United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
J.M. Waller Associates, Inc.	SBA No. SIZ-5108
Appellant	Decided: January 15, 2010
Solicitation No. HSCG88-09-R-623066(A)	

APPEARANCES

D. Grayson Yeargin, Esq., and Colin W. O'Sullivan, Esq., Nixon Peabody LLP, Washington, D.C., for Appellant.

Kenneth Dodds, Esq., Office of Procurement Law, Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency.

DECISION

HOLLEMAN, Administrative Judge:

I. Background

A. Solicitation and Protest

On February 20, 2009, the Contracting Officer (CO) for the U.S. Department of Homeland Security, U.S. Coast Guard Civil Engineering Unit in Oakland, California issued Solicitation No. HSCG88-09-R-623066(A) (RFP) to solicit a Regional Multiple Award Construction Contract (RMACC). The CO issued the solicitation as a total service-disabled veteran-owned small business set-aside and designated North American Industry Classification System (NAICS) Code 236210, Industrial Building and Construction, with a corresponding size standard of $33.5 million in average annual receipts. On April 2, 2009, Construction Engineering Services, LLC (CES) submitted an offer.

CES is a joint venture between J.M. Waller Associates, Inc. (Appellant) and Engineering Remediation Resources Group, Inc. (ERRG). On October 23, 2009, the CO identified CES as an apparent successful offeror. On October 28, 2009, Glen/Mar Construction, Inc. (Glen/Mar), an unsuccessful offeror, filed a protest claiming, inter alia, that CES exceeds the applicable size standard. Specifically, Glen/Mar alleged that ERRG is a large business.

B. Size Determination

On November 30, 2009, the Small Business Administration's (SBA) Office of Government Contracting—Area VI (Area Office) issued Size Determination No. 6-2010-019. Because CES self-certified that it is small on April 2, 2009, the Area Office determined the size of its owners (ERRG and Appellant) based on each firm's tax returns for the years 2006, 2007, and 2008. *See* 13 C.F.R. §§ 121.404(a), 121.104(a), (c). Based on this information, the Area Office found that ERRG's average annual receipts fall below the applicable size standard, but that Appellant's average annual receipts exceed the applicable size standard. Accordingly, the Area Office concluded that CES is not a small business for this procurement.

C. Appeal Petition

On December 14, 2009, Appellant filed its appeal of the Size Determination with the SBA Office of Hearings and Appeals (OHA). Appellant claims the Size Determination was based upon clear error of fact or law because the Area Office erroneously included in its calculation of Appellant's average annual receipts income from years outside the proper three-year measurement period. Specifically, Appellant claims the Area Office included income from years prior to 2006 that should have been excluded pursuant to Internal Revenue Code Section 481(a) (26 U.S.C. § 481(a)).

Appellant contends the Area Office is obligated to undertake more than a cursory review of its tax returns to determine its size and should instead use all information available to it in calculating average annual receipts. *See SDS Nat'l, LLC,* SBA No. SIZ-4676 (2004); *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4540 (2003). Appellant thus argues the Area Office must consider Internal Revenue Service (IRS) definitions and regulations in calculating receipts. *See Reiner, Reiner & Bendett, P.C.*, SBA No. SIZ-4587 (2003). As a result, Appellant claims the Area Office should have excluded Appellant's Section 481(a) adjustments from its receipts.

Appellant explains that those adjustments represent income from 2005 that only appears on its later tax returns because the firm changed its accounting methods in 2006. "[W]hile a change in accounting does not change the amount of actual income a company receives, it does require a 'true up' of revenues and costs to avoid duplication or omission." (Appeal Petition, at 4.) After a change in accounting method, Section 481(a) allows a firm to adjust its income for this purpose. Therefore, Section 481(a) adjustments do not constitute current income, and those amounts should not be included in the calculation of Appellant's average annual receipts. Appellant seeks reversal of the Area Office's Size Determination on the basis of this alleged error.

D. Agency Response

On December 30, 2009, the SBA filed its response to the Appeal Petition. SBA first points out that Appellant did not raise its Section 481(a) argument before the Area Office. SBA emphasizes its method of calculating annual receipts is clearly set forth at 13 C.F.R. § 121.104, and it is not the responsibility of the Area Office to recognize when a firm has changed its accounting method. "The burden of proof is on the firm whose size is under consideration so

that the Area Office will have all of the factual and legal information necessary to determine the concern's size." (Agency Response, at 3.)

SBA next contends the regulations on calculating annual receipts are clear. 13 C.F.R. § 121.104(a) provides in part: "For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph." Because Section 481(a) adjustments are not explicitly listed as excludable, they should not be excluded. Additionally, the regulations provide that annual receipts are calculated based on a firm's "total income" as reported to the IRS, not on a firm's "current income." *Id.* Furthermore, SBA argues, the purpose of Section 481(a) is to prevent duplications or omissions in reporting income for tax purposes. Neither duplication nor omission is a problem here. Appellant had to include income from 2005 on its later tax returns because it had not included it on its 2005 return. "Accepting [Appellant's] argument that these amounts must be excluded from total income in subsequent years would enable firms approaching the size limits to permanently exclude millions of dollars in total income by changing their accounting method." (Agency Response, at 5.)

Finally, SBA claims Appellant's cited cases do not support its position because the Area Office correctly used Appellant's "total income," as defined by the IRS, to determine Appellant's size, and Appellant never provided the Area Office with any outside information to be considered in addition to its tax returns. SBA concludes that Appellant has failed to prove the Area Office's Size Determination was based on clear error of fact or law.

II. Discussion

A. Jurisdiction & Standard of Review

Size determination appeals are decided by OHA 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 the instant appeal within fifteen days of receiving the Area Office's dismissal, so the appeal is timely. 13 C.F.R. § 134.304(a)(2). Accordingly, this matter is properly before OHA for decision.

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Furthermore, it is Appellant's burden to prove, by a preponderance of the evidence, that the Area Office committed an error. 13 C.F.R. § 134.314. Thus, the Administrative Judge may only overturn a size determination if Appellant establishes the Area Office made a patent error based on the record before it.

B. Analysis

As SBA highlights, Appellant did not raise its Section 481(a) argument before the Area Office. OHA may not consider substantive arguments raised for the first time on appeal. 13 C.F.R. § 134.316(a); *see also Size Appeal of Perry Mgmt.*, SBA No. SIZ-5100 (2009). It was Appellant's responsibility to present all relevant evidence and arguments to the Area Office when it submitted its protest. 13 C.F.R. § 121.1009(c) ("The concern whose size is under consideration has the burden of establishing its small business size."). Contrary to Appellant's

contentions,[1] it was not the responsibility of the Area Office to investigate whether Appellant had changed accounting methods and whether certain income should be excluded from its receipts. The Area Office cannot have committed clear error by failing to consider an argument that was never presented to it.

Furthermore, as SBA argues, the regulations regarding the calculation of average annual receipts are clear. 13 C.F.R. § 121.104(a)(1) provides in part: "The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern." Thus, the Area Office correctly used Appellant's tax returns to determine its size. Appellant argues the Area Office should take into account "information which clarifies a firm's federal income tax returns," but Appellant never provided any such information to the Area Office. (Appeal Petition, at 4.) In the absence of any such information, the Area Office's only option was to determine Appellant's size based on its tax returns.

Even had Appellant's Section 481(a) adjustments been before the Area Office, they would not have altered the outcome of the size determination. The regulation defines "receipts" as total income plus cost of goods sold, as reported on the challenged firm's Federal tax returns. 13 C.F.R. § 121.104(a). The only exclusions from receipts are those specifically provided for in the regulation. *Id.* OHA's cases have held these exclusions are to be interpreted strictly and are limited to those enumerated in the regulation. *See, e.g., Size Appeal of Social Impact*, SBA No. SIZ-5028, at 8 (2009) (citing *Size Appeal of Cash Realty of NY, Inc.*, SBA No. SIZ-4569, at 4 (2003); *Size Appeal of Cmty. Research Assocs., Inc.*, SBA No. SIZ-4554, at 5-6 (2003)).

Adjustments under the Internal Revenue Code are not among the enumerated exceptions, and thus may not be excluded from the calculation of a firm's receipts. Appellant argues these adjustments do not constitute current income, and should not be included in the calculation of receipts. However, the regulation does not refer to "current income", but instead relies on "total income" and "cost of goods sold" as those terms are reported on a challenged firm's tax returns. Appellant's argument is therefore without support in the regulation. Further, adopting Appellant's method of calculating receipts would permit a firm approaching a size limit to circumvent the size regulations and exclude large amounts of revenues by changing its accounting method.

Appellant failed to raise its Section 481(a) argument before the Area Office and now attempts to correct that omission on appeal. The Area Office properly calculated Appellant's

[1] Appellant relies on *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4540 (2003), which held that an Area Office has an independent responsibility to investigate the size of the challenged concern, to consider all the legal issues raised by those facts, to resolve the facts and the law, and thereby to determine the challenged concern's size. However, *Tiger* remanded that appeal because the Area Office had made numerous errors of fact and law, and failed to address issues that must be addressed in every size case. Appellant seeks to charge the Area Office with error for not considering an argument Appellant never made and that was not apparent from the face of the documentation Appellant presented. *Tiger* does not support such an argument.

average annual receipts according to the applicable size regulations. Therefore, Appellant has failed to prove the Area Office committed a clear error of fact or law in issuing its Size Determination.

III. Conclusion

The Area Office's Size Determination was not based on clear error. Accordingly, this appeal is DENIED and the Size Determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge