

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

SIZE APPEAL OF:

First Financial Associates, Inc.

Appellant,

RE: FEEA Childcare Services, Inc.

Appealed From  
Size Determination Nos. 05-2017-046, -  
047, -048

SBA No. SIZ-5869

Decided: November 28, 2017

APPEARANCES

Robert E. Korroch, Esq., William A. Wozniak, Esq., Williams Mullen, Norfolk, Virginia, for First Financial Associates, Inc.

Richard L. Moorhouse, Esq., Ryan C. Bradel, Esq., Józef S. Przygodzki, Esq., Greenberg Traurig, LLP, McLean, Virginia, for FEEA Childcare Services, Inc.

DECISION

I. Procedural History and Jurisdiction

On September 21, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office), issued Size Determination Nos. 05-2017-046, -047, -048, finding FEEA Childcare Services, Inc. (FCCS), is an eligible small business for U.S. Secret Service Solicitation No. HSS01-17-R-0012, the procurement at issue.

First Financial Associates, Inc. (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 that FCCS is not an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal and affirm the size determination.

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. The Solicitation and Protest

On March 17, 2017, the U.S. Department of Homeland Security, U.S. Secret Service, issued Solicitation No. HSS01-17-R-0012, for management of the childcare subsidy program. The Contracting Officer (CO) set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 541611, Administrative Management and General Consulting Services, with a corresponding \$15 million annual receipts size standard. Offers were due on April 10, 2017. FCCS submitted its offer on April 7, 2017.

On August 30, 2017, the CO announced that FCCS was the apparent successful offeror. On August 30, 2017, two unsuccessful offerors, The Rushlow Group and Skies the Limit Academy, LLC, filed size protests with the CO. On August 31, 2017, Appellant filed its size protest with the CO, alleging FCCS is not an eligible small business concern. Appellant alleged FCCS is wholly-owned subsidiary of Federal Employee Education and Assistance Fund (FEEAF), a non-profit organization whose profile on SAM.gov states it “is not a small business concern.” (Appellant's Protest at 2.) Thus, Appellant argues, FCCS is not an eligible small business. (*Id.* at 3.) Appellant attached material taken from SAM.gov showing FEEAF and FCCS have the same address and points of contact. Appellant also alleged FEEAF received over \$600,000 in tax-free donations and contributions in 2016, and can use this money “to help subsidize and defray operating expenses” for FCCS, so that FCCS “can bid a lower cost when it is unfairly competing against real small business concerns,” creating “an unfair competitive advantage.” (*Id.*) Thus, Appellant alleges, FCCS is able to win 80-90% of all Federal contracts for the administration of childcare subsidies, and is thus “dominant” in this field. (*Id.*) The CO referred the three protests to the Area Office for a size determination.

On September 7, 2017, the Area Office notified FCCS of the protests, and requested that it submit a response to the protest and certain other information. On September 11, 2017, FCCS provided the Area Office with its response to the protest allegations, its completed SBA Form 355, organizational documents, audited financial statements, and its own and FEEAF's Federal tax returns for their three most recently completed fiscal years ending April 30, 2014, 2015, and 2016. This information shows that FEEAF wholly owns FCCS as alleged, but also that their combined three-year average annual receipts are well below the \$15 million size standard.

FCCS denied Appellant's allegation that its parent FEEAF subsidizes it, noting that any shared costs between them “are fully allocated, charged, and audited each year.” (Response to Protests at 1.) In response to follow-up questions, FCCS provided additional information to the Area Office on September 19, 2017, including its organizational history and recent move from Colorado to Virginia, and FEEAF's By-Laws and Board of Directors.

### B. The Size Determination

On September 21, 2017, the Area Office issued Size Determination Nos. 05-2017-046, -047, -048, concluding FCCS is an eligible small business for this procurement. After summarizing the protests, the Area Office noted FCCS is wholly-owned by the non-profit

FEEAF and, thus, FCCS and FEEAF are affiliated through ownership under 13 C.F.R. § 121.103(c)(1). (Size Determination at 2-3.) FEEAF has no ownership in any other concern. (*Id.* at 3.)

Next, the Area Office considered whether FEEAF is affiliated with any other entities through common management under 13 C.F.R. § 121.103(e). Looking at FEEAF's By-Laws, the Area Office found that FEEAF is controlled by its Board of Directors, and that Board action on any business requires the quorum of a majority of the 14 directors. (*Id.* at 3.) Thus, no single individual can control FEEAF. (*Id.*) Further, because common management affiliation between two entities requires that the same person must control both entities, and no single person controls FEEAF, there is no common management affiliation between FEEAF and another entity. (*Id.* at 3-4 & n.2.)

The Area Office then calculated the annual receipts of FCCS and FEEAF as reported on their Federal income tax returns over their most recently completed fiscal years 2013, 2014, and 2015, and concluded that the combined annual receipts are below the \$15 million size standard. Therefore, FCCS is an eligible small business for this procurement. (*Id.* at 4.)

### C. The Appeal

On October 3, 2017, Appellant filed the instant appeal. Appellant contends the Area Office clearly erred in not considering the issue, raised by Appellant in its protest, of whether the fact that FCCS is the wholly-owned subsidiary of a nonprofit entity makes FCCS ineligible for award of a contract set aside for small businesses. (Appeal at 3-4.) Appellant asserts FCCS has an unfair competitive advantage as the subsidiary of a nonprofit entity, because it “can use tax-free donations provided to [FEEAF] to help subsidize and defray operating expenses.” (*Id.* at 3.) In this way, FCCS has won 80-90% of Federal contracts to administer childcare subsidy programs. (*Id.*) Appellant refers to FCCS as “essentially a for profit front, of an ineligible nonprofit entity.” (*Id.* at 5.)

Appellant argues that the small business regulations require an eligible small business to be, among other things, “a business entity organized for profit.” (*Id.* at 5-6, quoting 13 C.F.R. § 121.105(a)(1).) Further, the for-profit requirement is longstanding. (*Id.* at 6, citing *Size Appeal of Educational Planning and Advice, Inc.*, SBA No. SIZ-4201 (1996).) Appellant cites OHA decisions holding that nonprofit concerns do not satisfy the definition of small business, including *Size Appeal of Menan Cooperative Marketing and Supply, Inc.*, SBA No. SIZ-3208 (1989). (Appeal at 6.) OHA, moreover, has recognized that the rationale for this rule is that a nonprofit entity has tax and other competitive advantages such as Appellant complains of here. (Appeal at 7-8, citing *Size Appeal of Southern Tier Alcoholism Programming, Inc.*, SBA No. SIZ-2114 (1985); and *Size Appeal of Excel Enterprises, Inc.*, SBA No. SIZ-3392 (1990).)

As relief, Appellant requests that OHA find FCCS ineligible for award of the subject procurement.<sup>1</sup>

On October 6, 2017, Appellant moved to supplement the record, attaching three proposed new exhibits. Exhibit 3 is FEEAFs 2016 Annual Report. Exhibit 4 is FCCS's brochure for the childcare subsidy program. Exhibit 5 is a list of FCCS's officers and directors from the Virginia Secretary of State. Appellant asserts good cause exists for this new evidence because it is relevant to the issues on appeal, it does not unduly enlarge the issues, and it clarifies a fact on appeal. (Motion at 2.) The evidence is being offered to show FCCS is “the alter ego” of FEEAF and “a paper entity” to allow FEEAF to procure contracts set aside for small businesses and to “consistently undercut the market” when bidding on these contracts. (*Id.*)

On October 11, 2017, FCCS appeared by counsel in this matter and opposed Appellant's motion to supplement the record. Counsel asserts Appellant's “new evidence” adds nothing of probative value to the record and should have been submitted timely, with the protest. (Opposition at 2.)

#### D. FCCS's Response to the Appeal

On October 19, 2017, FCCS filed its Response to the Appeal. FCCS concedes the Area Office's size determination did not directly address Appellant's protest issue, whether the fact FCCS's parent is a non-profit entity disqualifies FCCS from receiving small business set-aside contracts. (Response at 1.) FCCS cites various OHA decisions holding that FCCS is not disqualified merely because its parent is a non-profit entity. (*Id.* at 1-2.) FCCS requests that OHA deny or dismiss the Appeal.

### III. Discussion

#### A. Standard of Review and New Evidence

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).

OHA generally will not consider evidence not previously presented to the Area Office. 13 C.F.R. § 134.308(a). OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at

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<sup>1</sup> In a footnote, Appellant also requests OHA to consider whether FCCS contributes to the U.S. economy by paying taxes, or whether it is a pass-through entity. (Appeal at 8 & n.2.) Appellant did not make this allegation to the Area Office, and OHA cannot consider new substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c). Therefore, I will not consider this issue.

10-11 (2006). 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.”).

Here, Appellant proposes as new evidence three exhibits, all of which were readily available to Appellant at the time of its protest, yet were not submitted with the protest and were not before the Area Office. I find Appellant has not established good cause for the submission of this new evidence now, and so I EXCLUDE it.

### B. Analysis

The Area Office found that FCCS is affiliated with its parent company FEEAF, and that the combined receipts of both FCCS and FEEAF do not exceed the size standard. Neither of these findings is questioned on appeal. Thus, the principal issue before me is whether the fact FCCS's parent company is a non-profit entity disqualifies FCCS from receiving the instant small business set-aside contract. I conclude that it does not.

The small business size regulations define eligible “small business” as follows:

Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

13 C.F.R. § 121.105(a)(1). This provision requires, among other things, that an eligible small business itself must be “a business entity organized for profit.” (*Id.*) The definition nowhere requires that the subject concern's affiliates also must be for-profit entities. OHA's longstanding case law holds that mere affiliation with a nonprofit organization does not render a concern ineligible for small business set-aside contracts. *E.g.*, *Size Appeal of Corporate Research Services, Inc.*, SBA No. SIZ-4646, at 3 (2004) (citing *Size Appeal of Eastside, Inc.*, SBA No. SIZ-3678, at 3 (1992)).

The regulations further provide:

In determining the concern's size, SBA counts the receipts, . . . of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

13 C.F.R. § 121.103(a)(6). This provision requires SBA to count the receipts of all the subject concern's affiliates, “regardless of whether the affiliates are organized for profit.” (*Id.*) The language here clearly indicates that some affiliates of a subject concern might be other than for-profit entities. If an affiliate is not for profit, its receipts are counted the same way as those of a

for-profit affiliate. OHA's case law is in accord with this provision. *E.g.*, *Size Appeal of Johnson Development, LLC*, SBA No. SIZ-5863, at 13 (2017).

Even if the parent company of the subject concern is a non-profit entity, the concern is not, for that reason, disqualified. In *Size Appeal of Western River Restoration Partners*, SBA No. SIZ-5695 (2015), the challenged concern's parent was a non-profit entity found to be affiliated with the challenged concern, and OHA affirmed the Area Office's determination that the parent's revenues must be included in the calculation of the concern's annual receipts. This precedent is also longstanding. *See Size Appeal of ASEE Services Corporation*, SBA No. SIZ-4250 (1997) (challenged concern wholly-owned by not-for-profit parent whose receipts must be counted). Here, FEEAF, the parent company that wholly owns FCCS, is a non-profit entity, and thus I find the *Western River* and *ASEE* precedents squarely applicable here. FCCS is affiliated with FEEAF, and thus FEEAF's receipts must be combined with those of FCCS. When the receipts of FCCS and FEEAF are combined, however, the total is still below the size standard, so FCCS is an eligible small business.

Appellant also contends FCCS has an unfair competitive advantage as the subsidiary of a nonprofit entity, because it “can use tax-free donations provided to [FEEAF] to help subsidize and defray operating expenses” thus enabling it to win Federal contracts. Appeal at 3. This is a meritless contention. First, the firms are affiliated, so the allegation of financial assistance from one firm to the other does not alter the finding of affiliation. Even when found affiliated, FCCS and FEEAF together are within the size standard, and are small businesses. Second, because the regulations do not prohibit concerns from having non-profit affiliates, the fact that such an affiliate receives tax-free donations, as non-profits do, does not make a challenged concern an ineligible small business. Third, Appellant has provided no evidence, only wild and utterly baseless speculation, that FEEAF improperly subsidizes FCCS using tax-free donations, and that such subsidies enable FCCS to win Federal contracts.

Accordingly, I conclude Appellant has failed to establish clear error in the size determination, and therefore I must deny the appeal and affirm the size determination.

#### IV. Conclusion

Appellant has failed to demonstrate 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. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge