

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

SIZE APPEAL OF:

Glucan Biorenewables LLC,

Appellant,

Appealed From
Size Determination No.

SBA No. SIZ-5608

Decided: October 20, 2014

APPEARANCE

Victoria Gonzalez, CEO, Glucan Biorenewables LLC, Saint Louis, Missouri

DECISION¹

I. Introduction

On July 30, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2014-042 concluding that Glucan Biorenewables LLC (Appellant) is not eligible for a Small Business Innovation Research (SBIR) grant. The Area Office specifically found that Appellant does not meet the ownership and control requirements of the SBIR program as set forth at 13 C.F.R. § 121.702(a)(1)(i). Appellant maintains that the size determination is erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. 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. Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Protest

On January 30, 2014, Appellant submitted Proposal No. 1430716, entitled “SBIR Phase II: Green Solvent-Enabled Synthesis of Biobased Furans,” to the National Science Foundation (NSF). In the proposal, Appellant represented itself as a small business.

On July 9, 2014, NSF protested Appellant's size and eligibility to participate in the SBIR program. NSF alleged that Appellant appears to be majority owned by two entities: Focus First, LP (Focus First) and Wisconsin Alumni Research Foundation (WARF). NSF expressed concern that Appellant's ownership structure may be impermissible because Focus First may be a venture capital (VC) or private equity (PE) firm, whereas WARF is not. (Protest at 2.) Therefore, “[Appellant] appears to be majority owned by a combination of VC/PE and WARF, an institutional owner and clarification of [Appellant's] eligibility is needed.” (*Id.* at 3.)

B. Area Office Proceedings

On July 16, 2014, the Area Office notified Appellant of the protest and requested a completed SBA Form 355, employee count, charter documents, and other information. The Area Office informed Appellant that its size would be determined as of July 9, 2014, the date of NSF's protest. 13 C.F.R. § 121.704(a).

On July 18, 2014, Appellant responded to the Area Office. Appellant explained that it is 48% owned by Focus First and 13% owned by WARF. The remaining 39% interest is held by four individuals: [Individual A] (16%), [Individual B] (13%), [Individual C] (9%), and [Individual D] (1%). Appellant's Board of Managers includes [Individual E] (who votes on behalf of preferred members), [Individual A] (who votes on behalf of common members), and Victoria Gonzalez (the founders' appointee), who is also Appellant's CEO and who has authority to act for Appellant.

Appellant stated that Focus First is a limited partnership that is comprised of general partner Focus First Holdings, LLC (FFH), and three individual limited partners: [Individual G], [Individual H], and [Individual I]. FFH, the general partner of Focus First, is owned by three individuals, who are also its managing partners: [Individual E], Ms. Gonzalez, and [Individual J]. Focus First's limited partnership agreement (LPA) states that “[t]he General Partner shall have the complete and exclusive right, power and authority to manage and control all of the business, affairs, assets and properties of the Partnership.” (LPA, Article 5.3.)

Appellant stated that Focus First is also the general partner of Nidus Investment Partners, LP (Nidus). Nidus was founded in 2010 as “a strategic partnership to scout and assess early stage technology.” (Response at 1.) Appellant indicated that “[a]s part of Focus First LP's compensation, it may form and operate start-up companies with technologies it has identified as promising.” (*Id.*) However, “[u]nder Section 5.8(c) of the Nidus limited partnership agreement, the Oversight Committee, a committee consisting of principally the corporate limited partners of

Nidus, may direct that Focus First LP investments be transferred to Nidus in accordance with Section 8.1(c) of the Nidus limited partnership agreement.” (*Id.*)

On July 25, 2014, the Area Office asked Appellant to provide ownership information for WARF, and to clarify whether WARF is organized for profit. Appellant responded that “WARF is a Wisconsin, non-stock, non-profit corporation recognized as exempt from U.S. taxation under Section 501(c)(3) of the Internal Revenue Code. WARF is also exempt from Wisconsin income tax.” (Email from V. Gonzalez to D. Gordon (July 29, 2014).)

C. Size Determination

On July 30, 2014, the Area Office issued Size Determination No. 04-2014-042 finding that Appellant is not eligible for an SBIR grant.

The Area Office recited the SBIR ownership and control regulation at 13 C.F.R. § 121.702(a)(1)(i), and then interpreted it:

Parsed into simpler form, the regulation requires that [Appellant] be owned and controlled in any one of three ways. It must be more than 50% directly owned and controlled by:

- 1) one or more individuals;
- 2) other small business concerns which are, in turn, more than 50% directly owned and controlled by individuals; or
- 3) any combination of alternatives 1) and 2).

(Size Determination at 1-2.)

Next, the Area Office examined each of these three alternatives. The Area Office found that individuals own less than 50% of Appellant, so alternative 1 fails. (*Id.* at 2.)

Turning to alternative 2, the Area Office explained that, because Appellant is more than 50% owned by two entities, Focus First and WARF, “both of those entities must, in turn, be more than 50% directly owned and controlled by individuals.” (*Id.*) In addition, both Focus First and WARF must be small businesses. The Area Office found that Focus First is controlled by its general partner, FFH, not by individuals. (*Id.*) Appellant's other entity owner, WARF, is organized as a not-for-profit entity and therefore is not a small business concern under 13 C.F.R. § 121.105(a)(1). (*Id.* at 3.) As a result, Appellant fails to qualify under alternative 2. (*Id.*)

As for the alternative 3, the Area Office stated:

[Appellant] cannot qualify under the terms of this alternative— allowing a combination of ownership and control by alternatives 1 and 2—for the simple reason that it does not meet the terms of either alternative 1 or alternative 2.

(*Id.*)

The Area Office concluded that Appellant is not eligible for an SBIR grant.

D. Appeal

On August 20, 2014, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the Area Office erred in finding that the structure of Focus First is impermissible under SBA regulations. In particular, Appellant argues that Appellant qualifies under alternative 3 of 13 C.F.R. § 121.702(a)(1)(i), because Appellant is more than 50% owned by Focus First and various individuals. (Appeal at 2.)

Appellant acknowledges that FFH is the general partner of Focus First, but emphasizes that FFH in turn is owned and managed by three individuals (Ms. Gonzalez, [Individual E], and [Individual J]). Contrary to the size determination, then, Focus First is controlled by individuals through FFH. (*Id.*) According to Appellant, “[t]here are no entities other than [FFH] and its affiliate Focus First LP (which are 100% owned and operated by individuals) that has the authority to direct, manage or control the activities or budget of [Appellant].” (*Id.* at 3.)

Appellant also argues that, insofar as SBA objects to the structure of Focus First, “[FFH] can easily vote to distribute [Appellant's] units currently held in Focus First LP to individual partners.” (*Id.* at 4.) Appellant asserts that “[w]ith this change, more than 50% of the units will be held directly by individuals.” (*Id.*)

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 that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb a size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that SBA 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 has not shown any reversible error in the size determination. The applicable regulation requires that an SBIR awardee must:

Be a concern which is more than 50% directly owned and controlled by one or more individuals (who are citizens or permanent resident aliens of the United States), other small business concerns (each of which is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the United States), or any combination of these.

13 C.F.R. § 121.702(a)(1)(i). The Area Office found that Appellant does not qualify under this provision because Appellant is 13% owned by an entity that is not a small business, and 48% owned by an entity that is not controlled by individuals. *See* Section II.C, *supra*.

On appeal, Appellant does not dispute that WARF is not a small business, and does not deny that Focus First is controlled by its general partner, FFH. Appellant emphasizes, however, that FFH is owned and managed by three individuals. Thus, in Appellant's view, Focus First is controlled by individuals, albeit indirectly through FFH. I find Appellant's argument unpersuasive because it is at odds with the plain language of 13 C.F.R. § 121.702(a)(1)(i), which permits that an SBIR awardee may be owned and controlled by small businesses which are, in turn, "more than 50% directly owned and controlled by individuals." Here, Focus First is not directly controlled by individuals because such control flows through an entity, FFH. Further, Appellant has the burden of proof in these proceedings, and has not established that the three individual owners of FFH do control Focus First. Notably, Appellant informed the Area Office that Focus First is also the general partner of Nidus, and stated that Nidus's Oversight Committee may unilaterally "direct that Focus First LP investments be transferred to Nidus." *See* Section II.B, *supra*. The appeal does not address the extent to which such ties with Nidus may affect the powers of the individual owners of FFH.

Appellant also suggests that Appellant's ownership could be restructured so that more than 50% of Appellant would be held directly by individuals. This argument fails because Appellant's size is determined as of July 9, 2014, the date of NSF's protest. 13 C.F.R. § 121.704(a). As a result, any changes of ownership occurring after July 9, 2014 will not alter the analysis of Appellant's size and SBIR eligibility.

IV. Conclusion

For these reasons, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge