

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

SIZE APPEAL OF:

US Builders Group,

Appellant,

Appealed From
Size Determination No. 4-2013-59

SBA No. SIZ-5519

Decided: December 11, 2013

APPEARANCES

Lawrence D. Hixson, President, and Amy M. Semlow, Esq., for US Builders Group

Stephen D. Massie, President, for DRS Veteran Enterprises, LLC

DECISION¹

I. Introduction and Jurisdiction

On September 4, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2013-59, concluding that US Builders Group (Appellant) is not an eligible small business.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, the appeal is granted, and the size determination is reversed.

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.

¹ This Decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the Decision, Appellant informed OHA it had no requested redactions. Therefore, I now issue the entire Decision for public release.

II. Background

A. Solicitation and Protest

On June 7, 2013, the Department of Veterans Affairs issued Solicitation No. VA246-13-B-0907 for demolition, construction, and related work at the Veterans Affairs Medical Center, Beckley, WV. The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran-Owned (SDVO) Small Businesses, and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard, as the applicable code. July 8, 2013 was the date of bid opening. US Builders Group, Inc. (Appellant) was the apparent successful offeror.

On July 10, 2013, DRS Veteran Enterprises, LLC (DRS), filed a timely size protest alleging Appellant is not an eligible small business. DRS set out various business and personal relationships between Appellant and DCCI based on public documents attached as exhibits, and asserted Appellant either is a “pass-thru” for Denn-Co Construction, Inc. (DCCI), or Appellant and DCCI are a joint venture. DRS also alleged the combined receipts of Appellant and DCCI exceed the size standard for the solicitation. Thus, while DRS did not use the term, it was alleging Appellant and DCCI were affiliated and therefore not small.

B. Size Determination

On September 4, 2013, the Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued a size determination that Appellant was not an eligible small business. DRS made a number of allegations of ties between Appellant and DCCI, most of which the Area Office found to be meritless. I will therefore not review them here.

The Area Office found that Lawrence Hixson is Appellant's President, Treasurer, Secretary, sole director and owns 51% of its stock. Mr. Hixson holds no stock in alleged affiliate DCCI, and has no position as officer, director or employee of DCCI. Sharon Pomante is Appellant's vice-president and owns 21% of its stock. Ms. Pomante's husband, Dennis M. Pomante, is DCCI's President, and owns 75% of DCCI's stock. Ms. Pomante holds no stock in DCCI, and has no position as officer, director or employee of DCCI. Mr. Pomante holds no stock in Appellant, and holds no position as officer, director or employee of Appellant.

Through DS Development and Investments, LLC, the Pomantes own the building where Appellant is located. The Area Office file contains the five-year lease agreement, which went effective on January 1, 2012. The lease is triple-net, with Appellant responsible for taxes, insurance, and building maintenance in addition to the stated monthly rent. Appellant's financial statements and tax returns reflect payment of the substantial rent called for by this lease as well as the lesser amount of rent from prior years, when Appellant occupied only part of the building. The Area Office determined that the lease was an arm's-length transaction.

Sheri L. Kaye is the daughter of the Pomantes. She owns a 7% interest in Appellant and

is employed there as a Senior Project Manager. She holds a West Virginia contractor's license on behalf of Appellant. Further, Ms. Kaye owns a 5% interest in DCCI and is a director. She holds a Florida contractor's license on behalf of DCCI and is the System for Award Management (SAM) point of contact for DCCI. She is also a former employee of DCCI, but left that position in February, 2002.

Charles S. Tosoian owns a 7% interest in Appellant and is its Vice President of Estimating. He also owns a 5% interest in, and is a director of, DCCI. He is a former employee of DCCI, but left that position in 2011. Wilfred A. Schmidt owns a 7% interest in Appellant and is its Vice President of Field Operations. In addition, he owns a 5% interest in, and is a director of, DCCI. He is also a former employee of DCCI, but left that position in 2005.

The members of DCCI's Board of Directors are Dennis M. Pomante, Sheri L. Kaye, John E. Bowman, Wilfred A. Schmidt, and Charles S. Tosoian.

The Area Office concluded that Mr. Tosoian, Mr. Schmidt and Ms. Kaye could, together, control DCCI's five-member Board, by preventing a quorum and by voting together. The Area Office noted that all three individuals own stakes in both concerns. The Area Office found that Mr. Tosoian and Mr. Schmidt were key employees of Appellant. The Area Office noted that common management may be found when the same individuals have the ability to exercise critical influence or have the ability to exercise substantive control. Accordingly, the Area Office concluded that because Ms. Kaye, Mr. Tosoian and Mr. Schmidt control or have the power to control DCCI and Mr. Tosoian and Mr. Schmidt have critical influence of the management or operations of Appellant, the firms were affiliated through common management.

The Area Office found that for DCCI to put Ms. Kaye, a non-employee, in the position of its SAM contact suggests an identity of interest. Further, that she has an ownership stake in both firms demonstrates her interest in the success of both firms. Without her vote, Mr. Tosoian and Mr. Schmidt would not have the ability to control DCCI. Finally, she has an identity of interest with her father, DCCI's majority shareholder, and her mother, Appellant's minority shareholder and vice president. The Area Office concluded that Appellant is affiliated with DCCI due to identity of interest based upon Ms. Kaye's family relationships and participation in both firms.

The Area Office then reviewed the financial information Appellant submitted, and concluded that while Appellant is, by itself, within the applicable size standard, once its affiliate DCCI's receipts are included Appellant exceeds the size standard, and is not a small business.

Appellant received the size determination on September 6, 2013, and timely filed its appeal on September 20, 2013.

C. The Appeal

Appellant argues the Area Office erred by raising issues that went outside the scope of the protest, and denied Appellant an opportunity to respond.

Appellant argues the Area Office erred in finding Appellant and DCCI affiliated through

common management. Appellant asserts that under DCCI's Bylaws Mr. Pomante, as majority shareholder, may remove a director or the entire Board, without cause, at an election of directors. Mr. Pomante may call a special meeting at any time and remove the entire Board, with or without cause. Further, Michigan corporation law permits a majority shareholder to remove directors with or without cause unless the corporation's articles provide otherwise, and DCCI's articles contain no such provision. Appellant argues OHA has held such ability to remove directors by a majority shareholder renders any control by the directors illusory, citing *Size Appeal of Environmental Quality Management, Inc.*, SBA No. SIZ-5429 (2012).

Appellant further asserts that Mr. Hixson controls Appellant as majority shareholder, president, treasurer, secretary and sole director. Mr. Hixson makes all of Appellant's major business decisions, including employee compensation, hiring and firing, approving subcontracts and handling day to day operations. Mr. Tosoian is in charge of the preconstruction phase of projects for Appellant. He presents pricing recommendations to Mr. Hixson, who makes the final decisions. Mr. Schmidt is in charge of contract documentation and the monitoring and coordination of field operations for Appellant, and he tracks and monitors project budgets and schedules. Mr. Hixson makes all decisions based upon Mr. Schmidt's reviews. Ms. Kaye assists in various tasks once Appellant is awarded a project.

Appellant argues that the Area Office's conclusion that Mr. Tosoian and Mr. Schmidt have critical influence on Appellant's management or operations is not supported by the record. The Area Office failed to discuss or identify how Mr. Tosoian and Mr. Schmidt have critical influence on Appellant's management or operations, or what information it relied upon in reaching this conclusion. Further, Mr. Hixson may, in his sole discretion, terminate Mr. Tosoian or Mr. Schmidt at any time.

Appellant also asserts the Area Office erred in finding Appellant and DCCI affiliated through identity of interest. Ms. Kaye does not control or have the power to control Appellant. Ms. Kaye holds no officer position within Appellant. Ms. Kaye does not control or have the power to control DCCI. Ms. Kaye holds no officer position within DCCI. Further, Appellant asserts that as a director she cannot control DCCI, because Mr. Pomante may dismiss the Board at any time.

Appellant argues it is not affiliated with DCCI due to an identity of interest between Ms. Kaye and her parents. Ms. Kaye has no power to control Appellant. Ms. Kaye has no power to control DCCI. She has no officer position and cannot control the Board. Mr. Pomante controls DCCI. Appellant and DCCI do not have common management, officers, directors, facilities, equipment or personnel. While they are both in construction, they do not have same client base. They are not dependent upon each other for business or contracts. They do not subcontract work to each other and do not do business together. Appellant thus argues that there is a clear line of fracture between itself and DCCI.

D. DRS's Response to the Appeal ²

DRS asserts the Area Office's size determination did not exceed the scope of the protest. DRS raises the issue of the relationship between Appellant and DCCI and provided a table of individuals showing connections between the two concerns.

On the common management issue, DRS asserts that Ms. Kaye, Mr. Tosoian and Mr. Schmidt can exert positive and negative control over DCCI. Contrary to Appellant's assertion, DRS argues that Mr. Pomante's exercise of authority to remove these three from the board of directors would have to take place at an annual or special meeting following no less than 10 nor more than 60 days notice, citing DCCI's Bylaws, Arts. 4.04 and 5.02. During that time, Ms. Kaye, Mr. Tosoian, and Mr. Schmidt, who are the majority of directors, would be sufficient to transact DCCI's business. Further, DRS argues that Mr. Pomante would not remove his own daughter. In addition, Ms. Kaye holds DCCI's contractor's license for Florida and, thus, her control is not illusory.

DRS argues that Mr. Tosoian, Mr. Schmidt, and Ms. Kaye, together, control review of all of Appellant's pre-bid contract documents with government and subcontractors, budgeting, scheduling, all field operations and on-site management of workers. Ms. Kaye has Appellant's West Virginia contractor's license. Therefore these three individuals are Appellant's key employees.

On the identity of interest issue, DRS argues that there is no clear line of fracture between Appellant and DCCI, due to the family relationship between Ms. Kaye and her parents.

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

1. Scope of Size Determination

Appellant argues the size determination went beyond the scope of the size protest. I

² DRS timely filed its Response by facsimile transmission on October 8, 2013. However, it was not docketed until OHA reopened after the restoration of normal government operations on October 17, 2013.

disagree. DRS clearly raised the issue of Appellant's affiliation with DCCI, and provided a table listing its allegations of common interests by various individuals involved with both concerns. This protest gave Appellant adequate notice of the grounds upon which its size was questioned. 13 C.F.R. § 121.1007(b).

2. Common Management

Firms are affiliated when one firm controls or has the power to control the other, or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). Further, affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns. 13 C.F.R. § 121.103(e). In order to find that firms are affiliated due to common management, both concerns must be controlled by the same person or persons. *See Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059, at 5 (1995).

The Area Office based its finding of common management affiliation on the fact that Ms. Kaye, Mr. Tosoian and Mr. Schmidt, acting together, are a majority of DCCI's Board and thus can control DCCI. At the same time, the Area Office found that Mr. Tosoian and Mr. Schmidt (and, more equivocally, Ms. Kaye) were also key employees of Appellant, and therefore the concerns were affiliated through common management, because they have critical influence over the management or operations of Appellant.

First, I must consider whether these three persons control or have the power to control DCCI, because Ms. Kaye, Mr. Tosoian, and Mr. Schmidt must control both Appellant and DCCI to support a finding of common management.

The Area Office clearly erred in finding that Ms. Kaye, Mr. Tosoian and Mr. Schmidt have the power to control DCCI. I come to this conclusion because control of DCCI is completely in the hands of Mr. Pomante, who owns 75% of DCCI's stock. He is thus clearly DCCI's majority shareholder. Further, DCCI's Bylaws provide that, as majority shareholder, Mr. Pomante, may remove any or all directors with or without cause at the annual shareholders meeting, or at a special shareholders meeting which can be called at any time with 10 to 60 days' notice. DCCI Bylaws, Articles 4.03, 4.04, 5.02, 5.04, 5.05. Further, under Michigan law, a majority of a corporation's shareholders may remove one or more directors without cause unless the Bylaws provide otherwise. MCL § 450.1511.

OHA has held that where a majority shareholder has the power to call a shareholders meeting and, at that meeting, to remove any and all directors with or without cause; it is the majority shareholder, not the directors, who controls the firm, and any control by the directors is illusory. *Size Appeal of Environmental Quality Management, Inc.*, SBA No. SIZ-5429, at 6 (2012); *Size Appeal of The Clement Group, LLC*, SBA No. SIZ-5146, at 6 (2010). Mr. Pomante, as DCCI's 75% shareholder, has the ability to call a shareholders meeting and remove any and all the directors. Mr. Pomante thus has control of DCCI.

DRS argues that Mr. Pomante is unlikely to remove his own daughter, who holds an

important license for DCCI. However, there is no question that he has the power to do so, and that is sufficient to establish his control. Further, it is not uncommon for family relationships to be strained by business differences, and Ms. Kaye's relationship with her father is no guarantee of a shield should he conclude he needs to exercise his control over DCCI. DRS's argument that Mr. Pomante would need to give ten days notice of a special shareholders meeting also is no barrier to Mr. Pomante's control. Such notice provisions are standard, and are no barrier to Mr. Pomante's exercise of control. They merely require a minor delay in his doing so.

I therefore conclude that the Area Office erred in finding that Ms. Kaye, Mr. Tosoian and Mr. Schmidt have the power to control DCCI. Because they do not have the power to control DCCI, the Area Office also erred in finding affiliation between Appellant and DCCI based upon common management.

3. Identity of Interest

The Area Office also found affiliation between Appellant and DCCI through the identity of interest between the Pomantes and their daughter, Ms. Kaye. The regulations provide:

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 . . .) 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). The Pomantes and their daughter share an identity of interest based on their family relationships; however, determining the existence of an identity of interest is only part of the affiliation inquiry. The regulations require that, unless the identity of interest is rebutted, the persons sharing the identity of interest must be treated as “one party” with their interests aggregated. Finally, the aggregated interests of the “one party” must be analyzed to determine whether they cause affiliation.

In analyzing questions of affiliation, the ultimate question is always whether one concern can control the other. “Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.” 13 C.F.R. § 121.103(a)(1); *see also Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128, at 5 (2010) (“The ultimate inquiry in any type of affiliation case . . . is the power to control.”). Thus, the affiliation question in an identity of interest case is whether, given the aggregated interests, one concern controls another, or a third party (for instance, the party or parties holding the aggregated interests) can control the concerns in question.

Here, the aggregated interests of the Pomantes and Ms. Kaye include control of DCCI (given that Mr. Pomante controls DCCI, as discussed *supra*). Thus, if the aggregated interests the Pomantes and Ms. Kaye also include control of Appellant, then the Appellant and DCCI would be affiliated because of the identity of interest. The Area Office, however, has identified no

evidence to support its conclusion that the aggregated interests the Pomantes and Ms. Kaye result in the control of Appellant, either by DCCI or by themselves directly.

Ms. Pomante is Vice President of and 21% shareholder in Appellant. Ms. Kaye is a 7% shareholder in Appellant. These combined interests cannot change the fact that Mr. Hixson remains Appellant's majority shareholder, sole director, President, Treasurer, and Secretary. Mr. Hixson, under Appellant's Bylaws and Michigan state law, still controls Appellant. Ms. Kaye also works for Appellant and holds Appellant's West Virginia contractor's license, but these additional facts do not confer control of Appellant to her. Ms. Kaye has no affirmative or negative control over Appellant, and Mr. Hixson can fire her at any time.

The fact the Pomantes, through DS Development and Investments, LLC, are Appellant's landlord also does not confer upon them control over Appellant. Their landlord-tenant relationship is governed by a written lease that is an arm's-length transaction, the rent charged is substantial, and actual payment of rent is reflected in Appellant's financial statements and income tax returns. Such a landlord-tenant relationship does not confer to the landlord control. *Size Appeal of A & H Contractors, Inc.*, SBA No. SIZ-5459, at 8-9 (2013); *cf. Size Appeal of Allied Safety and Environmental Distributing, Inc.*, SBA No. SIZ-5209 (2010) (sublease between husband and wife with nominal rent and terms not strictly enforced found to be a form of assistance). These facts are undisputed on appeal.

As the Area Office demonstrates, Mr. Hixson controls Appellant, and Ms. Pomante and Ms. Kaye do not. While there is an identity of interest among the Pomantes and Ms. Kaye based upon their family relationship, their aggregated interests still do not amount to the power necessary to control Appellant. Therefore I conclude that the Area Office erred in finding affiliation between Appellant and DCCI based upon the identity of interest between the Pomantes and Ms. Kaye.

Accordingly, because I conclude the size determination is based upon error of law and fact on both the common management and the identity of interest grounds of affiliation, I must reverse it and grant the appeal.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge