United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Advent Environmental, Inc., Appellant, Appealed From Size Determination No. 3-2011-112	SBA No. SIZ-5325 Decided: March 2, 2012

APPEARANCES

David R. Johnson, Esq., and Jamie F. Tabb, Esq., Vinson & Elkins LLP, Washington, DC, for Appellant

Antonio R. Franco, Esq., Steven J. Koprince, Esq., and Peter B. Ford, Esq., PilieroMazza PLLC, Washington, D.C., for J2 Engineering, Inc.

DECISION[1]

I. Introduction and Jurisdiction

On November 16, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-112 finding ADVENT Environmental, Inc. (Appellant) other than small for the procurement at issue. On December 1, 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.

[1] This decision was initially issued on February 16, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

II. Background

A. Solicitation and Protest

On April 13, 2010, the Naval Facilities Engineering Command Southeast issued Solicitation No. N69450-10-R-0104 seeking contractors to perform environmental remediation services at contaminated sites. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562910, Environmental Remediation Services, with an associated size standard of 500 employees. The procurement was issued under the two-phase design-build selection procedures authorized by Federal Acquisition Regulation (FAR) subpart 36.3. Phase I proposals were due May 26, 2010, and Phase II proposals, which included price, were due January 20, 2011. Appellant self-certified as a small business in its Phase II proposal.

On August 15, 2011, the CO announced that Appellant was one of five apparent successful offerors. On August 22, 2011, J2 Engineering, Inc. (J2), 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 November 16, 2011, the Area Office issued its size determination finding that Appellant was not a small business.

The Area Office first determined that Appellant is wholly-owned by Versar, Inc. (Versar). Appellant therefore is affiliated with Versar, as well as with three other concerns that are also wholly-owned subsidiaries of Versar: GEOMET Technologies, LLC (GEOMET), Versar International, Inc. (Versar International) and Professional Protection Systems, Ltd. (PPS). 13 C.F.R. § 121.103(a) and (c)(1). Appellant acknowledged that it is affiliated with Versar and its subsidiaries. (Size Determination at 2.)

The Area Office next found that Versar is a widely-held, publicly-traded company, and that no single person or concern owns a block of stock that is large compared with other stock holdings. As a result, pursuant to 13 C.F.R. § 121.103(c)(3), Versar is controlled by its Board of Directors and its President/CEO. The Area Office determined that Versar's CEO, Mr. Anthony Otten, controls Versar and the Versar subsidiaries, including Appellant. (Size Determination at 2-3.)

As part of the size review process, Appellant disclosed that Mr. Otten is one of four unrelated persons holding an ownership interest in International Wholesale Tile, LLC (IWT). Specifically, Mr. Otten holds a 25% interest in IWT's parent company, IWT Holdings, LLC (IWT Holdings). The three other owners of IWT Holdings are Mr. Paul Boucher, Mr. Christy Sadler, and Mr. Steven Hufft, each of whom also holds a 25% interest. The Area Office determined that, because the four owners of IWT Holdings have interests that are equal in size to one another, there is a rebuttable presumption that each owner has the power to control IWT

Holdings. 13 C.F.R. § 121.103(c)(2).

The Area Office found that Appellant did not rebut the regulatory presumption that Mr. Otten controls IWT Holdings and IWT. The Area Office noted that Mr. Otten is not merely a passive investor in IWT Holdings, but also participates in the management of the company. Specifically, the Area Office observed that Mr. Otten — along with Messrs. Boucher, Sadler and Hufft — serves on IWT Holdings' Board of Managers, which votes on high-level decisions affecting the company. Mr. Otten is also Treasurer of IWT Holdings and is its designated "Tax Matters Member." The Area Office explained:

> The evidence shows that Mr. Otten serves on IWT Holdings' Board of Managers and shares equal voting rights with the three other owners which he exercises at quarterly meetings. As a Manager and Treasurer of IWT Holdings, Mr. Otten has signature authority on behalf of the entity. Further, in his capacity as Tax Matters Member, Mr. Otten is authorized to act as IWT Holdings' representative in interactions with the Internal Revenue Service. Despite the fact that Mr. Otten does not appear to have exercised these powers, he does in fact have the power to exercise these grants of authority. As such, the presumption of control has not been rebutted.

(Size Determination at 6.) The Area Office thus found that Mr. Otten controls IWT and IWT Holdings, in addition to controlling Appellant, Versar, and the Versar subsidiaries.

The Area Office determined that the combined average number of employees of Appellant — when added to those of Versar, GEOMET, Versar International, PPS, and IWT — exceeds the 500 employee size standard. (*Id.* at 8.) As a result, Appellant is not a small business. Appellant acknowledged that it does not qualify as a small business if Appellant is affiliated with IWT. (*Id.* at 5.)

C. Appeal Petition

On December 1, 2011, Appellant filed its appeal petition. Appellant alleges that the Area Office erred in finding affiliation between Appellant and IWT. Appellant observes that the two companies operate in separate industries, and have no business ties with one another. Appellant asserts that due to the Area Office's finding of affiliation with IWT based on the minority shareholder presumption, Appellant, an otherwise small company, was found to exceed the size standard when combined with IWT's employees.

Appellant argues that Appellant submitted significant evidence to rebut the regulatory presumption that Mr. Otten has the power to control IWT. Appellant asserts that the size determination incorrectly focused on Mr. Otten's nominal positions with IWT Holdings. Appellant states that the IWT Holdings LLC Agreement prevents Mr. Otten from exercising control because it requires approval of three of the four managers on the board of IWT Holdings to take any action, and three managers are necessary to constitute a quorum. Appellant recognizes that prior OHA cases have found such limitations on individual control to be insufficient to rebut the presumption of control in 13 C.F.R. § 121.103(c)(2). (Appeal at 15

(citing *Size Appeal of Technical Support Services*, SBA No. SIZ-4794 (2006) and *Size Appeal of Indianhead Ski Corp.*, SBA No. SIZ-1904 (1984)). However, Appellant distinguishes cases such as *Technical Support Services* and *Indianhead* by asserting that Mr. Otten's presumed ability to control is diminished by evidence that Mr. Boucher, and to a lesser extent Mr. Sadler (who serves as a consultant to IWT), has actual power to control IWT. (Appeal at 13.) Appellant emphasizes that Mr. Boucher is a 25% owner of IWT Holdings, sits on the IWT Holdings board, is President and CEO of IWT and IWT Holdings, and "has total control over every aspect of [IWT's] operations." (*Id.* at 14.) Appellant asserts that, in comparison, Mr. Otten has no role in the operation of IWT and merely reviews monthly financial statements and attends quarterly board meetings. Appellant argues that Mr. Otten's Treasurer and Tax Matters Member positions are purely "nominal" with no powers or duties. Appellant states that Mr. Otten's investment in IWT Holdings is a personal "side investment." (*Id.* at 19.) Appellant argues that because the locus of power is demonstrated to reside with Mr. Boucher, the Area Office erred in concluding that Mr. Otten controlled IWT.

Appellant asserts that the Area Office's application of the minority shareholder rule to find Appellant affiliated with IWT "stretches the bounds of rationality." (*Id.* at 18.) Appellant states it was not even aware of IWT's existence before the size protest because Mr. Otten's investment is purely personal. Appellant notes that Appellant, Versar, and Appellant's acknowledged affiliates work in environmental remediation, whereas IWT sells ceramic tiles. Appellant also argues that the Area Office's decision is contrary to public policy because it discourages small businesses from hiring qualified executives, who are likely to have side investments which could cause affiliation, as well as potentially discouraging investments in small businesses like IWT. Appellant concludes that it has successfully rebutted the presumption that Mr. Otten controls IWT. Appellant argues to find Mr. Otten has the power to control IWT, despite the evidence submitted, would be contrary to OHA case law by "'ignor[ing] reality"' and "'clos[ing] [its] eyes to the facts of corporate life and relationships."' (*Id.* at 20 (quoting *Technical Support Services* at 13 and *Size Appeal of DeVac, Inc.*, SBA No. SIZ-612 (1973)).)

D. J2 Response

On December 19, 2011, J2 responded to the appeal. J2 maintains that the appeal should be denied because the Area Office did not err in determining that Appellant is affiliated with IWT. J2 emphasizes that Mr. Otten, CEO of Appellant's parent company, is one of four equal owners of IWT Holdings, which owns 100% of IWT; therefore, according to J2, Mr. Otten was properly presumed to control IWT. J2 asserts that the evidence Appellant presented to the Area Office did not rebut the presumption of minority shareholder control, but rather confirmed that Mr. Otten is a Board member and high-ranking officer of IWT Holdings, and has as much power to control IWT as the three other owners.

J2 asserts that the Area Office's determination was not erroneous, even if OHA were to accept Appellant's contention that Mr. Otten plays no active role in the management of IWT. J2 cites SBA regulations which indicate that "[i]t does not matter whether control is exercised, so long as the power to control exists." (Response at 1, citing 13 C.F.R. § 121.103(a)(1)). J2 asserts that Appellant essentially argues that none of the four owners of IWT Holdings controls IWT. J2

contends that if 13 C.F.R. § 121.103(c)(2) applied only to an owner who could affirmatively or negatively control the company, the regulation would seldom apply because minority shareholders by definition lack the power to take unilateral action. J2 asserts Appellant's arguments also contradict OHA case law, which has often applied 13 C.F.R. § 121.103(c)(2) even when a minority shareholder lacks the ability to take unilateral action. (Response at 5, citing *Size Appeal of Squire Associates*, SBA No. SIZ-2963 (1988) and *Size Appeal of Downtown Milwaukee Ramada Inn*, SBA No. SIZ-2869 (1988)).

J2 emphasizes that Mr. Otten is one of four equal owners of IWT Holdings, serves as a member of the board, and acts as Treasurer and Tax Matters Member. By Appellant's own admission, Mr. Otten participates in quarterly board meetings, reviews monthly financial statements, and votes on strategic decisions. J2 asserts that this is not a case where one minority owner has total control and another minority owner plays no role at all.

Finally, J2 states that the absence of other business connections between Appellant and IWT is irrelevant. J2 argues the companies' affiliation is based on common control by Mr. Otten, not on economic relationships. Similarly, J2 dismisses Appellant's public policy arguments as meritless, claiming that it is not a hardship for small businesses to inquire about a potential leader's outside investments.

E. Appellant's Motion to Supplement

On December 19, 2011, Appellant moved to supplement the record with new evidence. Specifically, Appellant seeks to introduce a "supplemental agreement" executed by the four owners of IWT Holdings on December 16, 2011. Appellant maintains that there is good cause to admit the document because the agreement "verifies in a formal corporate format what [Appellant] had already established before the Area Office — namely that Mr. Otten's role in IWT Holdings and IWT is that of an investor, with no ability to participate in the operation or management of the companies." (Motion at 2.)

On December 21, 2011, J2 opposed Appellant's motion. J2 asserts that the agreement may not be admitted on appeal because it was not first presented to the Area Office. J2 further argues that the agreement was executed long after the date of Appellant's self-certification, and therefore is irrelevant to deciding whether Appellant was a small business as of that date.

F. Appellant's Motion to Reply

On December 22, 2011, after the close of record, Appellant filed a reply. Appellant requests leave to reply to address alleged inaccuracies in J2's response. J2 opposes the motion.

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. §§ 134.207(b), 134.309(d). Appellant's reply was filed after the close of record, and reiterates arguments raised in the appeal petition. Accordingly, Appellant's motion is DENIED, and the reply is excluded from the record.

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has not shown good cause to admit the new evidence. The record indicates that Appellant was well aware that Mr. Otten's control of IWT Holdings was a central issue in the size determination. Further, Appellant offers no explanation why the new agreement it seeks to introduce could not have been prepared and executed much earlier in the review process. Accordingly, if Appellant wished to have the new evidence considered, Appellant could, and should, have produced it to the Area Office during the size review. *Size Appeal of BR Construction, LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which "sets forth factual information that could have been communicated to the Area Office"); *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 17 (2010) (rejecting new evidence because "Appellant knew its relationship with [the alleged affiliate] was at issue and should have presented this information to the Area Office"). Furthermore, Appellant has not established how the new agreement is relevant to this case. Appellant self-certified as a small business on January 20, 2011, and its size must be determined as of that date. 13 C.F.R. § 121.404(a). The new agreement, however, was not executed until December 16, 2011. Thus, the new agreement appears to be irrelevant in deciding whether Appellant was a small business as of January 20, 2011. *Cf., Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 5 (2011) (denying motion to admit new evidence when "Appellant has failed to show that the proffered new evidence is relevant to these proceedings.").

C. Analysis

The Area Office in this case determined that Appellant is controlled by Mr. Anthony Otten, CEO of Appellant's parent company, Versar. Appellant does not dispute that it is affiliated with Versar, or that Mr. Otten controls Appellant. Rather, the central issue presented is whether Mr. Otten also controls IWT. If so, Appellant is affiliated with IWT through common control by Mr. Otten. 13 C.F.R. § 121.103(a). Furthermore, if Appellant is affiliated with IWT, Appellant does not qualify as a small business, as the addition of IWT's employees to those of Appellant, Versar, and other acknowledged affiliates causes Appellant to exceed the applicable size standard.

In concluding that Mr. Otten controls IWT, the Area Office observed that Mr. Otten is one of four unrelated owners of IWT Holdings, IWT's parent company. Each owner holds a 25% interest. The Area Office therefore applied the "minority shareholder presumption," 13 C.F.R. § 121.103(c)(2), which imposes a rebuttable presumption that minority shareholders have the power to control a concern. Specifically, the regulation states 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.

13 C.F.R. § 121.103(c)(2). Because Mr. Otten and the other three owners hold equal 25% interests in IWT Holdings, the Area Office presumed that each has the power to control IWT.

Appellant contends that the Area Office "mechanically" applied the regulation, and should have concluded that Appellant had rebutted the presumption that Mr. Otten has the power to control IWT. (Appeal at 2.) In making this argument, Appellant recognizes that OHA has long held that the mere fact that a minority shareholder cannot individually control a concern is not sufficient to overcome the presumption. *E.g., Size Appeal of Technibilt, Ltd.*, SBA No. SIZ-5304 (2011); *Size Appeal of Technical Support Services*, SBA No. SIZ-4794 (2006); *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986). Indeed, the very purpose of the rule is to address situations in which no single person or entity has actual affirmative or negative power to control a concern. Thus, while it may be true that Mr. Otten could not by himself control IWT or IWT Holdings, this alone provides no basis to conclude that the Appellant has rebutted the presumption.

Appellant, however, contends that the instant case can be distinguished from prior cases considered by OHA. According to Appellant, although OHA's case precedent may be reasonable in situations where minority shareholders are equally situated with regard to the power to control, OHA nevertheless should find that "the presumption of control may be rebutted by a showing that one partial owner has total control over the day-to-day operation of the company

while another partial owner has no role at all in the company's operations." (Appeal at 16.)

Here, Appellant urges that IWT is controlled by Mr. Paul Boucher, rather than Mr. Otten. Like Mr. Otten, Mr. Boucher is one of the four owners and managers of IWT Holdings. However, Mr. Boucher is also President and CEO of IWT itself. Appellant claims that "Mr. Boucher makes all relevant decisions regarding IWT's day-to-day operations, hiring, sales, customer relations, purchasing and finance." (Appeal at 9.) Further, Appellant asserts that Mr. Boucher wields far more influence over IWT than does Mr. Otten, noting that Mr. Boucher directly supervises IWT's lower-level managers, and that Mr. Boucher has superior access to information about the business. In contrast to Mr. Boucher, Appellant argues that Mr. Otten is predominantly a passive investor who holds "nominal positions with no substantive duties or powers" and "plays no role in the operation or management of IWT." (*Id.* at 14.) Appellant maintains that the Area Office should have determined that the locus of power "rests firmly with Mr. Boucher," and not with Mr. Otten.

Appellant's arguments are marred by two principal flaws. First, the record does not establish that Mr. Otten is merely a passive investor who plays "no role at all in the company's operations," as Appellant urges. Mr. Otten is not only a 25% owner of IWT Holdings, but also serves on the four-person Board of Managers, and is the company's Treasurer and Tax Matters Member. Appellant claims that the latter positions are largely meaningless and have no significant responsibilities. Nevertheless, Appellant concedes that Mr. Otten reviews monthly financial statements, and participates in quarterly meetings of the Board of Managers, voting on "issues that affect the overall strategic direction of IWT, such as the annual budget approval and decisions on major acquisitions." (Appeal at 8-9.) Thus, the record indicates that, in addition to his ownership interest, Mr. Otten has direct, personal involvement in IWT's affairs, including oversight of its most important strategic decisions.

Second, IWT Holdings' LLC Agreement indicates that the Board of Managers "in its full and exclusive discretion, will manage and control, have authority to obligate and bind, and make all decisions affecting the business and assets of the Company." (LLC Agreement at § 6.1.) Under the terms of this agreement, then, the power to control IWT and IWT Holdings rests with the Board of Managers, of which Mr. Otten is one of four, with equal votes. It may be true that the Board, in practice, chooses to delegate various issues to Mr. Boucher, who makes decisions independently. Nevertheless, as a legal matter, the authority to control IWT is vested with the Board of Managers, including Mr. Otten.

OHA considered a substantially similar situation in *Size Appeal of Road Builders Corp.*, SBA No. SIZ-3016 (1988). In that case, the challenged firm was 45% owned by its president, and 40% owned by an alleged affiliate. The challenged firm asserted that the minority shareholder presumption should not apply because the firm's president operated and managed the company independently, whereas the alleged affiliate was a passive investor with "neither the knowledge nor the skills" to operate the business. *Road Builders*, SBA No. SIZ-3016, at 4. OHA, however, rejected this argument and denied the appeal, noting that the alleged affiliate was represented on the board of directors, which had legal authority to control the challenged firm's major expenditures. OHA concluded that "[t]here has been no showing that the power to control, though arguably not exercised, does not exist." *Id.* at 8.

In short, then, contrary to Appellant's arguments on appeal, the record does not support the premise that Mr. Otten is merely a passive investor in IWT. Rather, through his participation on the Board of Managers, Mr. Otten has direct personal involvement in IWT's strategic decision-making. Further, like the situation described in *Road Builders*, the IWT Holdings Board of Managers has legal authority to control IWT. Thus, regardless of whether Mr. Boucher, in practice, makes decisions independently, the Board of Managers (including Mr. Otten) has ultimate control of the company. I find, therefore, that the Area Office did not err in presuming that Mr. Otten controls IWT, or in determining that the presumption had not been rebutted.

Appellant's remaining arguments are easily dispatched. Appellant emphasizes that there is no business relationship whatsoever between Appellant and IWT. It is, however, unnecessary to find such ties in order to apply the minority shareholder presumption. *E.g.*, *Technibilt*, SBA No. SIZ-5304, at 4-5 (applying minority shareholder rule to find affiliation between a manufacturer of shopping carts and two Canadian pension funds, although the manufacturer conducted no business with either fund). Appellant also suggests that application of the minority shareholder presumption is contrary to sound public policy, such as by discouraging small businesses from hiring qualified executives. These concerns, however, derive from the regulation itself, and thus would be more appropriately directed to SBA policy officials. It is well-settled that OHA "has no authority to determine the validity of the size regulations and can entertain no challenge to them." *Size Appeal of Condor Reliability Servs., Inc.*, SBA No. SIZ-5116, at 6 (2010).

IV. Conclusion

As the challenged firm, Appellant was responsible for persuading the Area Office that it is a small business. 13 C.F.R. § 121.1009(c). Based upon the record, Appellant failed to do so. On appeal, it was Appellant's burden to prove that the size determination is clearly erroneous. 13 C.F.R. § 134.314. Again, Appellant has not done so. Therefore, I DENY this appeal and AFFIRM the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge