

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

SIZE APPEAL OF:

Apogee Engineering, LLC,

Appellant,

Appealed From  
Size Determination No. 05-2020-046

SBA No. SIZ-6078

Decided: November 5, 2020

APPEARANCES

William M. Jack, Esq., Amba M. Datta, Esq., Ken M. Kanzawa, Esq., Kelley, Drye & Warren, LLP, Washington, D.C., for Appellant

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox, Esq., Ian P. Patterson, Esq., Schoonover & Moriarty LLC, Olathe, Kansas, for Amaze Technologies, LLC

Paul R. Hurst, Esq., Caitlin T. Conroy, Esq., Steptoe & Johnson, LLP, Washington, D.C., for Wittenberg Weiner Consulting, LLC

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

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On September 15, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2020-046 (Size Determination), finding Apogee Engineering, LLC (Appellant) other than small. On September 30, 2020, Appellant filed the instant appeal from that size determination. Appellant

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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 timely requests for redactions and considered any requests in redacting the decision. On November 16, 2020, OHA held a conference call with counsel for Appellant to review the merits of the request and allowed comments from each party's counsel. Under advisement, OHA now publishes a version of the decision for public release.

argues that the size determination is clearly erroneous, and requests that OHA reverse it, and find Appellant is an eligible small business. For the reasons discussed *infra*, I DENY the appeal, and AFFIRM the Size Determination.

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 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. Solicitation and Protest

Appellant holds one of General Services Administration's (GSA) indefinite-delivery, indefinite-quantity (“IDIQ”) contracts (No. GS00Q14OADS113) under One Acquisition Solution for Integrated Services Small Business (“OASIS SB”). GSA awarded the Contract to Appellant on June 20, 2014. The designated North American Industry Classification System (NAICS) code is 541330, Engineering Services, with a corresponding \$15 million annual receipts size standard at the time of award. SBA raised this size standard to \$16.5 million, effective August 19, 2019. 84 Fed. Reg. 34261, 34276 (July 18, 2019). The Contract is a multiple award of more than five years duration, and the regulation requires that awardees of such contracts to re-represent their size status within 60 to 120 days prior to the end of the fifth year of the contract and prior to exercising an option period. 13 C.F.R. § 121.404(g)(3); FAR 52.219-28. Under this rule, Appellant was required to recertify its size between February 19, 2019, and April 19, 2019.

On August 17, 2020, Wittenberg Weiner Consulting, LLC (WWC) filed a size protest, alleging Appellant was other than small. (WWC Protest, August 17, 2020.) On September 2, 2020, the Area Office dismissed this protest as untimely. (Dismissal of WWC Protest, September 2, 2020.)

### B. Area Office's Size Investigation

On September 3, 2020, the Area Director initiated a size protest against Appellant pursuant to 13 C.F.R. § 121.1001(a)(1)(iii). (Area Director Protest, September 3, 2020.) In its letter informing Appellant of the protest, the Area Office noted that GSA issued an amendment to the Contract, extending it for six months, and allowing for an extended re-representation period between August 19, 2019, and October 19, 2019. (*Id.*, at 2.) The Area Office informed Appellant, “This extended period is not consistent with SBA regulations as cited above and will not be considered when determining the size of Apogee.” (*Id.*)

The Area Office further noted there was evidence Appellant has certified in the System for Award Management (SAM) that it was other than small for this NAICS code and size standard applicable for this Contract. (*Id.*) The Area Office indicated that Appellant may have incorrectly used a five-year period when calculating its annual receipts instead of a three-year period. (*Id.*) The Area Office directed Appellant to submit its response to the protest, a

completed SBA Form 355 as of April 19, 2019, and certain other information. (*Id.*) On September 11, 2020, Appellant's Vice President for Finance informed the Area Office, "Apogee has reviewed the request and using the calculation that SBA is requesting, we agree we are considered Other Than Small based on this request." (Email, A. Scott to S. Owens, September 11, 2020.) Appellant made no further submission to the Area Office in response to the protest.

#### C. Size Determination No. 05-2020-046

On September 15, 2020, the Area Office issued the Size Determination, finding Appellant other than small. The Area Office noted that Appellant had conceded that it would be found other than small using the three-year period to calculate size set forth in the Area Director's September 3<sup>rd</sup> letter. (Size Determination, at 1.)

In determining Appellant's size, the Area Office applied the \$15 million annual receipts size standard. The Area Office found the initial period of recertification of size status for the OASIS SB Pool 1 Contract was established in accordance with 13 C.F.R. § 121.404(g)(3) and FAR clause 52.219-28, "Post-Award Small Business Program Representation." The Area Office also found Appellant should have made its recertification between February 19, 2019, and April 19, 2019. The Area Office noted that GSA extended the term of the basic period of the Contract by six months and issued a FAR Class Deviation (CD 2019-09), which allowed for an extended re-representation period. However, the Area Office found that this extended period was not consistent with SBA's regulations, and therefore did not consider it when making the size determination.<sup>2</sup> (*Id.*)

The Area Office further noted that Appellant had failed to submit the information requested in the Area Office's September 3<sup>rd</sup> letter. The Area Office then found Appellant other than small, based upon Appellant's admission and its failure to make a submission, because such failure to submit the required information justified a presumption that the disclosure of such information would demonstrate that Appellant was other than small. (*Id.*, citing 13 C.F.R. § 121.1008(d).)

#### D. The Appeal

On September 30, 2020, Appellant filed the instant appeal. Appellant argues that the Area Office erred in finding it other than small for two reasons.

First, Appellant argues the Area Office wrongly determined the time for recertifying its size under the Contract was between February 19, 2019, and April 19, 2019. However, GSA extended the term of the base period of the Contract through a modification by six months from June 19, 2019, to December 19, 2019. Appellant further asserts that GSA issued a FAR Class Deviation (CD 2019-09), which allowed for an extended re-representation period from August 19, 2019, through October 19, 2019. Appellant argues the Area Office should have permitted it to submit information in support of a determination of size as of the time between August 19, 2019, and October 19, 2019. Appellant maintains it then would have had an opportunity to show

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<sup>2</sup> The Area Office miscited to 13 C.F.R. § 121.1008(d) here.

the Area Office that it was a small business under a \$16.5 million annual receipts size standard, which was the applicable size standard for NAICS code 541330 during the period from August 19, 2019, and October 19, 2019, rather than the \$15 million annual receipts size standard that was in effect between February 19, 2019, and April 19, 2019. (Appeal, at 2.)

Appellant admits it did not qualify as a small business during the period between February 19, 2019, and April 19, 2019, under the \$15 million size standard then in effect. Appellant maintains the Area Office should have given it the opportunity to submit information regarding its size for the August 19, 2019, through October 19, 2019, time period, as it was within the 60 to 120 days of the end of the base period of the Contract. Then, Appellant could have established it was a small business under the \$16.5 million size standard applicable for NAICS code 541330, during the period between August 19, 2019, through October 19, 2019. (*Id.*, at 7.)

Second, Appellant argues the Area Office erred as a matter of law when it informed Appellant that a three-year period of measurement must be used to determine its size because pursuant to the Small Business Runway Extension Act of 2018, Pub. L. 115-324, 132 Stat. 4444, Dec. 17, 2018, (“Runway Extension Act”), Appellant's size for this procurement must be calculated using a five-year period of measurement. Appellant maintains the five-year period of measurement for the average annual receipts has been in effect since December 17, 2018, well before the recertification period of the Contract. (*Id.*, at 3.)

Appellant asserts the Runway Extension Act makes one change in the Small Business Act, changing the word “three” to “five” in 15 U.S.C. § 632(a)(2)(C)(ii)(II). Previous to the passage of the Runway Extension Act, the Small Business Act prohibited any Federal department or agency from setting a size standard unless the standard determined size on the basis of annual gross receipts over a period of no less than three years. (*Id.*, at 9-10.)

Appellant maintains the Act applies to SBA, because SBA is clearly a Federal department or agency, despite prior SBA interpretations that it does not. Appellant bases its argument on the plain meaning of the statute and upon Congress's clear intent in enacting it. Appellant further argues the Act became effective upon its enactment, because a statute becomes effective upon enactment, in the absence of a contrary provision. Accordingly, Appellant argues the Area Office should have been prepared to calculate its size using a five-year period of measurement, instead of a three-year period. (*Id.*, at 10-15.)

Appellant submitted its proposal for the instant procurement in the knowledge that its annual receipts for the three-year period exceeded the size standard, but with the expectation that the Runway Extension Act's change to a five-year period for determining a concern's annual receipts was in effect. (*Id.* at 3.)

Appellant further maintains that Congress, through the Runway Extension Act, makes it clear that small business size must be calculated on at least a five-year, not a three-year, average of annual receipts. No Federal agency is permitted to use a three-year average, and the Act was effective immediately. Therefore, the Area Office erred in finding Appellant other than small. (*Id.* at 4.)

Appellant seizes on the Area Office's miscitation of 13 C.F.R. § 121.1008(d) as applying to the timing of recertification as a substantive error, because it does not apply to the measurement of size with regard to the extended re-representation periods of a contract. (*Id.*, at 8-9.)

Appellant does not seek to submit any new evidence with its appeal.

#### E. Agency's Response

On October 16, 2020, the SBA's Office of General Counsel responded to the appeal. SBA first asserts that Appellant was required to recertify its size at the end of the fifth year of its Contract, citing 13 C.F.R. § 121.404(g)(3). (SBA Response, at 6.) The certification should have been made no more than 120 days prior to June 19, 2019, the fifth anniversary of its Contract. (*Id.*) SBA maintains the GSA's FAR Class Deviation and the extension of the Contract do not extend the recertification period, because GSA had no authority to waive the rule. (*Id.*, at 7.) SBA has exclusive authority to certify a small business and to revoke that certification. (*Id.*) The GSA FAR Class Deviation did not and could not waive the rule. (*Id.*, at 8.)

SBA further asserts Appellant was required to certify its size using a three-year period to average its annual receipts. The plain language of the Small Business Act required SBA to apply its own size standards in effect in 2019. (*Id.*, at 9-14.) SBA maintains that Appellant's argument that the Runway Extension Act is effective immediately are based upon inapposite precedent. (*Id.*, at 15-19.) SBA further asserts that in preparing the implementing regulations for the Act, it considered the anticipated effect on industry, as required by law. (*Id.*, at 20-24.)

#### F. WWC's Response

On October 16, 2020, WWC responded to the appeal. WWC argues first, that Appellant has no standing to bring this appeal. Appellant failed to respond to the Area Office's request for information and did not file an SBA Form 355. WWC maintains that, under these circumstances, SBA's regulations permit the Area Office to presume the disclosure would demonstrate Appellant was other than small. (WWC Response, at 4.) Appellant also failed to respond to allegations in the Area Office's September 3<sup>rd</sup> letter that it had certified in SAM that it was other than small for this NAICS code and size standard, and calculated its receipts using a five-year average rather than a three-year average. (*Id.*, at 4-5.) The adverse presumption is fatal to this appeal in that Appellant cannot show it was small and it was harmed by the size determination, and therefore cannot demonstrate it has any standing. (*Id.*)

WWC indicates that publicly available information establishes Appellant has received contract awards, which would raise its annual receipts over the applicable size standard and has received further revenue from subcontract awards. WWC concludes that Appellant's annual receipts must exceed the applicable size standard. (*Id.*, at 5-7.) WWC further asserts Appellant represented itself as other than small to GSA on September 30, 2019 and has never re-represented itself as small since. It cannot argue it is small in this appeal. (*Id.*, at 7-8.) WWC also argues Appellant has never represented that it would be small using the three-year average of

receipts required by the regulations. Accordingly, it does not have standing to pursue this appeal. (*Id.*, at 8-10.)

WWC goes on to argue that even if Appellant had standing, the Area Office properly assessed its size as of the February 19 to April 19, 2019 recertification period. WWC points out that Appellant was required to recertify its small business size status no more than 120 days prior to the end of the fifth year of the Contract, and no more than 120 days prior to exercising any option thereafter. (*Id.*, at 10, citing 13 C.F.R. § 121.404(g)(3).) WWC argues Appellant has admitted it was not small during this recertification period and Appellant relies on GSA's FAR Class Deviation to support its claim that it should have a later recertification period. However, GSA lacked the authority to authorize contractors to skip a recertification required by SBA regulations. (*Id.*, at 11.)

WWC further argues the Area Office correctly relied upon OHA precedent in concluding that Appellant's size must be determined using a three-year period of measurement, despite the Runway Extension Act. (*Id.*, at 12-14, citing *Size Appeal of Cypher Analytics, Inc.*, SBA No. SIZ-6022 (2019).)

### G. Amaze's Response

Also, on October 16, 2020, Amaze Technologies, LLC (Amaze) filed a response to the Appeal. Amaze argues first that the instant appeal must fail because it is based upon arguments raised for the first time on appeal. Appellant attempts to dispute the Area Office's time of recertification and period of measurement now when it failed to do so in response to the protest. (Amaze Response, at 1-5.) Further, the Area Office was justified in drawing an adverse inference against Appellant, because Appellant failed to respond to the Area Office's requests for information. (*Id.*, at 5-8.) Appellant was required to recertify its size between February 19, 2019, and April 19, 2019, under 13 C.F.R. § § 121.404(g)(3). Amaze argues Appellant's reliance upon GSA's FAR Class Deviation is misplaced, because SBA's regulations must control here. (*Id.*, at 8-12.) Further, Amaze urges OHA to reaffirm its precedents on the applicability of the Runway Extension Act, and not accept Appellant's argument that its annual receipts should be calculated using a five-year period. (*Id.*, at 12-17, citing *Size Appeal of Cypher Analytics, Inc.* SBA No. SIZ-6022 (2019).)

## 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. The Merits of the Appeal

The critical moment in this appeal came on September 11, 2020, when Appellant responded to the Area Office's September 3<sup>rd</sup> letter with a one line email stating, "Apogee has reviewed the request and using the calculation that SBA is requesting, we agree we are considered Other Than Small based on this request." Section II.B, *supra*. The Area Office's September 3<sup>rd</sup> letter informed Appellant of the size protest, requested an SBA Form 355, and certain other information, together with any response to the protest, and informed Appellant its size was to be calculated as of the February 19, 2019, and April 19, 2019 period, using a three-year average of its annual receipts. Appellant's response to this letter was to decline to submit any of the requested information or argument, and to send a one-line acknowledgment that it was other than small. *Id.*

When a concern whose size status is at issue fails to submit a completed SBA Form 355 or respond to the Area Office's requests for information, the Area Office may draw an adverse inference, and presume that the information would demonstrate that the concern was other than small. 13 C.F.R. § 121.1008(d). Here, Appellant supplied the Area Office with no information whatsoever, except an admission, and the Area Office then drew the adverse inference that Appellant was other than small. Section II.B, *supra*.

On the issue of adverse inference, the question is whether the Area Office correctly applied the three-part test for adverse inference determinations. The test requires that (1) the requested information be relevant to an issue in the size determination; (2) there be a level of connection between the protested concern and the firm from which the information was requested; and (3) the request for information be specific. *Size Appeal of Forterra Systems, Inc.*, SBA No. SIZ-5029, at 9 (2009). If all three prongs of the test are met, the challenged business must submit the information to the area office or suffer an adverse inference that the information would show the challenged business was other than small. *Size Appeal of Clarity Communications Group, LLC*, SBA No. SIZ-6011, at 11 (2019).

Here, the requested information was relevant to the size determination, and indeed, it was essential information necessary to calculate the size of Appellant or any concern whose size was at issue. The information was Appellant's own information, so there was not only a connection, but an identity between Appellant and the concern whose information was requested. Finally, the request was very specific, a complete SBA Form 355 and its response to the protest. Section II.B, *supra*. OHA has held that when a challenged concern makes no response whatsoever to an area office's request for information necessary to make the size determination, the test is clearly met and the area office is fully empowered to draw the adverse inference. *Size Appeal of Canal Wood, LLC*, SBA No. SIZ-4852, at 4 (2007).

In this case, the Area Office properly drew the adverse inference, and relying upon Appellant's failure to submit the requested information and Appellant's one-line admission, found Appellant other than small. Section II.B-C, *supra*.

Appellant's arguments against the size determination are based upon the GSA FAR Class Deviation (CD 2019-09) and the Runway Extension Act. However, Appellant failed to raise

them at the Area Office in response to the Area Director's protest and it is now raising them for the first time on appeal. I may not consider substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Bacik Group, LLC*, SBA No. SIZ-6071, at 2 (2020). Likewise, OHA may not consider issues not raised or investigated before the Area Office. *Size Appeal of Elliot Aviation, Inc.*, SBA No. SIZ-5890, at 4 (2018).

I therefore conclude the Area Office properly drew an adverse inference that had Appellant submitted its SBA Form 355 and other information, this information would have demonstrated that Appellant was other than small. The inference, together with Appellant's admission that it was other than small, are strong support for the Area Office's determination that Appellant was other than small, and I can find no error of fact or law in the size determination.<sup>3</sup> Appellant's appeal is composed entirely of new arguments on appeal, which I may not consider. Section II.D, *supra*. Appellant had the opportunity to raise all these arguments before the Area Office, and if the Area Office was not receptive, to preserve them for its appeal. However, Appellant failed to do so and cannot raise them now. Thus, Appellant has failed to establish that the size determination is based upon any error of fact or law, and I must affirm it.

#### IV. Conclusion

Appellant has failed to establish that the size determination is based upon any clear error of fact or law. Accordingly, I DENY the instant appeal, and I AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge

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<sup>3</sup> The Area Office's miscitation to 13 C.F.R. § 121.1008(d) when discussing the FAR Class Deviation, rather than citing 13 C.F.R. § 121.404(g)(3), is harmless error. It in no way prejudiced Appellant. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718, at 8 (2016).