

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

SIZE APPEAL OF:

Alares, LLC,

Appellant,

RE: Brican, Inc.

Appealed From  
Size Determination No. 1-SD-2013-22

SBA No. SIZ-5471

Decided: May 22, 2013

APPEARANCE

Donald Maggioli, President, Alares, LLC, Quincy, Massachusetts

DECISION

I. Introduction and Jurisdiction

On March 26, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2013-22 finding that Brican, Inc. (Brican) is a small business under the size standard associated with the subject procurement. Alares, LLC (Appellant), which had previously protested Brican's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and conclude that Brican is not a small business. 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. The record reflects that the size determination was issued March 26, 2013, but not received by Appellant until April 5, 2013. 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 November 26, 2012, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA241-13-R-0069 seeking a contractor to replace mechanical systems at the

VA Medical Center in Northampton, Massachusetts. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industry Classification System code 238220, Plumbing, Heating, and Air-Conditioning, with a corresponding size standard of \$14 million in average annual receipts. Appellant and Brican submitted timely offers.

On March 5, 2013, the CO announced that Brican was the apparent awardee. Two days later, Appellant protested Brican's size. Appellant alleged that, according to the [federalspending.gov](http://federalspending.gov) website, Brican had been awarded Federal contracts totaling \$47,542,209 during fiscal years 2009, 2010, and 2011. Appellant further asserted that Brican's minority owner, Mr. James Franks, owns an interest in Q.B.S. Inc. (QBS). Appellant claimed that QBS and Brican are affiliated because Brican's majority owner, Mr. Brian Gibbons, is a former employee of QBS; Brican and QBS share employees; Mr. Franks provides loans and bonding guarantees for Brican; and Mr. Franks owns the building where Brican conducts business. In addition, Appellant alleged, Brican received over \$12 million in Federal contracts for work in Ohio. Appellant asserted that QBS has an Ohio office, but Brican does not. Therefore, Appellant posited, QBS may have performed this work for Brican.

The CO forwarded Appellant's protest to the Area Office for consideration.

#### B. Size Determination

On March 26, 2013, the Area Office issued Size Determination 1-SD-2013-22 finding that Brican is an eligible small business. The Area Office determined that Brican is not affiliated with QBS, and that, according to Brican's Federal tax returns, Brican's average annual receipts do not exceed the \$14 million size standard.

The Area Office explained that Brican is a Massachusetts corporation, and is 51% owned by Mr. Gibbons. Mr. Franks and his wife, Mrs. Rebecca Franks, own the remaining 49%.<sup>1</sup> Mr. Gibbons is also Brican's sole officer and director. (Size Determination at 3.) Mr. Gibbons is not related to the Franks by blood or marriage. Because Mr. Gibbons holds majority ownership of Brican, the Area Office found that Mr. Gibbons has the power to control Brican pursuant to 13 C.F.R. § 121.103(c)(1).

The Area Office then determined that Mr. and Mrs. Franks have no power to control Brican. (*Id.* at 3-4.) The Area Office explained that, in years past, Mr. and Mrs. Franks may have had the power to control Brican because they made a shareholder loan to Brican and provided other financial assistance. However, this assistance was no longer outstanding as of December 27, 2012, the date of Brican's self-certification for the instant procurement. (*Id.* at 4.)

Next, the Area Office examined potential affiliation between Brican and QBS. The Area

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<sup>1</sup> The Area Office determined that Mr. and Mrs. Franks share an identity of interest due to their spousal relationship. The Area Office aggregated their ownership interests upon concluding that they had not demonstrated clear fracture. 13 C.F.R. § 121.103(f).

Office found that Mr. Franks owns more than 50% of QBS's voting stock, and therefore has the power to control QBS. The Area Office determined that QBS has never provided financial support to Brican; Brican has never provided financial support to QBS or the Franks; Brican and QBS do not share facilities, employees, or administrative functions; and Brican and QBS do not subcontract with one another. (*Id.* at 5.) Although Mr. Gibbons did work as a Site Project Manager/Superintendent at QBS from 2005 to 2007, this is not sufficient grounds to find the firms presently affiliated. "Therefore, it is determined that Brican is not affiliated with QBS." (*Id.*)

The Area Office then considered whether Brican is affiliated with SAF, Inc. (SAF), an issue not raised in Appellant's protest. The Area Office concluded there was no such affiliation because, although Mr. Franks and his family may have the power to control SAF, they have no power to control Brican. Further, Brican has never shared facilities, employees, or administrative functions with SAF, and the firms have no financial or contractual ties. (*Id.*)

### C. Appeal

On April 12, 2013, Appellant filed its appeal of the instant size determination with OHA. Appellant maintains that the determination is clearly erroneous and should be reversed.

Appellant first argues that "non-veterans" (*i.e.*, Mr. and Mrs. Franks) can negatively control Brican. (Appeal at 2.) Appellant asserts that, if a Massachusetts corporation has three or more shareholders, Massachusetts law requires the corporation to have three directors. Here, the Area Office found that Brican has three shareholders, of which two are non-veterans. Appellant reasons that, because Mr. and Mrs. Franks have ownership interests in Brican, they can exercise negative control over Brican. (*Id.*)

Appellant also contends that Brican, QBS, and SAF are affiliated because Mr. Franks has ownership stakes in all three companies, and the Area Office identified historic ties between Brican and QBS. Appellant contends that Mr. Franks is the "common thread" among Brican, QBS, and SAF, and the Area Office should have determined they are affiliated and combined their average annual receipts. (*Id.* at 2-3.)

Appellant reiterates that Brican's majority owner, Mr. Gibbons, worked for QBS from 2005 to 2007. The Franks have ownership interests in QBS and SAF, and previously provided Brican with financial and managerial support. Appellant asserts that Brican received over \$12 million in Federal contracts for work performed in Ohio, but Brican does not have an office there.

## 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 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

Appellant's arguments have no merit. As a result, the appeal must be denied.

Appellant first contends that Mr. and Mrs. Franks have the power to negatively control Brican. Under OHA precedent, “[n]egative control exists if a minority owner can block ordinary actions essential to operating the company.” *Size Appeal of Carntribe-Clement 8AJV #1, LLC*, SBA No. SIZ-5357, at 13 (2012). In the instant case, though, the Area Office specifically found that Mr. Gibbons alone has the power to control Brican by virtue of his majority ownership. See Section II.B, *supra*. Mr. Gibbons is also Brican's sole officer and director. *Id.* Thus, there is simply no basis to conclude that Mr. and Mrs. Franks could block ordinary actions essential to operating Brican. Appellant asserts that, under Massachusetts state law, a corporation with multiple owners must also have multiple directors. Appellant, however, offers no legal authority for this proposition. Moreover, even assuming Appellant were correct that Brican is required to have three directors, it does not follow that Mr. and Mrs. Franks would necessarily be those directors, or that Mr. Gibbons would be powerless to remove them. If Mr. Gibbons could unilaterally replace directors without cause, negative control would be rendered illusory. *Size Appeal of Environmental Quality Management, Inc.*, SBA No. SIZ-5429 (2012). Thus, Appellant has not established that Mr. and Mrs. Franks have the power to negatively control Brican.<sup>2</sup>

Appellant's contention that Brican, QBS, and SAF are affiliated is also unavailing. Concerns are affiliated when one has the power to control another, or when a third party has the power to control both. 13 C.F.R. § 121.103(a). Although the Area Office did find that Mr. Franks has the power to control QBS and SAF, no affiliation with Brican would exist unless Mr. Franks also has the power to also control Brican. The Area Office determined that Mr. Franks has no such power, and Appellant puts forth no argument as to why this determination was in error.

In lieu of establishing error in the size determination, the appeal simply repeats allegations from Appellant's protest. Appellant emphasizes, for instance, that Mr. Gibbons is a former employee of QBS, and that Mr. Franks previously provided financial assistance to Brican. (Appeal at 2.) The record reflects that the Area Office thoroughly considered these issues, and properly concluded that these issues are not evidence of current affiliation between Brican and QBS, because these issues were no longer in effect as of December 27, 2012, the date of Brican's self-certification for the instant procurement. *Size Appeal of A&H Contractors, Inc.*, SBA No. SIZ-5459, at 7-9 (2013) (historic connections between challenged firm and alleged affiliate did

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<sup>2</sup> Appellant also complains that the Franks are “non-veterans.” (Appeal at 2.) Insofar as Appellant questions Brican's SDVO eligibility for this procurement, that issue is beyond OHA's jurisdiction. As explained in prior case decisions, “under current law any SDVO status protest arising out of a VA solicitation will be decided by the VA [Office of Small and Disadvantaged Business Utilization]”, not by SBA. *Size Appeal of HAL-PE Assocs. Eng'g Servs., Inc.*, SBA No. SIZ-5391, at 4 (2012).

not establish current affiliation); *Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254, at 9 (2011) (prior employment of challenged firm's owner with the alleged affiliate was “too far in the past to be relevant to the question of affiliation today.”). Appellant also repeats its protest allegation that Brican was awarded \$12 million in Federal contracts for work in Ohio, but that QBS actually performed this work because Brican lacks an Ohio office. Appellant offers no evidence to suggest that Brican engaged QBS to perform this work, and the Area Office found that Brican and QBS have never subcontracted with one another. A protester's mere unsupported allegations is not a proper basis to find error in a size determination. *Size Appeal of FFTF Restoration Co., LLC*, SBA No. SIZ-4684, at 7 (2005).

#### IV. Conclusion

The Area Office determined that Brican itself is a small business, and that Brican is not affiliated with either QBS or SAF. Appellant has not shown this determination is in error. I therefore DENY this appeal and AFFIRM the 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