United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Technibilt, Ltd., Appellant, Appealed From Size Determination No. 3-2011-118	SBA NO. SIZ-5304 Decided: December 7, 2011

APPEARANCE

Gary J. Welch, Esq., Johnston, Allison & Hord, P.A., Charlotte, North Carolina, for Appellant

DECISION

I. Introduction and Jurisdiction

On September 30, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-118 finding Technibilt, Ltd. (Appellant) other than small for the procurement at issue. On October 14, 2011, Appellant appealed the size determination to the SBA Office of Hearings and Appeals (OHA). For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

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. 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 May 23, 2011, the Defense Commissary Agency (DCA) issued Solicitation No. HDEC04-11-R-0026 seeking a contractor to provide bagger and grocery carts for DCA stores worldwide. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 333924, Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing, with an associated size standard of 750 employees. Appellant submitted its offer on June 17, 2011, self-certifying as a

small business.

On August 24, 2011, the CO announced that Appellant was the apparent successful offeror. On August 26, 2011, Industrial Bakery Equipment LLC, a disappointed offeror, filed a protest challenging Appellant's size. The CO forwarded the protest to the Area Office for a size determination.

B. Size Determination

On September 30, 2011, the Area Office issued its size determination. The Area Office found Appellant to be other than small due to affiliation with Technibilt Holdco, Ltd. (Technibilt Holdco), Cari-All Products, Inc. (Cari-All Products), Cari-All Group, Inc. (Cari-All Group), Rondi Industries, Inc. (Rondi), CDP Investissements, Inc. (CDP), and OMERS Administration Corporation/Ontario Ltd. (OMERS).

The Area Office first determined that Appellant is 100% owned by Technibilt Holdco, a holding company with no commercial business and no employees. Technibilt Holdco is 100% owned by Cari-All Products, which is in turn 100% owned by Cari-All Group. Cari-All Group also owns 100% of Rondi. Based on this ownership structure, the Area Office found that Appellant is affiliated with Technibilt Holdco, Cari-All Products, Cari-All Group, and Rondi. 13 C.F.R. § 121.103(a) and (c)(1).

The Area Office next examined the ownership of Cari-All Group, and determined ownership to be distributed as follows:

Shareholder	Ownership Percentage
CDP	36.12%
OMERS	36%
Norderon Capital, Inc.	13%
Ontario, Inc.	13%
Alain Michel	1%
Pierre Arsenault	0.9%

The Area Office determined that the holdings of CDP and OMERS are approximately equal in size, and collectively are large as compared with all other interests in Cari-All Group. Accordingly, pursuant to 13 C.F.R. § 121.103(c)(2), the Area Office presumed that both CDP and OMERS have the power to control Cari-All Group. Additionally, the Area Office observed that CDP and OMERS have the most seats on Cari-All Group's board of directors, two each as compared with one director apiece for the other four shareholders. The Area Office found that, due to their ownership and board seats, CDP and OMERS control Cari-All Group. Because Cari-All Group controls Appellant, the Area Office reasoned that CDP and OMERS have the power to control Appellant, and that Appellant is affiliated with CDP and OMERS.

The Area Office determined that the combined average number of employees of

Appellant, Technibilt Holdco, Cari-All Products, Cari-All Group, and Rondi would not exceed the 750 employee size standard. However, Appellant does exceed the size standard once the employees of CDP and OMERS are included. As a result, Appellant was found to be other than a small business.

C. Appeal Petition

On October 14, 2011, Appellant filed the instant appeal challenging the size determination. Appellant acknowledges that Cari-All Group ultimately controls Appellant, and that Appellant is affiliated with Technibilt Holdco, Cari-All Products, Cari-All Group, and Rondi. Appeal at 4. Appellant disputes the Area Office's determination that Appellant is affiliated with CDP and OMERS. Nevertheless, Appellant concedes that, if OHA determines that Appellant is affiliated with CDP or OMERS, Appellant is not a small business under the applicable size standard. *Id.* at 5, fn.3.

Appellant asserts that the Area Office erred in concluding that Appellant did not rebut the presumption that CDP and OMERS control Cari-All Group. Appellant explains that CDP and OMERS are two large Canadian pension plans that manage assets in excess of $150 billion and $60 billion, respectively. Appellant maintains that neither entity participates in any manner in the operation or control of Appellant. Appellant further argues that Appellant has never shared employees with CDP or OMERS; that Appellant has never performed services for CDP or OMERS; and that neither CDP nor OMERS assisted with Appellant's proposal for the procurement in question. Appellant asserts that the inability of CDP and OMERS to control Cari-All Group or Appellant is evidenced by the limited number of directors allocated to CDP and OMERS on the Cari-All Group board. Appellant states that although CDP and OMERS together own more than 72% of Cari-All Group, they have only 50% of Cari-All Group's directors. According to Cari-All Group's bylaws, a majority of directors must be present to establish a quorum. Thus, reasons Appellant, CDP and OMERS could not individually or collectively control Cari-All Group.

Appellant also points out that the Area Office did not find any common interests or management between CDP or OMERS to indicate those entities would collaborate to control Cari-All Group. Appellant argues the absence of a finding of common management or interests between CDP and OMERS demonstrates the lack of any basis to conclude that CDP and OMERS together have the ability to control Cari-All Group.

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. 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

This case turns upon whether CDP and OMERS — the largest minority shareholders of Cari-All Group — have the power to control Cari-All Group. Appellant concedes that Cari-All Group controls Appellant, and that Appellant will exceed the applicable size standard if Appellant is affiliated with either CDP or OMERS. Thus, if CDP and OMERS control Cari-All Group, Appellant is not a small business.

In finding that CDP and OMERS do control Cari-All Group, the Area Office applied 13 C.F.R. § 121.103(c)(2), which provides that:

> If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

Here, CDP owns 36.12% of Cari-All Group and OMERS owns 36%. These interests are approximately equal in size. Furthermore, CDP and OMERS together own more than 72% of Cari-All Group. The next largest holdings are Norderon Capital, Inc. and Ontario, Inc., each with 13% ownership. Accordingly, when aggregated, the interests of CDP and OMERS are large as compared with any other stock holding of Cari-All Group. Pursuant to 13 C.F.R. § 121.103(c)(2), the Area Office presumed that both CDP and OMERS have the power to control Cari-All Group.

Appellant contends that it introduced sufficient evidence to rebut the presumption of control. Appellant observes that neither CDP nor OMERS has so large an interest that it could, individually, control Cari-All Group. Nor did the Area Office find any reason to believe that CDP and OMERS would act in concert with one another. Further, although CDP and OMERS together own more than 72% of Cari-All Group, they hold only 4 of the 8 seats on Cari-All Group's board of directors, and thus could not by themselves establish a quorum.

I agree with the Area Office that the factors identified by Appellant are not sufficient to overcome the presumption of control in 13 C.F.R. § 121.103(c)(2). OHA has analyzed these issues in several prior cases. In *Size Appeal of Technical Support Services,* SBA No. SIZ-4794 (2006), OHA explained that:

> The best rationale for the minority shareholder presumption (13 C.F.R. § 121.103(c)(2)) is that all concerns must be controlled by someone or some group at all times. The alternative, to consider none of the minority stockholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved.

Technical Support Services, at 13. OHA determined that the presumption of control had not been rebutted, and found that the challenged firm was "essentially arguing no one can control [the alleged affiliate], which is inconsistent with the rationale for the minority shareholder presumption." *Id.*

In *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986), OHA held that an equal distribution of voting power among three minority stockholders was sufficient to give each the power to control the firm. OHA reached this conclusion notwithstanding the fact that "alone, [each minority stockholder] could neither affirmatively establish policy and execute management decisions, nor negatively block action favored by a majority of the stockholders or management." *Zygo*, at 6.

In *Size Appeal of Ceramatec, Inc.*, SBA No. SIZ-3040 (1989), the two largest shareholders held interests of 32.5% and 32.3%, with the remainder of the company owned by 31 other shareholders. OHA found that the two largest shareholders each had the power to control the concern, reasoning that this "reflects the reality of the business world where two dominant stockholders, 'although unable to singularly enact or block corporate action, wield great influence over company affairs ... and ... may easily enter into alliances or otherwise effect their wishes."' *Ceramatec* at 6 (quoting *Size Appeal of River Equipment Co., Inc.*, SBA No. SIZ-3024, at 5 (1988)).

Similarly, in the instant case, while Appellant maintains that CDP and OMERS do not control Cari-All Group, Appellant has not identified any other plausible candidate besides CDP and OMERS that could control Cari-All Group. The mere fact that CDP and OMERS could not individually control Cari-All Group is insufficient to overcome the presumption in 13 C.F.R. § 121.103(c)(2), since all concerns must always be controlled by some person or entity. As in*Technical Support Services*, a contention that Cari-All Group is not controlled by any party is plainly untenable. Further, given the relative size of CDP's and OMERS's ownership interests and their substantial representation on Cari-All Group's board, CDP and OMERS are the two dominant shareholders of Cari-All Group. At a minimum, then, CDP and OMERS exert far more influence over Cari-All Group than any other individual or concern, and there exists the potential that the firms could collaborate with one another to control Cari-All Group. Accordingly, the Area Office did not err in concluding that Appellant failed to rebut the presumption in 13 C.F.R. § 121.103(c)(2) that CDP and OMERS control Cari-All Group.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Instead, the record establishes that the Area Office correctly found that CDP and OMERS control Cari-All Group and, therefore, Appellant. Appellant concedes that it exceeds the applicable size standard if it is affiliated with CDP or OMERS. Accordingly, this appeal is DENIED, and the size determination is AFFIRMED.

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

KENNETH M. HYDE
Administrative Judge