

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

SIZE APPEAL OF:

Judson Builders, Inc.,

Appellant,

Appealed From  
Size Determination No. 6-2010-091

SBA No. SIZ-5144

Decided: July 16, 2010

APPEARANCE

Mark Judson, Chief Executive Officer, for Appellant, Judson Builders, Inc.

DECISION

I. Background

On September 16, 2009, the Contracting Officer (CO) for the U.S. Department of Housing and Urban Development (HUD) issued Solicitation No. R-OPC-23447 (RFP) seeking property maintenance and preservation services. The CO designated North American Industry Classification Code (NAICS) 531311, Residential Property Managers, with a corresponding size standard of \$2 million in average annual receipts.

The RFP was issued with the intent of awarding multiple indefinite delivery/indefinite quantity contracts, and awards were categorized by area. On May 10, 2010, Judson Builders, Inc. (Appellant) was selected as an apparent successful offeror for a contract in Area 1D (Utah, Colorado, New Mexico, Northern Texas), for which the RFP was issued on an unrestricted basis with no set-asides.

On May 19, 2010, the CO referred Appellant to the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) for a Certificate of Competency (COC). The CO indicated he was unable to determine Appellant's responsibility with regard to capacity and credit. On June 2, 2010, Appellant submitted its COC application and required documents.

In reviewing Appellant's COC application package, the Area Office discovered that Appellant may be affiliated with a number of other firms. Accordingly, on June 3, 2010, the Area Office emailed Mr. Mark Judson, Appellant's Chief Executive Officer, to request that he

complete an SBA Form 355, Application for Small Business Size Determination. On June 7, 2010, the Area Director for Government Contracting formally directed his staff to perform a size determination on Appellant. On June 9, 2010, the Area Office notified Appellant it would perform a size determination.<sup>1</sup> On June 11, 2010, Appellant submitted the completed SBA Form 355 and the required documentation to the Area Office, including its 2007, 2008, and 2009 Federal tax returns. Appellant also attached amended tax returns for 2007 and 2008, which had been sent to the Internal Revenue Service (IRS) on June 10, 2010.<sup>2</sup>

On June 22, 2010, the Area Office issued Size Determination No. 6-2010-091 (Size Determination) finding Appellant to be other than small. The Area Office determined Appellant is affiliated with a number of other entities and calculated Appellant's size based on the 2007, 2008, and 2009 Federal tax returns of Appellant and its affiliates. 13 C.F.R. §§ 121.104(a), (c)(1), (d)(1); 121.404(c). The Area Office relied upon Appellant's original 2007 and 2008 returns, not the amended returns, because the amended returns had been filed after initiation of the Size Determination. 13 C.F.R. § 121.104(a)(1). The Area Office concluded that Appellant's average annual receipts exceed the applicable size standard. The Area Office noted that if it “had been able to use [Appellant's] amended tax returns to calculate its size status on the instant procurement, [Appellant] would have average annual receipts of less than the applicable size standard.” (Size Determination 3.)

On July 1, 2010, Appellant filed its Appeal Petition with SBA's Office of Hearings and Appeals (OHA). Appellant claims the Area Office “was required to use erroneous financial information leading to the incorrect size determination that [Appellant] was not a small business under the solicitation.” (Appeal Petition 2.) Appellant explains that errors committed by its former accountant resulted in incorrect tax returns. Now that Appellant's new accountant has corrected those errors, Appellant argues “the correct information and not the erroneous information should be used to determine [Appellant's] true size.” *Id.* Appellant urges OHA to reverse the Size Determination and order a new determination based on the accurate tax returns.

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<sup>1</sup> Appellant noted in its Appeal Petition that the HUD CO requested only a COC, not a size determination. As the Area Office indicated in the Size Determination, SBA regulations provide that the Area Director of Government Contracting may initiate a size determination in connection with the COC program. 13 C.F.R. § 121.1001(b)(3)(ii). Accordingly, the instant Size Determination is proper.

<sup>2</sup> The Size Determination provides: “[Appellant] mailed its amended tax returns to the Internal Revenue Service on June 10, 2010, after the initiation of the size determination. . . .” (Size Determination 3.) Additionally, the Record contains a “conversation record” filed by Ms. Marina M. Laverdy reflecting that Mr. Judson personally delivered Appellant's completed size application to the Area Office on June 11, 2010. The Record provides that in the course of Ms. Laverdy's conversation with Mr. Judson, he indicated: “He had mailed the ammended [sic] returns to the IRS the previous day (June 10, 2010) and he was sure the IRS did not have the amended returns on file yet.” Although the amended tax returns in the Record are not signed or dated, Appellant did not challenge the assertion that the returns were filed on June 10, 2010, in its Appeal Petition. Therefore, I will accept it as accurate.

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 Area Office's Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

## II. Discussion

OHA reviews a size determination issued by an SBA area office to determine whether it is “based on clear error of fact or law.” 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Thus, the Administrative Judge may only overturn a size determination if Appellant proves that the area office made a patent error based on the record before it.

Appellant takes issue with the Area Office's decision to rely upon its original tax returns instead of its amended tax returns. However, the regulation provides that: “The Federal income tax returns and 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.” 13 C.F.R. § 121.104(a)(1). Appellant self-certified as part of its COC application on June 2, 2010, and the Area Office was required to use that date to determine Appellant's size. 13 C.F.R. § 121.404(c) (“The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC”). Accordingly, the regulation required the Area Office to use tax returns filed with the IRS prior to June 2, 2010.

Further, the Area Director initiated the instant Size Determination on June 7, 2010, and Appellant filed its amended returns with the IRS on June 10, 2010. Appellant filed its amended returns immediately after learning the Area Office would perform a size determination. The amended returns were thus prepared after Appellant's self-certification date and after the initiation of the size determination. Accordingly, the regulation explicitly prohibits using Appellant's amended returns to determine its size. The Area Office thus had no choice but to use Appellant's original tax returns to calculate the firm's size. The regulation is clear and unambiguous.

I cannot find that the Area Office committed an error when it fully complied with the applicable regulation. The regulation is intended to prevent fraud or the altering of tax returns for the purpose of circumventing the size regulations. The rule is important and mandatory, and neither the Area Office nor OHA can choose to ignore it. The Area Office properly relied upon official IRS tax returns filed by Appellant. If those returns contained incorrect information, it was Appellant's responsibility to file its amended returns as soon as it became aware of the errors and before the Area Office initiated a size determination. Accordingly, the Area Office did not err, and I must deny this appeal.

## III. Conclusion

The Area Office's determination was not based upon clear error. Accordingly, I AFFIRM the Size Determination, and I DENY this appeal.

This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN  
Administrative Judge