United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Specialized Veterans, LLC	SBA No. SIZ-5138
Appellant	Decided: June 11, 2010
Solicitation No. VA-101-09-RP-0101 Department of Veterans Affairs Washington, DC	

APPEARANCE

William A. Shook, Esq., Shook Doran Koehl LLP, Washington, D.C., for Appellant.

DECISION

I. Introduction and Jurisdiction

On March 26, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2010-46 (Size Determination) finding that Specialized Veterans, LLC (Appellant), is an other than small concern under the $33.5 million size standard applicable to Solicitation No. VA-101-09-RP-0101 (RFP), which was issued by the U.S. Department of Veterans Affairs (VA).

On April 9, 2010, Appellant appealed the Size Determination. For the reasons discussed below Appellant's appeal is granted in part and denied in part. I partially grant Appellant's appeal only insofar as it pertains to the newly organized concern rule. Nevertheless, this decision does not change the fact that Appellant is other than small for this procurement (and thus ineligible for award of the contract) because: (1) I affirm the Size Determination with respect to the Area Office's finding of affiliation based on the totality of the circumstances; and (2) the Area Office found a violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)), and the contract has since been awarded. Hence, as Appellant admits, the Office of Hearings and Appeals (OHA) has no jurisdiction to consider the ostensible subcontractor issue, and the Area Office's determination that Appellant is other than small due to a violation of that rule is final. 13 C.F.R. § 121.1101(b).[1]

[1] Even if the CO had not awarded the contract, I note the evidence in the Record is sufficient to support the Area Office's ostensible subcontractor determination.

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. Appellant filed its appeal within fifteen days of receiving the Area Office's dismissal, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA.

II. Issues

Did the Area Office commit a clear error of fact or law in applying the newly organized concern rule? 13 C.F.R. § 121.103(g).

Did the Area Office commit a clear error or fact or law in finding affiliation under the totality of the circumstances? 13 C.F.R. § 121.103(a)(5).

III. Background

A. Facts

1. On April 27, 2009, the VA issued the RFP for construction of crypts and development at the Sarasota National Cemetery in Sarasota, Florida. The Contracting Officer (CO) set-aside the procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs) and designated North American Industrial Classification System (NAICS) code 237990, with a corresponding size standard of $33.5 million.

2. On January 5, 2010, the CO notified J2A[2] JV, LLC (J2A) that the VA had awarded the contract arising out of the RFP (Contract No. VA101CFM-C-0045) to Appellant on December 29, 2009.

3. On January 15, 2010, J2A protested award to Appellant to both the CO and the Government Accountability Office (GAO). J2A raised size and veterans eligibility issues in its protest. Specifically, with regard to size, J2A raised issues relating to affiliation, identity of interest, and reliance upon other concerns (the ostensible subcontractor rule).

4. In a letter dated February 25, 2010, the CO formally adopted J2A's untimely protest and included a copy of J2A's protest to the Area Office.

5. Mr. Mark S. Held caused Appellant to be organized on March 25, 2009. Mr. Held employed a consultant, Mr. Lance Lovett, to coordinate formation of Appellant, *e.g.*, register it on the CCR and ORCA and obtain a bona fide bonding program in preparation for SDVO SBC set-aside bids. Mr. Held is Appellant's President and Managing Member. Mr. Held owns 60% of Appellant, and Mr. Ted Graham, who is also a member, owns 40% of Appellant. Mr. Held is the sole member of Appellant's Board of Directors.

6. Mr. Graham is President of Specialized Services, Inc., (Specialized) and owns 100% of Specialized. Specialized is an other than small concern. In addition, Mr. Graham is the 100% owner and Managing Member of Xpress Holdings, LLC.

7. On May 21, 2009, Mr. Held and Mr. Graham executed the first amendment to

Appellant's Operating Agreement. In return for a $300,000 personal investment (capital contribution) from Mr. Graham, Mr. Graham became a 40% owner in Appellant. Mr. Held retained a 60% ownership, but his investment or capital contribution was limited to $1,000. According to Appellant, the purpose of Mr. Graham's cash contribution was to satisfy the requirements of a bonding company (surety), which required Appellant to have available cash on hand as unencumbered equity. In addition, Appellant was required to have Specialized provide indemnification to the surety for the instant RFP.

8. Appellant and Specialized entered into a teaming agreement to perform the contract arising from the RFP.

9. Mr. Held is a former District Engineer for the U.S. Army Corps of Engineers (Corps) and he has significant expertise in military construction he gained during a 27-year career. After leaving the Corps, Mr. Held worked for O'Brien & Gere (OBG) as a Vice President in OBG's military construction business development program from August 2007 until February 2009. After leaving OBG in February 2009, Mr. Held worked for Specialized for four months as its Chief Operating Officer and resigned once he received notice he was a disabled veteran. As Specialized's Chief Operating Officer, Mr. Held was not actually a corporate officer, director, owner, or board member of Specialized. Nor did he supervise any employees or have signatory authority. Instead, Mr. Held served in an "at will" position whereupon he worked on various business development opportunities that included ongoing projects on which he had worked while employed by OBG, such as nuclear power plants. The goal was to utilize his Corps experience as a construction project manager and developer to the advantage of Specialized.

10. Mr. Held signed Appellant's offer, which included a price, on May 28, 2009. As of that date, only Mr. Held could be argued to be a full time employee of Appellant.

11. There is no evidence in the Record establishing that Mr. Held ever managed a private construction business before submitting an offer under the RFP. For example, there is no evidence Mr. Held ever hired or managed subcontractors, coordinated subcontractors to achieve a construction schedule, or obtained financing or a line of credit from a lender.

12. Appellant's proposal relied upon the experience of two entities it called Teammates, *i.e.*, the Batson-Cook Company and Specialized, to meet the Technical Capability and Past Experience requirements of the RFP.[2] *See* Volume 1 – Technical Proposal; Specialized Teaming Agreement (including a specific reference to Specialized's expertise).

B. The Size Determination

On February 25, 2010, the CO forwarded his size protest to the Area Office. On the same day, the Area Office notified Appellant of the size protest and requested the relevant documentation. Appellant filed its responses to the protest and provided documents to the Area Office until March 22, 2010.

[2] Appellant admits that it relied "in part" upon the past experience of Specialized and Batson-Cook Company (Appeal Petition 16), but disputes this should result in a finding of affiliation.

On March 26, 2010, the Area Office issued the Size Determination concluding Appellant is other than small. The Area Office found: (1) a violation of the newly organized concern rule (13 C.F.R. § 121.103(g)); (2) a violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)); and affiliation under the totality of the circumstances (13 C.F.R. § 121.103(a)(5)).

The Area Office found a violation of the newly organized concern rule because: (1) Appellant was organized on March 25, 2009; (2) Appellant could not have received bonding except for Mr. Graham's $300,000 capital contribution and Specialized's agreement to indemnify Appellant; (3) Mr. Held was a key employee of Specialized; and (4) there is no facture between Appellant and Specialized.

The Area Office found Mr. Held was a key employee of Specialized even though he only worked for Specialized for four months. The Area Office found that Mr. Held's title (Chief Operating Officer) and salary (six figures), along with the role he claimed for himself in Appellant's RFP proposal (wherein he claimed to be a project manager over major projects), indicated he had the ability to act independently and control Specialized's operations. Thus, the Area Office concluded Mr. Held had a position of authority with critical influence and should be considered a key employee.

The Area Office also determined that the relationship between Mr. Graham, as Specialized's sole owner, and Appellant was not a normal business arm's-length relationship because Mr. Graham's investment in Appellant, within a few months of its creation, was 300 times greater than Mr. Held's. This investment caused the Area Office to conclude there was no clear line of fracture between Appellant and Specialized. The Area Office thus found Appellant affiliated with Specialized based on the newly organized concern rule.

Additionally, the Area Office concluded that Appellant and Specialized are affiliated pursuant to the totality of the circumstances. 13 C.F.R. § 121.103(a)(5). The Area Office concluded that: (1) that the indemnity provided by Specialized; (2) Appellant's lack of employees and nascent status; and (3) the other issues it discussed under its newly organized concern findings all support the conclusion that Specialized has the power to control Appellant.

The Area Office also found affiliation between Appellant and Specialized because of a violation of the ostensible subcontractor rule. However, these findings need not be discussed because they cannot be reviewed in this appeal. *See* 13 C.F.R. § 121.1101(b).

C. The Appeal Petition

On March 26, 2010, Appellant received the Size Determination. On April 9, 2010, Appellant filed its size appeal with OHA. On April 12, 2010, Appellant moved to supplement the Record with declarations from Mr. Held and Mr. Graham.

Appellant first alleges the protest underlying the appeal is untimely and that J2A lacked standing to file a protest. Appellant explains that it did not raise this issue before the appeal stage because SBA had not provided it with a copy of the CO letter adopting the protest.

Appellant challenges the Area Office's finding that it violated the newly organized

concern rule. Appellant explained that Mr. Held's responsibilities were very limited and that he had no significant power or role within specialized beyond working on some projects on which he had previously and on certain new business projects identified by others within Specialized. Besides noting that Mr. Held had only worked for Specialized for four months Appellant emphasized that Mr. Held had no: (1) signatory authority for Specialized; (2) supervisory authority within Specialized; (3) invoice approval authority within Specialized; (4) payroll authority within Specialized; or (5) strategic decision making authority within Specialized. In his later declaration, Mr. Held emphasized that Specialized assigned him to work on specific projects with which he was familiar or that involved new business opportunities identified by others at Specialized.

Appellant also challenges the Area Office's findings concerning its lease and notes there is no association between the building owner and Specialized. Appellant asserts that Specialized's only role was to collect $500/month for apportioned services on behalf of the landlord. Appellant also asserts it gained no administrative support from Specialized.

Appellant also emphasizes that Mr. Graham's personal investment could only be used to obtain bonding. Appellant notes the money invested by Mr. Graham has not been used for any other purpose and disputes the Area Office's conclusion that Mr. Graham's contribution is not commensurate with his ownership interest.

Appellant also alleges the Area Office erred in its fact-finding with regard to its totality of the circumstances determination. In particular, Appellant disputes the Area Office's finding that Appellant had no employees. Appellant alleges that it did have one employee, Mr. Held, who hired a consultant to help him organize Appellant.

After its brief discussion of the totality of the circumstances, Appellant devotes the rest of its Appeal Petition to the Area Office's ostensible subcontractor findings. Because I have no jurisdiction to consider this issue, I will not discuss these arguments.

IV. Analysis

A. Standard of Review

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314. It is Appellant's burden to prove that the Area Office committed an error. *Id.* Clear error means the position of an area office lacks reason or is contradicted by the evidence in a record. Under the clear error standard, then, I must affirm the judgment of an area office unless I have 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 10-11 (2006).

B. The Merits

1. Supplementation of the Record

Appellant moved to supplement the Record with declarations from Mr. Held and Mr. Graham. OHA received no objections to Appellant's motion. Both of these declarations

addressed the kind of role Mr. Held filled when he was employed by Specialized. Because these declarations are relevant to the newly organized concern findings of the Area Office and will not expand the issues before me, I have ADMITTED them to the Record subject to the express limitations of the section that immediately follows.

2. Events Occurring After May 28, 2009, Are Irrelevant

Mr. Held signed Appellant's offer, including price, on May 28, 2009. (Fact 10.) Pursuant to 13 C.F.R. § 121.404(a), the Area Office must determine Appellant's size as of that date. Accordingly, the Area Office may not consider evidence or events that transpired after May 28, 2009. This makes it irrelevant what work or projects Appellant may have gained since that date. Accordingly, any information relating to events occurring after May 28, 2009, can have no bearing on this Appeal and will not be discussed herein.

3. Protest Status

As I found above, the CO adopted J2A's protest on February 25, 2010. (Fact 4.) Hence, J2A's status became irrelevant. *See* 13 C.F.R. § 121.1001(a)(ii). In addition, because there is no time limit on a CO protest, the CO's protest had to be decided by the Area Office, regardless of when it was filed. 13 C.F.R. § 121.1004(b).

4. Newly Organized Concern Rule

13 C.F.R. § 121.103(g) states:

> Affiliation based on the newly organized concern rule. Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern 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. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

The predicate for finding affiliation under the newly organized concern rule is the organization of a new concern in the same line of business by former principal stockholders, directors, officers, etc., or key employees of another concern. Without this status, there can be no affiliation by operation of this rule. Implicit in this requirement is that the founder/organizer of the new concern have been employed at the old concern for a meaningful period.

The facts before me establish that Mr. Held worked for Specialized for four months. (Fact 9.) Although Mr. Held had a substantial title, he was not a corporate officer, director, owner, etc., and there is no evidence in the Record that he held the role of a key employee within

Specialized. Instead, the evidence shows he was primarily a marketing or business development-oriented employee during his tenure with Specialized. *Id.*

Under the facts of this case, I hold it is clear error to find Mr. Held, who worked for Specialized for a scant four months, to be a key employee. In so holding, I am not pronouncing that a person cannot be a key employee if employed for four months or less. Rather, I am merely concluding that under the facts of this appeal, it is erroneous to find an employee with comparatively little time and responsibility a key employee as anticipated by 13 C.F.R. § 121.103(g). Thus, I find Mr. Held could not and did not have a critical influence in or substantive control over the operations or management of Specialized. Absent qualifying status for Mr. Held, there can be no affiliation through operation of the newly organized concern rule.

5. Totality of the Circumstances

13 C.F.R. § 121.103(a)(1) begins the discussion of affiliation under SBA's size regulations: "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. It does not matter whether control is exercised, so long as the power to control exists." Continuing, 13 C.F.R. § 121.103(a)(5) provides: "In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation."

In interpreting what affiliation means under the totality of the circumstances, OHA has held:

> Totality of the circumstances is not an independent basis of affiliation. The specific independent bases of affiliation, *i.e.*, those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h) are the nucleus of a finding of affiliation through the totality of the circumstances.
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> Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor (13 C.F.R. § 121.103(c), (d), (e), (f), or (g)), the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates. 13 C.F.R. §121.103(a)(5); *Size Appeal of A.M. Kinney Associates*, SBA No. SIZ-4401, at 5-8 (2000); *Size Appeal of Inland Dredging Company*, LLC, SBA No. SIZ-4350, at 6 (1999); *Size Appeal of Field Support Services, Inc*., SBA No. SIZ-4176, at 10 (1996). In making this kind of determination, the SBA must evaluate all factors and regulatory criteria in determining whether affiliation is present. *Size Appeal of First American Tax Valuation, Inc*., SBA No. SIZ-4206, at 5 (1996). 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(a), (b), (c), (d), (e), (f), (g), or (h), an area office's review of the totality of circumstances may lead it to conclude one business has the power to control another and, thus, both are affiliated. This means affiliation can arise where business or personal ties, combinations, or relationships, leads an area office to a reasonable conclusion that businesses are affiliates. But, our preference is that area offices find affiliation

> based upon the specific factors enumerated in 13 C.F.R. § 121.103, *i.e.*, 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h). That is, area offices should not use totality of the circumstances as a basis to find affiliation when the area office should have found affiliation under one or more of the specific factors. The Area Office has framed affiliation under a specific factor in this size determination.

Size Appeal of Lance Bailey & Associates, Inc., SBA No. SIZ-4817, at 13-14 (2006).

This means the Area Office may exercise its discretion and determine that the totality of the circumstances establishes there are enough indicators of control or dependence to establish affiliation. Therefore, even though there is insufficient evidence to sustain a newly organized concern finding, evidence used by the Area Office to establish the existence of a newly organized concern may be combined with other evidence and used to sustain a finding of affiliation under the totality of the circumstances. For example, some of the facts the Area Office recited to support its analysis that there was a violation of the newly organized concern rule and the lack of a clear fracture between Appellant and Specialized are relevant to the question of affiliation under the totality of the circumstances. These include: (1) Mr. Graham's capital contribution and ownership share in Appellant (Fact 7); (2) Specialized's agreement to indemnify the surety (Fact 7); (3) Mr. Held's lack of experience in managing a prime contractor (Fact 11); (4) Appellant's having been established sixty-three days before it submitted its offer under the RFP (Facts 5 and 10)[3]; and (5) the similarity in the names of Appellant and Specialized (Fact 6).

The Area Office's discussion of the ostensible subcontractor rule also contains findings relevant to a totality of the circumstances analysis. Specifically, the Area Office found, and the Record supports, that Appellant was a new concern with virtually no or minimal experience as an entity before submitting its offer under the RFP. Thus, the Area Office found the only way Appellant could have met the past experience requirements of the RFP was for Appellant to rely upon the experience of its "Teammates" and the projects completed by those "Teammates" (Specialized and the Batson-Cook Company).[4] I note that before Appellant submitted its offer in response to the RFP, Mr. Held was the only person that could be argued to be an employee of Appellant.[5] (Fact 10.) Given this fact, Appellant's proposal and Teaming Agreement with Specialized proves that Specialized would be providing significant technical assistance or expertise to Appellant so that Appellant could perform the horizontal construction requirements of the contract. (Fact 12.) Therefore, the Record supports the Area Office's finding that

[3] Appellant concedes it had been established for two months before it submitted its offer. (Appeal Petition 11.)

[4] The Area Office also discussed Appellant's key employees, virtually all of whom are or were employees of Appellant's Teammates.

[5] As Appellant asserts, the Area Office indicated that Appellant had no employees. The Area Office explicitly recognized Mr. Held's status as an employee of Specialized between March and May of 2009, but noted that Mr. Held's employment timeline is confusing. (Size Determination 5.) I agree with the Area Office that it is confusing and note that it is immaterial whether Appellant had one employee-owner or no employees given Mr. Held's status with Specialized.

Specialized or Mr. Graham, who controls Specialized, was providing both technical and critical financial assistance (in the form of enabling it to obtain required bonding) to Appellant.

Upon consideration of the foregoing facts, I cannot find clear error in the Area Office's determination that Appellant and Specialized are affiliated under the totality of the circumstances. Despite Appellant's arguments to the contrary, I find the Record establishes the relationship between Appellant and Specialized is not one at arm's length. Instead, the Record establishes Specialized's owner directly facilitated and collaborated with Mr. Held to make Appellant a bondable entity so that Mr. Graham and Mr. Held could take advantage of Mr. Held's status. These facts are not trivial. The Record establishes Appellant is viable because of the grace of Mr. Graham and Specialized. Whereas Mr. Graham and Specialized contributed materially to Appellant's ability to bid on Government construction contracts, Appellant's only tangible contribution was its status as an eligible SDVO SBC.[6] Consequently, because no specific general affiliation rule[7] is applicable to find affiliation here, and because I find the evidence taken as a whole is indicative of affiliation between Appellant and Specialized, the Area Office's finding of affiliation under the totality of the circumstances does not constitute clear error under the facts of this case.

V. Conclusion

For the above reasons, I REVERSE the Size Determination insofar as it applies the newly organized concern rule and AFFIRM the remainder of the determination. Accordingly, Appellant is affiliated with all concerns controlled by Mr. Graham and is thus other than small, both for this RFP and for all other purposes for size standards of $33.5 million or less. This also means Appellant was ineligible to receive any contract arising from the RFP, and the VA may not count award of this contract toward its small business goals.

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

THOMAS B. PENDER
Administrative Judge

[6] Without a bid bond and later performance and payment bonds, Appellant would not be able to bid on or perform a Federal Government construction contract. *See* FAR 28.101-1 *et. seq.*

[7] A violation of the ostensible subcontractor rule is not a general affiliation rule because unlike 13 C.F.R. § 103(c), (d), (f), (g), it applies to only to a single procurement.