

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

**REDACTED DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Western River Restoration Partners,

Appellant,

Appealed From  
Size Determination No. 06-2015-076

SBA No. SIZ-5695

Decided: December 1, 2015

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq.,  
Koprince Law LLC, Lawrence, Kansas, for Appellant

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DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 6, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2015-076, finding that Western River Restoration Partners (Appellant) is not an eligible small business. Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be a small business for the instant procurement. 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

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. 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.

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 June 2, 2015, the U.S. Army Corps of Engineers (Corps), South Pacific Division, Sacramento issued Request for Proposals (RFP) No. W91238-15-R-0045 for the planting and establishment of ecosystem restoration for Phase One of the Combined Ecosystem Restoration and Flood Risk Management Project in Hamilton City, California. The Contracting Officer (CO) set the contract aside entirely for small businesses and designated North American Industry Classification System (NAICS) code 115112, Soil Preparation, Planting, and Cultivating, with a corresponding \$7.5 million annual receipts size standard.

On August 14, 2015, the CO notified offerors that Appellant was the apparent successful offeror. On August 20, 2015, Sierra View Landscape, Inc. d/b/a Restoration Resources, an unsuccessful offeror, filed a protest with the CO alleging Appellant is not an eligible small business concern. The CO forwarded the protest to the Area Office for a formal size determination.

On August 21, 2015, the Area Office dismissed the protest as non-specific. The Area Director, however, initiated his own size protest against Appellant on the suspicion that its parent company, River Partners (River), may not be a small business.

### B. Response to Protest

On August 26, 2015, Appellant, through its auditor and accountant, responded to the protest. Appellant explained that River's financial statements and tax returns for 2014 and 2013 include "amounts deposited into escrow accounts from federal and state agencies to facilitate the acquisition of restricted properties by [River]." (Response at 1.) Appellant went on to explain:

In exchange for these deposits/grants, the federal and state agencies received easements on the property and certain restrictions on the ultimate use of those properties. [River] used these deposits/grants along with its own funds to acquire property that can be rehabilitated for riparian use, which is a part of [River's] exempt purpose. At the end of the rehabilitation project, the restricted properties must be turned over to a federal and state agency for ongoing maintenance and [River] does not retain easements on the properties or any other benefit.

(*Id.*) Appellant then pointed out that "[t]he accounting requirement for not-for-profits required that the monies that were deposited into escrow be recorded as revenue and the easements provided to the agencies as program expenses, which is a very different accounting requirement than for-profit entities." (*Id.*)

In terms of calculating River's annual receipts, Appellant noted that the pertinent regulation, 13 C.F.R. § 121.104(a), does not address the definition of “receipts” for nonprofits. Appellant argued that based on its reading of the regulation, certain activities were excluded from the sum “because they are not *earned* revenues.” (*Id.* at 2.) Here, as the amounts deposited into escrow accounts must be turned back over to the federal and state government, River is merely holding these amounts for the duration of the rehabilitation projects; thus, they are not earned revenues and should be excluded from the calculation of “receipts.”

On September 22, 2015, Appellant responded to further requests for information from the Area Office. Appellant elaborated that River's IRS Form 990 “lumps income and other items as revenue.” (Letter from G. Dion, Jr. to J. Nietes (Sept. 22, 2015).) Such other items include funds in escrow accounts for land acquisition by federal and state governments, which is required under Generally Accepted Accounting Practices. Appellant maintained “that these funds were not provided to [River] nor did they pass through [River].” (*Id.*) When these amounts are excluded, Appellant argued, River's average annual receipts are XXXXXX.

### C. Size Determination

On October 6, 2015, the Area Office determined that Appellant is not an eligible small business due to its affiliation with several companies, including River.<sup>2</sup>

The Area Office calculated the receipts for Appellant and its affiliates. Combined, their receipts exceed the \$7.5 million size standard. (Size Determination at 6.) In reaching this conclusion, the Area Office determined that River's nonprofit status was immaterial, reasoning that “SBA counts the receipts of a concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.” (*Id.* at 6.) Although SBA regulations provide for certain exclusions from the calculation of receipts, the Area Office declined to exclude the amounts put into escrow. The Area Office reasoned the exclusions in the regulation do not mention amounts in escrow, and OHA has held that the regulation's “exclusions are to be interpreted strictly and are limited to those enumerated in the regulation.” (*Id.*, quoting *Size Appeal of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015).)

### D. Appeal Petition

On October 21, 2015, Appellant filed its appeal of the size determination with OHA. Appellant argues the size determination contains clear errors of law, so OHA should either reverse it or vacate and remand it to the Area Office.

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<sup>2</sup> In addition to River, the Area Office determined Appellant is affiliated with Sierra Cascade Blueberry Farm; Wild Salmon Partners; and Tallac Applied Ecology & Design, LLC. Appellant does not dispute these findings of affiliation on appeal.

Appellant argues the Area Office misapplied the regulation for calculating receipts. The pertinent regulation states:

*Receipts* means “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 (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships).

13 C.F.R. § 121.104(a). Appellant explains that, because River is a nonprofit, it files an IRS Form 990, Return of Organization Exempt from Income Tax, a form not mentioned in § 121.104(a). The Form 990, Appellant observes, does not contain the line items “total income” or “cost of goods sold.” Therefore, “trying to determine a not-for-profit's receipts using the definition under Section 121.104(a) is like trying to fit a square peg in a round hole—the Section simply was not designed with not-for-profits in mind.” (Appeal at 2.)

In calculating River's receipts, Appellant explains that the Area Office improperly substituted “gross revenue” for “total income.” Instead, the Area Office should have determined what River's “total income” and “cost of goods sold” would be if it were required to report those figures. (*Id.* at 6.) Although this would require more work on the part of the Area Office, Appellant argues it is not unduly burdensome because “requiring the Area Office to simply follow the [r]egulation is not unduly burdensome.” (*Id.* at 10). Appellant argues that, had River filed a Form 1120, its “total income” would be XXXXXXXX. (*Id.* at 7.)

Appellant argues this case is distinguishable from *Size Appeal of ASEE Services Corporation*, SBA No. SIZ-4250 (1997), a case that involved the calculation of a nonprofit's “total income” and “cost of goods sold.” In that case, Appellant contends, the issue was whether certain funds should have been exempted from the calculation, not whether the Area Office made its calculation correctly. (*Id.* at 10.)

Alternatively, Appellant argues, even if it were proper to include River's land conservation amount in its receipts, the Area Office should have excluded them as capital gains. Under SBA regulations, receipts “do not include net capital gains or losses.” 13 C.F.R. § 121.104(a). In response to the protest, Appellant stated that the land conservation amounts are “very similar to capital gain or loss treatment.” If River were a for-profit entity, these amounts would be considered capital assets and would thus be excluded from the calculation of receipts.

#### E. Agency Response

On November 5, 2015, SBA responded to the appeal. SBA contends the Area Office correctly calculated River's receipts. Accordingly, OHA should deny the appeal.

The argument that the Area Office should have determined what “total income” would have been if it were reported on a tax return is meritless, SBA contends, because it ignores the fact that “total income” includes all income, whatever the source, whether earned or passive.

Further, the attempt to distinguish “revenue” from “income” is unconvincing because SBA regulations, OHA case law, and the IRS use the terms interchangeably. Regardless of whether money is labeled “revenue” or “income,” it must be included in the size calculation. The only exception to this rule is where a specific exemption enumerated in 13 C.F.R. § 121.104(a) applies. No such exemption applies.

SBA argues the Area Office was correct to use River's Form 990, because the regulations require it to use tax returns when determining size, and it had no authority to consider extraneous evidence. (Response at 5-6, citing *Size Appeal of Thomas Computer Solutions, LLC*, SBA No. SIZ-4841 (2007); *Size Appeal of SIETech LLC, Joint Venture*, SBA No. SIZ-5667 (2015).) Further, given that River had submitted copies of its tax returns, the alternative advanced by Appellant—that the Area Office should have asked River to determine its “total income” and “cost of goods sold”—would be “illogical and unreasonable.” (*Id.* at 4 n.5.) Besides placing an undue burden on area offices, Appellant's proposed alternative would also be unworkable. For example, it is unclear what business formation an area office should use as a basis for converting Appellant's financial information to arrive at “total income” and “cost of goods sold.” SBA contends that if River wishes to be treated as a for-profit entity for purposes of determining size, it is free to convert its status. (*Id.*)

SBA argues *ASEE Services* supports the size determination. In that case, OHA determined that federal funds constituted income and were correctly included in the size calculation. (*Id.* at 6.)

#### F. Motion to Reply

On November 13, 2015, Appellant moved to reply to SBA's response. Appellant argues there is good cause to permit the reply because SBA introduces a new argument—that the Area Office was prohibited from considering evidence beyond River's tax returns. Because this assertion was not in the size determination, Appellant argues it has not had the opportunity to address it. OHA has permitted replies when they “address factual errors or new issues raised in an opposing party's pleading.” (Reply at 2, quoting *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604 (2014).) Such is the case here.

I find Appellant has demonstrated good cause to admit the reply. As Appellant points out, the discussion regarding information extrinsic to a tax return was absent from the size determination, so Appellant has not had the opportunity to address this issue. *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668 at 10 (2015) (reopening the record to admit a reply addressing new arguments not previously raised). Accordingly, Appellant's motion is GRANTED and the reply is ADMITTED into the record.

### G. Reply

With its motion, Appellant submitted its proposed reply. Appellant repeats its argument that “total income” and “gross revenue” are not interchangeable terms because they include different items. Moreover, had the regulation contemplated using “gross revenue,” it would say as much.

Appellant argues that SBA regulations do not require the Area Office to rely only on tax returns in calculating a firm's size. To the contrary, SBA and OHA both routinely rely on information outside of a firm's tax returns to explain or clarify its financial situation. *E.g.*, *Size Appeal of Pynergy, LLC*, SBA No. SIZ-5558 (2014) (remanding size determination and instructing appellant to submit evidence of its inter-affiliate transactions even though appellant submitted tax returns for original size determination); *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5394 (2014) (PFR) (excluding 10% of the challenged firm's annual receipts from size determination based on the firm's statement that these amounts were inter-affiliate transactions); *Size Appeal of C2 Freight Resources, Inc.*, SBA No. SIZ-5223 (2011) (considering appellant's explanation—not found in tax returns—relating to exclusion of amounts collected for freight carrier as property broker). Further, Appellant argues, SBA's approach is an unreasonable interpretation of the regulatory scheme because it creates absurd results—It mandates the use of a tax form that does not contain the amounts that SBA regulations require be used to calculate size.

To avoid this absurdity, Appellant repeats that the Area Office should have determined what River's “total income” and “cost of goods sold” would have been had it filed a different tax return. SBA regulations permit the Area Office to “us[e] any other information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts” when the concern has not filed a Federal income tax return for a fiscal year which must be included in the period of measurement. 13 C.F.R. § 121.104(a)(2).

Appellant takes aim at the authorities cited by SBA to support the argument that the Area Office may not calculate what “total income” and “cost of goods sold” would be. The challenged firm in *Thomas Computer Solutions* was a sole proprietor, Appellant argues, so the Form 1040 it filed contained the terms “total income” and “cost of goods sold.” Therefore, when OHA stated, “13 C.F.R. § 121.104(a)(1) provides that area offices must use tax returns filed with the IRS on or before Appellant's self-certification date to evaluate [the firm's] size,” OHA was not addressing the issue present here—how to calculate size of a nonprofit. Appellant argues that, just like the Area Office must use supplemental information to calculate a travel agent's receipts, the Area Office must use supplemental information to calculate a nonprofit's receipts. Further, *SIETech* is distinguishable because that case did not involve a nonprofit, and the area office calculated receipts based on the “total income” and “cost of goods sold” listed on the Form 1120S.

Appellant contends there is no regulatory basis for the Area Office's decision to substitute “revenue” for “income,” so the Area Office could decide the next case completely differently. By contrast, Appellant's proposed alternative could be consistently applied.

## H. New Evidence

With its appeal, Appellant moved to introduce two new pieces of evidence. First, Appellant seeks to admit a spreadsheet showing what River's "total income" and "cost of goods sold" would have been on a Form 1120, if River Partners was a for-profit entity. The second piece of evidence Appellant seeks to admit is a declaration from Mr. Bryce Gibbs, a licensed certified public accountant.

Appellant argues this evidence is relevant and clarifies the issues on appeal, so there is good cause to admit it. It is relevant because it establishes that the calculation of River's receipts is erroneous. It clarifies the issues because it sets forth what River's receipts would have been, had they been properly calculated by adding the approximate values for River's "total income" and "cost of goods sold" under 13 C.F.R. § 121.104(a). Moreover, had the Area Office followed the formula set out in this regulation, these figures would already be in the record.

On November 5, 2015, SBA opposed Appellant's motion. SBA notes that "OHA has consistently held that evidence that was available for submission to the Area Office and yet was not presented to the Area Office is generally not admissible." (Opp. at 1, citing *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654 (2015).) Here, SBA argues, the evidence proffered by Appellant "could easily have been submitted to the Area Office during the processing of the size determination." (*Id.* at 2.) Appellant was aware of the issue involving River's receipts and submitted argument on it. In fact, nearly six weeks passed between when Appellant first argued that nonprofits do not report receipts on their tax forms and when the Area Office issued the size determination. Appellant therefore "had ample opportunity to submit evidence to the Area Office and has not provided any reason why Appellant was unable to do so." (*Id.*)

## 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).

Here, Appellant's proffered new evidence was available during the course of the size investigation, so Appellant could have submitted to the Area Office. OHA has consistently held it will not accept new evidence when the material in question was available during the course of the size investigation but not submitted to the Area Office. *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 10 (2015); *Size Appeal of Prod. Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Appellant's motion to supplement the record is therefore DENIED, and the proffered evidence is EXCLUDED from the record.

### C. Analysis

I find Appellant has not met its burden of proving that the size determination is clearly erroneous. The appeal is therefore denied.

For a firm to be an eligible small business, the combined receipts of the firm and its affiliates, regardless of whether the affiliates are organized for profit, may not exceed the size standard associated with the NAICS code designated to the procurement. 13 C.F.R. §§ 121.103(a)(6) and 121.402(a). In this case, Appellant does not dispute that it is affiliated with River, but rather that River's receipts are less than the Area Office determined. SBA regulations specify:

(a) Receipts means “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 (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include 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. 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.

(1) 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. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

13 C.F.R. § 121.104(a).

Although this regulation does not specifically state how to calculate the receipts of a nonprofit the way it does for for-profit entities, the regulatory history firmly rejects Appellant's argument that the Area Office could disregard River's tax return and instead make its own calculation, using extrinsic financial documents, as to what River's "total income" and "cost of goods sold" would be if River were a for-profit entity. In 1996, SBA amended this regulation to make clear that it "bases its calculation of a concern's [receipts] solely on information contained in the concern's Federal income tax returns." 67 Fed. Reg. 70,339, 70,341 (Nov. 22, 2002) (proposed rule) (citing 61 Fed. Reg. 3,280 (Jan. 31, 1996).) Prior to this amendment, "SBA could rely either on a concern's regular books of account or Federal income tax returns to determine a concern's [receipts]." *Id.* As the regulatory history clarifies, then, the Area Office must use tax returns when they are available, and not the "other available information" referenced in 13 C.F.R. § 121.104(a)(2). This is consistent with long standing OHA precedent that an area office must use a concern's Federal tax returns when calculating that concern's size. *E.g., Size Appeal of SIETech, LLC*, SBA No. SIZ-5667 (2015). That holding has applied to nonprofits, as well. *Size Appeal of ASEE Servs. Corp.*, SBA No. 4250, at 4 (1997) *recons. denied*, SBA No. SIZ-4254 (1997) (PFR). Accordingly, I find the Area Office did not err in its determination that it must use River's tax return to determine its receipts.

As Appellant points out, because River is a nonprofit that files a Form 990, its tax return does not have the terms "total income" or "cost of goods sold," the line items that are used to calculate receipts for a for-profit entity. Nevertheless, just because the Form 990 lacks these terms, and is silent as to which line items should be used to calculate "receipts," it does not mean that the Area Office should base its calculation on information outside of River's tax return or calculate a nonprofit's "cost of goods sold" and "total income." On this point, the regulatory history is also illustrative. SBA stated in a proposed rule that its "long-standing policy" is to "include[e] income from all sources in its definition of receipts." 67 Fed. Reg. 70,339, 70,341 (Nov. 22, 2002) (proposed rule). In the final rule, SBA confirmed, "It remains SBA's intent that amounts received from any source are to be counted in determining a firm's annual receipts. As noted in the proposed rule, this includes amounts received from gross sales, interest, dividends, rents, royalties and other income." 69 Fed. Reg. 29,192, 29,196 (May 21, 2004) (final rule). More recently, SBA has clarified that it gives a broader meaning to the term "income," stating that it "has always included *all revenues* in its calculation of receipts." 77 Fed. Reg. 7,490, 7,502 (Feb. 10, 2012) (emphasis added). One rationale for this practice is that it "provide[s] a consistent approach for establishing eligibility for small business programs for all

industries.” *Id.* As Appellant explains, the Form 990 does not use the term “total income,” but rather “total revenue.” However, because SBA has expressed its intent to include “all revenues” and “amounts from any source” in its calculation of receipts, I find the Area Office did not err in its determination to calculate River's receipts based on its “total revenue.”

Further support for this conclusion can be found on the face of the Form 990 itself. “Total revenue” is the sum of “contributions and grants,” “program service revenue,” “investment income,” and “other revenue.” IRS Form 990 at 1. Two insights stem from this ledger. First, the IRS takes a broad view of a nonprofit's revenue, as it includes items such as contributions and grants. Second, it is noteworthy that when “investment income” is combined with specific sources of revenue, the IRS refers to the sum as “total revenue.” Based on the IRS's use of these terms, then, “income” and “revenue” are not mutually exclusive and, at least in some cases, can be used interchangeably. Accordingly, I find no merit to Appellant's contention that “revenue” and “income” cannot be used interchangeably for purposes of determining receipts.

Appellant's argument that the Area Office should have excluded the amounts held in escrow as capital gains is also without merit. The fact that these amounts would be excluded if Appellant were a for-profit entity does not help Appellant because Appellant is not a for-profit entity. OHA has consistently held that the regulation's exclusions of certain revenue from a concern's receipts must be strictly construed, and all revenues must be counted in determining receipts. *Size Appeal of Connected Logistics, Inc.*, SBA No. SIZ-5617, at 4 (2014); *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). OHA has also specifically held that federal funds received by a nonprofit entity may not be excluded from “receipts.” *ASEE Servs. Corp.*, SBA No. 4250, at 4 (1997). Accordingly, I find no error in the Area Office's determination that those amounts should be included in Appellant's receipts.

#### IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge