

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

SIZE APPEAL OF:

J.W. Mills Management

Appellant

Appealed from  
Size Determination No. 6-2008-032

SBA No. SIZ-4909

Decided: March 4, 2008

APPEARANCE

Jerrad Mills, President, J.W. Mills Management, Los Angeles, California, for Appellant.

DECISION AND REMAND ORDER

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a January 16, 2008 size determination (Case No. 6-2008-032) (size determination) finding J.W. Mills Management (Appellant) to be an other than small business. The size determination arose from a December 17, 2007 protest filed by Superior Services, Inc., (Superior), which protested both Appellant's size and eligibility under the U.S. Small Business Administration's (SBA) HUBZone Program to submit an offer under RFP N00244-07-R-0078 (RFP).<sup>1</sup>

SBA's Office of Hearings and Appeals (OHA) has jurisdiction to decide 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.

II. Issue

Whether the Area Office's determination that Appellant is other than small because of the application of the newly organized concern rule (13 C.F.R. § 121.103(g)) was based on clear

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<sup>1</sup> On December 31, 2007, the SBA Director of the HUBZone Program dismissed the HUBZone protest for lack of specificity. The HUBZone challenge is not part of this appeal.

error of fact or law. *See* 13 C.F.R. § 134.314.

### III. Background

#### A. Findings of Fact

1. On August 6, 2007, the Department of the Navy, Fleet and Industrial Supply Center, Seal Beach, California (Navy) issued the RFP for an offeror to provide mess attendant services for Lemoore Naval Air Station. The Contracting Officer (CO) set the procurement totally aside for HUBZone small business concerns (FAR 52.219-3).

2. The CO designated North American Industry Classification System (NAICS) code 722310, Food Service Contractors, as the applicable NAICS code for this procurement, with a corresponding \$19 million annual receipts size standard. Final proposal revisions were due September 17, 2007. On August 29, 2007, Appellant submitted its proposal.

3. On December 17, 2007, the CO notified unsuccessful offerors that the apparent successful offeror was Appellant. On December 17, 2007, Superior, an unsuccessful offeror, protested Appellant's size with the CO.

4. Superior's protest alleged that Appellant may be affiliated with Avery Group, Inc. (AG), Severson Group, LLC (SG), and Blackstone Consulting, Inc. (BCI), causing Appellant to exceed the size standard.

5. On December 20, 2007, the CO referred the size protest to the Small Business Administration's (SBA) Office of Government Contracting, Area VI, in San Francisco, California (Area Office), for a size determination.

6. On December 26, 2007, the Area Office notified Appellant of the protest and requested certain information. Between January 2 and January 15, 2008, Appellant responded to the protest and supplied the requested information, including its SBA Form 355, Appellant's president's resume, and BCI's tax returns.

7. Appellant's response denied affiliation with any company. Appellant stated that since 2004, Jerrad Mills has been Appellant's president. Appellant asserted that Mr. Mills had previously been employed at BCI as an Operations Manager from 2001 to 2004. Appellant stated Mr. Mills' duties at BCI ranged from project management to leading the Information Technology (IT) efforts. Appellant stated Mr. Mills was not an officer, director, stockholder, or key employee at BCI.

8. Evidence in the Record establishes that:

a. BCI listed Mr. Mills as an alternate point of contact on its Central Contractor Registration (CCR) Profile;

b. As of May 3, 2007, BCI's website stated:

Blackstone Consulting, Inc. (BCI) *has entered mutually supportive partnerships with three companies owned by BCI employees.* Under the terms of the partnership, BCI will provide fee-based administrative and management support to each of the companies on contracts they receive. This arrangement relieves them of the need to incur the costs of staffing administrative and management functions when the companies are not actively working on a contract. The Companies are:

- Avery Group, Inc.
- The Severson Group, LLC
- *J.W. Mills Management*

(emphasis added);

c. Appellant certified it received the following gross sales between 2004 and 2006:

2006	0.00
2005	55,839.32
2004	0.00

; and

d. Appellant's proposal emphasized the JWM/BCI team as the basis of its qualifications to perform the work required by the RFP, *e.g.*, Appellant usually refers to Appellant and BCI's joint accomplishment of contract tasks. In addition, Appellant's proposal provided a corporate organization chart that indicates Appellant's only employee is Mr. Mills. Finally, Appellant's proposal identified current BCI employees as the On-Site Manager and Assistant/Quality Control Manager for the work required by the RFP and identified both positions as key positions.

#### B. The Size Determination

On January 16, 2008, the Area Office issued Size Determination No. 6-2008-032 (size determination), finding Appellant other than small due to its affiliation with BCI, a large concern. The Area Office found Appellant affiliated with BCI, Appellant's subcontractor in its proposal, under the newly organized concern rule at 13 C.F.R. § 121.103(g).

First, the Area Office noted (1) Appellant is a newly organized concern in the same line of business as BCI (food and janitorial services); (2) Appellant's sole officer and owner is Mr. Mills, a former BCI employee; and (3) Appellant has no employees.

Next, the Area Office found Mr. Mills (Appellant's President) was a key employee at BCI in his position as Operations Manager from April 2001 to June 2004. The Area Office found Mr. Mills "had a critical influence in or substantive control over the operations of [BCI]" based on Mr. Mills' responsibilities at BCI, including managing food service contracts and leading the IT department. Further, the Area Office found BCI's CCR profile, dated January 14, 2008, listed Mr. Mills as the Government Business Alternate Point of Contact.

The Area Office then concluded there was no clear line of fracture between Appellant and BCI based on the following provisions in their subcontracting agreement: (1) "[Appellant] brings strong oversight skills to this contract through its President, Jerrad Mills along with BCI's experience as a food service and mess attendant contractor with the DOD"; (2) "[Appellant] will have Mr. Jerrad Mills, President, serve as Project Director and BCI will have a senior member of the BCI team as consultant during the term of the agreement"; (3) "necessary capital and operating support shall be coordinated with BCI"; and (4) "working capital for the performance of the contract is anticipated to be provided by BCI."

In addition, the Area Office found BCI would be primarily responsible for providing working capital, consulting on day-to-day management, payroll processing, and internal accounting.

Accordingly, the Area Office found Appellant affiliated with its large subcontractor, BCI, under the newly organized concern rule. 13 C.F.R. § 121.103(g). Thus, Appellant was found other than small for the instant procurement and the Area Office found it unnecessary to consider the protestor's other allegations of affiliation.

### C. The Appeal

On January 23, 2008, Appellant filed the instant appeal. Appellant asserts that Mr. Mills worked at BCI over three years ago, and therefore does not have any critical influence in or substantive control over the operations of BCI. Appellant claims BCI had fourteen contracts during Mr. Mills' employment and Mr. Mills only oversaw two contracts. Further, Mr. Mills did not participate in financial discussions while an employee at BCI. With regard to Mr. Mills being listed as BCI's point of contact on its CCR profile, Appellant asserts it was a clerical error that is being corrected.

Appellant concedes Mr. Mills started a food and janitorial service business after learning about the business at BCI. However, Appellant asserts it should not be penalized for attempting to learn about a business before starting its own. Appellant then asserts that its subcontracting agreement was found acceptable by the CO and did not consist of an absolute commitment by either Appellant or BCI. Appellant then reiterates that it is not affiliated with BCI and has no influence over BCI's business.

#### IV. Discussion

##### A. Timeliness

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

##### B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006). Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

##### C. Affiliation under the Newly Organized Concern Rule

Under the newly organized concern rule, firms are affiliated when former officers, directors, principal stockholders, or key employees of one firm organize a new firm in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(g). To rebut affiliation, a challenged firm must demonstrate a "clear line of fracture" between itself and the large firm. *Id.*

The purpose of the rule is to prevent circumvention of the size standards by the creation of "spin-off" firms that appear to be small, independent firms but are, in fact, affiliates or extensions of large firms. *See Size Appeal of Field Support Services, Inc.*, SBA No. SIZ-4176 (1996).

The first question in applying the newly organized concern rule is whether the challenged firm was formed by shareholders, officers, or key employees of the large firm. If so, the next question is whether the older firm is providing the new firm with the types of assistance and resources delineated in the regulation, or whether a clear fracture has occurred that establishes the true independence of the newer firm. If the challenged firm was not formed by shareholders, officers, or key employees of the large firm, it is unnecessary to examine the other requirements of 13 C.F.R. § 121.103(g).

The first question is whether Appellant was formed by shareholders, officers, or key employees of BCI, the large firm. Appellant was formed by Mr. Mills, Appellant's only employee. Mr. Mills was neither a shareholder nor an officer at BCI. However, the Area Office found Mr. Mills was a key employee of BCI based on Mr. Mills' position as Operations Manager for BCI and leader of BCI's Information Technology Department. The Area Office noted Mr.

Mills was listed as BCI's point of contact, managed several BCI contracts, and reported to project managers. However, the size determination contains no discussion of how Mr. Mills exerted critical influence in or substantive control over the operations or management of BCI.

Appellant disputes he was a key employee of BCI. Appellant argues that since Mr. Mills was only responsible for supervising work that amounted to four percent of BCI's revenue or two of its fourteen contracts, he could not be a "key employee." The Record also establishes that other than bearing the unexplained title of "Operations Manager" and being listed as a point of contact, Mr. Mills: (1) Held no executive position at BCI; (2) Was not an officer of BCI; (3) Had no ownership stake in BCI; and (4) Worked for BCI for approximately three years.

I do not accept a strict quantitative limit on what makes an employee key, *i.e.*, how much of a concern's business a person can exert critical influence over before being found to be a key employee. However, I do find that Mr. Mills' supervision of only four percent of BCI's business is not sufficient to make Mr. Mills, a non-equity, non-executive, and non-officer of BCI, a key employee of BCI. Therefore, because the Area Office did not explain how Mr. Mills exerted critical influence over BCI's operations or management and there is no evidence indicating Mr. Mills played a significant role at BCI, I find the Area Office committed a clear error when it found Mr. Mills was a key employee of BCI and thus Appellant violated the newly organized concern rule.

Accordingly, I REVERSE the Area Office size determination finding Appellant affiliated with BCI under the newly organized concern rule.

#### V. Remand Instructions

I note the Area Office failed to discuss other affiliation grounds in favor of discussing the newly organized concern rule. Specifically, the Area Office failed to discuss whether Appellant violated the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)) and/or the totality of the circumstances rule (13 C.F.R. § 121.103(a)(5)), despite strong evidence in the Record.

Therefore, I REMAND this size determination and ORDER the Area Office to conduct a new size determination analyzing whether Appellant and BCI are affiliated under 13 C.F.R. § 121.103(a)(5), (h)(4). In so doing, I direct the Area Office to analyze whether BCI has the power to control Appellant. I further direct the Area Office to consider all aspects of the relationship between Appellant and BCI when applying 13 C.F.R. § 121.103(h)(4), including: (1) whether Appellant is unusually reliant upon BCI; and (2) whether BCI would perform primary and vital contract requirements. I note that if the Area Office finds either Appellant is unusually reliant upon BCI or that BCI is to perform primary and vital contract requirements, the Area Office must find a violation of 13 C.F.R. § 121.103(h)(4).

VI. Conclusion

Accordingly, the Area Office's size determination is REVERSED and REMANDED for action consistent with this Remand Order.

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THOMAS B. PENDER  
Administrative Judge