Cite as: *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5090 (2009)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Social Impact, Inc.	SBA No. SIZ-5090
Appellant	Decided: November 18, 2009
RE: The QED Group, LLC	
Appealed from Size Determination No. 2-2009-56	

APPEARANCES

Kathryn E. Swisher and Patricia H. Wittie, Oldaker, Belair & Wittie, LLP, Washington, D.C., for Appellant Social Impact, Inc.

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

Sam Q. Le, Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

DECISION

I. Jurisdiction

This appeal arises from Size Determination No. 2-2009-56, issued by the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) on July 20, 2009, finding that The QED Group, LLC (QED) is a small business. The Area Office found that QED properly excluded certain revenues from its receipts and is eligible to receive the contract under Solicitation No. M/OAA/DCHA/OTI-07-907 (RFP), issued by the United States Agency for International Development (USAID) on June 6, 2007. Social Impact, Inc. (Appellant) filed the instant appeal with the SBA Office of Hearings and Appeals (OHA) on July 30, 2009.

OHA decides size determination appeals pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed its appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R.

§ 134.304(a)(1). Accordingly, this appeal is properly before the OHA. For the reasons set forth below, the appeal is granted, and Size Determination No. 2-2009-56 is reversed.

II. Issue

Did the Area Office commit a clear error of fact or law when it determined QED properly excluded conference management revenues from its annual receipts as amounts collected for another pursuant to 13 C.F.R. § 121.104(a) and consequently concluded QED is a small business? *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation

On June 6, 2007, the Contracting Officer (CO) for USAID issued the RFP to procure services including monitoring and evaluation, professional development, and short-term technical assistance for its Office of Transition Initiatives. The CO issued the RFP as a total small business set-aside with a price evaluation 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 size standard of $6.5 million in average annual receipts.[1] Offers were due on July 30, 2007, and USAID identified QED as the intended awardee on May 9, 2008.

B. Initial Protest

On May 14, 2008, Appellant filed a protest asserting QED is other than small based on a Dunn & Bradstreet report and information Appellant found on QED's website. On May 19, 2008, the Area Office informed QED of the protest and requested that it submit a response to the protest, a completed SBA Form 355, and certain other information. On May 22, 2008, QED submitted its documentation 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 amounts directly attributed to conference management services provided to the government. On June 5, 2008, in response to the Area Office's request for more information, QED provided further justification and documentation for its exclusions explaining that it excluded amounts directly attributed to conference management services on two contracts, the USAID Accelerated Microenterprise Advancement Project (AMAP) Support Services Indefinite Quantity Contract and the Housing and Urban Development (HUD) Housing Management Information Systems (HMIS) contract (May 22, 2008 Letter from A. Franco to C. Decker, at 2-3).

[1] The RFP gave a $6 million size standard, but the Area Office properly modified this in the initial size determination (Size Determination No. 2-2008-86) to the $6.5 million specified in the regulation. 13 C.F.R. §§ 121.201; 121.402(d).

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C. First 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 [xxxxxxxxxx] is 100% owner of QED. [xxxxxxxxx] also owns 34% [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. QED owns another 33% of [xxxxxxxx] and the remaining 33% is owned by [xxxxxxxxxxxxx xxxxxxxxxxxxxxx]. 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.

D. First Appeal and Remand

On June 26, 2008, Appellant appealed the first size determination. Appellant argued the Area Office erred in excluding the revenues 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." 13 C.F.R. § 121.104(a). However, because QED sought to exclude nearly all amounts collected under the category of conference management business from the calculation of its annual receipts, I remanded the case to the Area Office for a determination of exactly what amount of QED's total conference management revenues were amounts collected as an agent for another.

E. Second 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 RFP. According to the second size determination, QED provided the Area Office with copies of its contracts, task orders, and final invoices. The Area Office indicated that QED seeks to exclude conference management expenses from four acquisitions originating from two contracts and that QED asserts those amounts 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 were eligible for exclusion under 13 C.F.R. § 121.104(a). The Area Office determined that there were conference management costs associated with the USAID AMAP and HUD HMIS contracts, but the Area Office did not agree with all the costs QED seeks to exclude. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] The Area

Office calculated QED's average revenue for 2004, 2005, and 2006. After excluding the conference management revenues, QED's average annual receipts were less than $6.5 million and, accordingly, the Area Office found QED small for the instant procurement.

F. Second Appeal and Remand

On January 21, 2009, Appellant filed an appeal of the second size determination. Appellant claimed the Area Office incorrectly applied the exclusion for amounts collected for another. Appellant argued the Area Office erred by simply determining which QED revenues for 2004, 2005, and 2006 fall under the definition of NAICS 561920, Convention and Trade Show Organizers—the NAICS code that includes providing conference management services—despite specific direction from OHA to determine the amount of QED's conference revenues collected as an agent for another. Appellant asserted the Area Office should have examined QED's actual costs to determine if the amounts QED sought to exclude were legitimate pass-through expenses.

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

On March 6, 2009, I remanded this case to the Area Office a second time. *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5028, at 8 (2009). In my Decision and Remand Order, I explained that to be excludable under 13 C.F.R. § 121.104(a), "[t]he 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." *Id.*, at 8. I also noted that 13 C.F.R. § 121.104(a) must be strictly construed. Although the Area Office properly asked QED to define the business activities included in the revenues it seeks to exclude, QED's explanations for the exclusions were overly broad. Therefore, I concluded the Record was not clear enough to establish whether the amounts excluded were in fact amounts collected for another, and I again remanded the case to the Area Office for a determination of exactly what amount of QED's total conference management revenues are amounts collected as an agent for another.

G. Third Size Determination No. 2-2009-56

In the third size determination issued in this matter, Size Determination No. 2-2009-56, the Area Office first reviewed QED's role in each transaction it sought to exclude as an amount collected for another. Under the USAID AMAP contract and the HUD HMIS contract, QED was required to offer conferences, seminars, and workshops for each agency. The Area Office concluded: "In performing the contracts, QED acted on behalf of the two federal agencies to obtain speakers, manage funds to support participant tuition and travel expenses, make travel

arrangements, and conduct the sessions" (Size Determination No. 2-2009-56, at 7).

The Area Office next identified the various business categories under which QED seeks exclusions: (a) scholarship fund—QED makes payments on behalf of USAID to educational institutions for scholarships; (b) training support fund—QED makes payments on behalf of USAID to entities offering training opportunities for participant costs; (c) conference and event planning management services—QED makes payments on behalf of USAID and HUD to travel and catering companies for participant costs; (d) invitational travel fund—QED makes payments on behalf of USAID to airlines and other transportation providers for conference participants' travel costs; (e) training and administration—QED makes payments on behalf of USAID to consultants and trainers for workshops, trainings, and other events.

Because OHA expressed concern that QED is attempting to exclude whole categories of business, the Area Office conducted a complete "line-by-line" itemized review of two (out of fourteen) task orders relating to these categories, and a less detailed review of the remaining task orders. "The itemized review allowed the Area Office to verify whether QED could support its rationale for excluding specific items, verify that the costs identified were those incurred as an agent and were not QED's own business expenses, and clarify how the costs were incurred on behalf of the client" (Size Determination No. 2-2009-56, at 9). The Area Office determined that QED is not seeking to exclude its own business income, but only pass-through amounts paid as an agent for another.

Finally, the Area Office determined what percentage of QED's total conference management revenues are amounts collected as an agent for another. The Area Office found that the value of the costs submitted by QED represents ten percent of the total contract value for the fourteen task orders that were reviewed. Of the ten percent, QED seeks to exclude sixty percent from its receipts. The Area Office concluded that the revenues QED seeks to exclude are properly excludable and, after the exclusions, QED is small under the applicable $6.5 million size standard.

H. Third and Instant Appeal

On July 30, 2009, Appellant filed the instant appeal of Size Determination No. 2-2009-56. Appellant claims the Area Office again failed to correctly apply the exclusion set forth in 13 C.F.R. § 121.104(a). First, Appellant argues QED does not have an agency relationship with either USAID or HUD. Appellant contends:

> To establish an agency relationship between the government and a government contractor, the record must show that the contractor was: (1) acting as a purchasing agent for the government; (2) the agency relationship was established by clear contractual consent; and (3) the contract between the contractor and the government specifically stated that the government would be directly liable to subcontractors for goods or services provided to the prime contractor.

(Appeal Petition, at 3 (citing *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983); *Central Freight Lines, Inc., v. United States*, 87 Fed. Cl. 104, 110 (2009)).)

Appellant claims there is no evidence here of a clear contractual agency relationship between QED and either USAID or HUD. Nor is there a specific statement indicating either USAID or HUD is liable directly to subcontractors. Instead, the relationship between QED and those federal agencies is a straightforward government-prime contractor relationship.

As a result, Appellant asserts, the Area Office erroneously excluded amounts that were not collected as an agent for another. First, Appellant contends, it is well-settled that consultant and trainer fees are not excludable as amounts collected for another. "'Because they are fees for work performed, these sums are not, under any circumstances, held in trust'" (Appeal Petition, at 4 (quoting *Size Appeal of ASEE Services, Corp.*, SBA No. SIZ-4254 (1997))). Moreover, it is QED who enters into the contractual relationship with these consultants, not USAID or HUD, and it is QED who is responsible for payment. Such an arrangement does not constitute an agency relationship.

Additionally, Appellant argues, travel costs, scholarship and training support funds, and the other miscellaneous categories under which QED seeks exclusions are not amounts collected for another. Appellant explains that QED merely arranged transportation for conference participants. It did not act as an agent. "[T]o the extent the contractor may advance funds to the vendor on behalf of its customer, it will ultimately be reimbursed for those expenditures under a claim of right. Therefore, such costs may not be excluded under the regulations" (Appeal Petition, at 6 (citing *Size Appeal of Mid-Columbia Engineering, Inc.*, SBA No. SIZ-4134 (1996))). QED could not have been acting as an agent in incurring travel costs because QED itself entered into the transactions, was liable for the expenses, and expected reimbursement from its customers.

With respect to scholarship and training support funds and the other miscellaneous categories QED seeks to exclude, Appellant emphasizes that the exclusion is strictly construed. *Size Appeal of Community Research Associates, Inc.*, SBA No. SIZ-4554 (2003). Appellant contends these amounts were not provided in QED's capacity as a conference management service provider, nor are they excludable categories identified in the regulation. Finally, the Area Office failed to explain how these revenues are amounts collected for another. Because these categories do not meet any of the regulation requirements, they cannot be excludable.

Appellant concludes that QED is not an agent of USAID or HUD, and the amounts QED seeks to exclude were ordinary business expenses. Appellant emphasizes that the key question in determining whether the revenues are excludable is whether they were collected for another. Simply because some of the costs were incurred in connection with QED's performance of conference management services is insufficient to establish that the expenses are excludable. The amounts must have been collected for another pursuant to 13 C.F.R. § 121.104(a). Here, none of the amounts QED seeks to exclude were collected for another.

On August 17, 2009, after having reviewed the Area Office Record (in accordance with the OHA Protective Order), Appellant submitted a supplemental memorandum to accompany its appeal. Appellant states that after reviewing the contracts between QED and USAID and between QED and HUD, it is clear that no agency relationship existed between QED and either agency. Neither contract provides clear contractual language indicative of such a relationship,

but rather both evidence a simple government-prime contractor relationship. Additionally, Appellant points out that if the amount excluded for consulting fees [xxxxxxxxxxxx] is included in QED's annual receipts, as Appellant argues it should be, QED exceeds the $6.5 million applicable size standard. Finally, Appellant calls attention to the fact that both the USAID contract and the HUD contract treat travel costs as "other direct costs." Thus, Appellant concludes, the amounts QED seeks to exclude should be included and QED should be found other than small.[2]

I. SBA Response

On August 17, 2009, SBA filed its response to this appeal. SBA "believes that OHA's decisions [in this matter] have the potential to be misinterpreted, and, accordingly, requests a remand to the Area Office with further instructions on how to apply the decisions." SBA asserts that the exemption for "amounts collected for another" is clarified in 13 C.F.R. § 121.201, the regulation that sets size standards for each NAICS Code. NAICS Code 561920, Convention and Trade Show Organizers, directs the reader to footnote 10, which applies the size standard "[a]s measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions." SBA argues:

> To determine the small business status of conference management service providers, SBA must refer to both the size standards table in § 121.201 (including footnotes) and the receipts calculation instructions in § 121.104(a). One rule does not make sense without the other. Thus, SBA must read the exemption for conference management service providers and the footnote for convention organizers harmoniously. Accordingly, the phrase "funds received in trust" in the table footnotes clarifies the use of "amounts collected for another" in the § 121.104(a) exemption.

(SBA Response, at 2.) SBA also relies upon the "claim of right" doctrine from Federal tax law to argue that a firm may exclude from income on its tax returns any amount to which it does not have a "claim of right."

SBA has reasoned that the two prior decisions issued in this matter greatly limit the applicability of the § 121.104(a) exemption to conference management service providers. The previous decisions indicate that whereas conference providers may exclude true pass-through expenses such as hotel and airline fees (paid by participants to the provider for delivery to the hotel or airline), conference providers may not exclude other conference expenses, such as conference facilities, equipment, and honoraria. SBA argues that "OHA's use of 'et cetera' at the end of the list of non-excludable expenses suggests that the list is merely illustrative. On the other hand, the list of excludable expenses—hotel room fees and airfare—appears to be exclusive." (SBA Response, at 6.) Thus, SBA concludes that one reasonable interpretation of these decisions (that any expense other than hotel or airline fees is not excludable) would render § 121.104(a) more restrictive than its text, which allows other expenses to be excluded

[2] On August 21, 2009, Appellant filed its Reply to Comments of SBA Office of General Counsel and Motion for Remand. Because the record in this matter closed on August 17, 2009, this Reply will not be considered.

as long as the conference provider can demonstrate the expenses were amounts collected for another.

SBA requests that OHA remand this matter to the Area Office for a third time because the prior decisions in this matter may be misinterpreted. SBA would like OHA to clarify whether it intended only hotel and airline fees to be excludable. SBA would also like clarification regarding whether there is a heightened evidentiary standard applicable to the exclusion because the prior decisions in this matter indicate that conference management service providers must "clearly establish" that an expense is an amount collected for another. SBA indicates this is the first matter before OHA dealing with the § 121.104(a) exclusion as applied to conference management service providers and asserts it needs guidelines on what information and documentation to request from conference management service providers to prove their exclusions.

J. QED Response

On August 17, 2009, QED filed its response to this appeal. QED claims the appeal should be denied because the Area Office made no error of fact or law in issuing Size Determination No. 2-2009-56. QED contends that over the course of this litigation it has provided substantial and detailed documentation of the expenses it seeks to exclude. Based on its review of this information and OHA's remand instructions, the Area Office determined which expenses were excludable and then calculated QED's revenues. QED asserts the Area Office correctly found QED to be a small business for this procurement, OHA should give deference to the Area Office's decision, and Appellant failed to meet its burden of proving the Area Office made a clear error of fact or law.

QED argues that it is an agent of both USAID and HUD and that Appellant has applied an agency test that is inapplicable to the facts at hand. According to QED, the correct test to determine whether receipts are excludable has been set forth in "a long and consistent line of OHA cases":

> 1) Is the challenged firm merely acting as an agent for another in the transactions it seeks to exclude? 2) Did the concern enter into the transactions in its own name? 3) Can the other parties hold the concern responsible for payment on the contracts? 4) Does the concern have any scope for independent action? 5) Do the transactions constitute an integral part of the concern's regular business activities?

(QED Response, at 11 (citing *Size Appeal of Mid-Columbia Engineering, Inc.*, SBA No. SIZ-3703 (1996); *Size Appeal of D.K. Shifflet & Associates, Ltd.*, SBA No. SIZ-3081 (1989); *Size Appeal of Courtesy Associates, Inc.*, SBA No. SIZ-2941 (1988)).)

QED contends that under this test, the expenses it seeks to remove from its revenue are clearly excludable. The transactions at issue were undertaken on behalf of USAID and HUD, QED exercised limited autonomy over the transactions, and the transactions are a minor part of QED's regular business. Furthermore, QED claims "[t]he 1996 addition of conference management services as an industry that is eligible to exclude certain receipts represents the

SBA's judgment that there should be a presumption in favor of excluding receipts that are merely passed through a company in its provision of conference management services" (QED Response, at 12). QED concludes the Area Office conducted a thorough analysis of QED's receipts, properly excluded conference management expenses collected for another, and correctly determined that QED's revenues render it small for this procurement.

IV. Discussion

A. 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 an appellant's size *de novo*. Rather, OHA reviews the record to determine whether the area office made a patent error of fact or law. Consequently, the Administrative Judge may disturb an area office's size determination only if he has a definite and firm conviction that the area office misapplied the law or made key findings of fact that are mistaken. *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. The Merits

13 C.F.R. § 121.104(a), the regulation at the center of this appeal, 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 . . . . Receipts do not include . . . 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.

As I noted in the second Decision and Remand Order in this matter, *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5028, at 8 (2009), the key phrase in this regulation is "amounts collected for another." As I also noted in that decision, the exclusions from receipts specifically allowed by 13 C.F.R. § 121.104(a) must be strictly construed. *Id.* (citing *Size Appeal of Cash Realty of NY, Inc.*, SBA No. SIZ-4569, at 4 (2003). I further explained:

> 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)).

Id., at 8-9. Accordingly, I directed the Area Office to determine which of the amounts QED seeks to exclude are in fact amounts collected for another.

The Area Office identified each business category under which QED seeks to exclude revenues, carefully reviewed QED's proposed excludable revenues, and determined that QED did act as an agent—i.e., did collect the amounts for another—in receiving the revenues it seeks to exclude. The Area Office thus found QED did not seek to exclude its own business income, QED properly excluded amounts collected for another, and, as a result, QED is small for the instant procurement. I find the Record does not support this conclusion.

1. Evidence in the Record

It is QED's burden to prove that the amounts it seeks to exclude are amounts collected for another. 13 C.F.R. § 121.1009(c); S*ize Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009). The Area Office has repeatedly requested that QED explain how it acted as an agent for USAID and HUD with regard to the expenses it seeks to exclude from its revenue. The Record reflects no satisfactory explanation from QED.

QED first introduced the issue of exclusions under 13 C.F.R. § 121.104(a) in its response to Appellant's initial protest. QED explained that "[i]t excluded the amounts directly attributed to conference management services directly provided on behalf of the United States Government." (May 22, 2008, Letter from A. Franco to C. Decker, at 3.) Upon the Area Office's request for further justification of these exclusions, QED provided that "when [QED's] chief financial officer learned of [13 C.F.R. § 121.104(a)], he reviewed two contracts (and underlying task orders) for which conference management services were required and excluded those revenues from QED's revenue base. QED's income tax returns do not reflect such exclusions but the enclosed contract documents support [QED's] calculations." QED included a number of tables breaking down by task order and by category the costs it seeks to exclude. (June 5, 2008, Letter from A. Franco to C. Decker, at 2-4.)

Attached to the June 5, 2008, letter are the following supporting documents: (1) page 15 of 65 of the AMAP contract, (2) pages 7-11 of Amendment 2 of the AMAP solicitation, (3) page 9 of Task Order 3 under the AMAP contract, (4) pages 6-9 of Task Order 4 under the AMAP contract, and (5) and page 3 of the HMIS contract. These excerpted pages indicate that QED did provide conference management services under the AMAP and HMIS contracts. However, these documents do not indicate how QED acted as an agent for USAID or HUD in performing or paying for those services. Accordingly, I remanded the first size determination (Size Determination 2-2008-86) to allow the Area Office to clarify this purported agency relationship—*i.e.*, to determine what of these amounts were actually collected for another.

Upon receipt of my Remand Order, the Area Office again asked QED to provide: "A complete copy of the contract to be excluded that includes a description of the tasks to be performed; [a] complete breakdown of each pass-through cost to be excluded for each contract and a copy of an invoice/bill for the cost; and [f]or each cost indicate the third party for whom you were holding the funds in trust" (November 3, 2008, Letter from C. Decker to [xxxxxxxx], at 1-2). In response, QED provided complete copies of the AMAP and HUD contracts, as well as three Task Orders issued under the AMAP contract and its job status reports. Again, these documents do not provide any insight as to how QED acted as an agent for USAID or HUD when providing conference management services. They prove that some conference services were provided, but they do not prove why QED should be considered an agent. Accordingly, I remanded the second size determination (Size Determination 2-2008-125), again to clarify this supposed agency relationship—*i.e.*, to determine what of these conference management service amounts were actually collected for another.

Most recently, upon this second remand, the Area Office offered the following directive to QED: "Clearly identify which revenues you are requesting to exclude and indicate how those revenues fall within the criteria of an agency relationship" (June 3, 2009, Letter from C. Decker to [xxxxxxxx], at 2). QED's response was as follows: "As indicated above the total revenues we are request to be excluded is [xxxxxxxxx], which fall within an agency relationship" (June 9, 2009, Letter from [xxxxxxxx]to C. Decker, at 3). This conclusory response provides no information whatsoever to explain how the revenues QED seeks to exclude "fall within an agency relationship."

It thus appears QED flooded the Area Office with paper without ever explaining how money "passed through" QED as an agent for USAID or HUD. I agree with QED's assessment that it has provided "substantial information and documentation" detailing the costs it seeks to exclude. However, QED never explained precisely its relationship to those expenses or the government's relationship to those expenses. Absent this crucial explanation, QED's evidence fails.

2. The Evidence Fails to Demonstrate an Agency Relationship

Under either the agency test proposed by Appellant or the test proposed by QED, QED failed to meet its burden of proving it acted as an agent for USAID or HUD. To prove an agency relationship, QED needed to explain precisely its role in each transaction as well as the government's role in each transaction. This required clarification as to how the transactions

proceeded logistically—*i.e.*, How did money flow between the entities? Did USAID and HUD reimburse QED for these expenses? Did USAID and HUD advance the money for these expenses to QED? What entity contracted for these expenses? Did QED enter into the transactions in its own name? Could the recipients of the funds for each transaction hold QED responsible for payment? Could the recipients of the funds hold the government responsible for payment? Were these expenses included in QED's revenue as reported on its IRS Form 1040? Instead of offering this sort of precise information, QED has merely generally and conclusorily asserted throughout these proceedings that it acted as an agent in providing conference management services. This is insufficient.

I turn again to the preeminent example of the travel agent—the agent buys a plane ticket on behalf of a customer, and the customer pays the agent, who transfers the money directly to the airline. We know the travel agent formed an agency relationship with the customer because the customer asked the travel agent to act on its behalf, the customer paid money to the travel agent, and the travel agent transferred the money to the airline. The tickets are not items the travel agent keeps in inventory to sell. Rather, the agent only acts upon direction from each specific customer, the transaction is entered into under the customer's name, and the customer is ultimately responsible for the fees. The travel agent thus acts "as" the customer or "in the customer's shoes" when it engages in the transaction.

Here, there is no indication in the Record of what entity entered into the specific transactions that generated the revenues QED seeks to exclude. There is no information regarding what entity was ultimately responsible for the fees QED seeks to exclude. There is no explanation of how the cash flowed between the entities. There is no information relating to QED's cost proposals for these contracts. There is not even a coherent explanation of the alleged agency relationship between QED and the government anywhere in the Record.

The Area Office attempted to explain this relationship in the most recent size determination:

> The services detailed in the USAID AMAP contract include, 'Developing, organizing, and implementing training programs, workshops, seminars, or conferences for USAID missions and partner personnel…' The HUD HMIS contract calls for QED to offer conferences on a regional and national level. In performing the contracts, QED acted on behalf of the two federal agencies to obtain speakers, manage funds to support participant tuition and travel expenses, make travel arrangements, and conduct the sessions.

(Size Determination 2-2009-56, at 7.) What the Area Office apparently fails to grasp is that simply because the contracts call for conference management services does not compel the conclusion that QED acted as an agent for the government in performing those services. On the contrary, it appears likely that QED was merely fulfilling its contractual obligations to the government, not acting "as" the government or "in its shoes."

Thus, the Area Office failed to properly analyze whether the amounts QED seeks to exclude were collected as an agent for another. It is clear that the Area Office analyzed QED's documents in detail and confirmed the amounts and existence of the costs QED seeks to

exclude. Nevertheless, Size Determination No. 2-2009-56 still contains no discussion of whether any of the amounts QED sought to exclude were legitimate pass-through expenses collected by QED or how QED could have been acting as an agent for the government with regard to those expenses. Appellant is absolutely correct that amounts collected under the category of conference management services are not excludable on that basis alone. As previously stated, the key is whether those conference management amounts were *collected for another*. QED failed to demonstrate that the amounts it seeks to exclude were collected as an agent for another, and the Area Office erred in concluding those expenses were properly excludable on the basis of this Record.

Finally, although this point is moot in light of my finding that QED failed to meet its burden, I question the veracity of QED's representation that all of the amounts it seeks to exclude were entered into its revenue stream or were reported as revenue to the IRS. For instance, QED seeks to exclude [xxxxxxxxx] for USAID's scholarship fund and [xxxxxxxxx] for USAID's training support fund. According to QED, the scholarship fund is used to pay tuition for USAID-selected attendees to educational institutions. The training support fund is used to pay tuition and travel costs for USAID trainees to attend various training sessions. Though it is not entirely clear, it appears that QED was paid to manage these funds and disperse them when directed to do so by USAID. If this is correct, the amount of each fund itself should never have been included in QED's revenues—*i.e.*, the fund monies were never held by QED. Rather, the government held the monies and QED merely disbursed them on behalf of the government. In this case, the only amount that should have been included in QED's revenues would be the fee paid to QED to manage each fund, which would obviously not constitute a pass-through expense. Again, had QED clarified its relationship with each of the transactions it seeks to exclude, this analysis would be more certain.

QED had multiple chances in this matter to explain to the Area Office how it acted as an agent for the government. It failed to do so. Absent a clear demonstration that QED acted as an agent, QED failed to meet its burden of proving that it properly excluded amounts collected for another. Thus, it was clear error for the Area Office to determine that QED was small for the instant procurement.

C. SBA's Motion for Remand

SBA moves for remand on the basis that the Area Office did not have clear precedent to apply to the facts at hand. Specifically, SBA seeks clarification on what types of expenses are excludable and whether there is a heightened evidentiary standard for concerns to meet when proving that their expenses are excludable under 13 C.F.R. § 121.104(a). Remanding this case will not answer SBA's questions regarding my previous decisions. Therefore, SBA's Motion for Remand is DENIED.

SBA's attempt to argue the "claim of right" concept from Federal tax law is inapposite here. We have long held that Internal Revenue Service regulations and the case law flowing from them are a body of law inapplicable to size cases. *Size Appeal of Manassas Travel, Inc., et al.*, SBA No. SIZ-4737 (2005). The phrase "funds received in trust from an unaffiliated third party" at 13 C.F.R. § 121.201 n.10 does not so much modify the regulation as restate it.

The important principle is that only funds received by the challenged firm on behalf of another party are not to be counted in the computation of its annual receipts.

SBA asserts in its pleading that there has been little guidance prior to these proceedings on how to apply the exemption to conference management service providers. However, contrary to this assertion, there is a significant body of OHA case law on how to apply the exclusion, some of it cited in the earlier *Social Impact* decisions. The cases may not specifically deal with conference management service providers, but the principal is still the same. Funds collected for another party may be excluded, a firm's own expenses and fees may not be.

SBA is concerned that my previous decisions can be read to limit the application of the 13 C.F.R. § 121.104(a) exclusion to conference management service providers. It argues that in giving the examples of hotel fees and airfare as the types of expenses which may be excludable, one could read the decision to say that only hotel fees an airfare are excludable. Although I disagree that this interpretation is a reasonable reading of the decisions, I state here for clarification that it was not my intention to limit conference management excludable expenses to hotel fees and airfare. In offering those examples, I merely intended to illustrate the underlying principle that the types of expenses that can be excluded must be amounts collected for another, and hotel fees and airfare are the most straightforward examples of this principle. It would not be prudent, or perhaps even possible, to include an exhaustive list of all the expenses that may be excludable.

Instead, the text of the regulation is controlling when determining whether expenses are excludable. The regulation clearly provides that so long as conference management expenses are collected for another, those expenses are excludable. The prior decisions in this matter do nothing to change that standard or to limit the regulation.

SBA also seeks clarification regarding what it calls the "heightened evidentiary standard" set forth in my prior decisions for conference management service providers to meet when proving whether their expenses are excludable. This assumption stems from one sentence in my second decision on this matter: "Any costs QED cannot clearly establish as amounts collected for another must be included in the calculation of its annual receipts." *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5028, at 10 (2009).

SBA argues that the use of the words "clearly establish" sets a heightened burden of proof for conference management service providers. SBA also questions what documentation would be necessary to meet this high standard. In using the words "clearly establish," I did not intend to evoke the clear and convincing standard of proof or any other heightened evidentiary standard. There is no heightened evidentiary standard for conference management service providers. I only sought to make clear that conference management service providers must be able to prove that the revenues they seek to exclude are not their own regular business expenses. It is a simple legal question of what role the conference management service provider played in the transaction. Thus, it is not a document trail of each expense that is important, but rather the relationship of the expense to the conference management service provider that must be proved. As outlined above, QED failed to sufficiently detail its

relationship with the expenses it seeks to exclude. As a result, it is other than small for the instant procurement.

V. Conclusion

The Area Office committed a clear error of law in determining that the expenses QED sought to exclude were amounts collected for another. The excluded amounts must be included in QED's revenues, and after the inclusion of those amounts, QED exceeds the size standard applicable to the RFP. Therefore, I GRANT the instant size appeal and REVERSE Size Determination No. 2-2009-56.

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CHRISTOPHER HOLLEMAN
Administrative Judge