Cite as: *Size Appeal of Camden Shipping Corporation*, SBA No. SIZ-5241 (2011)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Camden Shipping Corporation	SBA No. SIZ-5241
Appellant	Issued: June 21, 2011
RE: Ocean Ships, Inc.	
Appealed from Size Determination No. 5-2011-043	

APPEARANCES

Pamela J. Mazza, Esq., Patrick T. Rothwell, Esq., and Isaias "Cy" Alba, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant.

Ronald S. Perlman, Esq., William M. Pannier, Esq., and Oliya Zamaray, Esq., Holland & Knight LLP, Washington, D.C., for Ocean Ships, Inc.

DECISION[1]

HYDE, Administrative Judge:

I. Introduction and Jurisdiction

On April 15, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 5-2011-043 finding Ocean Ships, Inc. (Ocean Ships) to be an eligible small business for the procurement at issue. On May 2, 2011, Camden Shipping Corporation (Appellant), which had previously protested Appellant's size, filed an appeal of the size determination with the SBA Office of Hearings and Appeals (OHA). For the reasons discussed below, the appeal is denied.

OHA decides size determination appeals under the Small Business Act of 1958,

[1] This decision was issued on June 2, 2011, under a protective order to prevent the disclosure of confidential or proprietary information. At that time, I issued an order for redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered those requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On April 8, 2010, the U.S. Department of the Navy, Military Sealift Command issued Solicitation No. N0003-10-R-3140 seeking operation and maintenance of the United States Naval Ship *Lawrence H. Giannella*. The Contracting Officer (CO) set aside the procurement for small businesses and designated North American Industry Classification System (NAICS) code 483111, Deep Sea Freight Transportation, with a corresponding size standard of 500 employees. Ocean Ships self-certified as a small business on May 21, 2010, when the firm submitted its initial proposal. Final proposal revisions were due November 29, 2010.

On March 16, 2011, offerors were notified that Ocean Ships was the apparent successful offeror. On March 23, 2011, Appellant, a disappointed offeror, filed a protest challenging the size of Ocean Ships based upon its affiliation with other entities.

B. Size Determination

On April 15, 2011, the Area Office issued its size determination. The Area Office explained that Ocean Ships is wholly owned by Ocean Shipholdings, Inc. The Area Office set forth the ownership and management details of Ocean Ships and each of its alleged affiliates. Ocean Ships acknowledged that it is affiliated with twenty-five other entities through common stock ownership. The Area Office explained that of those entities, only three had any employees as of the date Ocean Ships self-certified as a small business: (1) Ocean Ships Management, Inc., (2) Ocean Duchess, Inc., and (3) Mode Chien, LLC.

The Area Office also found an identity of interest between Mr. Joe Vaughan Jr., the sole owner of Ocean Shipholdings, Inc., and Mr. [XXXXXXXX], [XXXXXXXXXXXXXXXXXX]. Based upon this identity of interest, the Area Office determined that Ocean Ships is affiliated with four other entities in which Mr. [XXXXX] holds ownership interests. Of these four affiliates, the Area Office explained that only three have employees: (1) [XXXXXXXXXXX], (2) [XXXXXXXXXXXX], and (3) [XXXXXXXXXXXX]. The Area Office also determined Ocean Ships is not affiliated with a fifth entity in which Mr. [XXXXX] holds an ownership interest, Alpine Waste & Recycling (Alpine), because Mr. [XXXXX] owns only [XX]% of the widely-held stock, and there is no other indicia of affiliation between Ocean Ships and Alpine.

Accordingly, the Area Office calculated the employees of Ocean Ships by aggregating its employees with those of the six entities listed above. The Area Office discussed its method of calculation at length. The Area Office explained that fully operating status (FOS) ships maintain a full crew who live and work on the vessel twenty-four hours a day, seven days a week for three to four months at a time. After that period, the crew returns home. Appellant alleged in its protest that the Area Office should count as employees of Ocean Ships those crewmembers that

have returned home but may be recalled for the next three to four month rotation.

Ocean Ships explained to the Area Office that its affiliates provide crews for FOS ships for a predetermined amount of time, usually three months, which is stipulated by a union contract. Once this tour of duty is complete, the term of employment is complete for that crew, and a new crew is hired for the next tour of duty. Ocean Ships indicated that the crew transfer process is staggered so that the entire crew does not change on the same day. Ocean Ships also asserted that a crewmember who has completed his tour of duty may or may not be rehired for another tour of duty, and those decisions are made on a case-by-case basis.

The Area Office next explained that on reduced operating status (ROS) ships, there is usually a maintenance crew, rather than a full time crew. Those employees are typically permanent employees working forty hours per week, and there is little turnover. When ROS ships transition to FOS, a full FOS crew is added to augment the permanent ROS crew. "All of the augmenting crew members are paid for their time, day for day, on the ship, and are terminated at the end of activation. They are counted by Ocean Ships as employees for the pay periods that they received paychecks during their employment period." (Size Determination 9.)

The Area Office concluded that, based upon the language of 13 C.F.R. § 121.106, employees who have completed their tour of duty but may later be rehired for a future tour of duty should not be included in the employee count for the time they are not actually serving as a crewmember. The Area Office cited *Size Appeal of Keystone Ocean Services, Inc.*, SBA No. SIZ-4712 (2005), in support of its position. In the *Keystone* case, OHA affirmed that two crewmembers occupying the same position who both worked on the shift-change day should both be included in the firm's employee count because they were both on the payroll for the period in question. The Area Office explained that, in this case, the crewmembers who have completed their tour of duty should not be counted as employees for all pay periods (as Appellant urges), but only the pay periods for which those crewmembers were actually on the payroll. Using this method of calculation, the Area Office concluded Ocean Ships and its affiliates have less than 500 employees, and Ocean Ships is a small business for the procurement at issue.

C. Appeal Petition and Addendum

On May 2, 2011, Appellant filed its appeal of the size determination claiming the Area Office erred in its calculation of Ocean Ships' employees. Appellant first contends the Area Office failed to include transitioning crewmembers in the employee count. Appellant explains that a ship operator must pay a stipend to each crewmember on FOS vessels (and activated ROS vessels) while the crewmember is travelling to or from a ship. Additionally, the ship operator is responsible for covering room and board, other living expenses, and medical expenses (known as "maintenance and cure" payments) for a crewmember who is injured or incapacitated while transitioning to or from a ship. Appellant asserts that this unique employer-employee relationship mandates that crewmembers who are transitioning to or from ships be included in Ocean Ships' employee count for the relevant period, even though those crewmembers may not officially be on the payroll.

Appellant also points out that during the crew transition period, two employees must be on the payroll for each position on a ship. That is, the old crew does not depart one day and new crew shows up the following day. Instead, there is a period of transition during which a new crewmember arrives and the old crewmember departs. Appellant asserts the *Keystone* case supports its argument that both crewmembers must be counted as employees during the relevant pay period. Thus, both crewmembers must be counted as employees during this transition period. Appellant asserts: "It does not appear from the size determination that the Area Office accounted for the doubling of personnel during the period when crewmembers on full operating status ships and activated reduced operating status ships are transitioning on or off the vessels." (Appeal Petition 3.) Consequently, Appellant believes the Area Office may have failed to include a substantial number of crewmembers in its employee count.

Appellant next contends the Area Office failed to take into account the fact that ship officers, such as captains and chief engineers, are [XXXXXXXXXXXXXXXXXXXXXXXX]. Appellant asserts that the union contract for these officers [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. It appears that Appellant concludes these officers should be included in the employee count for all pay periods.

Appellant also argues that the Area Office's finding that Ocean Ships is not affiliated with Alpine was conclusory. Appellant contends the fact that Alpine has fifty shareholders and is widely-held does not compel the conclusion that Mr. [XXXXX]'s [XX]% share of Alpine's stock is not controlling. Appellant asserts the Area Office should also have assessed whether Mr. [XXXXX]'s block of stock is large as compared to other stock holdings, as required by 13 C.F.R.§ 121.103(c)(3). *See Forterra Sys., Inc.*, SBA No. SIZ-5029 (2009) (finding that a block of stock 1.66 times larger than the next largest holding was large as compared with other stockholdings). The Area Office did not mention Alpine's other shareholder's ownership percentages in the size determination, so Appellant concludes the Area Office failed to perform the proper analysis to determine whether Mr. [XXXXX] controls Alpine.

On May 17, 2011, after reviewing the record in the case, Appellant filed an addendum to its appeal petition. Appellant notes that while on a vessel, crewmembers are paid for both their time on the ship and vacation time. According to Appellant, "[t]his means that when crewmembers leave the ship they are on leave, not simply unemployed." (Addendum 1.) Appellant also notes that crewmembers are not permitted to apply for unemployment during the period when they are on paid vacation leave, so they should be considered employees during that time. Appellant requests that OHA vacate the size determination and remand the case to the Area Office for a proper calculation of Ocean Ships' employees.

D. Ocean Ships Response

On May 17, 2011, Ocean Ships filed its response to the appeal petition. Ocean Ships asserts that the grounds for Appellant's appeal are merely speculative, and the appeal should be denied. Ocean Ships contends the payroll records it provided to the Area Office for itself and its affiliates identified "*every employee*, including transitioning employees, by name and social security number." (Response 2.) According to Ocean Ships, Appellant assumed that Ocean Ships counted employees by number of positions, but that assumption was incorrect. Instead,

Ocean Ships counted all actual employees on its payroll for each pay period, in accordance with *Keystone*. Ocean Ships asserts its claim is supported by the fact that the monthly employee count always exceeded the number of positions on each ship, specifically due to transition overlap.

Ocean Ships also claims there is no basis for including previously employed captains and chief engineers in the employee count. Ocean Ships explains these officers are employed by Ocean Ships as reflected by the payroll records, and when they are no longer employed, they no longer appear on the payroll. Ocean Ships disputes Appellant's contention that these former employees should be counted because [XXXXXXXXXXXXXXX]. Instead, according to Ocean Ships, these officers must be actually employed to be counted, and [XXXXXXXXXX] does not justify counting an officer who is not employed.

Ocean Ships next asserts the Area Office properly determined that Mr. [XXXXX] does not control Alpine. Ocean Ships dismisses as conjecture Appellant's allegation that Mr. [XXXXX]'s [XX]% holding may be large as compared to other holdings. Ocean Ships contends Mr. [XXXXX]'s stockholding is not even the largest minority holding in Alpine, and Mr. [XXXXX] does not control Alpine. Ocean Ships concludes that Appellant failed to meet its burden of showing the size determination was based upon clear error, and the size determination should be affirmed.

On May 19, 2011, after the close of the record in this matter, Ocean Ships filed an objection to Appellant's addendum. Appellant objects to the admission of Appellant's addendum to the record, claiming it raises new issues. As a substantive response to the addendum, Ocean Ships reiterates that its payroll records accurately account for all employees, including those on vacation. Ocean Ships asserts Appellant's addendum represents further speculation about the relationship between Ocean Ships and its employees and fails to offer any evidence or factual support for its allegations.

III. Discussion

A. Standard of Review

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 upon a clear error of fact or law. 13 C.F.R. § 134.314. Consequently, OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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. Analysis

The regulation governing the calculation of a firm's employees provides that "[i]n determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis." 13 C.F.R. § 121.106(a). "The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon

numbers of employees for each of the pay periods for the preceding completed 12 calendar months." 13 C.F.R. § 121.106(b)(1).

Here, Appellant contends that the Area Office erred because it failed to count "all individuals" employed by Ocean Ships in the twelve calendar months preceding its size certification. Appellant specifically alleges the Area Office failed to count: (1) crewmembers travelling to and from vessels for their tours of duty and (2) multiple crewmembers serving in the same position during on-ship transition periods when their service overlaps. As discussed below, a principal flaw in Appellant's arguments is that they are largely unsubstantiated. Ocean Ships represents that all employees are already included in its payroll records, and even after reviewing the payroll records of Ocean Ships, Appellant has offered no factual support that the Area Office failed to count these employees. Furthermore, I question the practical effect of Appellant's arguments. The record reflects that Ocean Ships and its affiliates are well below the 500 employee size standard, unless Alpine's employees are also included. Thus, even if Appellant could demonstrate that the Area Office did not actually count certain crewmembers, it is unlikely that any such errors would cause Ocean Ships to exceed the size standard. For instance, Appellant has not shown how adding a day or even a few days of travel time to the beginning and end of a crewmember's tour of duty would materially affect the employee count.

With regard to Appellant's allegations about crewmembers travelling to and from vessels, it is not clear that benefits provided before the crewmember boards the vessel or after departure constitute "employment." Rather, it is possible that individuals could reap certain benefits of employment even after their term of employment has ended. It is, for instance, common for employers to offer extended health insurance or to pay severance payments after employment is terminated. These circumstances do not compel that conclusion that an employer still "employs" the individual for the entire time that residual benefits are provided. Thus, Appellant has not persuasively shown that crewmembers travelling to and from vessels are actually "employed" by Ocean Ships during travel.

As for the double-counting of personnel during crew transition periods, Appellant has presented no reason to believe these employees are not included on Ocean Ships' payroll records. As Ocean Ships points out, its payroll records identify each specific employee by name, rather than listing positions. Thus, it would seem that if two crewmembers were paid during a particular period (even for the same position), they would both be on the payroll for that period. Appellant maintains that the Area Office ignored *Size Appeal of Keystone Ocean Services, Inc.*, SBA No. SIZ-4712 (2005). In *Keystone*, the challenged firm essentially argued that crewmembers should not be double-counted during the on-ship transition period because there was only one position, though two persons were performing it. OHA rejected this argument and determined the Area Office correctly counted both persons as "employees" during the transition period. OHA reasoned the Area Office must count all employed individuals, in accordance with the plain language of 13 C.F.R. § 121.106. *Keystone*, at 8.

In this case, the Area Office cited *Keystone* in rejecting Appellant's argument that FOS (and activated ROS) crewmembers should be counted for all pay periods rather than only those pay periods during which they are on a vessel. Instead, the Area Office emphasized that every employee should be counted only for the periods during which they were on the payroll. Thus,

contrary to Appellant's claims, the Area Office did follow the *Keystone* precedent. Pursuant to the text of 13 C.F.R. § 121.106, the Area Office counted every employee on the payroll for each month within the twelve calendar months preceding the self-certification date.

Appellant also contends the Area Office failed to count employees on paid vacation leave. Again, however, Appellant has failed to offer any factual support for its allegation that the Area Office failed to count these employees. Ocean Ships asserts its payroll records accurately reflect those employees on paid vacation leave. This again seems the most likely scenario because if the employees were being paid (regardless of whether they were working or on vacation), they would presumably be included on the payroll records.

Based upon Appellant's arguments, it appears Appellant takes issue with the way the payroll records of Ocean Ships are structured and not with the method the Area Office used to calculate Ocean Ships' employees. That is, it appears Appellant claims Ocean Ships did not include travelling, transitioning, and vacationing crewmembers in its payroll records. However, even after reviewing those records, Appellant has offered no basis to doubt the veracity of Ocean Ships' payroll records.

Appellant also claims that ship officers, such as captains and chief engineers should be counted for all pay periods, not merely those periods they serve on a vessel, [XXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. I see no merit to this argument. [XXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX].

Finally, Appellant contends the Area Office failed to properly consider whether Mr. [XXXXX]'s share of Alpine stock is large as compared with other Alpine stockholdings. This contention is also meritless. Mr. [XXXXX]'s share of Alpine is [XX]%. The record reflects that the other largest shareholders own 16.6%, 10.2%, 6.9%, and 5.3%. There are thirteen shareholders that own between 1% and 5% of Alpine stock, and forty-seven shareholders that each owns less than 1% of Alpine's stock. Thus, Mr. [XXXXX]'s stockholding is not the largest minority share, and even the largest shareholders combined do not hold a majority of Alpine stock. There is no basis on which to conclude that Mr. [XXXXX] can control Alpine, and the Area Office made no error in concluding that Ocean Ships is not affiliated with Alpine.

Appellant failed to prove that the Area Office committed any clear error of fact or law in its size determination. Instead, the allegations of error contained in the appeal petition are largely speculative. Furthermore, even if Appellant could show that the Area Office made some computational errors with regard to transitioning crewmembers, it does not appear that those errors could have caused Ocean Ships to exceed the size standard. As a result, any such errors would not be grounds for reversing the size determination. *E.g. Size Appeal of Tidewater, Inc.*, SBA No. SIZ-4681, at 4 (2005). Consequently, I deny this appeal.

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, this appeal is DENIED.

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

KENNETH M. HYDE
Administrative Judge