

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

SIZE APPEAL OF:

TLS Contracting, Inc.,

Appellant,

Appealed From
Size Determination No. 5-2014-009

SBA No. SIZ-5527

Decided: January 9, 2014

APPEARANCE

Rex W. Chronister, Esq., Chronister, Fields & Flake PLLC, Fort Smith, Arkansas, for Appellant

DECISION

I. Introduction and Jurisdiction

On December 13, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination 5-2014-009, finding that TLS Contracting, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and determine that Appellant is, in fact, an eligible small business. 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 filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On August 2, 2013, the U.S. Department of Veterans Affairs Medical Center issued Solicitation VA249-13-B-0523, seeking a contractor to replace a chiller and cooling tower. The Contracting Officer (CO) set the procurement aside for service-disabled veteran-owned small business concerns, and assigned North American Industry Classification System code 238220,

Plumbing, Heating, and Air-Conditioning Contractors, with a corresponding \$14 million average annual receipts size standard. Offers were due October 30, 2013.

The CO opened bids on October 30, 2013, and announced that Appellant was the apparent successful offeror. On November 4, 2013, Dunbar Mechanical Contractors, LLC (Dunbar), an unsuccessful offeror, submitted a size protest against TL Services, Inc. On November 21, 2013, the Area Office dismissed Dunbar's protest because it protested an entity that was not the successful offeror. The Area Director then initiated his own size protest of Appellant under the authority of 13 C.F.R. § 121.1001(a)(1)(iii).

B. Size Determination

On December 13, 2013, the Area Office issued Size Determination 5-2014-009, finding that Appellant is not an eligible small business. The Area Office determined Appellant is affiliated with TL Services, Inc. and TLS Management, Inc. based on common ownership. 13 C.F.R. § 121.103(a)(1). The Area Office explained that when Appellant's annual receipts are combined with those of its affiliates, Appellant exceeds the \$14 million size standard.

C. Appeal

On December 23, 2013, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the determination is clearly erroneous and should be reversed.

Appellant does not dispute the findings of affiliation. Rather, Appellant takes issue with the calculation of Appellant's size. Appellant points out that SBA defines receipts as “total income” plus “cost of goods sold,” as those terms are defined and reported on Internal Revenue Service (IRS) tax return forms. 13 C.F.R. § 121.104(a). Appellant then argues that, because the IRS treats “cost of goods sold” as a negative number, the Area Office should have subtracted “cost of goods sold” from “total income.” Had the Area Office done so, Appellant contends, the annual receipts of Appellant and its affiliates would not exceed \$14 million.

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 the 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. Analysis

SBA regulation 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.” 13 C.F.R. § 121.104(a). In the preamble to the final rule amending this regulation, SBA “clarified what the term ‘receipts’ encompasses.” 61 Fed. Reg. 3280, 3281. “For a corporation . . . , the applicable term is ‘total income.’ . . . To this amount, the ‘cost of goods sold’ (IRS Form 1120, line 2 . . .) is *added* to determine ‘receipts’ for SBA purposes.” *Id.* at 3282(emphasis added). Here, the record confirms—and Appellant acknowledges—that the Area Office added total income to the cost of goods sold, as it was reported on the IRS tax forms.

Appellant argues, though, that because “cost of goods sold” offsets “total income” for purposes of calculating tax liability, SBA should subtract “cost of goods sold” from “total income.” This argument is unpersuasive. Although 13 C.F.R. § 121.104(a) cites to IRS tax forms, OHA has held explicitly that SBA has not incorporated by reference IRS regulations, and IRS regulations “are inapposite to size cases.” *Size Appeal of Phillips Nat’l, Inc.*, SBA No. SIZ-4332, at 8 (1998). More specifically, OHA has held that deducting “cost of goods sold” when determining annual receipts “contradicts the definition of ‘annual receipts’ in the regulation.” *Size Appeal of Virgil G. Simons*, SBA No. SIZ-2636, at 3 (1987). This is because the size standard is based on revenue, and deducting “cost of goods sold” from “total income” would measure profitability, not revenue. *Id.* As OHA has explained, if “size were measured by profit alone, some very large firms could qualify as small.” *Size Appeal of Mid-Columbia Eng’g, Inc.*, SBA No. SIZ-4134, at 5 (1996). Accordingly, Appellant’s argument that SBA should adopt the IRS’s practice is unavailing, and I find no error in the calculation of Appellant’s size.

IV. Conclusion

Appellant has not demonstrated the size determination is in error. I therefore DENY this appeal and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge