

SIZE APPEAL OF: TERACORE, INC., APPELLANT

SBA No. SIZ-5830, 2017
2017 WL 2618806

May 9, 2017

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Small Business Administration (S.B.A.)

Office of Hearings and Appeals
[Size Appeal]***1** SIZE APPEAL OF: TERACORE, INC., APPELLANT***1**

SBA No. SIZ-5830

***1**

Appealed from Size Determination Nos. 3-2017-022 and -023

1** May 9, 2017**Appearance**1** Janine S. Benton, Esq.***1** Law Firm of Janine S. Benton, Esq.***1** Falls Church, Virginia***1** For Appellant**REDACTED DECISION FOR PUBLIC RELEASE**DECISION¹I. Introduction and Jurisdiction

***1** On March 22, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 3-2017-022 and -023, finding that Teracore, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. On appeal, Appellant maintains that the Area Office erroneously relied upon Appellant's 2013 tax return, which was filed several months after Appellant self-certified for the instant procurement, in determining Appellant's average annual receipts. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

***1** SBA's Office of Hearings and Appeals (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 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.

II. BackgroundA. Solicitation and Protests

***1** On June 10, 2014, the U.S. Department of Homeland Security (DHS) issued Request for Proposals (RFP) No. HSHQDC-14-R-00009 for the "Program Management, Administrative, Operations (Clerical), and Technical Services (PACTS II)" procurement, a "portfolio of [DHS]-wide Indefinite-Delivery/Indefinite-Quantity (ID/IQ) contracts for non-information technology (IT) support services." (RFP § B.1.) The Contracting Officer (CO) set aside the PACTS II procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). The RFP divided the required work into two "Functional Categories". Functional Category 1 (FC1), pertaining to program management and technical services, was assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$14 million average annual receipts. (*Id.* § C.2.) On July 11, 2014, Appellant submitted a proposal for FC1, self-certifying as an SDVO SBC.

***2** On February 16, 2017, the CO announced that Appellant would be awarded a contract for FC1. (Notice of Award, at 2.) Two offerors filed timely size protests challenging Appellant's size. The CO forwarded the protests to the Area Office for review.

B. Size Determination

***2** On March 22, 2017, the Area Office issued Size Determination Nos. 3-2017-022 and -023 concluding that Appellant is not a small business. The Area Office found that Appellant is affiliated with three concerns — [XXX]; [XXX]; and [[XXX] — Through common ownership, common management, and identity of interest. (Size Determination at 4-6.) Even without the receipts of these affiliates, though, Appellant alone exceeds the size standard. (*Id.* at 6.) The Area Office found that Appellant is not a small business based on its tax returns for the years

C. Appeal

***2** On April 6, 2017, Appellant filed the instant appeal. Appellant contends that the Area Office erred in calculating its average annual receipts using its 2013 tax return. (Appeal at 1.) According to Appellant, the 2013 tax return was not filed until October 2014, several months after Appellant self-certified for the PACTS II procurement, and SBA regulations at 13 C.F.R. § 121.104(a)(1) stipulate 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.” (*Id.* at 2, 5.) Further, although Appellant’s 2013 audited financial statements were available at the time of self-certification, the financial statements “did not accurately reflect annual receipts actually recognized in the year ending December 31, 2013.” (*Id.* at 2-3.) Thus, Appellant urges, the Area Office should have calculated Appellant’s receipts using the 2010, 2011, and 2012 tax returns. (*Id.* at 5, citing *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006).)

III. Discussion

A. Standard of Review

***2** 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

***3** Contrary to Appellant’s contentions, it is settled law that tax returns filed after the date of self-certification may be used by an area office if available at the time of the size determination. In *Size Appeal of Educational Services, Inc.*, SBA No. SIZ-4782 (2006), OHA held that an area office correctly computed the challenged firm’s average annual receipts using its 2001 tax return, which was filed after the date of self-certification. *Educational Services*, SBA No. SIZ-4782, at 3. OHA explained that the “proper period of measurement of a firm’s receipts is the last three completed fiscal years immediately preceding self-certification, even though the Federal income tax return for the last completed year was not available on the date of self-certification.” *Id.* Similarly, in *Size Appeal of Williams Adley & Company — DC, LLP*, SBA No. SIZ-5341 (2012), the challenged firm’s 2010 tax return had not been filed as of the date of self-certification, but was available during the size review, and OHA held that the area office “did not err in considering [the] 2010 return.” *Williams Adley*, SBA No. SIZ-5341, at 6. OHA found that, under SBA regulations, if a tax return for a year under review is unavailable, the area office “will calculate the concern’s annual receipts for that year using any other available information, such as the concern’s regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.” *Id.* at 5 (quoting 13 C.F.R. § 121.104(a)(2)). Thus, “[a]t a minimum, the Area Office could properly consider a tax return filed after the date of self-certification to be ‘other available information’ which can be used to calculate size in accordance with 13 C.F.R. § 121.104(a)(2).” *Id.* at 6.

***3** In the instant case, Appellant self-certified as small on July 11, 2014, when Appellant submitted its initial proposal including price. Section II.A, *supra*. As a result, the proper period of measurement for computing Appellant’s receipts is from 2011 to 2013 — “the most recently completed three fiscal years” immediately preceding self-certification. 13 C.F.R. § 121.104(c)(1). Although Appellant’s 2013 tax return had not yet been filed as of July 11, 2014, the unavailability of a tax return does not alter the period of measurement, but instead requires consideration of “other available information.” 13 C.F.R. § 121.104(a)(2); *Williams Adley*, SBA No. SIZ-5341, at 6; *Educational Services*, SBA No. SIZ-4782, at 3. Appellant’s 2013 tax return, albeit filed after the date of self-certification, was available during the size review. Section II.B, *supra*. Therefore, the Area Office properly utilized Appellant’s 2013 tax return in calculating Appellant’s average annual receipts.

IV. Conclusion

***4** Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal 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).

***4** Kenneth M. Hyde

***4** Administrative Judge

Footnotes

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 requests for redactions and considered such requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.