United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Allied Technical Services Group, LLC, Appellant, Appealed From Size Determination No. 2-2012-80	SBA No. SIZ-5373 Decided: July 3, 2012

APPEARANCES

John R. Tolle, Esq., Barton, Baker, Thomas & Tolle, LLP, McLean, Virginia, for Appellant

DECISION

I. Introduction and Jurisdiction

On April 4, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-80 finding that Allied Technical Services Group, LLC (Appellant)[1] is not a small business under the size standard associated with Solicitation No. SAQMMA-10-R-0248. The Area Office found that Appellant's 40% owner, Mr. Lawrence Doll, could exercise control over Appellant under 13 C.F.R. § 121.103(c)(2). The Area Office also found Appellant affiliated with four other companies controlled by Mr. Doll.

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and determine that Appellant is a small business. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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. 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] Appellant changed its legal structure from a limited liability company to a C-corporation in June 2011, after the date of self-certification. (Size Determination at 2.)

II. Background

A. Solicitation and Protest

On June 18, 2010, the U.S. Department of State issued Solicitation No. SAQMMA-10-R-0248 (RFP) seeking proposals for professional and management employee support services. The Contracting Officer (CO) set aside the procurement exclusively for service-disabled veteran-owned small business concerns (SDVO SBCs), and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of $7 million average annual receipts. Appellant self-certified as a small business on August 11, 2010.

On January 25, 2012, the CO notified unsuccessful offerors that Appellant was the apparent awardee. On January 30, 2012, an unsuccessful offeror, Ivan, Evan, and Alexander Corporation (IEA), protested Appellant's size and SDVO SBC status.[2] In its size protest, IEA contended that Appellant is not a small business because it has several affiliates and its revenues exceed the applicable size standard.

B. Size Determination

The Area Office found that Appellant's 40% owner and co-chairman, Mr. Doll, is the majority owner of four other companies. Specifically, he owns 100% of Lawrence Doll Homes, LLC (Homes); 60% of Doll Development, LLC (Development); 53% of Drexel Hamilton (Drexel); and 51% of ISI Professional Services, Inc. (ISI). (Size Determination at 2.) Given that Mr. Doll owns a majority interest in these firms, the Area Office found that Mr. Doll has the power to control each of these companies under 13 C.F.R. § 121.103(c)(1).

The Area Office went on to find that Mr. Doll controls Appellant under 13 C.F.R. § 121.103(c)(2). 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.

The Area Office found that Appellant is 40% owned by Mr. Doll, 35% owned by Mr. Patrick Kelly, 13% owned by Mr. Robert Hesser, and 12% owned by Mr. J. Thomas Esslinger. (Size Determination at 2.) The Area Office remarked that Mr. Doll and Mr. Kelly each owns less than

[2] The size determination did not consider whether "there is any violation of SDVOSB program regulations." (Size Determination at 6.) Accordingly, that issue is not before OHA on appeal.

50% of Appellant's stock, and that their holdings are approximately equal in size. Furthermore, Mr. Doll's and Mr. Kelly's holdings collectively are large compared to other stock holdings. Accordingly, the Area Office found that there was a rebuttable presumption under 13 C.F.R. § 121.103(c)(2) that Mr. Doll and Mr. Kelly each has the power to control Appellant. (*Id.* at 3.)

The Area Office found that Appellant did not rebut the presumption that Mr. Doll controls Appellant. The Area Office observed that Mr. Doll is Appellant's co-chairman, and serves on Appellant's Managing Board. Furthermore, according to Appellant's operating agreement, Mr. Doll "wields greater power over company matters with regards to dispute resolution than the other [three] Managing Board members." (*Id.*) Specifically, if the Managing Board reaches a stalemate that impedes Appellant's ability to perform under any contract, the issue is referred to Mr. Doll and Mr. Hesser for decision. (*Id.*) Furthermore, if the Managing Board cannot reach a majority decision over a financial matter and Mr. Doll and Mr. Hesser cannot agree on an outcome, the operating agreement vests Mr. Doll with power to make a decision. (*Id.*)

The Area Office also considered whether Mr. Kelly alone controls Appellant. According to the Area Office, Mr. Kelly is Appellant's president and managing member, and "is responsible for the day to day administration of the company." (*Id.*) However, Appellant's operating agreement vests actual control of Appellant exclusively in the Managing Board, which includes Mr. Doll. Accordingly, the Area Office found that Mr. Doll has the power to control Appellant.

Because Mr. Doll controls Appellant, and Mr. Doll also controls Homes, Development, Drexel, and ISI, the Area Office determined that Appellant is affiliated with Homes, Development, Drexel, and ISI. (*Id.* at 3-4.) Appellant exceeded the applicable size standard once its receipts were aggregated with those of the other four companies. (*Id.* at 5.)

C. Appeal Petition

On April 16, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant first argues that the situations where Mr. Doll will be the sole decision-maker are extremely limited. To demonstrate this attenuation, Appellant references portions of the operating agreement pertinent to resolving disputes. Section 5.1.C states that if the Managing Board is unable to achieve a majority vote on any matter or decision before it, an attempt to resolve the impasse should be made pursuant to Section 11.1. Section 11.1.A provides that the Members shall use their best efforts to settle all disputes arising under the operating agreement. But if they reach an impasse on an issue that "would preclude the continuing performance by the Company under any contract to which it is a party and such impasse is not resolved within five (5) workdays thereafter, the issue shall be referred immediately to [Mr.] Hesser and [Mr.] Doll for decision on an unanimous basis." (Appeal at 3-4 (citing Operating Agreement, Section 11.1.B).)

Section 5.1.C of the operating agreement provides that impasses unresolved under Section 11.1 are resolved as follows:

> If the matter or decision before the Board relates to operational matter or details, the position advocated by the majority of the Class B Members shall prevail. If the matter of decision before the Board relates to financial matters or details, including, but not limited to distributions or calls for capital, the position advocated by the majority of the Class A Members shall prevail.

(*Id.* at 4 (citing Operating Agreement, Section 5.1.C).) Based on these sections, Appellant emphasizes that Mr. Doll is the final decision-maker only when the matter is financial in nature.

Appellant argues further, however, that not all financial matters are decided by Mr. Doll, because the operating agreement delegates the power to decide certain financial matters to the President, Mr. Kelly. Appellant asserts that Mr. Kelly has the power to open, maintain, and close bank and custodial accounts; draw checks or other orders for the payment of money; maintain Appellant's funds; disburse available cash to the members in accordance with the operating agreement's provisions; file tax returns and make all tax elections; and generally oversee Appellant's day-to-day administrative affairs. (*Id.* at 4-5 (citing Operating Agreement, Section 5.1.G).)

Appellant thus maintains that the only financial matters Mr. Doll will decide are those not delegated to Mr. Kelly once the Managing Board has reached an impasse. Appellant contends that such decisions are limited to the following:

> (iii) to borrow money and issue evidence of indebtedness in furtherance of any or all of the purposes of the Company, and to secure the payment by security interest, pledge, or other lien or encumbrance on assets of the Company;
> (iv) to prepay in whole or in part, negotiate, refinance, increase, renew, modify or extend any secured or other indebtedness affecting Company property and in connection therewith to execute any extensions, renewals or modifications of any evidence of indebtedness, either unsecured or secured by security interests, pledges, or other encumbrances covering such assets;
> (vii) to set aside Company funds in reserve.

(*Id.* at 5 (quoting Operating Agreement, Section 5.1.D).)

Appellant further argues that there are other financial matters that Mr. Doll will never decide unilaterally because there can never be an impasse. According to Appellant, there will never be an impasse in these matters because they require a two-thirds supermajority vote. Financial decisions requiring supermajority approval are whether to "make, execute, or deliver any bond, mortgage, deed of trust, guarantee, indemni[t]y, bond, surety bond, or accommodations paper or accommodation endorsement; borrow money or use Company property as collateral; [or] purchase or acquire, sell or transfer, title to any real property." (*Id.* (quoting Operating Agreement, Section 5.1.P).)

Appellant next argues that it changed its legal structure in June 2011 from a limited liability company to a C-corporation. The by-laws of the C-corporation lack the impasse

provisions from the operating agreement. Furthermore, under the new by-laws, "all elections are determined by a majority vote of the shares of capital stock owned by the service-disabled veterans." (*Id.* at 7.) Appellant insists that, under the new approach, "[i]t takes both Mr. Doll and Mr. Hessler to make a decision." (*Id.*) Therefore, Appellant reasons, Mr. Doll can no longer unilaterally control Appellant's decision-making.

Finally, Appellant argues that Mr. Doll cannot exert negative control over Appellant. According to Appellant, the actions Mr. Doll may decide are extraordinary situations, and the requirement for Mr. Doll's consent in those circumstances are to protect his minority investment. *Size Appeal of EA Eng'g, Sci, and Tech.*, SBA No. SIZ-4973, at 7, 9 (2008). Appellant emphasizes that Mr. Doll cannot make ordinary business decisions such as the ability to hire, fire, or pay corporate officers responsible for operating the company. *Matter of Firewatch Contracting of Fla., LLC*, SBA No. VET-137 (2008). Nor are the decisions concerning financial matters that Mr. Doll can make vital to Appellant's business operations, because Appellant can conduct ordinary business without Mr. Doll's consent. *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303 (2011).

D. New Evidence

On April 16, 2012, Appellant moved to admit a declaration from Mr. Kelly, Appellant's President and 35% owner. Appellant argues that there is good cause to admit the evidence "because it goes directly to one of the issues that the Area Office should have explored, but did not, that being the remoteness" of situations that might be referred to Mr. Doll for decision. (Motion at 2.) Appellant asserts that the declaration is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on appeal.

According to Mr. Kelly's declaration, "there has never been a situation where the Managing Board was unable to achieve a majority vote on any matter or decision before the Managing Board. Thus, the provisions of the [operating agreement] that address what happens when there is an impasse have never been utilized." (Kelly Decl. ¶ 7.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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 Eng'g Techs., 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. First, Appellant offers no explanation why Mr. Kelly's declaration could not have been prepared 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 Constr., 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 declaration is relevant to this case. The central issue presented in this case is whether Appellant has overcome the presumption that Mr. Doll has the power to control Appellant under13 C.F.R. § 121.103(c)(2). OHA has found that the presumption cannot be refuted merely by showing that the power to control has not actually been exercised. *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 8-9 (2012) (citing *Size Appeal of Road Builders Corp.*, SBA No. SIZ-3016, at 8 (1988)). Accordingly, Mr. Kelly's declaration has limited relevance in resolving this appeal. *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

This case turns upon whether Mr. Doll, Appellant's 40% owner and co-chairman, has the power to control Appellant. It is undisputed that Mr. Doll controls Homes, Development, Drexel, and ISI. Thus, if Mr. Doll also controls Appellant, Appellant is affiliated with those four companies.

In determining that Mr. Doll has the power to control Appellant, 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, Mr. Doll owns 40% of Appellant and Mr. Kelly owns 35%. Those interests are approximately equal in size. Furthermore, Mr. Doll and Mr. Kelly together own 75% of Appellant. The remaining interest is held by Mr. Hesser, who owns 13%, and Mr. Esslinger, who owns 12%. Accordingly, when aggregated, the ownership interests of Mr. Doll and Mr. Kelly are large as compared with any other stock holding of Appellant. Pursuant to 13 C.F.R. § 121.103(c)(2), the Area Office correctly presumed that both Mr. Doll and Mr. Kelly have the power to control Appellant. The burden therefore shifts to Appellant to rebut the presumption.

Appellant emphasizes that Mr. Doll could not unilaterally control Appellant, except under certain "remote" circumstances unlikely to actually arise. This argument fails for two reasons. First, OHA has long held that "the mere fact that a minority shareholder cannot individually control a concern is not sufficient to overcome the presumption" in 13 C.F.R. § 121.103(c)(2). *ADVENT*, SBA No. SIZ-5325, at 7; *see also Size Appeal of Technibilt, Ltd.*, SBA No. SIZ-5304 (2011); *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794 (2006); *Size Appeal of Ceramatec, Inc.*, SBA No. SIZ-3040 (1989); *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986). Indeed, "the very purpose of the [minority shareholder] rule is to address situations in which no single person or entity has actual affirmative or negative power to control a concern." *ADVENT*, SBA No. SIZ-5325, at 7. Thus, supposing that Appellant were to demonstrate that Mr. Doll individually could not control Appellant, this alone would not suffice to rebut the presumption in 13 C.F.R. § 121.103(c)(2). Moreover, Appellant here has not shown that Mr. Doll lacks the power to unilaterally control Appellant. On the contrary, by arguing that Mr. Doll's power to control Appellant is "remote," Appellant essentially concedes that Mr. Doll could potentially control Appellant under some circumstances.

In prior case decisions, OHA has suggested that the minority shareholder presumption could be rebutted by establishing that that some party other than the minority shareholder has the power to control. *E.g., Technibilt*, SBA No. SIZ-5304, at 5 (noting that the challenged firm "has not identified any other plausible candidate besides [the two largest shareholders] that could control [[the challenged firm]."). Here, Appellant has not attempted to argue that any specific person or entity other than Mr. Doll has the power to control Appellant. Furthermore, the Area Office specifically determined that Mr. Kelly, who holds an ownership interest approximately equal to that of Mr. Doll, does not have exclusive power to control the company. (Size Determination at 3.) Appellant has not challenged this aspect of the Area Office's determination. Accordingly, the Area Office correctly presumed that Mr. Doll controls Appellant under 13 C.F.R. § 121.103(c)(2), and Appellant failed to rebut the presumption

Appellant also asserts that Mr. Doll no longer retains the power to control Appellant, because Appellant transitioned from a limited liability company to a C-corporation in June 2011. This argument has no merit. It is well-settled that "SBA determines size status as of the date of self-certification." *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351, at 8 (2012) (citing 13 C.F.R. § 121.404(a)). As a consequence, Appellant's reorganization, which occurred only after Appellant self-certified for the instant procurement, is irrelevant to the size determination on appeal.

V. Conclusion

For the reasons discussed *supra*, the 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