United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Civitas Group, LLC, Appellant, Appealed From Size Determination No. 2-2012-157	SBA No. SIZ-5424 Decided: November 30, 2012

APPEARANCES

Daniel S. Koch, Esq., and Alfred M. Wurglitz, Esq., Miles & Stockbridge P.C., Rockville, Maryland, for Appellant

DECISION

I. Introduction and Jurisdiction

This appeal arises from a size determination pertaining to Civitas Group, LLC (Appellant). On October 22, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-157 concluding that Appellant is not a small business. Specifically, the Area Office found that Appellant's single largest minority shareholder, Albright Stonebridge Group, LLC (Albright), has the power to control Appellant under 13 C.F.R. § 121.103(c)(1), and that the two firms therefore are affiliated.

Appellant maintains that the finding of affiliation with Albright relies on faulty Office of Hearings and Appeals (OHA) precedent. Appellant requests that OHA either overturn the line of cases, or "direct the Area Offices to apply [[the] decisions in a more flexible, sensible way." (Appeal at 1.) For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On March 8, 2012, the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, issued Solicitation DJA12RFQ0008 (RFQ) seeking planning, logistics, training, and response support services for its Emergency Support Function # 13. (RFQ § B.1.) The procurement was a task order issued against the U.S. General Services Administration Mission Oriented Business Integrated Services Schedule contracts. (*Id.*) The Contracting Officer (CO) set aside the procurement exclusively for small businesses and assigned North American Industry Classification System code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of $7 million in average annual receipts.[1] Initial offers were due April 13, 2012, and final offers were due May 14, 2012. Appellant and Commonwealth Trading Partners, Inc. (CTP) timely submitted offers, self-certifying themselves as small businesses.

On June 28, 2012, the CO announced that Appellant was the apparent awardee. On July 2, 2012, CTP protested Appellant's size, alleging that Appellant is affiliated with various entities.

B. Response

Appellant responded to the protest, explaining that it is owned by 13 individuals and entities, none of which holds a majority interest. Appellant maintained that its stock is widely held for a company of its size, and that no single block of stock is large as compared with all other stock holdings. Appellant stated that its operating agreement vests control in its managing board. No special rights, veto, or other provisions in the operating agreement afford special control to the largest shareholders. Appellant urged the Area Office to conclude that the firm is controlled by its officers and directors.

C. Size Determination

On October 22, 2012, the Area Office issued its size determination finding that Appellant is not an eligible small business.

The Area Office determined that, in fully-diluted terms, Albright owns 21.2% of Appellant. The next four largest shareholdings are 12.1%, 10.7%, 10.2%, and 10.1%. Eight other individuals and entities collectively own the remaining 35.7%. (Size Determination at 2.)

---

[1] Effective March 12, 2012, SBA increased the size standard for NAICS code 541611 to $14 million. 77 Fed. Reg. 7,490, 7,514 (Feb. 10, 2012). However, SBA regulations provide that "the size standard in effect on the date the solicitation is issued" is controlling, unless the CO formally amends the solicitation to adopt the new size standard. 13 C.F.R. § 121.402(a). No such solicitation amendment occurred here, so the applicable size standard remains at $7 million average annual receipts.

The Area Office rejected Appellant's argument that its officers and directors control Appellant, reasoning that for control to exist under 13 C.F.R. § 121.103(c)(3), rather than under 13 C.F.R. § 121.103(c)(1), there must be no single block of stock that is large compared with all other stock holdings. The Area Office found that Albright's block of stock was large compared to the others and that Appellant therefore is affiliated with Albright. (Size Determination at 5-6.)

In reaching this determination, the Area Office considered the differential between Appellant's two largest holdings in light of OHA precedent in *Size Appeal of Forterra Sys., Inc.*, SBA No. SIZ-5029 (2009); *Size Appeal of Eagle Pharm., Inc.*, SBA No. SIZ-5023 (2009); and *Size Appeal of Novalar Pharm., Inc.*, SBA No. SIZ-4977 (2008). In each of these cases, OHA determined that the single largest minority shareholder was "large" relative to the next largest shareholder, and therefore in control of the challenged firm under 13 C.F.R. § 121.103(c)(1). The Area Office summarized the data in the following table:

Case	Largest Shareholder %	Next Largest Shareholder %	Ratio (Largest to Next-Largest)	**Difference (percentage points)**
Eagle Pharm.	35.7	19.6	1.82	16.1
Novalar, Private A-8[2]	27.1	15.3	1.77	11.8
[Appellant]	**21.2**	**12.1**	**1.75**	**9.1**
Forterra Systems	28.7	17.3	1.66	11.4
Novalar, Private A-5	22.4	14.1	1.59	8.3

(Size Determination at 6, emphasis in original.)

Because Appellant's ownership structure was similar to that of *Novalar* Private A-8 and *Forterra*, cases where OHA held that the largest minority shareholdings were large relative to the next largest shareholders, the Area Office determined that Albright has the power to control Appellant. 13 C.F.R. § 121.103(c)(1). Further, 13 C.F.R. § 121.103(c)(1) is not a rebuttable presumption, unlike 13 C.F.R. § 121.103(c)(2). (Size Determination at 6.)

The Area Office determined that Albright has the ability to control Appellant, even though Appellant's operating agreement vests control of Appellant in the managing board. The Area Office explained that 13 C.F.R. § 121.103(c)(1) still applies even when, based on the corporate documents, legal control does not rest with that minority shareholder. (*Id.*)

[2] "Private A-5 and Private A-8 are privately held companies whose names were redacted from the published version of the *Novalar* decision." *Forterra*, SBA No. SIZ-5029, at 9, n.3.

The Area Office stated that it requested a Form 355 for Albright, which Appellant did not provide. Appellant stipulated, however, that it would exceed the $7 million size standard if its annual receipts were aggregated with those of Albright. The Area Office concluded that Appellant is not an eligible small business.[3] (*Id.* at 9.)

D. Appeal Petition

On November 6, 2012, Appellant filed its appeal of the size determination with OHA. Appellant concedes that the size determination is based on OHA precedent, but requests that OHA reconsider these prior decisions.

Appellant contends that, in situations where the next-largest shareholdings are equivalent in size to one another, an area office should "have discretion to conclude that the largest minority holder does not necessarily control the entity." (Appeal at 1.) In Appellant's view, an interpretation of the rule that considers the single largest minority shareholder only with respect to the next-largest shareholder is inconsistent with the underlying regulation, and leads to an irrational result. Appellant maintains that it is controlled by its board of directors and management under 13 C.F.R § 121.103(c)(3).

According to Appellant, OHA's decisions consider only the size of the two largest shareholdings. Appellant contends that the text of 13 C.F.R § 121.103(c)(1) requires consideration of the other holdings. "The regulation asks whether 'a block of voting stock [exists] which is large compared to other outstanding ***blocks*** of voting stock.'" (Appeal at 5, emphasis added in appeal petition). Thus, argues Appellant, by examining only the two largest shareholdings, OHA's decisions contravene the plain language of 13 C.F.R § 121.103(c)(1).

Appellant then recites OHA's explanation of the purpose of the rule:

> It is not enough that there is a difference in size between two blocks of stock. The difference must be sufficiently large to indicate that the larger block of stock can exercise some dominance over the affairs of the firm. A difference in size of only 8% between the largest and the next largest block of stock, when no one block represents a majority interest, is simply not large enough to enable the holder of the larger block to dominate the affairs of the firm.

Size Appeal of H.L. Turner Group, Inc., SBA No. SIZ-4896, at 6 (2008). Appellant argues it is appropriate to consider shareholdings beyond the next largest share, because the other shareholders may be large enough to prevent the largest shareholder from controlling the firm. Appellant contends that, in the instant case, any two of the four next largest stockholders are large enough to prevent Albright from controlling Appellant. (Appeal at 5-6).

---

[3] The Area Office also found Appellant affiliated with Aveshka, Inc. (Aveshka) on other grounds. Appellant does not dispute this portion of the size determination, so the issue is not discussed further here.

Next, Appellant argues Albright cannot control Appellant because Appellant's limited liability company agreement prevented Appellant's shareholders from directly participating in its management. Appellant explains that the agreement vests exclusive management authority in the managing board. (*Id.* at 6-7.)

Lastly, Appellant contends Albright never had the power to control any entity performing the subject contract. Appellant emphasizes that it had transferred its interest in the contract to Aveshka by the time of award, and that "Aveshka has been performing the contract from inception." (*Id.* at 8.)

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. Analysis

Firms are affiliated when one has the power to control the other or when a third party has the power to control both. 13 C.F.R. § 121.103(a)(1). A person that owns or controls at least 50% of a concern, or that controls a block of stock that is "large compared to other outstanding blocks," has the power to control the concern. 13 C.F.R. § 121.103(c)(1). In this case, the Area Office determined that Albright has a minority interest in Appellant that is 1.75 times larger than the size of the next largest holding. This ratio is well within the range that OHA considers "large" relative to the other minority shareholdings. *See* Section II.C, *supra*. Indeed, as recently as last year, OHA held that a minority interest was large when it was 1.71 times larger than the size of the next largest holding. *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 11 (2011). Due to its large minority interest, Albright has the power to control Appellant, and the firms are affiliated.

Appellant acknowledges that the size determination is consistent with OHA precedent, such as *Novalar* and *Forterra*. Appellant maintains, however, that these cases analyze a challenged firm's ownership in a manner contrary to the plain language of 13 C.F.R. § 121.103(c)(1). This argument lacks merit. The regulation asks whether there is a minority interest that is large relative to the other minority interests, not, as Appellant suggests, whether the remaining stockholders could collaborate to prevent the largest minority shareholder from exercising control. Nor is it necessary to separately examine all blocks of stock to assess whether the single largest minority interest is ""large." If the largest minority shareholder is large compared to the next-largest shareholder, then it is, by definition, large relative to all other shareholders.

Appellant also urges OHA to interpret 13 C.F.R § 121.103(c)(1) such that area offices would "have the discretion to conclude that the largest minority holder does not necessarily control the entity." (Appeal at 1.) Appellant, in effect, seeks to apply a rebuttable presumption of control to 13 C.F.R § 121.103(c)(1). OHA has expressly ruled, however, that "[u]nlike 13 C.F.R. § 121.103(c)(2), the presumption in 13 C.F.R. § 121.103(c)(1) is not rebuttable." *Forterra*, SBA No. SIZ-5029, at 10. Further, the regulatory history of 13 C.F.R. § 121.103(c)(1) indicates that SBA considered utilizing "a presumption of control which can be negated by specific facts in a particular case," but ultimately chose not to adopt it. 61 Fed. Reg. 3,280, 3,281 (Jan. 31, 1996). Thus, the approach Appellant advocates would be at odds with the agency's intent in promulgating 13 C.F.R § 121.103(c)(1).

IV. 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