

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

SIZE APPEAL OF:

Active Deployment Systems, Inc.,

Appellant,

RE: ACME Support Products, LLC,

Appealed From

Size Determination No. 6-2011-043

SBA No. SIZ-5230

Decided: May 3, 2011

APPEARANCES

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

Terry Lievens, Vice President, ACME Support Products

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 new concern formed by employees of an older concern, now in bankruptcy, is affiliated with that older concern.

DECISION¹

III. Background

A. Solicitation and Protest

On January 4, 2011, the Department of the Army Contracting Command, Mission and

¹ This Decision was originally issued under a Protective Order. On May 3, 2011, I issued an Order for Redactions directing each party to file a request for redactions if that party desired any information redacted from the published Decision. No party requested any redactions. Thus, OHA now publishes the Decision in its entirety.

Installation Contracting Officer, Fort Irwin, California (Army), issued a combined Synopsis/Solicitation No. 11-03-NTC-12A for lease/rental of shower and sink trailers for use by soldiers in the field. The Contracting Officer (CO) set the procurement aside for small business, and designated North American Industry Classification System (NAICS) code 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, with a corresponding \$7 million annual receipts size standard, as the NAICS code for the procurement. On January 6, 2011, ACME Support Products LLC (ACME) submitted its initial offer, including price.

On January 7, 2011, the CO awarded the contract to ACME, and notified the unsuccessful offerors on January 8th. On January 11, 2011, Active Deployment Systems, Inc. (Appellant) filed a size protest against ACME. Appellant asserts that ACME is affiliated with Golden Equipment Corporation (GEC), Southwest Equipment Solutions LLC (SES), and Southwest Charter Lines Inc. (SCL) under the newly organized concern rule and the totality of the circumstances.² Appellant also argued ACME is affiliated with Arizona Bank & Trust (the Bank) because of the Bank's actual control over ACME's equipment.

On February 1, 2011, the CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting — Area VI in San Francisco, California (Area Office). On February 3, 2011, the Area Office notified ACME of the protest, and requested it to submit a response, together with its completed SBA Form 355 and certain other information.³

B. Response to the Protest

On February 9, 2011, ACME responded to the protest. Its Articles of Organization state it was organized as a member-managed LLC on November 18, 2010. ACME's four members are also its officers. They are: Robert Ward, President and 35% member; Constance Frost, Chief Financial Officer and 35% member; Terry Lievens, Vice President and 15% member; and James Greeson, Director of Field Operations and 15% member. ACME stated its four members formed ACME because of the bankruptcy proceedings affecting GEC, their former employer. As former employees of GEC, two were account managers, one was an accountant, and one a foreman. Mr. Lievens also was formerly employed by SCL.

Mr. Lievens, Ms. Frost, and Mr. Ward are currently agents of the bankruptcy estate of SCL, which includes GEC. They were hired by the Bankruptcy Trustee and their role is solely to assist him with liquidating the bankruptcy estate. Mr. Lievens is listed as a Government Point of Contract (POC) on the Central Contractor Registration for GEC, SCL, and SES. His duties as Government POC are to pursue receivables and close contracts for the bankruptcy estate. He does not have the ability to act without the approval of the court-appointed Trustee. Ms. Frost serves as a POC to support Mr. Lievens. Ms. Frost serves as Secretary of GEC and SES in order

² See *Size Appeal of Active Deployment Systems, Inc.*, SBA No. SIZ-5216 (2011) for a discussion of the background of the SCL bankruptcy and its effect on GEC and SES.

³ The Area Office listed the NAICS code as 531120, Lessons of Nonresidential Buildings (except Miniwarehouses), with a corresponding \$7 million annual receipts size standard, stating that this NAICS code was listed in the combined synopsis/solicitation posted on FBO.gov on January 4, 2011. Because both NAICS codes have the same size standard, this is harmless error.

to sign documents and manage financial affairs as directed by the Trustee. Mr. Ward serves as POC for GEC to maintain communication with GEC's customers.

Although ACME initially identified GEC as a subcontractor on its SBA Form 355, the accompanying narrative describes GEC's role differently. There, ACME stated it is leasing GEC's equipment from the bankruptcy estate to perform this contract, with the intention of purchasing the equipment once the purchase agreement is finalized and approved by the Bankruptcy Court. ACME chose to purchase this equipment after also considering other sources. Two other concerns are also supplying ACME with equipment for the instant contract. The Bank is a secured creditor of the bankruptcy estate, and has no relationship with ACME.

C. The Size Determination

On February 25, 2011, the Area Office issued Size Determination No. 6-2011-043 (Size Determination) finding ACME to be a small business. The Area Office found Mr. Ward, Ms. Frost, Mr. Lievens and Mr. Greeson all have the power to control ACME.

The Area Office further found that SCL was in Chapter 7 bankruptcy and under the control of the Bankruptcy Court. Mr. Dale Ulrich is SCL's Trustee. As a result of adversary proceedings, GEC and SES were transferred to SCL's bankruptcy estate, and thus are under Mr. Ulrich as Trustee. The Area Office found that the Bankruptcy Court had the power to control GEC, SCL, and SES through Mr. Ulrich as Trustee. Mr. Ulrich is also President and sole owner of BFD Counseling, Inc., but because the Bankruptcy Court has no power to control, it is not affiliated with GEC, SES, or SCL.

The Area Office found that Mr. Ward, Ms. Frost, Mr. Lievens, and Mr. Greeson all had close ties to GEC. These four individuals formed a new concern, ACME, in the same or related field of operation as GEC. However, the Area Office found that GEC was not furnishing ACME with contracts or other assistance. As of January 6th, negotiations were taking place for ACME to purchase equipment from GEC. However, this sale had not taken place. Therefore, the Area Office concluded that there was no assistance provided by GEC to ACME, and the firms were not affiliated under the newly organized concern rule.

Further, the Area Office found no evidence of identical or substantially identical business or economic interests, such as economic dependence through contractual or other relationships, between ACME and GEC, SCL, and SES. Accordingly, the Area Office found no identity of interest between ACME and the other firms. Further, the Area Office found no common ownership between ACME and SES or SCL.

The Area Office further found insufficient evidence to support a finding of affiliation between ACME and any other firm based upon the totality of the circumstances. SCL and SES have not operated since 2009, and there was no evidence of ACME's reliance upon GEC which would support a finding of affiliation.

Finally, the Area Office rejected Appellant's claim ACME was associated with the Bank. The Bank is the secured creditor of SCL's bankruptcy estate. The Bank does not have the ability

to control Mr. Ulrich or the bankruptcy estate. Accordingly, the Area Office found ACME was not affiliated with the Bank.

Therefore, the Area Office found ACME has no affiliates, and is an eligible small business.

D. The Appeal

The Area Office transmitted the Size Determination by email. On March 14, 2011, Appellant filed the instant appeal.

Appellant moves to admit new evidence, which it asserts establishes that ACME is using GEC's equipment on its contracts.

Appellant asserts the Area Office erred in finding ACME not affiliated with GEC, SES, and SCL. Appellant asserts that Mr. Ward, Ms. Frost, Mr. Lievens, and Mr. Greeson are former high-ranking officers of GEC, SES, and SCL (collectively, the alleged affiliates), and they formed ACME to evade the restrictions of the bankruptcy and the debarments.

Appellant argues that the Area Office failed to consider Appellant's argument that ACME is affiliated with the alleged affiliates by virtue of common management. The Area Office found that Ms. Frost is an officer of all the companies, and that Mr. Lievens, Mr. Ward, and Mr. Greeson are, at least, high-ranking employees of all the companies. The Area Office erred because, even assuming the Bankruptcy Court and/or Trustee exercise control over the alleged affiliates, a finding of common management does not require a finding of total control over both firms, but whether the common manager has critical influence over the operations of the firms in question.

Appellant argues that the Area Office erred in finding that ACME cannot be affiliated with SCL or SES because those companies are no longer active. The Area Office mentioned repeatedly that SES and SCL were no longer operating, and this seemed to be a factor in its analysis. Appellant asserts that if a firm's liquidation is not completed prior to the date for determining size, it is not a former affiliate, and its size must be counted.

Appellant further argues that the Area Office did not properly apply the burden of proof, which is upon ACME to establish that it is small. Rather, the Area Office said there was insufficient evidence to establish that ACME was reliant upon the alleged affiliates. Instead, the burden was on ACME to demonstrate that it was not dependent upon these firms. Appellant points out that ACME did not indicate where it would get the equipment necessary to perform this contract, if not from the alleged affiliates.

Finally, Appellant argues the Area Office erred in not finding affiliation based upon the totality of the circumstances. Appellant argues that ACME and the alleged affiliates share key employees, operate in the same line of work, and use the same equipment. Further, Appellant argues ACME was formed for improper motives, to circumvent a proposed debarment.

E. Appellant's Supplemental Appeal

On March 17, 2011, I issued a Protective Order in this case. On March 24 and 29, I admitted Appellant's counsel under the Protective Order. On March 30, 2011, after counsel viewed the record under the terms of the Protective Order, Appellant moved to supplement its appeal.

Appellant argues that the Area Office erroneously failed to consider ACME's equipment lease with its alleged affiliates. ACME utilized GEC as a subcontractor supplying a major portion of the equipment for this contract. Appellant argues the Area Office thus erred when it found GEC was not furnishing ACME with any assistance. Further, nothing in the record indicates the Area Office requested or examined a copy of ACME's equipment lease with GEC, to determine whether its terms indicate ACME is unduly dependent upon GEC.

Appellant also asserts the Area Office should have considered whether ACME was affiliated with its alleged affiliates under the ostensible subcontractor rule. Finally, the Area Office's failure to request the equipment lease also renders its totality of the circumstances analysis faulty, as it failed to consider all appropriate factors.

Finally, Appellant asserts the Area Office failed to obtain reliable evidence of ACME's receipts. ACME has not yet filed a Federal tax return, and did not supply the Area Office with either audited or unaudited financial statements, a signed affidavit, or a formal declaration under penalty of perjury as evidence of its receipts. Appellant alleges the Area Office simply relied upon an email statement as to ACME's receipts.

F. ACME's Response to the Appeal

On March 29, 2011, ACME responded to the appeal. ACME addresses the question of the debarments of the previous owners of SCL, Mark Pike and David Pike (the Pikes). ACME asserts these individuals no longer control the alleged affiliates. ACME moves to admit new evidence, concerning the debarments of the Pikes.

ACME asserts the bankruptcy proceedings for SCL are not yet complete, and until it is concluded the alleged affiliates will not be terminated as going concerns. ACME alleges none of its owners holds any position in the alleged affiliates. ACME asserts the negotiations between the bankruptcy estate and ACME began months before the proposed debarment, resulting in a purchase agreement for equipment leased for this contract as well as numerous other items.

ACME asserts that SCL and SES have no current business operations, no assets, and no employees. ACME asserts that Mr. Lievens filed a response to the Area Office only because Mr. Ulrich, the Bankruptcy Trustee, was unavailable. ACME asserts it was formed in November, 2010, because GEC was no longer operating. ACME asserts that GEC is no more than a vendor supplying ACME with equipment to perform the contract.

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).

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 ACME is information which was available earlier and should have been submitted to the Area Office. This evidence is EXCLUDED. ACME's new evidence relates to the proposed debarment. This issue is not relevant here, and so this evidence is EXCLUDED. Appellant's proffered new evidence is a Bankruptcy Court document that was available at the time of the protest, and a statement and photographs that could have been obtained at the time of the protest. This new evidence is thus EXCLUDED from the appeal record.

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. Appellant correctly states that the burden of proof is upon the challenged concern to establish that it is small. 13 C.F.R. § 121.1009(c).

In the earlier, related case, OHA held that GEC, SCL, and SES are all controlled by the Bankruptcy Trustee, Mr. Ulrich, and thus are affiliated with each other. *Size Appeal of Active Deployment Systems, Inc.*, SBA No. SIZ-5216 (2011) (*Active I*). The question here is whether the affiliation among GEC, SCL, and SES extends to ACME, through Mr. Ulrich's control or otherwise. ACME is clearly owned by its members, Ward, Frost, Lievens and Greeson.

1. Common Management

Appellant correctly notes that the Area Office did not consider affiliation under common management. Affiliation arises under common management where one or more officers, directors, managing members or partners who control the board of directors or management of one concern also control the board of directors or management of another concern. 13 C.F.R. §

121.103(e). 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).

ACME's management is reserved to its four members, according to its Articles of Organization. The record contains not a shred of evidence of any role that Mr. Ulrich, the Bankruptcy Trustee, has on ACME's operation. ACME is clearly under the management control of its own owner/members. As for the alleged affiliates GEC, SCL, and SES, ACME's four owners participate only in ministerial roles in these concerns to assist Mr. Ulrich with the bankruptcy proceedings. As I held in *Active I*, Mr. Ulrich totally controls GEC, SCL, and SES. ACME's four owners do not control GEC, SCL, and SES. Therefore, there is no affiliation due to common management between ACME and the three alleged affiliates.

2. Newly Organized Concern

Appellant also argues ACME and its alleged affiliates are affiliated under the newly organized concern rule. Newly organized concern rule affiliation may arise when former officers, directors, stockholders or key employees of one concern organize a new concern in the same or related field, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the first concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(g). A key employee is an employee who, because of their position in the concern, has a critical influence in or substantive control over the operations of the concern. *Id.*

Here, three of the four ACME principals are neither officers, directors or shareholders of the alleged affiliates. The position of Ms. Frost, only one of ACME's four members, as Secretary, is not enough to invoke the newly organized concern rule. Further, it is difficult to see how in their former positions as account managers, accountant, and foreman they exercised critical influence in or substantive control of the operations of the alleged affiliates. The ACME principals are currently performing only ministerial duties to conclude the alleged affiliates' business under Mr. Ulrich's direction and supervision. Thus, because the ACME principals were not and are not officers, directors, stockholders, or key employees of the alleged affiliates (except for Ms. Frost as secretary), this necessary prong of the newly organized concern rule is not satisfied. Therefore, despite the fact the Area Office did not consider the equipment lease, it did not err in concluding that ACME was not affiliated with the alleged affiliates under the newly organized concern rule.

3. Totality of the Circumstances

Finally, I can find no affiliation between ACME and the alleged affiliates under the totality of the circumstances rule. 13 C.F.R. § 121.103(a)(5). The alleged affiliates are under the control of Mr. Ulrich, and ACME is under the control of its four owners. There are no circumstances which indicate affiliation between the firms. The fact that debarment proceedings are pending against the original principals of SCL is irrelevant to the question of affiliation. The

former employment of the ACME principals, their current ministerial duties assisting the Trustee, and one equipment lease, do not add up to affiliation between the concerns. There simply is no evidence of the alleged affiliates controlling ACME, or of ACME controlling the alleged affiliates.

4. Appellant's Other Arguments

Appellant also argues the Area Office erred in not considering possible affiliation between GEC under the ostensible subcontractor rule; and that the Area Office erroneously relied on an email for ACME's receipts where it should have insisted on better documentation, such as its Federal income tax returns, financial statements, or a statement made under penalties of perjury. I find both arguments meritless.

An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4). Fundamental to ostensible subcontractor analysis is a subcontractor. *Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4647 at 13-14 (2004). GEC, however, is not a subcontractor here. GEC's role (or rather, that of the bankruptcy estate) is only to lease some equipment that ACME will use (along with the equipment of two other vendors) to perform the contract. There is no indication that GEC is actually performing the contract, or that ACME is unusually reliant upon GEC for the equipment. ACME actually solicited other vendors which had this equipment available. Further, that there is a lease (rather than a purchase) of the former GEC equipment is not in ACME's control, but in that of the Bankruptcy Court, which must approve the purchase. Therefore, because ACME is not a subcontractor, the Area Office did not err in not considering ostensible subcontractor affiliation.

As for the documentation of ACME's receipts, Appellant ignores the fact ACME, a nascent concern lacking any prepared tax returns or even financial statements, did report its total receipts in its response to the protest, attached to its SBA Form 355. The Area Office did follow up with a more specific question, which ACME answered in the email. I conclude ACME did satisfy the requirement of providing its receipts to the Area Office.

Accordingly, I conclude there is no clear error of fact or law in the Size Determination, and find that I must affirm it and deny the appeal.

V. Conclusion

For the above reasons, I AFFIRM the Area Office's Size Determination and DENY the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge