

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

SIZE APPEAL OF:

Industria Lechera de Puerto Rico, Inc.,

Appellant,

Appealed From
Size Determination No. 1-SD-2013-61

SBA No. SIZ-5533

Decided: February 6, 2014

APPEARANCES

Antonio E. Marichal, Esq., Xavier Torres-Soto, Esq., Marichal, Hernández, Santiago & Juarbe, LLC, Guaynabo, Puerto Rico, for Appellant

DECISION

I. Introduction and Jurisdiction

On November 6, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2013-61 concluding that Industria Lechera de Puerto Rico, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. The Area Office specifically found that Appellant is controlled by, and affiliated with, the government of the Commonwealth of Puerto Rico because government officials have the power to control Appellant's parent company, the Fondo para el Fomento de la Industria Lechera (FFIL).

Appellant contends that FFIL does not control Appellant, and that the Puerto Rican government does not control FFIL. For the reasons discussed *infra*, the appeal is denied.

SBA's Office of Hearings and Appeals (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 November 6, 2013, but not received by Appellant until November 12, 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. Certificate of Competency

On July 2, 2013, the U.S. Department of Agriculture requested a Certificate of Competency (COC) for Appellant in conjunction with a procurement of evaporated and ultrahigh temperature (UHT) milk. Upon reviewing information submitted by Appellant, the Area Office questioned Appellant's small business status, raising several concerns about Appellant and FFIL. On September 18, 2013, the Area Office initiated a formal size protest against Appellant, pursuant to 13 C.F.R. § 121.408.

B. Size Determination

On November 6, 2013, the Area Office issued Size Determination No. 1-SD-2013-61 concluding that Appellant is affiliated with FFIL and the Puerto Rican government.

The Area Office explained that Appellant is a for-profit corporation founded in 1952, and has been a wholly-owned subsidiary of FFIL since 1962. (Size Determination at 3.) FFIL has the power to control Appellant by virtue of its 100% ownership interest. (*Id.* at 3-4, citing 13 C.F.R. § 121.103(c)(1).)

Next, the Area Office discussed the history and structure of FFIL. The Area Office found that FFIL is a fund created by the Puerto Rican legislature in 1957 to promote the production, sale, processing, and consumption of fresh milk and its byproducts in Puerto Rico. (*Id.* at 3.) “FFIL carries out these legislative purposes by: (1) conducting programs among the Puerto Rican dairy farmers to improve the quality and the quantity of fresh milk output in Puerto Rico; (2) conducting an advertising program aimed at increasing the consumption of fresh milk on the island; and (3) through its ownership of [Appellant], the promotion of the processing of fresh milk into cheeses, powdered milk, UHT milk, and other milk based products for consumption in Puerto Rico and on the mainland.” (*Id.*) The Area office noted that, shortly after FFIL acquired Appellant, the Puerto Rican legislature granted Appellant various tax exemptions which remain in effect so long as Appellant is owned by FFIL. (*Id.* at 3-5.)

The Area Office determined that, in 2002, the Puerto Rican legislature enacted a law restructuring FFIL, such that FFIL is now managed by a nine-member Administrative Board appointed by the Secretary of Agriculture of Puerto Rico. (*Id.* at 4-5.) In addition, a Puerto Rican government official, the Milk Industry Regulation Administrator, serves as Chairman of the Administrative Board, and votes if necessary to break a tie. Specifically, FFIL's operating statute reads as follows:

[C]ollections and disbursements shall be made in accordance with the regulations adopted by the Administrative Board. The disbursements shall not be subject to a preliminary audit by the Secretary of the Treasury. Besides the Administrator, who shall be its Chairman, the Administrative Board which shall administer the Fund shall be composed of: (i) five (5) representatives of the producers; (ii) one

(1) representative of each processor up to a maximum of two (2) representatives, and (iii) two (2) private citizens. These nine (9) members shall be appointed by the Secretary and chosen as follows: (i) the five (5) members representing the producers shall be chosen by ballot by the Farmers Association of Puerto Rico at a meeting called for such purpose and presided over by said Association; (ii) the members representing the processors shall be chosen from the recommendations submitted by each processor, provided, however, that in the future, if said group has three (3) or more bona fide members, the representation of said group to the Board shall be composed of a maximum of two (2) members chosen by ballot by the processors; and (iii) the two (2) private citizens shall be chosen by the members of the Board producers and processors, and shall be persons of good reputation and acknowledged experience in managerial or professional matters. The Administrator shall be an ex-officio member and Chairman of said Administrative Board; provided, that he/she shall only vote when needed to break the deadlock in decisions made by the Administrative Board.

(*Id.* at 4, quoting 5 L.P.R.A. § 1099(e), as amended (English translation).)

The Area Office concluded that “[i]t is clear that the government [of Puerto Rico] has power to exercise/exert control over [Appellant] through FFIL by its power to appoint elected members of the Administrative Board of FFIL and also through the vote of a government official (the Chairman of the Administrative Board) to break ties.” (*Id.* at 5.) Because the Puerto Rican government has the power to control FFIL, and FFIL in turn controls Appellant, Appellant is affiliated with the government of Puerto Rico and is not a small business. (*Id.* at 4-5, citing 13 C.F.R. § 121.103(a).)

C. Appeal¹

Appellant acknowledges that FFIL is Appellant's sole shareholder and “parent company.” (Appeal at 2.) Appellant asserts, however, that Appellant is a “regular corporation organized pursuant to the laws of Puerto Rico,” and is governed by its own corporate bylaws and board of directors. (*Id.*)

Appellant disputes the Area Office's conclusion that the Puerto Rican government has the power to control FFIL. Appellant claims that, according to legal opinions of the Puerto Rican Attorney General, FFIL is not considered to be a governmental entity. (*Id.* at 3.) Further, FFIL is funded by assessments imposed upon milk producers, not directly by the Puerto Rican government. (*Id.*) Appellant suggests that FFIL is similar in structure to the Asociación de Empleados del Estado Libre Asociado, an employee association which the Supreme Court of Puerto Rico has determined is not a government agency or instrumentality. (*Id.* at 4.)

Appellant contends that the Area Office erred in concluding that membership of FFIL's

¹ Appellant initially filed its appeal on November 26, 2013. Pursuant to 13 C.F.R. § 134.207, Appellant requested, and was granted, leave to amend its appeal, and submitted its amended appeal on December 11, 2013. All citations herein refer to the amended appeal.

Administrative Board is controlled by the government of Puerto Rico. (*Id.* at 5.) Appellant concedes that the Secretary of Agriculture “appoints” FFIL's Administrative Board, but insists that such appointment occurs only after private parties have selected the members. According to Appellant:

No member of the Administrative Board is **selected or chosen** by the government of Puerto Rico. Therefore, by law the Secretary of Agriculture is **required** to “appoint” any member selected to the Administrative Board of the FFIL pursuant to the process of selection set forth under [5 L.P.R.A. § 1099(e)].

(*Id.*, emphasis in original.) Appellant further argues that although the Administrative Board's Chairman is a government official, the Chairman has no real power to control the Administrative Board. As the Area Office noted, the Chairman votes only if necessary to break a tie, a rare occurrence given that the Administrative Board has nine voting members. (*Id.* at 5-6.) Appellant asserts that its tax-exempt status is not relevant and should be disregarded because many industries in Puerto Rico, whether for profit or not for profit, enjoy similar tax incentives or exemptions. (*Id.* at 6.)

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

Appellant raises two principal arguments in an effort to refute the size determination. First, Appellant maintains that Appellant is not controlled by FFIL. Second, Appellant contends that FFIL is not controlled by the Puerto Rican government. As discussed *infra*, neither of these arguments is meritorious. Consequently, the appeal must be denied.

Appellant first asserts that Appellant is not controlled by FFIL, because Appellant is a separate legal entity than FFIL, with its own business interests, corporate bylaws, and board of directors. Nevertheless, there is no dispute that Appellant is wholly-owned by FFIL. *See* Sections II.B and II.C *supra*. Pursuant to SBA regulations and OHA case law, an entity which owns 50% or more of a concern is deemed to control it, even in the absence of other indicia of control. 13 C.F.R. 121.103(c)(1); *Size Appeal of Marple Fleet Leasing, LLC*, SBA No. SIZ-5479, at 3-4 (2013); *Size Appeal of VoCare Servs., Inc.*, SBA No. SIZ-5266, at 6-7 (2011). Accordingly, the Area Office correctly concluded that FFIL has the power to control Appellant by virtue of its 100% ownership interest.

Appellant also contends that FFIL is not controlled by Puerto Rican government. Although the Area Office determined that the Secretary of Agriculture appoints the members of FFIL's Administrative Board, Appellant maintains that such "appointments" are a ministerial function because the Secretary is legally required to appoint any person selected under 5 L.P.R.A. § 1099(e). In addition, Appellant maintains, the Chairman of the Administrative Board lacks any power to control FFIL because he or she cannot vote except in rare situations to break a tie. Appellant emphasizes that FFIL is not recognized as a formal branch or agency of the Puerto Rican government, and does not receive funding directly from the government.

I find Appellant's arguments unpersuasive. Contrary to Appellant's contentions, there is no indication in the statute that the Secretary of Agriculture is legally required to appoint any person nominated under 5 L.P.R.A. § 1099(e). *See* Section II.B, *supra*. Indeed, such an interpretation essentially eliminates the statutory requirement that "members shall be appointed by the Secretary," as the Secretary would have no substantive role in the appointment process. A more plausible reading of 5 L.P.R.A. § 1099(e) is that the various interested groups will recommend candidates for FFIL's Administrative Board, and the Secretary may then accept or reject those candidates. Thus, ultimate decision-making over appointments rests with the Secretary, as the Area Office determined. Nor can I conclude that the Chairman does not control FFIL's Administrative Board merely because he or she votes only when necessary to break a deadlock. While it may be true, as Appellant suggests, that such deadlocks are relatively rare, 5 L.P.R.A. § 1099(e) clearly contemplates that a tie vote may occur, perhaps if there are vacancies on the Administrative Board or if one or more voting members abstain. At least in some situations, then, the Chairman may have the decisive vote which determines the action taken by the FFIL Administrative Board.

Lastly, it is immaterial that FFIL is not recognized as a formal branch or agency of the Puerto Rican government, and that FFIL does not receive funding directly from the Puerto Rican government. As explained in the size determination, FFIL is a fund created by an act of the Puerto Rican legislature, to carry out purposes mandated by the legislature. *See* Section II.B, *supra*. The organization, operation, and management of FFIL are specified by law, and the Area Office found that the Puerto Rican legislature chose to restructure FFIL as recently as 2002. *Id.* Furthermore, although FFIL derives its funding from contributions paid by milk producers, these contributions are not voluntary but rather are imposed upon milk producers by statute. *See* 5 L.P.R.A. § 1099(b). On these facts, then, the Area Office could reasonably conclude that FFIL is not an independent private organization, but rather is a quasi-governmental entity created, controlled, and managed by the Puerto Rican government, and funded through government-mandated assessments. Pursuant to the Small Business Act, a concern must be "independently owned and operated," in addition to being small, in order to qualify as a small business. 15 U.S.C. § 632(a)(1). Thus, because the Puerto Rican government controls FFIL, and FFIL in turn controls Appellant, the Area Office properly concluded that Appellant is not a small business.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge