United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
The H. L. Turner Group, Inc.	SBA No. SIZ-4896
Appellant	Decided: February 12, 2008
Appealed from Size Determination No. 1-SD-2007-54	

APPEARANCE

Harold Turner, Jr., P.E., President and Chief Executive Officer, The H.L. Turner Group, Inc., Concord, New Hampshire, for Appellant.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Solicitation and Protest

On May 31, 2007, the U.S. Department of Labor (DOL), Washington D.C., issued Solicitation No. DOL079RP20383, for Architectural and Engineering Services for the New Hampshire Jobs Corps Center. The Contracting Officer (CO) issued the solicitation as a 100% small business set-aside and designated North American Industry Classification System (NAICS) code 541310 with a corresponding $4.5 million annual receipts size standard.

On September 10, 2007, all offerors received notification that the H. L. Turner Group, Inc. (Appellant) was the apparent successful offeror.

On September 13, 2007, BBIX, LLC, an unsuccessful offeror, filed a size protest with the CO. BBIX alleged Appellant exceeded the applicable size standard based on Appellant's small business representation in its Central Contractor's Registration.

B. The Size Determination

On October 15, 2007, in response to BBIX's size protest the Small Business Administration (SBA), Office of Government Contracting, Area I, in Melville, New York (Area Office) issued Size Determination No. 1-SD-2007-54 (size determination) finding Appellant to be other than small under the relevant size standard.

The Area Office reviewed information submitted by Appellant in response to the size protest. Based on the information collected, the Area Office found Appellant affiliated with Turner Building Science & Design, LLC (TBS), the H.L. Turner Group Environmental Consultants, LLC (TEC), Quantum Construction Consultants, LLC (QCC), Turner Group Design-CT, LLC (TGD), Advantage Classrooms, Inc. (ACI), 3-Clicks Software, LLC (3CS), Advantage High Performance Systems, LLC (AHP), the H.L. Turner Group Properties, LLC (TP), C3 Supply, LLC (C3), Advantage Branch & Office Systems, LLC (ABO), and Air Diagnostics & Engineering, Inc. (ADE).

The Area Office found ACI and TGD are affiliated with Appellant under the majority ownership rule in 13 C.F.R. § 121.103(c)(1). The Area Office also relied on 13 C.F.R. § 121.103(c)(1) to find Appellant's ownership of 49% blocks of voting stock in TBS, TEC, and QCC amounted to affiliation because Appellant's ownership was large in comparison to the next largest block of voting stock in each company, 13.5%, 41%, and 36% respectively. Due to Mr. Harold Turner's majority ownership of Appellant and his interest in 3CS, C3, AHP, TP, and ABO, the Area Office found all those companies affiliated with each other based on common ownership. Moreover, the Area Office determined based on various common investments Mr. Harold Turner shared an identity of interest with Mr. William Turner, Mr. Gerard Blanchette, Mr. Joseph M. Ducharme, Jr., Mr. James A. Bouchard, Mr. David Hart, and Mrs. Laura Turner resulting in affiliation among Appellant and TBS, TEC, QCC, TGD, ACI, 3CS, AHP, TP, C3, ABO, and ADE.

The Area Office noted TBS, TEC, and QCC subcontracted significant amounts of their work to Appellant. The Area Office stated for fiscal years 2004, 2005, and 2006, TBS subcontracted approximately 91%, 81%, and 84%, respectively, of its revenue to Appellant. The Area Office stated TEC subcontracted 83%, 61%, and 50% of its revenue to Appellant during the same time period and QCC subcontracted 80%, 57%, and 52% of its revenue to Appellant. Thus, the Area Office determined TBS, TEC, and QCC are affiliated with Appellant based on the totality of the circumstances, 13 C.F.R. § 121.103(a)(5), and identity of interests, 13 C.F.R. § 121.103(f).

Additionally, the Area Office determined ADE is an affiliate of Appellant based on common ownership and management. The Area Office noted ADE is owned by Appellant's owner's brother, Mr. William Turner. The Area Office also stated that Mr. William Turner serves as Appellant's vice president and serves as president and chief executive officer of TBS.

The Area Office found Appellant exceeded the relevant $4.5 size standard after calculating the average annual receipts for Appellant and its affiliates: TBS, TEC, QCC, TGD, ACI, 3CS, AHP, TP, C3, ABO, and ADE.

C. The Appeal

On November 2, 2007, Appellant filed an appeal of the size determination. Appellant asserts the SBA size determination is contrary to the facts in the record. Appellant states the SBA made factual errors about annual revenues, subcontracted work, common investments, and affiliated interests. Appellant asserts its average annual income, including affiliate income, is $4,212,676 and therefore Appellant is a small business under the $4.5 million size standard.

Appellant asserts SBA made two errors with regards to annual income. Appellant argues SBA erroneously included $2,933 of income from CSP without finding CSP is an affiliate of Appellant. Appellant also states SBA erroneously included $30,284 of Appellant's income from after tax profits, income which was already included by SBA in the affiliate revenues.

Appellant states SBA improperly calculated that TEC and QCC subcontracted significant amounts of work to Appellant. Appellate states, despite SBA's determination that a significant amount of TEC and QCC revenues were subcontracted back to Appellant, only 3.07% and 3.27%, respectively, was contracted back to Appellant. Appellant concludes this is insignificant amounts of work.

Appellant argues SBA made errors with regards to common investments. Appellant includes a "Corrected Table" of common investments to correct the errors included in the SBA's determination. Appellant acknowledges Mr. Harold Turner, Mr. William Turner, and Mr. Blanchette share ownership of Appellant, 3CS, and AHP, and as Appellant share ownership of ACI and interest with others in TGD, TBS, and TEC. Appellant provides no indication of investment in QCC in its "Corrected Table."

Moreover, Appellant states SBA improperly included QCC as an affiliate. Appellant asserts QCC was certified a Disadvantaged Business Enterprise (DBE) by the New Hampshire Department of Transportation. Appellant states SBA did not even acknowledge QCC's DBE status. Appellant asserts when QCC's income, $264,855, is removed from the calculation, the resulting total revenue amount attributed to Appellant is $4,490,920.

Finally, Appellant argues TEC is not affiliated with Appellant. Appellant states it provided SBA with information to rebut the regulatory presumption of control in 13 C.F.R. § 121.103(c)(2). Appellant asserts it demonstrated TEC functions independently and without control from Appellant by providing SBA with a letter from TEC, a copy of the minutes of the annual meeting of the members, a certificate from the Board of Professional Engineers, and a

letter from New Hampshire Department of Environmental Services stating TEC is prequalified as a consulting engineer. Appellant states SBA erred in relying on 13 C.F.R. § 121.103(c)(2) to classify TEC as an affiliate of Appellant. Appellant asserts TEC's revenue, $278,244, should be removed from the total revenue for Appellant. Appellant asserts, with the aforementioned corrections, revenue for Appellant and its affiliates is $4,212,676, and is below the $4.5 million size standard.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the area office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). The Office of Hearings and Appeals (OHA) will disturb the area office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction 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).

C. The Merits

Both SBA and Appellant agree that by itself Appellant's annual receipts are below the applicable size standard. However, SBA and Appellant disagree on what companies should be included as affiliates of Appellant. In accordance with 13 C.F.R. § 121.104, the size of a business is determined by adding the average annual receipts of the business concern with the average annual receipts of each affiliate. Appellant disputes SBA's finding of affiliation with TEC and QCC based on: stock ownership, 13 C.F.R. § 121.103(c)(1); identity of interest, 13 C.F.R. § 121.103(f); and totality of the circumstances, 13 C.F.R. § 121.103(a)(5). Appellant argues TEC and QCC are not affiliates of Appellant and their annual receipts should not be considered in calculating Appellant's size. Appellant also argues SBA erred by including CSP's annual receipts in Appellant's size determination and SBA double counted $30,284 of Appellant's income from after tax profits, which was already included by SBA in the affiliate revenues.

1. Affiliation Based on Stock Ownership

SBA predicates its affiliation regulations upon the power of one concern to control another. 13 C.F.R. § 121.103(a). Affiliation exists if one concern owns or controls, or has the power to control, 50% or more of another concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock. 13 C.F.R. § 121.103(c)(1). Thus, a shareholder with a minority interest may have the power to control a concern through

stock ownership if its block of voting stock is large compared to other outstanding blocks of stock.

Neither the regulation nor OHA case law define how much larger a minority interest must be "compared to other outstanding blocks of voting stock" in order to be found to control or have the power to control the concern under 13 C.F.R. § 121.103(c)(1). OHA has held that a block of stock representing 45% of a company's ownership was large when the next largest block represented 30%, *see Size Appeal of Asphalt Products Corp.*, SBA No. SIZ-2589 (1987); *Size Appeal of Lebanon Foundry & Machine Company*, SBA No. SIZ-2433 (1986); as well as held that a block of stock representing a 46.67% interest was large as compared to a block representing 33.333%. *Size Appeal of U.S. Grounds Maintenance, Inc.*, SBA No. SIZ-4601, at 3, 10 (2003). Because there is not a bright line test of what constitutes a large block of voting stock compared to other outstanding blocks of stock, OHA's decisions are guided by the idea that the largest block of stock be substantially larger than the next largest block of stock in order to be found controlling.

Here, Appellant owns 49% of TEC and QCC. The next largest blocks of stock in TEC is 41% and the next largest block of stock in QCC is 36%. I agree with the Area Office that Appellant's 49% interest in QCC represents a block of stock which is substantially larger than the next largest block of 36%. Therefore, Appellant has the power to control QCC and Appellant is affiliated with QCC based on stock ownership. However, I am reluctant to find Appellant's 49% block of stock is large as compared to the next largest block of stock in TEC of 41%. OHA's precedents have found that a block of stock is large as compared to all others when there was a more substantial difference between the shares than merely 8%. It is not enough that there is a difference in size between two blocks of stock. The difference must be sufficiently large to indicate that the larger block can exercise some dominance over the affairs of the firm. A difference in size of only 8% between the largest and the next largest block of stock, when no one block represents a majority interest, is simply not large enough to enable the holder of the larger block to dominate the affairs of the firm. Thus, I find the Area Office erred in concluding Appellant is affiliated with TEC based on stock ownership.

2. Identity of Interests

Concerns and individuals are affiliated if they have an identity of interest. 13 C.F.R. § 121.103(f). A variety of situations can create an identity of interest, amounting to affiliation. *Id.* Identity of interest may be found among those who have common investments in more than one concern. *Size Appeal of Agrigold Juice Products*, SBA No. SIZ-4136 (1996). In such situations, the common business interests cause the parties to act in unison for their common benefit, and they may be treated as one party. *Id.* at 10. An identity of interest may be found among family members with common investments. *Id.* Appellant bears the burden of rebutting the presumption of identity of interest both among persons with common investments in multiple firms, and among family members. *Id.* Appellant also bears the burden of rebutting the presumption that these persons should be treated as one party. *Id.*

In this case, the Area Office determined an identity of interest exists between Mr. Harold Turner, Mr. William Turner, Mr. Blanchette, Mr. Ducharme, and Mr. Bouchard. These

individuals have a number of common investments. SBA determined Mr. Harold Turner, Mr. William Turner, and Mr. Blanchette share investments in nine businesses (Appellant, QCC, ACI, 3CS, AHP, TBS, TGD, TEC, and CSP) with Mr. Ducharme, and Mr. Bouchard also invested in two of those nine businesses (TEC and CSP).

Appellant disputes SBA's conclusions on common ownership. Appellant states SBA made factual errors in listing common investments and presents a "Corrected Table" of investments. However, Appellant's table also demonstrates numerous common investments among these individuals. Appellant's table does not include investment in QCC, but the Record and Appellant's SBA Form 355 support SBA's assertion that Appellant (Mr. Harold Turner, Mr. William Turner, and Mr. Blanchette) owns 49% of QCC. Appellant's table does indicate common investments between the individuals in Appellant, 3CS, AHP, ACI, TBS, TGD, TEC, and CSP. Moreover, Appellant presents no evidence to demonstrate a clear line of fracture exists among the individuals. Appellant fails to meet its burden of rebutting the presumption that an identity of interest exists between the individuals and therefore they may be treated as one entity. *See Size Appeal Priority One Services, Inc*., SBA No. SIZ-4479 (2002). Thus, the numerous common investments establish "a relationship that bespeaks a concert of purpose and effort" which supports the Area Office's finding of an identity of interest among the shareholders. *Size Appeal of Bend Research, Inc.*, SBA No. SIZ-4369, at 7 (1999).

3. Totality of the Circumstances

Totality of the circumstances, 13 C.F.R. § 121.103(a)(5), provides an independent basis for an area office to determine affiliation. As explained in *Size Appeal of Lance Bailey & Associates*, SBA No. SIZ-4817, at 13-15 (2006), the specific independent bases of affiliation, *i.e.*, those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h) can form a non-exclusive basis or "nucleus" of a finding of affiliation through the totality of the circumstances. Thus, while the evidence in the record may not establish affiliation under one of the specific factors enumerated in 13 C.F.R. § 121.103, an area office's review of the totality of the circumstances may lead the area office to find one concern has the power to control another and result in a determination of affiliation. An area office may aggregate facts that it found support one or more of the independent factors and conclude, on a separate basis, affiliation based on totality of the circumstances is warranted.

Here, in addition to stock ownership and identity of interest, Appellant is responsible for QCC's payroll and benefits. Appellant also shares administrative and finance staff with QCC, as well as rents QCC office space. SBA and Appellant dispute the amount of work TEC and QCC subcontracted to Appellant during the past three years, but Appellant does not deny a continuous contractual relationship among the businesses. Nevertheless, it is unnecessary for me to rule on the Area Office's determination of affiliation with TEC and QCC based on totality of the circumstances because, as discussed above, the businesses are clearly affiliated based on identity of interest.

4. CSP Annual Receipts and Income from After Tax Profits

Appellant argues SBA erred by including $2,933 of CSP's annual receipts in Appellant's size determination. The SBA determined CSP was not an affiliate of Appellant. Moreover, SBA noted that Appellant is other than small whether or not CSP is considered affiliated with Appellant and CSP's annual receipts are irrelevant to Appellant's size. Appellant also asserts SBA erroneously included $30,284 of Appellant's income from after tax profits that was already accounted for by SBA in the affiliate revenues. Since the exclusion of both these amounts, $2,933 and $30,284, will not impact Appellant's size for the purposes of this size standard, it is unnecessary to analyze these argument.

V. Conclusion

Appellant, who has the burden of proving by a preponderance of the evidence error in the Area Office's determination, has failed to make the requisite showing. 13 C.F.R. § 134.314. The Area Office determined TEC and QCC are affiliated with Appellant based on stock ownership, 13 C.F.R. § 121.103(c)(1); identity of interest, 13 C.F.R. § 121.103(f); and totality of the circumstances, 13 C.F.R. § 121.103(a)(5). Although I am unwilling to accept the Area Office's determination that TEC is affiliated based on stock ownership, the Record supports the Area Office's conclusions regarding affiliation with TEC and QCC based on identity of interest. Since one basis is sufficient to establish affiliation, finding affiliation based on stock ownership or totality of the circumstances is unwarranted.

For the above reasons, I DENY the instant 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(b).

CHRISTOPHER HOLLEMAN
Administrative Judge