

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

SIZE APPEAL OF:

Miami-Chameleon, LLC,

Appellant,

Appealed From
Size Determination No. 02-2021-077

SBA No. SIZ-6137

Decided: January 27, 2022

APPEARANCE

Patrick Miller, General Manager, for Miami-Chameleon, LLC

DECISION¹

I. Introduction and Jurisdiction

On October 18, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2021-077 (Size Determination), finding Miami-Chameleon, LLC (Appellant) other than small. On November 2, 2021, Appellant filed the instant appeal from that Size Determination. Appellant 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*, the appeal is DENIED, and the Size Determination is AFFIRMED.

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.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant's principal an opportunity to file a request for redactions if desired. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

II. Background

A. Solicitation and Offer

On July 6, 2020, the General Services Administration (GSA) issued a Request for Proposals (RFP) under Solicitation No. 47QTCB20R0005 (Solicitation) for a government-wide acquisition Multiple Award, Indefinite-Delivery, Indefinite Quantity (MA-IDIQ) contract for information technology services and solutions. (Solicitation at 2.) The procurement is known as Streamlined Technology Acquisition Resource for Services (STARS) III. GSA set the procurement aside for qualifying SBA certified 8(a) prime contractors with competitive prices, and while it was reserved for 8(a) prime contractors, it also incorporated authority for Ordering Contracting Officers (OCOs) to set aside task orders among the contract holders for various small business types listed at FAR 19.000(a)(3), pursuant to FAR 16.505(b)(2)(i)(F). (*Id.*) This provided OCOs the ability to target by set-aside a specific sub-group of the STARS III contract holders for task order award. The Contracting Officer (CO) for STARS III designated a primary NAICS code as 541512, Computer Systems Design Services with a corresponding \$30 million annual receipts size standard, as the appropriate code. (*Id.*, at 10.) Offers were due on August 26, 2020, and final proposal revisions from the second award cohort were due on September 10, 2021. (CO's Memorandum.)

On August 26, 2020, Appellant submitted an offer for STARS III. (*Id.*) Thereafter, on September 2, 2020, Appellant submitted an 8(a) Joint Venture (JV) application to SBA, indicating that the joint venture agreement is between, Miami Tribal Systems Integrators, LLC (MTSI), a current 8(a) participant, and Chameleon Integrated Services (CIS). (Appeal File (AF), SBA JV cover letter, at 1.)

On June 21, 2021, Appellant was informed by SBA STARS III CO that it was ineligible for the award. (E-mail from P. Miller to SBA (Jul. 13, 2021).) On July 6, 2021, GSA and SBA issued a joint notice to Appellant that it was not eligible for award. (AF, Joint Notice.) The notice stated that SBA conducted a review in accordance with 13 C.F.R. § 124.501(g), and during that review, SBA found that Appellant exceeded the \$30 million size standard corresponding to NAICS Code 541512, using both, the 3-year and 5-year calculations in accordance with 13 C.F.R. § 121.104(c)(1). As a result, Appellant was found to be ineligible for award.

On July 13, 2021, Appellant confirmed receipt of the joint notice and requested a formal size determination in accordance with 13 CFR § 121.104. (Email from P. Miller to SBA (Jul. 13, 2021).)

B. Size Determination

On October 18, 2021, the Area Office issued Size Determination No. 02-2021-077 finding Appellant other than small. Appellant is a joint venture consisting of MTSI, an 8(a) Participant firm, and Unitech Consulting, LLC, d/b/a CIS. The Area Office noted that a joint venture of two or more firms may submit an offer as a small business for a federal procurement, as long as each concern is small under the size standard applicable to that procurement. (Size

Determination, at 1- 2, citing 13 C.F.R. § 121.103(1)(i).) Appellant would qualify as a small business eligible for award provided MTSI and CIS, both, individually qualified as small businesses under 13 C.F.R. §§ 124.513(c) & (d). (*Id.*)

The Area Office examined Appellant's joint venture agreement and found that it met the regulatory requirements of 13 C.F.R. §§ 124.513(c) & (d). However, when reviewing the annual receipts of the joint venture partners, the Area Office concluded that while MTSI was small, CIS was other than small. (*Id.*, at 2-3.)

Particularly, CIS provided a completed SBA Form 355, showing CIS's gross receipts for the years 2017, 2018, and 2019, copies of its Profit & Loss Statements and Balance sheets for 2015, 2016, 2017, 2018, and 2019, and copies of its federal tax returns for 2017, 2018, and 2019. The Area Office found the record demonstrated that CIS's average annual receipts averaged over both a 3-year and 5-year period immediately preceding Appellant's initial offer, exceeding the applicable \$30 million size standard for STARS III. Thus, the Area Office determined that Appellant was other than small. (*Id.*, at 3.)

C. CIS's Form 355

In reviewing CIS' annual receipts, the record shows that Jeffrey W. Kelley, CIS's Chief Executive Officer (CEO) completed and signed Form 355, dated July 20, 2021. (AF, CIS's Form 355.) For question 12(a), Mr. Kelley selected a 5-year averaging period to average its annual receipts, while on question 12(b), the total 5-year receipts were \$147,787,584. (*Id.*, at 5.) For question 13(a), CIS identified affiliation with The Hicor Group (Hicor) as 100% owner of that concern. (*Id.*, at 6.) Under question 13(d), Hicor's total 5-year receipts were \$6,498,564. (*Id.*, at 7.) Mr. Kelley noted that Hicor had no annual receipts in the years 2015 and 2019. (*Id.*)

D. Appeal

On November 2, 2021, Appellant filed the instant appeal, arguing that the Area Office erred in finding it other than small. Appellant asserts the Size Determination included annual receipts attributable to a former affiliate of CIS and these receipts should have been excluded from the Size Determination. (Appeal, at 1-2.) CIS listed Hicor as an affiliate on its SBA Form 355. Appellant explains to OHA that Hicor was a commercial construction business, unrelated to CIS's other businesses. As Hicor was not successful, CIS decided to cease operations, wind up the concern, and dissolve Hicor. Hicor permanently ceased operations in June 2019, had no employees as of that date, and has since been dissolved. (*Id.*, at 2.) After filing Hicor's final tax returns on June 17, 2020, Hicor could no longer operate in Missouri. Appellant submits new evidence, in the form of a letter from Theresa Samples, Appellant's accountant, to document this. (*Id.*)

Appellant argues that Hicor was thus a former affiliate, and its annual receipts should not be included in the calculation of CIS's receipts. The exclusion applies to the entire period of measurement. (*Id.*, citing 13 C.F.R. § 121.104(d)(4).)

Further, Appellant asserts Mr. Kelley, CIS's CEO, was confused by the Form 355. (*Id.*, at 3.) As Appellant explains, Mr. Kelley believed Hicor to be a former affiliate, but was confused by the form, and included Hicor as an affiliate. Mr. Kelley also listed \$0 as Hicor receipts for 2019. Appellant submits new evidence, in the form of an affidavit from Mr. Kelley, to support these assertions. (*Id.*) Appellant also asserts, SBA made no follow up requests for information regarding Hicor.

Conversely, Appellant maintains that a shuttered business, which has permanently ceased operations and has no employees, should not be considered an affiliate for size determination purposes. This is especially true, for Appellant, if it is unlawful for the business to operate. Appellant then argues that on the date it submitted its offer, Hicor was a former affiliate of CIS, and its annual receipts should not be included in the accounting of CIS's receipts. When these receipts are excluded from the calculation, CIS's annual receipts are within the applicable size standard. (*Id.*, at 3-4.).

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).

Appellant seeks to submit new evidence on appeal, not presented to the Area Office. Section II.C, *supra*. New evidence will not be considered unless the Judge on his or her own motion orders the submission of such evidence, or a motion is filed and served establishing good cause for the submission of such evidence. 13 C.F.R. § 134.308(a). OHA's review is based upon the evidence in the record at the time the Area Office made its determination. Evidence that was not previously presented to the Area Office is generally not admissible and OHA will not consider it. Further, OHA will not consider new evidence where the proponent unjustifiably fails to submit the evidence during the size review. *Size Appeal of Rocky Mountain Medical Equipment, LLC*, SBA No. SIZ-6129, at 12 (2021). Here, Appellant could have raised the issue of Hicor being a former affiliate before the Area Office but did not do so. Sections II.B and II.C, *supra*. Accordingly, I EXCLUDE Appellant's proffered new evidence, Mr. Kelley's affidavit and Ms. Sample's letter.

B. Analysis

Appellant seeks to overturn the Size Determination on the grounds that Hicor is a former affiliate of CIS, and its receipts should have been excluded from the calculation of CIS's receipts. Section II.D, *supra*. Unfortunately, Appellant failed to raise this issue before the Area Office. CIS's SBA Form 355 lists Hicor as an acknowledged affiliate under question 13(a) and 100%

owned by CIS. Sections II.B and II.C, *supra*. At no point does CIS raise the issue of Hicor as a former affiliate with the Area Office. *Id.*

OHA will not consider substantive issues raised for the first time on appeal in size appeals. 13 C.F.R. § 134.316(c). OHA has consistently adhered to this regulation, whether the new issue raised is only one issue in the appeal as in *Size Appeal of Birmingham Industrial Construction, LLC*, SBA No. SIZ-5984, at 11 (2019) (rejecting attempt of appellant to make additional exclusions to its receipts that had not been made before the Area Office), or if the new issue is the whole of the appellant's case, as in *Size Appeal of B GSC Group, LLC*, SBA No. SIZ-5678 (2015) (Appeal based entirely on new issue not raised before the Area Office, new issue not considered, and appeal denied).

Here, Appellant failed to identify or raise the issue that Hicor was a former affiliate before the Area Office. Appellant failed to contact the Area Office to resolve any confusion about how to complete the Form 355, as many challenged concerns do. As the challenged concern, Appellant had the burden of establishing its status as a small business. 13 C.F.R. § 121.1009(c); *Size Appeal of Clarity Communications Group, LLC*, SBA No. SIZ-6011, at 12. (2019). Appellant did not make the effort to ensure it was filing an accurate Form 355 to meet that burden. Instead, Appellant filed CIS's Form 355, listing Hicor as an acknowledged affiliate with no argument that its receipts should be deducted from CIS because Hicor was a former affiliate. Appellant failed to raise that issue before the Area Office, but now attempts to raise it for the first time on appeal. Accordingly, I cannot consider this issue.

Appellant makes no other attempt to challenge the Size Determination and identifies no other error of fact or law by the Area Office, which would support reversing the Size Determination. Section II.D, *supra*. Accordingly, I conclude Appellant has failed to meet its burden of establishing that the Size Determination was based on an error of fact or law, and I must deny the appeal.

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