United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Active Deployment Systems	SBA No. SIZ-5216
Appellant	Decided: March 18, 2011
RE: Golden Equipment Corporation	
Appealed from Size Determination No. 6-2011-013	

APPEARANCES

Antonio R. Franco, Esq., Steven J. Koprince, Esq., Kelly E. Buroker, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant.

Dale Ulrich, Trustee, for Golden Equipment Corporation.

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 a concern controlled by a Bankruptcy Trustee is affiliated with other concerns controlled by that same Bankruptcy Trustee.

DECISION AND REMAND ORDER

III. Background

A. Solicitation and Protest

On October 14, 2010, the Department of the Army Contracting Command, Mission and Installation Contracting Officer, Fort Irwin, California (Army) issued a combined Synopsis/ Solicitation No. W9124B-11-T-0303 for mobile trailers as a total small business set-aside. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 532310, General Rental Centers, with a corresponding $7 million annual receipts size standard, as the applicable NACIS code for the procurement. Golden Equipment Corporation

(GEC) submitted its initial offer on October 18, 2010.

On October 21, 2010, the Army gave notice that GEC was the apparent successful offeror. On October 27, 2010, Active Deployment Systems, Inc. (Appellant), filed a protest alleging that GEC was not an eligible small business because of its affiliation with Southwest Charter Lines (SCL) and Southwest Equipment Solutions, LLC (SES).

Appellant asserted that on or about May 29, 2008, SCL filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Arizona. On September 21, 2009, the action was converted to a Chapter 7 proceeding, and Dale Ulrich (Mr. Ulrich) was appointed Trustee of the bankruptcy estate. In April, 2010, Mr. Ulrich, on behalf of the estate, instituted adversary proceedings against a number of concerns and individuals, including GEC and SES. On October 4, 2010, the Bankruptcy Court issued an order that provided that ownership and control of GEC and SES were to be transferred to SCL's bankruptcy estate within 15 days.

Appellant asserted that GEC is affiliated with SCL and SES by virtue of common management and common ownership. Appellant argues that even had the transfer not been completed by the date GEC submitted its offer, the present effect rule requires that the three concerns be treated as one entity. The three concerns share a common address, and telephone and facsimile numbers. The three concerns' CCR profiles list the same individuals as government points of contact, and list the same NAICS codes as fields in which they perform work.

On November 9, 2010, the Area Office informed GEC of the protest, and requested it to submit a response, together with a completed SBA Form 355, and certain other information.

B. Response to the Protest

On November 11, 2010, Mr. Ulrich responded to the protest on behalf of GEC. Mr. Ulrich denied any affiliation between GEC and SES or SCL. Mr. Ulrich asserted that in a Chapter 7 proceeding, ownership of a concern remains with its original owners; only the assets of the filing company are transferred, not ownership or prior business actions. Mr. Ulrich asserted that GEC is not affiliated with SCL, but SES and GEC are part of the Chapter 7 estate of SCL as a result of adversary proceedings. Mr. Ulrich acts as Trustee for GEC and SES, managing all business operations of the companies as well as the assets of SCL's bankruptcy estate. On August 2, 2010, an order of the Bankruptcy Court granted Mr. Ulrich the power to conduct the business operations of SES and GEC. Mr. Ulrich has continued to operate GEC without any changes in staff or business practices.

Mr. Ulrich went on to deny that GEC was affiliated with SCL under the totality of the circumstances. Mr. Ulrich did state that GEC, SES, and SCL share a common address, telephone number and facsimile number for collecting receivables, paying past debts, and servicing the interests of the bankruptcy estate. Mr. Ulrich asserted that neither SES nor SCL was pursuing additional business. Ownership of SES and SCL remains with the shareholders. In response to an Area Office query, Mr. Ulrich stated that he had been appointed by the Bankruptcy Court to control GEC as part of his fiduciary responsibility as Trustee of SCL's bankruptcy estate. Email November 29, 2010.

C. The Size Determination

On December 16, 2010, the Area Office issued Size Determination No. 6-2011-013 finding GEC to be a small business. The Area Office noted that a Chapter 7 Trustee is a private citizen and a disinterested person, appointed on a random basis and supervised by the Office of the U.S. Trustee, to administer bankruptcy cases under Chapter 7 of the Bankruptcy Code. Commencement of a bankruptcy case creates an estate, which becomes the temporary legal owner of all of the debtor's property. The debtor must relinquish to the Trustee all records and property within its possession or control. Any operation of the business by the Trustee must be in the best interest of the estate, and may only be done with court approval. Therefore, the Bankruptcy Court, through Mr. Ulrich as Trustee, has the power to control GEC and SES.

The Area Office found that GEC was incorporated on August 21, 2009, and Wilbur Davis is sole shareholder. GEC's Form 355 lists as its officers Mr. Ulrich as Trustee, Connie Frost as Secretary and Mr. Ulrich as sole Director. Mr. Ulrich has no personal ownership in SCL or GEC. Mr. Ulrich is sole owner and President of BFD Consulting, Inc. (BFD), but because the Bankruptcy Court has no power to control this concern, the Area Office found BFD was not affiliated with GEC.

The Area Office found that in a bankruptcy, because the Bankruptcy Court has control, concerns which would ordinarily be considered affiliated are not, citing *Size Appeal of Carolina Quilting, Inc.*, SBA No. SIZ-579 (1972) (Size Appeals Board). Accordingly, while Mr. Ulrich controls SES, the Area Office found no affiliation with GEC. Further, because as SCL's Bankruptcy Trustee, Mr. Ulrich does not own or manage SCL or control its business operations, and SCL is not affiliated with GEC, citing *Size Appeal of Wetsel-Oviatt Lumber Co.*, SBA No. SIZ-3525 (1991).

The Area Office also rejected Appellant's argument that GEC is affiliated with SES and SCL based upon the totality of the circumstances. The Area Office noted that while there was some indicia of affiliation due to shared facilities, Appellant had stated that SCL was not currently pursuing or would pursue additional business opportunities. The Area Office thus concluded there was insufficient evidence to find affiliation between GEC and SCL. The Area Office also found no affiliation between GEC and other concerns which had previously operated at the common address. The Area Office then determined GEC's size without affiliates, and determined that it was a small business.

D. The Appeal

On December 16, 2010, Appellant received the size determination. On December 30, 2010, Appellant filed the instant appeal.

Appellant argues that the October 4, 2010, Order of the Bankruptcy Court effectively consolidated the ownership interests of GEC, SES, and SCL, requiring all to be transferred to SCL's bankruptcy estate no later than October 19, 2010. Therefore, at the time GEC submitted its offer on October 18th, GEC and SES were wholly owned by SCL, or would be shortly. Thus, under the present effect rule, the concerns should have been found affiliated by common ownership. Appellant further argues that the Area Office erred in finding that a bankruptcy

estate is a new entity, citing *Size Appeal of Service Engineering Co.*, SBA No. SIZ-2660 (1987).

Appellant argues that GEC, SES, SCL and BFD are affiliated by common management, because Mr. Ulrich manages all four companies. Appellant disputes the Area Office's contention that Mr. Ulrich's status as a Trustee means he cannot be a manager for affiliation purposes. Appellant argues that OHA precedent holds that Chapter 11 debtors-in-possession control their concerns for affiliation purposes. Appellant further argues that a Chapter 7 Trustee is the equivalent of a Chapter 11 debtor-in-possession, and thus Mr. Ulrich must be found to control these concerns.

Appellant further argues that Mr. Ulrich's duty to act impartially does not exempt GEC, SES, SCL, and BFD from a finding of affiliation. Nothing in SBA's regulations exempts an individual or concern from a finding of control merely because they have pledged to use that control in a certain manner.

Appellant further asserts that Mr. Ulrich controls SCL, not merely its bankruptcy estate, because, for procurement purposes, the estate and the debtor are one and cannot be considered separately. Appellant also asserts that the precedents in *Carolina Quilting* and *Wetsel-Oviatt Lumber* do not support the Area Office's decision.

Appellant goes on to assert that GEC, SES, and SCL are affiliated under the totality of the circumstances. The three concerns share an address, telephone and facsimile numbers, and personnel, and are thus alter egos of each other.

Appellant further argues that the Area Office erred in considering SCL's stated future intent as evidence of non-affiliation. Finally, Appellant argues that by creating an exemption from affiliation for concerns in bankruptcy, the Area Office has created a loophole in SBA's affiliation regulations which is subject to abuse.

E. Additional Pleadings

On January 20, 2011, Appellant moved to submit new evidence on appeal, an Excluded Party List System entry indicating that the Department of the Navy had proposed GEC for debarment. Also on January 20, 2011, GEC moved to submit additional evidence on appeal, related to debarment actions against GEC. On January 24, 2011, Appellant consented to the admission of new evidence proffered by GEC.

IV. Discussion

A. Threshold Matters

Appellant filed its appeal within 15 days of receiving the Size Determination and, thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

The standard of review for this appeal is whether the Area Office based the Size Determination upon clear error of fact or law. 13 C.F.R. § 134.314. OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the record before

it. Consequently, I may not disturb the Area Office's Size Determination unless I have a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

Evidence not previously submitted to the Area Office will not be considered unless a motion is served and filed establishing good cause for the submission of the new evidence, or the Judge otherwise orders it. 13 C.F.R. § 134.308(a). Here, the proffered new evidence by both parties relates to the issue concerning GEC's proposed debarment. These issues are not relevant here, and so this evidence is EXCLUDED.

B. The Merits

Under SBA's regulations, concerns are affiliated when one controls, or has the power to control the other or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). Control may arise from common ownership (13 C.F.R. § 121.103(c)(1)) or common management (13 C.F.R. § 121.103(e)) or both.

Here, GEC, SCL and SES are clearly controlled by Mr. Ulrich, the Trustee of SCL. The October 4, 2010, Order and Mr. Ulrich's own statements make clear that he actually controls these three concerns in his capacity as Trustee, and that they operate together out of a common address with common telephone and facsimile numbers, and with at least some common employees. There is doubtless common management among the three concerns. The only argument against a finding of common management is the fact that Mr. Ulrich is a Chapter 7 Bankruptcy Trustee.

OHA has previously confronted the problem of concerns in receivership or bankruptcy. In *Size Appeal of Carolina Quilting Industries, Inc.*, SBA No. SIZ-579 (1972), the Size Appeals Board[1] found a concern operating in Chapter 11 was under the control of the Bankruptcy Court, and thus not affiliated with concerns controlled by its shareholders, which affiliation would have been found had the concern not been in bankruptcy. However, in *Size Appeal of Harvard Interiors Mfg. Co.*, SBA No. SIZ-829 (1975) a Chapter 11 debtor-in-possession who continued to manage the concern was found affiliated with other entities controlled by its sole owner and president, who was managing the concern during the proceeding. In *Size Appeal of Process Engineering, Inc.*, SBA No. SIZ-2770 (1987), a concern's parent corporation was a Chapter 11 debtor-in-possession was found to be in the control of its own management, and not affiliated with its creditors. In *Size Appeal of Wetsel-Oviatt Lumber Co.*, SBA No. SIZ-3525 (1991), OHA held that a concern operating under a court-appointed receiver was found to be under the control of its receiver, and not affiliated with the creditor who brought the action resulting in the receiver's appointment.

It thus is clear that, while the early *Carolina Quilting* case found control in the Bankruptcy Court, in subsequent cases OHA has found that concerns in bankruptcy or receivership are controlled by the officer who manages them for the court, the receiver or the

[1] Although the Size Appeals Board no longer exists, the OHA has adopted the body of cases decided by the Board as valid precedent, pursuant to the principle of *stare decisis. Size Appeal of Genie Services, Inc.*, SBA No. SIZ-1857 (1983).

debtor-in-possession. This is the better rule, as it is these persons who are actually managing the concern on a day-to-day basis. OHA thus found affiliation with other concerns controlled by the president of a debtor-in-possession concern in *Harvard Interiors*. The affiliations OHA has rejected were allegations of affiliation with a concern's creditors in *Process Engineering* and *Wetsel-Oviatt*.

Further, a Chapter 7 Trustee is clearly in the same position as a debtor-in-possession or a receiver. *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. 518, 524 (E.D.N.Y. 1989); 3 Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy* (16th ed. 2010) ¶ 323.04. A Chapter 7 Trustee has extensive power to operate the debtor concern's business, in a role analogous to that of a solvent concern's management. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 351-53 (1985). Accordingly, I hold that a Chapter 7 Trustee has control of the concern in Chapter 7 for purposes of determining whether the concern is affiliated with other concerns by common management.[2] Therefore, I conclude that OHA precedent supports the conclusion that Mr. Ulrich is in control of SCL because of his position as Trustee, and of GEC and SES because the Bankruptcy Court has given him control of them. The fact that SCL is not pursuing future business opportunities is not relevant here, because size must be determined as of October 18, 2010, the date of GEC's offer. 13 C.F.R. § 121.404(a).

The fact that Mr. Ulrich must administer these concerns in a disinterested manner, and that he acts on behalf of the Bankruptcy Court in no way diminishes his power to control the concerns. When an individual is found to have the power to control a concern, the fact he or she is required to use that control in a certain manner does not alter the fact that person is in control, *e.g.*, the officers of private corporations have a duty to act on behalf of shareholders. It is not necessary to find that a manager has total control to support a finding of common management. Rather, the test is whether the alleged common manager has critical influence upon or the ability to exercise substantive control over the operations of the challenged concern. *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-4603, at 5 (2004). That is clearly the case with Mr. Ulrich. There is nothing in the regulation that exempts from affiliation a disinterested manager. The issue is Mr. Ulrich's power to control, and that he clearly has.

In addition, OHA has rejected the argument that for size purposes, a concern in bankruptcy is a distinct entity from the concern prior to bankruptcy, holding that for size purposes they are the same entity. *Size Appeal of Service Engineering Co.*, SBA No. SIZ-2660, at 7 n.5 (1987).[3] Were SBA to treat challenged concerns in bankruptcy in any other manner, it could potentially create a significant loophole in the size regulations. A concern in bankruptcy, being operated by a Trustee or debtor-in-possession, and therefore under the supervision of the Bankruptcy Court, could claim it was not affiliated with its shareholders or other concerns with common ownership or common management, and thus use bankruptcy to evade the requirements

[2] I do not hold that there is affiliation due to common ownership, because a bankruptcy filing does not change the ownership of a concern. Therefore, the ownership of the various concerns at issue here is not vested in Mr. Ulrich.

[3] In other contexts, courts have held that a Chapter 7 bankruptcy estate is not a separate entity from the debtor concern itself. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527-28 (1984) (collective bargaining agreements); *In re Callahan*, 304 B.R. 743, 748 (W.D.Va. 2004) (taxes).

of the size regulations. This would be true even of an other than small concern in Chapter 11, which could obtain small business set-aside contracts, and emerge from a successful reorganization with contracts to which it was not otherwise entitled.

Because Mr. Ulrich owns and controls BFD, I must also find that GEC is affiliated with that concern by common management, In addition to SCL and SES. Again, the fact that he controls BFD as owner, and the other three concerns only as Chapter 7 Trustee, does not change the fact that he exercises management control over all four concerns.

Because the grounds for affiliation based upon common management are so clear here, I need not reach the question of affiliation based upon totality of the circumstances. Totality of the circumstances should only be the basis for a finding of affiliation when affiliation cannot be established under any of the specific affiliation rules, yet the relationship between the parties taken as a whole is indicative of affiliation. *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 10 (2010).

I therefore find that the Appellant has met its burden of establishing clear error of law in the Size Determination. The challenged concern, GEC, is affiliated with SCL and SES due to the three concerns being under the common management of Mr. Ulrich as SCL's Chapter 7 Trustee. GEC is also affiliated with BFD through common management, because Mr. Ulrich owns and controls that concern. I must therefore remand this case to the Area Office, for a new size determination on GEC, in accordance with this Decision.

V. Conclusion

Accordingly, the Size Determination is VACATED, and this case is REMANDED to the Area Office for a new size determination on GEC, as affiliated with SCL, SES and BFD, consistent with this Decision.

CHRISTOPHER HOLLEMAN
Administrative Judge