

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

SIZE APPEAL OF:

The Onyx-Urban Collaborative Joint
Venture,

Appellant,

Appealed From
Size Determination No. 2-2022-013

SBA No. SIZ-6157

Decided: May 31, 2022

APPEARANCE

Mark L. Gillem, Program Manager, The Onyx-Urban Collaborative Joint Venture,
Alexandria, Virginia

DECISION¹

I. Introduction and Jurisdiction

On January 11, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2022-013, concluding that The Onyx-Urban Collaborative Joint Venture (Appellant) is not a small business. More specifically, because Appellant did not provide required financial information to the Area Office, the Area Office drew an adverse inference that the missing information would have shown that Appellant is not small. On appeal, Appellant maintains that the size determination is erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) 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 after receipt of 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 provision of 13 C.F.R. § 134.205. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

II. Background

A. The Solicitation

On January 11, 2021, the U.S. Department of the Navy, Naval Facilities Engineering Systems Command Southwest, issued Synopsis No. N62473-21-R-1001 for architect-engineer services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industrial Classification System (NAICS) code 541320, Landscape Architectural Services, with a corresponding size standard of \$8 million average annual receipts. Initial proposals were due February 16, 2021. Appellant submitted a timely proposal, self-certifying as a small business.

B. Protest

Appellant was selected for award, but on November 22, 2021, the CO filed a protest challenging Appellant's size.² The CO observed that Appellant, a joint venture, was awarded its first federal prime contract on August 22, 2016. (Protest at 2.) SBA regulations indicate that “SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award.” (*Id.*, quoting 13 C.F.R. § 121.103(h).) Here, Appellant submitted a proposal for the instant procurement on February 16, 2021, more than two years after August 22, 2016. The CO therefore requested that the Area Office examine whether Appellant would qualify as small under the \$8 million size standard once the receipts of Appellant's joint venture participants are combined. (*Id.* at 1-2.)

C. Area Office Proceedings

On December 22, 2021, Appellant responded to the protest and provided a completed SBA Form 355; financial statements and income tax returns for the years 2015 through 2019; and other supporting information. Appellant stated that it is a joint venture between The Onyx Group and The Urban Collaborative, LLC, each owning 50% of Appellant. Appellant further acknowledged that the receipts of its joint venture partners must be combined in assessing whether Appellant is small. Appellant claimed, however, that the combined receipts of the two joint venturers “for the last five completed fiscal years preceding our self-certification on the subject procurement” are below the \$8 million size standard. (Protest Response at 10.)

The Area Office instructed that, because Appellant self-certified for the instant procurement on February 16, 2021, Appellant must provide income tax returns covering the year 2020, one of the completed fiscal years prior to the date of self-certification. Appellant refused to submit this information, stating:

[Appellant] does not intend to provide 2020 tax returns because our interpretation of [13 C.F.R. § 121.104(a)] supports the use of 2015-2019 tax returns. We base this finding on the SBA requirement to provide “Complete financial

² A CO's size protest is always timely. *See* 13 C.F.R. § 121.1004(b).

statements and Federal income tax returns for the last three or five completed fiscal years preceding your self-certification on this procurement for your firm and any affiliates as appropriate.” We self-certified on 1[6] February 2021. Given the traditional IRS filing deadlines and COVID impacts, our 2020 financial documents were not completed until well after that date. Given this, we respectfully request [the Area Office] evaluate our small business status based on 2015-2019 financial documentation provided.

We understand that the Area Office has explained that 2020 financial statements and tax returns may be required and that not providing that documentation may result in an adverse inference[.]

(E-mail from M. Gillem to H. Goza (Jan. 4, 2022).)

D. Size Determination

On January 11, 2022, the Area Office issued Size Determination No. 2-2022-013, concluding that Appellant is not a small business. The Area Office highlighted that Appellant “chose not to provide any information for FY 2020,” one of Appellant's completed fiscal years prior to the date of self-certification. (Size Determination at 5.) The Area Office therefore applied an adverse inference that the missing information would have shown that Appellant is not small. (*Id.* at 6.)

The Area Office explained that a concern's average annual receipts are calculated by determining the “total receipts of the concern *over its most recently completed 5 fiscal years* divided by 5,” or “*over its most recently completed 3 fiscal years* divided by 3.” (*Id.* at 3, quoting 13 C.F.R. § 121.104(c)(1) (emphasis added by the Area Office).) A “[c]ompleted fiscal year means a taxable year including any short year,” as defined by the IRS. (*Id.* at 4, quoting 13 C.F.R. § 121.104(b).) In the instant case, Appellant submitted its offer for the subject procurement on February 16, 2021, and Appellant uses the calendar year as its fiscal year. (*Id.*) Therefore, the three or five most recently completed fiscal years for purposes of calculating Appellant's average annual receipts are 2018-2020 if a three-year average is used, or 2016-2020 if a five-year average is used. (*Id.*) In either event, though, the period of measurement includes 2020, Appellant's “most recently completed fiscal year based on its date of initial offer.” (*Id.*)

In response to the protest, Appellant argued that fiscal year 2020 should not be considered, because Appellant had not yet filed its 2020 tax return at the time of its self-certification. The Area Office rejected this argument, noting that SBA regulations address the situation in which tax returns are not available for a year under review. (*Id.*) In particular, an area office will consider “other available information” for the year in question, but will not substitute an entirely different year. (*Id.*, citing 13 C.F.R. § 121.104(a)(2) and *Size Appeal of Williams Adley & Company — DC, LLP*, SBA No. SIZ-5341 (2012).)

The Area Office observed that Appellant provided the Area Office tax returns from 2015 through 2019, omitting the 2020 tax returns. (*Id.* at 4.) The Area Office therefore instructed Appellant to produce the 2020 tax returns, and warned that failure to provide the information

would result in an adverse inference. (*Id.* at 2, 5.) Appellant, though, declined to do so. (*Id.* at 5, quoting e-mail from M. Gillem to H. Goza (Jan. 4, 2022).)

The Area Office consequently applied an adverse inference that the missing 2020 tax returns would have shown that Appellant is not a small business. (*Id.* at 6, citing 13 C.F.R. §§ 121.1008(d) and 121.1009(d).) OHA has established a three-part test for determining when an adverse inference is appropriate: “(1) the requested information [is] relevant to an issue in the size determination; (2) there [is] a level of connection between the protested concern and the firm from which the information was requested; and (3) the request for information [is] specific.” (*Id.*, quoting *Size Appeal of Apogee Eng'g, LLC*, SBA No. SIZ-6078, at 7 (2020).) All three elements of the test are met here because (1) the requested information is relevant as 2020 is “a year required to be included based on [Appellant's] date of initial offer”; (2) the information is Appellant's own and is within Appellant's possession; and (3) the Area Office specifically requested 2020 tax returns for Appellant, its member firms, and any other joint ventures. (*Id.*)

E. Appeal

On January 26, 2022, Appellant filed the instant appeal. Appellant acknowledges that it self-certified for the subject procurement on February 16, 2021, and that its joint venture partners are affiliated with one another for purposes of determining size. (Appeal at 1.) Appellant renews its contention, however, that the Area Office unreasonably insisted on obtaining financial information for 2020. (*Id.* at 2-3.)

Appellant highlights that it had not yet filed its 2020 tax returns as of February 16, 2021, the date of Appellant's self-certification. (*Id.* at 2.) At the time of the self-certification, then, Appellant necessarily relied on data from 2015-2019. Furthermore, SBA regulations at 13 C.F.R. § 121.104(a)(1) indicate that “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.* quoting 13 C.F.R. § 121.104(a)(1).) In Appellant's view, “[t]his is very clear and requires [Appellant] to use our 2015-2019 tax returns since those are the only ones completed and filed with the IRS on or before our self-certification.” (*Id.*)

Although the Area Office referenced various OHA decisions that have rejected Appellant's line of argument, Appellant contends that “there is room for equitable interpretation at this point.” (*Id.*) Specifically: (1) Appellant relied on financial information available as of the date of self-certification; (2) the Area Office originally did not make clear to Appellant that data from 2020 would be mandatory; and (3) COVID-19 impacted Appellant's ability to file its 2020 tax returns prior to the federal tax deadline of April 15, 2021. (*Id.*) Appellant adds that, under its interpretation of 13 C.F.R. § 121.104(a)(1), Appellant “would have no basis for an appeal if [its] self-certification was on or after 15 April 2021.” (*Id.*)

Lastly, Appellant states that, had it known that the Area Office would insist on considering information from fiscal year 2020, Appellant “would have submitted this solicitation using a different model,” for example using a prime contractor/subcontractor relationship rather than a joint venture. (*Id.* at 3.) Appellant would be “willing to reclassify [its] submittal in this fashion if that would resolve this case equitably for all parties.” (*Id.*)

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

I find no merit to this appeal. As the Area Office correctly observed in the size determination, the proper period of measurement for computing Appellant's receipts is from 2016 through 2020 — “the most recently completed five fiscal years” immediately preceding February 16, 2021, the date of Appellant's self-certification. 13 C.F.R. § 121.104(c)(1). Furthermore, SBA regulations state, and OHA has repeatedly held, that the unavailability of a tax return for one or more of the years under review does not alter the period of measurement, but instead requires consideration of “other available information” pursuant to 13 C.F.R. § 121.104(a)(2). *Size Appeal of Teracore, Inc.*, SBA No. SIZ-5830, at 3 (2017); *Size Appeal of Williams Adley & Company — DC, LLP*, SBA No. SIZ-5341, at 4-6 (2012); *Size Appeal of Educational Servs., Inc.*, SBA No. SIZ-4782, at 3 (2006). Accordingly, although Appellant had not yet filed its 2020 tax returns as of February 16, 2021, when Appellant self-certified for the instant procurement, the Area Office nevertheless was required to consider information from 2020 in assessing Appellant's size. Appellant's 2020 tax returns were available by the time of the size review, and thus at a minimum would constitute “other available information” that could be used in determining Appellant's size.

Because the Area Office properly requested that Appellant produce its 2020 tax returns or other financial information, and Appellant refused to do so, the Area Office appropriately drew an adverse inference that the missing information would have shown that Appellant is not small. As the Area Office determined, all three elements of the adverse inference test are met here: (1) the requested information was relevant to the size determination, as it was essential for calculating Appellant's size; (2) the information was Appellant's own and within Appellant's possession; and (3) the Area Office clearly communicated to Appellant what specific information was being requested. Indeed, during the course of the size review, Appellant itself acknowledged that “the Area Office has explained that 2020 financial statements and tax returns may be required and that not providing that documentation may result in an adverse inference.” Section II.C, *supra*. Under these circumstances, there is no basis to disturb the adverse inference. *E.g.*, *Size Appeal of Juliet Constr., LLC*, SBA No. SIZ-5974, at 8 (2018) (“an adverse inference is justified when a concern, regardless of its subjective intentions, ‘submits incomplete information’ or ‘fail[s] to furnish requested information.’”).

IV. Conclusion

Appellant has shown no error in the size determination. As a result, 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).

KENNETH M. HYDE
Administrative Judge