

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

SIZE APPEAL OF:

Alpha Protective Services, Inc.

Appellant

Appealed from
Size Determination No. 3-2009-28

SBA No. SIZ-5035

Decided: April 30, 2009

APPEARANCE

Jeffrey Weinstein, of Jeffrey Weinstein, PLLC, Washington, D.C., for Alpha Protective Services, Inc.

DECISION

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's calculation of the challenged firm's annual receipts is based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Solicitation

On June 6, 2008, the U.S. Marshals Service issued Request for Proposals No. DJMS-08-R-0026 (RFP) for court security officer services in the Northern District of Florida. The Contracting Officer (CO) issued the RFP as a 100% 8(a) small business set aside. The CO failed to include a North American Industry Classification System (NAICS) code in the RFP.

On March 3, 2009, the CO made a non-responsibility determination on the apparent successful offeror, Alpha Protective Services, Inc. (Appellant). On March 4, 2009, the CO requested the Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) in Atlanta, Georgia, perform a Certificate of Competency (COC) determination on

Appellant. The CO included a NAICS code designation of 561612, Security Guards and Patrol Services, with a corresponding \$17 million average annual receipts size standard in the COC referral. The CO later stated that the NAICS code was probably provided in response to questions about the solicitation.¹

In the course of performing the COC determination, the Area Office concluded that there was a question whether Appellant was a small business under the applicable size standard. Accordingly, the Area Director requested a size determination under 13 C.F.R. § 121.1001(b)(3)(ii). On March 17, 2009, the Area Office informed Appellant of the size determination, and requested it submit an SBA Form 355, together with its federal income tax returns for 2006, 2007, and 2008, and certain other information. On March 19, 2009, Appellant complied with this request.

B. The Size Determination

On March 27, 2009, the Area Office issued Size Determination No. 3-2009-28 finding Appellant other than small. The Area Office found that Appellant's sole owner is Jeffrey B. Brinson, and the concern is not owned by any other individual or entity. In addition, Appellant owns a 51% interest in a joint venture, APS-ARTI, LLC. The joint venture was undertaken under an SBA-approved 8(a) mentor-protégé agreement between Appellant and Advance Resource Technologies, Inc.

The Area Office stated that it reviewed Appellant's financial information, combined Appellant's annual receipts with 51% of the annual receipts of the joint venture, found Appellant's annual receipts exceeded the size standard, and concluded Appellant was other than small. The size determination did not include the Area Office's computations.

Appellant then contacted the Area Office by email, inquiring as to the method of computation of its receipts. The Area Office sent Appellant its computation sheet, via email. The Area Office first computed Appellant's annual receipts for each year by adding total income to cost of goods sold, and adding income from the joint venture. This income was negative income in 2005 and 2006, and positive income in 2007. This computation resulted in an annual receipts figure of less than \$17 million. The Area Office then computed 51% of the annual receipts of the joint venture, from its Internal Revenue Service (IRS) Form 1065, Partnership Income Return, and arrived at a figure which, when added to Appellant's annual receipts as previously computed, caused Appellant's receipts to exceed the applicable size standard.

¹ The SBA Area Office later designated NAICS code 561612 as appropriate under its authority to clarify, complete or supply an unclear NAICS code designation. 13 C.F.R. § 121.402(d).

C. The Appeal

On April 8, 2009, Appellant filed the instant appeal. Appellant asserts the Area Office erred in the computation of its annual receipts. Appellant asserts that the joint venture's receipts were improperly counted twice, and that Appellant is within the size standard.

Appellant concurs with the Area Office's calculation of its share of the joint venture's annual receipts, based on the joint venture's IRS Form 1065.

Appellant then reviewed the Area Office's calculation of its annual receipts. The Area Office added the figures for total income to cost of goods sold on Appellant's corporate tax return. However, Appellant asserts the Area Office deducted only the net receipts of the joint venture from the figures on Appellant's corporate return, by relying on the "other income" figure from Appellant's corporate tax return, before then adding back Appellant's 51% share of the joint venture. Appellant argues the Area Office twice counted a substantial portion of Appellant's joint venture receipts and this double counting causes Appellant's receipts to exceed the size standard.

Appellant asserts the Area Office made errors of calculation. In calculating the joint venture's income, Appellant states the Area Office did not take the amount from line 5 of Appellant's Form 1120, but went to the joint venture's Form 1065 and took the amount for "ordinary business income." Appellant asserts this approach is not supported by the regulations. Appellant argues that the Area Office has double counted items of its revenue, and thus computed its annual receipts with an inaccurately high figure that places Appellant over the applicable size standard.

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.

C. The Merits

SBA calculates a concern's annual receipts by adding total income to cost of goods sold as these terms are defined and reported on the concern's IRS tax return forms, such as Form 1120 for corporations and Form 1065 for partnerships. 13 C.F.R. § 121.104(a). The receipts of a concern's affiliates are also included in the calculation of its annual receipts. 13 C.F.R. § 121.104(d)(1). If a concern is engaged in a joint venture, the calculation of its receipts must include the concern's proportionate share of the joint venture receipts. 13 C.F.R. § 121.103(h)(5).

Here, the Area Office properly calculated the annual receipts of the Appellant corporation from its Form 1120. The Area Office added the firm's total income to its cost of goods sold. Appellant then deducted the income received from the joint venture, so as to avoid the double counting of revenue. *See Size Appeal of Crown Moving & Storage Company d/b/a Crown Worldwide Moving and Storage*, SBA No. SIZ-4872 (2007).

The Area Office then performed the same computation on the joint venture's Form 1065. The Area Office took the total income figure (line 8) on each return, as required by the regulation. The joint venture did not report any cost of goods sold on any of its returns. The Area Office then took 51% of the total income for the joint venture, and added Appellant's receipts to obtain the total amount of receipts for Appellant and its affiliated joint venture. This was proper, it adds the total income and cost of goods sold of the partnership, and then attributes to Appellant a proportion equal to its proportionate share of the joint venture, in accordance with the regulation.

In order for Appellant's argument to make sense, the joint venture's receipts would have to already be included in Appellant's corporate return. But that is not supported by the record. The corporation and the partnership are two different entities, with separate businesses and two different returns. The income and cost of goods sold of the partnership are not included in the corporate return. The corporate return does include income from the partnership, but the Area Office was careful to exclude that amount. Appellant's proposed calculations are not supported by the regulation. The Area Office properly computed Appellant's receipts. The Area Office's only error was in not including its calculations in the size determination itself. Nevertheless, this is harmless error, not least because the Area Office shared these calculations with Appellant when they were requested.

I find Appellant has failed to meet its burden of establishing clear error in the Area Office's size determination, and in fact the Area Office correctly calculated Appellant's annual receipts according to the regulation. I therefore deny the instant appeal.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

CHRISTOPHER HOLLEMAN
Administrative Judge