

Cite as: *Size Appeal of Native Energy and Technology Inc.*, SBA No. SIZ-5249 (2011)

REDACTED DECISION FOR PUBLIC RELEASE

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

SIZE APPEAL OF:

Native Energy and Technology Inc.

Appellant

RE: TSI Corporation

Appealed from

Size Determination No. 6-2011-029

SBA No. SIZ-5249

Decided: June 16, 2011

APPEARANCES

Lawrence J. Sklute, Esq., Sklute and Associates, Potomac, Maryland, for Appellant.

Richard B. Oliver, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for TSI Corporation.

DECISION¹

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 the Area Office made clear error of fact or law in concluding that the protested concern is not affiliated with other concerns under the totality of the circumstances.

¹ This Decision was originally issued under a Protective Order. On June 16, 2011, I issued an Order for Redactions. OHA received one request for redactions. I now issue a redacted version of the Decision for public release.

REDACTED DECISION FOR PUBLIC RELEASE**SIZ-5249****III. Background****A. The Solicitation and Protest**

On December 22, 2009, the Contracting Officer (CO) for the Air National Guard, Selfridge ANG Base, Michigan, issued Solicitation No. W912JB-10-R-4001 for professional and administrative support services. The CO set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding \$33.5 million annual receipts size standard. TSI Corporation (TSI) submitted its initial proposal on January 26, 2010.

On December 29, 2010, the CO notified offerors that TSI was the apparent successful offeror. On January 5, 2011, Native Energy and Technology Inc. (Appellant) filed a size protest with the CO. Appellant alleged TSI was affiliated, based on the totality of the circumstances, with six other concerns: Jantec, Inc. (Jantec); Jancorp Enterprises, Inc. (Jancorp); Jantec Services Group; The Trend Group, LLC (TTG); The Siegel Group, LLC (The Siegel Group); and TrendTec, Inc. (TrendTec).

Appellant attached to its protest 48 exhibits. These exhibits included material from the *sbcontract.com* and *Governmentcontractswon.com* websites showing TSI's address at 2810 W. Charleston Blvd., Las Vegas, which is also Jantec's address; and pages from the Central Contractor Registration (CCR) showing, among other things, that TSI and Jantec share a line of business in NAICS code 561210. Exhibit 5 is a Dun & Bradstreet (D&B) Report, listing Heidi Siegel as TSI's President and noting, "Director(s): The Officer(s)" and "100% of capital stock is owned by officers." Exhibit 9 is TSI's foreign corporation filings in the State of Florida, showing Mr. Jarvis as President and Director in 2005; and Ms. Siegel as President and Ms. Clark as Director in 2007-2010. Exhibit 44 is a printout from *manta.com* showing TTG's sales as \$230,000.

Appellant also alleged that TSI and Jantec shared several employees. Further, Heidi Siegel, a Service-Disabled Veteran, joined TSI in order to qualify it for set-aside contracts. Appellant alleged TSI's receipts combined with its affiliates' exceed the size standard, emphasizing a \$45 million Navy contract (No. N00140-07-D-0011) awarded to TSI in 2007 and completed in 2008.

On January 6, 2011, Appellant supplemented its protest with five more exhibits to allege as additional affiliates Trend Western Technical Corporation (TWTC), Del-Jen, Inc. (Del-Jen), and Fluor Company. On January 6, 2011, Appellant's protest and supplement were forwarded to the Small Business Administration (SBA) Office of Government Contracting-Area VI (Area Office) for a size determination.

B. The Area Office Investigation and File

On January 10, 2011, the Area Office sent to TSI a copy of the protest and requested it to respond to the protest allegations, submit a completed SBA Form 355, and provide various documents. On January 17 and 18, 2011, TSI provided the requested materials, with those from

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also an April 15, 2010 Statement to Shareholders, in which Mr. Jarvis designated himself as the Chairman and only member of TSI's Board, and appointed himself CEO and Ms. Siegel as President.

Jonathan Siegel has been TSI's Director of Operations since January 2010. Only one of the three other allegedly "shared" employees works or has ever worked for TSI. Katie Eblen has been with TSI as an accountant since 2005, and has never worked for Jantec.

Mr. Jarvis stated in his declaration that TSI has been located at 501 S. Rancho Drive, Suite I-58, Las Vegas, for the past five years. He further stated TSI does not share office space, personnel, telephone lines, computers or other equipment with any other company, except for admitted affiliate TTG, with which it shared personnel and facilities. TSI has no contracts or subcontracts, loans or any other financial arrangement with any of the alleged affiliates.

The declarations further state that Ms. Clark is not related to Mr. Jarvis, and that neither Ms. Clark nor Mr. Jarvis is related to the Siegels. Mr. Jarvis also pointed out that the \$45 million Navy contract cited in the protest is an ID/IQ contract over five years, and that receipts from it have been far less than the \$45 million ceiling. Federal income tax returns for the applicable fiscal years 2009, 2008, and 2007, show that TSI's annual receipts, by themselves, are below the size standard.³

2. Alleged Affiliates

TWTC, Del-Jen, and Fluor. Mr. Jarvis founded TWTC in 1954. In January 2004, he and his family sold all of their TWTC stock to Fluor Company (Fluor), and TWTC is now part of Fluor's subsidiary Del-Jen. Mr. Jarvis and his family have had no involvement with TWTC, Del-Jen, or Fluor since then, except that Mr. Jarvis's son worked at Fluor until 2005.

Jantec, Jancorp, and Jantec Services Group. Ms. Clark founded Jantec in 1984, owns all of its stock, and is its only director. Ms. Clark also owns all of Jancorp, and concedes Jancorp is affiliated with Jantec. Ms. Clark also stated Jantec Services Group is not an entity but may have been a trade name. The declarations also show that between 2000 and 2005, Heidi Siegel worked for Jantec as an administrative assistant, and that between December 2000 and March 2007, Jonathan Siegel worked for TrendTec as a Project Manager and then for Jantec as Director of Operations. Of the other allegedly "shared" employees, Belinda Hines works for Jantec, Rose Brown formerly worked for Jantec, and neither Hines nor Brown has ever worked for TSI. Ms. Clark also stated Jantec has been at 2810 W. Charleston Blvd., Suite 75, Las Vegas, NV, for the past nine years and does not share office space, personnel, telephone lines, computers or other equipment with TSI.

³ The Form 355 for TSI reports its receipts for the last three completed fiscal years as: \$[xxxx] (2007); \$[xxxx] (2008); and \$[xxxx] (2009). TSI did not follow the regulatory formula in calculating its receipts, resulting in a small understatement of its receipts in one year, and a small overstatement in another year. See 13 C.F.R. § 121.104(a). These errors did not affect the outcome of the Size Determination, and do not affect the outcome here.

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TrendTec. In 1999, TWTC and Jantec formed TrendTec as a joint venture to bid on government contracts. In 2000, TWTC sold its entire holding of TrendTec to Ms. Clark, who became its sole owner. She renamed it Jancorp in 2002.

The Siegel Group. The Siegels, a married couple, founded this concern in 2007 after Jonathan Siegel's employment with Jantec ended. The Siegels are its only owners, although Heidi Siegel never performed any work there. This concern has been inactive since January 2010, when Jonathan Siegel went to work for TSI.

TTG. A joint venture between TSI and Jantec, TTG was formed on August 15, 2008, to bid on Solicitation No. FA4452-08-R-0015 for work at MacDill Air Force Base (AFB). Its bid was not successful. Mr. Jarvis's declaration stated the TTG joint venture "no longer exists." After learning from the protest that TTG still had active listings at the State of Nevada, on the CCR, and with Dun & Bradstreet (D&B), Mr. Jarvis submitted a supplemental declaration to the Area Office. There he asserted that by the terms of the Joint Venture Agreement (JVA), the joint venture had terminated when it failed to win that contract. He quoted the JVA, which states:

This Joint Venture Agreement and the Joint Venture formed hereunder shall apply and extend only to the performance of work under the Contract and shall not apply or extend to any other activities or work unless approved by the Management Committee. . . . The Joint Venture will also terminate if TTG [The Trend Group] fails to win the Contract award and there are no liabilities to be resolved between the parties.

Supplemental Declaration of Mr. Jarvis ¶ 4 (quoting JVA, Article X (alterations are his)). The JVA, submitted on appeal, in addition to stating its purpose is to compete for the MacDill contract, also notes the parties have "potential interests in competing for other Government contracts." JVA, Recitals. The JVA further provides that TSI's address is TTG's principal place of business, with support services at Jantec's address. JVA, Article 2. Mr. Jarvis further asserted he would formally dissolve TTG with the State of Nevada, and correct the CCR and D&B listings. Both TSI and Jantec contributed resources to TTG. Jonathan Siegel worked part-time at TTG between December 2008 and December 2009. TTG never had any receipts.

C. The Size Determination

On January 28, 2011, the Area Office issued Size Determination No. 6-2011-029 (Size Determination). The Area Office determined that Mr. Jarvis controls TSI, that Ms. Clark does not control TSI, and that there is no common management, or other affiliation between TSI and Jantec. The Area Office noted that there is common management between TSI and The Siegel Group, but that it did not cause affiliation between them because the Siegels have no control over Mr. Jarvis, TSI's sole owner. Further, the joint venture TTG did not cause affiliation between TSI and Jantec except as to the one contract that TTG bid on but did not win. Thus, TSI is a small business under NAICS code 561210.

REDACTED DECISION FOR PUBLIC RELEASE**SIZ-5249****D. Appeal Proceedings**

Appellant received the Size Determination on January 28, 2011, and filed its size appeal with the Office of Hearings and Appeals (OHA) on February 14, 2011. On March 2, 2011, TSI moved to dismiss the appeal. On March 3, 2011, following the first of three telephone conferences with the parties, I ordered Appellant to file its Supplemental Appeal and its Opposition to TSI's Motion to Dismiss by March 22, 2011. Appellant did so, and TSI filed its Response to the Appeal (as supplemented) on April 5, 2011.

On April 11, 2011, I ordered TSI to file TTG's JVA, and TSI filed it on April 15, 2011, accompanied by authenticating affidavits. Appellant then requested leave to file, and filed, supplemental argument concerning the JVA on April 19, 2011. TSI then requested leave to file, and filed, its response to Appellant's supplemental argument on April 21, 2011. I GRANT each party's request for leave to file these additional pleadings. Both parties also requested leave to file pleadings exceeding the 20-page limit, and I GRANT that leave.

1. New Evidence

Appellant submits new evidence with both its Appeal Petition and its Supplemental Appeal. This new evidence includes:

Exhibit 3 - State of Nevada, "Entity Actions for TTG, LLC," including entries dated July 23, 2010 and January 24, 2011;

Exhibit 4 - Amendment 0002 to Solicitation No. HSFLAR08R00001, issued by the Federal Law Enforcement Training Center (FLETC), on March 26, 2008, including the sign-in sheets for a pre-proposal conference;

Exhibit 5 - CCR listing for Jantec, titled "Pending Changes" printed on February 3, 2011;

Exhibit 6 - August 31, 2009, Award Notice for Solicitation No. FA4452-08-R-0015, issued by the Department of the Air Force for work at MacDill AFB;

Exhibits 7a-7d - TTG's State of Nevada filings dated July 22, 2009, and earlier;

Exhibit 7e - TTG's State of Nevada filing dated July 23, 2010; and

Exhibit 7f - TTG's Certificate of Dissolution dated January 24, 2011.

Appellant offers Exhibits 3 and 6 to show TTG was not dissolved after award of the MacDill AFB contract to another bidder, as TSI had told the Area Office, but continued to exist until January 24, 2011. Thus, TSI had misled the Area Office on this point.

Appellant offers Exhibit 4 to show that Jonathan Siegel attended the March 8, 2008, pre-proposal conference at MacDill AFB on behalf of TSI.

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Appellant offers Exhibit 5 to show that after the protest was filed, TSI changed Jantec’s address on the CCR from Suite 75 to Suite 76.

Appellant offers Exhibit 7a-7e to counter TSI’s statement that Mr. Jarvis was unaware of TTG’s active registration in the State of Nevada as of both TSI’s January 26, 2010, self-certification date for the instant contract and the January 18, 2011, Declaration of Mr. Jarvis in response to the protest. Appellant offers Exhibit 7f to show that it was only after Appellant’s protest that Mr. Jarvis took action to dissolve TTG.

TSI opposes the admission on appeal of all of Appellant’s new evidence.

2. Arguments on Appeal

a. Appellant

Appellant first asserts TSI is affiliated with Jantec through their joint venture TTG. It is undisputed that TTG is a joint venture entity owned by TSI and Jantec, and that TTG was an active entity on January 26, 2010, the day as of which TSI’s size is determined. Further, Appellant asserts, TTG’s subsequent dissolution, in response to Appellant’s size protest, has no effect on TSI’s size status. Appellant notes that TTG, contrary to Mr. Jarvis’s assertion in his Supplemental Declaration, was not created to bid on a single, specific government contract, but to bid on any government contract, citing Mr. Jarvis’s original Declaration (formed “to bid upon government contracts”). Thus, the Area Office record does not support TSI’s assertion that TTG was limited to one procurement, and the joint venture did not end after TTG did not win a contract under Solicitation No. FA4452-08-R-0015, for work at MacDill AFB. Appellant asserts that JVA’s recital that the parties have interest in competing for other Government contracts and the continuing registration of TTG show an ongoing relationship between TSI and Jantec.

Second, Appellant asserts the Area Office found common management between TSI, Jantec, Jancorp, and The Siegel Group but erred in concluding they were not affiliated.

Third, Appellant asserts, based on the totality of the circumstances, that TSI is affiliated with Jantec. Even though Ms. Clark’s TSI stock is non-voting, it is counted in the totality of the circumstances analysis. Further, Protest Exhibit 9 shows State of Nevada⁴ foreign corporation filings stating Ms. Clark was a director of TSI from 2007 through its 2010 filing. Appellant asserts Ms. Clark’s declaration provided to the Area Office stated that she is not a director in the present tense, and as such does not contradict either Exhibit 9 or Mr. Jarvis’ April 15, 2010 Statement to Shareholders, in which he designated himself as the Chairman and only member of TSI’s Board, and appointed himself CEO and Ms. Siegel as President. These documents could be read together to mean that Ms. Clark was TSI’s director from 2007 until April 15, 2010, and thus also on the self-certification date. Additionally, the Area Office failed to review the 2005 “Investment Agreement” to determine whether it grants Ms. Clark any negative control over TSI, similar to ¶ 2.3 of the TSI Shareholders Agreement (SA), which provides [xxxxxxxxxxxxx
xx].

⁴ Appellant probably meant State of Florida filings.

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Fourth, Appellant attacks TSI's credibility and truth of its Area Office filings. Appellant asserts TSI's conduct does not engender confidence in its integrity, raising suspicion about its overall protest response. Appellant points specifically to TSI's attempts, first, to convince the Area Office that TTG no longer exists, and then, when shown the contrary, disingenuously states unawareness that the entity registration was still active. Appellant characterizes these successive inconsistent submissions as "intentionally" misleading the Area Office, and urges OHA to treat it accordingly. Appellant also cites the "single specific procurement" inconsistency in Mr. Jarvis' statements about TTG.

Fifth, Appellant asserts TSI is other than small under the adverse inference rule. Appellant asserts TSI failed to provide requested information about affiliates, specifically TTG's Federal income tax returns, which Appellant asserts would have had to be filed with the Internal Revenue Service (IRS) regardless of whether TTG generated any income. Thus, Federal tax returns exist, and were not provided to the Area Office. In support, Appellant cites *Size Appeal of Management Support Technology, Inc.*, SBA No. SIZ-4976 (2008).

Appellant also asserts TSI and The Siegel Group are affiliated under the identity of interest rule.

As relief, Appellant requests OHA either to reverse the Size Determination or to vacate it and remand the proceeding to the Area Office for a new size determination.

b. TSI's Response

On April 5, 2011, TSI responded to the appeal. TSI argues that Appellant seeks a "do-over" of the Size Determination by submitting new evidence on appeal. TSI further asserts that Appellant ignores OHA's standard of review by requesting that OHA make *de novo* findings of fact, rather than determine whether the Area Office's findings of fact or conclusions of law were clearly in error.

TSI argues Appellant's allegations of the Area Office's alleged findings of fact are unsupported by the record. Ms. Clark has no ability to control TSI because Mr. Jarvis owns the majority of the stock and all the voting stock. The Area Office reasonably relied upon the documentation and sworn statements submitted by TSI that Ms. Clark is not a director, and that Mr. Jarvis serves as TSI's CEO and has full control of the concern. Appellant's allegations are based upon documents, many of them outdated, which are not in the record.

TSI further asserts that none of Appellant's assignments of error of law has merit. The Area Office did not err in finding that a limited amount of common management between TSI and The Siegel Group did not create affiliation. The Area Office did not limit its analysis of TSI's ownership to voting shares, as Appellant suggests. The Area Office also did not err in finding TSI not affiliated with its alleged affiliates controlled by Ms. Clark, because Ms. Clark does not control TSI. Further, TSI and Jantec are not affiliated due to being joint venture partners.

REDACTED DECISION FOR PUBLIC RELEASE**SIZ-5249****IV. Discussion****A. Preliminary Matters****1. Timeliness**

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

2. New Evidence on Appeal

Under the regulations governing size appeals, new evidence may not be admitted on appeal unless the Judge orders it *sua sponte* or a motion is filed and served establishing good cause for its admission. 13 C.F.R. § 134.308(a).

In its Appeal Petition, Appellant moves to admit as new evidence Exhibits 3-6. In its Supplemental Appeal, Appellant moves to admit Exhibits 7a-7f. Appellant properly moves to admit the new evidence; however, the motion does not establish good cause.

I EXCLUDE all of Appellant's proposed new evidence on appeal.

Exhibits 4, 6, and 7a-7d are all public records that were available to Appellant at the protest stage. Appellant neglected to gather and submit this evidence at that time, and cannot be permitted to submit it now on appeal. *Size Appeal of Management Support Technology, Inc.*, SBA No. SIZ-4976, at 3 (2008).

Exhibits 3, 5, 7e, and 7f all describe events occurring after the January 26, 2010, self-certification date and thus are irrelevant here.

In addition, Exhibit 4, contrary to Appellant's assertion, is not from an Air Force solicitation but is from FLETC, and it has nothing to do with work at MacDill AFB.

3. New and Abandoned Issues

On appeal, Appellant argues for the first time that TSI is affiliated with The Siegel Group through identity of interest. This issue was not raised in the protest and not considered by the Area Office, so I may not hear it. 13 C.F.R. § 134.316(a); *Size Appeal of Innovative Resources*, SBA No. SIZ-5239 (2011).

On appeal, Appellant does not argue TSI is affiliated with TWTC, Del-Jen, and Fluor Company. Thus these issues are abandoned. 13 C.F.R. § 134.316(a); *Size Appeal of Falcon, Inc.*, SBA No. SIZ-5239 (2011).

REDACTED DECISION FOR PUBLIC RELEASE**SIZ-5249****4. Motion to Dismiss**

TSI moves to dismiss this appeal asserting that, even if TSI were affiliated with the alleged affiliates, the combined total receipts do not exceed the size standard. Appellant opposes TSI's Motion to Dismiss. Appellant cites disparities in the figures provided in the record it received to review under the Protective Order.

Because, as noted in footnote 2, there is some question over the precision of TSI's numbers, and I believe there are significant issues to discuss here, I DENY TSI's Motion to Dismiss.

5. 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 on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999). OHA will disturb the Area Office's 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. Merits of the Appeal**1. TSI is not affiliated with Jantec through their joint venture TTG.**

Appellant errs in arguing that that TSI's formation of TTG, rendered TSI generally affiliated with Jantec, its joint venture partner. A concern is not affiliated with its joint venture partner (except for the particular procurements for which the joint venture is formed) merely because of the joint venture. 13 C.F.R. § 121.103(h); *Size Appeal of Innovative Resources*, SBA No. SIZ-5238, at 5 (2011). Affiliation may arise between joint venture partners because of economic dependence due to contractual relations (13 C.F.R. § 121.103(f)). However, those have not been established here. Accordingly, the Area Office correctly found no affiliation between TSI and Jantec due to the formation of TTG.

Appellant argues that TSI's failure to file documents dissolving TTG in Nevada results in continuing affiliation with TTG. However, TSI concedes affiliation with TTG. TSI also establishes in the declarations filed with the Area Office that TTG never received a contract, had no revenue, and thus had no impact on TSI's size. Appellant's assertion that TTG had revenue is based upon Exhibit 44 of its protest, information from the manta.com website. Thus, this assertion is based upon at best, second-hand information posted on a website. OHA has consistently held reports which represent information that is second hand at best (such as Dun & Bradstreet or manta.com) cannot be used to determine size or to question the results reached by the Area Office's examination of the Federal tax returns. Accordingly, Appellant's reliance upon them is misplaced. *Size Appeals of SETA Support Services Alliance, LLC, et al.*, SBA No. SIZ-5101, at 5 (2009).

REDACTED DECISION FOR PUBLIC RELEASE**SIZ-5249****2. TSI and The Siegel Group are not affiliated through common management.**

As to The Siegel Group, there is interlocking management between this concern and TSI, with its owners, the Siegels, in positions at TSI. However, Mr. Jarvis retains his control of TSI, as sole owner of the concern's voting stock, as TSI's CEO and thus the superior of the Siegels. Accordingly, because the Siegels cannot exercise any control over TSI, I find the concerns are not affiliated. Even if affiliation were found between TSI and The Siegel Group, The Siegel Group's negligible annual receipts ([xxxxxxxxxxxxx]) would have no effect on the decision in this case.

3. TSI is not affiliated with Jantec under the totality of the circumstances.

Concerns are affiliated when one concern 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) (emphasis added). 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. 13 C.F.R. § 121.103(a)(5).

As in all affiliation analysis under the size regulations, the touchstone issue is control. A connection between two concerns does not necessarily cause affiliation. There must be an element of control present.

Appellant has raised large number of issues, attempting to establish affiliation. Appellant seeks to establish affiliation under the totality of the circumstances rule between TSI and Ms. Clark and the concerns owned and controlled by her. Appellant's attempt must fail, because the issues Appellant raises do not establish any control or power to control TSI by Ms. Clark.

Appellant's argument that TTG renders TSI and Jantec affiliated is meritless. The fact that the JVA recital indicates an interest in future contracts, or that its state registration was continued, does not change the fact that the TTG joint venture expired by its own terms upon its failure to receive the MacDill AFB contract which it was formed to pursue. Further, TTG never sought additional contracts. TTG had no contract and no revenue. TSI was thus not dependent upon it. Thus, there was no control of TSI by Jantec through TTG, and therefore no affiliation.

Appellant mentions repeatedly that Ms. Clark was TSI's founder. However, Appellant's size is determined as of the date of its certification that it is small with its initial offer, including price. 13 C.F.R. § 121.404(a). Ms. Clark's status as a founder does nothing to give her any control over TSI as of the date of self-certification. Further, Appellant's argument that the Area Office erred in not discussing Ms. Clark's status as TSI's founder is meritless. First, because whether a particular individual is a concern's founder is irrelevant to the question of control. Second, the Area Office implicitly recognized Ms. Clark's status as founder by noting that until 2005, she owned 100% of TSI's stock.

Ms. Clark owns stock in TSI, but it is non-voting stock. Ownership of non-voting stock does not confer power to control on its owner, absent some provisions that give the owner that power. Further, the actual Shareholders Agreement prohibits any eventual transfer of voting

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stock to Ms. Clark. Far from evidencing control, the Shareholders Agreement reinforces Ms. Clark's lack of control. The Agreement ensures that Ms. Clark will never exercise control over TSI, and thus underscores the meritlessness of this appeal.

Appellant has cited no authority for its proposition that non-voting stock counts as an indicia of control under the totality of the circumstances and I cannot find any.

Appellant speculates to the provisions of the Investment Agreement (i.e., a provision giving Ms. Clark the right to demand repayment) and then asserts that Ms. Clark has power to control because of it. Such speculation is meritless. If such a redemption provision existed, it would have been in TSI's Articles, or its By-Laws, or in the Shareholder Agreement.

Appellant asserts Ms. Clark is a director of TSI, and that she controls TSI through her post as a director. However, the information in TSI's Form 355 and the corporate documents submitted makes clear that Ms. Clark is not a TSI director. Appellant is basing its assertion here on the erroneous Florida filing. The sworn declarations of an SBA Form 355 and the corporate documents TSI submitted have greater weight than the State filing submitted by Appellant, even without the explanation TSI provided. Ms. Clark is not a director of TSI, and thus was not in a position to exercise control over TSI.

Appellant points to the Shareholders Agreement's limitations on Mr. Jarvis's ability to transfer his shares of stock. However, these limitations do not give Ms. Clark power to control TSI's operations. Rather, these controls are meant only to protect the investment of the minority shareholders and do not affect the concern's daily operations. OHA has held that these limitations do not constitute negative control. *Size Appeal of EA Engineering Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008).

Appellant's argument as to common addresses is meritless. As noted above, TSI has been located at South Rancho Drive for five years, and Jantec has been at West Charleston Blvd. for nine years. Any common address listing is due to outdated information or the TTG joint venture which operated from both addresses, neither of which are indicia of affiliation.

4. The Area Office properly credited TSI's statements and submissions.

Appellant generally attacks TSI's credibility and the truth of its Area Office filings. First, I have excluded much of the evidence Appellant relies upon above, as evidence that was either available to Appellant at the protest stage, or describes events occurring after the self-certification date. Second, Appellant's evidence submitted with its protest is a grab-bag of filings in state Secretary of State's offices, information from the internet and other various sources. Much of it does not contradict the information Appellant has submitted. To the extent any of it does, none of it is as reliable as first-hand information submitted directly from TSI, TSI's SBA Form 355 and sworn statements from Mr. Jarvis, Ms. Clark, and the Siegels. TSI's submissions are more reliable than Appellant's and thus I give them greater credence. *Size Appeal of FFTF Restoration Co., LLC*, SBA No. SIZ-4684 (2005).

REDACTED DECISION FOR PUBLIC RELEASE**SIZ-5249**5. The Area Office properly did not draw an adverse inference relating to TTG.

Appellant's argument that TSI must be found other than small under the adverse inference rule is misplaced. Under the adverse inference rule, if a challenged concern fails or refuses to furnish information, SBA may assume that the disclosure would be contrary to the interest of the party making the disclosure. 13 C.F.R. § 121.1009(d). Appellant argues the failure to submit tax returns for TTG compels an adverse inference against TSI. However, the regulation says the Area Office may draw the adverse inference, it does not require the Area Office to do so. Here, the Area Office chose not to draw the adverse inference where all the other documentation was properly submitted and TTG had no revenue. I conclude that it was not error for the Area Office to exercise its discretion in declining to draw an adverse inference here.

Accordingly, I must DENY the instant appeal.

III. Conclusion

The Area Office's Size Determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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



CHRISTOPHER HOLLEMAN
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that, on June 29, 2011, I served the foregoing, by electronic mail or facsimile transmission (as indicated) upon the following:

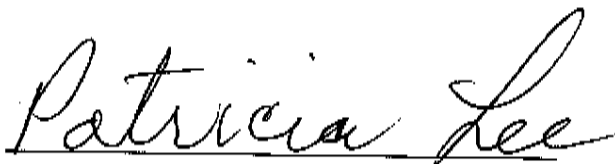
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