

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

SIZE APPEAL OF:

MicroTechnologies, LLC d/b/a MicroTech,

Appellant,

Appealed From  
Size Determination No. 2-2019-102

SBA No. SIZ-6039

Decided: December 12, 2019

APPEARANCES

Isaias “Cy” Alba, IV, Esq., Timothy F. Valley, Esq., Samuel S. Finnerty, Esq., Anna R. Wright, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 23, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2019-102 concluding that MicroTechnologies, LLC d/b/a MicroTech (Appellant) is not a small business. The Area Office found that Appellant's average annual receipts exceed the applicable size standard, based on Appellant's tax returns. On November 7, 2019, Appellant appealed the size determination, claiming that the Area Office erred by failing to adjust Appellant's receipts for the 2018 sale of Appellant's [REDACTED] division. 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 appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

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<sup>1</sup> This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

## II. Background

### A. Solicitation and Protest

On July 16, 2019, the U.S. Department of the Army issued Request for Proposals (RFP) No. W911SD19R0178 for Geographic Information System support services. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industry Classification System (NAICS) code 541370, Surveying and Mapping (except Geophysical) Services, with a corresponding size standard of \$15 million in average annual receipts.<sup>2</sup> Appellant submitted its initial offer including price on August 23, 2019, self-certifying as a small business.

On September 17, 2019, the CO announced that Appellant was the apparent awardee. On September 23, 2019, E.L. Blake, Inc., an unsuccessful offeror, filed a protest challenging Appellant's size. The CO forwarded the protest to the Area Office for review.

### B. Area Office Proceedings

In response to the protest, Appellant noted that, in prior size determinations, the Area Office had found Appellant to be small. (Protest Response, at 2.) Further, the Area Office had previously accepted Appellant's contention that “cognizable business units that were sold were rightly excluded from the calculation of receipts.” (*Id.*) Appellant highlighted that, in December 2018, Appellant sold a “cognizable business unit” — the [REDACTED] division — to another company, [PURCHASING FIRM]. (*Id.*) If the receipts of the [REDACTED] division are deducted, Appellant would qualify as a small business. (*Id.*)

Appellant provided a copy of an Asset Purchase Agreement (APA) between itself and [PURCHASING FIRM], dated December 28, 2018. The APA stated that [PURCHASING FIRM] would acquire the “Purchased Assets,” defined as “all of the right, title and interest that [Appellant] owns or has rights in or to, as of the Closing, associated with the [REDACTED] Contract.” (APA § 2.1(b).) More specifically, [PURCHASING FIRM] would acquire Appellant's [REDACTED] prime contract with the Air Force, Contract No. [REDACTED]; task, delivery, and purchase orders awarded to, or pending award to, Appellant under that contract; and certain “related tangible assets,” such as computer equipment, used in performing the [REDACTED] contract. (*Id.* §§ 2.1(b) and 6.8(d) and Schedule 2.1(b)(viii).) Appellant and [PURCHASING FIRM] agreed to jointly request that the Air Force novate the [REDACTED] contract to recognize [PURCHASING FIRM] as the new prime contractor. (*Id.* § 6.3(a).) During the time period between APA closing and novation, Appellant would continue to perform the [REDACTED] contract as the prime contractor. (*Id.* § 6.8(a).) The APA would terminate upon

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<sup>2</sup> On July 18, 2019, two days after the RFP was issued, SBA increased the size standard for NAICS code 541370 from \$15 million to \$16.5 million. 84 Fed. Reg. 34,261, 34,276 (July 18, 2019). Because the CO did not amend the RFP to incorporate the new size standard, the \$15 million size standard remains applicable to this RFP. 13 C.F.R. § 121.402(a); *Size Appeal of Dawson Technical, LLC*, SBA No. SIZ-5476 (2013).

mutual consent of the parties, or if the Air Force did not novate the [REDACTED] contract within 12 months. (*Id.* § 8.1.)

Accompanying the APA, Appellant and [PURCHASING FIRM] executed a “Bill of Sale and Assignment Agreement” (Bill of Sale). The Bill of Sale stated that Appellant “hereby sells, transfers, assigns, conveys and delivers to [PURCHASING FIRM] all of its right, title and interest that [Appellant] possesses in and to the Purchased Assets.” (Bill of Sale at A-1.) [PURCHASING FIRM] “hereby purchases, accepts and acquires from [Appellant] such Purchased Assets.” (*Id.*)

On October 18, 2019, Appellant informed the Area Office that, other than the [REDACTED] contract, “[a]ll other contracts in [the [REDACTED] division] have already been performed and were closed out prior to the sale of this Cognizable Business unit.” (E-mail from D. Barton to H. Goza (Oct. 18, 2019).) Appellant stated that, pursuant to the APA, Appellant and [PURCHASING FIRM] had requested that the Air Force novate the [REDACTED] contract. (*Id.*) The Air Force, though, had not yet agreed to the novation. (*Id.*)

### C. Size Determination

On October 23, 2019, the Area Office issued Size Determination No. 2-2019-102, sustaining the protest. The Area Office first addressed Appellant's argument that the Area Office had found Appellant to be small in prior size determinations. Those earlier size determinations involved different time periods and different size standards than the instant case, and therefore had no bearing here. (Size Determination, at 2-3.)

The Area Office next considered whether Appellant's average annual receipts could appropriately be adjusted for the sale of the [REDACTED] division, and if so, the amount of any such adjustment. (*Id.* at 3.) The Area Office found that no adjustment was permitted. Appellant did not provide supporting evidence, such as “documentation for the sale and accounting information,” demonstrating that Appellant did in fact divest the [REDACTED] division and corroborating the amount of the proposed adjustment. (*Id.*) Further, Appellant did not show proper “regulatory support for removing these receipts.” (*Id.*)

The Area Office noted that, during the course of its investigation, Appellant provided the Area Office a copy of the APA describing the sale of Appellant's [REDACTED] contract, which, Appellant asserted, was the only active contract performed by the [REDACTED] division. Appellant informed the Area Office, however, that the contract novation contemplated by the APA “had not gone through as of the date of initial offer (nor has it yet gone through).” (*Id.* at 4.) Absent novation, “the only active contract of the [REDACTED] division] remains with [Appellant],” and there was not sufficient evidence to conclude that the [REDACTED] division had been transferred to [PURCHASING FIRM]. (*Id.* at 6.)

The Area Office explained that, by regulation, a concern's average annual receipts are calculated based on its tax returns for its three most recently-completed fiscal years. (Size Determination at 6-7, citing 13 C.F.R. § 121.104.) After reviewing Appellant's tax returns for the years 2016-2018, the Area Office found that Appellant's average annual receipts exceed the \$15

million size standard applicable to this procurement. (*Id.* at 7.) Therefore, Appellant is not a small business.

#### D. Appeal

On November 7, 2019, Appellant filed the instant appeal. Appellant contends that the Area Office misinterpreted the APA and “ignored the real question at hand: has [PURCHASING FIRM] acquired the [REDACTED] division?” (Appeal at 5.) Appellant states that it sold the [REDACTED] division in 2018, well before the date of self-certification, so the receipts of the [REDACTED] division should have been excluded in determining Appellant's size.

Appellant first argues that, by entering into the APA, Appellant agreed “to sell the [REDACTED] division to [PURCHASING FIRM].” (*Id.* at 3.) Further, “[t]he [REDACTED] division's assets are collectively referred to in the [APA] as the ‘Purchased Assets.’” (*Id.*, citing APA § 2.1(b).) Under Virginia state law, which governs the APA, “the time for the passing of title on a sale of personal property is to be ascertained from the intention of the parties as evinced by the language of the contract and the circumstances under which it was made.” (*Id.* at 5-6, quoting *Montauk Ice Cream Co. v. Daigger Co.*, 141 Va. 686, 696 (1925).) Thus, the Area Office should have found that Appellant's right, title and interest in the [REDACTED] division transferred to [PURCHASING FIRM] in December 2018. (*Id.* at 6-8.) The Area Office incorrectly focused on whether the [REDACTED] contract had been novated, but novation has “no import in determining whether the [REDACTED] division has been transferred.” (*Id.* at 7.)

Appellant next argues that, by finding that the [REDACTED] division had not been transferred to [PURCHASING FIRM] prior to the date of self-certification, the Area Office contravened SBA's “present effect” rule, 13 C.F.R. § 121.103(d)(1). Appellant characterizes the APA as “effectively an agreement to merge the [REDACTED] division into [PURCHASING FIRM].” (*Id.* at 10.) The APA was executed well before Appellant's self-certification, so if the APA were given present effect, the Area Office should have found that “the [REDACTED] division [is] a former affiliate of [Appellant]” because Appellant had “severed its ability to control [REDACTED].” (*Id.* at 9-10.) Appellant adds that, if [PURCHASING FIRM]'s size had been under review, “[PURCHASING FIRM] would be found to control [the [REDACTED] division], and the two entities would be deemed affiliated.” (*Id.* at 10.) Excluding the receipts of the [REDACTED] division from Appellant's receipts is therefore appropriate to avoid double-counting. (*Id.*)

Appellant argues that “where a company sells a segregable, cognizable business unit, that business unit qualifies as a former affiliate [of its prior owner], and its revenues must be excluded when determining size.” (*Id.* at 13.) In support, Appellant points to OHA decisions which have considered mergers and acquisitions in other contexts, such as application of the “successor-in-interest” rule, 13 C.F.R. § 121.105(c). (*Id.* at 11-12, citing *Size Appeal of Atmel Corp.*, SBA No. SIZ-3286 (1990); *Size Appeal of Xenon Technix, Inc.*, SBA No. SIZ-4242 (1997); *Size Appeal of Alex-Alt. Experts, LLC*, SBA No. SIZ-4974 (2008); *Size Appeal of Mark Dunning Indus., Inc.*, SBA No. SIZ-5284 (2011); *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5348 (2012); and *Size Appeal of Global, A 1st Flagship Co.*, SBA No. SIZ-5462 (2013).)

Appellant concludes that the size determination lacks proper foundation in law or regulation. (*Id.* at 15.) In Appellant's view, “the Area Office had no reason not to recognize the transfer of the Purchased Assets, despite the pending Novation, and should have deemed the [REDACTED] division a former affiliate of [Appellant] for size purposes.” (*Id.* at 16.)

### 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

Appellant's principal argument in this case is that the Area Office erred in concluding that the sale of Appellant's [REDACTED] division was not complete as of August 23, 2019, the date of self-certification. The issue is significant, Appellant maintains, because if the Area Office had recognized that Appellant had divested the [REDACTED] division prior to August 23, 2019, the Area Office should then have treated the [REDACTED] division as Appellant's “former affiliate” under 13 C.F.R. § 121.104(d)(4), such that the receipts of the [REDACTED] division would be excluded in calculating Appellant's size. Appellant contends that it does not exceed the size standard if the receipts of the [REDACTED] division are excluded.

I find Appellant's arguments unpersuasive for two reasons. First, it is not evident from the record that Appellant did divest the [REDACTED] division prior to the date of self-certification. Notably, the APA itself made no mention of the [REDACTED] division. Section II.B, *supra*. Nor did the APA state that Appellant would be selling an entire division or business unit. *Id.* Rather, the APA defined the “Purchased Assets” as meaning merely the [REDACTED] contract between Appellant and the Air Force; orders awarded to Appellant under that contract; and certain equipment used in performing the contract. *Id.* Based on the APA, then, there is no indication that Appellant did, in fact, divest its [REDACTED] division, or even that the “Purchased Assets” (*i.e.*, the [REDACTED] contract and related orders and equipment) were those of the [REDACTED] division and not any other business unit. Further, the APA made clear that, during the time period between APA closing until novation, Appellant would continue to perform the [REDACTED] contract as the prime contractor. *Id.* The contract was not actually novated prior to self-certification, however, and Appellant has not explained how Appellant could have continued to perform the [REDACTED] contract if the division purportedly engaged in such work had already been transferred to [PURCHASING FIRM]. Thus, Appellant has not established the factual predicate that Appellant did divest its [REDACTED] division prior to August 23, 2019.

Second, even if OHA were to agree that Appellant had in fact sold the [REDACTED] division as of the date of self-certification, Appellant has not demonstrated that the [REDACTED] division could appropriately be treated as a “former affiliate.” Contrary to Appellant's arguments on appeal, OHA has repeatedly held that a division or line of business within a concern is not a “former affiliate,” and therefore cannot be excluded from the challenged firm's receipts or employee count. *Size Appeal of Blaine Larsen Farms, Inc.*, SBA No. SIZ-4742 (2005); *Size Appeal of United Coupon Clearing House, Inc.*, SBA No. SIZ-3359 (1990); *Size Appeal of JL Assocs., Inc.*, SBA No. SIZ-3302 (1990); *Size Appeal of Microtech Indus., Inc.*, SBA No. SIZ-1866 (1984). Similarly, SBA has expressed the view, as a matter of agency policy, that “[e]ven if [a] division is later sold, [the division's] receipts were always part of the receipts directly received by the concern itself, and SBA believes that those receipts should remain a part of the concern's receipts after the sale for purposes of determining the concern's size.” 84 Fed. Reg. 29,399, 29,401 (June 24, 2019); *see also* 84 Fed. Reg. 66,561, 66,566 (Dec. 5, 2019). Appellant addresses neither the above OHA precedent nor SBA policy in the instant appeal. Section II.D, *supra*. Accordingly, even assuming that Appellant had divested its [REDACTED] division prior to the date of self-certification, Appellant still would not qualify as a small business, because the receipts of the [REDACTED] division are part of Appellant's own receipts and cannot be excluded under the “former affiliate” rule.

#### IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore 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).

KENNETH M. HYDE  
Administrative Judge