

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

SIZE APPEAL OF:

Sanford Federal, Inc.,

Appellant,

Appealed From
Size Determination No. 02-2024-006

SBA No. SIZ-6261

Decided: January 16, 2024

APPEARANCE

Dror Lewy, Esq., Sanford Federal, Inc., Stafford, Virginia

DECISION¹

I. Introduction and Jurisdiction

On November 21, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2024-006, concluding that Sanford Federal, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. The Area Office found that Appellant did not respond to the Area Office's requests for information, and therefore drew an adverse inference that the missing information would have shown that Appellant is not small. On appeal, Appellant contends that the underlying size protest was deficient, and urges SBA's Office of Hearings and Appeals (OHA) to reverse the size determination. 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 15 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 provisions of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

II. Background

A. The Solicitation

On August 8, 2023, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. 36C26223Q1604 for boiler plant safety device testing, calibration, and inspection at the Northern Arizona VA Healthcare System in Prescott, Arizona. (RFQ at 4.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 238290, Other Building Equipment Contractors, with a corresponding size standard of \$22 million in average annual receipts. (*Id.* at 1, 4.) Quotations were due August 31, 2023. (RFQ, Amendment 0001.) Appellant and Caldaia Controls, LLC (Caldaia) submitted timely quotations. On October 6, 2023, the CO announced that Appellant had been selected for award.

B. Protest and Area Office Proceedings

On October 12, 2023, Caldaia filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant is not small because Appellant received significant contract awards between 2019 and 2023, according to publicly available data:

Timeframe Federal Awards

2019	[\$XXXX]
2020	[\$XXXX]
2021	[\$XXXX]
2022	[\$XXXX]
2023	[\$XXXX]

(Protest at 1.) Caldaia maintained that Appellant's average annual receipts over this time period would be \$[XXXX], which exceeds the size standard applicable to the instant procurement. (*Id.*) The CO forwarded the protest to the Area Office for review.

On October 20, 2023, the Area Office notified a representative of Appellant, Ms. Mariam Senhaji, of the protest and instructed Appellant to provide a completed SBA Form 355 as well as financial statements and federal income tax returns for the five completed fiscal years preceding Appellant's self-certification for the instant procurement. (E-mail from H. Goza to M. Senhaji (Oct. 20, 2023).) In a letter attached to the e-mail, the Area Office cautioned that “[i]f you fail to submit the completed [information] along with the other material requested within the specified time or obtain an extension, [the Area Office] may determine your business to be other than small.” (Letter from H. Goza (Oct. 20, 2023), at 2.)

Appellant did not respond to the Area Office's October 20, 2023 e-mail. On October 30, 2023, the Area Office forwarded a copy of its earlier e-mail, with attachments, to Appellant's President and CEO, Mr. Joseph Mandour. (E-mail from H. Goza to J. Mandour (Oct. 30, 2023).) Appellant again failed to respond to the Area Office.

C. Size Determination

On November 21, 2023, the Area Office issued Size Determination No. 02-2024-006, concluding that Appellant is not a small business under a \$22 million size standard. Because Appellant failed to respond to the requests for information, the Area Office drew an adverse inference that the missing information would have shown that Appellant is not small. (Size Determination at 3.)

The Area Office explained that, pursuant to 13 C.F.R. § 121.1008, Appellant was required to return a completed SBA Form 355 and other documents within three business days after being notified of Caldaia's size protest. (*Id.* at 2.) If Appellant did not do so, the Area Office could draw an adverse inference that disclosure would show that Appellant was other than small. (*Id.*, citing 13 C.F.R. § 121.1009(d).) The Area Office further explained that OHA has established a three-part test to determine whether an adverse inference is appropriate:

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).

(*Id.* at 3, quoting *Size Appeal of Apogee Eng'g, LLC*, SBA No. SIZ-6078, at 7 (2020).)

The Area Office found all three elements are met here. (*Id.*) The requested information was relevant as it is “the standard information” sought during size investigations. (*Id.*) The requested information was connected to the Appellant since it concerned Appellant's own finances. (*Id.*) Lastly, the Area Office's e-mails were specific that Appellant must complete an SBA Form 355 and submit tax returns and financial records. (*Id.*) Thus, the Area Office found, an adverse inference was warranted. (*Id.*)

D. Appeal

On December 5, 2023, Appellant appealed Size Determination No. 02-2024-006 to OHA. Appellant does not dispute that it received the Area Office's e-mails of October 20, 2023 and October 30, 2023. Appellant argues, however, that the Area Office erred in relying upon the financial information set forth in Caldaia's protest. (Appeal at 1-2.) The protest was based predominantly on contracts awarded to Appellant during 2023, “and which would not begin generating income [[for Appellant] until Fiscal year 2024” at the soonest. (*Id.* at 2.) Furthermore, one contract in particular amounted to \$[XXXX]. (*Id.*) This contract was terminated for the Government's convenience in November 2023, and Appellant received no revenues from it. (*Id.*) Excluding even this single award, Appellant's five-year average annual receipts would not exceed the size standard. (*Id.*) Appellant therefore should have been found small under the applicable \$22 million size standard. (*Id.*)

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 agree with Appellant that Caldaia's size protest was nonspecific. The record reflects that Appellant self-certified as small for the instant procurement on October 6, 2023. Section II.A, *supra*. Generally, the applicable period of measurement is the five most-recently completed fiscal years prior to self-certification, or in this case, 2018-2022. *See* 13 C.F.R. § 121.104(c)(1). Caldaia's protest, though, was based almost entirely on contracts recently awarded to Appellant during 2023. Section II.B, *supra*. Because Caldaia did not offer any reason to believe that Appellant exceeded the applicable size standard over the relevant time period, the protest lacked specificity. *E.g.*, *Size Appeal of Glob. Pac. Design Builders, LLC*, SBA No. SIZ-6260 (2023).

Nevertheless, the problem for Appellant is that Appellant did not voice any objection to the protest to the Area Office, or otherwise claim to be a small business. Section II.B, *supra*.

Indeed, Appellant remained completely silent in response to the Area Office's requests for information. *Id.* It follows, therefore, that Appellant's current objections are new issues raised for the first time on appeal, which OHA cannot adjudicate. 13 C.F.R. § 134.316(c); *Size Appeal of B GSE Grp., LLC*, SBA No. SIZ-5678, at 3 (2015).

OHA's decision in *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707 (2016) is analogous here. In *OxyHeal*, an area office drew an adverse inference against the challenged firm, and the challenged firm argued on appeal that “the size determination should be vacated because the initial protest was untimely and not specific.” *OxyHeal*, SBA No. SIZ-5707, at 8. In rejecting these contentions, OHA explained that OHA cannot adjudicate new substantive issues raised for the first time on appeal. *Id.* “Had [the challenged firm] read and responded to the Area Office's communications, it could have raised the issues of timeliness and nonspecificity before the Area Office. Having failed to so do then, it cannot do so now.” *Id.*

Here, as in *OxyHeal*, Appellant does not dispute that it knew of the size protest that had been lodged against it. Sections II.B and II.D, *supra*. Appellant thus could have requested that the Area Office dismiss the protest as nonspecific, or could have produced information showing that Appellant was small over the years 2018-2022. Appellant raised no such arguments to them Area Office, however, and its claim that the protest was nonspecific is therefore not properly before OHA on appeal. *OxyHeal*, SBA No. SIZ-5707, at 8.

Because OHA cannot entertain Appellant's argument that the size protest was nonspecific, Appellant has not shown that the Area Office erred in applying an adverse inference. SBA regulations stipulate that, when a concern's small business status is protested, “[t]he concern whose size is under consideration has the burden of establishing its small business size.” 13 C.F.R. § 121.1009(c). The challenged firm must produce a “completed SBA Form 355” together with “its answers to the allegations contained in the protest” and “any supporting material.” *Id.* § 121.1008(c). Furthermore:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business.

Id. § 121.1008(d); *see also* § 121.1009(d). Here, Appellant did not respond to the protest and did not produce a completed SBA Form 355 and other requested documents. Section II.B, *supra*. The Area Office therefore appropriately drew an adverse inference.

IV. Conclusion

Appellant has not demonstrated clear error of fact or law in the size determination. While it may be true that the underlying protest was nonspecific, Appellant did not raise this argument to the Area Office. The Area Office properly concluded that Appellant did not respond to the protest allegations; did not submit requested information; and ultimately failed to meet its burden of establishing that it is a small business. The appeal therefore is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge