

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

SIZE APPEAL OF:

Chu & Gassman, Inc.,

Appellant,

Appealed From
Size Determination No. 1-SD-2011-50

SBA No. SIZ-5291

Decided: October 18, 2011

APPEARANCES

Mark R. Thomas, Esq., and Celeste R. Gamache, Esq., Reid Law P.C., Denver, Colorado,
for Appellant

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a Small Business Administration (SBA) size determination issued to Chu & Gassman, Inc. (Appellant) in conjunction with Appellant's offer on a procurement set aside for service disabled veteran owned small businesses. In the size determination, SBA's Office of Government Contracting, Area I (Area Office) found Appellant to be other than small due to affiliation with two other concerns. For the reasons discussed below, the appeal is granted and the size determination is remanded for further review.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. The record reflects that the size determination was issued August 18, 2011, but not received by Appellant until August 24, 2011.² Appellant filed the instant appeal within fifteen days of

¹ Appellant requested confidential treatment of this decision to protect its sensitive business information. *See* 13 C.F.R. § 134.205. On issuance of the original decision, I ordered Appellant to recommend which portions should be redacted from the published decision. Appellant did not propose any redactions and OHA now publishes the decision in its entirety.

² Accompanying its appeal petition, Appellant moved to admit a declaration from its President concerning the date of receipt of the size determination. Because Appellant has established good cause for admission of this document, and because it will not unduly enlarge the issues at hand, I GRANT Appellant's motion and ADMIT the declaration into the record. 13 C.F.R. § 134.308(a)(2).

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. Solicitation, Protest, and Size Determination

On May 3, 2011, the U.S. Department of Veteran Affairs issued solicitation VA244-11-RP-0250 seeking a professional architect/engineering firm to perform services at the Wilkes-Barre Medical Center. The Contracting Officer (CO) set aside the procurement entirely for service disabled veteran owned small businesses, and assigned North American Industry Classification System (NAICS) code 541310, Architectural Services, with a corresponding size standard of \$4.5 million in average annual receipts. On June 29, 2011, the CO awarded the contract to Appellant.

On June 30, 2011, an unsuccessful offeror, Willow Design, Inc., protested Appellant's size based on information in the Central Contractor Registration which suggested that Appellant's majority owner and President, Mr. William Gassman, owns and controls two other businesses: Chu & Gassman Consulting Engineers, PC (Engineers) and Sunrise Management Services, Inc. (Sunrise).

On August 18, 2011, the Area Office issued its size determination finding that Appellant was not a small business. The Area Office determined that Appellant was formed in 1980 by Mr. Gassman and Mr. Jon T. Chu. In 2009, Mr. Chu sold his stake in Appellant to other individuals, and no longer retains any ownership of the company. The Area Office found that Mr. Gassman currently has the power to control Appellant, because he is the majority stockholder (51%), President, and holds veto power over all corporate decisions.

The Area Office observed that, in addition to Appellant, Messrs. Chu and Gassman established two other companies together: Engineers and Sunrise. Mr. Chu is President and 51% owner of Engineers, whereas Mr. Gassman is Vice President and 49% owner. The Area Office found that Mr. Chu alone has the power to control Engineers.

Sunrise was established by Messrs. Chu and Gassman in 2003. Later that same year, Messrs. Chu and Gassman sold their interests in the company to an Employee Stock Ownership Plan (ESOP) trust, which holds 100% of Sunrise's stock. The Area Office found that the ESOP Trust is managed and administered by the trustees and board of directors. The Area Office concluded that “[s]ince [Messrs.] Chu and Gassman both serve on the Board of Directors and both are Trustees, they have the power to control Sunrise.” Size Determination at 3.

The Area Office next determined that Messrs. Chu and Gassman share an identity of interest under 13 C.F.R. § 121.103(f) due to their “history of common investments.” *Id.* at 4. Specifically, the Area Office noted that Messrs. Chu and Gassman established three companies together, and have had a business relationship since at least 1977. The Area Office cited *Size Appeal of Ridge Instrument Co., Inc.*, SBA No. SIZ-4207 (1996), and *Size Appeal of Priority One Services, Inc.*, SBA No. SIZ-4479 (2002), to support its finding of identity of interest.

In addition to an identity of interest, the Area Office also found affiliation between

Appellant and Engineers based on the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). The Area Office noted a “continuous contractual relationship” between Sunrise and the other two concerns. The Area Office explained that Sunrise was established to provide employee leasing services and at the time of its inception in 2003 Sunrise's employees were employees of Appellant and Engineers. Both Appellant and Engineers have entered into employee leasing arrangements with Sunrise. The Area Office found that, through Sunrise, Appellant and Engineers share employees and office space. Size Determination at 4.

Finally, the Area Office calculated Appellant's size with its affiliates, Engineers and Sunrise. The Area Office determined that, under the inter-affiliate transaction rule, 13 C.F.R. § 121.104(a), Sunrise's revenue should be excluded from the annual receipts calculation because “Sunrise generates revenue solely from leasing employees to [Appellant] and [Engineers].” *Id.* at 5. The Area Office found that the combined average annual receipts of Appellant and Engineers exceeded the applicable size standard of \$4.5 million, so Appellant is not a small business under NAICS code 541310.

III. Appeal

On September 6, 2011, Appellant appealed the size determination to OHA. Appellant argues that the size determination erroneously found that Messrs. Chu and Gassman share an identity of interest. Appellant insists that the Area Office could not reasonably have reached this conclusion because Messrs. Chu and Gassman currently “have a common investment in only one entity, Engineers.” Appeal at 4. Thus, according to Appellant, the size determination was not based on any existing identity of interest, but rather on the fact that Messrs. Chu and Gassman have a “history of common investments.” Appellant is adamant that Mr. Gassman has no power to control Engineers, and Mr. Chu has no power to control Appellant. Appellant notes that the Area Office itself found that Mr. Gassman alone has the ability to control Appellant and Mr. Chu alone has the ability to control Engineers. Appellant also maintains that Appellant and Engineers have no contracts with one another, provide no assistance to one another, operate in different markets, and do not compete against one another for work.

Appellant also disputes the Area Office's finding that it is affiliated with Sunrise. Appellant argues that Sunrise is an employee leasing company, and that SBA regulations specifically state that employee leasing arrangements are not a proper basis for finding affiliation. 13 C.F.R. § 121.103(b)(4). Appellant further asserts that the ESOP trust owns 100% of Sunrise's stock, and that Messrs. Chu and Gassman, as trustees of the trust, owe a fiduciary duty to the trust and must comply with the legal requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §§ 1001 *et seq.* Appellant maintains that although Messrs. Chu and Gassman may exercise some measure of control over Sunrise, they must act in the best interests of the trust pursuant to ERISA and not in their own interests or for the benefit of another entity, such as Appellant or Engineers.

Appellant concludes that Appellant, Engineers, and Sunrise “each have their own interests, markets, finances, and contracts without regard for the other” and do not act in unison for their common benefit. Accordingly, Appellant insists that there is no affiliation among

Appellant, Engineers, or Sunrise and that Appellant alone is a small business under the applicable size standard.

IV. 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. 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 Area Office in this case determined Appellant to be affiliated with Engineers and Sunrise. For the reasons set forth below, I find that the Area Office's determination with respect to Engineers is clearly erroneous. With regard to Sunrise, although the analysis in the size determination does not demonstrate that Appellant and Sunrise are affiliated, the record nevertheless does contain some potential indicia of affiliation between the firms. I therefore remand the issue to the Area Office for further review.

1. Affiliation Between Appellant and Engineers

The Area Office found Appellant to be affiliated with Engineers due to an identity of interest between Mr. Chu, who has the power to control Engineers, and Mr. Gassman, who has the power to control Appellant. Pursuant to 13 C.F.R. § 121.103(f), “Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.” The Area Office reasoned that the interests of Messrs. Chu and Gassman should be combined due to their common investments. Appellant counters that Messrs. Chu and Gassman currently have only one common investment, and therefore do not share identical or substantially identical business or economic interests.

OHA has repeatedly held that an identity of interest on the basis of common investments requires more than one joint investment. *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244, at 4 (2011); *Size Appeal of Eagle Pharms., Inc.*, SBA No. SIZ-5023, at 9 (2009) (“Identity of interest on the basis of 'common investments' plainly requires, at minimum, more than one common investment between two persons.”); *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822, at 5 (2006) (“This Office has held that an identity of interest may be found among those who have common investments in more than one concern, whose common business interests cause the parties to act in union for their common benefit.”). Here, the only current common investment between Messrs. Chu and Gassman is their joint investment in Engineers. Although Mr. Chu co-founded Appellant, and previously held a stake in the company, he divested that

interest in 2009. Thus, Messrs. Chu and Gassman currently have no common investment in Appellant. Similarly, Messrs. Chu and Gassman do not share a joint investment in Sunrise. The Area Office determined that Sunrise was established in 2003, and in that same year Messrs. Chu and Gassman sold their holdings to an ESOP trust, which “currently holds 100% of Sunrise's company stock.” Size Determination at 3. It therefore appears that neither Mr. Chu nor Mr. Gassman presently holds an investment in Sunrise. In accordance with settled OHA precedent, joint investment in only one concern is not sufficient grounds to establish that Messrs. Chu and Gassman share an identity of interest.

The Area Office appears to have attached significance to the “history of common investments” between Messrs. Chu and Gassman, observing that they founded three companies together and have had a business relationship since 1977. However, 13 C.F.R. § 121.103(f) does not provide for affiliation through a past history of joint investments, and prior investments which are no longer in effect cannot logically support a conclusion that two investors share “identical or substantially identical business interests.” Accordingly, the “history of common investments” between Messrs. Chu and Gassman does not create an identity of interest under 13 C.F.R. § 121.103(f). *See also Size Appeal of Action Services Group, Inc.*, SBA No. SIZ-5208, at 5 (2011) (historical ties do not establish that concerns are currently affiliated); *Size Appeal of LGS Management, Inc.*, SBA No. SIZ-5160, at 4 (2010) (“[N]or does potential past affiliation necessarily result in present affiliation.”).

The Area Office also found Appellant affiliated with Engineers under the “totality of the circumstances,” 13 C.F.R. § 121.103(a)(5). OHA has explained that SBA may find firms affiliated under the totality of the circumstances if “the interactions between the businesses are so suggestive of reliance as to render the firms affiliates. Although the evidence in the record may not establish affiliation under one of the specific factors enumerated in the regulation, a review of all the factors may lead to the conclusion one business has the power to control the other and, thus, both are affiliated.” *Size Appeal of Diverse Construction Group, LLC*, SBA No. SIZ-5112, at 7 (2010) (citations omitted).

Here, the Area Office expressly determined that Mr. Chu alone has the power to control Engineers, and Mr. Gassman alone has the power to control Appellant. Size Determination at 3. In other words, Mr. Chu has no power to control Appellant, and Mr. Gassman has no power to control Engineers. As discussed above, Messrs. Chu and Gassman do not share an identity of interest. Furthermore, Appellant and Engineers have no contracts with one another, provide no assistance to one another, operate in different markets, and do not compete against one another for work. As a result, the Area Office clearly erred in finding Appellant to be affiliated with Engineers, since there is no indication that either firm has the power to control the other. 13 C.F.R. § 121.103(a) (affiliation exists when “one [concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.”); *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128, at 5 (2010) (“The ultimate inquiry in any type of affiliation case ... is the power to control.”).

2. Affiliation Between Appellant and Sunrise

The Area Office also found Appellant to be affiliated with Sunrise. However, because Sunrise derives its revenues solely from Appellant and Engineers, the Area Office determined that Sunrise's revenues constitute inter-affiliate transactions and therefore must be excluded for purposes of determining Appellant's average annual receipts. Size Determination at 5. As a result, the size determination devoted little attention to Sunrise, and the rationale for finding Appellant to be affiliated with Sunrise is not clearly described.

The Area Office does, however, allude to two possible grounds for affiliation between Appellant and Sunrise that are different than those cited with respect to Engineers. First, the Area Office refers to a "continuous contractual relationship" between Appellant and Sunrise. *Id.* at 4. Second, the size determination states that Mr. Gassman, as a trustee of the Sunrise ESOP trust and a member of its board of directors, has the power to control Sunrise. *Id.* at 3. If Mr. Gassman does have the power to control Sunrise, Appellant and Sunrise could then be affiliated on the basis of common management, 13 C.F.R. § 121.103(e).

Appellant insists that it is not affiliated with Sunrise on either of these grounds. According to Appellant, the contractual relationships between Appellant and Sunrise are insignificant because Sunrise is an employee leasing firm, and 13 C.F.R. § 121.103(b)(4) specifically excludes employee leasing arrangements as a basis for affiliation. Appellant further contends that Mr. Gassman must operate under fiduciary duty to the ESOP trust, and therefore cannot fully "control" Sunrise.

I find it appropriate to remand this matter for further development of the record. OHA has recognized that the fact that a trustee owes a fiduciary duty to another party does not necessarily preclude the trustee from exercising "control" over a concern within the meaning of SBA regulations. *Size Appeal of Active Deployment Systems, Inc.*, SBA No. SIZ-5216, at 5 (2011). On the other hand, the structure of the trust, or the fact that there are multiple trustees, can be significant considerations in assessing the degree of "control" exercised by the trustee. *Size Appeals of Technical Support Services and Vanguard Resources Corp.*, SBA No. SIZ-4794, at 5 (2006) (noting that a particular individual was "but one of the three trustees (and equal votes) of the ESOP Trust and thus cannot control it solely with his vote."). With regard to the contractual ties between Appellant and Sunrise, the Area Office recognized that "Sunrise was established to provide employee leasing services" and that Appellant and Engineers have signed employee leasing agreements with Sunrise. Size Determination at 4. It is unclear, however, whether Sunrise engages exclusively in employee leasing, and the Area Office did not address the applicability of 13 C.F.R. § 121.103(b)(4). Thus, the factual record is incomplete with regard to Appellant's potential affiliation with Sunrise.

3. Remand

Although the Area Office clearly erred in finding Appellant to be affiliated with Engineers, Appellant may still be affiliated with Sunrise on different grounds. On remand, the Area Office must determine whether Appellant is affiliated with Sunrise in light of 13 C.F.R. §

121.103(b)(4). If the Area Office determines that Appellant and Sunrise are affiliated, the Area Office must also determine whether there are any properly-excludable inter-affiliate transaction receipts between Appellant and Sunrise and, if so, in what amount. Those amounts must be excluded from the calculation of Appellant's average annual receipts.

V. Conclusion

The size determination contains clear errors. I therefore GRANT the appeal, VACATE the size determination, and REMAND this matter to the Area Office for further review in accordance with this decision.

KENNETH M. HYDE
Administrative Judge