

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

SIZE APPEAL OF:

Connected Logistics, Inc.,

Appellant,

Appealed From
Size Determination No. No. 3-2014-069

SBA No. SIZ-5617

Decided: November 24, 2014

APPEARANCE

Forrest Burke, CEO, Connected Logistics, Inc., Huntsville, Alabama

DECISION¹

I. Introduction and Jurisdiction

On August 6, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2014-069 finding Connected Logistics, Inc. (Appellant) ineligible as a small business for U.S. Army Contracting Command (ACC) Solicitation No. W909MY-13-R-A0003 (solicitation). The Area Office found affiliation between Appellant and Canopy Logistics, Inc. (Canopy). The Area Office determined that Appellant and its affiliate exceed the \$14 million average annual receipts size standard associated with North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, assigned to the solicitation.

Appellant contends that the Area Office erred in not excluding certain amounts from Appellant's receipts under 13 C.F.R. § 121.104(a). For the reasons discussed *infra*, 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

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. No redactions were requested, and OHA now publishes the decision in its entirety.

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 May 17, 2013, the ACC Contracting Officer (CO) issued the solicitation as a total small business set-aside. The solicitation sought offerors with a comprehensive knowledge of the Army logistics enterprise and a high degree of technical competence with regard to Army logistics operations, services, and policy to provide support to the Army G-4. Performance Work Statement (PWS) at § 1.

On July 10, 2014, the CO notified unsuccessful offerors that Appellant was an apparent successful offeror. On July 11, 2014, the CO received a protest from Enterprise Resource Performance, Inc. (ERPI). ERPI alleged that Appellant's three-year annualized revenue rate is \$20,329,487, based on publicly available information and, accordingly Appellant exceeds the small business size standard assigned to the solicitation. Protest at 1. The CO forwarded Appellant's protest to the Area Office for consideration.

B. Size Determination

On August 6, 2014, the Area Office issued Size Determination No. 3-2014-069, finding affiliation between Appellant and Canopy. The Area Office found that together the companies are large for the \$14 million size standard assigned to the procurement. Size Determination at 6.

The Area Office determined Mr. Charles F. Burke, Appellant's Chief Executive Officer and 100% stockholder, and Ms. Wanda M. Burke, 100% owner of Canopy and Mr. Burke's spouse, have an identity of interest. *Id.* at 3-4; 13 C.F.R. § 121.103(f). The Area Office stated OHA has held a company may rebut the presumption of an identity of interest between family members by presenting evidence such as lack of close involvement in business matters. Size Determination at 4. However, the Area Office noted Appellant and Canopy have not rebutted the presumption and that there are intercompany relations as evidenced by a note receivable owed to Appellant from Canopy without an executed loan agreement or terms of repayment. *Id.*

In Appellant's response to the protest, Appellant stated as a conference management or travel broker, Appellant had confirmed that its subcontractor had arranged the travel and conferences. *Id.* Appellant stated it did not ““make the arrangements or structure the conferences, like any other broker, [Appellant] just made sure that [the subcontractor] was doing things the right way.”” *Id.* at 4-5 (citing an email from Appellant to the Area Office sent on July 24, 2014). Accordingly, Appellant indicated substantial amounts of Appellant's 2011 and 2012 revenues are reimbursements made on customer's behalf and should not be included in the calculation of annual receipts. *Id.* at 5.

The Area Office found that Appellant is not a conference management service provider for the contract on which the pass through adjustment to revenues is based. The Area Office

asserted Appellant is “a *broker*, and subcontracts to another company to perform the conference management service.” *Id.* (emphasis in the original). The Area Office states 13 C.F.R. § 121.104(a) indicates which industries are allowed to exclude certain revenue. *Id.* The Area Office notes “Brokers” are not entitled to the benefit of excluding revenue. *Id.*

Therefore, the Area Office calculated Appellant's size, in accordance with 13 C.F.R. § 121.104(c)(1), for fiscal years 2011, 2012, and 2013, and did not exclude revenues Appellant characterized as reimbursements. Based on the calculation, the Area Office found Appellant and Canopy large for the \$14 million size standard.

C. Appeal

On August 19, 2014, Appellant filed the instant appeal with OHA. Appellant argues the Area Office erred in calculating Appellant's size because the Area Office included receipts of amounts Appellant collected for another as a travel or conference management service provider. Appeal at 4. Appellant asserts the size determination includes the erroneous inclusion of pass-through receipts, contrary to 13 C.F.R. § 121.104(a), and “the improper inclusion of cash conversion from prior and subsequent years, in direct conflict with the treatment of annual receipts as specified in 48 C.F.R. § 19.101.” *Id.* at 5.

Appellant argues the Area Office erroneously concluded that Appellant is not a small business because Appellant characterized itself as “a *broker*, [that] subcontracts to another company to perform the conference management service.” *Id.* at 6 (quoting the size determination at 5). Appellant asserts because it informally referred to its actions as a broker and brokers are not enumerated as eligible for exclusions, the Area Office determined the revenues received and transmitted to an unaffiliated third party were not excluded. *Id.* at 6-7. Appellant argues its informal usage of the word broker, as an intermediary between two parties, should not preclude Appellant's ability to exclude receipts collected for QBE, LLC (QBE). *Id.*

Appellant references a memorandum from the Department of the Army, Program Executive Office, Enterprise Information Systems, Product Manager, Area Processing Centers issued to Appellant on September 15, 2010, and forwarded to the Area Office. *Id.* at 7. The memorandum directed Appellant to support the Army as a “conference management service provider and travel agent” by coordinating and brokering System Engineering conferences and travel. *Id.* Appellant was instructed to acquire these services from QBE, as a third-party service provider of Integrated Process Team (IPT) conferences. *Id.* at 7-8. Appellant reiterates that whether Appellant is characterized as a broker or conference management service provider and travel agent these pass-through receipts were collected for another and meet the terms of 13 C.F.R. § 121.104(a). *Id.* at 9.

Appellant asserts its independent auditor's report, included in the record before the Area Office, further supports its appeal. *Id.* at 10. Appellant states its auditor considered the issue in terms of the Internal Revenue Service (IRS) tax code, U.S. Financial Accounting Standards Board, and SBA regulations. *Id.* The auditor estimated approximately “\$18 million shown in [Appellant's] tax filings were actually pass-through receipts for conference management and travel agent services that did not count for IRS, Generally Accepted Accounting Practices, nor

SBA purposes.” *Id.* at 10-11. Appellant argues it self-certified and reported to the SBA its accrual-based receipts from its independently audited financial statements, in compliance with 48 C.F.R. § 19.101, and urges that the Area Office should have considered Appellant's independently audited financial statements. *Id.* at 11.

Finally, Appellant argues the Area Office's determination was not based on the factual information presented. *Id.* at 12. Appellant cites the September 15, 2010 memorandum from the Army, its independently audited financial statements, the invoices provided in over 100 emails and more than 800 documents, and the fact Appellant had no participation in the conferences. *Id.* at 12-15.

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. Analysis

For size determination purposes, 13 C.F.R. § 121.104(a) provides a limited exclusion from receipts for:

net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and *amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. . . .*

Id. (emphasis added).

OHA has noted that accurately assessing a firm's receipts is essential to making a size determination and maintaining the integrity of small business set-aside programs and, therefore, exclusions from receipts specifically allowed by 13 C.F.R. § 121.104(a) must be strictly construed. *Size Appeal of Cash Realty of NY, Inc.*, SBA No. SIZ-4569, at 4 (2003)(citing *Size Appeal of Community Research Associates, Inc.*, SBA No. SIZ-4554, at 5-6 (2003)).

Here, the size determination seemed to turn on the characterization of Appellant as a broker, where the focus should have been on whether Appellant collected amounts for another as a travel agent or conference management provider. *See* 13 C.F.R. § 121.104(a). SBA regulations

allow a challenged firm in one of the enumerated industries to 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.

OHA has explained that examples of these excluded receipts include hotel room fees and airfare paid by conference attendees to the conference manager for convenience sake or to ensure a group rate that are then paid by the conference manager to the hotel or airline. *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5028 at 8 (2009). Similarly, OHA has indicated that the payment for other expenses of running the conference, the conference facilities themselves, honoraria, and equipment are not amounts collected for another and cannot be excluded from a challenged firm's receipts. *Id.* 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). *Id.*; *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 (1998)).

The record demonstrates Appellant served not as a conference and management service provider, but as the broker for those services. The Army explicitly indicated Appellant was directed to coordinate and broker conferences and travel through QBE, a third-party service provider of IPT conferences. Army Memorandum at 1 (Sept. 15, 2010). The Army states, "QBE will be the primary obligor to the Government during these conferences and travel." *Id.* The Army explained:

QBE will provide [Appellant] with required service categories and prices commensurate with their existing level of effort delivering these conferences and travel. [The Army] will approve all product and service specifications while working directly with QBE and will reimburse QBE through [Appellant] as our IPT conference management broker.

Id.

Although the Army's memorandum refers to Appellant as a conference management service provider and travel agent, it is QBE which was acting as the conference management service provider. Appellant was a conduit for the Army to arrange conferences for Army personnel and QBE consultants. QBE performed the services required here, and Appellant was not acting within the scope of a conference and management service provider. The 560 invoices from QBE to Appellant and 137 from Appellant to Science Applications International Corporation, Appellant's prime contractor, for conference management booking and travel services establish that it was QBE that was actually performing the conference management services. Appellant explains it did not participate in these conferences, did not manage participation, agendas, products or services emanating from the conferences, and was not the obligor for the services. Appeal at 15. Appellant's sole role was to broker these services and pay the QBE invoices, for which it would then itself be reimbursed.

OHA has explained that conference management service providers must be able to prove that the revenues they seek to exclude are not their own regular business expenses—a simple legal question of what role the conference management service provider played in the transaction. *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5090 (2009). In reviewing whether a firm is acting as a conference service provider, SBA must consider the functions the firm actually performed, rather than the words used to describe the activity. Here, Appellant was not providing conference management services. QBE performed that function and the funds were owed by the Army to QBE and passed through Appellant. Appellant therefore is not entitled to claim the exclusion for amounts collected for another in the regulation, because it did not fall into one of the limited categories of businesses the regulation permits to take that exclusion.

Accordingly, I must conclude that the Area Office correctly characterized Appellant's role as that of a broker, rather than a conference management service provider. Consequently, Appellant is not entitled to exclude from its annual receipts any funds as amounts collected for another. The Area Office then properly calculated Appellant's size based upon its tax returns, and concluded Appellant was other than small. I find no error of fact or law in the size determination and therefore must affirm it and deny this appeal.

IV. Conclusion

For the above reasons, I AFFRIM the Area Office's size determination and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge