

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

SIZE APPEAL OF:

Ascendant Services, LLC,

Appellant,

RE: Caelum Research Corporation

Appealed From

Size Determination No. 2-2021-087

SBA No. SIZ-6131

Decided: December 2, 2021

APPEARANCES

W. Brad English, Esq., Jon D. Levin, Esq., Joshua B. Duvall, Esq., J. Dale Gipson, Esq., Maynard, Cooper & Gale, P.C., Huntsville, Alabama, for Appellant

J. Bradley Reaves, Esq., Paul Hawkins, Esq., ReavesColey PLLC, Chesapeake, Virginia, for Caelum Research Corporation

DECISION

I. Introduction and Jurisdiction

On August 25, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2021-087, dismissing a size protest filed by Ascendant Services, LLC (Appellant) against Caelum Research Corporation (Caelum). The Area Office found that the protest was not sufficiently specific. On appeal, Appellant maintains that the Area Office improperly dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For reasons discussed *infra*, the appeal is denied.

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. Solicitation and Protest

On March 1, 2021, the U.S. Army Contracting Command — Aberdeen Proving Ground issued Request for Proposals (RFP) No. W91CRB-20-R-0017 for information technology support services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 518210, Data Processing, Hosting, and Related Services, with a corresponding size standard of \$35 million in average annual receipts. (RFP at 1.) Proposals were due April 12, 2021.

On July 26, 2021, the CO informed Appellant, an unsuccessful offeror, that Caelum was the apparent awardee. On August 2, 2021, Appellant filed a protest with the CO challenging Caelum's size. The CO forwarded the size protest to the Area Office for review, noting in her referral letter that “[t]he Small Business Size Standard for this requirement is \$35M.” (Letter from T. Casey (Aug. 3, 2021), at 2.)

In the protest, Appellant claimed that the NAICS code applicable to this procurement is 541512, Computer Systems Design Services, with a size standard of \$30 million average annual receipts. (Protest at 2.) Appellant asserted that, according to “publicly available information,” Caelum is “bumping up against the size standard.” (*Id.* at 1.)

Appellant observed that SBA normally calculates size using the average annual receipts of a concern over its five most recently completed fiscal years divided by five. (*Id.* at 2.) Appellant then cited information obtained from Westlaw, Pitchbooks, Manta, and ZoomInfo, purporting to show that Caelum had sales or revenues of “as much as \$49,106,879” during 2017 or other unspecified years. (*Id.* at 1-3.) Further, the website USAspending.gov reflects that, over a five-year period, government agencies awarded contracts to Caelum valued collectively at \$148.74 million, which when divided by five would be “less than \$300,000 shy” of a \$30 million size standard. (*Id.* at 3.) Appellant posited that Caelum may also have another division, Caelum White Sands, which “may report revenue apart from Caelum,” but Appellant offered no evidence or explanation to support this claim. (*Id.*)

### B. Size Determination

On August 25, 2021, the Area Office issued Size Determination No. 2-2021-087, dismissing Appellant's protest as non-specific. The Area Office noted that, according to SBA regulations:

***A protest must include specific facts.*** A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where

materials supporting the protest are available, they should be submitted with the protest.

(Size Determination at 1, quoting 13 C.F.R. § 121.1007(b).)

In the instant case, Appellant's protest did “not make any specific statements or allegations regarding Caelum's 3 or 5 year average annual receipts.” (*Id.* at 2.) Instead, the protest asserted that data from USAspending.gov shows that Caelum's average annual receipts are below the size standard. (*Id.*) Appellant's allegations were further weakened by the fact that contract values as reported on USAspending.gov are “not the same as receipts” for size purposes. (*Id.*) As a result, apart from Appellant's unsupported speculation that Caelum may have additional unreported subcontracts or other receipts, the protest offered no basis to suggest that Caelum exceeds the applicable \$35 million size standard. (*Id.* at 2-3.)

### C. Appeal

On September 9, 2021, Appellant filed the instant appeal. Appellant argues that the Area Office erred in dismissing Appellant's size protest as non-specific.

Appellant observes that SBA regulations provide six examples to illustrate whether a size protest is sufficiently specific. (Appeal at 5.) The sixth example states:

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is \$5 million) because it received Government contracts in excess of \$5 million last year is sufficiently specific.

(*Id.*, quoting 13 C.F.R. § 121.1007(c).) Further, when analyzing protest specificity, OHA focuses on “(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds.” (*Id.*, citing *Size Appeal of Alutiiq Int'l Sols., LLC*, SBA No. SIZ-5069 (2009).)

Here, Appellant argues, the protest was sufficiently specific because Appellant referenced financial information that suggests that Caelum is not small. (*Id.*) The protest alleged that Caelum has had sales or revenues as high as \$49 million during one or more years. (*Id.*) The protest also alluded to a potential division and claimed that Caelum may have sources of revenue that might not be fully captured in the publicly-available information. (*Id.*)

Appellant argues that the Area Office improperly faulted Appellant for failing to discuss “Caelum's 3 or 5 year average annual receipts.” (*Id.* at 6.) No such requirement is explicitly stated in SBA regulations. Further, the Area Office erred by concluding that publicly-available financial data constituted “no basis or supporting information” that Caelum exceeds the size standard. (*Id.*) Appellant claims that, unless overturned by OHA, the Area Office's decision here will effectively require a protestor to already know details of the challenged firm's finances in order to survive dismissal, an illogical and untenable standard. (*Id.*)

#### D. Caelum's Response

Upon docketing the appeal, OHA established September 28, 2021 as the date of the close of record. On October 12, 2021, Caelum moved to reopen the record and submitted its proposed Response to the Appeal. Caelum explains that, because Caelum was unfamiliar with OHA procedures and was not previously represented by counsel, Caelum did not understand that it could respond to the appeal. (Motion at 2-3.) Further, permitting Caelum now to respond to the appeal is not prejudicial to Appellant and will not unduly delay proceedings. (*Id.* at 3.) Appellant did not respond to Caelum's motion.<sup>1</sup> Accordingly, for good cause shown, Caelum's motion is GRANTED, and the proposed Response is ADMITTED.

In its Response, Caelum urges that OHA should deny the appeal. Contrary to Appellant's suggestions, the Area Office did not state that a valid protest must contain specific discussion of 3 or 5 year average receipts. (Response at 4.) Instead, the Area Office merely commented that SBA utilizes either 3 or 5 year averages when calculating receipts. (*Id.* at 4-5.) Appellant's protest was flawed because it did not demonstrate, or explain, how Caelum would be large under either a 3 or a 5 year standard. (*Id.* at 5.) The protest cited data from 2016-17, which would be relevant only if a 5 year standard were applied, and referenced government information indicating that Caelum's receipts are within the \$35 million size standard. (*Id.*)

Caelum insists that the data cited in the protest was inadequate, because that data plainly showed that Caelum is small for the instant procurement. (*Id.*) Appellant's protest attempted to “fill that gap with speculation as to additional potential revenue that *may* make Caelum other than small.” (*Id.* at 6, emphasis Caelum's.) However, Appellant failed to provide any supporting facts or evidence for such assertions. (*Id.*) The Area Office correctly recognized that Appellant's claims relating to, for example, unreported subcontracts, were no more than “bald allegations” and not specific. (*Id.*)

Finally, Caelum disputes Appellant's contention that the Area Office's dismissal creates an unworkable paradigm whereby a protestor must know details of the challenged firm's finances. (*Id.*) According to Caelum, no such implication arises here. Instead, the Area Office properly and reasonably concluded that, after disregarding the speculative portions of Appellant's protest, Appellant's remaining allegations were not specific or supported by sufficient facts. (*Id.* at 6-7.)

### 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

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<sup>1</sup> Pursuant to 13 C.F.R. § 134.211(c), “[a]ll non-moving parties must file and serve a response to [a] motion or be deemed to have consented to the relief sought.”

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 recognized, several of Appellant's protest allegations were speculative and factually unsupported, such as Appellant's claims that Caelum may have additional unreported subcontracts or that Caelum may have another division which generates income separately from Caelum itself. Section II.A, *supra*. Appellant did not offer evidence, or even explanation, to support these contentions. *Id.* Accordingly, the Area Office properly rejected such allegations as non-specific. *E.g.*, *Size Appeal of JEQ & Co., LLC*, SBA No. SIZ-5932, at 2 (2018) (“Because [the] protest merely alleged that [the challenged firm] is not a small business without any supporting evidence or explanation, the Area Office correctly dismissed the protest as non-specific.”).

In the protest, Appellant also argued that, over a five-year period, government agencies have awarded Caelum contracts valued at \$148.74 million, which when divided by five would be “less than \$300,000 shy” of a \$30 million size standard. Section II.A, *supra*. This allegation, though, was marred by the fact that Appellant evidently misunderstood which size standard is applicable to this procurement. Although Appellant asserted in its protest that a \$30 million size standard should be utilized, the size standard actually associated with the assigned NAICS code was \$35 million. *Id.* Thus, even assuming Appellant were factually correct that Caelum's receipts may be “bumping up against” a \$30 million size standard, this accusation would not demonstrate, or suggest, that Caelum exceeds the applicable \$35 million size standard. The Area Office did not err in dismissing a size protest which “provided no reason to believe that [the challenged firm's] receipts, even when combined with those of the alleged affiliates, exceed the [relevant] size standard.” *Size Appeal of Arrow Moving & Storage — Mayflower Transit*, SBA No. SIZ-5902, at 2 (2018).

Appellant's remaining protest allegation was that Caelum had sales or revenues of “as much as \$49,106,879” during 2017 or during other unspecified years. Section II.A, *supra*. As the Area Office observed in its decision, however, the mere fact that Caelum's receipts may have exceeded the size standard during one single year would not connote that Caelum also exceeded the size standard over a three or a five year period, particularly since the single year in question (2017) would not necessarily even be part of the period of measurement. The Area Office therefore could reasonably conclude that Appellant failed to offer any credible grounds to question Caelum's size.

### IV. Conclusion

Appellant has not established that the Area Office erred in dismissing Appellant's protest for lack of specificity. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge