United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
C2 Freight Resources, Inc.	SBA No. SIZ-5223
Appellant	Decided: March 31, 2011
Appealed from Size Determination No. 3-2011-25	

APPEARANCES

Henry E. Seaton, Esq., Seaton & Husk LP, Vienna, Virginia, for Appellant.

DECISION

HYDE, Administrative Judge:

I. Introduction & Jurisdiction

On February 23, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-25 finding C2 Freight Resources, Inc. (Appellant) other than small. For the reasons discussed below, this matter is remanded to the Area Office for a new size determination.

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 instant appeal within fifteen days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. HUBZone Application and Size Determination

On August 18, 2010, Appellant submitted its application for admission to the Historically Underutilized Business Zone (HUBZone) program. On January 25, 2011, the Deputy Director (DD) for the SBA HUBZone program requested a formal size determination of Appellant. The DD expressed concern that the financial information submitted with Appellant's HUBZone application (which included information on potential affiliates) suggested that Appellant's

average annual receipts exceed the applicable size standard.

On February 23, 2011, the Area Office issued its size determination. The Area Office determined Appellant is affiliated with the following five entities: (1) Life Fit Family Fitness Center, on the basis of common ownership and an identity of interest; (2) C2 Leasing Corporation, on the basis of common ownership; (3) C2 Management Services Company, Inc., on the basis of common ownership; (4) Vern Creek Cattle, LLC, on the basis of common management and an identity of interest; and (5) Sipsey River Timber Company, Inc., on the basis of common ownership. 13 C.F.R. § 121.103(a)(1), (c)(1), (c)(2), (f). The Area Office noted that Appellant may have previously been affiliated with Plantation Lawn Care and Landscaping, LLC, through common ownership; however, any affiliation between the firms ceased before the applicable dates for the size determination and, therefore, was not considered. 13 C.F.R. § 121.104(d)(4).

The Area Office next observed that Appellant's primary North American Industry Classification System (NAICS) code is 488510, Freight Transport Arrangement. The Area Office explained that, ordinarily, the size standard for this NAICS code is $7 million in average annual receipts. There is an exception for Non-Vessel Owning Common Carriers and Household Goods Forwarders, which utilizes a larger size standard of $25 million in average annual receipts. 13 C.F.R. § 121.201. However, based upon Appellant's description of its business operations, the Area Office determined Appellant does not qualify for the exception. Thus, the Area Office concluded that the $7 million size standard must be used. The Area Office also noted that Appellant stated in an email: "We have not had or do not currently have any pass through of funds held in trust for unaffiliated third parties. This is not something that we would do here for any reason that we can think of at this time." (Size Determination 6 (quoting email from Tonya Turner, Accounting Manager, C2 Freight Resources, Inc., to Dina Inhulsen, Size Specialist, SBA Office of Government Contracting Area III (February 7, 2011, 2:52pm).)

The Area Office determined Appellant's size as of August 18, 2010, the date Appellant submitted its HUBZone application, and January 25, 2011, the date the Area Office received the size determination request from the HUBZone office.[1] The Area Office calculated the average annual receipts of Appellant and its affiliates based upon each entity's tax returns and other financial information for the past three completed fiscal years. 13 C.F.R. § 121.104(a)(2), (c)(1), (c)(2). After aggregating the receipts of each concern, the Area Office concluded that the total average annual receipts for Appellant and its affiliates exceeded the applicable $7 million size standard.

[1] Under 13 C.F.R. § 121.404(b), a HUBZone applicant must qualify as a small business for its primary industry classification "as of the date of its application and the date of certification by SBA." The Area Office erred in utilizing the date of its receipt of the request for the size determination as the "date of certification." *See Size Appeal of Innovate Constr. & Mgmt. Servs., LLC*, SBA No. SIZ-5202, at 7-8 (2011); *Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222, at 3 (2011). In this case, however, Appellant was also not a small business as of the date of its HUBZone application (*i.e.,* August 18, 2010). Therefore, the incorrect "date of certification" does not by itself constitute reversible error.

B. Appeal Petition

On March 10, 2011, Appellant filed the instant appeal claiming the Area Office incorrectly calculated its annual receipts. Specifically, Appellant maintains that Appellant's own personnel mistakenly advised the Area Office that Appellant does not hold any pass through funds for unaffiliated third parties. In actuality, Appellant now contends, pass through funds account for the large majority of its revenues.

Appellant asserts that it is a federally licensed property broker that arranges for transportation of its customers' property for compensation. Thus, Appellant explains that it is merely an agent that collects money from its shipper/customer for freight charges due to the carrier. Moreover, Appellant explains it is required to keep its accounts so that revenues relating to the brokerage portion of its business are separate from other activities. *See* 49 C.F.R. §§ 371.3, 371.10, 371.11.

Appellant argues that in the ordinary course of its business, it must act as a fiduciary to collect payment from its customers and transmit it to the carriers. Appellant explains that it works on commission, so the amount attributable to its own services is far less than the gross amount it receives from a customer as a property broker because it must pay a portion of that amount to a third party carrier. Appellant contends that the funds it collects for third party carriers (as required by federal transportation statutes and regulations) should not be counted in the calculation of its own annual receipts, and the revenues attributable to its own services fall below the applicable $7 million size standard.

Appellant further explains that a broker must post a bond in the amount of $10,000 with the Federal Motor Carrier Safety Administration (FMCSA) to obtain property broker authority. *See* 49 U.S.C. § 13904(d); 49 C.F.R. § 387.307; *Milan Express Co. v. Western Surety Co.*, 792 F.Supp. 571 (M.D. Tenn. 1992). "Taken in toto, these regulations evidence a congressional intent that property brokers act as agents with a fiduciary obligation to transmit payment pursuant to a clearly intended constructive trust." (Appeal Petition 3.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. Consequently, OHA will disturb the 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

Appellant does not challenge the Area Office's findings of affiliation, nor its determination that the applicable size standard is $7 million. Accordingly, the only issue presented here is whether the amounts Appellant collects for freight carriers as a property broker should be excluded from the calculation of its annual receipts.

Both the Area Office and Appellant agree that Appellant's business falls squarely within NAICS code 488510, Freight Transport Arrangement. The SBA size standard regulation provides that a firm's size under NAICS code 488510 is calculated "[a]s measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenues." 13 C.F.R. § 121.201 n.10. Similarly, the SBA regulation governing the calculation of a firm's annual receipts states, in pertinent part: "Receipts do not include . . . amounts collected for another by a . . . freight forwarder or customs broker." 13 C.F.R. § 121.104(a). Applying these rules, OHA has held that "[f]unds collected for another party may be excluded, a firm's own expenses and fees may not be." *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5090, at 14 (2009)*;see also Size Appeal of ASEE Servs. Corp.*, SBA No. SIZ-4250, at 7 (1997) (refusing to exclude amounts received by a non-profit entity for payment to its member scientists for work performed on the non-profit's contracts because the payments "are similar to sums paid to contractors and consultants for their work; they are not funds received 'in trust'"); *Size Appeal of Tour West Travel*, SBA No. SIZ-3832, at 4 (1993) (declining to exclude a tour agency's affiliate's receipts because the subsidiary/affiliate sold appellant's own tour products, "as opposed to receiving funds in trust for a unaffiliated third party").

In this case, the record establishes that Appellant acts as an agent for its customers, and the fees it pays to carriers are truly pass-through expenses. Appellant is not attempting to exclude funds paid to its own employees or subcontractors, nor is Appellant attempting to exclude funds paid to an affiliate. Rather, Appellant sets up a shipping transaction, collects money from the shipper, and pays it to the carrier, which is not a subsidiary or employee of Appellant. Appellant retains only a fee for the service it provides in organizing the transaction, just as a travel agent retains only his fee when he reserves a hotel room or plane ticket for a customer. Additionally, Appellant explains it is required by federal regulations to keep records of each transaction for which it acts as a broker—which must include "[t]he amount of any freight charges collected by the broker and the date of payment to the carrier"—and to "maintain accounts so that the revenues and expenses relating to the brokerage portion of its business are segregated from its other activities." 49 C.F.R. §§ 371.3, 371.13. Because Appellant is expected to collect funds from one party (the shipper) for the benefit of an unrelated third party (the carrier), with no benefit to itself except the fee paid for its own services, Appellant receives the funds "in trust for an unaffiliated third party." Thus, these funds should be excluded from Appellant's receipts.

The *NAICS Manual*[2] and the regulation governing the calculation of a firm's annual receipts support this conclusion. The *NAICS Manual* indicates that the businesses encompassed

[2] Executive Office of the President, Office of Management and Budget, *North*

by NAICS code 488510 "are usually known as freight forwarders, marine shipping agents, or customs brokers." *NAICS Manual*, at 642. The regulation controlling the calculation of receipts specifically identifies "freight forwarders" and "customs brokers" as types of business that may exclude from their receipts "amounts collected for another." 13 C.F.R. § 121.104(a). Because Appellant collects funds for the sole purpose of paying them to another party, the amounts Appellant collects from its customers and pays to its freight carriers are "amounts collected for another" within the meaning of 13 C.F.R. § 121.104(a) and should be excluded from the calculation of Appellant's annual receipts.

I recognize that Appellant itself indicated that the amounts paid to its freight carriers are not "funds held in trust for unaffiliated third parties" (although Appellant has subsequently reversed its position on appeal). Nevertheless, upon recognizing the agency relationship between Appellant and its customers, the Area Office should have calculated Appellant's annual receipts in conjunction with the language of the applicable regulations. Accordingly, I find the Area Office clearly erred in failing to exclude the amounts Appellant collects from its customers and pays to its carriers. On remand, the Area Office must determine the amount of these funds and exclude them from Appellant's average annual receipts to determine whether Appellant's average annual receipts (when aggregated with those of its affiliates) fall within the applicable $7 million size standard.

IV. Conclusion

The Area Office erred by failing to exclude from Appellant's receipts the amounts it received in trust for unaffiliated third parties. Accordingly, Size Determination No. 3-2011-25 is VACATED, and this matter is REMANDED to the Area Office for a recalculation of Appellant's average annual receipts.

KENNETH M. HYDE
Administrative Judge

American Industry Classification System (2007), *available at* http://www.census.gov/eos/www/naics/ (hereinafter *NAICS Manual*).