United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Diversified Protection Corporation Appellant, Appealed From Size Determination No. 06-2020-007	SBA No. SIZ-6042 Decided: December 20, 2019

APPEARANCES

Scott R. Williamson, Esq., Daniel R. Williamson, Esq., Williamson Law Group, LLC, Bethesda, Maryland, for the Appellant

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Chenega Global Protection, LLC

DECISION

I. Introduction and Jurisdiction

On November 1, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2020-007 finding that Diversified Protection Corporation (Appellant) is not a small business. Appellant contends 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 after 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. 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) he 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) e 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).

Shortly after the Runway Extension Act was enacted, SBA issued SBA Information Notice No. 6000-180022 (Dec. 21, 2018). The Information Notice expressed SBA's view that "the Runway Extension Act modifies the method for prescribing size standards for small businesses," but that "[t]he Small Business Act still requires that new size standards be approved by the Administrator through a rulemaking process." (Information Notice at 1.) As a result, SBA stated, "[t]he change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process." (*Id.*)

On June 24, 2019, SBA issued proposed regulations to implement the Runway Extension Act. 84 Fed. Reg. 29,399 (June 24, 2019). In the commentary accompanying the proposed rules, SBA stated that, although SBA did not believe the Runway Extension Act applies to SBA, SBA nevertheless was "propos[ing] to change its own size standards to provide for a 5-year averaging period for calculating annual average receipts for all receipts-based size standards" so as to "promote consistency government-wide on small business size standards." 84 Fed. Reg. at 29,400.

On December 5, 2019, SBA published a final rule to implement the Runway Extension Act by "lengthen[ing] the time in which the SBA measures size through revenue, from the average of the past 3 years to the average of the past 5 years." 84 Fed. Reg. 66,561, 66,562 (Dec. 5, 2019). SBA explained that, because some small businesses could be disadvantaged by utilizing a 5-year average, SBA would adopt a two-year transition period during which "a firm may choose between calculating receipts using a 3-year average or a 5-year average." *Id.* at 66,563. The new rules become effective January 6, 2020. *Id.* at 66,561. SBA cautioned that:

> [U]ntil the effective date of a final rule, SBA will continue to apply the 3-year averaging period in the present [13 C.F.R.] § 121.104 for calculating average annual receipts for all SBA's receipts-based size standards. Since size is determined as of the date when a firm certifies its size as part of its initial offer which includes price, the 3-year calculation period will apply to any offer submitted prior to the effective date of the final rule. Thus, even if SBA receives a request for a size determination or size appeal after the effective date of the final rule, SBA will still use a 3-year calculation period if the determination or appeal relates to a certification submitted prior to the final rule's effective date.

Id. at 66,568.

B. Solicitation and Protest

On May 2, 2019, the U.S. Department of Homeland Security issued Request for Proposals (RFP) No. 70RFP119RE2000004 for security officer services in Puerto Rico. The Contracting Officer (CO) set aside the procurement entirely for participants in the 8(a) Business

Development program, and assigned North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services, with a corresponding size standard of $20.5 million in average annual receipts.[1] Proposals were due June 20, 2019.

On September 30, 2019, the CO announced that Appellant had been awarded the contract. On October 4, 2019, Chenega Global Protection, LLC (Chenega), an unsuccessful offeror, filed a protest challenging Appellant's size. The CO forwarded the protest to the Area Office for review.

In response to the protest, Appellant acknowledged that its average annual receipts, calculated over a three-year period, exceed the $20.5 million size standard. (Protest Response at 3.) Appellant asserted, however, that pursuant to the Runway Extension Act, a five-year period of measurement should be used, and that Appellant does not exceed the size standard using a five-year average. (*Id.* at 2-3.) Appellant maintained that OHA's decision in *Size Appeal of Cypher Analytics, Inc. d/b/a Crown Point Systems*, SBA No. SIZ-6022 (2019) was incorrectly decided and should be reversed. (*Id.* at 3-5.)

C. Size Determination

On November 1, 2019, the Area Office issued Size Determination No. 06-2020-007, sustaining the protest. The Area Office found no merit to Appellant's claim that the Runway Extension Act requires the Area Office to immediately utilize a five-year calculation period, and rejected the notion that OHA's decision in *Cypher Analytics* was incorrect. (Size Determination at 5.) The Area Office noted that, in *TechAnax LLC; Rigil Corp.*, B-408685.22, B-408685.25, Aug. 16, 2019, 2019 CPD ¶ 294, the U.S. Government Accountability Office (GAO) upheld SBA's interpretation of the Runway Extension Act. (*Id.*) The Area Office found that, until SBA amends its regulations to implement the Runway Extension Act, the Area Office must continue to apply a three-year averaging period. (*Id.*)

The Area Office found that Appellant's average annual receipts exceed the $20.5 million size standard, based on Appellant's tax returns for the three fiscal years preceding the date of self-certification. (*Id.* at 4-5.) Therefore, Appellant is not small.

D. Appeal

On November 12, 2019, Appellant filed the instant appeal. Appellant contends that the Area Office erred in finding that the Runway Extension Act is not presently effective because "absent a clear direction by Congress to the contrary, [a statute] takes effect on the date of its enactment." (Appeal at 4, citing *Farrell v. U.S.*, 313 F.3d 1214 (9th Cir. 2002).) Had the Area

[1] On July 18, 2019, SBA increased the size standard for NAICS code 561612 from $20.5 million to $22 million. 84 Fed. Reg. 34,261, 34,277 (July 18, 2019). Because this change occurred after proposals were submitted, the new size standard does not affect the instant procurement, and the $20.5 million size standard remains applicable to this RFP. 13 C.F.R. § 121.402(a).

Office used a five-year period to calculate Appellant's average annual receipts, the Area Office would have found Appellant to be a small business. (*Id.* at 3.)

Appellant asserts that the Runway Extension Act "amended the Small Business Act's small business size standard methodology from the previously used three-year approach, to be modified to a five-year calculation period." (*Id.* at 4.) The legislative history of the Runway Extension Act indicates that the intent of the law was to "allow small businesses at every level more time to grow and develop their competitiveness and infrastructure, before entering the open marketplace" and to "help advanced-small contractors successfully navigate the middle market as they reach the upper limits of their small size standard." (*Id.* at 5, quoting H.R. Rep No. 115-939, at 2 (2018).) Appellant is the type of concern the Runway Extension Act was meant to assist, as Appellant "still requires more time to develop and mature to truly compete in the full and open marketplace against large government contractors." (*Id.*)

Appellant highlights that, in July 2019, the House of Representatives passed H.R. 2345, entitled "Clarifying the Small Business Runway Extension Act." Appellant points to the following provisions from the bill:

> SEC. 2. SENSE OF CONGRESS.
>
> It is the sense of Congress that—
>
> (1) the Small Business Runway Extension Act of 2018 (Public Law 115-324) applies to calculations of the size of a business concern made by the Administrator of the Small Business Administration;
>
> (2) Federal agencies rely upon such calculations to award contracts, including governmentwide acquisition contracts, to small business concerns; and
>
> (3) the Small Business Runway Extension Act of 2018 has been effective since the date it was signed into law, on December 17, 2018.
>
> SEC. 3. CLARIFYING AMENDMENT TO THE SMALL BUSINESS RUNWAY EXTENSION ACT OF 2018.
>
> Section 3(a)(2)(C) of the Small Business Act (15 U.S.C. 632(a)(2)(C)) is amended by inserting "(including the Administration when acting pursuant to subparagraph (A))" after "no Federal department or agency".

(*Id.* at 7-8.) In Appellant's view, these provisions demonstrate that "the intent of the legislature was to have the [Runway Extension Act] be immediately implemented to amend the size standard methodology and calculation measurement period from three years to five years." (*Id.* at 9.)

Appellant renews its arguments that *Cypher Analytics* was incorrectly decided. (*Id.* at 9-12.) Appellant maintains that, contrary to OHA's reasoning in *Cypher Analytics*, the Runway

Extension Act "has nothing to do with the promulgation of size standards." (*Id.* at 10.) Instead, the "provision that was amended is the provision that dictates the size standard measurement period." (*Id.*) Appellant contends that SBA "apparently agrees" with Appellant's view, because SBA has issued a proposing rule that would extend the time period used to calculate the size of a particular business. (*Id.* at 10-11.)

Appellant also argues that OHA's conclusion that the Runway Extension Act can be implemented only through notice-and-comment rulemaking misreads the text and intent of the statute. (*Id.* at 11.) Although notice-and-comment rulemaking is required when prescribing a size standard, "SBA is not prescribing a size standard in this case." (*Id.*) Appellant urges that the "most straightforward and logical" interpretation of the Runway Extension Act is that "Congress intended the measurement period to be lengthened immediately" but that "[o]ther Small Business Act requirements, such as the process to prescribe a size standard, remain unchanged." (*Id.* at 12.)

E. Chenega's Response

On December 3, 2019, Chenega responded to the appeal. Chenega argues that Appellant has not shown any valid reason to disturb OHA's decision in *Cypher Analytics* or GAO's decision in *TechAnax*. Further, OHA specifically affirmed *Cypher Analytics*, and rejected many of the same arguments now raised by Appellant, in *Size Appeal of Advanced Technology Systems Company*, SBA No. SIZ-6034 (2019). (Response at 1.) Under the doctrine of *stare decisis*, these decisions are controlling precedent and are dispositive of the instant appeal. (*Id.* at 4, 6-7.)

Chenega notes that the bill referenced by Appellant, H.R. 2345, has passed only one chamber of Congress and therefore does not carry the force of law. (*Id.* at 3, 5.) Moreover, OHA discussed H.R. 2345 in *Advanced Technology*, and found that the bill directs SBA to issue a final rule implementing the Runway Extension Act by December 17, 2019. As a result, OHA concluded, H.R. 2345 "acknowledges that a five-year term for determining annual receipts in SBA size determinations is not yet in effect and recognizes that the rulemaking process is required to fully implement it." (*Id.* at 4, quoting *Advanced Technology*, SBA No. SIZ-6034, at 11.)

Chenega disputes Appellant's contentions that *Cypher Analytics* was incorrectly decided. (*Id.* at 2-3, 5.) Although Appellant maintains that the Runway Extension Act concerns the methodology used to calculate the size of a particular small business rather than the promulgation of size standards, the text of the law does not support these claims. (*Id.* at 5-6.)

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

I agree with the Area Office and Chenega that OHA's decisions in *Size Appeal of Cypher Analytics, Inc. d/b/a Crown Point Systems*, SBA No. SIZ-6022 (2019) and *Size Appeal of Advanced Technology Systems Company*, SBA No. SIZ-6034 (2019) are dispositive of the instant appeal. As in those earlier cases, the sole issue presented here is the legal question of whether Appellant's average annual receipts should be calculated over a five-year period rather than over a three-year period. Existing regulations require that receipts be averaged over a three-year period. *See* 13 C.F.R. § 121.104(c)(1); Federal Acquisition Regulation (FAR) 19.101. Further, it is undisputed that Appellant does not qualify as a small business if its receipts are calculated over a three-year period. Sections II.B and II.C, *supra*.

In *Cypher Analytics*, OHA addressed the issue of whether the Runway Extension Act supersedes existing regulations pertaining to the period of measurement for calculating receipts, and concluded that it does not:

> 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." Likewise, the pertinent section of the Runway Extension Act itself was entitled "Modification to Method for Prescribing Size Standards for Business Concerns." Although it may well be true, as [the challenged firm] 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, [the challenged firm] 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 [the challenged firm] 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. 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." The Runway Extension Act, though, was silent as to any such exception being granted here. 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.

Cypher Analytics, SBA No. SIZ-6022, at 7-8 (internal citations omitted).

OHA affirmed *Cypher Analytics* in *Advanced Technology*, explaining:

> [A]s noted in *Cypher Analytics*, the Runway Extension Act did not alter the provisions of the Small Business Act which specifically state that "the Administrator may specify detailed definitions of size standards" and provides that the Administrator will do so through rulemaking. 15 U.S.C. § 632(a)(2)(A), (a)(6). In other words, the definitions of the size standards must come as part of notice and comment rulemaking from the Administrator. Further, the provision of the Small Business Act revised by the Runway Extension Act, § 3(a)(2)(C), requires that size standards be promulgated only through notice and comment rulemaking, and with the approval of SBA's Administrator, and this requirement was not altered by the Runway Extension Act. [The challenged firm's] arguments as to Congress' intent and the effective date of the statute do not change the fact that the Runway Extension Act was in fact a narrow statute and failed to alter any of the requirements for notice and comment rulemaking in setting size standards. The change in the statute altered the number of years of a concern's annual receipts to be used in setting size standards under § 3(a)(2)(C), but it does not short-circuit the process for promulgating regulations. Indeed, it leaves undisturbed the requirement for a size standard to be set only after notice and comment. Therefore, the statute does not conflict with the existing regulation.

Advanced Technology, SBA No. SIZ-6034, at 10.

Appellant's arguments here are substantially similar to those advanced, and rejected, in *Cypher Analytics* and *Advanced Technology*. While Appellant asserts that the Runway Extension Act had "nothing to do with the promulgation of size standards," that argument is plainly contradicted by the text of the Runway Extension Act itself, as is explained in *Cypher Analytics* and *Advanced Technology*. Indeed, the Runway Extension Act amended only one sentence of the Small Business Act which pertains specifically to the promulgation of size standards. Section II.A, *supra*. Further, because the Runway Extension Act did not alter the requirements for notice-and-comment rulemaking and approval by the SBA Administrator, the Runway Extension Act can be implemented only by adhering to these requirements. *Id.* Accordingly, as in *Cypher*

Analytics and *Advanced Technology*, 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 define the period of measurement used to compute size.

It is worth noting that, after the instant appeal was filed, SBA published a final rule implementing a five-year period for calculating average annual receipts. Section II.A, *supra*. These new rules, however, become effective January 6, 2020, and SBA's commentary in the *Federal Register* makes clear that the three-year calculation period continues to apply to "any offer submitted prior to the effective date of the final rule." *Id.* Appellant submitted its offer for the instant procurement in June of 2019, and as such, the final rule has no impact on this case.

IV. Conclusion

Appellant has not established any 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