

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

SIZE APPEAL OF:

Seacon Phoenix, LLC,

Appellant,

Appealed From
Size Determination No. 1-SD-2014-007

SBA No. SIZ-5523

Decided: December 20, 2013

APPEARANCE

Christopher R. Shiplett, Esq., Watson and Associates, LLC, Denver, Colorado, for Appellant

DECISION

I. Introduction and Jurisdiction

On November 18, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination 1-SD-2014-007 finding that Seacon Phoenix, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and determine Appellant is, in fact, an eligible 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 January 15, 2013, the U.S. Department of the Navy, Naval Sea Systems Command issued Solicitation N00164-13-R-GP56, seeking outboard submarine and surface ship connector and receptacle assemblies. The solicitation contemplated awarding multiple Indefinite Delivery/Indefinite Quantity contracts, and it contains 85 Contract Line Items Numbers (CLINs). CLINS 0001-0052 were specifically set aside for small businesses, and CLINS 0053-0084 would

be procured through full and open competition.¹ The CO assigned North American Industry Classification System code 335931, Current-Carrying Wiring Device Manufacturing, with a corresponding 500-employee size standard. Offers were due April 8, 2013. Appellant submitted its offer on March 21, 2013.

On September 27, 2013, the CO announced that Appellant was the apparent awardee for CLINS 0017-0018, 0055-0078, and 0083-0085. On October 21, 2013, after dismissing a size protest against Appellant for lack of specificity, the Area Director initiated her own size protest of Appellant under the authority of 13 C.F.R. § 121.1001(a)(1)(iii).

B. Size Determination

On November 18, 2013, the Area Office issued Size Determination 1-SD-2014-007 finding that Appellant is not an eligible small business. The Area Office determined Appellant is affiliated with SEACON Europe Ltd., SEACON Global Production, SEACON Advanced Products, LLC, Precision Subsea AS, Brantner and Associates, Inc., SEACON Marsh and Marine, SEACON International, SEACON Brazil, and Phoenix Optix, Inc (POI). The Area Office found that Appellant's employees, when combined with those of its affiliates, exceed the 500-employee size standard.

In reaching this determination, the Area Office noted that six individuals own Appellant. Specifically, Mr. Patrick Simar, Mr. Denton Seilhan, and Mr. Frank Ravenelle each own 25%. Mr. Brian Ravenelle and Mr. Scott Findeisen each own 10%. Mr. Philip Morin owns the remaining 5%.

Messrs. Simar and Seilhan also have ownership interests in many other companies. Together they own 100% of SEACON Europe Ltd., SEACON Global Production, SEACON Advanced Products, LLC, Brantner and Associates, Inc., SEACON Marsh and Marine, SEACON International, and SEACON Brazil. They also own a collective 50% of Precision Subsea AS. The Area Office determined Messrs. Simar and Seilhan have an identity of interest based on these common investments, considered them one party, and aggregated their percentage interests. 13 C.F.R. § 121.103(f). The Area Office also determined they have the ability to control these companies based on their stock ownership. *Id.* § 121.103(c)(1).

Next, the Area Office explained, the Ravenelles and Mr. Morin have ownership interests in POI, and Mr. Findeisen is POI's president. Based on their common business interest in POI, the Area Office reasoned, the Ravenelles and Messrs. Morin and Findeisen have an identity of interest. *Id.* § 121.103(f). They are therefore treated as one party with their ownership interests aggregated. However, because their collective ownership of POI is 49%, there is not the ability to control based on stock ownership.² *See id.* § 121.103(c)(1).

¹ CLIN 0085 was for a data management report that would be included in every contract awarded.

² Although there is no ability to control based on stock ownership, the Area Office determined Appellant was affiliated with POI based on common ownership and management and the totality of the circumstances. Appellant does not challenge this finding on appeal. Moreover,

The Area Office then turned its attention to Appellant, noting that Messrs. Simar and Seilhan have an identity of interest and own a collective 50% of Appellant. The remaining 50% is owned by the Ravenelles and Messrs. Findeisen and Morin, who also have an identity of interest. Because both groups of owners each own 50% of Appellant, each group has the ability to control Appellant. *Id.* § 121.103(c)(1). Appellant is therefore affiliated with these six owners and the other companies they control. *Id.* § 121.103(a)(1). Accordingly, Appellant is affiliated with SEACON Europe Ltd., SEACON Global Production, SEACON Advanced Products, LLC, Precision Subsea AS, Brantner and Associates, Inc., SEACON Marsh and Marine, SEACON International, SEACON Brazil, and POI.

C. Appeal

On December 3, 2013, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the determination is clearly erroneous and should be reversed.

Appellant first argues the Area Office erred in determining control under 13 C.F.R. § 121.103(c)(1). Rather, because no one block of stock is large relative to the others, the Area Office should have considered control under § 121.103(c)(2), which unlike § 121.103(c)(1), creates a presumption that the challenged firm may rebut.

Appellant argues that 13 C.F.R. § 121.103(c)(1) refers to control by a person, individual, concern, or entity. Importantly, it “do[es] not include an ad-hoc conglomerate consisting of a set of persons with an 'identity of interests.’” *See* 13 C.F.R. §§ 121.103(c)(1)-(2). It was therefore error for the Area Office to create two sets of owners who each hold 50% of Appellant.

Appellant maintains that, had the Area Office analyzed control under § 121.103(c)(2), it would have concluded that neither Mr. Simar nor Mr. Seilhan control Appellant. Appellant's operating agreement provides, “Consent of at least fifty-one (51%) percent of the membership interests shall be required for the LLC to act with respect to the management, conduct and operation of the business in all respects and in all matters.” Operating Agreement ¶ 9. Therefore, Appellant argues, even if Messrs. Simar and Seilhan acted in concert, they would not have the requisite voting power to control Appellant.

Appellant points out that the regulation governing affiliation based on identity of interest creates a right to rebut the presumption of affiliation. *See* 13 C.F.R. § 121.103(f). In this case, however, the Area Office did not notify Appellant that it would find that Messrs. Simar and Seilhan have identical interests, and it did not provide Appellant the opportunity to rebut that finding.

the Area Office noted that, even if Appellant is not affiliated with POI, Appellant would still exceed the size standard based on its other affiliations.

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

I find Appellant's arguments lack merit. Appellant's reads 13 C.F.R. § 121.103(c), the regulation governing control based on stock ownership, in isolation. Although the regulation does not refer to aggregating blocks of stock based on identity of interest, authority for doing so is found in 13 C.F.R. § 121.103(f). That regulation makes plain that “[i]ndividuals or firms that have identical or substantially identical business or economic interests (such as . . . individuals or firms with common investments . . .) may be treated as one party with such interests aggregated.” 13 C.F.R. § 121.103(f). Therefore, although an individual owner may not have the ability to control a firm based on his individual ownership interest, multiple owners may have the collective ability to control based on their aggregated interests. *See e.g., Size Appeal of AcelRx Pharm., Inc.*, SBA No. SIZ-5501 (2013). Here, Messrs. Simar and Seilhan have common investments in the SEACON group of companies. As OHA has explained, “[a]n identity of interest is found where common interests establish 'a relationship that bespeaks a concert of purpose and effort' and 'cause the parties to act in union for their common benefit.’” *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 8 (2011) (internal citations omitted). Here, the record supports the Area Office's finding that Messrs. Simar and Seilhan have significant ownership interests in a multitude of companies, many of which they own exclusively. This level of common investment clearly bespeaks a common purpose, such that a finding of identity of interest is appropriate.

As Appellant points out, a challenged firm may rebut a finding of identity of interest. 13 C.F.R. § 121.103(f) (“Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination by showing that the interests deemed to be one are in fact separate.”) Appellant argues the Area Office deprived Appellant the opportunity to present such a rebuttal. I disagree. The Area Office put Appellant on notice that its relationships with the SEA CON group of companies was at issue. Indeed, the Area Office told Appellant explicitly that SBA “ha[d] conducted searches on Seacon Phoenix, LLC ... [that] revealed [it] is affiliated with SEA CON, SEA CON (EUROPE) Ltd, SEA CON Global Production, SEACON Advanced Products, LLC, Precision Subsea AS, SEACON Brazil, SEACON do Brazil, and Phoenix Optic LLC.” Appellant was therefore free to argue that these companies are not affiliated and that they do not have overlapping ownership. However, because this was not the case, Appellant made no such argument. To the contrary, Appellant acknowledged this overlapping ownership in its SBA Form 355. The reason, then, that the Area Office found an

identity of interest between Messrs. Simar and Seilhan is not because it deprived Appellant the opportunity to rebut the finding of identity of interest. Rather, it was because Appellant provided the Area Office with evidence establishing an identity of interest.

Moreover, it does not appear that a different outcome would ensue had the Area Office explicitly invited Appellant to argue that there was no identity of interest between Messrs. Simar and Seilhan. Significantly, Appellant does not argue on appeal that Messrs. Simar and Seilhan do not, in fact, have an identity of interest, nor does Appellant dispute that Messrs. Simar and Seilhan collectively own 100% of seven companies and 50% of an eighth company. Thus, I see no need to remand for further discussion of this point.

Finally, Appellant's argument that the Area Office should have analyzed control based on 13 C.F.R. § 121.103(c)(2) is based on the premise that the Area Office erred in aggregating Appellant's shares based on identity of interest. For the reasons discussed *supra*, I find no such error. Thus, once the Area Office aggregated these blocks of stock, there were two groups of owners who each owned 50%. It was therefore proper for the Area Office to conclude that each group had the ability to control Appellant under 13 C.F.R. § 121.103(c)(1).

IV. Conclusion

Appellant has not demonstrated the size 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).

CHRISTOPHER HOLLEMAN
Administrative Judge