

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

SIZE APPEAL OF:

HAL-PE Associates Engineering Services,
Inc.,

Appellant,

RE: Valiant Construction, LLC,

Appealed From
Size Determination No. 3-2012-081

SBA No. SIZ-5374

Decided: July 9, 2012

DECISION

I. Introduction and Jurisdiction

On May 10, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2012-081 finding Valiant Construction LLC (Valiant) to be a small business for the procurement at issue and accompanying size standard. Appellant now appeals the decision. For the reasons discussed *infra*, the appeal is denied.

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 timely filed the instant appeal on April 13, 2012. Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the size determination finding Valiant as a small business, and not affiliated with any other company, under the applicable size standard was based on clear error of fact or law.

II. Background

A. Solicitation and Protest

On October 27, 2011, the Contracting Officer (CO) for the Department of Veterans Affairs (VA), Robley Rex Medical Center, Louisville, KY issued Solicitation No. VA-249-12-R-0006, seeking to procure the design, supply, install and commissioning an HVAC system (supply

and exhaust) for Oncology and Hematology Department at the Robley Rex Medical Center. The CO set the procurement aside for Service Disabled Veteran Owned Small Business Concerns (SDVO SBCs) and designated North American Industry Classification System (NAICS) code 238220, Plumbing, Heating, and Air-Conditioning Contractors, with a corresponding \$14 million annual receipts size standard as the appropriate code for this procurement.¹

On February 13, 2012, the CO issued a notice that Valiant was the apparent successful offeror. On February 15, 2012, HAL-PE Associates Engineering Services, Inc. (Appellant) protested Valiant's small business status, claiming Valiant's affiliation with AACON General Contractors (AACON), ARCOM Construction Inc. (ARCOM), and Abel Construction Company, Inc. (ACC) based on Mr. William Abel's role as organizer and officer of Valiant and Valiant's share of an address, telephone and fax number with AACON and ARCOM. Lastly, Appellant claimed Valiant had received three awards under an illegal joint venture.

B. Size Determination No. 3-2012-075

On May 2, 2012, the Area Office issued Size Determination No. 3-2012-075, concluding that Valiant is other than a small business concern for the procurement at issue. Additionally, the Area Office stated that Valiant may not certify as a small business concern under the size standard of \$14 million unless it was recertified by an appropriate SBA office. It also asked Valiant to update its Central Contractor Registration (CCR) database profile and Online Representations & Certification Application (ORCA).

The Area Office undertook an affiliation analysis regarding Valiant and its owners. The Area Office found Mr. Patrick Broderick held a 51% interest in Valiant, and Mr. William Abel held the remaining 49%. The Area Office found no ownership interest in any other company by Mr. Broderick. The Area Office found Mr. Abel to be the organizer of Valiant at the time of its forming, but not an officer of the company. The Area Office stated Valiant's Operating Agreement allows for all decisions concerning the company to be made by the Managing Member, Mr. Broderick. However, the Operating Agreement also states that in order to effectuate certain actions, the affirmative vote of the Members is required. The Area Office took this to mean that based on their status as Members, both Mr. Broderick and Mr. Abel are required to vote in the affirmative in order to issue any changes in the Articles of Incorporation and Operating Agreement. According to the Area Office, this particular clause grants Mr. Abel the power to exercise negative control of Valiant under 13 C.F.R. 121.103(a)(3).

¹ On April 25, 2012, the Department of Veterans Affairs' Deputy Assistant Secretary for Acquisition and Logistics issued a notice directing the CO to terminate the contract award and re-solicit the procurement. OHA will still decide the appeal because the size determination has future applicability for Valiant. The issues in the size determination are not contract-specific, so Valiant remains eligible to compete for small business set-aside procurements conducted under this size standard as long as the size determination is in effect. It is well-settled that "a size appeal is not moot even if a procurement is canceled, if the issues are not contract-specific and the size determination at issue has future applicability." *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 5 (1998).

The Area Office found Mr. Able to be the sole owner of three companies, Abel Air, LLC, Abel Construction Company, Inc., and Bale Equipment Rental, LLC. The Area Office determined Mr. Abel has the power to control these three companies and Valiant, thus rendering them affiliated with Valiant.

The Area Office also stated Mr. Abel is part owner of numerous other companies, which from the information provided to the Area Office, it seems they too would be affiliated with Valiant. However, the issue of affiliation with these other companies was not addressed based on Valiant's affiliation with Abel Construction Company, a large business.

Concerning Appellant's claims that Valiant was also affiliated with AACON and ARCOM, the Area Office found no such affiliation. Valiant's legal counsel explained that Valiant and AACON shared the same building but in different suites. Counsel further stated that Valiant at one time shared the same fax number with AACON but that arrangement ended when Valiant relocated to a new address. Lastly, Valiant's stated that it never shared the same telephone number with ARCOM. Thus, the Area Office found no affiliation between Valiant, AACON and ARCOM. The Area Office further found no affiliation with SCTA Properties, LLC (SCTA), Valiant's former landlord.

Regarding Appellant's claims of Valiant receiving three awards under an illegal joint venture, the Area Office received notification from Valiant's counsel stating that Valiant had never formed or participated in any joint venture. Based on the evidence provided, the Area Office concluded Valiant had never participated in any joint venture.

Based on the finding of affiliation between Valiant, Abel Air, LLC, Abel Construction Company, Inc., and Bale Equipment Rental, LLC, the Area Office determined Valiant was ineligible for the procurement at issue. It concluded that Valiant and its affiliates, taken together, exceeded the size standard for NAICS code 238220. Furthermore, the Area Office stated Valiant could not certify itself as a small business concern unless it was recertified as a small business concern by an appropriate SBA office.

C. Size Determination No. 3-2012-081

On May 10, 2012, the Area Office issued Size Determination No. 3-2012-081, rescinding Size Determination No. 3-2012-075. The Area Office noted the receipt of new information regarding the Kentucky State Limited Liability Company Act, which caused the previous size determination to be rescinded and Valiant to be found a small business concern for the size standard and procurement at issue.

The Area Office stated the previous finding of affiliation between Valiant, Abel Air, LLC, Abel Construction Company, Inc., and Bale Equipment Rental, LLC, was based on Mr. Abel having the power of negative control over Valiant. The Area Office explained that under Valiant's Operating Agreement, the affirmative vote of the Members is needed when effectuating certain actions, such as amending the Articles of Incorporation and Operating Agreement. Given this requirement, the Area Office previously found Mr. Abel to have the power of negative control over Valiant.

However, the Kentucky State Limited Liability Company Act states that in order for there to be an affirmative vote, there need only be a consent of a majority-in-interest of the members, not a unanimous vote. Based on Mr. Broderick owning 51% interest in Valiant, the Area Office found him to have a majority-in-interest by himself and Mr. Abel unable to veto any vote regarding Valiant's Articles of Incorporation or Operating Agreement. Thus, the Area Office found Mr. Abel did not have the power to exercise negative control over Valiant. Furthermore, Mr. Broderick submitted an affidavit explaining that Mr. Abel is not a manager, director, officer, or employee of Valiant. Mr. Broderick explained the reason for Mr. Abel's listing on the Kentucky Secretary of State records as an officer was a clerical error based on the way Kentucky's system populates the report from information entered describing the names and business address of members/managers.

The Area Office concluded Valiant to not be affiliated with any company owned by Mr. Abel based on Mr. Abel's lack of control over Valiant. The Area Office reaffirmed its findings in the earlier size determination that Valiant was not affiliated with AACON, ARCON and SCTA, and had not engaged in any joint ventures with any other concern. The Area Office reviewed the annual receipts for Valiant and found they did not exceed the applicable size standard of \$14 million.

D. Appeal Petition

On May 24, 2012, Appellant filed the instant appeal. Appellant asserts the Area Office's decision failed to find Valiant affiliated with other businesses that have substantially identical business or economic interests as Valiant. Appellant further asserts the SBA failed to properly find affiliation based on the newly concern rule because Mr. Abel has a critical and coercive influence in the operations and management of Valiant. Next, Appellant states the SBA should have found a violation of the ostensible subcontractor rule due to Valiant's relationship with its subcontractors creating a joint venture. Lastly, Appellant asserts the SBA failed to analyze several material facts that would have led to a finding of affiliation under the totality of the circumstances test.

Appellant argues Valiant is affiliated with businesses associated with Mr. Abel pursuant to identity of interest under 13 C.F.R. § 121.103(f). Appellant argues businesses associated with Mr. Abel have identical interests as that of Valiant given that they participate in the same field as Valiant. Appellant alleges Valiant is being used by Mr. Abel in order to receive set-aside procurement for which Mr. Abel's businesses are ineligible. Appellant alleges Valiant simply subcontracts work to Mr. Abel's other businesses once it has been awarded government contracts.

Appellant argues Valiant and Mr. Abel's other businesses should be found affiliated under the newly organized concern rule. Appellant argues Mr. Abel, as the person on record as having organized Valiant, played a crucial role in establishing Valiant as a new business concern in order to pass subcontract work to Mr. Abel's other business interests. Appellant further argues Mr. Abel's is a key employee of Valiant who exerts critical influence in the operations or management of Valiant. Appellant argues that critical influence exists because Mr. Abel owns

other businesses in the same or related industry as Valiant, and Mr. Abel organized Valiant and owns a 49% interest in it.

Appellant argues the SBA erred in relying on Valiant's bare assertions that it did not enter into a joint venture because simply stating that no joint ventures exists does not make it true. Appellant argues Valiant has been unusually reliant on its subcontractors, thus creating a joint venture under 13 C.F.R. § 121.103(h)(4). Appellant states it has reason to believe Valiant has been, or intends to, subcontract substantial portions of its awarded projects to Mr. Abel's other business concerns.

Appellant argues Valiant is affiliated with Mr. Abel's other businesses under the totality of the circumstances test. Appellant states its previous arguments regarding the identity of interest rule, newly organized rule and ostensible subcontractor rule, taken together, are evidence of affiliation between Valiant and Mr. Abel's other business concerns. Lastly, Appellant argues the original Articles of Organization state Valiant was to be managed by its members, including Mr. Abel, which shows the intention of having Mr. Abel exert control over Valiant.

Appellant requests the size determination finding Valiant as a small business be reversed, for Valiant to be found affiliated with Mr. Abel's business concerns, and Valiant ordered to be removed from the VetBiz registry.

III. Discussion

A. Standard of Review

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

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

1. New Organized Concern Rule

Appellant argues the newly organized concerned rule applies in this situation because Mr. Abel's other business concerns participate in the same or related industry or field of operations as Valiant. Appellant argues for the applicability of the rule based on Mr. Abel's listing as Valiant's organizer under the Kentucky Secretary of State records. Appellant further argues the rule applies based on Mr. Abel being a key employee of Valiant who exercises critical influence in the operations or management in the company.

The newly organized concern rule provides that when former officers, directors, shareholders or key employees of one concern organize a new concern in the same or related industry, and serve as the new concern's officers, directors, shareholders or key employees, and the first concern is furnishing the second with contracts, financial or other technical assistance, the concerns are affiliated. 13 C.F.R. § 121.103(g). However, a key word under this rule is the reference to *former* key employees. *Size Appeal of Cherokee Nation Healthcare Services, Inc.*, SBA No. SIZ-5343 (2012) (*Cherokee Nation*).

Appellant rests its argument on the fact that Valiant and Mr. Abel's other business concerns are in the same or related industry or field of operation. I find this argument meritless. OHA has stated there are four required elements for the newly organized concern rule: (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010).

Here, it is clear that the first, third, and fourth elements are not met. Mr. Abel is not a *former* officer, director, principal stockholder, managing member, or key employee of Abel Air, LLC, Abel Construction Company, Inc., and Bale Equipment Rental, LLC, the concerns which Appellant alleges Valiant is affiliated. Mr. Abel is still a stockholder and officer of Abel Construction Company, and his most recent personal tax returns show him as receiving compensation based on his status as a company officer. Further, Mr. Abel remains sole shareholder of the other two concerns. The newly organize concern rule does not apply to persons such as Mr. Abel who remain involved with the older concerns. Then, the analysis must be to determine whether there is affiliation due to common ownership, common management, or some other factor. *Cherokee Nation*, at 5.

Further, Mr. Abel is listed only as a member of Valiant in the Kentucky Secretary of State records. The records also state Valiant as a manager managed company. In turn, Valiant's Operating Agreement states that the affirmative vote of the Members is needed when effectuating certain actions. Appellant's argument rests on the fact that Mr. Abel organized and is a member of Valiant, thus under its own Operating Agreement, Valiant is susceptible to Mr. Abel's power to control it. However, Kentucky State Statute allows that the affirmative vote required to decide any matter connected with the business affairs of the limited liability company, can be effectuated by the "consent of the majority-in-interest" of the members. Ky. St. § 275.175(1). Mr. Broderick, as the managing member of Valiant, and its majority-in-interest Member, is the only one that has the power to control Valiant. Thus, the third element of this rule is not met because Mr. Abel is not an officer, director, principal stockholder, managing member, or key employee of Valiant. This evidence is supported by the sworn affidavit of Mr. Broderick stating Mr. Abel's role in Valiant as only being the organizer of the company and a member with a minority interest. This also means that there is no affiliation between Valiant and the concerns owned by Mr. Abel based upon common management or common ownership, because Mr. Abel, as a minority owner who is not a managing member, does not have the power to control Valiant

and has never served as an officer or director of Valiant. *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5344, at 9 (2012); *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011).

Lastly, absent evidence, I cannot find Mr. Abel, or any of his other business concerns, as furnishing Valiant with contract assistance, either financial or technical. Accordingly, the Area Office did not err in finding no affiliation between Valiant and Mr. Abel's other business concerns under the newly organized concern rule.

2. Identity of Interest

Appellant argues Valiant and Mr. Abel's business concerns are affiliated under the identity of interest rule based on their shared participation in the same field or industry of work and Valiant subcontracting work from contract awards to Mr. Abel's other business concerns. The applicable regulation provides that:

Affiliation may arise among two or more persons with an identity of interest. 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. Where SBA determines that such interests 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.

13 C.F.R. § 121.103(f).

OHA has found the identity of interest rule applies in order to determine who controls an entity. The rule can establish affiliation between firms where those firms or the people who control them have such similar interests that it can be assumed they will act in concert. *Size Appeal of McLendon Acres, Inc.*, SBA No SIZ-5222, at 6-7 (2011). Further, OHA has found identity of interest based on economic dependence when one firm relies upon another for 70% or more of its receipts. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007).

Here, Appellant argues Valiant subcontracts work to Mr. Abel's other business concerns once it receives a contract award. They offer as evidence the fact that Abel Construction Company is engaged in the same industry as the procurement at issue, the design and build of an HVAC system. However, merely being in the same industry is not enough to establish identity of interest. There is no family relationship between Mr. Abel and Mr. Broderick. Nor is there any evidence of any economic dependence by Valiant upon Mr. Abel's enterprises, because there are no contractual relationships between these firms. Appellant's allegations of contractual dependence are simply unsupported allegations. Valiant's sworn submission with its SBA Form 355 that no such contractual relationships exist carries more weight, and I must thus conclude that Valiant is not economically dependent upon the concerns Mr. Abel controls. *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 8 (2012). Nor is there any showing that Mr. Abel and Mr. Broderick have other common investments, so that an identity of interest

could be found between them. There is no evidence supporting Appellant's claim of identity of interest between Valiant and the concerns owned by Mr. Abel. Accordingly, the Area Office did not err in not finding affiliation between Valiant and Mr. Abel's other business concerns under the identity of interest rule.

3. Ostensible Subcontractor

Under the “ostensible subcontractor” rule, a prime contractor and its subcontractor may be treated as joint venturers, and thus affiliates, if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. 13 C.F.R. § 121.103(h)(4). OHA has held that to apply the ostensible subcontractor rule, the Area Office must consider all aspects of the relationship between the prime and subcontractor, including the terms of the proposal, agreements between the concerns (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006).² The rule is meant to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). An ostensible subcontractor case must be analyzed on the basis of the RFP and proposal at hand. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011).

Appellant, however, raises this issue for the first time on appeal, and therefore I cannot consider this issue. 13 C.F.R. 134.316(c).³

Lastly, Appellant asserts it has reason to believe Valiant is subcontracting or will be subcontracting its awarded contracts to some of Mr. Abel's business concerns, thus creating a joint venture based on Valiant being unusually reliant on its subcontractors. Again, this is an issue raised for the first time on appeal. Even if it were not a new issue, Appellant provides no evidence of Valiant subcontracting work to Mr. Abel's business concerns. Further, a joint venture

² Appellant argues that Valiant is unusually reliant upon Mr. Abel's other business concerns based on the seven factors test. However, the seven factors test is no longer applicable. *C&C Int'l Computers and Consultants, Inc.*, at 12-13.

³ Even if Appellant had raised the issue in its protest, Appellant's allegation of affiliation under the ostensible subcontractor is utterly meritless. Affiliation under the ostensible subcontractor rule is applicable only to the contract on which the two concerns have teamed. 13 C.F.R. § 121.103(h)(2); *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 11-12 (2012). Valiant's proposal for the procurement at issue does not list any of Mr. Abel's other business concerns as subcontractors. Mr. Abel's concerns are thus not involved with this procurement as subcontractors. The ostensible subcontractor rule is therefore not applicable to this case. There cannot be a finding of affiliation based on the ostensible subcontractor rule when the challenged concern is not using its alleged affiliates as a subcontractor in the procurement at issue.

based on a violation of the ostensible subcontractor rule cannot be found on the belief that in the future one concern will be unusually reliant upon its subcontractors. As noted above, an ostensible subcontractor finding cannot be based upon conjecture, but upon the solicitation, proposal and subcontract in the procurement at issue. *Size Appeal of Smart Data Solutions LLC T/A SDSE, LLC*, SBA No. SIZ-5071 (2009).

4. Totality of the Circumstances

In determining affiliation, SBA will consider the totality of the circumstances, and may find affiliation even if no one factor is sufficient to constitute affiliation. 13 C.F.R. § 121.103(a)(5). Appellant alleges Valiant and Mr. Abel's other business concerns are affiliated under the totality of the circumstances. Appellant's argument here is based upon (1) Mr. Abel's influence and control over Valiant under the newly concerned rule, and which rule is not applicable here. Further, it is contradicted by evidence of Mr. Abel's lack of power to exercise control or influence over Valiant, (2) identity of interest based on Mr. Abel's other business concerns participating in the same field or industry as Valiant, and Valiant passing through subcontract work to these business concerns once it receives award of a contract, which has proved to be without any foundation because there is no evidence of economic dependence by Valiant upon Mr. Abel's companies and (3) Valiant's violation of the ostensible subcontractor rule, an allegation which I find meritless.

Therefore, Appellant's argument here is meritless, because all of the allegations that support its argument are meritless. Appellant's arguments are unsupported by evidence. In addition, the instant appeal is bereft of any citation to OHA case law which might support its arguments. An argument for affiliation based upon the totality of the circumstances, (or any ground for that matter) must fail if none of the alleged bases for affiliation is supported by evidence. *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 11-12 (2012).

IV. Conclusion

Appellant has not met its burden of proving that the Area Office committed clear errors of 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