

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

SIZE APPEAL OF:

Kingfisher Systems, Inc.,

Appellant,

Appealed From
Size Determination No. 02-2019-035

SBA No. SIZ-6003

Decided: May 2, 2019

APPEARANCES

Kevin P. Mullen, Esq., Sandeep N. Nandivada, Esq., Morrison & Foerster LLP,
Washington, D.C., for Appellant

Paul A. Debolt, Esq., Chelsea B. Knudson, Esq., Spencer P. Williams, Esq., Venable
LLP, Washington, D.C., for Agile-Bot II, LLC

DECISION¹

I. Introduction and Jurisdiction

On February 13, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 02-2019-035 finding that Kingfisher Systems, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand or reverse. 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 initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Protest

On September 5, 2018, the U.S. Navy — Space and Navy Warfare Systems Command issued Request for Proposals (RFP) No. N66001-18-R-0011 for advanced cyber support services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding size standard of \$27.5 million in average annual receipts. Proposals were due October 23, 2018. On January 25, 2019, the CO announced that Appellant was the apparent awardee.

On January 31, 2019, Agile-Bot II, LLC (Agile-Bot), an unsuccessful offeror, filed a protest challenging Appellant's size. Agile-Bot alleged that Appellant's receipts exceed the size standard based on publicly-available information. (Protest at 1.) In addition, Agile-Bot contended, Appellant is affiliated with at least two other companies through common control. (*Id.*) The CO forwarded the protest to the Area Office for review.

On February 8, 2019, Appellant responded to the protest. Appellant maintained that its average annual receipts do not exceed the size standard. More specifically, Appellant stated that its receipts for its three most recently completed fiscal years are:

Time Frame	Total Revenue
Fiscal Year [XXXX]	\$(XXXXXX)
Fiscal Year [XXXX]	\$(XXXXXX)
Fiscal Year [XXXX]	\$(XXXXXX)
Three-Year Average	\$(XXXXXX)

(Letter from K. Mullen to H. Goza (Feb. 8, 2019), at 3.) Appellant provided its Federal income tax returns but offered no further explanation as to how these revenue totals were derived. (*Id.*)

For fiscal years [XXXX] and [XXXX], the amounts Appellant identified as “Total Revenue” in its protest response correspond exactly with the amounts Appellant reported as “Total income” on line 6 of its Federal income tax return, Form [XXXX]. (Protest Response, Exhibits 3 and 4.) Appellant's [XXXX] tax return, though, showed a “Total income” of \$(XXXXXX). (Exhibit 5, Form [XXXXX], line 6.) This amount included \$(XXXXXX) of gross receipts and an additional \$(XXXXXX) labeled “Net gain (loss) from Form [XXX], line [X].” (*Id.*, lines [X] and [X].)

B. Size Determination

On February 13, 2019, the Area Office issued Size Determination No. 02-2019-035 concluding that Appellant is not a small business under the applicable size standard. (Size Determination at 5.)

The Area Office first addressed Agile-Bot's allegation that Appellant is affiliated with White Owl Systems, Inc. (White Owl) and ManTech Gray Hawk Systems, Inc. (ManTech). White Owl had no receipts during the years under review, so the Area Office considered any affiliation with White Owl to be immaterial. (*Id.* at 3.) There was a historical connection between Appellant and ManTech, but the Area Office found no evidence of current ties sufficient to give rise to affiliation. (*Id.* at 3-4.)

Having determined that Appellant is not affiliated with White Owl or ManTech, the Area Office turned to an analysis of Appellant's average annual receipts. After quoting the rule for calculating receipts at 13 C.F.R. § 121.104(a), the Area Office explained that:

[Appellant] provided federal income tax returns for itself for the three years prior to its offer for this procurement, as well as a completed SBA Form 355. [Appellant] also provided its own calculation for its three year average in its response; however, the Area Office notes that [Appellant's] calculations [of] its receipts are incorrect. It appears that [Appellant] used line 1a of its tax returns rather than calculating its receipts in the manner required by regulation at 13 CFR § 121.104(a). When this error is corrected, [Appellant's] three year average exceeds the size standard.

(*Id.* at 4-5.) As a result, Appellant is not a small business.

C. Appeal

On February 28, 2019, Appellant filed the instant appeal. Appellant maintains that the Area Office committed two errors in its review. First, the Area Office mistakenly based its decision “solely on the sum reported as ‘total income’ on [Appellant's] [XXXX] Form [XXXX], without considering whether the total income reported actually reflected [Appellant's] receipts in [XXXX].” (Appeal at 1.) Second, the Area Office “failed to apprise [Appellant] of the basis of its adverse [s]ize [d]etermination.” (*Id.*)

Appellant highlights that the size determination did not explain why the Area Office considered Appellant's calculation of its receipts to be incorrect. Appellant posits, however, that the difference between Appellant's calculations and the Area Office's calculations relates to the net gain of \$[XXXXXX], reported on line [X] of Appellant's [XXXX] Form [XXXX]. (*Id.* at 4.) Appellant did not include this amount in its calculation of its [XXXX] receipts, whereas the Area Office apparently did do so. (*Id.*) In Appellant's view, the Area Office “committed clear error when it mechanically based its [s]ize [d] etermination solely on the sum reported as ‘total income’ on [Appellant's] [XXXX] Form [XXXXXX] without considering the nature of the items reported.” (*Id.* at 5.)

Appellant argues that the \$[XXXXXX] reported gain was not a receipt, but instead was an accounting correction which “arose from a reduction in the price of the business property [Appellant] purchased in [XXXX].” (*Id.*) Appellant continues:

In [XXXX], [Appellant] purchased certain assets from another company for \$[XXXXXX]. The parties agreed [Appellant] would pay \$[XXXXXX] of the agreed purchase price in [XXXX], and would pay the remaining amount (\$[XXXXXX]) if and when the parties (1) novated a particular contract to [Appellant]; and (2) migrated a [XXXXXXXXXXXXXXXXXXXX] to [Appellant]. For tax purposes, [Appellant] treated the \$[XXXX] purchase price as the cost of the assets it was purchasing and started depreciating its investment in the purchased assets on the initial date of purchase ([XXXXXX]). [Appellant] claimed \$[XXXXXX] in depreciation on the purchased property in [XXXX] and \$[XXXXXX] in [XXXX] (for the 3 months before the price adjustment), for a total depreciation deduction of \$[XXXXXX].

(*Id.*) When neither of the anticipated contingencies actually occurred, the parties agreed that Appellant would not be liable for the remaining \$[XXXXXX] balance of the original purchase price. (*Id.*) The reduction in purchase price caused a lower tax basis in the purchased assets than what Appellant had reported in [XXXX]. (*Id.*) In addition, the lower tax basis meant that Appellant could claim less depreciation than it had deducted, which required Appellant to reverse the previous depreciation deducted in [XXXX] and [XXXX]. (*Id.* at 5-6.) Appellant's accountants determined that the appropriate amount of depreciation required to be reversed was \$[XXXXXX]. Because “there was no direct way to report the depreciation reversal,” Appellant reported the \$[XXXXXX] purchase price reduction and the resulting \$[XXXXXX] depreciation reversal on Form [XXXX] and on line [X] of the Form [XXXX]. (*Id.* at 6.)

Appellant argues that neither the purchase price reduction nor the depreciation reversal should be considered revenue. (*Id.*) The \$[XXXXXX] depreciation reversal was “merely an accounting correction” and “was properly excluded from [Appellant's] calculations because it does not reflect any actual economic gains or receipts of proceeds from the sale of property.” (*Id.* at 7.) Further, in an attachment to its [XXXX] Form [XXXX], Appellant included a table with an entry labeled “Depr Allowed” in the amount of \$[XXXXXX], the same amount as the “Net gain” reported on line [X] of Appellant's [XXXX] Form [XXXX]. (*Id.*) In addition, on the attachment to the [XXXX] Form [XXXX], “the ‘Sales Price’ and ‘Cost or Basis’ columns are identical and do not reconcile to the ‘Gain or Loss’ column.” (*Id.*) In Appellant's view, “[t]his indicates the reported gain was merely the reversal of previously deducted depreciation, rather than an actual receipt.” (*Id.*)

Appellant contends that the Area Office “could have easily inquired with [Appellant] about the reported gain in the [XXXX] tax return,” but instead “focused solely on the amount reported as total income.” (*Id.* at 8.) The details in the attachment to the [XXXX] Form [XXXX], and the fact that Appellant did not include the \$[XXXXXX] reported gain in its total receipts calculation, mean that “the Area Office had good reason to believe the general rule that receipts is total income may not apply in this specific case.” (*Id.*, citing *Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4540 (2003) and *Size Appeal of Corporate Training and Development, Inc.*, SBA No. SIZ-4849 (2007).) Had the Area Office conducted a more thorough inquiry, it would have discovered that Appellant's total income, as shown on line [X] of the [XXXX] Form [XXXX], did not reflect Appellant's actual receipts during [XXXX]. (*Id.* at 9.)

Appellant argues that the Area Office also erred by not explaining why Appellant's calculation of average annual receipts was flawed. "Instead, [the Area Office] simply indicated [Appellant] was incorrect to rely on the sums reported in Line [X] of its tax returns." (*Id.* at 10.) Because the Area Office did not describe how it calculated Appellant's annual receipts, Appellant can only speculate regarding the basis of the calculations, which "underscores the Area Office's cursory assessment overall." (*Id.* at 10-11.) Appellant urges OHA, at a minimum, to remand this matter to the Area Office for further consideration.

D. Agile-Bot's Response

On March 19, 2019, Agile-Bot responded to the appeal. Although Agile-Bot acknowledges that it is not privy to the details of Appellant's tax returns, Agile-Bot argues, based on the information available to it, that the Area Office's size determination was reasonable and should be affirmed. (Response at 2.) Agile-Bot highlights that "OHA has consistently limited exclusion of funds from a challenged firm's receipts to categories specifically identified in the regulation." (*Id.*, citing *Size Appeal of Pynergy, LLC*, SBA No. SIZ-5558 (2014).) Further, the cases cited by Appellant do not demonstrate that the Area Office erred in its calculation of Appellant's receipts. (*Id.* at 2-3.)

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

The instant case is analogous to OHA's decision in *Size Appeal of EASTCO Building Services, Inc.*, SBA No. SIZ-5437 (2013). In *EASTCO*, the challenged firm contended on appeal that certain amounts should have been excluded from its receipts as inter-affiliate transactions. The items in question, though, were labeled "management fee" on the challenged firm's tax returns, and the challenged firm had not argued to the area office that such amounts should be excluded from its receipts. OHA explained that, under SBA regulations, the challenged firm is responsible for establishing that it is a small business. *EASTCO*, SBA No. SIZ-5473, at 5 (citing 13 C.F.R. § 121.1009(c)). Furthermore, "it is unrealistic and unduly burdensome to expect that the Area Office, on its own initiative, should have gleaned that an item labeled "management fee" on [the challenged firm's] tax returns might constitute inter-affiliate transactions." *Id.* OHA therefore denied the appeal, holding that the challenged firm's "failure to timely communicate its arguments to the Area Office is fatal to this appeal." *Id.* OHA has applied the reasoning seen in *EASTCO* in several subsequent decisions. *E.g.*, *Size Appeal of Serviam Constr., LLC*, SBA No. SIZ-5872, at 8 (2017) ("OHA will not overturn a size determination based on arguments that

were never raised to the area office.”); *Size Appeal of ASI-SUMO JV, LLC*, SBA No. SIZ-5594, at 5 (2014).

In the instant case, similar to the situation seen in *EASTCO*, Appellant made no argument to the Area Office as to the manner in which Appellant believed its receipts should be calculated. Appellant provided the Area Office a table purporting to show Appellant's “Total Revenue” for each of the three fiscal years under review, but offered no explanation as to how Appellant arrived at those figures. Section II.A, *supra*. Further, although Appellant acknowledges on appeal that receipts normally will be the same as total income, Appellant did not contend to the Area Office that its receipts should be different than the total income shown on its tax returns. *Id.* In addition, for two of the three years under review, the amounts Appellant itself identified as “Total Revenue” corresponded exactly with the amounts Appellant reported as total income on line 6 of its Federal income tax returns. *Id.* On this record, then, it was reasonable for the Area Office to conclude that the amount Appellant cited as its [XXXX] “Total Revenue” was in error, perhaps because Appellant had referenced the wrong line of its [XXXX] tax return. Sections II.A and II.B, *supra*. Accordingly, Appellant has not shown reversible error in the size determination. As in *EASTCO*, if Appellant wished to argue for adjustments to the amounts shown on its tax returns, it was incumbent upon Appellant to raise such arguments to the Area Office, and to prove the validity of those adjustments.

Appellant asserts that the Area Office “had good reason to believe the general rule that receipts is total income may not apply in this specific case,” because the Area Office could have determined, based on an attachment to Appellant's [XXXX] Form [XXXX], that the “Net gain” of \$[XXXXXX] Appellant reported as part of its [XXXX] total income was, in actuality, a reversal of previously deducted depreciation. Section II.C, *supra*. I find no merit to this argument. Contrary to Appellant's suggestions, the origins of the \$[XXXXXX] “Net gain” are far from obvious based on Appellant's [XXXX] return. Moreover, by choosing not to provide any explanation on this issue, Appellant assumed the risk that the Area Office would not understand that Appellant believed the “Net gain” of \$[XXXXXX] should be excluded from Appellant's [XXXX] receipts.

Lastly, it is worth noting that Appellant has not established that it is, in fact, proper to exclude the \$[XXXXXX] from the calculation of Appellant's average annual receipts. While it may be true, as Appellant contends, that the \$[XXXXXX] does not reflect economic gains from the sale of property, Appellant nevertheless acknowledges that it reported the \$[XXXXXX] as income during [XXXX] in order to partially reverse depreciation deductions that Appellant had claimed in prior years. Section II.C, *supra*. Logically, if the depreciation had been correctly reported in prior years, Appellant's receipts in those prior years would have been correspondingly higher. Accordingly, Appellant has not persuasively explained why it would be appropriate to exclude the \$[XXXXXX] from Appellant's receipts for [XXXX], but not to make any upward adjustments to Appellant's receipts for prior years.

IV. Conclusion

Appellant has failed to establish that the size determination is clearly erroneous. Accordingly, I DENY the instant appeal, and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 316(d).

KENNETH M. HYDE
Administrative Judge