

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

SIZE APPEAL OF:

Financial & Realty Services, LLC,

Appellant,

RE: Four Seasons Environment, Inc.

Appealed From
Size Determination No. 04-2016-016

SBA No. SIZ-5719

Decided: March 1, 2016

APPEARANCES

Claude A. Gregory, Managing Principal, Financial & Realty Services, LLC, Silver Spring, Maryland

Stephen P. Withee, Esq., Frost Brown Todd LLC, Columbus, Ohio, for Four Seasons Environmental, Inc.

DECISION

I. Introduction and Jurisdiction

On December 17, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2016-016 finding that Four Seasons Environmental, Inc. (FSE), is a small business for the subject procurement. Financial & Realty Services, LLC (Appellant), which had previously protested FSE's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) clarify FSE's small business size status. 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 25, 2015, the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) issued Request for Proposals (RFP) No. 2015-N-17162 for facilities maintenance services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services. The RFP initially specified an incorrect size standard. On September 1, 2015, the CO issued RFP Amendment 00001, which, among other things, correctly identified the size standard for the RFP as \$38.5 million in average annual receipts.¹ FSE self-certified as a small business with its offer on September 25, 2015.

On November 27, 2015, the CO announced that FSE had been awarded the contract. On December 2, 2015, Appellant, a disappointed offeror, protested FSE's size. Appellant alleged that FSE "is no longer a small business [for NAICS code 561210] as indicated on their [U.S. General Services Administration (GSA) Federal Supply Schedule (FSS)] contract." (Protest at 1.)

The CO forwarded Appellant's size protest to the Area Office for a size determination. On December 11, 2015, FSE responded to the protest and provided the Area Office its completed SBA Form 355; Federal income tax returns for 2012, 2013, and 2014; audited financial statements for those years; and other documents. The Area Office file also includes a copy of FSE's GSA FSS contract, its System for Award Management (SAM) profile, and its responses to follow-up inquiries from the Area Office.

In its protest response, FSE acknowledged that, on May 16, 2014, FSE had self-certified as a large business under NAICS code 561210 in conjunction with its GSA FSS contract. (Protest Response at 1.) However, the size standard at that time was \$35.5 million. By September 25, 2015, the date of FSE's offer for the instant procurement, the size standard had increased to \$38.5 million, and FSE was once again small under the new size standard. (*Id.*)

B. Size Determination

On December 17, 2015, the Area Office issued Size Determination No. 04-2016-016, concluding that FSE is a small business. The Area Office found that Mr. Daniel H. Tarkington controls FSE, and that FSE has no affiliates. (Size Determination at 2.)

Turning to Appellant's protest, the Area Office cited the regulation at 13 C.F.R. § 121.404(a) and noted that the only pertinent self-certification is the one made in response to the instant RFP, and thus the GSA FSS self-certification is irrelevant here. FSE's self-certification on the GSA FSS contract occurred in May 2014, well over a year before the instant RFP was even issued. Moreover, the size standard for NAICS code 561210 increased between May 2014 and September 2015, when FSE self-certified on the instant RFP. (*Id.*)

¹ Effective July 14, 2014, SBA increased the size standard for NAICS code 561210 from \$35.5 million to \$38.5 million. 79 Fed. Reg. 33,647, 33,664 (June 12, 2014).

Next, “[b]ased upon a review of the federal income tax returns submitted by FSE”, the Area Office found that FSE's average annual receipts do not exceed the \$38.5 million size standard. (*Id.* at 3.) Therefore, the Area Office concluded, FSE is an eligible small business for this procurement.

C. Appeal

On January 2, 2016, Appellant filed the instant appeal with OHA. Appellant complains that the Area Office “does not state that the last three years of [FSE]'s tax returns, fiscal years 2012, 2013, and 2014 were used” citing 13 C.F.R. § 121.104(a)(1). (Appeal at 1.)

Appellant also contends that FSE's receipts exceed the size standard, because: (1) a list of U.S. Department of Defense (DoD) “FY 2014 contractors with awards of \$25,000,000.00 (Page 111) includes [FSE]”; (2) a linked Dun & Bradstreet (D&B) document purportedly shows FSE's “annual earnings at \$43,456,665 which was verified 4-14-2014”; and (3) a linked “NAICS Newsletter, July 28, 2014 lists [FSE] as one of four firms that exceeded \$50 million.” (*Id.* at 2.) Appellant attached to its appeal the 317-page DoD list, links to the other two documents mentioned in its appeal, various emails, and some items that already are in the Area Office file. Appellant does not explain why Appellant failed to provide this data, or other evidence, with its protest.

Appellant “specifically requests a ruling by the OHA that in fact [FSE] is a small business concern and eligible for the contract award.” (*Id.* at 3.)

D. FSE's Response

On January 19, 2016, FSE responded to the appeal in support of the Area Office's size determination. FSE contends, first, that the Area Office correctly determined FSE's receipts based on its 2012-2014 tax returns, which FSE had provided to the Area Office, even if the Area Office did not specifically state in the size determination that it had based FSE's size status on the tax returns from those years. (Response at 3.)

Second, FSE contends that the May 2014 size certification on the GSA FSS contract is irrelevant here because, under 13 C.F.R. § 121.404(a), SBA determines a concern's size as of the date of the concern's initial offer including price, and that date is September 25, 2015. (*Id.*) Further, the self-certification on the GSA FSS contract reflects the smaller size standard in effect at that time for NAICS code 561210. (*Id.* at 4.)

Third, FSE contends that SBA must determine FSE's size based on its tax returns, and not on documents from third parties such as Appellant presents on appeal. Further, Appellant misstates the amount on the DoD list, which is only \$25,000, not \$25,000,000. (*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 that 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

I find no merit to this appeal. The record reflects that the Area Office fully considered Appellant's protest allegations, and determined that FSE is an eligible small business.

First, the size regulations require that average annual receipts be calculated from the concern's Federal income tax returns for its three most recently completed fiscal years. 13 C.F.R. § 121.104(a), (c)(1). Here, FSE's 2012-2014 tax returns were submitted to the Area Office, and are the only tax returns in the Area Office file. Section II. A, *supra*. The Area Office correctly based its size decision on the receipts as shown in those tax returns.

In the event of a size protest, a concern's size status is determined “as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer . . . , which includes price.” 13 C.F.R. § 121.404(a). FSE submitted its initial offer to the CDC on September 25, 2015. The Area Office did not err in assessing FSE's size as of that date. Further, an area office will base its decision largely on information “provided by the concern whose size status is at issue,” and will “give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” 13 C.F.R. § 121.1009(b) and (d). Accordingly, the Area Office properly relied upon the sworn statements in the SBA Form 355, Federal income tax returns, and other supporting documentation submitted by FSE. Appellant has failed to show any valid reason to disturb the size determination.

The instant appeal is further undermined by the fact that, in its appeal petition, Appellant attempts to introduce new evidence and allegations that were not included in Appellant's protest. Rather, Appellant raises these issues for the first time on appeal. It is settled law, however, that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Wescott Electric Co.*, SBA No. SIZ-5691, at 5 (2015) (quoting *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012).) Given that Appellant's protest made no mention of the D&B document, the DoD list, or the NAICS newsletter, Appellant has not demonstrated that the Area Office erred by not addressing them in the size determination.

IV. Conclusion

It is Appellant's burden to prove that the Area Office committed a clear error of fact or law, a burden Appellant has failed to meet. As a result, 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