

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

SIZE APPEAL OF:

Venergy Group, LLC,

Appellant,

Appealed From
Size Determination No. 3-2021-019

SBA No. SIZ-6143

Decided: March 28, 2022

ORDER DISMISSING APPEAL¹

I. Background

On January 11, 2022, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. 36C25622Q0299 for inspection, tuning, testing, calibrating, and adjustment of burners and boiler plant controls at the Overton Brooks VA Medical Center in Shreveport, Louisiana. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 238220, Plumbing, Heating, and Air-Conditioning Contractors, with a corresponding size standard of \$16.5 million average annual receipts. On February 10, 2022, the CO announced that Venergy Group, LLC (Appellant) was the apparent awardee.

On February 11, 2022, Caldaia Controls, LLC, an unsuccessful offeror, filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant's average annual receipts exceed the applicable size standard for the instant procurement based on publicly-available information in the Federal Procurement Data System. The CO forwarded the protest to the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) for review.

On March 10, 2022, the Area Office issued Size Determination No. 3-2021-019, concluding that Appellant is not a small business. The Area Office specifically found that Appellant's annual receipts, averaged over its five most recently completed fiscal years, exceed the applicable \$16.5 million size standard. (Size Determination at 5.) The Area Office based its

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

decision on Appellant's "Federal Tax returns for 2017, 2018, 2019, and 2020, and financial statements for 2021," which Appellant itself had provided to the Area Office. (*Id.* at 2.)

On March 23, 2022, Appellant filed the instant appeal with SBA's Office of Hearings and Appeals (OHA). Appellant does not allege that the Area Office committed any error of fact or law in its decision. However, Appellant maintains, OHA should overturn the size determination because the Area Office did not have access to the most current information. Appellant claims that "a Financial Statement for 2020 was submitted [by Appellant to the Area Office] and [Appellant] did not realize this was not the most updated information." (Appeal at 1.) Accompanying its appeal, Appellant offers financial statements for the year ending December 31, 2020, as well as several other years. Appellant did not file a motion to introduce new evidence for the first time on appeal, as required by 13 C.F.R. § 134.308(a).

II. Discussion

The instant appeal is defective for several reasons. First, a proper size appeal must contain "[a] full and specific statement as to why the size determination . . . is alleged to be in error, together with argument supporting such allegations." 13 C.F.R. § 134.305(a)(3). Such information is essential because, in a size appeal proceeding, the appellant bears the burden of proving that the size determination is clearly erroneous. *Id.* § 134.314. The instant appeal, though, does not allege any error in the size determination, and therefore is deficient on its face. *See, e.g., Size Appeal of ProSouth Constr. Servs., LLC*, SBA No. SIZ-5708 (2016) (dismissing appeal that failed to allege error of fact or law in the size determination); *Size Appeal of Cherokee — Technical Specialists, LLC*, SBA No. SIZ-5434 (2013); *Size Appeal of Alleghany Wood Prods., Inc.*, SBA No. SIZ-5366 (2012).

Second, the appeal is based entirely on new evidence which, by Appellant's own admission, Appellant never provided to the Area Office. Section I, *supra*. OHA, however, cannot consider new evidence for the first time on appeal unless "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a)(2). Appellant here did not file the requisite motion, and moreover, Appellant's claim that it mistakenly submitted faulty information to the Area Office appears to stem from Appellant's own error or negligence, and thus would not constitute good cause to admit new evidence. *E.g., Size Appeal of Miami-Chameleon, LLC*, SBA No. SIZ-6137, at 4 (2022) (declining to consider new evidence when the proponent "unjustifiably fail[ed] to submit the evidence during the size review").

Lastly, Appellant also has not explained why the new evidence even would be relevant to this case. The new evidence consists of Appellant's financial statements for 2020 and other years, but under 13 C.F.R. § 121.104(a), the Area Office would not have utilized financial statements to calculate Appellant's size unless tax returns were unavailable. Indeed, according to the size determination, the Area Office computed Appellant's size based on Appellant's "Federal Tax returns for 2017, 2018, 2019, and 2020, and financial statements for 2021." Section I, *supra*. Thus, even accepting as true Appellant's claim that the 2020 financial statements Appellant provided were out-of-date, those financial statements would not appear to have affected the Area Office's decision.

III. Conclusion

Appellant has not alleged any error in the size determination, and the appeal is based entirely on new evidence, which OHA cannot consider for the first time on appeal, and which appears in any event to be irrelevant to the outcome of this case. Accordingly, the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge