

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

SIZE APPEAL OF:

Colossal Contracting, LLC,

Appellant,

Appealed From
Size Determination No. 02-2023-070

SBA No. SIZ-6285

Decided: May 17, 2024

APPEARANCES

Thomas K. David, Esq., Kenneth D. Brody, Esq., Lewis P. Rhodes, Esq., Reston Law Group, LLP, Reston, Virginia, for Colossal Contracting, LLC

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

On January 25, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2023-070, concluding that Colossal Contracting, LLC (Appellant) is not a small business under a \$34 million size standard. The Area Office found that Appellant's average annual receipts exceed the size standard, when financial information beyond Appellant's tax returns is considered. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is granted.

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. Procedural History

On March 31, 2023, the Area Office issued Size Determination No. 02-2023-022, finding Appellant other than small under the size standard associated with North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services. The Area Office based its decision on Appellant's 2017-2021 federal tax returns. (Size Determination No. 02-2023-022, at 2.) In reaching its decision, the Area Office commented that “SBA will rely upon the information in a concern's tax returns to determine its annual receipts, and will give greater weight to signed, specific factual evidence rather than unsupported allegations or opinions.” (*Id.* (quoting *Size Appeal of Stellar Innovations and Sols., Inc.*, SBA No. SIZ-5851, at 9 (2017)).)

Appellant did not appeal Size Determination No. 02-2023-022 to OHA. However, after amending its 2020 tax return, Appellant requested recertification. On August 10, 2023, the Area Office issued Size Determination No. 02-2023-060, again finding Appellant other than small. This determination was based on Appellant's 2018-2021 federal tax returns, and internal financial statements for 2022. (Size Determination No. 02-2023-070, at 1.) At the time Size Determination No. 02-2023-060 was issued, “[Appellant] had not yet filed its 2022 tax return nor had it received its audited financial statements from its accountant.” (*Id.*)

Appellant did not appeal Size Determination No. 02-2023-060 to OHA. After filing its 2022 federal tax returns, Appellant again requested recertification on September 21, 2023.

B. Appellant's Tax Returns and Financial Statements

Accompanying its latest request for recertification, Appellant submitted its tax returns for fiscal years 2018-2022. Appellant's tax returns — specifically, its Form 1120-S — reflect the following information for “cost of goods sold” (line 2) and “total income” (line 6):

	2018	2019	2020	2021	2022
Cost of goods sold (line 2)	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]
Total income (line 6)	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]
Total Receipts:	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]	[\$XXXXX]

(Appellant's Tax Returns 2018-2022, Forms 1120-S.)

Appellant also submitted a spreadsheet from its Certified Public Accountant (CPA) which purported to describe Appellant's net revenues, including amounts associated with being a value-added reseller:

	2020	2021	2022
[Value Added Reseller] Receipts	[\$XXXXXX]	[\$XXXXXX]	[\$XXXXXX]
[Value Added Reseller] Costs	(\$[XXXXXX])	(\$[XXXXXX])	(\$[XXXXXX])
Services Revenue	[\$XXXXXX]	[\$XXXXXX]	[\$XXXXXX]
Net Revenue:	[\$XXXXXX]	[\$XXXXXX]	[\$XXXXXX]

(Revenues 2020-2022 Spreadsheet.)

C. The Instant Size Determination

On January 25, 2024, the Area Office issued Size Determination No. 02-2023-070, concluding that Appellant is not a small business under a \$34 million size standard.

The Area Office first explained that, when making a size determination, “SBA will rely upon the information in a concern's tax returns to determine its annual receipts, and will give greater weight to signed, specific factual evidence rather than unsupported allegations or opinions.” (Size Determination No. 02-2023-070 at 2, quoting *Size Appeal of Stellar Innovations and Sols., Inc.*, SBA No. SIZ-5851, at 9 (2017).) In a recent False Claims Act decision, however, the U.S. District Court for the District of Columbia opined that:

Tax returns may be used to calculate receipts, but they cannot be used to skirt [13 C.F.R.] § [121.]104(a)'s clear guidance. Even if the [challenged concern]'s tax returns were prepared correctly, [the challenged concern] still needed to calculate receipts using § [121.]104(a)'s basic formula: receipts are “all revenue . . . reduced by returns and allowances,” and “the only exclusions from receipts are those specifically” listed in § [121.]104(a).

(*Id.*, quoting *United States ex rel. Bid Solve, Inc. v. CWS Mktg. Grp., Inc.*, 678 F.Supp.3d 53, 59-60 (D.D.C. May 18, 2023).)

The Area Office turned to Appellant's revenue recognition policy. (*Id.* at 3.) Based on its financial statements, Appellant identifies itself as a value-added reseller of IT equipment and software. (*Id.* at 2.) Furthermore, Appellant “recognizes only the commission or the difference between the sales and price and the product purchase price as revenue.” (*Id.* at 3, quoting Appellant's 2021 Financial Statement, at 17.) As a result, Appellant does not report the full cost of goods sold for its value-added revenue on its tax returns. (*Id.*) Appellant's internal financial statements for fiscal year 2022 show that Appellant's “cost of goods sold for drop shipped products” totaled [XXXXXX], yet Appellant's 2022 tax returns reflect total receipts of [XXXXXX]. (*Id.*)

The Area Office contacted Appellant's CPA, Ms. Catherine Sadaat. (*Id.*) She asserted that it is common practice for concerns that identify as value-added resellers to calculate net revenue by disregarding the cost of goods sold. (*Id.* at 3-4.) Ms. Sadaat illustrated the net revenue method by providing a spreadsheet listing Appellant's receipts, costs, and revenue associated with Appellant's value-added reselling business. (*Id.* at 4.) The spreadsheet indicates that Appellant's

cost of goods sold was approximately [XXXXX] in 2021 and [XXXXX] in 2020. (*Id.*) Thus, if the value-added reseller cost of goods sold is included in determining Appellant's receipts, Appellant [exceeds] the applicable \$34 million size standard. (*Id.*)

As discussed in *Bid Solve*, SBA regulations define “receipts” as “all revenue . . . reduced by returns and allowances,” and “the only exclusions from receipts are those specifically” listed. (*Id.* at 5, citing *Bid Solve*, 678 F.Supp.3d at 60 (quoting 13 C.F.R. § 121.104(a)).) Because 13 C.F.R. § 121.104(a) does not exclude value-added reseller cost of goods sold, the Area Office concluded that such amounts “are required to be included [as receipts] regardless of whether [Generally Accepted Accounting Principles] or [Internal Revenue Service] rules allow them to be left off of certain accounting and tax documents.” (*Id.* at 6.) The Area Office calculated Appellant's five-year average annual receipts, including the value-added reseller cost of goods sold, and determined that Appellant [is not small]. (*Id.* at 8.) As such, the Area Office did not continue its analysis of receipts generated by Appellant's affiliates and/or joint ventures. (*Id.*)

D. Appeal

On February 6, 2024, Appellant appealed Size Determination No. 02-2023-070 to OHA. Appellant contends that the Area Office clearly erred by using financial information beyond Appellant's tax returns to calculate Appellant's average annual receipts. (Appeal at 2.)

Appellant highlights that, in calculating receipts, an area office must review the challenged concern's tax returns and any amendments filed before the date of self-certification. (*Id.* at 8, citing 13 C.F.R. § 121.104(a)(1).) There is no authority that would enable an area office to disregard such documents in favor of unamended returns or internal financial statements. (*Id.*) Accordingly, the Area Office here clearly erred by relying on Appellant's unamended 2020 tax return and 2022 internal financial statements to conclude that Appellant is not small. (*Id.* at 8-9.)

Appellant disputes the Area Office's reliance on *Bid Solve*. (*Id.* at 9.) This ruling on a pre-trial motion in a False Claim Act case is not controlling upon SBA or OHA. (*Id.*) Furthermore, district court decisions generally are not binding precedent. (*Id.* at 10, citing *Camreta v. Greene*, 563 U.S. 692, 714 fn. 7 (2011).) The Area Office should instead have followed well-established OHA precedent, which has been applied in numerous appeals to find that receipts are calculated by adding the cost of goods sold and total income as found on a concern's federal income tax returns. (*Id.*) Had the Area Office done so here, Appellant would have been found small. (*Id.* at 11.)

Appellant observes that the U.S. Court of Federal Claims, affirming OHA, has recognized that “[r]eceipts means ‘total income’ (or in the case of a sole proprietorship, ‘gross income’) plus ‘cost of goods sold’ as these terms are defined and reported on [IRS] tax return forms.” (*Id.*, citing *Kingfisher Sys., Inc. v. United States*, 145 Fed. Cl. 22, 24 (2019).) OHA's decisions may be challenged at the U.S. Court of Federal Claims, so the Area Office should have calculated Appellant's receipts in line with *Kingfisher* rather than *Bid Solve*. (*Id.*)

Even if OHA deems *Bid Solve* applicable here, Appellant argues that SBA should be required to apply the decision uniformly to all small business contractors. (*Id.* at 12.) SBA cannot

“selectively enforce the regulations.” (*Id.*, quoting *Joseph Forrester Trucking v. Dir., Off. Of Worker's Comp. Programs*, 987 F.3d 581, 589 (6th Cir. 2021).) Appellant offers a list of contractors that it believes also would not be considered small under the *Bid Solve* reasoning. (*Id.*, Exh. B.) Appellant reiterates its view that an area office only should consider tax returns, when available, in calculating receipts. (*Id.* at 13.) If SBA is now abandoning this long-standing policy, SBA should apply *Bid Solve* equally to all small businesses, similar to how SBA reacted to the decision in *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 2023 U.S. Dist. LEXIS 124268 (E.D. Tenn. July 19, 2023). (*Id.*)

E. OHA's Request for Comments

On March 11, 2024, OHA requested that SBA submit comments on the issues presented in this appeal. More specifically, OHA asked that SBA address Appellant's claim that the Area Office erred by disregarding 13 C.F.R. § 121.104(a)(1) and by failing to base its decision solely on Appellant's tax returns in calculating average annual receipts. (OHA's Order at 1.) OHA further requested that SBA comment on the Area Office's reliance upon *Bid Solve* for the proposition that financial information beyond tax returns may appropriately be considered, even when tax returns are available. (*Id.*)

F. SBA's Comments

On March 25, 2024, SBA submitted comments in response to OHA's request. SBA maintains that the Area Office correctly calculated Appellant's receipts to find Appellant other than small. (SBA Comments at 4.)

Under 13 C.F.R. § 121.104(a), “receipts” are defined as “all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances.” (*Id.* at 2.) SBA contends that, insofar as a concern's tax returns “reflect the requirements” of § 121.104(a), SBA need not “look beyond the tax returns.” (*Id.*) If, however, SBA learns “that the tax returns do not contain all receipt information as defined in 13 C.F.R. § 121.104, then SBA will consider other financial information when making its size determination.” (*Id.*)

In the instant case, Appellant previously had provided the Area Office with internal financial statements for 2022. (*Id.* at 3.) The financial statements did not accord with Appellant's 2022 tax return because Appellant is a “Value Added Reseller” and “only the net difference between the product it obtains for its client and the price the client pays [Appellant] for the item is considered revenue for tax purposes.” (*Id.*) While this method of reporting revenue may be “acceptable for tax purposes,” it does not fall within the specific exclusions identified in 13 C.F.R. § 121.104(a). (*Id.*) Based on the information Appellant had provided, the Area Office was aware that Appellant's tax returns did not fully reflect its receipts, and thus correctly considered the financial statements “in addition to the tax return” in assessing Appellant's receipts. (*Id.*)

SBA acknowledges that the False Claims Act decision in *Bid Solve* is not controlling here. (*Id.*) Nevertheless, SBA does not “completely ignore” district court rulings interpreting SBA regulations. (*Id.*) In *Bid Solve*, the Court concluded that tax returns could not be used to

circumvent the basic formula at 13 C.F.R. § 121.104(a) for receipts calculation. (*Id.* at 3-4, citing *Bid Solve*, 678 F.Supp.3d at 59-60.) SBA does not consider the Court's interpretation “contrary to the meaning of SBA's rules.” (*Id.* at 4.) Accordingly, the Area Office could properly rely on *Bid Solve* to look beyond Appellant's tax returns, since the Area Office was aware that Appellant's tax returns did not fully reflect Appellant's receipts as defined in § 121.104(a). (*Id.*)

G. Appellant's Comments

On April 1, 2024, Appellant submitted comments in response to OHA's Order. Appellant reiterates its contention that the Area Office clearly erred by relying on *Bid Solve*, a non-binding district court opinion in a False Claims Act suit, to overrule “decades” of OHA precedent. (Appellant's Comments at 1-2.)

Appellant reasserts its view that the sole issue on appeal is the correct interpretation of 13 C.F.R. § 121.104(a). (*Id.* at 5.) This regulation, according to Appellant, dictates that receipts are calculated by combining Line 2 (Cost of Goods Sold) and Line 6 (Total Income) as found on a concern's income tax returns, provided that the concern has filed tax returns for the years in question. (*Id.* at 6.) OHA has recognized that, since 1996, SBA relies exclusively on tax returns to perform such calculations. (*Id.*, citing *Size Appeal of Eurostyle, Inc.*, SBA No. 4233 (1996).) Furthermore, applying SBA regulations, OHA has repeatedly held that tax returns, if available, must be used to calculate receipts. (*Id.*, citing *Size Appeal of W. River Restoration Partners*, SBA No. SIZ-5695 (2015).) SBA itself has taken the position that an area office “would [commit] error in *not* relying [on a concern's] tax returns.” (*Id.*, quoting SBA comments filed in *Size Appeal of Mission Critical Techs., Inc.*, SBA No. SIZ-5494, at 7 (2013) (emphasis SBA's).) The only possible justification to diverge from this analysis is if the tax returns were deemed fraudulent or false, but this standard requires that “the returns must have been prepared with actual knowledge they were incorrect, or with reckless indifference to the facts, and with an intent to deceive.” (*Id.* at 7, quoting *Size Appeal of Phillips Nat'l, Inc.*, SBA No. 4332, at 5 (1998).) Appellant's tax returns here are neither fraudulent nor false. (*Id.*) Appellant claims that SBA is now attempting to “backtrack” from its own long-standing regulatory requirement. (*Id.*)

Appellant distinguishes its situation from that discussed in *Bid Solve*. (*Id.* at 8.) The defendant in that case created its own software and sold it to the government, whereas Appellant resells hardware manufactured by third parties as a value-added reseller. (*Id.*) Appellant does not take custody of the sold items at any time and as such records its finances on an accrual accounting basis but generates tax returns on a cash basis. (*Id.*) In any event, Appellant maintains, *Bid Solve* is not determinative since it was a False Claims Act dispute. (*Id.* at 9.) Appellant observes that an SBA size specialist submitted a declaration in *Bid Solve* in which she asserted that “I am required to use filed Federal income tax returns and to include all receipts aside from those items listed as not included. My job does not include assessing whether a firm's filed Federal income tax returns are correct or not, nor am I authorized to do so.” (*Id.* at 7, citing Goza Decl. ¶ 14 (Sept. 6, 2022).)

Lastly, Appellant renews its claim that Size Determination No. 02-2023-070 improperly singled out Appellant and denied Appellant due process. (*Id.* at 12.) Appellant contends that the

analysis in *Bid Solve* should come into play only if SBA promulgates a regulatory change allowing area offices to look beyond a concern's tax returns, and defining the circumstances under which this may transpire. (*Id.* at 13.) SBA then would be free to apply its new approach to all parties rather than just Appellant. (*Id.*) At a minimum, all value-added resellers should face the same scrutiny as Appellant here. (*Id.* at 14.)

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 turns upon the meaning of 13 C.F.R. § 121.104(a). This regulation defines “receipts” as “all revenue in whatever form received or accrued from whatever source,” and specifies that receipts “[g]enerally” are calculated by combining a concern's “total income” and “cost of goods sold,” as reported on its federal income tax returns. 13 C.F.R. § 121.104(a). The regulation mandates that:

The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

Id. § 121.104(a)(1). If, however, “a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement,” SBA then may utilize “other available” financial information, such as audited financial statements, to calculate receipts. *Id.* § 121.104(a)(2).

As Appellant correctly observes, OHA has repeatedly interpreted § 121.104(a) to mean that, if tax returns are available for the years under review, such returns must be used to calculate a concern's receipts, to the exclusion of any extrinsic financial information. *See, e.g., Size Appeal of Thomas Comput. Sols., LLC d/b/a TCS Translations*, SBA No. SIZ-4841, at 7 (2007) (“there is no authority for an area office to consider any evidence apart from tax returns (when they have been filed) when calculating a firm's average annual receipts”); *Size Appeal of The Associated Constr. Co.*, SBA No. SIZ-5314, at 6 (2011) (“the Area Office did not err in basing its calculations on the amounts reported on [the challenged concern's] tax returns, notwithstanding [the challenged concern's] contention that the tax returns are incorrect”); *Size Appeal of W. River Restoration Partners*, SBA No. SIZ-5695, at 8 (2015) (“the Area Office must use tax returns when they are available, and not the ‘other available information’ referenced in 13 C.F.R. §

121.104(a)(2)"); *Size Appeal of Nordstrom Cont. & Consulting Corp.*, SBA No. SIZ-5891, at 5 (2018) (“[the challenged concern's] tax returns for the years in question (*i.e.*, 2014, 2015, and 2016) were available, so the Area Office was required to utilize those tax returns, not other sources of information, to calculate size.”); *Size Appeal of SC&A, Inc.*, SBA No. SIZ-6059, at 12 (2020) (“Because tax returns must be used to calculate size unless those returns are unavailable, revenue data from other non-tax sources ‘cannot be used to determine size or to question the results reached by the Area Office's examination of the Federal tax returns.’” (quoting *Size Appeal of Mission Critical Techs., Inc.*, SBA No. SIZ-5494, at 8 (2013))).

OHA's long-standing interpretation of § 121.104(a) is further bolstered by the regulatory history of the rule. Prior to 1996, SBA regulations permitted that “SBA could rely either on a concern's regular books of account or Federal income tax returns to determine a concern's [average annual receipts].” 67 Fed. Reg. 70,339, 70,341 (Nov. 22, 2002). In late 1995, however, SBA proposed to utilize tax returns exclusively to calculate receipts, and SBA then formally adopted this approach in 1996. 61 Fed. Reg. 3,280 (Jan 31, 1996). Thus, since 1996, it has been SBA's policy to “base[] its calculation of a concern's [average annual receipts] solely on information contained in the concern's Federal income tax returns,” when such returns are available. 67 Fed. Reg. 70,339, 70,341 (Nov. 22, 2002). In *Federal Register* commentary, SBA has explained that its rationale for “requiring decisions to be based upon tax returns . . . is to ensure standardization and uniformity in the size evaluation process by relying on tax returns submitted to the IRS under well-understood rules and the penalty of perjury.” *Thomas Comput. Sols.*, SBA No. SIZ-4841, at 7 (summarizing regulatory history). SBA also has commented that, because SBA “use[s] a concern's income tax return to determine “receipts”D’, a concern is “not [] required to restate its revenue under the accrual basis of accounting if its return was filed other than under the accrual method.” 60 Fed. Reg. 57,982, 57,984 (Nov. 24, 1995).

As revised in 1996, § 121.104 contained the caveat that:

Use of information other than the Federal tax return. Where other information gives SBA reason to regard Federal Income Tax returns as false, SBA may base its size determination on such other information.

13 C.F.R. § 121.104(c) (1996). This provision, however, was rescinded in 2004, and replaced with the current language indicating that financial information other than tax returns may be utilized when tax returns are unavailable. *See* 69 Fed. Reg. 29,192, 29,203 (May 21, 2004).

Accordingly, considering the plain language of 13 C.F.R. § 121.104(a), OHA's case precedent, and the relevant regulatory history, I must conclude that the Area Office clearly erred in the instant case by utilizing information beyond Appellant's tax returns to determine receipts. There is no dispute that Appellant's tax returns were available for all of the years under review. Section II.B, *supra*. As a result, § 121.104(a)(2) is not applicable here. Instead, the relevant portion of the rule is § 121.104(a)(1), which requires that “[t]he Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern.”

In response to the appeal, SBA suggests that “if SBA is aware that the tax returns do not contain all receipt information as defined in 13 C.F.R. § 121.104, then SBA will consider other financial information when making its size determination.” Section II.F, *supra*. This argument, though, lacks support in existing law. As discussed above, although SBA regulations previously did permit that “[w]here other information gives SBA reason to regard Federal Income Tax returns as false, SBA may base its size determination on such other information,” that rule has long since been rescinded. As currently written, “[t]he Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern,” and other extrinsic financial information may be utilized to calculate receipts only if “a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement.” 13 C.F.R. § 121.104(a)(1) and (2). The regulatory text, OHA precedent, and regulatory history are clear: an area office must calculate receipts based solely on the concern's tax returns, unless such returns are unavailable.

Lastly, the district court's decision in *United States ex rel. Bid Solve, Inc. v. CWS Mktg. Grp., Inc.*, 678 F.Supp.3d 53 (D.D.C. May 18, 2023) does not alter the above analysis. Both Appellant and SBA agree that *Bid Solve* involved a False Claims Act dispute, to which SBA was not a party. Sections II.D and II.F, *supra*. *Bid Solve* is thus not binding on either SBA or OHA. Furthermore, although the defendant in *Bid Solve* offered the court a declaration from an SBA size specialist in which she explained that, by regulation, “she is limited to reviewing tax returns when making size determinations,” the court declined to give weight to this statement, because the court could not ascertain whether it constituted SBA's “authoritative or official position.” *Bid Solve*, 678 F.Supp.3d at 58-59. Conversely, there is no doubt here — based upon the plain language of the rule, OHA case law, and the regulatory history — as to the correct meaning of § 121.104(a).

IV. Conclusion

For the above reasons, the appeal is GRANTED, Size Determination No. 02-2023-070 is VACATED, and the matter is REMANDED to the Area Office for a new size determination.

KENNETH M. HYDE
Administrative Judge