Cite as: *Size Appeal of Obsidian Solutions Group, LLC*, SBA No. SIZ-6076 (2020)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Obsidian Solutions Group, LLC, Appellant, Appealed From Size Determination No. 2-2020-116-117	SBA No. SIZ-6076 Decided: October 29, 2020

APPEARANCE

Milton C. Johns, Esq., Executive Law Partners, PLLC, Fairfax, Virginia, for Appellant

DECISION

I. Introduction and Jurisdiction

On September 10, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2020-116-117 finding that Obsidian Solutions Group, LLC (Appellant) is not a small business. Appellant contends that the Area Office improperly calculated Appellant's receipts over a 3-year period rather than over a 5-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 chapter 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).

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 immediately 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 became 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 Protests

On April 19, 2019, the U.S. Department of Energy (DOE) issued Request for Proposals (RFP) No. 89243318RAU000002 for "Technical Security, Communications Security, Cyber, Analysis and Security Administration" support services. The Contracting Officer (CO) set aside

the procurement entirely for participants in SBA's 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 561621, Security Systems Services (except Locksmiths), with a corresponding size standard of $20.5 million in average annual receipts.[1] Appellant submitted its proposal on July 18, 2019, self-certifying as a small business.

DOE selected Appellant as the apparent awardee, but stated that it intended to ask SBA "for confirmation of eligibility and size status prior to making the award." (Letter from B. Burns to D. Shepherd (Sept. 2, 2020).) On September 2, 2020, the CO wrote to SBA's Richmond District Office to request a formal size determination of Appellant. The CO explained that Appellant's SAM.gov profile indicated that Appellant was not a small business under NAICS code 561621. (Letter from B. Burns to C. Knoblock (Sept. 2, 2020).) The Area Office subsequently informed Appellant that its size had been questioned not only by the CO but also by the Director of SBA's Richmond District Office. (Letter from H. Goza to T. Logan (Sept. 2, 2020), at 1.) The Area Office noted that Appellant had previously acknowledged in an e-mail to an SBA official that Appellant had utilized a 5-year period for computing its average annual receipts when Appellant submitted its proposal for the instant procurement in July 2019. (*Id.*) Appellant had further indicated that its average annual receipts over a 5-year period were $17,471,947, but that its average annual receipts over a 3-year period were $21,751,616. (*Id.* at 1-2.)

In response to the protests, Appellant argued that pursuant to the Runway Extension Act, Appellant properly used a 5-year period of measurement to calculate receipts, and that Appellant did not exceed the size standard using a 5-year measurement period. (Letter from T. Logan to H. Goza (Sept. 8, 2020).) Appellant observed that the current version of SBA's Form 355 allows a firm to select either a 3-year or a 5-year period of measurement. (*Id.*, citing SBA Form 355, instructions for question 12(a).)

C. Size Determination

On September 10, 2020, the Area Office issued Size Determination No. 2-2020-116-117, concluding that Appellant is not a small business. The Area Office found no merit to Appellant's claim that the Runway Extension Act permitted Appellant to immediately use a 5-year measurement period to calculate receipts. (Size Determination at 3-4.) OHA has held in several decisions that the 5-year measurement period did not become effective immediately, but instead had to be implemented through regulation. (*Id.*) Further, according to SBA's final regulations implementing the Runway Extension Act, the 5-year measurement period can be utilized only for certifications that occur after January 6, 2020. (*Id.* at 4, citing *Size Appeal of Diversified Protection Corporation*, SBA No. SIZ-6042 (2019).) In the instant case, Appellant self-certified as small with its proposal of July 18, 2019, so a 3-year measurement period must be used. (*Id.*)

[1] Effective August 19, 2019, SBA increased the size standard for NAICS code 561621 from $20.5 million to $22 million. 84 Fed. Reg. 34,261, 34,277 (July 18, 2019). Because the CO did not amend the RFP to incorporate the $22 million size standard, the $20.5 million size standard remained applicable to this RFP. 13 C.F.R. § 121.402(a).

The Area Office rejected Appellant's argument that Appellant had the option to choose a 5-year measurement period based on the instructions in the current version of the SBA Form 355. (*Id.*) OHA considered this exact argument in *Size Appeal of BTAS, Inc.*, SBA No. SIZ-6063 (2020), and opined that the argument "borders on the frivolous." (*Id.*, quoting *BTAS*, SBA No. SIZ-6063, at 13.)

The Area Office found that Appellant's average annual receipts for the 3 fiscal years preceding the date of self-certification exceed the $20.5 million size standard. (*Id.* at 5-6.) Therefore, Appellant is not small.

D. Appeal

On September 25, 2020, Appellant filed the instant appeal. Appellant highlights that the Runway Extension Act was signed into law on December 17, 2018, and therefore had been in effect for 7 months by the time Appellant submitted its proposal for the instant procurement on July 18, 2019. (Appeal at 2.) Based on the Runway Extension Act, SBA was required to immediately utilize "at least a 5-year, not a 3-year" period of measurement. (*Id.* at 4.) The Area Office thus erred in calculating Appellant's receipts based on a 3-year average. Had the Area Office used a 5-year period to calculate Appellant's average annual receipts, the Area Office would have found Appellant to be a small business. (*Id.* at 2.)

Appellant disagrees with OHA's line of cases pertaining to the Runway Extension Act. These cases were wrongly decided, Appellant maintains, because SBA no longer had authority to use a 3-year measurement period once the Runway Extension Act was enacted. (*Id.* at 4.) Appellant insists that the Runway Extension Act was immediately effective as the law did not specify a different effective date. (*Id.*, citing *Johnson v. U.S.*, 529 U.S. 694 (2000).) Further, it is immaterial that existing regulations continued to utilize a 3-year period of measurement, because a statute takes precedence over any conflicting regulation. (*Id.* at 4-5, citing *R&W Flammann GmbH v. U.S.*, 339 F.3d 1320 (Fed. Cir. 2003).)

Appellant asserts that the legislative history of the Runway Extension Act reflects an intent to "help small contractors successfully navigate the middle market as they reach the upper limits of their size standard." (*Id.* at 5.) Moreover, in July of 2019, the House of Representatives passed a bill entitled "Clarifying the Small Business Runway Extension Act." While this bill did not become law, it did express disagreement with the notion that the Runway Extension Act did not apply to SBA, as well as with SBA's position that the Runway Extension Act could be implemented only through regulation. (*Id.* at 5-6.) According to Appellant, "Congress did not direct the SBA to create a rule; rather it very clearly and simply directed SBA to change the calculation from 3 years to 5 years. No rulemaking was necessary." (*Id.* at 6.)

Appellant additionally argues that it properly relied on the instructions in the SBA Form 355 when calculating its receipts. (*Id.* at 7.) Specifically, the current version of the SBA Form 355 states that a concern may choose to use either a 3-year or a 5-year measurement period. (*Id.*) Appellant reasons that, through the instructions on the form, SBA represented to Appellant that it could elect a 5-year measurement period. (*Id.* at 7-8.)

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 find no merit to this appeal. As the Area Office correctly observed, OHA has considered several prior cases involving the Runway Extension Act, and has repeatedly held that the 5-year period of measurement did not become effective immediately, but instead had to be implemented through regulation. *Size Appeal of Cypher Analytics, Inc. d/b/a Crown Point Systems*, SBA No. SIZ-6022 (2019); *Size Appeal of Advanced Tech. Sys. Co.*, SBA No. SIZ-6034 (2019); *Size Appeal of Diversified Protection Corp.*, SBA No. SIZ-6042 (2019); *Size Appeal of BTAS, Inc.*, SBA No. SIZ-6063 (2020). In its prior decisions, OHA explained that the Runway Extension Act "amended only a single sentence of the Small Business Act," and that "the provision amended pertains specifically to the promulgation of size standards, not to the methodology used to calculate the size of a particular business." *Cypher Analytics*, SBA No. SIZ-6022, at 7. As result, OHA concluded, the Runway Extension Act did not directly contradict or overrule existing regulations — such as 13 C.F.R. § 121.104 and Federal Acquisition Regulation 19.101 — which at that time specified a 3-year period of measurement to determine size. *Id.*

OHA's prior cases have further explained that, even if the Runway Extension Act could be understood as lengthening the period of measurement used for calculating size, the specific provision of the Small Business Act that was amended by the Runway Extension Act requires notice-and-comment rulemaking and approval of the SBA Administrator. Section II.A, *supra*. It therefore follows that the 5-year measurement period must be implemented through the rulemaking process. OHA has recognized that "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." *Diversified Protection*, SBA No. SIZ-6042, at 8.

Although Appellant disagrees with OHA's prior decisions, Appellant has not set forth any valid reason to disturb, or depart from, them here. Appellant's legal arguments concerning interpretation of the Runway Extension Act have already been considered, and rejected, in prior cases. Nor does Appellant identify any factual grounds to distinguish the instant case from OHA's prior decisions involving the Runway Extension Act. As in the earlier OHA cases, Appellant does not dispute that regulations at the time of its self-certification required that receipts be averaged over a 3-year period. Appellant does not dispute that its own average annual receipts, when calculated over a 3-year period, exceed the applicable size standard. Section II.B, *supra*. In addition, Appellant does not dispute that it self-certified as small prior to January 6,

2020 — the effective date of SBA's final regulations implementing the Runway Extension Act — and SBA's commentary accompanying those final regulations made clear that "the 3-year calculation period will apply to any offer submitted prior to the effective date of the final rule." Section II.A. Given this record, the Area Office correctly concluded that Appellant is not a small business.

Lastly, I see no merit to Appellant's contention that it relied on misleading instructions in the SBA Form 355. This argument fails because Appellant self-certified as a small business on July 18, 2019, but the SBA Form 355 was not revised to indicate that a concern could choose to utilize a 5-year measurement period until several months later. *See* 84 Fed. Reg. at 66,577. At the time of its self-certification, then, Appellant could not have been relying upon any incorrect or confusing instructions in the SBA Form 355.

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