United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
DMS Facility Services, LLC	SBA No. SIZ-4913
Appellant	Decided: March 12, 2008
Appealed from Size Determination No. 6-2008-041	

APPEARANCE

Jeff Magann, Vice President, DMS Facility Services, LLC, Santa Ana, California, for Appellant.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a February 5, 2008 size determination (Case No. 6-2008-041) finding DMS Facility Services, LLC to be an other than small business for a $32.5 million size standard. The size determination arose from a December 21, 2007 protest filed by Raven Services Corporation.

The Small Business Administration (SBA) 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 affiliation with another concern under 13 C.F.R. § 121.103(c)(1) was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Findings of Fact

1. On May 21, 2007, the Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C. (Treasury) issued Request for Proposals No. BEP-07-0030 (RFP) for an offeror to provide operations and maintenance services at a Bureau of Engraving and Printing facility in Ft. Worth, Texas.

2. The Contracting Officer (CO) set the procurement totally aside for small businesses and designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, as the applicable NAICS code for this procurement, with a corresponding $32.5 million annual receipts size standard. Final proposal revisions were due November 21, 2007. On December 11, 2007, Treasury awarded the contract to DMS Facility Services, LLC (Appellant).

3. On December 14, 2007, the CO notified unsuccessful offerors that the apparent successful offeror was Appellant. On December 21, 2007, Raven Services Corporation (Raven), an unsuccessful offeror, protested Appellant's size with the CO.

4. Raven's protest alleged Appellant may be affiliated with DMS Window Cleaning and Metal Care Services, Inc. (DMS Window) and Diversified Maintenance Services, Inc. (Diversified)[1], causing Appellant to exceed the size standard.

5. On January 18, 2008, the CO referred the size protest to the SBA Office of Government Contracting, Area VI, in San Francisco, California (Area Office), for a size determination.

6. On January 18, 2008, the Area Office notified Appellant of the protest and requested certain information. On January 25, 2008, Appellant supplied the information[2] and filed its Response. Appellant asserted that it is a separate entity from DMS Window and Diversified with separate financial accounts, boards of directors, and management directives. Appellant asserted its Operating Agreement, Section 3.9, "clearly establishes a limit of control for the manager of [Appellant] by virtue of the fact that that position must have unanimous agreement from all investor members for any major operational, financial decisions or commitments." Response, at 2.

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[1] On July 24, 2007, Diversified Maintenance Services, Inc. changed its name to DMS Facility Services, Inc. However, this decision will refer to the company as Diversified to avoid confusion with Appellant, DMS Facility Services, LLC.

[2] Appellant submitted pertinent federal tax returns, a completed SBA Form 355, Appellant's Operating Agreement, Diversified's Articles of Incorporation and Bylaws, and other documents, as requested by the Area Office.

B. The Size Determination

On February 5, 2008, the Area Office issued Size Determination No. 6-2008-041 (size determination), finding Appellant affiliated with Diversified under the majority ownership rule in 13 C.F.R. § 121.103(c)(1).

Specifically, the Area Office found Richard Dotts owns a majority interest (more than 50 percent) in both Appellant and Diversified. Accordingly, Mr. Dotts has the power to control both concerns under 13 C.F.R. § 121.103(c)(1) and Appellant and Diversified are affiliated under 13 C.F.R. § 121.103(a)(1). The Area Office then found Appellant exceeded the applicable $32.5 million size standard after calculating the combined average annual receipts for Appellant and Diversified for fiscal years 2004, 2005, and 2006.[3]

C. The Appeal

On February 20, 2008, Appellant filed the instant appeal at OHA. Appellant does not dispute Mr. Dotts' more than 51 percent ownership in both Appellant and Diversified. Appellant does, however, "disagree with the interpretation that this [Mr. Dotts' level of ownership] constitutes control of [Appellant] by [Diversified]." Appeal, at 2. Appellant maintains that it and Diversified are legally and operationally separate entities.

Appellant asserts that it is not controlled by Diversified nor does it receive assistance from Diversified. Further, Appellant contends that "[c]ontrol is not exercised between the companies, nor does the potential for control offer any benefit as they have separate business missions and markets."

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.

[3] Appellant self-certified as a small business on July 9, 2007, and its fiscal year ends on December 31. Accordingly, the Area Office used Appellant's and Diversified's tax returns for fiscal years 2004, 2005, and 2006. 13 C.F.R. § 121.104(a)(1), (c)(1).

C. The Merits

Appellant does not dispute that Mr. Dotts owns more than 50 percent of both Appellant and Diversified. Appellant does "disagree with the *interpretation* that this [Mr. Dotts' level of ownership] constitutes control of [Appellant] by [Diversified]." Appeal, at 2 (emphasis added). However, the Area Office did not interpret the regulations to find that an individual with majority ownership in two concerns has the power to control the two concerns and, as such, the concerns are affiliates. Rather, the Area Office strictly followed clear regulatory guidance on this issue.

SBA regulations provide that a person who owns 50 percent or more of a concern's voting stock controls or has the power to control the concern. 13 C.F.R. § 121.103(c)(1). Mr. Dotts owns 87.77 percent of Diversified's voting stock, an amount greater than 50 percent. Thus, Mr. Dotts has the power to control Diversified under 13 C.F.R. § 121.103(c)(1).

Appellant is a limited liability company (LLC). Mr. Dotts is a Class A Member of Appellant with a 69.68 percent ownership interest in Appellant. Appellant's Operating Agreement, Section 8.2, provides that each Class A Member shall have the right to vote in proportion to the Member's Percentage Interest and Class B Members shall have no right to vote.[4] As the holder of 69.68 percent Class A voting interest, Mr. Dotts has the clear majority of the vote and, as such, controls or has the power to control Appellant under 13 C.F.R. § 121.103(c)(1).

Appellant's response to the protest stated that its Operating Agreement, Section 3.9, "clearly establishes a limit of control for the manager of [Appellant] by virtue of the fact that that position must have unanimous agreement from all investor members for any major operational, financial decisions or commitments." Response, at 2. The regulation does not distinguish between controlling the voting stock for major actions or ordinary business. 13 C.F.R. § 121.103(c)(1). Regardless, Appellant's Operating Agreement, Section 3.9, provides that the manager may not take major actions without the regular vote of the members. Section 2.30 of the Operating Agreement defines "regular vote" as "the vote of a majority in interest of the members," not, as Appellant alleges, as unanimous agreement from all investor members. Accordingly, as a Class A Member with a 69.68 percent voting interest, Mr. Dotts also has the power to control major actions taken by Appellant under 13 C.F.R. § 121.103(c)(1).

SBA regulations provide that concerns are affiliates of each other when a third party controls or has the power to control both concerns. 13 C.F.R. § 121.103(a); *see also Size Appeal of Rochester Hospitality Company*, SBA No. SIZ-4495, at 4 (2002). Mr. Dotts is a third party who has the power to control both Appellant and Diversified under 13 C.F.R. § 121.103(c)(1); accordingly, Appellant and Diversified are affiliates under 13 C.F.R. § 121.103(a). Thus, the Area Office correctly determined that Appellant and Diversified are affiliates whose average annual receipts should be aggregated for size purposes. 13 C.F.R. § 121.104(d).

[4] Class B Members are entitled to vote on matters that relate solely to the Class B Member Division with which the Member is associated. Appellant's Operating Agreement, Section 8.3.

With regard to Appellant's contention that "[c]ontrol is not exercised between the companies, nor does the potential for control offer any benefit as they have separate business missions and markets," SBA regulations provide that it does not matter whether control is exercised or whether exercising control would be beneficial to both parties' business missions, so long as the power to control exists. 13 C.F.R. § 121.103(a).

Appellant has thus failed to establish that there is any clear error of fact or law in the Area Office's size determination, and I must deny its appeal.

V. Conclusion

For the above reasons, the size determination is AFFIRMED and Appellant's appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge