

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

SIZE APPEAL OF:

CS360, LLC

Appellant,

Appealed From
Size Determination No. 02-2012-175

SBA No. SIZ-5419

Decided: November 15, 2012

ORDER DISMISSING APPEAL

I. Background

CS360, LLC (Appellant) applied to the Department of Veterans Affairs (VA) for certification as a Service Disabled Veteran Owned Small Business (SDVOSB) on November 9, 2009. The VA denied this application in July, 2010, and denied reconsideration of its decision in November, 2010. In January, 2011, Appellant filed suit in Federal District Court for the District of Columbia challenging these denials. On March 6, 2012, the Court remanded the matter to the VA for further consideration. *CS360, LLC v. U.S. Department of Veterans Affairs*, 846 F. Supp. 171 (D.D.C. 2012). On July 19, 2012, the VA requested a size determination from the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office).¹

On September 25, 2012, the Area Office issued Size Determination No. 02-2012-175. The Area Office found Appellant to be other than a small concern. According to the appeal petition, Appellant received the size determination on September 26, 2012.

On October 26, 2012, Appellant filed the instant appeal with SBA's Office of Hearings and Appeals (OHA). On November 1, 2012, Appellant moved to admit additional evidence.

On November 1, 2012, I ordered Appellant to show cause, no later than November 8, 2012, why its appeal should not be dismissed as untimely.

On November 8, 2012, Appellant responded. Appellant argues the appeal is timely

¹ The size determination appears to have been performed in accordance with 13 C.F.R. § 121.904, which provides that, for compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

because it would have been timely under the OHA filing deadline in effect at the time the VA should have requested the size determination.

Appellant maintains that in this case it is not reapplying for admission to the SDVOSB program, but is standing upon its original application of November 9, 2009, and the question at hand is whether it was an eligible SDVOSB on November 9, 2009. Accordingly, Appellant argues its size must be determined as of November 9, 2009. Appellant argues that this means its size must be determined using the regulations in effect on November 9, 2009.

In 2009, the regulation governing the commencement of size appeals at OHA had two deadlines for filing a size appeal petition. The regulation required that an appeal from a size determination in a pending procurement or Government sale be filed within 15 days of receipt of the size determination. 13 C.F.R. § 134.304(a)(1) (2009). The regulation further required that an appeal from a size determination in a case not involving a pending procurement or Government sale be must filed within 30 days of receipt of the size determination. 13 C.F.R. § 134.304(a)(2) (2009). In 2011, SBA changed the regulation. Effective March 4, 2011, all size appeals must be filed within 15 days of receipt of the size determination. 13 C.F.R. § 134.304(a); 76 Fed. Reg. 5680, 5685 (Feb. 2, 2011).

Appellant argues that to find its appeal untimely would be to retroactively apply the current regulation to a 2009 case. Appellant asserts the VA should have requested the size determination in 2009, and it is those regulations which should apply in this case. Appellant argues that because a size determination should have been performed in 2009 or 2010, the SBA regulations in effect at that time should be applied to the appeal of that size determination, including the regulation setting the deadline for filing the appeal petition.

Appellant relies on various cases invalidating Federal agency attempts to impose retroactive rules. Appellant particularly points to *New York State Energy Research and Development Authority v. Federal Energy Regulatory Commission*, 746 F.2d 64 (D.C. Cir. 1984) (*NYSERDA v. FERC*) which overturned an agency's treatment of an application as untimely filed under a new rule when the application would have been timely under the old rule. In that case there was an express provision in FERC's rules which allowed application of the old rule to proceedings pending on the effective date "in the interests of justice."

II. Discussion

Under OHA regulations, filing is the receipt of pleadings at OHA. 13 C.F.R. § 134.204(b). An OHA judge may modify almost any time period or deadline, but not the time period governing the commencement of a case. 13 C.F.R. § 134.202(d)(2)(i)(A). Further, the regulations explicitly require that an untimely size appeal must be dismissed. 13 C.F.R. § 134.304(c).

Appellant argues that the new filing deadline became effective on March 4, 2011, and that the timeliness of appeals of size determinations from before then (not involving pending procurements) should be determined under the old 30-day rule. Therefore, Appellant argues, the instant size appeal, which is in connection with a matter initiated at the VA on November 9,

2009, a date well before March 4, 2011, is timely filed.

The problem with Appellant's argument is that this is not a case of retroactive application of a regulation. A retroactive regulation extends in scope and effect to matters that have occurred in the past. It is the “[A]pplication of a new rule of law to an act or transaction that was completed before the rule was promulgated. ... [or] when a new rule of law is applied to an act or transaction in the process of completion ...” BLACK'S LAW DICTIONARY 1318 (7th ed. 1999). A retroactive law is one that looks backward and contemplates the past, affecting acts or facts that existed before the law came into effect. *Id.*

Here there is no question of retroactively applying a regulation. While Appellant argues that VA should have referred this matter for a size determination in 2009 or 2010, the fact remains that the VA did not do so. The VA formally requested the size determination on July 19, 2012. The Area Office issued the size determination on September 25, 2012, and Appellant received it on September 26th. Therefore, in no way can the instant size determination be said to be a transaction that was completed or pending on March 4, 2011. All the actions concerning this size determination, from the VA's request for it to the Area Office's investigation to the issuance of the determination, took place in 2012, long after the March 4, 2011 effective date of the new OHA regulation on the commencement of size appeals. None of these actions took place prior to March 4, 2011, nor were any of them pending on March 4, 2011. Therefore the procedural regulations which became effective on March 4, 2011, apply to the instant appeal. Under those regulations, Appellant had fifteen days to file this appeal, a deadline it failed to meet.

Appellant's reliance on *NYSERDA v. FERC* is inapposite. In that case, the application was pending at the time of the rule, and there was an explicit provision that applications could be filed under the old rules if it was in the interest of justice. Here, the VA's request for a size determination was not pending at the time of the rule change, and there is no provision whatever for applying the previous rule after the effective date of the new rule. The other cases Appellant cites deal with retroactive application of rules, and they are not applicable here because I am not applying the regulation retroactively. Rather, I am applying the regulation in effect at the time the instant size determination was requested and issued.

Accordingly, because the instant appeal petition was filed more than fifteen days after Appellant's receipt of the size determination, I must dismiss the appeal as untimely. I have no discretion to waive the time limit for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c). *Size Appeal of REES Group, Inc.*, SBA No. SIZ-5387 (2012).²

² In light of the disposition of this appeal, I need not reach Appellant's motion for additional evidence.

III. Conclusion

For the above reasons, I DISMISS the instant appeal as untimely. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge