

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Social Impact, Inc.

Appellant

Re: The QED Group, LLC

Appealed from
Size Determination No. 2-2008-86

SBA No. SIZ-4990

Decided: August 27, 2008

APPEARANCES

Kathryn E. Swisher, Esq., Oldaker, Biden & Belair, LLP, Washington, D.C., for
Appellant Social Impact, Inc.

Antonio R. Franco, Esq., and Kelly E. Buroker, Esq., Piliero Mazza, PLLC, Washington,
D.C., for The QED Group, LLC.

DECISION AND REMAND ORDER

HOLLEMAN, Administrative Judge:

I. Jurisdiction

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals 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 size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On June 6, 2008, the U.S. Agency for International Development (USAID) issued a Solicitation No. M-OAA-DCHA-OTI-07-907 for Program Development Quickly II, to procure services for the Office of Transition Initiatives including monitoring and evaluation, personnel development, and short-term technical assistance. The Contracting Officer (CO) issued the solicitation with preference for Historically Underutilized Business Zone firms and designated North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$6.5 million annual receipts size standard, as the applicable code for this procurement.¹ Offers were due on July 30, 2007.

On May 9, 2008, USAID identified The QED Group, LLC (QED) as the intended awardee. On May 14, 2008, Social Impact, Inc. (Appellant) filed a protest asserting QED was other than small. On May 19, 2008, the Small Business Administration (SBA) Office of Government Contracting, Area 2, in Philadelphia, Pennsylvania (Area Office) informed QED of the protest and requested that it submit a response to the protest, together with a completed SBA Form 355, and certain other information. On May 22, 2008, QED submitted this information to the Area Office. QED informed the Area Office that its submission in response to the protest excluded from its revenue calculations amounts directly attributed to conference management services provided to the U.S. Government, in accordance with 13 C.F.R. § 121.104(a)(1). On June 5, 2008, QED submitted additional documentation justifying the proposed exclusion at the Area Office's request.

B. The Size Determination

On June 12, 2008, the issued a size determination that QED is an eligible small business.

The Area Office found that Neelima Grover is 100% owner of QED. Ms. Grover also owns 34% of QED Group PVI, Ltd., New Delhi, India (QED India). QED owns another 33% of QED India, and the remaining 33% is owned by Alka Kacker, QED India's manager. Accordingly, the Area Office found QED India affiliated with QED.

The Area Office further found that QED's size should be determined as of July 30, 2007, the date of its submission of its self-certification as small with its initial offer, including price. *See* 13 C.F.R. § 121.404(a). The Area Office also found that, in computing annual receipts, it must exclude amounts collected for another by a conference management service provider. *See* 13 C.F.R. § 121.104(a).

¹ The solicitation gives a \$6 million size standard, but the Area Office properly modified this in the size determination to the \$6.5 million specified in the regulation. 13 C.F.R. §§ 121.201; 121.402(d).

After reviewing QED's submission, the Area Office concluded that QED had properly calculated its receipts and that, together with its affiliate, QED is an eligible small business for this procurement.

B. The Appeal

On June 18, 2008, Appellant received the size determination. On June 26, 2008, Appellant filed the instant appeal. Appellant argues that the Area Office erred in excluding the amounts QED claimed as amounts collected for another. Appellant asserts the majority of these revenues were not pass through expenses, but QED's own expenses in providing conference management services.

Appellant moved to admit additional evidence into the record and requested an opportunity to review documents in the Area Office file.

On July 3, 2008, QED moved to dismiss the appeal and opposed Appellant's motion to admit new evidence.

On July 9, 2008, I denied Appellant's motion to admit new evidence and issued a Protective Order.²

On July 17, 2008, Appellant opposed QED's motion to dismiss.

On July 17, 2008, I denied QED's motion to dismiss and set August 6, 2008, as the date for the close of record.

On August 5, 2008, Appellant filed a motion to permit a supplemental pleading together with the pleading. Appellant argues that the Area Office erred by permitting QED to deduct from its annual receipts all revenues attributable to conference services, not merely those amounts collected for another.

On August 6, 2008, QED filed an opposition to Appellant's motion to permit filing of a supplemental pleading. QED argues that I have discretion to permit such a filing only under terms needed to avoid prejudice to any non-moving party and QED will be prejudiced by allowing Appellant's late pleading.

IV. Discussion

A. Timeliness and Standard of Review

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).

² I am not issuing this decision under the Protective Order because it contains no protected material.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Appellant's August 5th Pleading

Appellant's motion to permit a supplemental pleading is superfluous, and I need not rule on it. Appellant filed its pleading prior to the close of record; the pleading is thus timely and is a part of the record and cannot be characterized as the type of supplemental pleading envisioned by 13 C.F.R. § 134.207(b). Appellant's pleading is far from being late, but was filed after its counsel was admitted under the July 17th Protective Order and had access to the record. OHA's practice has always been to permit further pleadings once counsel have reviewed the administrative record, so long as they are filed within the date set for the close of record. QED could have moved for permission to respond, which would likely have been granted, but instead chose to try to strike a timely pleading. This was fruitless.

C. The Merits

In order for a business to be eligible as small, it must come within the applicable SBA size standard. 13 C.F.R. § 121.101(a). In calculating a challenged firm's annual receipts, SBA adds a firm's "total income" to its "cost of goods sold" as defined and reported on Internal Revenue Service tax return forms. 13 C.F.R. § 121.104(a). However, certain amounts may be excluded from a firm's annual receipts. Among these exceptions are "amounts collected for another by a ... conference management service provider." 13 C.F.R. § 121.104(a).

The key phrase in the regulation is "amounts collected for another" (emphasis supplied). The regulation does not permit the exclusion from receipts amounts attributable to whole categories of business. Rather, just the amounts a challenged firm engaged in certain enumerated lines of business holds as a result of having collected them for another may be excluded. In the case of conference managers, this would include such items as hotel room charges paid to them by conference participants to be remitted to the hotels. The challenged firm must be merely acting as agent for another in the transactions it seeks to exclude. *Size Appeal of Mid-Columbia Engineering, Inc.*, SBA No. SIZ-4134 (1996).

Here, QED seeks to exclude virtually all amounts collected from its conference management business from the calculation of its annual receipts. This must include significant sums not collected for another, such as its own expenses in running the conference and its own profits.

Accordingly, I conclude that I must REMAND this case to the Area Office, for a determination of exactly what proportion of QED's conference management revenues are amounts collected as an agent for another and how much must be included in the calculation of QED's annual receipts.

V. Conclusion

For the above reasons, I VACATE Size Determination No. 2-2008-86 and REMAND the instant proceedings to the Area Office for further investigation and a new size determination consistent with this Decision and Remand Order.

CHRISTOPHER HOLLEMAN
Administrative Judge