

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

SIZE APPEAL OF:

Nordstrom Contracting & Consulting  
Corp.,

Appellant,

RE: Williams Building Company, Inc.

Appealed From  
Size Determination No. 1-SD-2018-16

SBA No. SIZ-5891

Decided: March 7, 2018

APPEARANCES

Oscar Nordstrom, Sr., President, Nordstrom Contracting & Consulting Corp., Pomona, New York

Joseph A. Camardo, Jr., Esq., Camardo Law Firm, P.C., Auburn, New York, for Williams Building Company, Inc.

DECISION

I. Introduction and Jurisdiction

On January 10, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 1-SD-2018-16, concluding that Williams Building Company, Inc. (WBC) is an eligible small business for the subject procurement. On appeal, Nordstrom Contracting & Consulting Corp. (Appellant), which had previously protested WBC's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of 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 filed this 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

On October 26, 2017, the U.S. Department of Veterans Affairs (VA), Network Contracting Office 2, issued Invitation for Bids (IFB) No. VA242-17-B-0729 for the replacement of air handling units at the VA Medical Center, Hudson Valley Healthcare System, in Montrose, New York. The Contracting Officer (CO) set aside the procurement entirely for Service Disabled Veteran Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction.<sup>1</sup> Bids were due November 28, 2017.

### B. Protest

On November 28, 2017, bids were opened and the CO announced that WBC was the apparent awardee. Appellant then filed a size protest against WBC, alleging that WBC's receipts exceed the \$36.5 million size standard based on information from USASpending.gov. Appellant further contended that WBC's owner and President, Mr. Timothy C. Williams, has controlling interests in other companies, including MCX Site LLC (MCX), Ironhorse Expeditions, Inc. (IEI), and Village Marketplace, LLC (VML). The CO forwarded Appellant's protest to the Area Office for review.

### C. Size Determination

On January 10, 2018, the Area Office issued Size Determination No. 1-SD-2018-16, concluding that WBC is a small business under the \$36.5 million size standard. The Area Office found that WBC is wholly-owned by Mr. Williams, who also wholly owns MCX, IEI, and VML. Therefore, WBC is affiliated with MCX, IEI, and VML. (Size Determination at 2.)

The Area Office rejected the notion that data from USASpending.gov should be utilized to determine WBC's size. "Th[is] information is not an accurate reflection of the average annual receipts of a concern," the Area Office stated, because USASpending.gov "track[s] contract award amounts, including options that may be awarded in the future." (*Id.* at 3.) Moreover, SBA regulations require that tax returns be used to determine size, unless those returns are unavailable. (*Id.*, citing 13 C.F.R. § 121.104.)

WBC submitted its bid on November 28, 2017, so the Area Office reviewed WBC's and IEI's tax returns for the years 2014, 2015, and 2016. (*Id.*) Because MCX and VML had not been in business for three complete fiscal years as of November 28, 2017, the Area Office computed their average annual receipts by dividing their total receipts for the time period they were in business by the number of weeks in business, and multiplying the result by 52. (*Id.*) The Area Office found that the combined receipts of WBC and its affiliates do not exceed \$36.5 million. (*Id.* at 3-4.) As a result, WBC is a small business.

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<sup>1</sup> NAICS code 236220 is associated with a \$36.5 million size standard, but the IFB incorrectly stated that the size standard was \$15 million.

The Area Office noted that business dealings between WBC and MCX arguably could be excluded from the size calculations as inter-affiliate transactions. (*Id.* at 3.) It was unnecessary to explore this issue, though, because WBC qualifies as a small business whether or not the transactions are excluded. (*Id.*)

#### D. Appeal

On January 24, 2018, Appellant filed the instant appeal, charging that the Area Office “apparently did not include [WBC's] 2017 tax returns, which were not available.” (Appeal, at 1.) Appellant highlights that, based on USASpending.gov, “[WBC] was awarded federal contracts exceeding over \$50M in 2017 and over \$36.9M in 2016.” (*Id.*) Therefore, “it is possible that [WBC] could have exceeded the size [standard], had the [Area Office] review included the 2017 Fiscal year.” (*Id.*) On January 26, 2018, Appellant supplemented its appeal to assert that the size determination “should have included the fiscal years 2015, 2016, and 2017, since the review was conducted in 2018.” (Supp. Appeal, at 1.)

#### E. WBC's Response

On February 13, 2018, the date of the close of record, WBC responded to the appeal. WBC contends that Appellant has shown no error in the size determination. Therefore, the appeal should be dismissed or denied.

WBC argues that the Area Office correctly did not base its decision on WBC's 2017 tax returns, because “[t]hose tax returns simply did not exist at the time of the bid which is the self-certification cut-off date.” (Response, at 1.) Furthermore, utilizing WBC's 2017 tax returns would contravene 13 C.F.R. § 121.104 and OHA precedent, such as *Size Appeal of Thomas Computer Solutions, LLC d/b/a TCS Translations*, SBA No. SIZ-4841 (2007). (*Id.* at 2.)

WBC insists that the Area Office properly found that WBC is a small business, and this conclusion is supported by “a mountain of information” which WBC produced “at a great deal of time and expense.” (*Id.*) WBC requests that OHA impose monetary penalties against Appellant for pursuing a frivolous appeal, so as “to curtail the Appellant from engaging in activities that are a waste of taxpayers' dollars and abusive to WBC.” (*Id.* at 3.)

#### F. Reply and Opposition

On February 13, 2018, Appellant replied to WBC's Response. Appellant maintains that WBC mischaracterizes Appellant's arguments. (Reply, at 1.) In particular, Appellant's position is that, because WBC's 2017 tax returns were unavailable, the Area Office should have considered WBC's 2015 and 2016 tax returns and other available information for 2017. (*Id.*) In addition, contrary to WBC's suggestions, data from USASpending.gov did provide a factual basis for the instant appeal. (*Id.*)

WBC objects to Appellant's Reply. OHA's rules of procedure stipulate that a reply to a response will not be permitted unless OHA so directs, and no such direction occurred here. (Opp.

at 1, citing 13 C.F.R. § 134.309.) WBC also reiterates its view that Appellant's arguments are meritless and that Appellant should be sanctioned for “complete abuse of process.” (*Id.*)

I agree with WBC that Appellant's Reply is improper. OHA did not direct Appellant to file a reply as is contemplated under 13 C.F.R. § 134.309(d). Further, Appellant's Reply merely expounds upon arguments already raised in the appeal petition, and Appellant does not explain why a reply is necessary or appropriate. Accordingly, the Reply is EXCLUDED from the record, and has not been considered for purposes of this decision. *E.g., Size Appeal of AeroSage, LLC*, SBA No. SIZ-5841, at 4 (2017).

### 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

The key question presented here is whether the Area Office utilized the appropriate period of measurement to determine WBC's size. Pursuant to 13 C.F.R. § 121.404(a), a concern's size 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 (or other formal response to a solicitation), which includes price.” An area office computes size by examining “the total receipts of the concern over its most recently completed three fiscal years divided by three.” 13 C.F.R. § 121.104(c)(1). A completed fiscal year means a taxable year. *Id.* § 121.104(b). Here, it is undisputed that WBC self-certified as a small business with its bid on November 28, 2017. Therefore, WBC's three most recently completed fiscal years were 2014, 2015, and 2016. Fiscal year 2017 was not yet complete at the time of WBC's self-certification, and thus is not included in the period of measurement. Accordingly, the Area Office correctly based its review on WBC's average annual receipts over the time period 2014 — 2016.

Appellant suggests that, because WBC's 2017 tax return was unavailable at the time of self-certification, the Area Office should have substituted other information to assess WBC's size for that year. This argument is meritless. It is true that, according to 13 C.F.R. § 121.104(a)(2), an area office may consider “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.” By its own terms, though, § 121.104(a)(2) applies only if a concern has not filed a Federal income tax return “for a fiscal year which must be included in the period of measurement.” In the instant case, as discussed above, 2017 is not “a fiscal year which must be included in the period of measurement”, because fiscal year 2017 was not complete at

the time of WBC's self-certification. As a result, the Area Office properly did not include 2017 receipts in computing WBC's size.

Appellant also argues that the Area Office's decision is inconsistent with data from USASpending.gov. OHA has made clear, however, that “there is no authority for an area office to consider any evidence apart from tax returns (when they have been filed) when calculating a firm's average annual receipts.” *Size Appeal of Thomas Computer Solutions, LLC d/b/a TCS Translations*, SBA No. SIZ-4841, at 7 (2007). Here, WBC's tax returns for the years in question (*i.e.*, 2014, 2015, and 2016) were available, so the Area Office was required to utilize those tax returns, not other sources of information, to calculate size. Any inconsistency between the tax returns and USASpending.gov is therefore immaterial, as the tax returns are controlling. *Size Appeal of Mission Critical Techs., Inc.*, SBA No. SIZ-5494, at 8 (2013).

Lastly, I reject WBC's request that OHA impose monetary sanctions against Appellant. OHA's rules of procedure do not permit OHA to impose monetary penalties as a sanction. 13 C.F.R. § 134.219. Moreover, although I agree with WBC that the appeal is meritless, WBC has not established that Appellant acted in bad faith or engaged in serious misconduct, such that sanctions would be warranted.

#### IV. Conclusion

Appellant has shown no material error of fact or law in the size determination. Therefore, 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