

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

**SIZE APPEAL OF:**

Malouf Construction, LLC

SBA No. SIZ-5250

Appellant

Decided: June 16, 2011

Appealed from  
Size Determination No. 3-2011-58

**APPEARANCE**

George Malouf, President, Malouf Construction, LLC, Sidon, Mississippi, for Appellant.

**DECISION**

HYDE, Administrative Judge:

**I. Introduction & Jurisdiction**

On May 13, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-58 finding Malouf Construction, LLC (Appellant) other than small. On May 27, 2011, Appellant filed an appeal of the size determination. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

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, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

**II. Background**

**A. Application for Recertification and Size Determination**

In July 2010, the Area Office performed a size determination on Appellant in connection with the firm's application for the SBA Historically Underutilized Business Zone (HUBZone) program. On July 29, 2010, the Area Office issued Size Determination No. 3-2010-106, finding that Appellant was other than small for its primary North American Industry Classification

System (NAICS) code, 237990, Other Heavy and Civil Engineering Construction, which employs a size standard of \$33.5 million in average annual receipts. On April 4, 2011, Appellant requested that the Area Office recertify Appellant as a small business.

On May 13, 2011, the Area Office issued its size determination in connection with Appellant's application for recertification. The Area Office determined Appellant is affiliated with the following entities: (1) Malouf Construction Services, Inc. based upon common stock ownership and common management; (2) Malouf Transport and Marine, Inc., based upon common stock ownership; (3) Delta Land and Development, LLC, based upon common stock ownership and an identity of interest; and (4) Rising Sun Properties, based upon a familial identity of interest. The Area Office also explained that Appellant's share of receipts from its joint venture, Naylor/Malouf Special Projects Group Joint Venture, must be added to Appellant's annual receipts. Upon aggregation of Appellant's average annual receipts with the receipts of its affiliates, the Area Office determined Appellant exceeds the applicable size standard and directed Appellant that it may not self-certify as a small business under that size standard.

#### B. Appeal Petition

On May 26, 2011, Appellant filed the instant appeal, claiming that the Area Office erred by failing to exclude Mississippi Material Purchase Certificate (MPC) tax payments from the firm's average annual receipts. Appellant does not challenge the Area Office's affiliation findings.

Appellant contends the MPC tax constitutes a tax "collected for and remitted to a taxing authority" within the meaning of 13 C.F.R. § 121.104(a). Appellant explains that the State of Mississippi imposes upon prime contractors a 3.5% tax on nonresidential construction projects exceeding \$10,000 in value. Appellant asserts the amounts are collected from its customers and remitted to the State of Mississippi. Appellant specifies that the only payments it wishes to exclude from its receipts are those remitted to the State of Mississippi when Appellant itself was the prime contractor (not a subcontractor), state law required Appellant to collect and remit the tax, and Appellant actually did collect and remit the tax. Appellant concludes that the Area Office failed to properly exclude the amounts Appellant paid for the MPC tax from the firm's revenue. Appellant contends the exclusion of these amounts would bring its average annual receipts within the \$33.5 million size standard and therefore seeks reversal of the size determination.

### 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. 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**

The SBA regulation governing calculation of a firm's average annual receipts provides, in pertinent part: "Receipts do not include . . . taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees." 13 C.F.R. § 121.104(a). OHA has recognized that "the only taxes SBA excludes from a firm's annual receipts are those taxes which the firm receives as an agent for the taxing authority or as a conduit." *Size Appeal of Uniband, Inc.*, SBA No. SIZ-4326, at 5 (1998). Thus, direct taxes on a firm are included in the firm's receipts. Such taxes are not collected from other parties on behalf of a taxing authority, but rather are "purely and simply another part of [a firm's] cost of doing business (not at all unlike the rent it pays for the building and the cost of its utilities)." *Size Appeal of Res. Consultants, Inc.*, SBA No. SIZ-2163, at 5 (1985).

In this case, the Mississippi Department of Revenue describes the MPC tax as follows: "The 3 1/2% [MPC] tax is imposed against the prime contractor and is due on all non-residential, commercial [construction] contracts regardless of whether or not the owner is a governmental, exempt, or non-profit entity." State of Mississippi Department of Revenue, Sales and Use Tax Guide for Construction Contractors (2011), <http://www.dor.ms.gov/taxareas/sales/constr.html>. The Mississippi statute implementing the MPC tax provides:

*Upon every person engaging or continuing in this state in the business of contracting or performing a contract or engaging in any of the activities, or similar activities, listed below for a price, commission, fee or wage, there is hereby levied, assessed and shall be collected a tax equal to three and one-half percent (3- 1/2 %) of the total contract price or compensation received, including all charges related to the contract such as finance charges and late charges, from constructing, building, erecting, repairing, grading, excavating, drilling, exploring, testing or adding to any building, highway, street, sidewalk, bridge, culvert, sewer, irrigation or water system, drainage or dredging system, levee or levee system or any part thereof, railway, reservoir, dam, power plant, electrical system, air-conditioning system, heating system, transmission line, pipeline, tower, dock, storage tank, wharf, excavation, grading, water well, any other improvement or structure or any part thereof when the compensation received exceeds Ten Thousand Dollars (\$10,000.00). Such activities shall not include constructing, repairing or adding to property which retains its identity as personal property. The tax imposed in this section is levied upon the prime contractor and shall be paid by him.*

Miss. Code Ann. § 27-65-21(1)(a)(i) (emphasis added).

In *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217 (2011), OHA determined that a state tax, which was "substantively indistinguishable from a traditional sales tax," was excludable from a firm's receipts. *Hal Hays*, at 5. In that case, the tax in question required the firm to act "as a conduit by collecting the tax from its customers and forwarding the

proceeds to the [state taxing authority].” *Id.* There was no dispute that the tax was passed on to the firm’s customers, and several courts had opined that the tax operated identically to a traditional sales tax. *Id.* at 4-5.

In contrast, the Mississippi statute that established the MPC tax clearly provides that the tax “is levied upon the prime contractor and shall be paid by him.” The Mississippi Department of Revenue reiterates that the MPC tax “is imposed against the prime contractor.” There is no suggestion in either the statute or the Mississippi Department of Revenue’s guidance that the tax is necessarily passed on to the prime contractor’s customers. Nor is there any indication that a contractor collects the MPC tax from its customers as an agent of the State of Mississippi. On the contrary, the MPC tax is assessed directly on the contractor itself and therefore represents a cost of doing business in the state of Mississippi. Accordingly, I disagree with Appellant’s contention that the MPC tax is “collected for and remitted to a taxing authority” within the meaning of 13 C.F.R. § 121.104(a). The MPC tax is not excludable, and the Area Office did not err in failing to deduct Appellant’s tax payments from the firm’s average annual receipts.

#### IV. Conclusion

Appellant has failed to demonstrate that the size determination contains any clear error of fact or law. I therefore DENY this appeal and AFFIRM the Area Office’s size determination.

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

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KENNETH M. HYDE  
Administrative Judge