

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

SIZE APPEAL OF:

Resicum International, LLC,

Appellant,

RE: Advanced Technology Systems
Company

Appealed From
Size Determination No. 02-2019-081

SBA No. SIZ-6024

Decided: August 28, 2019

APPEARANCE

Jeffrey K. Walker, Company Counsel, Resicum International LLC, Virginia, for the Appellant

DECISION

I. Introduction and Jurisdiction

On July 3, 2019, Resicum International, LLC (Appellant) protested the size status of Advanced Technology Systems Company (ATSC). On July 15, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2019-081 (Size Determination), dismissing the protest as non-specific.

Appellant filed the instant appeal on July 24, 2019. Appellant argues that the dismissal is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and require the Area Office to perform the size determination. For the reasons discussed *infra*, I VACATE the Size Determination, and REMAND the case to the Area Office.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. 1 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the 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

On May 3, 2019, the Mission and Installation Contracting Command Fort Benning (Agency) issued Solicitation No. W911SF19R0011 (Solicitation) for Aviation Maintenance Services. (Case File Attach. C.) The Contracting Officer (CO) set the procurement aside entirely for small business, designating North American Industry Classification System (NAICS) 488190 (Other Support Activities for Air Transportation) with a corresponding \$32.5 million annual receipts size standard, as the appropriate code. (*Id.*; Appeal, Exhibit 7.) On July 2, 2019, the Agency informed Appellant that ATSC was the awardee. (Notice of Non-Award.)

B. Size Protest

On July 3, 2019, at 3:27 PM, Appellant filed its Protest (characterized as a Petition for Size Determination) with the Agency. (Protest, found at Appeal, Exhibit 7.) The Protest challenged the small business status of ATSC. (*Id.*) In the initial Protest, Appellant alleges that data received from the CO shows that ATSC has average annual receipts of \$38,764,404 over the previous three years. (*Id.*) This would exceed the applicable \$32.5 million size standard for NAICS code 488190. (*Id.*) Appellant argues that this shows that ATSC is ineligible for the award of the small-business set-aside contract and should be disqualified. (*Id.*)

C. Size Determination

On July 15, 2019, the Area Office issued Size Determination No. 02-2019-081. (Size Determination at 1.) The Area Office dismissed the Protest as non-specific under 13 C.F.R. §§ 121.1007(b) and (c). (*Id.*) In the Size Determination, the Area Office stated that a Protest that offers no evidence that a firm's receipts exceed the size standard is non-specific. (*Id.* at 2.) The Area Office stated that this sentence formed the entire basis for Appellant's Protest:

According to data provided by your [The CO's] office, ATSC has average annual receipts of \$38,764,404 over the preceding three years.

However, the Area Office found that no further information or receipts were included with the appeal. (*Id.*) The Area Office quoted the CO's response to its inquiry on the source of the information: "I do not know where they got the dollar amount of \$38,764,404 stated in the next to last paragraph [in] their protest letter." (*Id.*) The Area Office concluded that since there was no supporting evidence, sufficient detail to identify the sources, or any other reason to believe the Protest, the Protest must be dismissed as non-specific. (*Id.* at 3.)

On July 16, 2019, after receiving the Size Determination, Appellant contacted the Area Office with an email arguing that the Area Office relied on an incorrect version of the Protest. (email, J. Walker to H. Goza, July 16, 2019). Appellant alleged that on 3:52 PM on July 3, 2019, Appellant contacted the CO to inform her that Appellant had mistakenly attributed the source of ATSC's annual receipts to the CO's office, rather than FPDS.gov, and attached a new copy of the

Protest. (*Id.*) At 5:23 PM the same day, Appellant again contacted the CO to inform them that the FPDS data was stripped off the email and attached it separately. (*Id.*) On July 9, 2019, Appellant contacted the CO to confirm whether the Protest was timely received and attached a copy of the Protest to that email. (*Id.*) Later that day, the CO informed Appellant that the size protest had been forwarded and acknowledged by the Area Office. (*Id.*)

Appellant's July 16th email to the Area Office explained the prior email communications with the CO, arguing that on July 3, 2019 at 5:23 PM, the CO had been provided the corrected Protest with the accompanying supporting documents. (*Id.*) Appellant requested that the Area Office reconsider the decision in light of the corrected copy of the Protest and supporting documents. (*Id.*) On July 17, 2019, the Area Office informed Appellant that it would not reopen the case. (*Id.*)

D. Appeal

On July 24, 2019, Appellant filed the instant appeal, arguing that the Area Office erred in dismissing Appellant's Protest. (Appeal at 1.) Appellant requests that OHA determine the awardee ATSC be found other than small for the instant procurement and to direct the CO to cancel the award to ATSC. (*Id.* at 4.) Appellant reiterates its assertions about its problems with email transmissions to the CO it made to the Area Office and maintains that it submitted the information necessary to render its protest specific. (*Id.* at 3.)

In the Appeal, Appellant points to FAR 19.302(g), which states that the CO must forward size protests to the Area Office, and FAR 19.302(c)(3)(i), which states that the CO shall forward the protest and any accompanying material to the Area Office. (*Id.*, citing FAR 19.302(g) and (c)(3)(i).) Appellant argues that the record establishes that the CO had possession of the complete and correct size determination with the supporting evidence on July 3, 2019. (Appeal at 3.) Additionally, Appellant claims that the CO was asked about the status of the Protest with an email that was accompanied by the corrected petition with the supporting evidence on July 9, 2019. (*Id.*) Therefore, Appellant argues that the Area Office was incorrect in dismissing the Protest. (*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

The Area Office dismissed the Protest for being non-specific under 13 C.F.R. §§ 121.1007(b) and (c), because it did not offer evidence to support the Protest and did not identify the source of the information upon which the Protest was based. However, Appellant has provided evidence which establishes that the CO was in possession of the corrected Protest in addition to the accompanying evidence as of July 3, 2019. Appellant has its records of its email transmissions to the CO, showing that it corrected its earlier errors and stated its source of information was FPDS.gov, and including the printout of information. Additionally, Appellant has provided evidence which shows that it had contacted the CO to confirm that they were in possession of said documents on July 9, 2019. Further, the record contains a memorandum by a Supervisory Contract Specialist at Fort Benning, stating that she had found that she had received Appellant's emails which included the information from FPDS.gov on ATSC, and corrected its initial protest. (Memorandum, B. Clark, July 17, 2019.) As a result, the Area Office should have had in its administrative record the corrected Protest with the accompanying evidence when it made the Size Determination.

The “clear error” standard is synonymous with the “clearly erroneous” standard of review and is a term of art signaling court review. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 at 9 (2006), citing *Dickinson v. Zurko*, 527 U.S. 150,152 (1999). Review under the “clear record” standard is “significantly deferential” and requires a “definite and firm conviction that a mistake has been committed.” *Taylor Consultants* at 9, citing *Concrete Pipe and Products of Col. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). When evaluating Area Office Size Determinations for clear error of fact, OHA must consider whether the Area Office: (1) Properly considered available and relevant facts; (2) Evaluated the arguments of the parties; and (3) Correctly applied the regulations and law to the relevant facts in making its size determination. *Taylor Consultants* at 11, citing 13 C.F.R. § 121.103(a)(5).

Here, while Appellant's initial protest had a specificity problem and inaccurately identified that source of its information, Appellant quickly corrected this and submitted its supporting information within the five-day time period for filing a protest. 13 C.F.R. § 121.1004(a)(2). Once this information is received, the CO has the obligation to forward the protest and all supporting information to the Area Office. 13 C.F.R. § 121.1006(a) & (b). A CO's failure to do so may result in a size determination based upon errors of fact which necessitate a remand. *Size Appeal of Okland Construction*, SBA No. SIZ-4786 (2006). Because the CO failed to forward all the information it had received from Appellant to the Area Office, the Area Office did not consider the corrected protest and the accompanying evidence. Therefore, the Area Office failed to consider all available and relevant facts when dismissing the Protest.

Appellant has established that the Size Determination was based on a clear error of fact. As such, I find it appropriate to remand the Size Determination to the Area Office for further review considering the corrected Protest and accompanying evidence.

IV. Conclusion

Appellant has established clear error in the size determination. I therefore VACATE Size Determination No. 02-2019-081 and REMAND this case to the Area Office for a new size determination consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge