

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

SIZE APPEAL OF:

EASTCO Building Services, Inc.,

Appellant,

Appealed From
Size Determination No. 01-SD-2012-57

SBA No. SIZ-5437

Decided: January 18, 2013

APPEARANCES

Richard B. Oliver, Esq., McKenna Long & Aldridge LLP, Los Angeles, California
for Appellant

Jonathan A. DeMella, Esq., James F. Nagle, Esq., and Allison L. Pehl, Esq., Oles
Morrison Rinker & Baker LLP, Seattle, Washington, for Dellew Corporation

DECISION¹

I. Introduction and Jurisdiction

On October 15, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination 1-SD-2012-57, finding that EASTCO Building Services, Inc. (Appellant) is not an eligible small business under the size standard associated with the instant procurement. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant received the size determination on October 22, 2012, and filed the instant appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was initially issued on January 10, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one request for redactions and considered that request in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Protest

On February 23, 2012, the U.S. Social Security Administration (SSA) issued solicitation SSA-RFP-R01-12-1001 seeking mechanical maintenance services for SSA's Northeastern Program Service Center in Jamaica, New York. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 238990, All Other Specialty Trade Contractors, with a corresponding size standard of \$14 million in average annual receipts. Appellant and Dellew Corporation (Dellew) submitted timely offers, self-certifying themselves as small businesses.

On September 24, 2012, the CO announced that Appellant was the apparent awardee. On September 26, 2012, Dellew protested Appellant's size, alleging that Appellant is affiliated with various entities.

B. Size Determination and Requests to Reopen

On October 15, 2012, the Area Office issued its size determination, finding that Appellant is not an eligible small business under the \$14 million size standard due to affiliation with five other entities. The Area Office explained that Mr. Steven Brown is President, CEO, and sole owner of Appellant. Mr. Brown also owns [XX]% of [Affiliate 1], [Affiliate 2], [Affiliate 3], and [Affiliate 4]. The Area Office found that Appellant is affiliated with [Affiliate 1], [[Affiliate 2], [Affiliate 3], and [Affiliate 4] through common ownership. (Size Determination at 2.)

Next, the Area Office found that Mr. Brown's wife, [***], owns [XX]% of [[Affiliate 5]. Because the Browns are a married couple, they are presumed to share an identity of interest under 13 C.F.R. § 121.103(f). [Affiliate 5], though, had no revenue for the preceding three years, so Appellant did not attempt to rebut the presumption of identity of interest between Mr. and Mrs. Brown. The Area Office concluded that Appellant and [Affiliate 5] are affiliated through identity of interest.

The Area Office then calculated Appellant's size by aggregating Appellant's average annual receipts with those of [Affiliate 1], [Affiliate 2], [Affiliate 3], [Affiliate 4], and [Affiliate 5]. The Area Office explained that:

13 C.F.R § 121.104 defines *Receipts* as “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. Based upon the information that was submitted by [Appellant], this office found that the average annual receipts of [Appellant] and its affiliates exceed the size standard of \$14 million.

(Size Determination at 3.)

Prior to issuance of the size determination, Appellant did not identify any purported inter-affiliate transactions between Appellant and its affiliates. However, on October 23, 2012, following its receipt of the size determination, Appellant requested that the Area Office reopen the review. As part of the request, Appellant submitted a letter from its certified public accountant asserting that the income reflected on Appellant's tax returns included certain inter-affiliate transactions which should have been excluded from the calculation of average annual receipts. Appellant also submitted proposed revised tax returns to illustrate the amount of receipts after elimination of those inter-affiliate transfers.

The Area Office denied Appellant's request to reopen the size determination on October 24, 2012. The Area Office explained that there was no error in the size determination because the computation of average annual receipts was based on tax returns submitted by Appellant during the review. Further, under 13 C.F.R. § 121.104(a)(1), the Area Office is barred from considering amended tax returns filed after a size review is initiated.

On October 31, 2012, Appellant renewed its request for reopening. With its renewed request, Appellant provided a chart to assist the Area Office in calculating average annual receipts. According to the chart, after deducting inter-affiliate transactions, the combined average annual receipts for Appellant and its affiliates for the years in question do not exceed the size standard. The Area Office did not respond to Appellant's renewed request to reopen the size determination.

C. Appeal

On November 6, 2012, Appellant filed the instant appeal with OHA. Appellant does not dispute the Area Office's affiliation findings. Rather, Appellant contends that the Area Office clearly erred in determining the combined average annual receipts. Appellant requests that OHA reverse the size determination and find that Appellant is an eligible small business.

Appellant asserts that the Area Office miscalculated the combined average annual receipts of Appellant and its affiliates because the Area Office did not exclude inter-affiliate transactions between Appellant and [Affiliate 1]. Appellant observes that, under SBA regulations, "receipts do not include . . . proceeds from transactions between a concern and its domestic or foreign affiliates." 13 C.F.R. § 121.104(a). Here, argues Appellant, the Area Office erroneously included management fees that [Affiliate 1] annually transferred to Appellant as reimbursement for [Affiliate 1]'s share of joint operating expenses. Appellant contends such reimbursements are "a means of allocating certain joint operating expenses," not sales, and therefore should have been excluded from Appellant's receipts. (Appeal at 5.) Furthermore, Appellant explains, the amounts of those management fees are reflected in Appellant's tax returns. Appellant likens the instant case to *Size Appeal of AIS Engineering, Inc.*, SBA No. SIZ-5348 (2012), in which OHA found that an area office erred by failing to subtract inter-affiliate transactions from the combined receipts.

Appellant also argues that the Area Office improperly refused to reopen the size determination. Appellant concedes that 13 C.F.R. § 121.1009(h) affords the Area Office discretion to decide whether or not to reopen a size determination, but argues that this discretion

must be exercised reasonably and may not be abused. (*Id.* at 10.)

Appellant alludes to the possibility of additional computational errors and states that “[o]nce the Area Office record is available, [Appellant] will be able, if necessary, to amend its appeal to identify and address any other calculation errors.” (*Id.* at 11.)

D. Dellew's Response

On November 21, 2012, Dellew responded to the appeal. Dellew contends that SBA's regulations are clear that the Area Office was under no obligation to reopen the size determination. 13 C.F.R. § 121.1009(h). Furthermore, an Area Office is not permitted to reopen a size determination once an appeal has been filed with OHA. *Id.*

E. Appellant's Reply

On November 23, 2012, the date of the close of record, Appellant replied to Dellew's response. Appellant reiterates its view that the Area Office's discretion to reopen a size determination is not absolute. Appellant contends further that the “eventual filing of this appeal does not affect the Area Office's unreasonable failure to reopen this Size Determination during the [[preceding] two week period.” (Reply at 3.) Appellant observes that Dellew's response did not dispute Appellant's arguments that the Area Office should have excluded management fees as inter-affiliate transactions, which Appellant describes as the “fundamental issue of the appeal.” (*Id.* at 4.) Appellant's reply does not address any additional alleged computational errors.

F. New Evidence and Objection Thereto

In its appeal, Appellant moved to admit new evidence. Specifically, Appellant seeks to introduce Statement 1 from its tax returns for each of the years in question. According to Appellant, the Statement 1s list the reimbursed management fee as other income. Appellant explains that it attempted to submit this information to the Area Office on October 31, 2012. Appellant maintains that the evidence is relevant to the issues on appeal, does not enlarge the issues, and clarifies the relevant facts. Therefore, OHA should admit it. (Appeal at 4.)

Dellew opposes the introduction of this new evidence. Dellew contends that Appellant did not submit a motion establishing good cause for the submission of this evidence, as 13 C.F.R. § 134.308(a) requires. *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006) (denying request to submit new evidence because there was no corresponding motion establishing good cause). Moreover, argues Dellew, this evidence was available at the protest stage, but Appellant failed to submit it to the Area Office. Thus, Appellant may not do so on appeal. *Size Appeal of Mgmt. Support Tech., Inc.*, SBA No. SIZ-4976, at 3 (2008).

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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).

B. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has not shown good cause to admit the new evidence. Appellant could have submitted this evidence to the Area Office, and identified the purported inter-affiliate transactions, prior to the issuance of the size determination. Accordingly, if Appellant wished to have the new evidence considered, Appellant could, and should, have produced it to the Area Office during the size review. *Size Appeal of Profl Project Servs., Inc.*, SBA No. SIZ-5411, at 7 (2012) (“OHA has repeatedly declined to accept new evidence when the proponent did not first submit the material to the Area Office during the size review.”); *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which “sets forth factual information that could have been communicated to the Area Office”). Appellant's motion is DENIED.

C. Analysis

Appellant correctly observes that inter-affiliate transactions are excluded from the definition of “receipts.” 13 C.F.R. § 121.104(a). Accordingly, insofar as the management fees do represent inter-affiliate transactions between Appellant and [Affiliate 1], it would have been proper to subtract them from the calculation of average annual receipts. The problem for Appellant is that Appellant did not timely raise this issue to the Area Office during the size review. Rather, Appellant advanced the argument for the first time in its requests to reopen the size review, after the size determination had already been issued. Furthermore, although the dollar amounts of the management fees may have been recorded in Appellant's tax returns, it

would not have been obvious to the Area Office that Appellant considered those fees to be inter-affiliate transactions, particularly in the absence of any explanation from Appellant.

I find that Appellant's failure to timely communicate its arguments to the Area Office is fatal to this appeal. Pursuant to SBA's regulations, "[t]he concern whose size is under consideration has the burden of establishing its small business size." 13 C.F.R. § 121.1009(c). Accordingly, it was Appellant's responsibility to notify the Area Office of inter-affiliate transactions that should be excluded from the calculation of combined average annual receipts. Appellant failed to inform the Area Office of such inter-affiliate transactions, or to prove their validity. Appellant may not now argue on appeal what it should have argued to the Area Office. *Size Appeal of J.M. Waller Assocs., Inc.*, SBA No. SIZ-5108, at 4 n.1 (2010) (denying appeal because the challenged firm "seeks to charge the Area Office with error for not considering an argument [the challenged firm] never made and that was not apparent from the face of the documentation [the challenged firm] presented."). Furthermore, given the time constraints associated with size reviews,² it is unrealistic and unduly burdensome to expect that the Area Office, on its own initiative, should have gleaned that an item labeled "management fee" on Appellant's tax returns might constitute inter-affiliate transactions.

Appellant also asserts that the Area Office improperly refused to reopen the size determination under 13 C.F.R. § 121.1009(h), which states that "SBA may, in its sole discretion, reopen a formal size determination to correct an error or mistake." Appellant's argument fails for two reasons. First, Appellant cites no authority for the proposition that the Area Office's discretion under 13 C.F.R. § 121.1009(h) must be exercised reasonably; rather, it appears that the Area Office's discretion is absolute. Indeed, in promulgating 13 C.F.R. § 121.1009(h), SBA explained that the purpose of the rule is to "permit SBA to correct [an] error or mistake without requiring the filing of an appeal at OHA." 60 Fed. Reg. 57,982, 57,993 (Nov. 24, 1995). Thus, the rule plainly is intended to avoid unnecessary litigation at OHA, not to mandate reopening of a size review if such a course of action is shown to be reasonable. Second, 13 C.F.R. § 121.1009(h) grants area offices the discretion to reopen a size review "to correct an error or mistake." Here, though, the Area Office committed no error or mistake, because Appellant did not raise any argument regarding purported inter-affiliation transactions prior to the issuance of the size determination. Under the circumstances, then, the Area Office could properly choose not to reopen the size determination.

Lastly, Appellant alludes to the possibility of additional computational errors, reserving the right to "amend its appeal to identify and address any other calculation errors." *See* Section II.C, *supra*. However, Appellant did not submit an amended appeal to OHA. I find, therefore, that Appellant has abandoned this issue, and it need not be further addressed here. 13 C.F.R. § 134.316(c); *Size Appeal of Cherokee Nation Healthcare Servs. Inc.*, SBA No. SIZ-5343, at 4 (2012).

² An area office ordinarily is expected to issue a size determination within 15 business days after receipt of a size protest. 13 C.F.R. § 121.1009(a)(1).

IV. Conclusion

For the reasons discussed *supra*, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge