

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

SIZE APPEALS OF:

Sabre88, LLC

and

Phacil, Inc.

Appellants

Appealed from

Size Determination No. 01-2010-011

SBA No. SIZ-5113

Decided: February 26, 2010

APPEARANCES

Rafael Collado, Chairman & CEO, for Phacil, Inc.

Robert Cottingham, Managing Member, for Sabre88, LLC.

ORDER DISMISSING APPEALS AND REQUESTING A SIZE DETERMINATION

I. Background & Jurisdiction

On November 5, 2009, the Small Business Administration's (SBA) Assistant Administrator for the Division of Program Certification and Eligibility requested a formal size determination for Phacil, Inc. (Phacil) to determine the firm's eligibility to remain in the 8(a) Business Development Program. On January 11, 2010, SBA's Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-2010-011 (Size Determination) finding that Phacil is affiliated with Sabre88, LLC (Sabre88) based on the newly organized concern rule (13 C.F.R. § 121.103(g)) and with CaselTech, LLC (CaselTech) based on both the newly organized concern rule and the identity of interest rule (13 C.F.R. § 121.103(f)).

Nonetheless, the Area Office also determined that Phacil is a small business, even after its receipts are aggregated with those of Sabre88 and CaselTech, under Phacil's primary North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, which employs a size standard of \$25 million. Both Phacil and Sabre88 now appeal the finding of affiliation between those firms.¹

¹ Phacil does not challenge the finding of affiliation between itself and CaselTech.

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. Appellants each filed an appeal within thirty days of receiving the Area Office's Size Determination, so the appeals are timely. 13 C.F.R. § 134.304(a)(2). Thus, this matter is properly before OHA for decision.

II. Consolidation

Upon review of the appeals of Sabre88 (Docket No. SIZ-2010-01-27-01) and Phacil (Docket No. SIZ-2010-02-02-02), I find that they concern the same Size Determination and raise the same issues. Therefore, consolidation of these appeals would promote judicial economy without prejudicing the parties. Accordingly, I ORDER these appeals CONSOLIDATED for disposition.

III. The Appeal Petitions

On January 27, 2010, Sabre88 submitted its appeal to the SBA's Office of Hearings and Appeals (OHA). Sabre88 first explains that it has standing to appeal the Size Determination pursuant to 13 C.F.R. § 134.302(a), which provides that "any person adversely affected by a size determination" may appeal. Sabre88 contends that it will be adversely affected by the Size Determination because if its receipts are aggregated with those of Phacil, it will not be able to compete for small business set-aside contracts under its primary NAICS code 541990, All Other Professional, Scientific and Technical Services, which has a \$7 million size standard. Additionally, Sabre88 claims the Size Determination will prevent it from entering the 8(a) Business Development Program, again because its combined receipts would exceed the \$7 million size standard listed on its application.

On February 1, 2010, Phacil submitted its appeal to OHA. Phacil's appeal petition is virtually identical to that of Sabre88. The only substantive difference between the appeals is that Phacil explains it has standing to appeal the Size Determination because it may force a premature exit from the 8(a) program, resulting in lost revenues for Phacil.

On February 16, 2010, Sabre88 filed a Motion to Intervene in Phacil's appeal pursuant to 13 C.F.R. § 134.210(b). Sabre88 again explains that it is an interested party because SBA will reject its pending application for the 8(a) Business Development Program if its revenues are aggregated with Phacil's revenues based on the alleged affiliation between the firms.

IV. Analysis

As both Sabre88 and Phacil point out in their appeals, 13 C.F.R. § 134.302(a) provides that "any person adversely affected by a size determination" may appeal it. Despite their arguments to the contrary, however, neither party has been "adversely affected" by the instant Size Determination. Sabre88 claims that it *will be* adversely affected because it *may be* denied admission to the 8(a) Program. This contemplated harm is purely speculative, and I find there is no live controversy to decide at this time. Sabre88 itself has not been found other than small and has not been "adversely affected." Thus, I conclude Sabre88's appeal is premature and must be dismissed for lack of standing.

Similarly, Phacil claims that the affiliation finding *may* force its early exit from the 8(a) Program. This harm is also purely speculative. In the Size Determination at issue, the Area Office determined that Phacil was small. No identifiable harm has resulted to Phacil from this finding, and Phacil has not been “adversely affected.” The harm claimed by Phacil is only a potential future harm that may not come to pass. Hence, I conclude Phacil’s appeal is also premature and must be dismissed for lack of standing.

V. Request for a Size Determination

Even though Sabre88 lacks standing to contest the size determination, OHA is cognizant of Sabre88’s concerns with regard to its pending 8(a) Program application. At this point, the Area Office has only examined the relationship between Sabre88 and Phacil through the prism of Phacil’s Size Determination. The appropriate channel for Sabre88 to refute any alleged affiliation between itself and Phacil is through a formal size determination of Sabre88 itself.

Therefore, because Sabre88’s concerns clearly necessitate a size determination, I request that the Area Office consider that Sabre88 has requested a size determination and that the Area Office perform an official size determination of Sabre88 pursuant to 13 C.F.R. § 121.1001(b)(2)(i)(A). This offers Sabre88 its *own* opportunity to prove that it is not affiliated with Phacil.

In performing the size determination, the Area Office should look carefully at the elements of the newly organized concern rule. First, the Area Office should determine whether Mr. Robert Cottingham was an officer or a key employee while he was employed by Phacil. The Area Office should obtain from Sabre88 all information and evidence relevant to this inquiry, such as Mr. Cottingham’s resume, his Phacil job description, the specific duties he performed for Phacil, his starting and ending compensation, the level of authority he had to bind the company in transactions with other entities, and anything demonstrating the level of influence or control he held over the operations or management of Phacil.

The Area Office must also examine whether Sabre88 and Phacil operate in the same or a related field of business. Again, the Area Office must obtain all necessary information with respect to this question and carefully delineate the reasons for its findings. The Area Office must investigate the particular activities undertaken by Sabre88 in performing the contracts or subcontracts awarded to it—*i.e.*, what specific work was performed, who performed the work, for whom the work was performed—and compare its findings to the activities and NAICS codes of Phacil.

Finally, the Area Office must examine the financial ties between Sabre88 and Phacil, most particularly the subcontracts between the parties. Specifically, the Area Office must obtain information as to Sabre88’s yearly revenues, the precise amount of yearly subcontracting work it receives from Phacil for each applicable year, and any evidence of Sabre88’s outside sources of revenue. With regard to the subcontracting inquiry, the Area Office should also examine whether an identity of interest exists between the firms. Of course, the Area Office must also examine any other potential issues or affiliations that may arise within the normal course of its performance of an official size determination.

Sabre88 is hereby on notice that when the Area Office performs a size determination, the burden is on the firm to prove that it is small—*e.g.*, Sabre88 must prove, among other things, that it is not affiliated with Phacil. 13 C.F.R. § 121.1009(c). Sabre88 is also on notice that any failure to provide all relevant and complete information to the Area Office will result in an adverse inference being drawn against it. 13 C.F.R. §§ 121.1008(d), 1009(d). If the Area Office determines Sabre88 is other than small, Sabre88 may appeal its own size determination to OHA at that time.

VI. Conclusion

The appeals of Phacil and Sabre88 are both DISMISSED FOR LACK OF STANDING because they are premature. Additionally, I request that the Area Office perform an official size determination of Sabre88 in consideration of its pending 8(a) Program application.

In light of these decisions, Sabre88's Motion to Intervene in Phacil's appeal is DENIED AS MOOT.

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

THOMAS B. PENDER
Administrative Judge