Cite as: *Size Appeal of The MayaTech Corporation*, SBA No. SIZ-5269 (2011)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
The MayaTech Corporation	SBA No. SIZ-5269
Appellant	Decided: August 12, 2011
Appealed from Size Determination Case No. 2-2011-03	

APPEARANCES

John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Edmund M. Amorosi, Esq., Erica J. Geibel, Esq., Smith Pachter McWhorter, PLC, Vienna, Virginia, for Appellant.

Alan Chvotkin, Esq., Executive Vice President and Counsel, for the Professional Services Council, Arlington, Virginia, Intervenor.

DECISION[1]

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 made clear error of fact or law in not excluding certain amounts from the receipts of the protested concern.

[1] In its appeal petition Appellant requested confidential treatment to protect its sensitive business information. *See* 13 C.F.R. § 134.205. On issuance of the original Decision, I ordered Appellant to note which portions it wanted me to consider redacting from the published Decision. I now issue the redacted version of the Decision for public release.

III. Background

A. The Solicitation and Protest

On April 15, 2010, the U.S. Department of Health and Human Services (DHHS), Substance Abuse and Mental Health Services Administration (SAMHSA) issued Solicitation No. 277-10-0344 for Technical Assistance through the DHHS Substance Abuse and HIV Prevention Technical Assistance Coordinating Center. Page 8 of the Solicitation states: "Independently and not as an agent of the Government, the Contractor shall be required to furnish all the necessary services, qualified personnel, material, equipment, and facilities, not otherwise provided by the Government, as needed to perform the Statement of Work." SAMHSA set the procurement aside for small businesses under North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, which has an annual receipts size standard of $7 million. The MayaTech Corporation (Appellant) submitted its initial offer on June 11, 2010.

On September 30, 2010, the Contracting Officer (CO) notified offerors that Appellant had been awarded the contract. On October 5, 2010, McFarland & Associates, Inc. (McFarland), an unsuccessful offeror, filed a size status protest against Appellant. McFarland alleged that Appellant's Online Representations and Certifications Application (ORCA), dated January 4, 2010, and covering the June 11, 2010, self-certification date, stated Appellant's gross revenues were between $10-$17 million and that it is not a small business under NAICS code 541690. On October 6, 2010, the CO referred the protest to the U.S. Small Business Administration (SBA), Office of Government Contracting-Area II (Area Office) for a size determination.

B. The Area Office Proceedings

On October 8, 2010, the Area Office notified Appellant of the size protest, requesting Appellant's completed SBA Form 355, Federal income tax returns, Appellant's response to the protest allegations, and other information. On October 15, 2010, Appellant submitted the required material to the Area Office.

This submission shows Appellant is wholly owned by Jean-Marie Mayas, and has several admitted affiliates, none of which has receipts. Appellant's tax returns show that Appellant's own receipts for the applicable years 2009, 2008, and 2007 are $[xxxxxx], $[xxxxxx], and $[xxxxxx] respectively, totaling $[xxxxxx]. Thus, Appellant's average annual receipts over the three years are $[xxxxxx], exceeding the $7,000,000 size standard for NAICS code 541690.[2]

[2] The figures entered in Item 12 of Appellant's SBA Form 355 are adjusted receipts calculated by subtracting from gross receipts Appellant's claimed exclusions, as described in the accompanying spreadsheet. Instead of taking its gross receipts from its tax returns, however, as the size regulation requires, Appellant appears to have taken its gross receipts from its statements of income. Thus, Appellant entered $[xxxxxx], $[xxxxxx], and $[xxxxxx] as gross receipts for the three years, resulting in average annual receipts of $[xxxxxx] (before the claimed exclusions), and $[xxxxxx] (after the claimed exclusions).

In its October 15, 2010, response, Appellant asserted that the size protest was non-specific. Therefore, the Area Office had no authority to conduct a size determination. Further, Appellant's updated receipts information submitted to the Central Contractor Registration (CCR) in May 2010 has not migrated correctly to the ORCA until July, so the public information on which McFarland's protest was based was old, reflecting the higher receipts of previous years. The ORCA as of July 12, 2010, shows Appellant as small under NAICS code 541690.

Appellant also asserted that $[xxxxxx] (approximately [xx]% of its receipts) should be excluded from the size calculation. In support, Appellant pointed to Size Determination No. 2-2003-027 (2003 Size Determination) issued on January 17, 2003. There, the Area Office had excluded similar items and concluded Appellant was an eligible small business under NAICS code 561920 (Convention and Trade Show Organizers), which at the time had a $6 million size standard. Appellant noted it calculated its size for the May 2010 ORCA update on similar exclusions from receipts as were allowed by the Area Office in the 2003 Size Determination.

On February 14, 2011, the Area Office requested documentation for each transaction underlying the receipts Appellant had claimed were excluded, so that the Area Office could analyze the claimed exclusions under the guidelines issued by the Office of Hearings and Appeals (OHA) in its decision in *Size Appeal of Social Impact Inc.*, SBA No. SIZ-5090 (2009). The Area Office also asked several questions about each transaction. There were a total of 4,214 transactions, and the documentation, provided to SBA in binders, filled eight cartons. These transactions, grouped by invoice and then by contract, include facility expenses such as meeting room and equipment rental and supplies; and expenses related to speakers and presenters such as their honoraria, airfare, lodging, ground transportation, and meals.

All of these transactions were entered into by Appellant pursuant to the following five contracts and subcontracts:

- January 2003 Prime Contract with DHHS;
- November 2003 Prime Contract with DHHS;
- March 2004 Task Order No. 2 under Subcontract with Prime Contractor Westat, Inc., whose Government customer was SAMHSA;
- June 2008 Task Order No. 3 under Subcontract with Prime Contractor Westat, Inc., whose Government customer was SAMHSA; and
- November 2005 Subcontract with Prime Contractor Westat, Inc., whose Government customer was SAMHSA.

The January 2003 Prime Contract states, on page 2: "Independently, and not as an agent of the Federal government, the contractor shall provide all personnel, services, and supplies necessary to meet the requirements of Section C."

As required by each contract or subcontract, Appellant separately invoiced either DHHS or the Prime Contractor for reimbursement of its costs for such items as hotel bookings, airfares,

ground transportation, meals, audio-visual equipment, printing, and other expenses related to particular events. Appellant stated that none of the claimed exclusions was Appellant's own direct or indirect expense (personnel costs, other operating business expenses, or profits).

Appellant submitted the required documents (including some but not all of the contract documentation) and information on April 29, 2011, along with additional argument. Appellant asserted the claimed exclusions -- travel, lodging, venue, materials, and speakers -- are external to itself as planner but intimately connected to the particular events. They are direct costs paid by Appellant to parties outside of and unrelated to Appellant (service providers), on behalf of clients who then directly reimburse Appellant.

Regarding *Social Impact,* Appellant asserted it is an agent for its customers because the customers request Appellant to set up the events, Appellant engages external resources only as its customers direct, and then the customers must pay to Appellant the fees. Thus, Appellant acts "as" the customer, "in the customer's shoes" when it engages in the transactions whose receipts it seeks to exclude.

On May 3, 2011, the Area Office requested Appellant to provide copies of the contracts and task orders under which the costs being claimed by Appellant as exclusions were incurred. On May 6, 2011, Appellant provided them.

C. The Size Determination

On May 11, 2011, the Area Office issued Size Determination No. 2-2011-03 (Size Determination) concluding Appellant is other than small under the $7 million annual receipts size standard. The Area Office first addressed the specificity of the size protest, concluding it was specific enough to authorize a size determination.

Next, the Area Office addressed Appellant's receipts and the claimed exclusions. The Area Office found that each of the 4,214 transactions had been entered into by Appellant in its own name, with the Government customer (DHHS) ultimately responsible for the fee sought to be excluded. In each transaction, the cash went from Appellant to the outside party first, and then DHHS reimbursed Appellant. DHHS did not advance the money to Appellant for any transaction, and each transaction was reported as revenue on Appellant's Federal tax return.

Applying the *Social Impact* criteria, the Area Office disallowed all of the requested exclusions, because in each case they were "reimbursements of purchases a contractor makes at a customer's request." None of the transactions met the "amounts collected for another" test or the "funds received in trust" test under 13 C.F.R. § 121.104(a). Rather than the funds flowing first from Appellant's customer to Appellant and then to the service provider, as was the case in *Size Appeal of C2 Freight Resources, Inc.*, SBA No. SIZ-5223 (2011), in Appellant's case the funds flowed first from Appellant to the service provider, and then from Appellant's customer to Appellant. There was no evidence the funds were held in trust, such as segregated funds. Because Appellant could not meet either the "collected for another" or the "received in trust" tests, the Area Office found it needed not discuss Appellant's "agency" argument.

After disallowing Appellant's claimed exclusions, the Area Office concluded Appellant's annual receipts exceed the size standard. Therefore, the Area Office determined Appellant is other than small.

D. The Appeal

Appellant received the Size Determination on May 11, 2011, and filed its size appeal with the Office of Hearings and Appeals (OHA) on May 26, 2011.

Appellant renews on appeal the arguments it had presented to the Area Office. First, Appellant asserts that McFarland's protest was not specific, invalidating the Size Determination. Second, Appellant asserts the Area Office, and OHA, are bound by the 2003 Size Determination, in which the Area Office allowed similar claimed exclusions from Appellant's receipts, and which resulted in the conclusion that Appellant was an eligible small business.

Appellant again asserts that the $[xxxxxx] in revenue from the 4,214 transactions should be excluded from its receipts. Thus, the Area Office clearly erred in not excluding that revenue from the calculation of its annual receipts, and in finding Appellant other than small as a result. Appellant makes several arguments.

First, the Size Determination is inconsistent with the regulatory exclusion for conference management service providers. Specifically, the Area Office misinterpreted the regulation when it found the amounts in question were not "amounts collected for another" but reimbursements for purchases made at a customer's request. In so doing, the Area Office erroneously relied on the last sentence of 13 C.F.R. § 121.104(a), which is inapplicable here under *Size Appeal of Aliron International, Inc.*, SBA No. SIZ-4317 (1998).

Appellant asserts its position is supported by the regulatory history of the conference management service providers exclusion, which examined that industry and recognized the agent-like function of the conference management service providers on behalf of their customers. This history specifically mentions costs like honoraria, venue, and the expenses of presenters in which this agent-like function operates. Appellant carefully contrasts these actual cost elements of *implementing* the planned event, which are completely *external* to the conference management services provider itself, with cost elements that are *internal* to the conference management services provider, such those of its own personnel, office space, general administrative expenses, and business profits. Appellant further notes that its April 29, 2011 submission to the Area Office included only the third-party costs specifically incurred and paid for by Appellant on behalf of its clients. Appellant specifically did not submit for exclusion from annual receipts its own direct and indirect costs of planning, coordinating, and managing the client conferences.

Further, the Area Office elevated form over substance in requiring the funds to have flowed from the client to the conference management services provider to the third-party provider in order to be "amounts collected for another" and thus to qualify the transaction as excludable from annual receipts. These "timing or manner" requirements are not in the regulation and would prohibit a conference management services provider operating under a cost reimbursement contract from qualifying those transactions for the exclusion from receipts of its expenses reimbursed by the Government.

Second, the Area Office here (and OHA in *Social Impact),* have interpreted the conference management service providers exclusion so as to render it meaningless. This erroneous interpretation arises out of SBA's failure to distinguish between external, third-party costs normally reimbursed by the conference's sponsoring organization and those costs internal to the conference management service providers. Also, SBA ignores the conference management service providers' role as agent for the sponsoring organization.

Third (and alternatively), the Area Office misapplied *Social Impact* by not applying the "agency" test as it relates to conference management service providers, because if it had applied this test, it would have found Appellant was an agent of the United States for purposes of "this RFP".

Finally, the Area Office Size Determination (and *Social Impact*) represents a substantial departure from SBA's previous, long-standing interpretation of the exclusion (as shown in the 2003 Size Determination). Contrary to *Stellacom, Inc. v. United States*, 783 F. Supp. 647 (D.D.C. 1992), SBA made the change without notice.

As relief, Appellant requests OHA to reverse the Size Determination as based on clear errors of fact and law, and to conclude that Appellant is an eligible small business under the applicable $7 million size standard.

On June 13, 2011, The Professional Services Council (PSC) a trade association of government contractors of which Appellant is a member, filed a Response in support of the appeal. The PSC asserts the Area Office erred in not excluding pass-through receipts related to meeting expenses such as airfare, hotel, catering, and speaker fees, which are precisely the types of receipts SBA meant to exclude from the calculation of size status.

The PSC also asserts OHA's decision in *Size Appeal of Social Impact,* SBA No. SIZ-5090 (2009), effectively nullifies the receipts exclusion for conference management service providers whose Federal work is typically under cost-reimbursement contracts. Thus, *Social Impact* itself is also erroneous, and both it and the Size Determination should be reversed.

IV. Discussion

A. Timeliness

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).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999). OHA will disturb the Size Determination only if the 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).

C. Preliminary Issues

1. The Size Protest did meet the Specificity Requirement.

Appellant renews its argument, made to the Area Office, that McFarland's protest is non-specific because it was based on incorrect information due to an anomaly in the ORCA system. This argument is meritless.

Under the size regulations, "A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation must be given." 13 C.F.R. § 121.1007(b). The purpose of this provision is to ensure that a protested concern receives adequate due process so it may craft a meaningful response to the protest. "In determining the sufficiency of protests, OHA has focused on (1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds." *Size Appeal of Unitron, LP,* SBA No. SIZ-5084, at 2 (2009).

Here, McFarland did not merely state Appellant was other than small, it pointed to Appellant's own ORCA, which stated Appellant's receipts were $10-$17 million. There is no requirement that the information on which a size protest is based must ultimately prove to be accurate. *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828, at 8 (2006) (citing *Size Appeal of Emergency Beacon Corporation*, SBA No. SIZ-4813, at 12 (2006)).

Accordingly, I conclude McFarland's size protest against Appellant was sufficiently specific, and the Area Office had the authority to initiate a size determination proceeding as a result of it.

2. The 2003 Size Determination is not Binding on the Area Office or on OHA.

Appellant's second argument is that because the Area Office excluded similar types of items from Appellant's receipts in 2003, the Area Office must do so again here.

I disagree. Appellant cites no authority for its proposition that the Area Office must follow its earlier size determination, and there is none. To the contrary, under OHA's case law, a prior size determination is not binding on either an Area Office or on OHA. *Size Appeal of Miltope Corporation*, SBA No. SIZ-5066, at 7 (2009).

Accordingly, I must reject Appellant's second argument that the Area Office erred in not following the 2003 Size Determination.

D. Appellant's Claimed Exclusions are Insufficient to bring its Annual Receipts below the $7,000,000 Size Standard.

I must deny this appeal on the ground that even if Appellant's claimed exclusions are allowed, Appellant's annual receipts still exceed the applicable size standard. All of Appellant's arguments on appeal relate to one overarching issue: whether certain amounts are excludable

from Appellant's annual receipts because these are "amounts collected for another" by Appellant as a conference management service provider. Even if all the claimed amounts are allowed, the appeal cannot be granted because these amounts are insufficient.

Under the size regulations, "receipts" means "total income" plus "cost of goods sold" as these terms are defined and reported on the concern's Internal Revenue Service (IRS) tax return forms. 13 C.F.R. § 121.104(a). "Annual receipts" of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three. 13 C.F.R. § 121.104(c)(1). Appellant's tax returns show that its receipts for the applicable years 2009, 2008, and 2007 total $[xxxxxx]. Thus, average annual receipts for that three-year time period are $[xxxxxx], exceeding the $7,000,000 size standard by $[xxxxxx] per year or $[xxxxxx] across all three years.

Both before the Area Office and here on appeal, Appellant has claimed that certain amounts should be excluded from its receipts because of its pass-through costs as a conference management service provider. The claimed exclusions, however, average just $[xxxxxx] per year ($[xxxxxx] across the three years) as against the $[xxxxxx] per year ($[xxxxxx] across all three years) by which Appellant's annual receipts exceed the size standard. Thus, even if every one of Appellant's claimed exclusions is allowed, Appellant's annual receipts, for size determination purposes, would be $[xxxxxx], exceeding the size standard by $[xxxxxx].

Accordingly, because Appellant cannot be small even if all of its arguments are accepted, I must DENY this appeal.

E. The Area Office Properly Disallowed the Claimed Exclusions from Annual Receipts.

In addition, I must deny this appeal because the Area Office properly disallowed all of Appellant's claimed exclusions from receipts.

Under the small business size regulations:

> 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.

13 C.F.R. § 121.104(a). Footnote 10 to the size standards states:

> *NAICS codes 488510 (part) 531210, 541810, 561510, 561520,* and *561920* — As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenues.

13 C.F.R. § 121.201 (fn 10).

Appellant's first argument is that the Size Determination is inconsistent with the regulatory exclusion for conference management service providers. I disagree. The Size Determination is in accord with the regulation. SBA has been very consistent in construing strictly the exclusions from receipts allowed by § 121.104(a). *E.g., Size Appeal of Social Impact, Inc.,* SBA No. SIZ-5090, at 9 (2009). This strict construction applies to the determination of which industries are permitted to exclude any receipts at all, *Size Appeal of Cash Realty of NY, Inc.,* SBA No. SIZ-4569 (2003), and also to which transactions business concerns in those industries are permitted to exclude. *Size Appeal of Community Research Associates, Inc.,* SBA No. SIZ-4554 (2003).

Appellant also discusses the regulatory history at length. However, this history discusses only the issue of which industries are permitted to exclude "amounts collected for another" from their receipts, and not the specific costs which may be excluded from receipts. Thus, the regulatory history is inapposite to Appellant's argument in this appeal.

Appellant's argument that the Area Office and OHA should use the five factors set out in the proposed rules to determine whether to allow exclusions from a concern's receipts is meritless. These factors (industry characteristics) are in the preambles to the proposed rules. 57 Fed. Reg. 38452 (Aug. 25, 1992) (proposed rule), 60 Fed. Reg. 57881, 57985-86 (Nov. 24, 1995) (same). The factors are not in the regulatory text itself. The factors are applied at the rulemaking level, to determine which industries are eligible for exclusions from receipts. They are not directly applied in making size determinations or in deciding appeals. The Area Office and OHA are both strictly limited to the exclusions specifically set out in the regulation. *Size Appeal of Allstates Employer Services II, Inc.*, SBA No. SIZ-5190, at 7 (2011); *Size Appeal of Mission Solutions, Inc.,* SBA No. SIZ-4828, at 9-10 (2006).

The key regulatory language governing which transactions are covered by the exclusion, "amounts collected for another", does not cover reimbursements. Reimbursements are dealt with in the last sentence of the regulation. The regulation states "reimbursements for purchases a contractor makes at a customer's request … may not be excluded from receipts." The contract directs the contractor make the purchases, and instructs the contractor how to invoice the government for reimbursement. *See e.g.,* January 2003 Prime Contract, Art. G.2. Thus, the regulation itself prohibits this type of transaction from being excluded from a challenged concern's receipts. Appellant, however, seeks to exclude from its receipts just this type of reimbursed cost. The Area Office only followed the directive of the plain language of the regulation.

Also, Appellant misreads *Aliron*. That decision merely restates the clear principle that the exclusions from receipts are limited to the industries enumerated in the regulation. The sentence beginning "All other items" at the end of § 121.104(a) enumerates costs that may not be taken as exclusions from receipts by *any* industry, because they are expenses of the challenged concern (*e.g.,* subcontractor costs, payroll taxes) and not "amounts collected for another." To the extent the language of *Aliron* clouds this principle, and implies that the enumerated industries are permitted to exclude from receipts the expenses enumerated under "All other items," this dicta in *Aliron* is in error.

Second, Appellant argues that the Area Office and OHA have interpreted the conference management service providers exclusion so as to render it meaningless because they fail to distinguish between a contractor's own internal costs and external, third-party costs. I disagree. It is the regulatory language itself, "amounts collected for another," that makes no distinction between these two types of costs.

Appellant's third argument is that the Area Office failed to apply the "agency test" under which it would have found Appellant was an agent of the United States for purposes of "this RFP" (Appeal Petition, at 2) and thus eligible to exclude the amounts of the 4,214 transactions. I disagree with this argument because it would be impossible for the Area Office to find Appellant is an agent of the United States for purposes of "this RFP" since "this RFP" expressly states on page 8 that the contractor acts "[i]ndependently and not as an agent of the Government."

Finally, Appellant's argument that the Size Determination and *Social Impact* are a substantial departure from SBA's previous, long-standing interpretation of § 121.104(a) is meritless. Appellant argues that OHA has somehow overturned longstanding precedent. However, *Social Impact* in no way departed from the regulation or OHA precedent in interpreting the regulation. *Social Impact* articulated no new rule. It simply relied on existing precedent in determining what expenses could be excluded by the challenged concern in that case.

For these reasons, I reject all of Appellant's substantive arguments and conclude that the Area Office did not clearly err in disallowing all of Appellant's claimed exclusions from its annual receipts. Appellant's annual receipts exceed the applicable $7,000,000 size standard. Accordingly, Appellant is an other than small business and I must affirm the Area Office's Size Determination. Therefore I must DENY the instant appeal, and AFFIRM the Area Office's size determination.

V. Conclusion

The Area Office's Size Determination was not based upon clear error of fact or law. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge