

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

SIZE APPEAL OF:

Leader Communications, Inc.

Appellant

Appealed from
Size Determination No. 5-2009-036

SBA No. SIZ-5036

Decided: April 30, 2009

APPEARANCES

Chad Westfahl, Chief Financial Officer, Leader Communications, Inc., Oklahoma City, Oklahoma, for Appellant.

Stephen R. Bolden, Esq., Mysock, Chevaillier & Bolden, LLP, Tulsa, Oklahoma, for Solutions Through Innovative Technologies, Inc.

DECISION

I. Introduction and Jurisdiction

This appeal arises from an April 8, 2009 size determination (5-2009-036) finding Leader Communications, Inc. (Appellant) to be an other than small business under the relevant \$25 million size standard. The size determination arose from a protest filed by Solutions Through Innovative Technologies, Inc. (Solutions). For the reasons discussed below, the size determination is affirmed.

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Facts

On October 6, 2008, Tinker Air Force Base issued Solicitation No. FA8101-09-R-0001 (RFP) as a competitive 8(a) set-aside. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541511, Custom Computer Programming Services, with a corresponding \$25 million average annual receipts size standard. Appellant submitted its proposal on November 3, 2008.

On March 18, 2009, the CO informed unsuccessful offerors that Appellant was the apparent successful offeror. On March 23, 2009, Solutions protested Appellant's size status, alleging Appellant was affiliated with the Oklahoma Small Business Group (OKSBG) and its member companies.

On March 26, 2009, the SBA's Office of Government Contracting, Area V (Area Office) notified Appellant of the protest and requested various documents including (1) Appellant's SBA Form 355, (2) Appellant's financial statements and federal tax returns for the past three completed fiscal years prior to self-certification on the instant procurement, (3) any teaming agreements or joint venture agreements for this procurement, (4) a list of any contracts between Appellant and OKSBG from 2005-2008, and (5) Appellant's substantive response to the protest. Appellant timely supplied the requested information.

III. Size Determination

On April 8, 2009, the Area Office found Appellant other than small based solely on Appellant's average annual receipts for 2005, 2006, and 2007. The Area Office stated that while Appellant's SBA Form 355 lists average receipts of less than \$25 million, these receipts appear to be calculated from financial statements, not IRS tax returns as required under 13 C.F.R. § 121.104(a). Utilizing Appellant's tax returns for the years in question, the Area Office found Appellant exceeded the \$25 million size standard (the Area Office did not specify its calculations) and thus other than small. The Area Office did not investigate Appellant's alleged affiliation with OKSBG, presumably because Appellant's receipts, without taken into account any potential affiliates, exceeded the size standard and the issue was moot.

IV. Appeal

Appellant timely filed its appeal of the size determination on April 13, 2009. 13 C.F.R. § 134.304(a)(1). Appellant asserts the Area Office's gross receipts calculation improperly included taxes that Appellant collected and then paid to New Mexico between 2005 and 2007 and an industrial funding fee paid to the General Services Administration (GSA) between 2005 and 2007, both of which were included in Appellant's total income on its IRS tax returns. *See* 13 C.F.R. § 121.104(a) ("Receipts do not include . . . taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers . . ."). Appellant maintains that its average gross receipts are within the \$25 million size standard when adjusted to exclude these taxes. Accordingly, Appellant argues the Area Office's size determination should be reversed.

V. Protestor Response

On April 28, 2009, Solutions filed its response to Appellant's appeal. First, Solutions argues OHA cannot consider the New Mexico tax and the GSA funding fee issues because these issues were not before the Area Office. Alternatively, Solutions argues the New Mexico tax is not a sales tax but a tax on gross receipts for the privilege of doing business in New Mexico, and thus it was properly included in Appellant's gross receipts. Solutions cites the New Mexico Administrative Code § 3.2.4.8, which states that the gross receipts tax is imposed on persons

engaging in business in New Mexico and such persons “are solely liable for payment of the tax; they are not ‘collectors’ on behalf of the state.” Solutions also argues the GSA fee is a fee for holding one’s Federal Supply Schedule with GSA; it is not a charge to the federal agency or schedule user. Solutions cites the FAR, which requires offerors to include the GSA fee in their prices, and argues this requirement demonstrates the fee is included in Appellant’s GSA rate schedule pricing and not separately. *See* 48 C.F.R. 552.238-74(b)(2). Thus, the GSA fee is charged to Appellant for the privilege of acquiring a GSA Multiple Award Schedule Contract, and must be included in Appellant’s gross receipts.

VI. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon a clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant’s size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office’s size determination only if I have a definite and firm conviction the Area Office made material findings of law or fact that are mistaken.

VII. Discussion

In determining the size of a challenged firm under an annual receipts size standard, SBA computes the firm’s receipts by adding “total income” plus “cost of goods sold” as those terms are defined on the firm’s IRS tax returns. 13 C.F.R. § 121.104(a).

The issue here is whether payment to (1) a state’s gross receipts tax, and (2) the GSA’s industrial funding fee, may be excluded from SBA’s calculation of a firm’s average annual receipts. The SBA regulation excludes from a firm’s receipts “taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees.” 13 C.F.R. § 121.104(a).

OHA has previously held that “the only taxes SBA excludes from a firm’s annual receipts are those which the firm receives as an agent for the taxing authority or as a conduit. Social security and unemployment taxes do not fall into this category.” *Size Appeal of Uniband, Inc.*, SBA No. SIZ-4326 (1998). Thus, direct taxes on an employer, such as an employer’s share of Social Security and Medicare taxes, are included in a firm’s receipts because the taxes are not collected from other parties and remitted to the taxing authority. *Id.*

OHA has allowed exclusions from a firm’s annual receipts only under extremely limited circumstances, such as where the firm was an agent collecting funds for another, not paying funds as the cost of doing business. *See Size Appeal of Mid-Columbia Engineering, Inc.*, SBA No. SIZ-4134 (1996) (excluding revenues received by the firm from other firms to pay the salaries of temporary personnel it provided to the paying firm). Conversely, OHA held a recycling firm could not exclude from its average annual receipts revenues constituting a state-mandated processing fee payment because the firm was not acting as an agent of the state. *Size*

Appeal of Recycling Resources, LLC, SBA No. SIZ-4324 (1998).

Appellant argues the New Mexico gross receipts tax should be excluded from its gross receipts. The New Mexico Transportation and Revenue Department website provides:

The gross receipts tax, very different from a sales tax, is a tax on the privilege of doing business in this state. It applies to the total amount of money or other consideration . . . that a business receives for its transactions here in New Mexico. The taxable amount is the gross amount -- not net after business expenses -- and the tax liability belongs to the business instead of the customer.

Appellant's Attachment 4, *available at* <http://www.tax.state.nm.us/pubs/WhatIsGrossReceipts98.pdf> (last accessed April 30, 2009). Moreover, the New Mexico Administrative Code § 3.2.4.8 provides that the gross receipts tax is imposed on persons engaging in business in New Mexico and such persons "are solely liable for payment of the tax; they are not 'collectors' on behalf of the state." Thus, the gross receipts tax is a direct tax on Appellant as the cost of doing business in New Mexico, and Appellant is not serving as an agent for the taxing authority. Accordingly, the Area Office properly included the tax in the calculation of Appellant's annual receipts.

Appellant's GSA funding fee was also properly included in Appellant's annual receipts because the GSA fee is charged to Appellant for the privilege of acquiring a GSA Multiple Award Schedule Contract. Indeed offerors must include the GSA fee in their prices and be reflected in the total amount charged to ordering activities. FAR 552.238-74(b)(2).

Therefore, no authority exists to exclude the gross receipts tax and GSA fee from Appellant's annual receipts, and the Area Office did not err in declining to do so. Accordingly, I find Appellant has failed to meet its burden of establishing the size determination was based on a clear error of fact or law and must deny the instant appeal.

VIII. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DENY the instant appeal.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge