

United States Court of Appeals for the Federal Circuit

OBSIDIAN SOLUTIONS GROUP, LLC,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2021-1836

Appeal from the United States Court of Federal Claims
in No. 1:20-cv-01602-RAH, Judge Richard A. Hertling.

Decided: December 8, 2022

MILTON C. JOHNS, Executive Law Partners, PLLC,
Fairfax, VA, argued for plaintiff-appellant.

STEVEN C. HOUGH, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Washington,
DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, PATRICIA
M. McCARTHY.

Before REYNA, HUGHES, and CUNNINGHAM, *Circuit Judges*.

HUGHES, *Circuit Judge.*

Obsidian Solutions Group, LLC appeals a decision of the United States Court of Federal Claims granting judgment on the administrative record. The court held that the Office of Hearings and Appeals did not act arbitrarily or capriciously in determining Obsidian was not a small business. We affirm.

I

On April 19, 2019, the Department of Energy (DOE) issued a solicitation for Technical Security, Communications Security, Cyber, Analysis and Security Administration. The solicitation was designated as a small business set-aside, and the size limit for interested businesses was a maximum of \$20.5 million in average annual receipts. Obsidian submitted a bid proposal on July 18, 2019. At the time, Obsidian self-certified as a small business based on its five-year average of annual receipts (roughly \$17.5 million). On September 2, 2020, the DOE notified Obsidian that it was the apparent successful offeror but that the DOE would submit a request to the Small Business Administration (SBA) to confirm Obsidian's size status before making the award.

On September 10, 2020, the SBA determined Obsidian did not qualify as a small business for the purposes of the solicitation. Rather than use the five-year average of receipts, the SBA used Obsidian's three-year average (roughly \$21.8 million), which exceeded the \$20.5 million limit. Because of the SBA's adverse size determination, the DOE did not award the procurement to Obsidian.

After the Office of Hearings and Appeals (OHA) affirmed the SBA's size determination, Obsidian filed a bid protest in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(b). Obsidian argued that the size determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because the

SBA was required to start using five years of annual receipts on December 17, 2018, the effective date of the Runway Extension Act (REA). Suppl. App. 25–26 (quoting 5 U.S.C. § 706(2)(A)). In addition to bid preparation and proposal costs, Obsidian requested injunctive relief, including that the court set aside the size determination; declare that Obsidian is a small business; and reinstate Obsidian as the apparent awardee. Suppl. App. 29–30. The Court of Federal Claims granted the United States’ motion for judgment on the administrative record and denied Obsidian’s cross-motion because the REA clearly and unambiguously did not apply to the SBA. *Obsidian Sols. Grp., LLC v. United States*, 153 Fed. Cl. 334, 344–45 (2021). Because Obsidian did not succeed on the merits, the trial court denied Obsidian’s requested relief. *Id.* at 345.

Obsidian appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review judgment on the administrative record in a bid protest action de novo. *Off. Design Grp. v. United States*, 951 F.3d 1366, 1371 (Fed. Cir. 2020). We review denial of injunctive relief for abuse of discretion. *Nichia Corp. v. Everlight Ams., Inc.*, 855 F.3d 1328, 1340 (Fed. Cir. 2017).

A

At issue is whether the REA’s amendment to Section 3(a)(2) of the Small Business Act (15 U.S.C. § 632(a)(2)), and in particular, its requirement to use a five-year average of receipts for purposes of size determinations, was immediately binding on the SBA. Before the REA was enacted in 2018, Section 3(a)(2) of the Small Business Act read, in relevant part:

(A) In general

In addition to the criteria specified in paragraph (1), the [SBA] Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act.

(B) Additional criteria

The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) Requirements

Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining—

...

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years;

...; [and]

(iii) is approved by the [SBA] Administrator.

15 U.S.C. § 632(a)(2)(A)–(C) (2018).

The SBA has long interpreted subsection (C) as applying to only *non-SBA* agency size standards—not to SBA

size standards promulgated under subsections (A) and (B). Small Business Size Standards: Calculation of Annual Average Receipts, 84 Fed. Reg. 29399, 29399 (June 24, 2019). The SBA repeated this interpretation in the Federal Register more than 50 times in the two decades before the enactment of the REA. 84 Fed. Reg. at 29400. Thus, although the SBA used a three-year average for size determinations, it did so pursuant to the authority granted in subsection (A), not the requirement in (C). E.g., 13 C.F.R. § 121 (1990) (citing 15 U.S.C. § 632(a) for its authority to set size standards and using three years of annual receipts).

B

Effective December 17, 2018, Congress passed the REA, an amendment that made a single change to Section 3(a)(2): it changed “3 years” in subsection (C)(ii)(II) to “5 years.” Small Business Runway Extension Act of 2018, Pub. L. No. 115-324. The REA did not amend subsections (A) or (B) or any other language in subsection (C). *Id.*

After the REA became effective, the SBA restated its longstanding interpretation that subsection (C) did not apply to the SBA. 84 Fed. Reg. at 29399. Nonetheless, to promote consistency between the SBA and non-SBA agencies, the SBA proposed a rule change on June 24, 2019. *Id.* at 29400. The proposed rule would change the SBA’s existing three-year averaging period to a five-year period. *Id.* The SBA clarified that, because size is determined as of the date a firm certifies its size with its initial bid, the three-year period would continue to apply for all bids submitted before the effective date of the final rule. *Id.* at 29401. After a notice-and-comment period, the final rule took effect on January 6, 2020. Small Business Size Standards: Calculation of Annual Average Receipts, 84 Fed. Reg. 66561 (Dec. 5, 2019).

The SBA’s proposed rule was not yet final when Obsidian submitted its proposal in July 2019. In making its size determination, the SBA explained that Obsidian’s size

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