

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

SIZE APPEAL OF:

VMJR Companies LLC,
Appellant,

Appealed From
Size Determination No. 01-SD-2022-22

Solicitation No. W912DS22B0014

SBA No. SIZ-6184

Decided: January 12, 2023

APPEARANCE

Andrew Weeden, Vice President of Finance, VMJR Companies LLC, Glens Falls, New York

DECISION¹

I. Introduction and Jurisdiction

On September 26, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 01-SD-2022-22, concluding that VMJR Companies LLC (Appellant) is other than small for the subject procurement. On appeal, Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand it. For the reasons discussed *infra*, the appeal is denied, and the Size Determination No. 01-SD-2022-22 is affirmed.

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 after receipt of 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 originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to file a request for redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

II. Background

A. Solicitation

On July 25, 2022, the U.S. Department of the Army issued Solicitation No. W912DS22B0014 for commercial and institutional building construction services. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industrial Classification System (NAICS) code 236220, Commercial and Industrial Building Construction, with a corresponding \$39.5 million annual receipts size standard. Sealed bids were due on September 7, 2022. Appellant submitted a timely bid, self-certifying as a small business.

B. Protest

Appellant was selected for award. On September 9, 2022, Enfield Enterprises LLC (Protestor) filed a protest challenging Appellant's size. The Protestor alleged that Appellant is affiliated with Sweet Constructors (SC) and Adirondack Construction Corp (ACC). (Protest, at 2.) While Appellant and ACC are each registered in SAM.gov as small business with annual receipts above \$16.5 million but below \$39.5 million in different NAICS codes, ACC was listed as immediate owner of Appellant.

On the same day, the CO promptly referred the protest to the Area Office.

C. Area Office Proceedings

On September 14, 2022, the Area Office requested Appellant submit the SBA Form 355, the IRS Form 4506T, a copy of its Articles of Incorporation and By-Laws, Appellant's and affiliates' annual statements to shareholders, and the preceding three years of complete financial statements and income tax returns from Appellant and affiliates, within three working days after receipt of SBA's request.

In response to SBA's request, Appellant maintained that it is a small business for this procurement and explained that ACC is now a division of VMJR Companies LLC. All projects awarded to ACC in the last 3 years were awarded as “[ACC] A Division of VMJR Companies LLC.” Further, Appellant has an active registration in SAM.gov, taking place of the ACC registration. Thus, ACC's SAM.gov registration will no longer be used. Appellant further asserted Sweet Associates and Sweet LLC, are dormant companies kept for name recognition and have had no revenue over the last three years. This is also true of ACC. Appellant asserted its tax returns and financial statements would establish that it was within the size standard.

Appellant further asserted that SC's affiliation was taken out of context, because Appellant's website states, “Sweet Constructors, now a division of The VMJR Companies, was founded in Schenectady, NY by the late Ansel Sweet, P.E., LLS in 1951. Sweet also opened offices in Burlington, VT and Spartanburg, SC in the late ‘70s and soon became the third-largest Construction Management firm in the United States.”

Appellant also submitted the requested documents, including SBA Form 355 and its past three years of tax returns. With this, Appellant indicated that its tax returns and financial statements support its assertion Appellant is within the size limit as registered in SAM.gov.

On September 20, 2022, the Area Office made additional information requests of Appellant. Particularly, the Area Office asked Appellant (1) to identify Appellant's 80% owner of VMJR Family Partners LP and the remaining 20% owner; (2) any familial relationship between Victor Macri and Timothy Hughes; and tax returns from 2017 through 2021 for the following entities:

- a. VMJR Companies LLC
- b. VMJR Enterprises LLC
- c. VMJR Family Partners LP
- d. Overland Construction Group Inc.
- e. VMJR Properties
- f. VMJR Companies
- g. Adirondack Construction Corp.
- h. Adirondack Construction LLC
- i. Sweet Associates Inc.
- j. Sweet Constructors LLC
- k. Promatory Inc.

(E-mail from S. Liu to A. Weeden (Sep. 20, 2022).)

The Area Office gave Appellant until September 22, 2022, to submit the requested documentation. Further, Appellant was notified that if it failed to submit the requested information within the specified time, SBA might determine Appellant to be other than small.

On September 21, Appellant reported back to the Area Office and answered Question No. 1, that the 20% owner as of 1/1/2022 is Timothy Hughes, “which is part of the plan to eventually transition all the ownership to Tim.” Answering Question No. 2, Timothy Hughes and Victor Macri are not family. Answering Question No. 3, Appellant stated that it would request the tax returns dating back to 2017. Appellant explained:

However the tax returns for VMJR Companies LLC and VMJR Properties flow through family partners, and the tax returns for Adirondack Construction Corp., Adirondack Construction LLC., Sweet Associates Inc., Sweet Constructors LLC., and Promatory Inc. all flow through the Overland Construction Group Tax returns. Lastly, VMJR Companies is legally named VMJR Companies LLC, they are not different companies.

(E-mail from A. Weeden to S. Liu (Sep. 21, 2022).)

Appellant informed that it would upload the tax returns for VMJR Family partners, VMJR Enterprises, and Overland Construction Group directly to the drop box once received from its CPA. (*Id.*)

On September 22, 2022, the Area Office reminded Appellant that the requested information was due. On the same day, at 5:19 p.m., Appellant contacted the Area Office and indicated that the current ownership of Appellant is 80% to Victor Macri and 20% to Timothy Hughes as of January 1, 2022. Further, the year 2022 is the first year that a tax return will be filed by VMJR Companies directly, while in prior years, VMJR Companies and VMJR Properties filed their tax returns under VMJR Family Partners. For Adirondack Construction Corp., Adirondack Construction LLC., Sweet Associates Inc., Sweet Constructors LLC., and Promatory Inc., they do not have individual tax returns. All these companies flow through the Overland Construction Group Tax returns. Appellant stated that it will send the returns once received from its accountant. (Appeal Exh., at 32.)

In response to Appellant's email, at 7:08 p.m., the Area Office requested Appellant submit the tax returns by noon of the next day, September 23, 2022, or the Area Office would be forced to make a size determination, without the tax returns being factored into the determination.

D. Size Determination

On September 26, 2022, the Area Office issued Size Determination No. 01-SD-2022-22, concluding Appellant is not a small business. The Area Office explained that SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response to a solicitation which includes price. (Size Determination, at 4, citing 13 C.F.R. § 121.404 (a).)

Since Appellant submitted its written self-certification that it is a small business as part of its bid on September 6, 2022, the Area Office determined the size status of VMJR for this procurement as of September 6, 2022. Further, the average annual receipts of a concern and its affiliates are determined based on its most recently completed five fiscal years preceding the date of self-certification. (*Id.*, citing 13 C.F.R. § 121.104(c)(1).) A completed fiscal year means a taxable year including any short year, as defined by the Internal Revenue Service (IRS). (*See* 13 C.F.R. § 121.104(b).) Accordingly, the measuring period to determine the business size of Appellant for the referenced procurement was from fiscal years 2017 to 2021.

The Area Office found that Appellant was established in 2005 and it is majority owned by Mr. Victor Macri, Jr., Appellant's CEO and Chairman of, and that Mr. Macri had the power to control Appellant. Further, SBA Form 355 shows that Mr. Macri and VMJR Enterprise LLC jointly own VMJR Family Partners LP. VMJR Family Partners LP is the parent company of VMJR Properties, LLC, and Overland Construction Group Inc. In turn, Overland Construction Group Inc. is the parent company of Adirondack Construction Corp, Sweet Associates, Inc., Promatory, Inc., Adirondack Construction, LLC, and Sweet Constructors, LLC. (*Id.*, at 4-5.) In addition, Appellant's financial statements also identified Forest Enterprises, Inc. and Thatcherbrook Millwork, LLC, as related parties. (*Id.*, at 5.)

As a response to the protest, Appellant submitted 2021 Income Tax Returns for VMJR Family Partners, LP, 2021 Income Tax Returns for VMJR Enterprises, LLC, and VMJR's Financial Statements for December 31, 2018, through December 31, 2021. (*Id.*)

The Area Office noted that on September 20, 2022, the Office asked Appellant to provide tax returns from 2017 through 2021 for all the entities mentioned in the same email by September 22, 2022. On September 22, 2022, Appellant was reminded that the requested information was due. On the same day, Appellant responded to the Area Office's reminder email stating, ". . . VMJR Properties filed their tax returns under VMJR Family Partners. Adirondack Construction Corp., Adirondack Construction LLC., Sweet Associates Inc., Sweet Constructors LLC., and Promatory Inc. do not have individual tax returns. All of these companies flow through the Overland Construction Group Tax returns." (*Id.*) Apart from the email statement, Mr. Weeden did not provide any of the requested documents.

The Area Office further noted it gave Appellant an extension to submit the missing information by noon of September 23, 2022. However, Appellant did not submit the requested information by the set deadline. (*Id.*, at 5-6.)

Therefore, based on 13 C.F.R. §§ 121.1008(d) and 121.1009(d), the Area Office applied an adverse inference that the missing information would have shown that Appellant is not small. (*Id.* at 6.)

E. Appeal

On September 28, 2022, Appellant filed the instant appeal. Appellant maintains that the Area Office originally requested tax returns for the past three years, from 2019 to 2021, which were provided immediately through the SBA drop box portal. (*Appeal*, at 1.)

Appellant states that on September 20, 2022, at 5:23 p.m., it received a request from the Area Office for additional tax returns for the years 2017 through 2021, which Appellant did not have them readily available. On the next day, Appellant requested the tax returns for VMJR Family Partners, Overland Construction Group, VMJR Enterprises, and Forest Enterprises Management Inc., from its CPA. However, Appellant was given two business days to provide the additional information and was at the mercy of the accounting firm's response time. Further, in an email correspondence with the Area Office, Appellant informed the additional tax returns were requested from its CPA and they would be provided once received. (*Id.*)

On September 22, 2022, Appellant again requested these tax return documents from its CPA. At 7:08 p.m., Appellant received the Area Office's e-mail, demanding the tax returns by noon of the next day, September 23, 2022, or the Area Office would be forced to make a size determination, without the tax returns being factored into the determination. (*Id.*) Here, Appellant claims, the four business hours given to Appellant to respond to such a demand were unreasonable and inadequate. This ultimately led to the Area Office issuing an adverse size determination without the tax returns.

Appellant explains that its Vice President, Mr. Weeden, had very limited access to his email on Friday, September 23, 2022, as he was working out of the office, and did not see the Area Office's extension email until the morning of Monday, September 26, 2022, at which time, Appellant had received and forwarded the requested tax returns. However, the size determination had already been made and Appellant had received it earlier on that day. (*Id.*, at 1-2.)

In addressing the merits of its size, Appellant submits its tax returns from 2017 through 2021, and states that the combined income of Appellant and all affiliated entities is under the \$39.5 million threshold. Appellant reiterates the statement made to the Area Office, that the entities, Adirondack Construction Corp., Adirondack Construction LLC., Sweet Associates Inc., Sweet Constructors LLC., and Promatory Inc. do not have individual tax returns, and they flow through the Overland Construction Group Tax returns. (*Id.*, at 2.) Further, VMJR Companies LLC and VMJR Properties did not file individual tax returns, because these entities flow through VMJR Family Partners' tax returns. (*Id.*)

Finally, Appellant states that, had Appellant been given more than two business days to provide the additional tax returns as requested, the Area Office would have found Appellant small for this procurement. (*Id.*)

III. 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 that the size determination is based upon a clear error 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

This appeal is without merit. The Area Office correctly characterized the proper period of measurement for computing Appellant's receipts is from 2017 through 2021, which are “the most recently completed five fiscal years” immediately preceding September 6, 2022, the date of Appellant's self-certification. 13 C.F.R. § 121.104(c)(1). On September 20, 2022, the Area Office requested that Appellant submit these five-year tax returns and Appellant failed to submit them, thereby prompting the Area Office to draw an adverse inference that the missing information would have shown that Appellant is not small.

As part of the size determination, the regulations at 13 C.F.R. § 121.1008(d) provide that:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing

information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

Further, when reviewing the weight of the evidence, 13 C.F.R. § 121.1009(d) states:

SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

Here, the Area Office determined that Appellant is not small on the basis of drawing an adverse inference after failing to receive Appellant's tax returns within the required time, as permitted by 13 C.F.R. §§ 121.1008(d) and 121.1009(d). OHA has articulated a test for when an adverse inference may be drawn by an Area Office when making a size determination:

The three-part test requires, first, that the requested information be relevant. In other words, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the challenged firm and the concern about which the information is requested. Finally, the request for information must be specific. If all of these criteria are met, the challenged firm or the alleged affiliate must produce the information requested by the Area Office.

Size Appeal of USA Jet Airlines, Inc., SBA No. SIZ-4919, at 12 (2008), citing *Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255, at 7 (1997).

In this case, I find that all three elements of that test are met here when (1) the requested information, i.e., tax returns, was vital to the size determination and was critical for calculating Appellant's size; (2) the information was Appellant's own tax returns and at Appellant's disposal; and (3) the Area Office's communication to Appellant was clear and understandable. *USA Jet Airlines, Inc.*, *supra*, at 12.

During the Area Office's investigation into Appellant's size, Appellant conceded that even after receipt of the Area Office's email reminder and extension to submit the missing documents by noon of September 23, 2022, it was Appellant who failed to check this email on September 23, 2022 and failed to request an extension of time to submit them before or thereafter. Section II. E, *supra*. Certainly, Appellant was at least aware that the missing information was due on September 22, 2022, and failure to submit them could result in an adverse finding. Yet, Appellant failed to submit them. *Id.* Appellant's neglect in monitoring its own email communications does not excuse him for failing to provide the requested information, nor can it be said to be the source of error on the part of the Area Office. *Size Appeal of OxyHeal Medical Systems, Inc.*, SBA No. SIZ-5707 (2016); *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016).

While Appellant argues that the deadline to respond to such a demand was unreasonable and inadequate, and the untimely submission was due to the accountant's delay, I cannot find the Area Office committed error, when the Area Office communicated to Appellant the information sought, the deadline to submit them, and the consequences when failing to do so. As the regulations require the Area Office to issue a formal size determination within 15 business days after receipt of a protest, if possible, I cannot find that the Area Office was acting capriciously or unreasonably. 13 C.F.R. § 121.1009(a)(1). The five-year tax returns were clearly relevant to determine Appellant's size. It was Appellant's failure to timely file the missing documents and to seek an extension of time with the Area Office.

Under these circumstances, the adverse inference was proper. *E.g.*, *Size Appeal of Macro-Z Technology Company*, SBA No. SIZ-5361, at 6 (2012). This inference led to its determination Appellant was other than small. I conclude I must affirm this size determination.

IV. Conclusion

Appellant has shown no error in the size determination. As a result, 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).

CHRISTOPHER HOLLEMAN
Administrative Judge