United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Signal Ship Repair, LLC, Appellant, Appealed From Size Determination No. 3-2012-028	SBA No. SIZ-5335 Decided: March 15, 2012

APPEARANCES

David S. Bland, Esq., Julie M. Araujo, Esq., LeBlanc Bland, PLLC, New Orleans, Louisiana, for Appellant

DECISION[1]

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 a clear error of fact or law in determining that Appellant was affiliated with its shareholders, and thus that the Area Office properly drew an adverse inference when those shareholders declined to submit information on the number of their employees.

III. Background

A. The Solicitation and Protest

On September 19, 2011, the U.S. Coast Guard issued Solicitation No. HSCG85-12-R-P45003 for dry docking and repairs of the CGC CYPRESS, a Coast Guard sea-going buoy tender. The Contracting Office set procurement totally aside for small business and designated North American Industry Classification System (NAICS) code 336611, Ship Building and

[1] Appellant had requested confidential treatment of this appeal. *See* 13 C.F.R. § 134.205. On issuing the original Decision, I ordered Appellant, by March 23, 2012, to note any portions it requests I consider redacting from the published Decision. As Appellant made no request, I now issue the entire Decision for public release.

Repairing, with a corresponding 1,000 employee size standard, as the applicable code for this solicitation.

On November 28, 2011, the Coast Guard issued notice that Signal Ship Repair, LLC (Appellant), was the apparent successful offeror. On November 30, 2011, International Ship Repair & Marine Services, Inc. (Protestor) filed a protest alleging Appellant was not a small business. Protestor attached four documents, a U.S. Equal Employment Opportunity Commission (EEOC) press release dated April 20, 2011, stating Appellant has more than 1,500 employees; a statement on Appellant's website that it employs more than 1,000 workers in three states; and ORCA and CCR records indicating Appellant is not a small business. On that same day, the CO referred the protest to the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III, in Atlanta, Georgia (Area Office).

On December 1, 2011, the Area Office informed Appellant of the protest, and requested Appellant submit a response to the protest, together with a completed SBA Form 355 and certain other information. Appellant responded on December 9, 2011. The Area Office made other requests for information from Appellant, and received several later submissions.

B. The Size Determination

On December 21, 2011, the Area Office issued Size Determination No. 3-2012-028 (Size Determination) finding Appellant is not an eligible small business. The Area Office first reviewed Appellant's responses to Protestor's allegations. Appellant asserted the information in Protestor's submissions was out of date (*e.g.*, the information in the EEOC press release was based upon 2007 manning levels), and its number of employees had decreased in recent years. Appellant asserted to the Area Office it is now within the size standard.

The Area Office then turned to Appellant's ownership. Appellant is wholly owned by Signal International, Inc. (Signal). Signal also owns 100% of Signal International, LLC. Signal International, LLC owns Signal International Texas GP, LLC, and a 99% interest in Signal International Texas, L.P. Signal International Texas, GP, LLC, owns the remaining 1% in Signal International Texas, L.P. The Area Office concluded that of these firms are affiliated due to common ownership, because they are all ultimately owned by Signal.

The largest single owner of Signal is Retirement Systems of Alabama (RSA) — Signal Holdings, LLC (RSA-Signal), which owns 46.1%. RSA-Signal is an investment vehicle created by ACON Offshore Partners, LP (ACON), in 2008 for the sole purpose of collecting investment funds from the RSA and investing those funds into Signal. The Area Office further found that ACON owns 25.9% of Signal, the second largest ownership interest.

The Area Office noted Appellant's December 16, 2011, email stated, “ACON has complete control over RSA-Signal Holdings, LLC.” The Area Office further found that ACON has control of 719,075.3 shares of Signal. The Area Office found Appellant had reported via telephone conversation the website for ACON that depicts the company investments and strategy is located at ACON Investments. This website describes ACON Investments as a private equity investment firm managing capital through varied investment funds and special purpose

partnerships.

The Area Office listed the seven members of Signal's Board of Directors, noting that one of them represented ACON Investments, LLC.

The Area Office concluded ACON has an identity of interest with RSA-Signal based upon their common investment in Signal. The Area Office decided to treat the two entities as one concern with their interests aggregated. The aggregated interests have a 72% share of Signal. The Area Office thus concluded ACON/RSA-Signal has a controlling interest in and is affiliated with Signal. Therefore the companies in which ACON has a 50% interest or in which it is the single largest shareholder are also affiliated with Signal.

On December 13, 2011, and again on December 20th, the Area Office requested from Appellant information on RSA-Signal and ACON. The Area Office requested the number of their employees and ownership interests in the companies. The Area Office advised Appellant that ACON could submit the information directly to SBA. Appellant replied that it did not have the information on these companies. Appellant argued these companies were hedge funds whose sole purpose is to make money for their clients. Appellant also argued it was excluded from affiliation with ACON and RSA-Signal under 13 C.F.R. § 121.103(b)(5)(vi).

The Area Office concluded that 13 C.F.R. § 121.103(b)(5)(vi) was not applicable here because it does not apply to Federal procurements. Further, the exemption at 13 C.F.R. § 121.103(b)(1) was not applicable because Appellant was not owned by an investment company licensed under the Small Business Investment Act (SBIA) of 1958. The Area Office recorded that it reviewed all licensees under the SBIA to determine Signal and ACON were not licensed.

The Area Office thus drew an adverse inference that the information on RSA-Signal and ACON would show that they were not small businesses. The Area Office then concluded that Appellant was affiliated with Signal, all the firms owned by Signal and ACON Offshore Partners, LP and ACON Investments. The Area Office then applied the adverse inference, and concluded Appellant was other than small.

C. The Appeal

Appellant received the Size Determination on December 21, 2011, and on January 5, 2012, Appellant filed the instant appeal.

Appellant asserts, first, that the Size Determination is in error because it contains no discussion or analysis of Protestor's allegations or Appellant's response. Appellant asserts that the documentation it submitted to the Area Office established that during the relevant time period, the number of employees of Appellant and its affiliates never exceeded 1,000.

Appellant first states the Area Office erred in stating that RSA-Signal was created by ACON when Appellant had informed the Area Office that it was created by ACON Investments. Appellant asserts the Area Office blurred the distinction between these two entities and determined Appellant was affiliated with each entity.

Appellant also asserts the Area Office erred in its discussion of Signal's Board of Directors. Appellant asserts that of seven members, two are associated with ACON Investments, LLC. Appellant asserts it was a *non sequitur* for the Area Office to state that companies in which ACON has at least a 50% interest or has the largest single block of stock are also considered affiliated with ACON and Appellant.

Appellant argues the Area Office was not justified in drawing a negative inference against Appellant because of its error in confusing ACON and ACON Investments. Therefore, there was no clear connection between Appellant and the concern from which the Area Office requested the information, ACON Investments and the 27 other concerns in which ACON Investments invests. Appellant asserts that the Area Office erred in treating ACON and RSA-Signal as a single entity with their interests aggregated. Appellant argues an identity of interest based upon common investments requires more than one joint investment, citing *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291 (2011). Appellant finds it curious the Area Office found an identity of interest between just two of Signal's nine shareholders. Appellant asserts that this is due to the Area Office's confusion as to the separate ACON entities, based upon misinterpretation of Appellant's Controller's statement to the Area Office, which statement was defined to be ACON Investments, not ACON.

Appellant argues it has rebutted any presumption of affiliation. Neither RSA-Signal nor ACON has a majority interest in Signal. Appellant argues that the Area Office could have aggregated these interests only by using 13 C.F.R. § 121.103(c)(2), the multiple largest minority shareholders rule. Appellant argues that this finding of power to control may be rebutted by a finding that such control does not in fact exist. Appellant asserts it submitted such evidence to the Area Office. Appellant asserts it submitted to the Area Office on December 21, 2011, a memorandum discussing Signal's corporate structure, together with copies of Signal's Articles of Incorporation, By-Laws and Board of Directors (which documents were already in the Area Office file). Appellant acknowledges that this evidence was submitted after the Director of the Area Office signed the Size Determination, but argues that the Size Determination was sent to Appellant after it dispatched its December 21st submission, and argues that these exigent circumstances support this evidence being admitted under 13 C.F.R. § 134.308.

IV. Discussion

A. Timeliness, New Evidence, and Standard of Review

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

New evidence not presented to the Area Office is generally not considered on appeal. *See* 13 C.F.R. § 134.308(a). Appellant's December 21st submission to the Area Office was sent too late for the Area Office to consider, because the Area Director had already signed the Size Determination. This evidence is Signal's corporate documents, most of which were already in the record. Appellant could have and should have submitted this earlier in the size protest process, it was available to Appellant, and it was the type of evidence the Area Office had

requested. Appellant should not be permitted to make a submission it should have timely made to the Area Office. I DENY Appellant's request for admission of this new evidence, to the extent it is not already in the record.

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, at 4-5 (1999). OHA will disturb the 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. The Merits of the Appeal

Appellant's argument that the Area Office did not deal with the protest allegations is meritless. The protest allegations were essentially the same, that Appellant's number of employees exceeded the size standard. The Area Office's task was to determine the number of employees for Appellant and its affiliates. 13 C.F.R. § 121.106(b)(4)(i). The Area Office thus properly first attempted to determine the identity of Appellant's affiliates, and the number of employees of these affiliates.

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). SBA considers factors such as ownership, management, and previous relationships or ties to another concern, and contractual relationships, in determining whether control exists. 13 C.F.R. § 121.103(a)(2). Affiliation may arise among two or more persons with an identity of interest. Individuals or firms with identical or substantially identical business or economic interest may be treated as one party with such interest aggregated. 13 C.F.R. § 121.103(f). Where SBA determines such interest should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate. *Id.* An entity that owns, or has the power to control, 50% or more of a concern's voting stock, or a block of stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern. 13 C.F.R. § 121.103(c)(1).

The heart of Appellant's appeal is that the Area Office erred in aggregating the RSA-Signal and ACON interests, and erred in combining those interests with ACON Investments.

The Area Office did err in finding that RSA-Signal was created by ACON Offshore Partners, LP, rather than ACON Investments, as Appellant's submission to the Area Office stated. However, I find that this was harmless error, because Appellant's own representations to the Area Office treat RSA-Signal and the two ACON entities as one party. The Area Office was thus justified in treating them as one party for the purposes of the Size Determination.

The Area Office contacted Appellant on December 13th and December 20th seeking the information on the number of employees of and ownership interests in RSA-Signal and ACON. On December 13, 2011, Appellant submitted to the Area Office a list of Signal's shareholders. RSA-Signal is listed as having 460,532.4 shares, or a 46.1% interest. ACON Offshore Partners,

LP is listed as having 258,542.9 shares, or a 25.9% interest. Appellant added a note to the roster of shareholders:

> RSA-Signal Holdings, LLC is an investment vehicle created by ACON Investments in 2008 for the sole purpose of collecting investment funds from the Retirement Systems of Alabama (RSA) and investing those funds into Signal International. ACON has complete control over RSA-Signal Holdings, LLC. In essence, ACON has control of 719,075.3 shares. The management of Signal International, Inc. has no access and has never seen any documents related to this entity as it was created and is maintained by ACON Investments.

On December 16, 2011, the Area Office inquired of Appellant via email, "If ACON has control of 719,075.3 shares is it accurate to say their ownership interest is 72%?" On that same day, Appellant replied via email "Yes, that is accurate."

I therefore conclude that it was Appellant itself who informed the Area Office that RSA-Signal, ACON Offshore Partners, and ACON Investments are one party with their interest aggregated. Appellant itself represented to the Area Office that ACON, as one aggregate, controlled 72% of Appellant's parent, Signal. It is true that the Size Determination conflates RSA-Signal and the various ACON interests and mistakes which concern created RSA-Signal, but that is because Appellant did so in its own submissions to the Area Office. Appellant itself stated that ACON as an entity held 719,075.3 shares, or a 72 % interest, in Signal, Appellant's parent. Appellant cannot now attempt to argue that the Area Office was in error, for relying upon the information Appellant itself had provided. While it is not clear that exactly how RSA-Signal is owned and exactly what the relationship is between ACON Investments and ACON Offshore Partners, that is because Appellant has failed to provide that information. The Area Office reached its conclusion on the basis of Appellant's submission. Appellant cannot now argue that the Area Office erred in finding RSA-Signal and ACON Offshore Partners are one ACON party when that is what Appellant's own submission states. I therefore conclude that the Area Office correctly found that RSA-Signal and ACON Offshore Partners controlled Signal as its majority shareholder. A majority shareholder controls a concern, and there is no rebuttal that can be made to such a finding. 13 C.F.R. § 121.103(c)(1); *Size Appeal of Miltope Corporation dba VT Miltope Corporation*, SBA No. SIZ-5066, at 7 (2009).

Accordingly, I find that the Area Office correctly found that Signal, Appellant's parent corporation, was controlled, and thus affiliated with RSA-Signal, RSA-Signal's owner, ACON Investments, and ACON Offshore Partners, treated as one ACON party with their interests aggregated.

Appellant's arguments to the contrary are meritless. The allegations made by the protestor were concerning Appellant's number of employees. The Area Office was attempting to discern the total number of employees for Appellant and its affiliates, based upon direct evidence from Appellant and its affiliates. The composition of Signal's Board is irrelevant if ACON has a 72% controlling interest. It is not a *non sequitur* for the Area Office to assert that companies in which ACON has a least a 50% interest or the largest block of stock, are affiliated, it is the plain meaning of the regulation. Appellant's citation to the multiple largest minority shareholders rule

is inapposite, as this is case with a majority shareholder. Appellant cannot argue that party with a majority interest in Signal does not control, and thus is not affiliated with, Signal.

I now turn to whether the Area Office properly drew an adverse inference when Appellant did not submit the requested information on RSA-Signal and ACON. Appellant asserts the Area Office misapplied the adverse inference rule after Appellant had failed to submit various requested information. I disagree. The size determination regulations provide:

> If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

13 C.F.R. § 121.1008(d). Further:

> In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

13 C.F.R. § 121.1009(d). These provisions are known as the adverse inference rule.

OHA has long decided cases on the application of the adverse inference rule using a three-part test. The test requires, first, that the requested information be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Finally, the request for information must be specific. If all three criteria are met, the challenged firm or the alleged affiliate must produce the information requested by the Area Office or suffer the consequences of an adverse inference. *E.g., Size Appeal of DMI Educational Training, LLC*, SBA No. SIZ-5275, at 9 (2011).

Here, the information sought is relevant, RSA-Signal/ACON controls and thus is affiliated with Signal, Appellant's parent, and therefore the Area Office needed to obtain the number of its employees. There is no question there is a level of connection between the concerns. The Area Office specifically requested the information on two occasions, and informed Appellant that ACON could submit the information directly to the Area Office. Appellant still failed to submit the information. It is the SBA, and not the protested concern, that makes the affiliation determinations and determines whether particular information is relevant to a size determination. Under these conditions, the Area Office has no choice but to apply the adverse inference rule to the Size Determination. *Id.* Appellant cannot argue that the information was not in its control. The information was in the control of Appellant's affiliate, and the regulation required that Affiliate to provide it. *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919, at

13 (2008). Accordingly, I conclude the Area Office was correct to apply the adverse inference rule in its Size Determination to find Appellant was not a small business.[2]

Appellant has failed to establish any error of fact or law in the Size Determination, and I must deny its appeal.

V. Conclusion

Appellant has not met its burden of proving that the Area Office committed clear errors of fact or law based upon the record before it. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

[2] Appellant does not raise on appeal its argument that it fits the exclusion from affiliation provided by13 C.F.R. § 121.103(b)(5)(vi). Accordingly, Appellant has abandoned this issue and I need not consider it. *Size Appeal of Apex Group, Inc.*, SBA No. SIZ-4300 (1998).