

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

SIZE APPEAL OF:

LuminUltra Technologies, Inc.,

Appellant,

Appealed From
Size Determination No. 2-2022-014

SBA No. SIZ-6155

Decided: May 23, 2022

APPEARANCES

James S. Phillips, Esq., Roeder, Cochran, Phillips, PLLC, McLean, Virginia, for Appellant

Kyle R. Jefcoat, Esq., David R. Hazelton, Esq., Nathan A. Sandals, Esq., Latham & Watkins, LLP, Washington, D.C., for Biobot Analytics, Inc.

DECISION¹

I. Introduction and Jurisdiction

On January 18, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2022-014, finding that LuminUltra Technologies, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. On appeal, Appellant requests that SBA's Office of Hearings and Appeals (OHA) reconsider and reverse the Area Office's decision. 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 a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to request redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

II. Background

A. Solicitation and Protest

On November 10, 2021, the Centers for Disease Control and Prevention (CDC) issued Request for Proposals (RFP) No. 75D301-22-R-72099 for wastewater testing services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541380, Testing Laboratories, with a corresponding size standard of \$16.5 million in average annual receipts. On November 22, 2021, Appellant submitted its initial proposal, self-certifying as a small business.

On December 8, 2021, the CO announced that Appellant was the apparent awardee. On December 13, 2021, Biobot Analytics, Inc. (Biobot), an unsuccessful offeror, filed a size protest with the CO challenging Appellant's size. The protest alleged that Appellant is the U.S. subsidiary of LuminUltra Technologies, Ltd. (LTL), a Canadian firm. (Protest at 2.) According to publicly-available information, “[LTL] by itself has revenues far in excess of the applicable size standard.” (*Id.* at 3.) Further, in addition to Appellant, LTL also has other subsidiaries based in other countries. (*Id.* at 1-2.) Biobot contended that Appellant is affiliated with LTL and LTL's other subsidiaries through common ownership, and that Appellant therefore is not a small business. The CO forwarded Biobot's protest to the Area Office for review.

B. Area Office Proceedings

In response to the protest, Appellant acknowledged that the average annual receipts of Appellant and its affiliates exceed the applicable \$16.5 million size standard. (Letter from J. Phillips to H. Goza (Dec. 29, 2021), at 1.) Appellant stated that it had mistakenly represented itself as small for the instant procurement due to an “innocent misunderstanding” of SBA regulations. (*Id.* at 3.) Appellant continued:

In submitting its proposal for this contract, [Appellant] made a mistake under the SBA Affiliation and Size Status Rules by (1) not including revenues of its affiliates, and (2) not determining its average annual revenues over three or five years. But, [Appellant] never intended to break the rules to win [the] contract. It was simply ignorant of them. Specifically, [Appellant] believed [it] could rely solely on [its] 2020 tax return showing revenues of \$9,684,789 for that year. . . . In this case, [Appellant] truly thought [it was] well under the \$16.5 million size status threshold. Furthermore, several elements of both [Appellant's] SAM.gov registration and its CDC proposal show [Appellant's] confusion about the regulations and demonstrate that it was not trying to hide anything about its size status.

(*Id.*) Appellant observed that its proposal repeatedly disclosed that Appellant is owned by LTL, such that Appellant “made no effort to hide its affiliate.” (*Id.* at 3-4.)

C. Size Determination

On January 18, 2022, the Area Office issued Size Determination No. 2-2022-014, sustaining Biobot's protest. The Area Office quoted from Appellant's letter of December 29, 2021, and noted that Appellant itself conceded that Appellant is "other-than-small for the applicable size standard when properly combined with its affiliates." (Size Determination at 2.)

D. Appeal

On February 2, 2022, Appellant filed the instant appeal. Appellant states that, during 2020, Appellant's parent company, LTL, "stepped up to help Canada and the world with the COVID-19 pandemic, while not knowing it would affect its U.S. subsidiary's opportunities for business." (Appeal at 3.) Specifically, the Canadian government awarded LTL a short-duration, emergency contract to manufacture the assay used in testing humans for COVID-19. (*Id.* at 4.) The contract "added a one-time large increase to LTL's bottom line in 2020." (*Id.*) But for this single contract, Appellant maintains, the combined receipts of Appellant and its affiliates would not exceed the size standard. (*Id.* at 6.)

In response to the size protest, Appellant informed the Area Office "that [Appellant] is not small based on its five-year annual receipts, as reflected on its federal and its affiliates' foreign tax returns." (*Id.* at 7.) Nevertheless, under the circumstances presented here, a "mechanical" application of SBA regulations would be unjust, as doing so "effectively punishes [Appellant] and its parent for responding to an allied Government's request for extraordinary assistance during a time of pandemic." (*Id.*) Appellant requests that OHA "allow the Contracting Officer to disregard a non-recurring transaction in the application of the NAICS code small business standard of \$16.5 million for this procurement so that the [CDC] can complete its badly needed COVID-19 wastewater testing as quickly as possible." (*Id.* at 8.)

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 that 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

Appellant has not shown clear error in the size determination. As a result, this appeal must be denied.

Pursuant to 13 C.F.R. § 121.1009(b), a size determination is based primarily on information provided by the protestor and by the challenged firm. Here, Biobot's protest alleged

that Appellant is owned by, and thus affiliated with, LTL, and that the combined receipts of Appellant, LTL, and other affiliates exceed the size standard. Section II.A, *supra*. In response to the protest, Appellant itself conceded that these allegations are accurate. Section II.B, *supra*. Accordingly, given the information provided, the Area Office correctly determined that Appellant is not a small business.

On appeal, Appellant emphasizes that a significant portion of LTL's receipts stem from a short-duration, emergency contract awarded during 2020. Section II.D, *supra*. Disregarding this single contract, Appellant argues, Appellant and its affiliates would qualify as small. *Id.* Appellant, though, points to no legal authority that would enable OHA to discount a portion of LTL's receipts. On the contrary, SBA regulations make clear that “[i]n determining [a] concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” 13 C.F.R. § 121.103(a)(6). Moreover, the regulations describe in detail how a concern's “receipts” are calculated, and stipulate that “[f]or size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph.” 13 C.F.R. § 121.104(a). Accordingly, OHA has no mechanism to grant the relief Appellant requests here. While Appellant suggests that SBA should, as a matter of public policy, permit exceptions to its size regulations for firms engaged in pandemic-related aid, such arguments should be directed to SBA policy officials, not to OHA. It is well-settled that OHA does not establish agency policy, and lacks authority to disturb SBA regulations. *E.g.*, *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 9 (2012) (citing *Size Appeal of Condor Reliability Servs., Inc.*, SBA No. SIZ-5116, at 6 (2010)).

IV. Conclusion

For the reasons discussed *supra*, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge