

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

SIZE APPEAL OF:

Williams Adley & Company -- DC, LLP,

Appellant,

Appealed From
Size Determination No. 2-2012-16

SBA No. SIZ-5341

Decided: April 18, 2012

APPEARANCES

Pamela J. Mazza, Esq., Patrick T. Rothwell, Esq., and Kelly A. DiGrado, Esq.,
PilierioMazza PLLC, Washington, D.C., For Appellant

Sam Q. Le, Esq., Office of General Counsel, Washington, D.C., For the U.S. Small
Business Administration

DECISION¹

I. Introduction and Jurisdiction

On January 25, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-16, finding that Williams Adley & Company — DC, LLP (Appellant) is not a small business under the size standard associated with Solicitation No. C-OPC-23822. The Area Office based its determination on Appellant's federal income tax returns for the years 2008, 2009, and 2010. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) vacate and remand the size determination to the Area Office with instructions to determine size based on Appellant's tax returns for the years 2007, 2008, and 2009. Alternatively, in the event OHA requires the size determination to be based on Appellant's annual receipts from 2008, 2009, and 2010, Appellant requests that OHA instruct the Area Office to allow Appellant to supplement the record by affidavit or other available information setting forth annual receipts for 2010. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

¹ This decision was initially issued on April 5, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

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. Issue

Whether the Area Office made a clear error of law or fact in assessing Appellant's size based on Appellant's tax returns from 2008, 2009, and 2010? 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On May 5, 2011, the U.S. Department of Housing and Urban Development (HUD) issued Solicitation C-OPC-23822 for accounting and financial operations support services. The Contracting Officer (CO) set aside the procurement exclusively for small businesses and designated North American Industry Classification System (NAICS) code 541211, Offices of Certified Public Accountants, with a corresponding size standard of \$8.5 million average annual receipts. Appellant submitted its proposal on May 26, 2011, self-certifying as a small business.

On October 6, 2011, the CO notified offerors that Appellant was selected for award. DP George & Company, LLC (DPG), a disappointed offeror, protested Appellant's size. DPG alleged that Appellant received an average of \$9.2 million in federal contract awards during the years 2008, 2009, and 2010. (Protest at 1.)

On November 15, 2011, the Area Office requested that Appellant respond to the protest and submit its tax returns for the three most recently completed fiscal years prior to May 26, 2011. On November 28, 2011, Appellant produced its tax returns for 2007, 2008, 2009, and 2010. Appellant explained that its 2010 tax return had not yet been filed at the time of Appellant's self-certification. Appellant therefore urged the Area Office to calculate size based on Appellant's tax returns for 2007, 2008, and 2009. The Area Office also requested the past three years of financial statements, which Appellant did not provide.

B. Size Determination

On January 25, 2012, the Area Office issued its size determination finding Appellant's average annual receipts for 2008, 2009, and 2010 exceeded the \$8.5 million size standard. The Area Office acknowledged that Appellant had argued that size should be determined based on Appellant's tax returns for 2007, 2008, and 2009 because the 2010 return was not available at the time of self-certification. The Area Office rejected this contention, however, explaining that 13 C.F.R. § 121.104(c) requires that the size of a concern be determined based on its three most recently completed fiscal years, whether or not the tax returns for those years are available. The Area Office found that SBA regulation "does not permit the Area Office to eliminate a fiscal

year from its size calculation if the income tax return for that year was not filed with the Internal Revenue Service.” (Size Determination at 2.)

C. Appeal Petition

On February 9, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.

Appellant contends that the Area Office should not have calculated size based on Appellant's 2010 tax return. Rather, according to Appellant, the Area Office should have based its size determination on Appellant's tax returns for 2007, 2008, and 2009 because Appellant had not filed its 2010 tax return as of May 26, 2011, the date of Appellant's self-certification. Appellant bases this argument on the first sentence of 13 C.F.R. § 121.104(a)(1), which provides that “tax returns or amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern.” Appellant further supports its argument with language from *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5234, at 8 (2011), where OHA remarked 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.”

Appellant argues in the alternative that if OHA concludes that the Area Office did not err in determining Appellant's size based on its annual receipts for the years 2008, 2009, and 2010, Appellant's 2010 federal tax return is not the proper measurement for the annual receipts from 2010. Appellant contends that 13 C.F.R. § 121.104(a)(2), when read in light of § 121.104(a)(1), does not support the use of Appellant's 2010 tax return as a measure for annual receipts in 2010. Subsection 121.104(a)(2) provides that:

When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

13 C.F.R. § 121.104(a)(2). Appellant argues that the phrase “[w]hen a concern has not filed a Federal income tax return with the IRS for a fiscal year” necessarily presupposes that the “Federal income tax return” referenced in subsection (a)(2) is the same as that in subsection (a)(1). Therefore, Appellant reasons that the Area Office should not have used Appellant's 2010 tax return when determining revenues for 2010, and instead should have based its analysis on “other available information.” For this reason, Appellant requests that OHA permit Appellant to supplement the record with other information to demonstrate its annual receipts for 2010.

D. Agency Response

On February 27, 2012, SBA timely intervened² and filed its response to the appeal petition. SBA maintains that the Area Office did not err when it considered Appellant's 2010 tax return. According to SBA, the Area Office was correct to reject Appellant's request to use the years 2007-2009 because "SBA calculates a concern's annual receipts by determining the 'total receipts of the concern over its most recently completed three fiscal years divided by 3.'" (Agency Response at 2 (quoting 13 C.F.R. § 121.104(c)(1)).) A "completed fiscal year means a taxable year," as defined by the IRS. 13 C.F.R. § 121.104(b). Appellant submitted its offer on the procurement on May 26, 2011. Therefore, the three most recently completed taxable years for calculating Appellant's annual receipts are 2008, 2009, and 2010. Because 2007 is Appellant's fourth most recently completed taxable year, SBA insists that the agency cannot properly consider Appellant's 2007 tax return in lieu of the 2010 return.

SBA asserts that the regulations specifically discuss the situation in which a firm has yet to file tax returns. In particular, size officials will consider "any other available information" for the year in question, 13 C.F.R. § 121.104(a)(2), but will not substitute an entirely different year. SBA cites *Size Appeal of Educational Services, Inc.*, SBA No. SIZ-4782 (2006) for the proposition that an area office may examine tax returns filed after the date of self-certification.

SBA further argues that Appellant's reliance on the *Hal Hays* decision is misplaced. SBA argues that the issue in *Hal Hays* was whether a concern whose tax returns showed that it was not small could amend its tax returns after self-certification in an effort to change its status to a small business. *Hal Hays*, SBA No. SIZ-5234, at 8. That issue is not present here, nor was it present in *Educational Services*. Indeed, OHA distinguished *Educational Services* from *Hal Hayson* that basis, stating that "*Educational Services* did not involve an amended return at all ..." *Id.* at 10.

Finally, SBA responds to Appellant's request to supplement the record to demonstrate its annual receipts for 2010. SBA contends that it would make no sense to afford Appellant that opportunity because Appellant was already given such an opportunity but declined to take it. SBA cites the Area Office's November 15, 2011 letter asking Appellant to submit financial statements, which Appellant did not submit.

DPG, the original protestor, did not respond to the appeal.

IV. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error

² "SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first." 13 C.F.R. § 134.210(a).

of fact or law. 13 C.F.R. § 134.314. OHA will disturb an 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 principal issue presented in this case is whether the Area Office erred in considering Appellant's 2010 federal tax return, which had not yet been filed as of the date of Appellant's self-certification. As discussed below, I find no error in the Area Office's decision.

The applicable regulation is 13 C.F.R. § 121.104. Subsection 104(c)(1) provides that “[a]nnual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.” Here, Appellant self-certified on May 26, 2011, so its most recently completed three fiscal years were 2008, 2009, and 2010. Accordingly, pursuant to 13 C.F.R. § 121.104(c)(1), the Area Office correctly based its analysis on Appellant's annual receipts from 2008, 2009, and 2010.

Appellant emphasizes that tax returns filed with the IRS prior to the date of self-certification normally are used to determine size. Appellant maintains that its 2010 return should not be used here because that return was not yet filed as of the date of self-certification. [An] SBA regulation, however, specifically addresses the situation where tax returns are not available for one or more of the years under review:

When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

13 C.F.R. § 121.104(a)(2). Thus, SBA regulations do not contemplate that, if tax returns for a given year are unavailable, an area office should determine size using some alternate period of measurement. Rather, the regulation instructs an area office to substitute “other available information” in lieu of a tax return.

OHA considered a substantially similar case in *Size Appeal of Educational Services, Inc.*, SBA No. SIZ-4782 (2006). In *Educational Services*, the challenged firm self-certified on July 23, 2002. *Id.* at 3. Therefore, the appropriate fiscal years for measuring size were 1999, 2000, and 2001, although the 2001 tax return was not available as of the self-certification date. *Id.* at 3-4. By the time the area office conducted the size determination, the challenged firm's 2001 tax return was in fact available. *Id.* at 4. OHA held that the area office properly used the 2001 tax return because it was available at the time of the size determination. OHA further explained that 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.

In the instant case, as in *Educational Services*, Appellant's tax return for the most recent completed fiscal year was not available when Appellant self-certified, but was available at the time of the size determination. Thus, the Area Office could appropriately use that return to determine Appellant size. At a minimum, the Area Office could properly consider a tax return filed after the date of self-certification to be “other available information” which can be used to calculate size in accordance with 13 C.F.R. § 121.104(a)(2).

Appellant asks that OHA overturn *Educational Services*, arguing that it is inconsistent with the more recent ruling in *Hal Hays*. I find no inconsistency between these decisions. In *Hal Hays*, the challenged firm filed initial tax returns prior to the date of self-certification, and amended returns after the date of self-certification but before the commencement of the size determination. OHA found that the initial returns, rather than the amended returns, should be used, noting that under 13 C.F.R. § 121.104(a)(1), “[t]he 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.”³ OHA considered *Educational Services* in *Hal Hays*, but found the cases distinguishable because “*Educational Services* did not involve an amended return at all.” *Hal Hays*, SBA No. SIZ-5234, at 10. In addition, OHA characterized *Educational Services* as having held that “the Area Office was permitted, but not required, to base its calculation on the newly filed return.” *Id.*

In sum, the Area Office did not err in considering Appellant's 2010 return. Under 13 C.F.R. § 121.104(c)(1), the Area Office was required to examine the years 2008, 2009, and 2010, and was not at liberty to substitute a different year. Further, although Appellant's 2010 tax return was filed after the date of self-certification, it was available at the time of the size review, and the Area Office was “permitted ... to base its calculation on the newly filed return.” *Hal Hays*, SBA No. SIZ-5234, at 10.

Lastly, I agree with SBA that Appellant need not be given an opportunity to submit other evidence of its 2010 receipts. The record reveals that Appellant was afforded such an opportunity, but failed to produce its financial statements or other evidence of its 2010 receipts. Furthermore, tax returns are recognized as an inherently reliable source of information, due to the severe penalties for filing false tax returns. *Id.* at 9. Thus, even if Appellant were to submit other information, it is not clear that such information could be used to contradict or supersede Appellant's tax return.

³ Unlike Appellant here, the challenged firm in *Hal Hays* did not dispute which years should be considered in performing the size review.

V. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge