United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Advanced Projects Research, Inc. Appellant, RE: ArmorWorks Enterprises, LLC Appealed From Size Determination No. 6-2013-094	SBA No. SIZ-5504 Decided: September 26, 2013

APPEARANCES

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DECISION [1]

I. Introduction and Jurisdiction

This appeal involves a size protest of ArmorWorks Enterprises, LLC (AWE), an Arizona limited liability company (LLC). Mr. William J. Perciballi and Anchor Management, LLC (Anchor) are AWE's managers. Armor Works, Inc. (AWI) has a 60% membership interest in AWE, and C Squared Capital Partners, LLC (C Squared) owns the remaining 40%. Mr. Perciballi is the sole owner of AWI. Anchor is the manager of C Squared.

On August 22, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2013-094,

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded AWE an opportunity to propose redactions to the published decision. AWE indicated it did not wish to propose redactions. OHA now publishes the decision in its entirety.

finding AWE to be an eligible small business under the size standard associated with Solicitation FA8504-12-R-30298. In reaching this determination, the Area Office found AWE was not affiliated with its manager, Anchor.

Advanced Projects Research, Inc. (Appellant), who protested AWE's size, contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and find that AWE is not a small business under the size standard associated with the instant procurement. For the reasons discussed *infra*, the appeal is granted, and the size determination is remanded to the Area Office for further review and investigation.

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 September 5, 2012, the U.S. Department of the Air Force issued Solicitation FA8504-12-R-30298 for the C-130 Armor Plate Program. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 332999, All Other Miscellaneous Fabricated Metal Product Manufacturing, with a corresponding 500-employee size standard. Offers were due October 19, 2012.

On July 17, 2013, the CO notified unsuccessful offerors that AWE was selected for award. Appellant, an unsuccessful offeror, protested the award on July 24, 2013, alleging AWE is affiliated with Insight Enterprises Inc. (Insight), a large business. Specifically, Appellant alleged Mr. Timothy Crown and Mr. Eric Crown control both Insight and Anchor, and Anchor controls AWE. Protest at 2. The Area Office determined the protest was timely and specific.

B. Response to the Protest

On August 7, 2013, AWE responded to the protest, arguing that Anchor does not control AWE. AWE included a declaration from Mr. Perciballi, in which he stated, "The understanding between the two Members of [AWE] ([AWI and C Squared]) has been that C Squared and Anchor are not involved in [AWE's] day-to-day operations. Instead, Anchor serves as a passive Manager, primarily for purposes of monitoring C Squared's minority interest investment in [AWE]." Perciballi Decl. ¶ 7. Further, "[t]he practical dealings of the Members on a day-to-day basis also reflect the Members' agreement that C Squared would remain a passive investor and that neither C Squared nor Anchor was authorized to exert control over [AWE's] operations." *Id.* ¶ 8. The declarations go on to explain that since 2007 Mr. Perciballi manages all AWE's day-to-day operations and Anchor has been uninvolved. *Id.* ¶ 8.a-n.

AWE also argued that, even if Anchor could control AWE, it is of no significance

because Anchor is not affiliated with Insight. Specifically, there is no common control of Anchor and Insight because the Crowns do not control Insight. AWE explained that, although Timothy Crown is Chairman of Insight's Board of Directors, there are eight other directors, and he is not an officer. Eric Crown is a former Chairman of Insight, who gave up his position many years ago and currently owns less than 5% of Insight.

C. Size Determination

On August 22, 2013, the Area Office issued its size determination finding AWE to be an eligible small business. In reaching this conclusion, the Area Office determined Anchor does not control AWE; thus, the firms are not affiliated. The Area Office did not determine whether the Crown brothers control Insight or Anchor.

The Area Office concluded that Mr. Perciballi controls AWE as a result of his exclusive ownership of AWE's majority owner, AWI. Size Determination at 2. Although AWE's operating agreement was never signed by both members, based on Mr. Perciballi's declarations, "the informal agreement between the managers appears to indicate that [Anchor] does not have control or the power to control AWE." *Id.* at 7.

D. Appeal Petition

On September 6, 2013, Appellant filed its appeal of the size determination with OHA.[2] Appellant argues that, as one of AWE's two managers, Anchor can exercise negative control over AWE. Thus, the size determination is clearly erroneous and should be reversed.

Appellant emphasizes that AWE has no valid written operating agreement, and argues that the oral agreement is no substitute because, according to the size determination, it is between AWE's managers, not its members. Appellant stresses that the managers do not have the power to execute an operating agreement governing the LLC. Ariz. Rev. Stat. §§ 29-601(14) and 29-682(A).

Appellant argues that in the absence of an enforceable operating agreement between the members of AWE, Anchor has the power to control AWE. Arizona law provides that where the articles of organization vest management of the LLC in one or more managers, then management of the LLC is vested in its managers, "subject to any provisions in an operating agreement restricting or enlarging the management rights or responsibilities of one or more managers." Ariz. Rev. Stat. § 29-681(B). Appellant points out that Article 4 of AWE's articles of organization vests management of AWE in the managers. Appellant argues there is no valid operating agreement to restrict or enlarge those powers. Appeal at 10-11.

[2] With its appeal, Appellant filed a motion to submit evidence. Specifically, Appellant seeks to admit AWE's Articles of Organization, and explains that the motion was "filed in an abundance of caution in the event that the Articles of Organization ... was not provided to the Area Office." Because the record already contains the Articles of Organization, I need not rule on this motion. *Size Appeal of Envtl. Restoration LLC*, SBA No. SIZ-5395, at 5 (2012).

Moreover, under the Arizona LLC Act, "if management of the limited liability company is vested in one or managers, the affirmative vote, approval, or consent of the sole manager or a *majority of the managers*, is required to ... resolve any difference concerning the matters connected with the business of the limited liability company." Ariz. Rev. Stat. § 29-681(D). Here, because AWE has two managers,[3] both Anchor and Mr. Perciballi must approve AWE's business matters. Accordingly, Anchor has the power to exercise negative control over AWE. Appeal at 12-13.

Appellant argues the oral agreement does nothing to restrict Anchor's power to control AWE. Appellant contends Mr. Perciballi's declarations show only how Anchor has exercised its management powers and does not show an agreement to legally restrict or waive those powers. Appellant emphasizes that "it does not matter whether control is exercised" in determining affiliation. 13 C.F.R. § 121.103(a)(1). Rather, the relevant inquiry is whether "the power to control exists." *Id.*

E. Response

On September 20, 2013, AWE responded to the appeal. AWE contends the size determination is correct, so OHA should affirm it.

AWE emphasizes that Arizona law permits an LLC to conduct business without an operating agreement, so long as it has filed articles of organization with the Arizona Corporation Commission. Ariz. Rev. Stat. §§ 29-682 and 29-631. The law also contemplates an LLC being governed by an oral agreement. *See id.* § 29-601(14(a)) (defining an "operating agreement" to include any "written or oral agreements among all members concerning the affairs of a limited liability company or the conduct of its business.") AWE argues it "has operated based on an oral agreement between the members that Mr. Perciballi will operate and control AWE, and that Anchor's role as a *named* manager is to monitor C Squared's passive investment in AWE."[4] Response at 8 (emphasis AWE's).

[3] In support of the proposition that Anchor is a co-manager with the power to lock up AWE, Appellant cites pleadings from earlier civil litigation that is in the record. C Squared initiated this litigation against Mr. Perciballi in 2011 regarding the management and control of AWE. According to these pleadings, "the Maricopa County Superior Court held that Anchor was a current co-manager of AWE and ordered Mr. Perciballi to 'take all actions necessary to amend AWE's Articles of Organization to reflect [Anchor's] status as a manager of [AWE].'" Appeal at 3 (citing Perciballi Bankruptcy Decl. ¶ 63). On July 10, 2013, AWE, AWI, and Mr. Perciballi filed a Motion for Stay of Execution of Judgment Under 62(A). The parties argued that "the reinstatement of Anchor as a manager for AWE with authority in excess of what was represented to SBA in connection with the 2007 Bid Protest creates risks that AWE may lose its small business status. . . ."*Id.* at 5 (citing Motion for Stay at 11).

[4] AWE quotes letters and declarations it sent to the Area Office in 2007 with respect to an earlier size determination of AWE, as well as testimony and pleadings. These statements echo the proposition that Anchor has had a hands-off role in AWE, and Anchor and C Squared do not have the power to control AWE. Response at 8-13, 22. AWE also quotes Mr. Perciballi's

AWE also argues that, for the reasons stated in its response to the protest, the Crowns do not control Insight. Therefore, even assuming Anchor has the ability to control AWE, such affiliation does not render AWE affiliated with Insight. *Id.* at 6.

AWE challenges Appellant's argument that Arizona statute confers on Anchor the power to exercise negative control over AWE. AWE emphasizes that the provision Appellant cites contains the limiting clause "[e]xcept as provided in an operating agreement." Ariz. Rev. Stat. § 29-681(D). AWE reiterates that Arizona law permits oral operating agreements, and that an operating agreement may expand or restrict a manager's power. *Id.* §§ 29-601(14(a)) and 29-681(B).

Next, AWE argues that, contrary to the appeal, the Maricopa Superior Court did not rule that Anchor should be reinstated as a manager "without any limitations." Rather, the Superior Court simply ruled that Mr. Perciballi did not have the legal authority to remove Anchor as a manager by unilaterally filing amended articles of organization. AWE explains that it then filed Articles of Correction of Articles of Organization to reflect Anchor's status as a named manager. Response at 20-21.

AWE also contends C Squared agreed to limit Anchor's authority, and the record establishes as much. Specifically, AWE argues, the declarations from Mr. Perciballi and AWE's CFO confirm an oral agreement between AWE's members. AWE argues the Area Office never determined that AWE's members never entered into an oral operating agreement. Although the size determination references an ""informal agreement between the managers," the record makes plain that there was an agreement between the members. *Id.* at 22-23.

F. Appeal Supplement

On September 20, 2013, after its counsel viewed the record under a protective order, Appellant filed a supplement to its appeal. Appellant argues the record confirms that the power to control AWE is statutorily vested in Anchor.

Appellant reiterates that AWE's articles of organization provide that "management of the limited liability company is vested in a manager or managers." According to the Articles of Amendment to the Articles of Organization, AWE's managers are Anchor and Mr. Perciballi. Appellant argues that there is no operating agreement in place to restrict Anchor's power as co-manager. Supplement at 3.

According to Appellant, the record confirms that the oral agreement at issue is between AWE's managers, not its members (C Squared and AWI). Appellant emphasizes the absence of a declaration from C Squared acknowledging an oral agreement with Mr. Perciballi, owner of AWI. Anchor's August 14, 2013 declaration likewise lacks facts supporting such an agreement between C Squared and AWI. In fact, Anchor's declaration states that AWE's response to the

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declaration from the instant size determination, in which he represents that the respective management roles have not changed since the 2007 size determination. *Id.* at 14-17.

protest "do[es] not necessarily reflect the positions of Anchor or C Squared." *Id.* at 4 n.3

Appellant highlights AWE's Motion for Stay, in which AWE stated, "Management of AWE Will Be Deadlocked" and "[t]he authority that is statutorily conferred upon Anchor as a result of the Court's Judgment grants C Squared a level of control [it] never previously had." *Id.* at 5 (citing Motion for Stay at 11). Appellant argues this position contradicts what AWE's argument on appeal. *Id.*

Appellant reiterates its point on appeal that Mr. Perciballi's declaration focuses on how Anchor has elected to exercise its statutory power, not whether the power to control exists. That power is statutorily conferred on Anchor as co-manager. *Id.* at 5-6.

Next, Appellant attacks AWE's reliance on the 2007 size determination. According to Appellant, the 2007 size determination is inapposite because the Area Office did not consider the statutory power of a co-manager in a manager-managed LLC with no operating agreement. *Id.* at 6.

Appellant then argues that the record contains no credible information regarding the Crown brothers' holdings. Therefore, should OHA grant the appeal, OHA should remand to the Area Office for further investigation. *Id.* at 7-8.

G. Response to Supplement

On September 24, 2013, AWE responded to Appellant's supplemental appeal. AWE argues that neither the appeal nor the supplement provide a basis for reversing the size determination.

AWE reiterates that "*the Crowns do not have the power to control Insight*." Response to Supplement at 2 (emphasis added). AWE remarks that Appellant's argument is merely speculative in this regard.

Next, AWE contends the record demonstrates an oral agreement between AWE's members. AWE argues that "the Area Office's reference to an agreement between the *managers* (as opposed to its members) was an inadvertent error because [[AWE's] original submission to the Area Office, and all of the supporting evidence of record in this proceeding, establish an oral agreement and understanding between the *members* of [AWE]." *Id.* at 3.

Contrary to Appellant's contention that the record lacks a declaration from C Squared as to the existence of an oral operating agreement, AWE emphasizes that Anchor is C Squared's manager. Therefore, Anchor's declaration is an admission by C Squared. *Id.* at 4.

AWE then responds to Anchor's declaration that it does not endorse AWE's position of Anchor being a passive manager. AWE argues Anchor's position is ""hardly surprising" given that the parties are in litigation and have an acrimonious relationship. *Id.*

In AWE's view, Appellant cites the Motion for Stay out of context. AWE argues the

passage about deadlocking AWE's management "simply points out the problems and uncertainty created by a ruling that ordered that Anchor's name be placed back onto the Articles of Organization ... without delineating the agreed upon historical limits to Anchor's authority." *Id.* at 5.

AWE challenges the argument that Anchor is statutorily vested with the power to negatively control AWE. According to AWE, this argument ignores the evidence in the record that the members have an oral agreement. *Id.* at 6.

AWE emphasizes that, according to the 2007 size determination, AWE is not affiliated with Anchor. *Id.* at 6-7.

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. Analysis

I find it appropriate to remand this case. This appeal turns on whether an oral operating agreement exists between the members of AWE. Although the Area Office cited probative evidence, it was ultimately silent on this issue, finding instead that an operating agreement exists between AWE's managers. This finding, however, is legally insufficient to support the determination that Anchor cannot exercise negative control over AWE.

Arizona law specifies that where, as here, "the articles of organization provide that management of the limited liability company is vested in one or more managers, management of the limited liability company is vested in a manager or managers, subject to any provision in the operating agreement restricting or enlarging the management rights or responsibilities of one or more members." Ariz. Rev. Stat. § 29-681(B). Further, it is "[t]he *members* of a limited liability company [who] may adopt an operating agreement. . . ." *Id.* § 29-682(A) (emphasis added). An operating agreement is "[a]ny written or oral agreements among all *members* concerning the affairs of a limited liability company or the conduct of its business." *Id.* § 29-601(14(a)) (emphasis added). Therefore, the Area Office's determination that an agreement to restrict Anchor's powers exists between the *managers* does not shed light on whether the *members* reached such an agreement. Moreover, an agreement of the managers is not binding on the members.

Contrary to AWE's position, the 2007 size determination is not dispositive of whether AWE and Anchor are affiliated. As OHA has explained: Area offices are not courts or

administrative tribunals, so the doctrines of *res judicata* and collateral estoppel do not extend to determinations issued by such offices. Indeed, OHA has repeatedly reached this conclusion in other cases, explaining that "a prior size determination is not binding on either an Area Office or OHA." *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 7 (2009); *see also Size Appeal of The MayaTech Corp.*, SBA No. SIZ-5269, at 7 (2011) (finding "no authority for [the] proposition that [an] Area Office must follow its earlier size determination"); *Size Appeal of Coastal Management Solutions, Inc.*, SBA No. SIZ-5281, at 5 (2011) (prior size determination which had reached different conclusion was "not dispositive"); *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 11 (2012) ("Size determinations not appealed to OHA are not binding precedent, and are not controlling in any other case."). *Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427, at 8 (2012).

C. Remand Instructions

On remand, I direct the Area Office to determine whether C Squared and AWI, AWE's members, have an oral operating agreement to restrict Anchor's powers to control AWE. If the Area Office does not find such an agreement, and Anchor has the ability to exercise negative control over AWE, the Area Office should continue with the affiliation analysis and determine whether the Crown brothers have the ability to control both Anchor and Insight.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, the size determination is VACATED, and this matter is REMANDED to the Area Office for further review and investigation consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge