

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

SIZE APPEAL OF:

Global Submit, Inc.,

Appellant,

RE: LORENZ International LLC

Appealed From
Size Determination No. 1-SD-2017-008
(02-SD-2017-11)

SBA No. SIZ-5804

Decided: January 18, 2017

APPEARANCES

Rahul Mistry, Chief Executive Officer, Global Submit, Inc., Philadelphia, Pennsylvania

John R. Prairie, Esq., George E. Petel, Esq., Wiley Rein LLP, Washington, D.C., for
Lorenz International LLC.

DECISION

I. Procedural History and Jurisdiction

On November 28, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-SD-2017-008 (02-SD-2017-11),¹ finding that LORENZ International LLC (LORENZ Int'l) is an eligible small business for the procurement at issue. The Area Office determined that LORENZ Int'l is affiliated with other subsidiaries of its parent company, LORENZ Archiv-Systeme GmbH (LORENZ Archiv), but that the combined size of these companies does not exceed the applicable size standard.

Global Submit, Inc. (Appellant), which had previously protested LORENZ Int'l's size, contends that the size determination is clearly erroneous and requests that SBA's Office of

¹ The case was originally assigned to Area II, but was subsequently transferred to Area I and given a new number for purposes of recordkeeping. (Letter from S. Liu to R. Lorenz (Nov. 15, 2016), at 1.)

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 November 29, 2016 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.

II. Background

A. Solicitation and Protest

On July 1, 2016, the U.S. Food and Drug Administration issued Request for Proposals (RFP) No. 16-223-SOL-00073 seeking “software licenses, maintenance and support and the activities associated with implementing [Electronic Common Technical Document] validation and review software.” (RFP § C.3.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 511210, Software Publishers, with an associated size standard of \$38.5 million average annual receipts. (*Id.* § B.2.) On October 4, 2016, the CO announced that LORENZ Int’l had been awarded the contract.

On October 7, 2016, Appellant, an unsuccessful offeror, filed a size protest against LORENZ Int’l. Appellant alleged that LORENZ Int’l is not a small business because LORENZ Int’l “is affiliated with a family of international companies” that bear the name “LORENZ.” (Protest at 1-2.) According to Appellant, LORENZ Int’l’s corporate officers hold similar managerial positions in other affiliated companies. Appellant further contended that LORENZ Int’l is affiliated with Digital Media Systems Co., Ltd. (DMS) because the “primary executive” of DMS, Mr. Hiroji Emoto, also serves on the management team of LORENZ Life Science Group. (*Id.*) In a footnote, Appellant questioned whether LORENZ Int’l is an eligible business concern under 13 C.F.R. § 121.105(a)(1) because “[m]ost of the business of the affiliated family business is conducted outside of the U.S. so it is unclear how this requirement could be met, even if the combined affiliates’ revenue were below the size standard.” (*Id.* at 3 n.3.)

On October 27, 2016, LORENZ Int’l responded to the protest, and provided its completed SBA Form 355 and other documents, including copies of its tax returns for the years 2013, 2014, and 2015. LORENZ Int’l explained that it is an American subsidiary of LORENZ Archiv, a German company. LORENZ Archiv also controls subsidiaries in several other countries, including Germany, Canada, India, and the United Kingdom.

B. Size Determination

On November 28, 2016, the Area Office issued Size Determination No. 01-SD-2017-008 (02-SD-2017-11) concluding that LORENZ Int’l is a small business concern for the procurement at issue.

The Area Office found that LORENZ Int'l is 100% owned by LORENZ Archiv. LORENZ Archiv also owns 100% of LORENZ Life Science, Ltd., LORENZ Life Science GmbH, and LORENZ Life Science India Pvt. Ltd., as well as majority interests in LORENZ Bridge Software GmbH and LORENZ Newbook, Inc. (Size Determination at 2.) LORENZ Int'l is affiliated with all of these companies by virtue of their common ownership and control by LORENZ Archiv.

The Area Office next found that individual owners of LORENZ Archiv and other LORENZ entities appear to share an identity of interest through family relationships and common investments. LORENZ Int'l did not dispute the presumption of identity of interest. (*Id.* at 3.) As a result, the Area Office determined that LORENZ Int'l is affiliated with three other companies controlled by these individuals: LORENZ Immobilien GmbH; LORENZ Orga-Systeme GmbH; and LORENZ Office Service GmbH. (*Id.* at 3-4.) The Area Office found that LORENZ Int'l is not affiliated with LORENZ Stiftung (LORENZ Foundation) because LORENZ Foundation has no shared interest, management or control with LORENZ Archiv or LORENZ Int'l. (*Id.* at 4.) Similarly, the Area Office concluded that LORENZ Int'l is not affiliated with DMS, which operates as “a distributor of LORENZ's software products in Japan.” (*Id.*) DMS does not share common ownership or common management with the LORENZ group of companies.

The Area Office found that the combined average annual receipts of LORENZ Int'l and its affiliates do not exceed \$38.5 million.² Therefore, LORENZ Int'l is a small business for the instant procurement. (*Id.* at 5.)

C. Appeal Petition

On December 14, 2016, Appellant filed the instant appeal, asserting that the size determination is clearly erroneous and requesting that OHA reverse. (Appeal at 3.) Appellant argues that the Area Office did not adequately support its calculations, and that the Area Office ignored Appellant's protest allegation that LORENZ Int'l is not an eligible small business under 13 C.F.R. § 121.105(a)(1).

Appellant complains the Area Office should have performed more thorough calculations when aggregating the average annual receipts of LORENZ Int'l and its affiliates, rather than summarily stating that LORENZ Int'l and its affiliates satisfy the size standard “based on the submitted tax returns and financial statements”. (*Id.* at 1, quoting Size Determination at 4.)

Appellant also contends that the Area Office failed to consider whether LORENZ Int'l is eligible for the instant procurement under 13 C.F.R. § 121.105(a)(1), an issue raised by Appellant in the size protest. (*Id.* at 2.) Appellant maintains that LORENZ Int'l is merely “a virtual entity” which acts as a “marketing presence” for the LORENZ family of companies. (*Id.*) Appellant questions whether LORENZ Int'l “has any employees that can be considered U.S. labor or whether the company's products can be considered U.S. products.” (*Id.*) Further, the size

² The Area Office prepared a separate worksheet detailing its calculations, but did not include the specifics of its calculations in the size determination.

determination did not address whether LORENZ Int'l pays taxes in the United States, although Appellant acknowledges that “the tax returns provided to the [Area Office] may provide information in that regard.” (*Id.*)

In its appeal, Appellant points to LinkedIn pages belonging to LORENZ Life Science Group and to Ms. Yaprak Eisinger as well as to a corporate profile of LORENZ Int'l. Appellant did not file a motion to supplement the record, and does not explain why good cause exists to consider new information.

D. LORENZ Int'l's Response

On January 3, 2017, LORENZ Int'l responded to this appeal, asserting that the appeal is based on speculation and inadmissible new evidence. (Response at 1, 2.) LORENZ Int'l maintains that it is an eligible small business concern irrespective of any foreign affiliations or foreign ownership. LORENZ Int'l highlights that 13 C.F.R. § 121.105 does not prohibit U.S.-based subsidiaries of foreign companies from participating in small business set asides, citing *Size Appeal of Torgreen, Inc.*, SBA No. SIZ-4213 (1996) in which OHA recognized that **“foreign-owned small businesses with places of business in the U.S. which also contribute to the U.S. economy”** are eligible. (*Id.* at 3, quoting *Torgreen*, SBA No. SIZ-4213, at 3 (emphasis added by LORENZ Int'l).) LORENZ Int'l asserts that it operates from offices in Philadelphia, Pennsylvania; that it has paid U.S. taxes for at least the past three years; and that it employs American labor as evidenced by its monthly payroll expenses and its SBA Form 355. (*Id.* at 2, 3.)

LORENZ Int'l argues that the Area Office implicitly determined that LORENZ Int'l is an eligible business concern under § 121.105. The Area Office addressed LORENZ Int'l's foreign affiliations and concluded that LORENZ Int'l meets the applicable size standard, so the absence of specific discussion of § 121.105 was “at most harmless error”. (*Id.* at 2.) LORENZ Int'l further contends that explicit discussion of § 121.105 is not required by law, regulation, or OHA jurisprudence. (*Id.*)

LORENZ Int'l argues that OHA should not consider the new information proffered by Appellant on appeal. (*Id.* at 3.) According to LORENZ Int'l, the new information was publicly available at the time of the initial protest, and Appellant has not submitted the required motion establishing good cause to supplement the record. Further, the new information has no apparent relevance to the issues on appeal, and is less credible than the tax returns and other documents filed by LORENZ Int'l in response to the protest. (*Id.*)

III. Discussion

A. New Evidence

OHA's review is based on the evidence in the record at the time the Area Office made its size determination. As a result, evidence that was not first 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 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 appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

Here, Appellant failed to file a motion to admit new evidence, and OHA has held such an omission may be “fatal” to an attempt to introduce new evidence. *Size Appeal of Quigg Bros., Inc.*, SBA No. SIZ-5786, at 8 (2016). Moreover, the new information was publicly available at the time of Appellant's protest and Appellant offers no rationale as to why this information could not have been provided to the Area Office. OHA has consistently held that 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. *E.g.*, *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 10 (2015). For these reasons, the new information is EXCLUDED from the record and has not been considered for the purposes of this decision.

B. 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).

C. Analysis

Having reviewed the record and the arguments of the parties, I find that Appellant has not shown clear error of fact or law in the size determination. As a result, the appeal must be denied.

Appellant argues that the size determination is opaque regarding the calculation of LORENZ Int'l size. SBA regulations make clear, however, that SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law. 13 C.F.R. § 121.1008(d). It therefore is “common practice for SBA not to include confidential or proprietary information in a size determination that will be issued to a firm's competitors.” *Size Appeals of GTA Containers, Inc. et al.*, SBA No. SIZ-5760, at 7 (2016). Further, SBA regulations permit outside legal counsel to obtain access to sensitive information under a protective order that restricts the information's use. 13 C.F.R. § 134.205(e). Thus, if Appellant wished to review the specifics of the Area Office's calculations, Appellant could easily have done so by engaging legal counsel. *Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 9 (2015). Appellant has failed to show any error in the size calculations.

Appellant also argues that the Area Office did not properly investigate Appellant's protest allegation that LORENZ Int'l is ineligible under 13 C.F.R. § 121.105(a)(1) because “[m]ost of the business of the [LORENZ companies] is conducted outside of the U.S.” Section II.A, *supra*. As LORENZ Int'l observes in its response, though, OHA has long recognized that § 121.105(a)(1) does not bar foreign-owned small businesses from participating in small business set asides, provided that the small business is based in the U.S. and contributes to the U.S. economy. *Size Appeal of Torgreen, Inc.*, SBA No. SIZ-4213 (1996). In addition, SBA regulations require that “SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” 13 C.F.R. § 121.1009(d). Here, Appellant offered no evidence to support its claim that LORENZ Int'l does not comply with 13 C.F.R. § 121.105(a)(1), whereas LORENZ Int'l's submissions to the Area Office — including its sworn SBA Form 355 and its three prior years of tax returns — demonstrated that LORENZ Int'l is based in the U.S. and has made contributions to the U.S. economy by paying U.S. taxes and employing American workers. Thus, while it is true that the Area Office did not address § 121.105(a)(1) in the size determination, it does not appear that a more thorough discussion of this issue would have resulted in a different outcome. I therefore find that the absence of any discussion of § 121.105(a)(1) was harmless. *E.g.*, *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected the outcome).

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).

KENNETH M. HYDE
Administrative Judge