.

On appeal, Appellant offered evidence from its accountant that clarified Appellant's statement about paying rent to Five Star. Specifically, Appellant's accountant explained that Five Star generates all of its rental income by leasing its only income-producing asset to Appellant. Appellant's clarification is critical, for 13 C.F.R. § 121.104(a) states:

> 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 . . . .*

(emphases added).

SBA's reasoning for excluding interaffiliate transactions is found in the preamble to the final rule for 13 C.F.R. § 121.104. 69 Fed. Reg. 29192 (May 21, 2004) (preamble to final rule). Specifically, when explaining a regulatory change that omitted a requirement that affiliates file consolidated tax returns to qualify for an exclusion for interaffiliate transfers, SBA stated:

> In response to this comment, the SBA notes that it did intend to delete the parenthetical requiring the filing of a consolidated return in this instance. The SBA understands that not all firms file such consolidated returns, but that these amounts should nonetheless still be excluded. Whether a consolidated return is filed should have no bearing on whether properly documented interaffiliate transactions are excluded from annual receipts. *To do otherwise would be to count such amounts twice.*

69 Fed. Reg. 29192, 29197 (May 21, 2004) (preamble to final rule) (emphasis added).

Based upon the foregoing, I hold that Five Star's receipts should be excluded as an interaffiliate transaction. 13 C.F.R. § 121.104(a). Accordingly, the Area Office made a clear error in determining Appellant to be other than small by aggregating Five Star's receipts with Appellant's receipts.

V. Conclusion

For the above reasons, I GRANT the instant appeal and REVERSE the Area Office's size determination. Accordingly, Appellant is a small concern under NAICS Code 484210.

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

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THOMAS B. PENDER
Administrative Judge