United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Hal Hayes Construction, Inc., Appellant, Appealed From Size Determination Nos. 6-2011-037, -038	SBA No. SIZ-5234 Decided: May 25, 2011

APPEARANCES

Antonio R. Franco, Esq., Steven J. Koprince, Esq., and Ryan C. Bradel, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant

Kenneth W. Dodds, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION[1]

I. Introduction and Jurisdiction

On April 1, 2011, on remand from the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA), the SBA Office of Government Contracting, Area VI (Area Office) issued a size determination in case numbers 6-2011-037 and 6-2011-038 finding Hal Hays Construction, Inc. (Appellant) other than small. On April 8, 2011, Appellant filed an appeal of the size determination with OHA. For the reasons discussed below, the appeal is denied.

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, 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 issued on May 17, 2011, under a Protective Order to prevent the disclosure of confidential or proprietary information. At that time, I issued an Order for Redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published Decision. OHA received one or more timely requests for redactions and considered any requests in redacting the Decision. OHA now publishes a redacted version of the Decision for public release.

II. Background

A. Solicitation, Protests, and Remand

On January 8, 2010, the U.S. Department of Homeland Security, Customs and Border Protection issued Solicitation No. HSBP10-10-R-0018 seeking maintenance and repair of the border fence. The Contracting Officer (CO) set aside the procurement for Historically Underutilized Business Zone (HUBZone) small businesses and designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of $33.5 million in average annual receipts. Appellant self-certified as a small business on March 1, 2010, when the firm submitted its initial proposal.

On January 14, 2011, offerors were notified that Appellant was the apparent successful offeror. On January 18, 2011, a disappointed offeror, Cerrudo Services, filed a protest challenging Appellant's size. On January 20, 2011, Mission Critical Solutions, another disappointed offeror, filed a similar protest.

On February 9, 2011, the Area Office issued its initial size determination. The Area Office rejected Appellant's contention that Arizona Transaction Privilege Tax (ATPT) payments should be excluded from Appellant's receipts for purposes of determining Appellant's size. The Area Office also found that Appellant is affiliated with H&E, LLC (H&E) based upon common ownership and with Golden Arrow Engineering (GAE) based upon an identity of interest.

On March 17, 2011, upon appeal from Appellant, OHA determined that the ATPT is a tax "collected for and remitted to a taxing authority" in accordance with 13 C.F.R. § 121.104(a) and that the ATPT payments therefore should be excluded from Appellant's receipts. *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217 (2011) (*Hal Hays I*). Appellant acknowledged its affiliation with H&E, and OHA affirmed the Area Office's finding that Appellant is affiliated with GAE. OHA remanded the matter to the Area Office for a new calculation of Appellant's annual receipts.

B. Size Determination

On April 1, 2011, the Area Office issued the size determination now at issue. The Area Office explained that Appellant provided Transaction Privilege, Use, and Severance Tax Returns (TPT-1) for each month of fiscal years 2007, 2008, and 2009. Nevertheless, the Area Office concluded that, even excluding the ATPT payments, Appellant still exceeds the size standard.

The Area Office next addressed Appellant's claim that its net gains, as reported on line 4 of its federal income tax returns, should be excluded from its receipts. The Area Office set forth the method by which it calculates a firm's receipts and explained that only net capital gains, as reported on line 8 of a firm's federal income tax returns, are excludable from total income. The Area Office thus refused to deduct Appellant's net gains from the calculation of the firm's receipts.

The Area Office went on to analyze whether any transactions between Appellant and its affiliates are excludable from Appellant's receipts. The Area Office stated that interaffiliate transactions are excludable only to prevent the double counting of receipts. The Area Office further explained that Appellant makes rental payments to H&E, which owns Appellant's facility and has no other income. The Area Office concluded that because Appellant and H&E are commonly owned, the rental payments received by H&E are interaffiliate transactions that are properly excludable from Appellant's receipts.

On the other hand, the Area Office determined that receipts from subcontracts between Appellant and GAE are not excludable. The Area Office highlighted that Appellant and GAE are not commonly owned, but are affiliated due to an identity of interest between the owners of the firms. The Area Office stated that such receipts do not present a double counting problem because the ultimate recipients of the revenues are different parties. Because Appellant merely purchases services from GAE, as it could purchase services from any other subcontractor, GAE is not Appellant's subsidiary, and the firms could not file consolidated tax returns.

Upon calculating Appellant's average annual receipts based upon Appellant's federal income tax transcripts from the IRS, the Area Office determined Appellant's own receipts exceed the $33.5 million applicable size standard, even before the addition of GAE's receipts. The Area Office thus concluded Appellant is other than small for any procurement employing this or a smaller size standard.

C. Appeal Petition

On April 8, 2011, Appellant filed its appeal of the size determination issued upon remand. Appellant contends that based upon the numbers in the Area Office's own preliminary size calculation worksheet (produced to Appellant during the initial size determination), the exclusion of Appellant's ATPT payments, as reported on the TPT-1, renders Appellant small under the size standard.

Appellant also asserts that its receipts fall within the size standard even upon aggregation with GAE's receipts. Appellant argues that the receipts from subcontracts awarded to GAE by Appellant must be excluded from Appellant's receipts as proceeds from interaffiliate transactions. According to Appellant's calculations, after Appellant's receipts are aggregated with those of GAE, and both the ATPT payments and GAE's subcontract receipts are excluded, Appellant is small under the size standard.

Finally, Appellant argues that the Area Office failed to give Appellant adequate notice of the basis for the size determination because the determination does not include any detailed discussion of the calculations the Area Office performed to reach its conclusion. Appellant contends that this constitutes a violation of due process because Appellant was not afforded an opportunity to respond to the Area Office's reasons for taking adverse action against Appellant. Appellant requests that OHA reverse the size determination and find that Appellant is a small business under the applicable size standard.

D. Motion to Admit New Evidence and Supplement to Appeal Petition

On April 27, 2011, after review of the record in this matter, Appellant filed a motion to admit new evidence and a motion to supplement its appeal petition. The new evidence Appellant seeks to admit is as follows: (1) a declaration from Appellant's Certified Public Accountant (CPA); (2) a letter from Appellant's CPA to Appellant explaining errors in Appellant's 2007 and 2008 tax returns as originally filed with the IRS; and (3) calculation sheets attached to the CPA's letter to Appellant, which reconcile Appellant's audited financial statements, original tax returns, and amended tax returns. The supplemental appeal petition addresses information not previously available to Appellant, specifically the Area Office's methodology for calculating Appellant's size.

New evidence is admissible before OHA if the party seeking to admit the evidence files a motion and establishes good cause for the admission. 13 C.F.R. § 134.308(a)(2). Appellant's new evidence and supplemental appeal petition will not enlarge the issues and clarifies the arguments made on appeal. Furthermore, no party will be prejudiced by the admission of the information. Accordingly, I find Appellant established good cause for admission, and I GRANT Appellant's motions and ADMIT both the new evidence and the supplemental appeal petition into the record.

E. Appellant's Supplemental Appeal Petition

In its supplemental appeal petition, Appellant contends that in calculating Appellant's size, the Area Office erroneously used Appellant's federal income tax return transcripts for 2007 and 2008, instead of using Appellant's amended federal income tax returns for those same years. According to Appellant, the applicable regulation, rulemaking history, and OHA case law demonstrate that amended tax returns filed after the date of self-certification but before the initiation of a size determination should be used to calculate a firm's receipts.

Appellant explains that it self-certified as a small business on March 1, 2010, when it submitted its initial proposal. Appellant further explains that it filed its 2007 and 2008 amended tax returns on April 4, 2010, and November 4, 2010, respectively. The size determination process was initiated in January 2011. Thus, in this case, Appellant filed amended returns after the date of self-certification, but before the initiation of the size determination.

To support its view that the amended tax returns should have been used, Appellant first recites the plain language of 13 C.F.R. § 121.104(a)(1)— which provides: "The 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. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination." Appellant contends a proper reading of the regulation as a whole indicates that it is the date of initiation of the size determination, not the date of self-certification, that is the deadline for use of amended tax returns in calculating a firm's receipts. Appellant claims the first sentence of 13 C.F.R. § 121.104(a)(1) merely instructs the SBA to use federal tax returns for specific years to calculate a firm's size and does not prohibit the use of amended returns filed after the self-certification date. According to Appellant, the second sentence of the regulation establishes that any amended tax

returns filed before the initiation of the size determination should be used to calculate a firm's receipts.

Appellant cites *Size Appeal of Educational Services, Inc.*, SBA No. SIZ-4782 (2006), to support its position. In *Educational Services*, the protested concern's tax return was not available on the date the firm self-certified, but it was available by the time the size determination was conducted, so the Area Office used it to calculate the firm's receipts. OHA affirmed the Area Office's use of the newly filed return. Although *Educational Services* did not involve an amended tax return, Appellant asserts that "[n]othing in the text of 13 C.F.R. § 121.104(a)(1) distinguishes between late, original tax returns, like the one used in *Educational Services*, and amended tax returns like the one filed by [Appellant]." (Supplement 7.)

Appellant also argues the Area Office's conclusion that the first sentence of 13 C.F.R. § 121.104(a)(1) prohibits the use of any amended returns filed after the self-certification date nullifies the second sentence of that regulation and renders it superfluous. Appellant urges that, because regulations must if possible be interpreted so that no language is meaningless, the Area Office's interpretation of 13 C.F.R. § 121.104(a)(1) is unreasonable and erroneous.

Appellant acknowledges that some prior OHA cases suggest that tax returns filed after the date of self-certification may not be used to calculate a firm's receipts, but emphasizes that those cases all involve amended tax returns filed after the initiation of the size determination. *See, e.g., Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006). Appellant asserts that OHA has not previously ruled upon the issue of whether tax returns filed after the self-certification date but before the initiation of the size determination may be used to calculate a firm's size.

Appellant points to *Size Appeal of Judson Builders, Inc.*, SBA No. SIZ-5144, at 3 (2010), where OHA opined that "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," to support the notion that OHA has contemplated the possibility that amended returns filed before the initiation of a size determination could be used to calculate a firm's receipts. Appellant also cites *Size Appeal of Reiner, Reiner & Bendett, P.C.*, SBA No. SIZ-4587 (2003), to argue that 13 C.F.R. § 121.104(a) does not limit SBA to calculating a firm's receipts based upon the firm's tax returns as they existed on the date of self-certification. Appellant contends the *Reiner* case makes clear that the SBA may look past a firm's tax returns, even to documents that did not exist on the date of self-certification, if it believes the tax returns to be erroneous.[2] Based upon these decisions, Appellant claims a firm should be permitted to submit, and the Area Office should base its calculations upon, amended tax returns filed prior to the initiation of a size determination.

Finally, Appellant argues that the Area Office's use of Appellant's original tax returns to calculate the firm's receipts is contrary to public policy because the SBA should be committed to issuing size determinations based on the most current and accurate information available.

---

[2] *Reiner* was decided before 13 C.F.R. § 121.104(a)(1) was amended to include the language currently at issue.

Appellant highlights that if the Area Office is not permitted to use the most recent information, firms that are actually small may be precluded from receiving small business set-aside contracts simply because of an error on the firm's tax returns. Likewise, firms that are not actually small could become eligible to receive small business set-aside contracts if remedying an error in the firm's tax returns would increase the firm's size beyond the applicable size standard. Appellant argues allowing the Area Office to use the most recent tax returns submitted before the initiation of a size determination would improve the accuracy of size determinations and would comport with the SBA's stated objectives of preventing delay to the size determination process and preventing fraud. *See* 67 Fed. Reg. 70,339, 70,342 (Nov. 22, 2002). Appellant concludes the Area Office's use of Appellant's original tax returns in lieu of its amended tax returns was clear error and urges OHA to reverse the size determination.

F. Agency Comments

On April 28, 2011, I issued a Request for Agency Comments seeking the SBA's perspective on the applicability of 13 C.F.R. § 121.104(a)(1) to the facts of this case. On May 6, 2011, the SBA submitted its comments. The SBA contends the first sentence of 13 C.F.R. § 121.104(a)(1) makes clear that the Area Office "must" use a firm's tax returns filed before the self-certification date to calculate the firm's receipts. The SBA asserts the second sentence of the regulation "merely provides guidance and addresses the most likely or common scenario that might arise, *i.e.*, upon learning that a size protest has been filed or a size investigation has been initiated, the firm amends its tax returns to make itself eligible." (Agency Comments 4.)

The SBA next asserts a firm is responsible for knowing whether it meets the size standard on the date it self-certifies as a small business. *See* Federal Acquisition Regulation (FAR) 19.301-1(a) ("To be eligible for award as a small business, an offeror must represent in good faith that it is a small business at the time of its written representation."); FAR clause 52.204-8(d) ("[T]he offeror verifies by submission of the offer that the representations and certifications ... are current, accurate, complete, and applicable to this solicitation ... as of the date of this offer."). The SBA argues that here, if Appellant had thoroughly reviewed its tax returns and the information available to it as of the date of self-certification for this procurement, Appellant would not have been able to represent itself as a small business.

The SBA also claims that the legislative history of 13 C.F.R. § 121.104(a)(1) supports the agency's position. Specifically, the SBA points to the preamble language of the proposed rule, which stated: "A business concern is expected to base its small business self-certification on information existing at that time. This rule is in accord with OHA rulings that size status must be based on documents in existence and available as of the date of self-certification." 67 Fed. Reg. at 70,342. Thus, there was no suggestion in the preamble that SBA intended for consideration to be given to information after the date of self-certification. The SBA asserts that its position is consistent with the general rule that the SBA determines a firm's size as of the date of initial offer including price. 13 C.F.R. § 121.404(a). Here, Appellant had filed tax returns for 2007 and 2008 as of the date of self-certification.

The SBA emphasizes that the Area Office must use a firm's tax returns to calculate a firm's receipts unless there is reason to suspect the tax returns are false. The SBA further

contends that, because Appellant later filed amended tax returns, Appellant was other than small at the time it self-certified for this contract.[3] (Agency Comments 7.) Thus, the SBA concludes Appellant is ineligible for award of the contract.

The SBA also highlights that the concern whose size is at issue has the burden of establishing that it is a small business and that the Area Office must give greater weight to signed, dated tax returns than to other documents. The SBA notes that Appellant submitted unsigned and undated 2007 and 2008 federal tax returns to the Area Office and failed to address the issue of amended tax returns. The SBA thus concludes the Area Office made no error in relying upon the tax return transcripts received by the IRS rather than the unsigned and undated amended returns submitted by Appellant.

Finally, the SBA addresses Appellant's discussion of OHA case law. The SBA asserts that OHA has stated without qualification that the Area Office "may not consider amended tax returns prepared and filed after the firm's self-certification date." *Size Appeal of Cmty. Research Assocs.*, SBA No. SIZ-4554 (2003). The SBA contends the *Educational Services* case does not apply here because that case dealt with a fiscal year in which the firm's tax return had not yet been filed as of the date of self-certification. The SBA also alleges that Appellant's policy arguments—that the SBA's goal is to render accurate size determinations—do not support the proposition that a firm may correct an erroneous self-certification by amending its tax returns after self-certification. Rather, according to the SBA, an offering firm must review all available information and accurately represent its size in connection with a contract offer. The SBA thus urges OHA to deny the appeal.

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

As discussed above, the Appellant in this case submitted amended tax returns after the date of its self-certification, but before the initiation of the size determination. The principal issue

[3] On May 10, 2011, Appellant filed a Motion for Leave to Reply to the SBA's comments, accompanied by its reply. In the reply, Appellant objects to any suggestion that it falsely self-certified. Because that allegation is not at issue in this appeal, and because Appellant's reply was filed after the close of record, Appellant's motion is DENIED, and the reply is excluded from the record.

presented is whether SBA may, or should, consider those amended returns in assessing Appellant's size, or whether the original returns are controlling.

The applicable regulation, 13 C.F.R. § 121.104(a)(1), provides: "The 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. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination." Appellant contends the first sentence of the regulation merely informs the Area Office to use tax returns to calculate a firm's size, whereas the second sentence permits the Area Office to use amended tax returns filed after self-certification but before initiation of a size determination. The SBA adopts the view that the first sentence mandates the use of any tax returns filed before self-certification, and the second sentence reinforces that same basic principle in the scenario when a firm is most likely to submit amended tax returns—*i.e.*, when a firm tries to amend its tax returns after it learns its size has been challenged.

Upon review of the regulation, the legislative history, OHA case precedent, and the arguments of the parties, I agree with the SBA that the first sentence of 13 C.F.R. § 121.104(a)(1) requires the use of tax returns filed before self-certification to calculate a firm's receipts. The language of the first sentence is clear and unambiguous: "The 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." 13 C.F.R. § 121.104(a)(1) (emphasis added). Although the second sentence injects some lack of clarity into the regulation as a whole, I agree with the SBA that the most likely intent of the second sentence was merely to address how the rule applies to a common situation. As the SBA points out, a firm whose size is challenged may attempt to file amended returns with the Area Office, and it is reasonable to conclude the SBA was alerting all interested parties that such amendments will not be considered.

The legislative history of 13 C.F.R. § 121.104(a)(1) supports this interpretation. When the current iteration of the rule was proposed, the preamble explained that: "A business concern is expected to base its small business self-certification on information existing at that time. This rule is in accord with OHA rulings that size status must be based on documents in existence and available as of the date of self-certification." 67 Fed Reg. at 70,342. Thus, a firm is expected to know and to verify its size as of the date of self-certification.

Appellant argues that, under this interpretation of the regulation, firms that are legitimately small may be penalized and may lose contracts due to innocent errors on their tax returns. However, the regulatory history indicates that the SBA specifically considered this possibility and decided that "[w]here a concern is determined to be other than small, but legitimately erred in reporting its income on its Federal tax returns, it could subsequently request recertification as a small business from SBA based on amendments filed with the IRS. SBA then would be able to conduct a review of the amended returns without delaying the size determination or the Federal procurement process." 67 Fed Reg. at 70,342. Thus, the regulatory history reflects that SBA believed that amended returns could not be used to cure a defective self-certification, but instead could be considered as part of a recertification. As for Appellant's concern that firms that are actually large may obtain small business set-aside contracts by manipulating their tax returns (*i.e.*, deliberately filing false tax returns and later amending those

returns to show that the firms are actually large), Appellant itself acknowledges that there are severe penalties for filing fraudulent tax returns, as well as for misrepresenting size status. *See generally* 13 C.F.R. § 121.108. Thus, the likelihood that firms would intentionally engage in such activity appears remote.

Appellant argues that SBA's reluctance to consider amended tax returns is motivated primarily by a desire to avoid delay in the size determination process. Thus, SBA remarked in the *Federal Register*:

> This proposed [rule] would preclude a concern that is the subject of a size protest from providing revised Federal tax returns to SBA while a size determination or appeal is pending. If SBA were to accept amended tax returns prepared after initiation of a size determination, SBA would constantly be re-evaluating cases that had already been completed or that were substantially prepared. This would invariably lead to delays in the size determination process and, in the case of pending procurements, delays in contract award.

67 Fed Reg. at 70,342. Appellant contends that accepting amended tax returns filed after the date of self-certification but before the initiation of a size determination would not delay the size determination process, so it would not have been SBA's intent to preclude acceptance of such amended returns.

However, although delay in the size determination process was a significant consideration, it appears that SBA was also concerned with the simplicity and predictability of the rule:

> Under the current regulations, SBA bases its calculation of a concern's [average annual receipts] solely on information contained in the concern's Federal income tax returns over its last three completed fiscal years. Previously, SBA could rely either on a concern's regular books of account or Federal income tax returns to determine a concern's [average annual receipts]. That policy change was made by SBA in an effort to simplify its size regulations by using the information a business concern reports to the Internal Revenue Service (IRS) for tax purposes to determine the annual receipts of a concern.

67 Fed Reg. at 70,341. Accordingly, delay of the size determination process was one concern, but simplicity of the rule was also taken into account. Considering the SBA's explicit recognition that "size status must be based on documents in existence and available as of the date of self-certification," it appears the SBA weighed these concerns and decided upon a bright line rule as to when tax returns and amendments may be accepted so as to avoid any possible uncertainty. This rule is contained in the first sentence of 13 C.F.R. § 121.104(a)(1). The second sentence does not create a broad exception to the general rule; it merely addresses a common situation where a challenged firm may attempt to introduce new information once its size is in question.

OHA's case law also supports this interpretation of 13 C.F.R. § 121.104(a)(1). Appellant relies heavily upon *Size Appeal of Educational Services, Inc.*, SBA No. SIZ-4782 (2006).

In *Educational Services*, the challenged firm argued that because the tax return from its most recently completed fiscal year was not available at the time it self-certified, the Area Office could not use the tax return (which was completed before initiation of the size determination) to calculate the firm's size. OHA disagreed, finding "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.* at 3. Thus, *Educational Services* did not involve an amended return at all. According to regulation, where a tax return filed before self-certification is not available, the Area Office may use "any other available information to calculate a firm's receipts." 13 C.F.R. § 121.104(a)(2). Thus, in *Educational Services*, OHA held that the Area Office was permitted, but not required, to base its calculation on the newly-filed return. In contrast to the *Educational Services* case, Appellant's pre-self-certification 2007 and 2008 tax returns were available, and so the Area Office was required to use them to calculate Appellant's receipts. 13 C.F.R. § 121.104(a)(1).

Appellant's reliance on *Mission Solutions* and *Judson Builders* is similarly misplaced. Although Appellant is correct that these cases involved amended tax returns filed after the initiation of the size determination, the reasoning in each decision makes clear that the Area Office would also have been prohibited from using amended tax returns filed after the date of self-certification. In *Mission Solutions*, OHA specifically opined that "the Area Office may not consider amended tax returns prepared and submitted after the firm's self-certification date." *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828, at 9 (2006) (citing *Size Appeal of Cmty. Research Assocs.*, SBA No. SIZ-4554 (2003)). In *Judson Builders*, OHA affirmed the Area Office's decision to calculate the challenged firm's size based upon its original tax returns rather than its amended tax returns filed after initiation of the size determination. OHA found that 13 C.F.R. § 121.104(a)(1) "required the Area Office to use tax returns filed with the IRS prior to [the self-certification date]." *Size Appeal of Judson Builders, Inc.*, SBA No. SIZ-5144, at 3 (2010).

Finally, Appellant asserts that the Area Office failed to give Appellant adequate notice of the basis for the adverse size determination. This contention is meritless. As this matter was on remand from OHA's decision in *Hal Hays I*, Appellant was fully aware that the calculation of its average annual receipts would be at issue. Furthermore, Appellant did not timely alert the Area Office that it had submitted amended tax returns for two of the years in question. As a result, the issue was discovered only after receiving Appellant's tax return transcripts from the IRS. If Appellant wished to avoid any confusion related to this matter, it could have raised the issue earlier in the size determination process.

Based upon the foregoing, I conclude the first sentence of 13 C.F.R. § 121.104(a)(1) requires that the Area Office must use a firm's tax returns filed before the self-certification date to calculate the firm's receipts. The Area Office properly utilized the IRS transcripts of Appellant's original 2007 and 2008 tax returns to calculate Appellant's receipts, and, based upon those returns, Appellant's own receipts exceed the size standard applicable to the instant

procurement.[4] Consequently, Appellant is other than a small concern for any procurement employing this or a smaller size standard.

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, this appeal is DENIED.

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

KENNETH M. HYDE
Administrative Judge

[4] Appellant's average annual receipts are calculated as follows:

	2009	2008	2007
Cost of goods sold:	[XXXXXX]	[XXXXXX]	[XXXXXX]
Total income:	[XXXXXX]	[XXXXXX]	[XXXXXX]
ATPT payments:	[XXXXXX]	[XXXXXX]	[XXXXXX]
Total:	[XXXXXX]	[XXXXXX]	[XXXXXX]

TOTAL = [XXXXXX]
Average Annual Receipts = [XXXXXX]

Because Appellant's own receipts exceed the size standard before aggregation with the receipts of GAE, I need not consider Appellant's argument that the interaffiliate transaction rule applies to exclude receipts from subcontracts between Appellant and GAE. Even if Appellant were to prevail on this point, the outcome would not be affected, so Appellant was not prejudiced by any error. *See e.g., Size Appeal of Barlovento, LLC,* SBA No. SIZ-5191, at 4 (2011) (although the Area Office committed errors in calculating average annual receipts, the appeal was denied because "correcting the errors would not bring Appellant's receipts within the applicable size standard.").