

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

SIZE APPEAL OF:

Marple Fleet Leasing, LLC,

Appellant,

Appealed From
Size Determination No. 2-2013-91

SBA No. SIZ-5479

Decided: June 24, 2013

APPEARANCES

Ben K. Rosenbloom, Chief Marketing Officer, Marple Fleet Leasing, LLC, Broomall, Pennsylvania

Christopher Cullen, President, Acme Auto Leasing, LLC, North Haven, Connecticut

DECISION

I. Introduction and Jurisdiction

On May 13, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2013-91 finding that Marple Fleet Leasing, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the size determination contains several errors, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and conclude that Appellant is 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. 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 19, 2013, the U.S. Department of the Air Force (Air Force) issued Request for

Quotations (RFQ) No. F2VUCC3064A001 seeking to lease a pick-up truck and a sport utility vehicle at MacDill Air Force Base, Florida.¹ The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 532112, Passenger Car Leasing, with a corresponding size standard of \$35.5 million in average annual receipts. Appellant and Acme Auto Leasing, LLC (Acme) submitted timely quotations.

On April 18, 2013, Acme learned that Appellant had been selected for award. The next day, Acme protested Appellant's size. Acme alleged that Appellant is a wholly-owned subsidiary of Pacifico Marple Ford Lincoln (PMFL).²

On April 30, 2013, Appellant responded to the protest.³ Appellant asserted that Appellant and PMFL are in separate lines of business; have no contractual relationships with each other; and do not share office space, employees, equipment, or communications systems. Appellant also pointed out that it has its own Federal Employer Identification Number, tax returns, assets, and liabilities.

B. Size Determination

On May 13, 2013, the Area Office issued the instant size determination finding that Appellant is not a small business due to affiliation with PMFL. The Area Office specifically determined that Appellant is affiliated with PMFL through common ownership, 13 C.F.R. § 121.103(c).

The Area Office explained that, contrary to the protest allegation, Appellant is not a subsidiary of PMFL. Rather, Mr. Joseph D. Pacifico owns 55% of Appellant. Mr. Pacifico also owns 60% of PMFL. Due to his majority ownership of Appellant and PMFL, Mr. Pacifico has the power to control both firms; therefore, the companies are affiliated. 13 C.F.R. § 121.103(a) and (c).

The Area Office found that Appellant, by itself, is a small business under the \$35.5 million size standard. However, once Appellant's average annual receipts are aggregated with those of PMFL, Appellant exceeds the size standard.

¹ After the size determination was issued, the Air Force cancelled the procurement. Nevertheless, the appeal is not moot because the issue on appeal— whether Appellant is affiliated with PMFL through common ownership—is not contract-specific and has future applicability for Appellant. *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at n.2 (2011).

² In the protest, Acme referred to the alleged parent company as “Pacifico Ford” and “Pacifico Marple Ford.” (Protest at 1.)

³ Appellant provided revenue information for PMFL, but maintained that Pacifico Ford is a different entity and is not associated with Appellant or PMFL.

C. Appeal

On May 28, 2013, Appellant filed its appeal with OHA. Appellant does not deny that both Appellant and PMFL are owned and controlled by Mr. Pacifico. Rather, Appellant requests that OHA “reconsider” the size determination in light of the factors Appellant outlined in response to the protest. (Appeal at 2.)

Appellant also raises two “technical objections” to the size determination. First, Appellant complains that the size determination referred to PMFL as “Pacifico” in some instances and “Ford” in others. Appellant asserts that the Area Office “wrongfully characterized the original protest and confused two separate entities.” (*Id.* at 1.) As a result, Appellant contends, the Area Office exceeded the scope of the protest. (*Id.*)

Appellant also takes issue with the Area Office's conclusion that Acme's protest was timely and specific. Appellant argues that the documents Acme provided in support of its protest “appear to say nothing” and lack evidentiary value. (*Id.*)

D. Response

On May 30, 2013, Acme responded to the appeal. Acme contends the appeal does not challenge the finding of affiliation through common ownership. Accordingly, OHA should uphold the size determination. (Response at 1.)

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

Under SBA regulations, concerns 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). Further, a person who owns 50% or more of a concern has the power to control that concern. *Id.* § 121.103(c)(1). In this case, the Area Office determined—and Appellant does not dispute—that Mr. Pacifico is the majority owner of both Appellant and PMFL. Thus, Mr. Pacifico controls both Appellant and PMFL, and the firms are affiliated.

Appellant argues that, aside from their common ownership, Appellant and PMFL share no other ties and conduct no business with one another. This argument is unavailing, as OHA has

repeatedly explained that a person “owning 50% or more of a concern is deemed to control it,” even in the absence of other indicia of control. *Size Appeal of VoCare Servs., Inc.*, SBA No. SIZ-5266, at 6-7 (2011); *see also Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 7 (2009) (“The plain language of the pertinent size regulation, 13 C.F.R. § 121.103(c)(1), clearly states that 50% or more ownership *is* control”) (emphasis in original); *Size Appeal of DLI Eng'g Corp.*, SBA No. SIZ-4801, at 5 (2006) (“It is thus clear that a concern with [majority] ownership of another concern controls it, and any argument to the contrary is meritless.”). Here, Appellant does not contest the key finding that Mr. Pacifico is the majority owner of both Appellant and PMFL. Because Mr. Pacifico controls both companies, Appellant and PMFL are affiliated through common ownership. It is not necessary to consider whether Appellant and PMFL are also affiliated on any other independent grounds.

Appellant further contends that the Area Office exceeded the scope of Acme's protest, which alleged only that Appellant is a wholly-owned subsidiary of PMFL. SBA regulations, however, permit an area office to base a size determination “on grounds not raised in the protest” or on “other information” that it may request from “the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.” 13 C.F.R. § 121.1009(b). Here, in the SBA Form 355 Appellant submitted to the Area Office, Appellant disclosed that Mr. Pacifico owns 55% of Appellant and 60% of PMFL. Accordingly, based on this record, the Area Office properly concluded that Appellant is affiliated with PMFL through common ownership by Mr. Pacifico, notwithstanding that Acme's protest did not raise this exact issue.

Lastly, I reject Appellant's “technical objection” that the documents attached to Acme's protest “appear to say nothing.” (Appeal at 1.) By regulation, relevant supporting documentation, if available, “should be submitted with the protest.” 13 C.F.R. § 121.1007(b). Thus, Acme appropriately forwarded information that Acme deemed to be relevant for the Area Office's review and consideration. Further, there is no indication here that the Area Office based its decision, in whole or in part, on any document attached to Acme's protest. Accordingly, whether Acme's supportive documentation had probative value is wholly immaterial to OHA's review of the size determination, because the Area Office did not did not rely on any such documentation.

IV. Conclusion

The Area Office found that Appellant is not a small business, and Appellant has shown no error in the determination. 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