

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

SIZE APPEAL OF:

Cypher Analytics, Inc. d/b/a Crown Point
Systems,

Appellant,

Appealed From
Size Determination No. 06-2019-043

SBA No. SIZ-6022

Decided: August 27, 2019

APPEARANCES

Matthew T. Schoonover, Esq., John M. Mattox II, Esq., Haley E. Claxton, Esq., Gregory P. Weber, Esq., Koprince Law LLC, Lawrence, Kansas, for the Appellant

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

On May 30, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2019-043 concluding that Cypher Analytics, Inc. d/b/a Crown Point Systems (Appellant) is not a small business. Appellant maintains that the Area Office improperly calculated Appellant's receipts over a three-year period rather than over a five-year period, in contravention of Public Law 115-324, the “Small Business Runway Extension Act of 2018” (Runway Extension Act). For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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

¹ OHA originally issued this decision under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Runway Extension Act

The Runway Extension Act was signed into law on December 17, 2018. Section 2 of the Runway Extension Act, entitled “Modification to Method for Prescribing Size Standards for Business Concerns,” stated that “Section 3(a)(2)(C)(ii)(II) of the Small Business Act (15 U.S.C. 632(a)(2)(C)(ii)(II)) is amended by striking ‘3 years’ and inserting ‘5 years’.” *See* Runway Extension Act, Pub. Law No. 115-324, § 2. The Runway Extension Act did not specify an effective date.

As a result of the Runway Extension Act, the Small Business Act now reads, in pertinent part:

SEC. 3. DEFINITIONS.

(a) SMALL BUSINESS CONCERNS.—

(1) * * *

(2) ESTABLISHMENT OF SIZE STANDARDS.—

(A) IN GENERAL.—In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this Act or any other Act.

(B) ADDITIONAL CRITERIA.—The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) REQUIREMENTS.—Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining—

(I) the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 5 years;

(III) the size of other business concerns on the basis of data over a period of not less than 3 years; or

(IV) other appropriate factors; and

(iii) is approved by the Administrator.

15 U.S.C. § 632(a)(2).

B. Protest

In May of 2019, the Defense Information Technology Contracting Organization sought to award Appellant a sole-source purchase order through the 8(a) Business Development program. The North American Industry Classification System (NAICS) code assigned to the order was 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$15 million average annual receipts. An SBA official questioned whether Appellant is a small business under this size standard, and referred the matter to the Area Office for review. On May 9, 2019, the Area Office initiated a formal size determination of Appellant, pursuant to 13 C.F.R. § 121.1001(b)(9).

C. Size Determination

On May 30, 2019, the Area Office issued Size Determination No. 06-2019-043, concluding that Appellant is not small under a \$15 million size standard. The Area Office reviewed Appellant's ownership and management structure, and found that Appellant is affiliated with Crown Cove Consulting, LLC (CCC). (Size Determination at 3-6.) CCC has no receipts, and therefore does not affect whether Appellant qualifies as a small business.²

Turning to the calculation of Appellant's size, the Area Office noted that Appellant had argued to the Area Office that concerns about its size were based on the “erroneous predicate”

² On appeal, Appellant challenges only the portion of the Area Office's analysis relating to the Runway Extension Act, so further discussion of the Area Office's findings pertaining to CCC and other unrelated matters is unnecessary. *E.g.*, *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”).

that size should be calculated over a three-year period. Appellant urged that the Runway Extension Act instead required the Area Office to utilize a five-year calculation period. (*Id.* at 6.)

The Area Office rejected Appellant's argument, explaining that, in SBA Information Notice No. 6000-180022, SBA commented that it does not consider the Runway Extension Act presently effective, and that “[u]ntil SBA changes its regulations, businesses still must report their receipts based on a three-year average.” (*Id.* at 7, quoting SBA Information Notice No. 6000-180022.) The Area Office reiterated that SBA regulations implementing the Runway Extension Act “have not yet been made effective.” (*Id.* at 6.) Therefore, the Area Office would determine Appellant's size “based on the regulations in effect as of May 9, 2019,” the date of the protest, and those regulations require that receipts be calculated over a three-year period. (*Id.* at 7.)

The Area Office found that Appellant's average annual receipts over its last three completed years exceed the \$15 million size standard. (*Id.* at 7-8.) As a result, Appellant is not a small business.

D. Appeal

On June 12, 2019, Appellant filed the instant appeal. Appellant argues that the Area Office erred in finding that the Runway Extension Act is not presently effective, as “under well-established principles of statutory interpretation, the Act has been in effect since it was signed into law in December 2018.” (Appeal at 1.) Had the Area Office used a five-year period to calculate Appellant's average annual receipts, the Area Office would have found Appellant to be small. (*Id.*)

Appellant contends that because the Runway Extension Act did not specify an effective date, it has been in effect since December 17, 2018, when it was signed into law. (*Id.* at 5.) As a result, since December 17, 2018, the Small Business Act, as revised by the Runway Extension Act, “has prohibited any ‘Federal department or agency’ from utilizing a receipts-based size standard that determines the size of a business over a period of less than five years.” (*Id.* at 6, quoting 15 U.S.C. § 632(a)(2)(C)(ii)(II).)

Further, the Runway Extension Act takes precedence over any contrary regulations. (*Id.*, citing *R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1324 (Fed. Cir. 2003) (“A regulation that contravenes a statute is invalid.”).) Appellant maintains that Congress intended for SBA to lengthen the time by which concerns' average annual receipts are calculated from three years to five years. “By following its regulations instead of a law (passed by Congress and signed by the President), the SBA violated these well-established principles.” (*Id.*)

Appellant insists that it is immaterial whether SBA's Administrator has approved a five-year calculation period. (*Id.*) Through the Runway Extension Act, Congress modified the provision of the Small Business Act that empowers SBA to create size standards. (*Id.* at 7.) Moreover, the Administrator cannot approve any size standard that conflicts with the underlying statute. (*Id.*)

Appellant anticipates possible arguments as to why SBA has not yet implemented the Runway Extension Act. SBA may assert that section 3(a)(2)(C) of the Small Business Act, as amended by the Runway Extension Act, is ambiguous because the law now refers to a calculation period of “not less than 5 years.” In Appellant's view, this would not excuse the SBA's failure to apply the Runway Extension Act because (1) the legislative history makes clear that Congress directed SBA to change the calculation period from the average of the past three years to the average of the past five years; and (2) even assuming section 3(a)(2)(C) is unclear with regard to the maximum time period, SBA still violated the law by utilizing a calculation period less than five years. (*Id.* at 7-8.)

Appellant predicts that SBA also may offer policy-based reasons why the Runway Extension Act should not be given immediate effect, but “these policy reasons cannot overcome Congress' mandate that the Act be given immediate effect.” (*Id.* at 8.) The Runway Extension Act was intended to reduce the impact of rapid-growth years, which may cause a small business to prematurely lose its size status. (*Id.*) This scenario is exactly what confronts Appellant, because Appellant experienced [XXXXXXXX] in 2016. (*Id.* at 9.) By refusing to apply the Runway Extension Act, the Area Office improperly accelerated Appellant's exit as a small business. “Any policy-based arguments advanced by the SBA to justify its refusal simply cannot overcome the fact that its failures have undermined the purpose — and violated the letter — of the Runway Extension Act.” (*Id.*)

Appellant highlights that its average annual receipts fall below the \$15 million size standard when calculated over a five-year period. The Area Office's failure to apply the five-year calculation period was incorrect and prejudicial, so the size determination should be reversed.

E. SBA's Response

On June 21, 2019, SBA responded to the appeal. SBA observes that the agency has now drafted a proposed rule to implement the Runway Extension Act which will be published in the *Federal Register* on June 24, 2019. (Response at 1.) The proposed rule, if finalized, would require that calculations of average annual receipts be based on a five-year period. The proposed rule explains that a five-year calculation period is not effective until the issuance of a final rule, “and thoroughly discusses SBA's rationale” for interpreting the Runway Extension Act as not immediately imposing a five-year calculation period. (*Id.*) SBA urges OHA to review the proposed rule in response to this appeal.

SBA notes that it issued a public SBA Information Notice shortly after the Runway Extension Act was enacted, explaining that section 3(a)(2)(C) of the Small Business Act requires formal rulemaking for any changes to a size standard. (*Id.* at 2, citing 15 U.S.C. § 632(a)(2)(C)(i).) The SBA Information Notice is available online and small businesses have been relying upon its direction for over six months. (*Id.*) Additionally, the Federal Acquisition Regulation (FAR), SAM.gov, and SBA's regulations still refer to a three-year average. As a result, “it is unfair for [Appellant] or any other individual firm to obtain an exception to the three-year average, and, in fact, it is a misrepresentation for a firm to certify as small using a five-year average when the certification requires a three-year average.” (*Id.*) Since the publication of the SBA Information Notice in December 2018, all businesses have been on

notice that the new averaging period would be subject to rulemaking, so Appellant could not have had any expectation that it would receive immediate regulatory relief. (*Id.* at 2-3.)

SBA finds the Supreme Court's decision in *Gundy v. United States*, 588 U.S. (June 20, 2019) relevant to this matter. (*Id.* at 3.) Having been delegated the authority to prescribe size standards, SBA is implicitly authorized to address associated issues that are not squarely discussed in statute, such as “whether to apply an averaging period only to services firms or to all industries with receipts-based size standards, whether to apply the averaging period to all agencies' size standards, and, where the statute refers to a period ‘of not less than five years,’ what exact period to use.” (*Id.* at 3-4.)

SBA finds that the legislative history of the Runway Extensive Act “does not speak directly to an effective date for a five-year averaging period,” so greater weight should be attached to the fact that the Small Business Act requires that any size standard changes go through a notice-and-comment rulemaking. (*Id.*) In 2010, Congress enacted an “interim rule” making a change to SBA size standards for loan programs that was effective immediately, showing that “Congress knows how to craft an immediately effective change to SBA size standards” when it sees fit. (*Id.*)

Lastly, SBA maintains that rulemaking is “crucial here” because the proposed rule addresses an inconsistency between the averaging period for service-industry firms and for construction or agricultural firms by proposing a common five-year average for all receipts-based size standards. (*Id.* at 5.)

F. Reply

On June 27, 2019, the date of the close of record, Appellant moved for leave to reply to SBA's Response, and submitted its proposed Reply. A Reply is warranted, Appellant argues, because SBA's Response relies upon a new proposed rule which did not exist at the time Appellant filed its appeal. (Motion at 1.) Further, in the proposed rule, SBA asserts that section 3(a)(2)(C) of the Small Business Act does not apply to SBA, an issue not discussed in the size determination. (*Id.* at 1-2.) OHA may grant a party leave to file a reply in order to address new issues raised for the first time in an opposing party's pleading. *E.g.*, *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Accordingly, for good cause shown, Appellant's motion to reply is **GRANTED**.

In its Reply, Appellant maintains that the Runway Extension Act was designed to immediately amend the Small Business Act “to prohibit ‘any federal department or agency’ from determining the size of a small business providing services on the basis of its annual average gross receipts over a period of less than five years.” (Reply at 2, citing 15 U.S.C. § 632(a)(2)(C).) SBA now takes the “extraordinary position” that the amended portion of the Small Business Act does not apply to SBA. (*Id.*) Appellant argues that the text and structure of the Small Business Act show that section 3(a)(2)(C) does apply to SBA. (*Id.*)

Appellant highlights that section 3(a)(2)(C) states that “no Federal department or agency” may prescribe a receipts-based size standard under which size is calculated over a period of “less

than five years.” (*Id.*, quoting 15 U.S.C. § 632(a)(2)(C).) SBA is a Federal department or agency and it is not specifically exempted from that definition. (*Id.* at 2-3.) Nor is SBA expressly exempted from the requirements associated with adopting size standards under section 3(a)(2)(C). (*Id.* at 3.) Further, Congress evidently believes that section 3(a)(2)(C) applies to SBA, as Congress's intent in enacting the Runway Extension Act was to “lengthen [] the time in which [SBA] measures size through revenue, from the average of the past 3 years to the average of the past 5 years.” (*Id.* at 4, quoting H.R. Rep. No. 115-939, pt. 1, at 2.)

Appellant disputes SBA's position that the Runway Extension Act is not immediately effective. Although a rulemaking process is required if SBA creates or changes a size standard, here Congress “immediately changed the size standard receipts calculation period when it passed the Runway Extension Act.” (*Id.* at 5.) Further, because a regulation cannot conflict with its underlying statute, SBA is not required to update its rules to give the Runway Extension Act immediate effect. (*Id.*)

Appellant argues that it is not seeking an exception to the rule for calculating average annual receipts, but rather is following the law. According to Appellant, “even though Congress has said that [Appellant] should qualify as a small business, the SBA's failure to follow [the Runway Extension Act] has arbitrarily led it to conclude otherwise.” (*Id.* at 6.) Appellant asserts that it is the type of company Congress intended to help. Had it not been for an outlier year in which Appellant [XXXXXXXXXX], Appellant would be considered a small business even under a three-year calculation period. (*Id.*)

In response to SBA highlighting the substantial discretion granted to the Administrator by Congress, Appellant insists that “an agency's rules may not conflict with a statute; if they do, the statute governs.” (*Id.* at 7, citing *GHS Health Maintenance Org., Inc. v. United States*, 536 F.3d 1293 (Fed. Cir. 2008).) Congress further intended the Runway Extension Act to be effective immediately “by not specifically including a later-effective date.” (*Id.*, citing *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991).)

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 sole issue presented in this case is whether the Area Office erred in calculating Appellant's average annual receipts over a three-year period rather than over a five-year period. Appellant does not dispute that the Area Office correctly determined Appellant's size as

of May 9, 2019 (*i.e.*, the date of the Area Office's protest), and does not dispute that applicable regulations in effect on that date required that receipts be averaged over a three-year period. *See* 13 C.F.R. § 121.104(c)(1); FAR 19.101. Appellant maintains, however, that the Area Office nevertheless erred because the Runway Extension Act superseded those regulations and imposed a five-year period of measurement.

I find Appellant's arguments unpersuasive, for two principal reasons. First, the Runway Extension Act amended only a single sentence of the Small Business Act, and the provision amended pertains specifically to the promulgation of size standards, not to the methodology used to calculate the size of a particular business. Thus, the language introduced by the Runway Extension Act appears within the portion of the Small Business Act entitled “Establishment of Size Standards,” outlining requirements that are to be addressed by any “proposed size standard.” Section II.A, *supra*. Likewise, the pertinent section of the Runway Extension Act itself was entitled “Modification to Method for Prescribing Size Standards for Business Concerns.” *Id.* Although it may well be true, as Appellant asserts, that in addition to revising the law governing establishment of size standards, Congress also intended to lengthen the period of measurement used to compute the size of a particular business concern, the fact remains that the actual text of the Runway Extension Act was narrow in scope and revised only the specific portion of the Small Business Act relating to the establishment of size standards. As a result, Appellant has not shown that the Runway Extension Act directly contradicts and overrules the regulations at 13 C.F.R. § 121.104(c)(1) and FAR 19.101, which address the period of measurement used to determine size.

Second, as SBA emphasizes in its response to the appeal, an additional problem for Appellant is that, even as amended by the Runway Extension Act, section 3(a)(2)(C) of the Small Business Act continues to state that a size standard may be established only after notice-and-comment rulemaking and with approval of the SBA Administrator. Section II.A, *supra*. Accordingly, insofar as the Runway Extension Act can be understood as lengthening the time period used to calculate the size of individual businesses, such a change would have occurred in the context of a revision to the size standard methodology, and therefore could be implemented only through notice-and-comment rulemaking and with approval of the SBA Administrator. Notably, section 3(a)(2)(C) of the Small Business Act — the exact provision revised by the Runway Extension Act — not only requires notice-and-comment rulemaking and approval of the SBA Administrator, but also contemplates an exception to these requirements if, and only if, “specifically authorized by statute.” *Id.* The Runway Extension Act, though, was silent as to any such exception being granted here. *Id.* Consequently, SBA could reasonably conclude, as stated in SBA Information Notice No. 6000-180022, that the Runway Extension Act is not immediately effective and instead must, based on the entirety of section 3(a)(2)(C) of the Small Business Act, be implemented via notice-and-comment rulemaking.

Appellant also takes issue with SBA's position, expressed in SBA's proposed rule addressing the Runway Extension Act, that section 3(a)(2)(C) of the Small Business Act does not apply to SBA, because SBA relies upon a different portion of the Small Business Act, section 3(a)(2)(A), when promulgating size standards. *See generally* 84 Fed. Reg. 29,399, 29,400 (June 24, 2019). I find it unnecessary to resolve this question. As discussed above, Appellant has not shown that the Runway Extension Act directly contradicts existing regulations concerning the

period of measurement used to compute size, nor that Congress intended that the Runway Extension Act should be effective immediately without adhering to the statutorily-mandated notice-and-comment and SBA approval requirements, which are set forth in the same portion of the Small Business Act amended by the Runway Extension Act. If, as SBA claims, SBA is not subject to section 3(a)(2)(C), this would only further bolster SBA's rationale for implementing the Runway Extension Act through the regulatory process.

IV. Conclusion

Appellant has not established clear error of fact or law in the size determination. Accordingly, I DENY the instant appeal and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge