United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Accent Service Company, Inc. Appellant, Appealed From Size Determination No. 6-2010-076	SBA No. SIZ-5237 Decided: May 26, 2011

APPEARANCES

Peter B. Ford, Esq., Theodore P. Watson & Associates, LLC, Denver, CO, for Appellant

DECISION

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 there was clear error of fact or law in the Area Office's determination of Appellant's size status. *See* 13 C.F.R. § 134.314.

III. Background

A. The Request for Size Determination and Area Office Investigation

On March 25, 2010, the U.S. Small Business Administration's (SBA) Division of Program Certification and Eligibility (DPCE) requested the SBA's Office of Government Contracting - Area VI (Area Office) to conduct a size determination on Accent Service Company, Inc. (Appellant). The purpose of the size determination was to determine Appellant's continuing eligibility for the 8(a) Business Development (BD) program.

On April 10, 2010, the Area Office commenced its size investigation by letter to Appellant requesting various information, including its completed SBA Form 355, Federal income tax returns and/or financial statements for the applicable years 2009, 2008, and 2007.

B. The Size Determination

On February 11, 2011, the Area Office issued Size Determination No. 6-2010-076 (Size Determination), concluding that Appellant is not a small business as of March 25, 2010.

The Area Office found that Appellant is wholly owned by Dan R. Yasui, who is President, and sole officer and Director. Additionally, Mr. Yasui is sole owner of Environmental Cleaning Solutions & Facility Management, LLC (Cleaning), and serves as its President and CEO. Accordingly, the Area Office found Cleaning affiliated with Appellant. Mr. Yasui is also sole owner and President/CEO of Federation Alliance, Inc. (FA). The Area Office thus found Appellant affiliated with FA. The Area Office further found that the combined annual receipts of Appellant, Cleaning, and FA were below the applicable $16.5 million annual receipts size standard for Appellant's primary industry, NAICS code 561720, Janitorial Services.

The Area Office then turned to the issue of Appellant's possible affiliation with Teltara, LLC (Teltara). Appellant entered into a Master Subcontract Agreement (MSA) with Teltara on February 27, 2004. The MSA states that both Appellant and Teltara provide janitorial services, that Teltara has Government contracts, that Appellant seeks to engage Teltara's assistance in gaining qualification to bid on and perform services on Government prime contracts, and that Appellant seeks Teltara's assistance in connection with Appellant's performance of Federal contracts. MSA, Recitals. Under the MSA, neither party may assign, transfer, novate or delegate its rights, duties, liabilities, obligations, or responsibilities under the MSA without prior written consent of the other party. MSA, Clause 6.

The MSA also states that Appellant is responsible for all communication with the Government, and Appellant and Teltara are to keep each other informed of all communications with the Government, and neither party shall make a commitment to the Government that affects the other party's performance without first obtaining that party's consent. MSA, Clause 12. The Area Office found that this means Appellant is unable to manage its contracts without Teltara's explicit approval, and is indicative of a joint venture, not a prime/sub relationship.

The MSA further states that if the Government alleges a performance problem or takes other action on account of its dissatisfaction with the performance of one party to the MSA, that party will take immediate action to remedy the Government's concern and to keep the other party apprised of its efforts. If the Government's concerns are not remedied within a reasonable time the other party may take any action necessary to satisfy the Government, and the responsible party will be liable for the cost of that action. MSA, Clause 13. The Area Office found that this is evidence of a joint venture rather than a prime/sub relationship, because Teltara could take action on a contract on which it is not the prime by augmenting Appellant's work force and charging Appellant for its costs.

The MSA's Termination for Default clause provides that Appellant may terminate the MSA if Teltara defaults but that Teltara may terminate with 60 days notice to Appellant. MSA, Clause 16. The Area Office found that because Appellant could not also terminate the MSA at its sole discretion, this provision is more indicative of a joint venture than a prime/sub relationship.

The Area Office found that Teltara has a degree of control over the business operations of Appellant in contrast to a prime/sub relationship, and thus that the relationship between Appellant and Teltara is a joint venture, rendering the concerns affiliated.

Appellant has had a total of 21 Government contracts since the MSA was executed. Of these, Teltara was the subcontractor on 9. The contracts on which Appellant used Teltara as subcontractor account for more than 80% of Appellant's receipts for fiscal years 2007 - 2009, the period being used to determine Appellant's size, although they number just under half of Appellant's Government contracts. Appellant paid approximately 38.7% of its revenue to Teltara and its affiliates during 2007-09. Teltara has never used Appellant as a subcontractor on any of its prime contracts. The Area Office concluded that the recitals in the MSA meant Appellant did not have the relevant past performance expertise or qualifications to bid on janitorial services contracts. Thus, Appellant likely would not have been awarded the contracts as Teltara had the past performance and expertise in the area of janitorial services.

The Area Office then turned to a Strategic Alliance Agreement (SAA) Appellant entered into with Contract Acquisitions Group, LLC (CAG), a Teltara affiliate. The SAA provides that Appellant has requested CAG's assistance in performing contracts. The actual contracts to be performed are identified in addendums to the SSA, one for each contract, executed over time, which call for CAG to receive a 4% fee. The duties CAG will perform include Opportunity Selection, Proposal Development, Contract Award Negotiation, Quality Control on Performance, Labor Relations, Human Resources, Invoicing, Contract Assignment/Finance, Contract Administration, Equipment Financing, and Payroll Related Services. The Area Office stated that these tasks constituted more than mere administrative support and may involve controlling key aspects of the business's operations. Appellant stated that CAG was hired to assist in bidding on and providing administrative support for government contracts. The contracts CAG assisted Appellant on were the same contracts on which Teltara was a subcontractor.

Appellant informed the Area Office that CAG provides further assistance by introducing Appellant to potential clients. CAG does not provide financing. Appellant has its own financing with Wells Fargo Small Business, Wells Fargo Commercial, and JP Morgan Chase. Appellant, on the other hand, has provided financial assistance to Teltara by advancing it money on its contracts.

The Area Office further found that CAG's 2009 fees for administrative services on 9 contracts were 34% of Appellant's total 2009 administrative fees on all of its contracts. Thus, CAG's fees were a significant amount.

The Area Office found that Appellant and Teltara had a vested economic interest in each other's business, because over 80% of the receipts from Appellant's last three fiscal years were derived from contracts in which Teltara was the subcontractor and CAG provided administrative support. The Area Office thus found affiliation between Appellant and Teltara based on identity of interest.

The Area Office found that in July, 2009, Appellant informed SBA of its intent to terminate all agreements with Teltara and CAG. However, Teltara sued Appellant, and the matter

was referred to mandatory arbitration. Appellant was unable to terminate Teltara until the contracts were completed. The Area Office found that Appellant's inability to terminate the contracts was evidence of the control Teltara exerts over Appellant. The Area Office found that the contractual ties between Appellant and Teltara gave Teltara negative control over Appellant.

The Area Office also found Appellant and Teltara affiliated under the totality of the circumstances. Appellant's agreements with Teltara and CAG indicate Appellant did not have sole responsibility as prime contractor on its contracts. Appellant entered into the MAS to pursue contracts for which Teltara had the experience and qualifications. The Area Office essentially repeated its analysis for the other grounds of affiliation, and stated that this also supported a finding of affiliation based upon the totality of the circumstances.

The Area Office thus concluded that Appellant and Teltara are affiliated and Appellant therefore is other than small.

Appellant received the Size Determination on February 11, 2011, and filed the instant appeal on March 11, 2011.

C. The Appeal

Appellant asserts first, that the MSA was executed on February 27, 2004. Nevertheless, Appellant argues that the MSA was superseded by a Teaming Agreement, executed June 10, 2005. Appellant moves for admission of the Teaming Agreement. Appellant asserts it failed to submit the Teaming Agreement to the Area Office because of error on the part of the individual who handled Appellant's response to the protest. Appellant also seeks to introduce affidavits of some of its officials, new evidence not presented to the Area Office.

Appellant asserts that it did not bid as a joint venture on any of the contracts on which it used Teltara as a subcontractor. Rather, Appellant bid on each contract as an 8(a) prime contractor. Under the 8(a) regulations, 8(a) contracts may be awarded to joint ventures only when certain specific criteria set forth at 13 C.F.R. § 124.513(c) are met. These criteria were not met for the contracts Appellant undertook with Teltara as a subcontractor.

Further, Appellant argues the MSA does not establish a joint venture under Arizona law governing the establishment of joint ventures.

Appellant goes on to argue that under the terms of the Teaming Agreement, neither Teltara nor Appellant controls or has the power to control the other.

Appellant further asserts that the Area Office erred in finding that the services CAG provides under the SAA are more than administrative support. CAG does not provide Appellant with financial support; it merely advises Appellant of available lenders and introduced Appellant to Wells Fargo. CAG is merely a consultant. Appellant argues the fact that CAG's administrative fees were 34% of Appellant's administrative fees is irrelevant, and do not indicate economic dependence by Appellant. Appellant further asserts that like the MSA, the terms of the SAA do not establish a joint venture under either the SBA regulatory criteria or Arizona law.

Appellant further notes that the Area Office itself found that Appellant is not reliant upon Teltara for project funding. Appellant further notes that it is not economically dependent upon Teltara, because Teltara is its subcontractor, and it does not subcontract for Teltara.

IV. Discussion

A. Timeliness, New Evidence, and Standard of Review

Appellant filed the instant appeal within 30 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(2).

The regulations governing size appeals disallow evidence not previously presented to the Area Office unless on motion establishing good cause. 13 C.F.R. § 134.308(a)(2). Here, Appellant seeks to introduce material that was available at the time its responded to the size protest, and that Appellant admits was not submitted through the error of its own employee. Appellant's proffered new evidence is EXCLUDED.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a 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). OHA will disturb the Size Determination only if the 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).

B. The Merits of the Appeal

It is undisputed that Appellant, together with its admitted affiliates Cleaning and FA, is below the applicable size standard. If Appellant is found affiliated with Teltara, however, it would be other than small. The question is then, was the Area Office's finding of affiliation with Teltara and CAG clear error.

1. Joint Venture

The heart of SBA's affiliation regulation is that concerns are affiliates when one concern has control or the power to control another. 13 C.F.R. § 121.103(a)(1). The Area Office found that the MSA was indicative of a joint venture between Appellant and Teltara, and I find that this finding was clear error.

The MSA's Clause 6 provides that neither party can assign, transfer, novate or delegate its rights, duties, liabilities, obligations, or responsibilities under the MSA without prior written consent of the other party. Rather than give Teltara control over Appellant, this clause is merely a standard provision of many contracts, providing that neither party to the contract will find itself with a new counterparty without its consent.

The MSA's Clause 12 also does not give control over Appellant to Teltara. Rather,

Clause 12 specifically provides that it is Appellant who is to be responsible for all communication with the Government. If Clause 12 gives control to any party, it is to Appellant. The remainder of the clause merely provides that neither party will make a commitment that affects the other party without that party's consent. Both parties have the same obligation, and neither has control over the other. Rather, this provision prevents either party from obligating the other without its consent.

Similarly, the MSA's Clause 13 does not give either party control over the other. Rather, the provision deals with those situations where the Government has a problem with contract performance. Only when the Government's concerns are not remedied may either party take action, and hold the other party liable for the cost of performance. Both parties are potentially liable here, and only in those instances where they fail to perform.

It is true that the Termination for Default Clause 16 gives more leeway to Teltara than to Appellant, but by itself this is no evidence of control. Nothing in the MSA gives Teltara any control over Appellant.

The Area Office thus found that Teltara and Appellant were engaged in a joint venture. In order to find that firms are engaged in a joint venture under the ostensible subcontractor rule, the challenged firm must be found to be unusually reliant upon its subcontractor, or the subcontractor must be performing the primary and vital requirements of the contract. 13 C.F.R. § 121.103(h)(4). Nothing in the MSA specifies which party will perform which tasks on the contracts they perform together. Therefore, there is nothing in the MSA which provides that Teltara will be performing the primary and vital requirements of the contracts on which it will be Appellant's subcontractor. Further, there is nothing in the MSA that makes Appellant unusually reliant upon Teltara. While the MSA recites that Appellant sought Teltara's assistance in competing for Government contracts, the Area Office leapt too hastily to the conclusion that this meant that Appellant could not have received contracts without Teltara's participation. The fact a contractor receives some assistance from its subcontractor is not indicative of economic dependence. The Area Office pointed to nothing in the record that established that Appellant lacked the qualifications to perform janitorial services contracts absent Teltara's assistance. The Area Office thus erred in finding that Appellant and Teltara are engaged in a joint venture.

2. Identity of Interest (Economic Dependence)

The Area Office also found affiliation between Appellant and Teltara based on identity of interest. Affiliation may arise between concerns that have identical or substantially identical business interests such as concerns that are economically dependent upon each other through contractual relationships. 13 C.F.R. § 121.103(f). However, the fact that Appellant used Teltara as a subcontractor on contracts which accounted for 80% of its revenue, and that 38.7% of Appellant's revenue was paid to Teltara as a subcontractor, is not evidence of economic dependence, contrary to the Area Office's finding. The cases in which OHA has found an economic dependence based upon contractual relationships involved situations where the challenged concern is reliant upon receipts or subcontracts *from* its alleged affiliate. *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 7 (2010). That a challenged concern grants subcontracts to another concern is not evidence of dependence upon the second concern. *Id.* The

fact that Appellant uses Teltara as a subcontractor on a large portion of its contracts does not establish that Appellant is economically dependent upon Teltara. Indeed, the record reflects that Appellant has provided financing to Teltara, not the other way around. The Area Office thus erred in finding Appellant economically dependent upon Teltara. Thus, the Area Office erred in finding affiliation between Teltara and Appellant based on identity of interest.

Turning to the SAA, I conclude that the Area Office simply misread the SAA. The Area Office's conclusory finding that the services to be performed under the contract are more than administrative support and involve controlling key aspects of Appellant's operations is simply not supported by the record. The SAA, with its 4% fee and its listing of administrative tasks is clearly a contract calling for a modest fee to provide administrative support and nothing more. Appellant is clearly not dependent upon CAG for financing. The Area Office itself noted in the determination that Appellant has its own bank financing. The fact that Appellant paid a substantial portion of the administrative fees it incurred to CAG is again in no way indicative of dependence. The Area Office looked here at one area of Appellant's expenditures, and found that CAG accounts for a substantial portion of it. But, again, this does not demonstrate economic dependence or unusual reliance. Appellant was paying CAG fees due under the SAA, it was not receiving funds and thus was not economically dependent. Further, the services provided by CAG were ancillary administrative services, not the services Appellant was required to provide the Government under its contracts. The SAA establishes no affiliation between Appellant and CAG.

The fact that Appellant was unable to terminate is contracts with Teltara is not evidence of control by Teltara. Rather, Appellant was simply held to its legal obligation under the contracts. In the absence of any provisions that the contracts gave Teltara control over Appellant, this cannot be found as evidence of Teltara's control over Appellant. The Area Office's finding that Teltara exercises negative control over Appellant is an error of law. Negative control primarily describes instances where a concern's minority shareholders have the ability under a concern's charter, by-laws or shareholder's agreement to prevent a quorum or otherwise block action by a concern's board of directors or shareholders. 13 C.F.R. § 121.103(a)(3). It has not been used in the context of a concern's contractual relationships with other concerns. Here, there is no instance of Teltara exercising negative control over Appellant. Teltara merely acted to enforce contracts already in place, an action any firm with contracts with Appellant could take.

3. Totality of the Circumstances

Finally, the Area Office erred in finding Appellant and Teltara affiliated under the totality of the circumstances. Concerns may be found affiliated under the totality of the circumstances when no single factor is sufficient to constitute affiliation. 13 C.F.R. § 121.103(a)(5). 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). Here, the Area Office merely recapitulated all the indicia of affiliation it had found, and then found affiliation under the totality of the circumstances. However, as discussed above, none of the grounds of affiliation the Area Office found withstands scrutiny. Accordingly, I find that the relationship between Appellant and Teltara and CAG has no indicia suggestive of

affiliation. Therefore, the Area Office clearly erred in finding Appellant and Teltara/CAG affiliated under the totality of the circumstances.

I therefore find that the Area Office erred in finding Appellant affiliated with Teltara/CAG based on identity of interest due to economic dependence, on being engaged in a joint venture, through contractual relations, and under the totality of the circumstances. The Size Determination is based upon clear error of fact and law, and I must reverse it.

IV. Conclusion

Appellant met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is GRANTED, and the Size Determination is REVERSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge