

**REDACTED DECISION FOR PUBLIC RELEASE**

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

SIZE APPEALS OF:

Baldt, Inc.

Appellant

Re: Lister Chain & Forge, Inc.

Appealed from  
Size Determination Nos.  
6-2008-060 & 6-2008-061

SBA No. SIZ-4987

Decided: August 27, 2008

**APPEARANCES**

Glenn S. Suplee, President, for Appellant Baldt, Inc.

Robert K. Tompkins, Esq., Elizabeth M. Gill, Esq., Patton Boggs LLP, for Lister Chain and Forge, Inc.

**DECISION AND REMAND ORDER**

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. Solicitation No. SPM4A6-08-R-0046

On October 16, 2007, the Department of Defense, Defense Logistics Agency, Defense Supply Center Richmond (DLA/DSCR), issued Solicitation No. SPM4A6-08-R-0046 for “Chain, Anchor, Stud Link, Flash Butt Welded.” The designated North American Industry Classification System (NAICS) code, 332618, Other Fabricated Wire Product Manufacturing, has a corresponding 500-employee size standard. On January 31, 2008, the Contracting Officer (CO) issued Amendment 2, changing the solicitation from a HUBZone set-aside to a total small business set-aside and changing the deadline for offers to February 11, 2008. Lister Chain & Forge, Inc. (Lister) self-certified as a small business with its offer on November 16, 2007.

On March 11, 2008, the CO notified unsuccessful offerors that Lister was the apparently successful offeror. On March 17, 2008, Baldt, Inc. (Appellant) filed with the CO a protest alleging that Lister is not a small business because it is affiliated with numerous other entities. Appellant named Castle Harlan Partners III, L.P., and Castle Harlan Partners IV, L.P., as among these alleged affiliates. Appellant alleged Lister has 23 affiliates with a combined total of 42,000 employees. On March 27, 2008, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting, Area VI, in San Francisco, California (Area Office), for a size determination.

#### B. Solicitation No. SPM4A6-08-R-0324

On January 28, 2008, the DLA/DSCR issued Solicitation No. SPM4A6-08-R-0324 for “Chain, Stud Link, Flash Butt Welded.” The solicitation was a total small business set-aside and again the designated NAICS code was 332618, Other Fabricated Wire Product Manufacturing, with a corresponding 500-employee size standard. Offers were due on February 28, 2008. Lister self-certified as a small business with its offer on February 22, 2008.

On March 26, 2008, the CO notified unsuccessful offerors that Lister was the apparently successful offeror. On March 31, 2008, Appellant filed a size protest against Lister similar to the one filed on March 17th. On April 10, 2008, the CO forwarded the protest to the Area Office for a size determination.

#### C. The Area Office Investigation

On April 8, 2008, Lister responded to the Area Office’s request for information following the March 17th protest, enclosing its completed SBA Form 355 and supporting documents. Lister noted that, in 2006, its parent company was found to be small under the same size standard. Lister updated the Area Office on changes made within its affiliate group since then, changes which, Lister asserted, did not change its small business size status.

Regarding the companies that the protests identified with Castle Harlan, Inc. (Castle Harlan), Lister stated those companies are actually owned by “several different investment partnerships (the ‘Partnerships’). The Partnerships include Castle Harlan Partners IV and Castle





its President, Glenn S. Suplee. Appellant moves to admit the Suplee Affidavit into the record on appeal. In his Affidavit, Mr. Suplee states that, on April 25, 2008, he visited the State of Delaware's Division of Corporations and viewed public records of 22 active business entities containing the words "Castle Harlan." The Affidavit contains the names of each of these entities. Appellant asserts that CHP III and CHP IV are limited partnerships and that the Area Office failed not only to get the complete names of these entities but also to identify them as limited partnerships and to identify the general partners that Delaware law requires limited partnerships to have.

Appellant also asserts, based on the Affidavit, that the Area Office erred in its failure to extend its size investigation beyond the issues of stock ownership. In support, Appellant quotes extensively from the portion of OHA's decision in *Size Appeals of Ross Aviation, Inc., and Ryan International Airlines*, SBA No. SIZ-4829 (2006) that discusses common management, identity of interest, and other grounds for affiliation.

As relief, Appellant requests OHA to overturn the size determination and find Lister to be other than a small business concern.

Appellant's second appeal is very similar to its first, but includes the additional argument that the Area Office erred in its failure to consider "beneficial stock ownership" in its affiliation analysis. Appellant attaches a Schedule 13D that Morton's Restaurant Group, Inc. (Morton's), filed with the SEC on February 14, 2006. Appellant asserts the Schedule 13D shows that Lister's affiliate Harlan Castle has the power to control Morton's. Appellant also attaches several Dun & Bradstreet Company Profiles and various documents from Castle Harlan's and Branford Castle's websites. Appellant claims that it had sent these documents to the CO on April 3, 2008, but they were not forwarded to the SBA Area Office.<sup>2</sup>

#### F. Consolidation and Lister's Response

On May 14, 2008, Lister moved to consolidate the appeals, noting that they involve the same protested concern, the same size standard, and the same issues on appeal. Appellant did not oppose this motion. On May 16, 2008, I consolidated both appeals into one proceeding.

On May 27, 2008, Lister responded to the appeal petitions. Lister opposes Appellant's motion to admit the Suplee Affidavit into the appeal record, and also opposes admission of the additional documents proffered in the second appeal. Regarding the protest attachments that, Appellant claims, the CO did not forward to the Area Office, Lister notes that the materials it provided to the Area Office were more up-to-date and detailed than Appellant's documents. The SEC filing, in particular, was very old when Lister self-certified as a small business.

Substantively, Lister does not dispute the Area Office's factual findings and conclusions of affiliation. Lister asserts the Area Office did not err in stopping its analysis at Castle Harlan.

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<sup>2</sup> The Area Office files were transferred to OHA pursuant to 13 C.F.R. § 134.306(a). The documents Appellant claims were not forwarded to the Area Office are not in either Area Office file.

Lister describes Castle Harlan as a private equity investment firm that manages a variety of investment funds for outside, unaffiliated investors and invests those funds in its portfolio companies, which it calls its “Advisees.” Lister reiterates that it does not dispute the Area Office’s conclusion that Lister is affiliated with Castle Harlan through Mr. Castle’s significant ownership interest.

Lister disagrees, however, with Appellant’s argument that Lister is affiliated with the Advisees stressing that neither Castle Harlan nor Mr. Castle has any substantial ownership interest in the Advisees. Further, it provided to the Area Office evidence that there is no common management in that Castle Harlan people do not hold a majority of seats on any Advisee’s board of directors. As to Appellant’s other theories of affiliation, Lister notes Appellant has presented no specific facts to support its allegations.

Finally, Lister distinguishes its own ownership situation from that in *Size Appeals of Ross Aviation, Inc.*, and *Ryan International Airlines* and the related case *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008). In those cases, the concern whose size was at issue was ultimately owned by three investment funds, whereas Lister is owned in a separate vertical chain of entities, none of which has common ownership or management with the Advisees.

Because Appellant has failed to meet its burden of showing the size determinations contain clear error of fact or law, Lister requests OHA to affirm the size determinations and to deny the appeals.

#### IV. Discussion

##### A. Timeliness

Appellant filed both appeal petitions within 15 days of receiving the respective size determinations, and thus both appeals are 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 size determinations are based on 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 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. New Evidence on Appeal

New evidence not in the record that was before the area office may be admitted into the record in a size appeal on motion establishing good cause for its submission. 13 C.F.R. § 134.308(a). The appeals contain new evidence in the form of the Suplee Affidavit, various materials from Castle Harlan’s and Branford Castle’s websites, several Dun & Bradstreet

company profiles, and the Morton's Schedule 13D. Lister opposes all of this new evidence. After reviewing these documents, I conclude that I must deny Appellant's motion to admit this new evidence into the record on appeal.

The Suplee Affidavit alleges the existence of many additional affiliates, allegations that Appellant declined to make in either protest although the Delaware filings on which they are based were as publicly available to Appellant then as they were when the appeals were filed. Appellant's purpose in presenting this affidavit is clearly to enlarge the issues on appeal. Accordingly, I EXCLUDE the Suplee Affidavit from the record on appeal.

I agree with Lister that the information it presented to the Area Office in response to the protest is more current and is more specific to the affiliation issues than is either the website or the Dun & Bradstreet material. In addition, while Dun & Bradstreet material is useful to support the specificity of a protest at the Area Office level and to help the Area Office raise possible affiliation questions for the protested concern to address, neither the Area Office nor OHA puts primary reliance on Dun & Bradstreet material because it is second-hand information. *See Size Appeal of Horizon Consulting, Inc.*, SBA No. SIZ-4658, at 6 (2004). Accordingly, I EXCLUDE the website and the Dun & Bradstreet material from the record on appeal.

The Morton's Schedule 13D was filed with the SEC some twenty months before Lister self-certified as a small business on the earlier of the two procurements at issue here. Thus, this document is irrelevant to either of the two size determinations that are on appeal. Accordingly, I EXCLUDE the Morton's Schedule 13D from the record on appeal.

Appellant's Motion for Admission of New Evidence is DENIED.

**D. The Merits of the Appeal**

Lister does not contest the Area Office's conclusion that Lister is affiliated with the [xxxxxxx]. companies the Area Office identified in its size determinations. Thus, this appeal concerns only whether there are any other affiliated companies whose employees must be added to those of Lister in order to determine its size status on the self-certification dates for the instant procurements. Appellant argues: (1) the Area Office failed to consider affiliation issues other than stock ownership; and (2) the Area Office failed to adequately identify and investigate all of the "Castle Harlan" entities, particularly CHP III and CHP IV.

After careful consideration of the appeal petition, Lister's response, and the documents contained in the Area Office files, I conclude that I must agree with Appellant on both points. Therefore, I remand this proceeding for further investigation and new size determinations.

The regulations governing size determinations provide that concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). Further, affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party. 13 C.F.R. § 121.103(a)(4).

Under these general principles, affiliation analysis proceeds incrementally from the original protested concern whose size status is at issue. As each affiliate is determined, the Area Office then must proceed to determine whether that affiliate also has other affiliates -- entities which must be counted with the protested concern in order to determine whether that concern is an eligible small business for the special benefits available under the Small Business Act, including Federal contracts set aside for small businesses.

Some affiliates are readily apparent because they are aligned along a vertical chain of majority-owned companies; others, such as a sister company having a majority owner in common (or an ultimate majority owner in common), may not be so readily apparent. For this reason, I must reject Lister's attempt to distinguish its own ownership situation from that in *Size Appeals of Ross Aviation, Inc.*, and *Ryan International Airlines* and *Size Appeal of USA Jet Airlines, Inc.* To the contrary, these decisions give much helpful guidance to Area Offices about the nature of affiliation under the Small Business Act.

Here, John K. Castle controls Castle Harlan directly through his majority stock ownership. He controls Lister indirectly through other entities which he controls by his majority ownership. Mr. Castle, thus, is a third party who controls both Castle Harlan (directly) and Lister (indirectly), and it is through him that Castle Harlan and Lister are affiliates of each other. Lister readily acknowledges these relationships. In like manner, any other entity found to be controlled either by Castle Harlan or by Mr. Castle must also be affiliated with Lister for size determination purposes, and their employees must also be added to Lister's.

1. Affiliation Issues other than Stock Ownership

Without a doubt, many of the companies under examination in these size determinations have very complicated ownership and management structures. Thus, the Area Office must look beyond stock ownership in its affiliation analysis. Other regulatory grounds for affiliation that the Area Office may find applicable include identity of interest (as through common investments) under 13 C.F.R. § 121.103(f), negative control (such as control of a shareholder meeting or a board of directors through quorum or supermajority requirements in bylaws or shareholders agreements) under 13 C.F.R. § 121.103(a)(3); *Size Appeal of Jensco Marine, Inc.*, SBA No. SIZ-4330, at 7-8 (1998); common management under 13 C.F.R. § 121.103(e); and management and contractual relationships under 13 C.F.R. § 121.103(a)(2).

As an example of management relationships, Appellant's original protests clearly identified CHP III and CHP IV as limited partnerships. The Area Office, however, did not investigate CHP III and CHP IV as limited partnerships, *i.e.*, it did not determine who or what other entity acts as the general partner(s), and who or what other entity (if any) controls the general partner(s). See 13 C.F.R. § 121.103(a)(2) (management control by a partner). A general partner generally has management control over a limited partnership. *Size Appeal of Ochoco Lumber Company*, SBA No. SIZ-3812, at 14 (1993); *see, e.g.*, Uniform Limited Partnership Act, §§ 402(a), 406(a).

As an example of contractual relationships, I note that two of Lister's affiliates, Castle Harlan, Inc. and CHAMP, are identified in Lister's submission to the Area Office with NAICS



code 523930 (Investment Advice). The Management Agreement sets out in very general terms the relationship between Castle Harlan and one of its former Active Advisees, but it does not indicate, for instance, which party controls the decision-making that would follow the provision of investment advice. Thus, the Area Office also must consider the contractual relationships between the Active Advisees and: the Funds/limited partnership(s) that legally own(s) the the Active Advisees, the general partner(s) that manages them, and Castle Harlan itself (including Mr. Castle) to determine if these contractual relationships cause affiliation.

Additionally, each Fund invests in Active Advisees and it needs to be determined whether that Fund (or an affiliate), though a minority stockholder, controls any of the Active Advisees. *See* 13 C.F.R. § 121.103(c) (minority stock ownership rules); *Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896 (2008); *Size Appeal of Novalar*, SBA No. SIZ-4977 (2008); *Size Appeal of Colt Defense LLC*, SBA No. SIZ-4943 (2008). If so, the controlled entities would be affiliates of the Fund and of Lister, and Lister must add those entities' employees to its total count for size purposes. Any entity should be examined for common management affiliation under 13 C.F.R. § 121.103(e); *see Size Appeal of USA Jet, Inc.*, SBA No. SIZ-4867, at 22-23 (2008).

## 2. Investigation of other "Castle Harlan" Entities

As noted above, the Area Office needs to investigate CHP III and CHP IV more fully, and in so doing, it may well learn of additional "Castle Harlan" entities not investigated earlier.

Further, three of Lister's affiliates are identified in Lister's submission to the Area Office as holding companies, with employee counts of zero and a NAICS code of 551112 (Holding Companies, not elsewhere classified). These affiliates are: (1) [xxxxxxxxxxxxxxxxxxxxxxxx]; (2) [xxxxxxxxxxxxxxxxxxxxxxxx]; and (3) [xxxxxxxxxxxxxxxxxxxxxxxx]. The Area Office concluded only that these three holding companies are affiliated with Lister; however, there is no information on what entities (if any) these three holding company affiliates own and no determination of whether those entities are affiliated with the holding company affiliate(s) and, thus, with Lister.

Finally, it appears the Area Office may have relied on an earlier size determination performed on Lister's parent company in order to determine the extent of Lister's affiliation network. This size determination is not in the record so I cannot comment on it other than to note that a prior size determination is not binding on an Area Office. *See Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4540, at 8 (2003).

## E. Remand Order

1. The Area Office must request from Lister the information and documents necessary to determine whether Harlan Castle or Mr. Castle or another of Lister's affiliates controls or has the power to control Castle Harlan Partners III, L.P. (CHP III), and Castle Harlan Partners IV, L.P. (CHP IV) (the Funds), with particular attention to identifying the general partner(s) and who or what entity controls the general partner(s). If affiliation is found between either CHP III or CHP IV and Lister, then the Area Office must also determine whether any of the Active Advisees

owned by these Funds are also affiliated with the Funds, and therefore with Lister. If so, the employees of the affiliated Active Advisee(s) must be added to Lister's employees to determine Lister's size.

2. The Area Office must request from Lister the information and documents necessary to determine whether [xxxxxxxxxxxxxxxxxxxxxxxx]; [xxxxxxxxxxxxxxxxxxxxxxxx]; and [xxxxxxxxxxxxxxxxxxxxxxxx] (the three holding companies), all of whom are affiliates of Lister, own any other companies. If they do, the Area Office must determine whether there is affiliation between those companies and the three holding companies, and therefore with Lister. If so, the employees of the affiliates must be added to Lister's employees to determine Lister's size.

3. If Lister is not knowledgeable on these matters, the Area Office may receive the necessary information directly from Castle Harlan or another affiliate.

4. Only if necessary should the Area Office proceed to investigate CHAMP.

5. Lister may concede affiliation with any entity thereby reducing the scope of the Area Office's investigation. If Lister contests an affiliation, it should present argument to the Area Office to help it determine the issue.

#### V. Conclusion

For the above reasons, I VACATE Size Determination Nos. 6-2008-060 & 6-2008-061 and REMAND the instant proceedings to the Area Office for further investigation and new size determinations consistent with this Decision and Remand Order.

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CHRISTOPHER HOLLEMAN  
Administrative Judge