

**REDACTED DECISION FOR
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**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. 2-2008-125

SBA No. SIZ-5028

Decided: March 6, 2009

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

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 size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

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III. Background

A. Solicitation

On June 6, 2008, the U.S. Agency for International Development (USAID) issued 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.

B. Protest

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 and informed the Area Office that, in accordance with 13 C.F.R. § 121.104(a)(1), it excluded from its revenue calculations amounts directly attributed to conference management services provided to the government.

C. Size Determination No. 2-2008-86

On June 12, 2008, the Area Office issued Size Determination No. 2-2008-86 finding QED is an eligible small business. The Area Office found that [REDACTED] is 100% owner of QED. [REDACTED] also owns 34% of [REDACTED]. QED owns another 33% of [REDACTED] and the remaining 33% is owned by [REDACTED]. Accordingly, the Area Office found QED India affiliated with QED. The Area Office also noted it must exclude amounts collected for another by a conference management service provider in calculating annual receipts under 13 C.F.R. § 121.104(a). 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.

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).

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D. Appeal and Remand

On June 26, 2008, Appellant appealed. Appellant argued the Area Office erred in excluding the amounts QED claimed as amounts collected for another and asserted the majority of these revenues were not pass through expenses, but QED's own expenses in providing conference management services.

On August 27, 2008, I remanded the case to the Area Office, *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-4990 (2008). In my Decision and Remand Order, I noted that certain amounts may be excluded from a firm's annual receipts, including "amounts collected for another by a ... conference management service provider." However, because QED sought to exclude nearly all amounts collected from its conference management business from the calculation of its annual receipts, I remanded the 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.

E. Size Determination No. 2-2008-125

On January 8, 2009, the Area Office issued Size Determination No. 2-2008-125, again, finding QED to be small for the solicitation.

Size Determination No. 2-2008-125 (size determination on remand) recites the earlier findings of Size Determination No. 2-2008-86, regarding ownership, control, and affiliation. Additionally, the size determination on remand quotes the NAICS code definition for 561920, Convention and Trade Show Organizers:

This industry comprises establishments primarily engaged in organizing, promoting, and/or managing events, such as business and trade shows, conventions, conferences, and meetings (whether or not they manage and provide the staff to operate the facilities in which these events take place).

The size determination on remand also quotes 13 C.F.R. § 121.104(a) which provides:

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

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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.

Id.

According to the size determination on remand, QED provided the Area Office with copies of the contracts, task orders, and final invoices. The Area Office indicated QED seeks to exclude conference management expenses from four acquisitions originating from two contracts and that QED asserts the amounts it excludes were collected for another by QED as a conference/event management service provider.

The Area Office conducted a thorough review of the contracts associated with QED's request to determine if the business activities are eligible for exclusion under 13 C.F.R. § 121.104(a). The Area Office determined that there are conference management costs associated with the USAID Accelerated Microenterprise Advancement Project (AMAP) support services contract and the Housing and Urban Development (HUD) Housing Management Information Systems (HMIS) contract. However, the Area Office did not agree with all the costs QED seeks to exclude. Where QED excluded approximately [REDACTED] from 2004 receipts, [REDACTED] million from 2005 receipts, and [REDACTED] million from 2006, the Area Office determined [REDACTED] is excludable from 2004 receipts, [REDACTED] million is excludable from 2005 receipts, and [REDACTED] million is excludable from 2006 receipts. The Area Office determined QED's average revenue for 2004, 2005, and 2006, after excluding the conference management revenues, is less than \$6.5 million and, accordingly, QED is small for the procurement.

F. The Appeal

1. Substance of the Appeal

On January 21, 2009, Appellant filed an Appeal. Appellant argues the Area Office made clear errors of law.

Appellant argues the Area Office erred by simply determining which QED revenues for 2004, 2005, and 2006 fall under the definition of NAICS 561920, despite specific direction from OHA to determine the proportion of QED's conference revenues collected as an agent for another and the amount to be included in the calculation of QED's annual receipts. Appellant states the regulation does not permit the exclusion from receipts of amounts attributable to whole categories of businesses and the Area Office incorrectly applied the exclusion for amounts collected for another.

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Appellant also argues the Area Office erred in reviewing the statements of work of the contracts and task orders to determine whether those contracts included business that fell within the definition of conference management services. Appellant asserts the Area Office should have examined QED's actual costs to determine if the amounts QED sought to exclude were legitimate pass-through expenses. As an example, Appellant cites the Area Office's assessment of the HUD HMIS contract, where Appellant asserts the Area Office fails to identify the conference management costs or note if the costs excluded qualify as amounts collected as an agent for another. Similarly, Appellant argues the Area Office's discussion of the USAID AMAP contract does not identify which conference management costs associated with the contract were collected by QED as an agent for another.

Appellant asserts QED's conference management services activities do not qualify as amounts collected for another by a conference management service provider. Appellant argues QED is not an agent, but provides conference-related support services directly to its customers. Appellant states the Area Office erred in conflating conference management expenses with amounts collected for another by a conference management service provider. Appellant argues the Area Office violated the regulation and remand order by allowing QED to exclude all amounts attributable to an entire category of business activities.

2. Motion for Access to the Area Office File

In addition to its Appeal, Appellant also filed a Motion for Access to the Area Office File. Appellant asserts the appeal revolves around the specific costs that were excluded from the calculation of QED's average annual receipts and whether those costs are properly excludeable. Appellant states the costs are not identified in the size determination and it is necessary to review the supporting case file.

G. QED's Response

On February 6, 2009, QED filed its response to the appeal. QED argues Appellant's Appeal is moot. QED asserts OHA may dismiss as moot a protestor's appeal of a size determination concluding that a firm is small when the contract has been awarded, even though the issues on appeal are not specific to that procurement. Appellant cites to *Size Appeal of E.D. Etnyre & Co.* SBA No. SIZ-4990 (2004), and *Size Appeal of Spectrum Landscape Services, Inc.*, SBA No. SIZ-4313 (1998), to support dismissal.

Moreover, QED argues the Area Office correctly calculated QED's annual receipts. QED states the Area Office had the benefit of QED's initial submission in response to the size protest, OHA's remand instructions, as well as additional information the Area Office requested QED provide. QED asserts the Area Office reviewed all this information, which is evidenced by the fact that they determined certain costs were not eligible for exclusion, and recalculated QED's annual revenues. QED argues the size determination on remand is based on a well-developed record and should be given deference.

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QED argues Appellant has failed to meet its burden of proving, by a preponderance of the evidence that the Area Office's size determination is based on clear error of fact or law. QED asserts Appellant offers no evidence to support allegations the Area Office improperly calculated QED's average annual receipts.

H. Appellant's Additional Motions

On February 6, 2009, Appellant filed two additional motions: a Motion to Permit Filing a Supplemental Pleading and a Motion to Permit Filing a Reply and for an Extension of Time in which to File Such Reply.

Attached to its Motion to Permit Filing a Supplemental Pleading, Appellant included a copy of its supplemental pleading. In its Supplemental Pleading, Appellant asserts the statements of work for the HUD and the AMAP task orders demonstrate that the work performed by QED does not qualify as conference management services. Appellant argues the statements of work are broad and include activities that do not fall within those contemplated by SBA and the conference management exclusion in the regulation. Appellant notes that the NAICS codes for the HUD and AMAP contracts, 541611 and 541990, respectively, are not the NAICS codes the Area Office considers to include conference planning, 561920. Moreover, Appellant states the tasks described by the contract do not constitute conference management services and QED did not identify which portions of those job cost reports may have related to conference management services. Appellant argues there is no evidence to demonstrate that the amounts QED seeks to exclude are amounts collected for another. For these reasons, Appellant asserts the Area Office's size determination on remand should be overturned.

IV. Discussion

A. Timeliness

Appellant filed its 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 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 made key findings of law or fact that are mistaken.

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C. The Merits

1. Appellant's Motions

With Appellant's Appeal, Appellant moved for access to the Area Office case file. On January 23, 2009, I issued a Protective Order in the case and, on January 30, 2009, I admitted counsel for Appellant under the Protective Order which permitted Appellant's access to the Area Office case file.

Additionally, on February 6, 2009, Appellant's counsel filed: a Motion to Permit Filing a Supplemental Pleading and a Motion to Permit Filing a Reply and for an Extension of Time in which to File Such Reply. On February 9, 2009, I ruled on these motions. I granted Appellant's Motion to Permit Filing of a Supplemental Pleading as it was necessary to address information in the Area Office file which was inaccessible to Appellant until Appellant was admitted under the Protective Order. I denied Appellant's Motion to Permit Filing of a Reply and for an Extension of Time in which to File such a Reply because Appellant failed to present any justification to deviate from 13 C.F.R. § 134.309(d), which prohibits a reply unless directed by the judge.

2. Appellant's Appeal is Not Moot

QED's arguments that Appellant's Appeal is moot are without merit and QED's reliance on *Size Appeal of Spectrum Landscape Services, Inc.*, SBA No. SIZ-4313 (1998), is misplaced. *Size Appeal of Ross Aviation*, SBA No. SIZ-4840 (2007), explicitly overruled *Size Appeal of Spectrum Landscape Services*. *Size Appeal of Ross Aviation* noted the law that traditionally determines when a case is moot has only a limited application to appeals before OHA and held, pursuant to 13 C.F.R. § 134.316, OHA judges have substantial discretion, outside of 13 C.F.R. § 121.1101(b), to determine when issues in an appeal are moot. *Size Appeal of Ross Aviation* acknowledges:

There are several points of incompatibility between *Spectrum*, the Act, and SBA's implementing regulations. As discussed throughout, SBA wrote its regulations to enhance the integrity of the process. *Spectrum* does the opposite, for it: (1) Ends the size determination process before resolution; (2) Truncates the appeal rights of a protesting concern before resolution of the size of the protested concern; (3) Potentially permits other than small concerns from continuing to represent themselves as small; (3) Lowers the confidence of those involved in the process; (4) Ignores the intent of standing rules designed to exclude other than small firms from set-aside programs; and (5) Imposes Article III (case or controversy) mootness rules in a situation where OHA does not have the authority to grant specific relief to an appellant.

Id., at 21.

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Accordingly, this appeal is not moot, for determining the true size of QED is an inherent part of SBA's mission and OHA's adjudicatory mission.

3. Excludable Amounts

As quoted above, for size determination purposes, 13 C.F.R. § 121.104(a) provides a limited exclusion from receipts for:

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. . . .*

Id. (emphasis added).

Calculating a firm's receipts is critically important in capturing a realistic estimate of a firm's size and maintaining the integrity of small business set-aside programs. Accordingly, exclusions from receipts specifically allowed by 13 C.F.R. § 121.104(a) must be strictly construed. *Size Appeal of Cash Realty of NY, Inc.*, SBA No. SIZ-4569, at 4 (2003)(citing *Size Appeal of Community Research Associates, Inc.*, SBA No. SIZ-4554, at 5-6 (2003)). Otherwise, large firms could erroneously qualify as small and undermine the small business set-aside program.

The key phrase in 13 C.F.R. § 121.104(a) is "amounts collected for another." A challenged firm in one of the specified industries may only exclude from its receipts funds which it collected on behalf of another party; funds which were owed by the payer to the party to which the challenged firm then paid them. Examples are hotel room fees and airfare paid by conference attendees to the conference manager for convenience sake or to ensure a group rate, which funds were then paid by the conference manager to the hotel or airline. The money must be owed by the party paying the challenged firm to the party receiving the money. Payment for other expenses of running the conference, the conference facilities themselves, honoraria, equipment, etc., are not amounts collected for another and cannot be excluded from a challenged firm's receipts. Because the rule must be strictly construed, if a challenged firm cannot clearly establish that a questioned item is an amount collected on behalf of another party, then the item must be included in the calculation of the firm's annual receipts. Moreover, OHA has consistently ruled that exclusion of pass-through receipts is limited to the specific agent-like industries identified in 13 C.F.R. § 121.104(a). *Size Appeal of Reiner, Reiner & Bendett, P.C.*, SBA No. SIZ-4587, at 6 (2003)(citing *Size Appeal of Cash Realty of NY, Inc.*, SBA No. SIZ-4569 (2003); *Size Appeal of Recycling Resources LLC.*, SBA No. SIZ-4324 (1998); *Size Appeal of Aliron International Corporation, Inc.*, SBA No. SIZ-4317)).

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On remand, the Area Office determined that some conference management costs associated with the USAID AMAP contract and the HUD HMIS contract are excludable, but the Area Office did not agree with all the costs QED is seeking to exclude. Regrettably, the record provides no distinction between the excludable costs and the costs incurred by QED in its own name.

The Area Office case file evidences the Area Office understood my remand direction. The Area Office emailed QED after reviewing QED's invoices and contract and task orders. The Area Office specifically asked QED to define the business activities included in the revenues QED seeks to exclude. The Area Office explained it cannot include QED's own expenses in running a conference and cannot include QED's profits. Pointedly, the Area Office stated it needed to be able to state what QED means when it list under a meeting and conference voucher "[REDACTED], [REDACTED], Corner Bakery, and American Express." Email from Carol Decker, SBA Procurement Analyst, to [REDACTED], Chief Financial Officer QED (Dec. 9, 2008, 8:23).

QED's response to the Area Office's email is less direct. QED stated the exclusions from receipts are those amounts collected for another by QED as a conference service provider. With regards to conference management services, QED states:

The exclusions from revenue and receipts were those pass-through amounts related to conference hotel bills, participants and speakers' travel expenses, consulting fees, conference catering costs, etc. Hotel bills excluded from receipts were paid for conference meeting room rental, audiovisual (A/V) equipment rental, and Internet and call-in conference lines. Catering services were paid for meals for participants, lodging costs for participants, speakers, and presenters.

Email from [REDACTED], Chief Financial Officer QED, to Carol Decker, SBA Procurement Analyst (Dec. 16, 2008, 13:03).

QED's explanations for exclusions seem far broader than anticipated by 13 C.F.R. § 121.104(a). Conference meeting room rentals, A/V equipment rentals, and internet and call-in conference lines are likely QED's cost in running a conference and not costs incurred as an agent for another.

QED must identify for the Area Office which revenues it is requesting to exclude and indicate how those revenues fall within the criteria of an agency relationship. The crux of the matter is whether an agency relationship exists with respect to the costs in question, i.e., they are not ordinary business expenses of the challenged business, but are costs incurred on behalf of the client. Any costs QED cannot clearly establish as amounts collected for another must be included in the calculation of its annual receipts.

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The record before me is not clear enough to establish definitively that the all the amounts excluded by the Area Office either were or were not amounts collected for another, as allowed by 13 C.F.R. § 121.104(a). Therefore, another remand is in order.

Accordingly, I must REMAND this case to the Area Office, again, for a determination of exactly what proportion of QED's conference management revenues are amounts collected as an agent for another, as allowed by 13 C.F.R. § 121.104(a) and how much must be included in the calculation of QED's annual receipts. The resulting size determination should clearly identify which revenues were received as an agent for another.

V. Conclusion

For the above reasons, I VACATE Size Determination No. 2-2008-125 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