United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Olgoonik Solutions, LLC, Appellant, Appealed From Size Determination No. 06-2015-038	SBA No. SIZ-5669 Decided: July 10, 2015

APPEARANCE

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

This appeal involves a size determination issued to Olgoonik Solutions, LLC (Appellant), an applicant to SBA's 8(a) Business Development (BD) program. Appellant is a wholly-owned subsidiary of Olgoonik Development, LLC (ODL), which in turn is a wholly-owned subsidiary of Olgoonik Corporation (OC). OC is an Alaska Native Corporation (ANC).

On June 3, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2015-038, concluding that Appellant is not a small business. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted.

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. Size Investigation

On April 8, 2015, the Area Director, on reviewing Appellant's System for Award Management (SAM) listing, instituted a protest of Appellant's size, pursuant to 13 C.F.R. §

121.1001(b)(9). In its 8(a) BD application, Appellant identified its primary North American Industry Classification System (NAICS) code as 541512, Computer Systems Design Services, which has a corresponding size standard of $27.5 million annual receipts. In addition to 541512, Appellant certified in SAM as a small business under NAICS codes 238210, 334290, 541690, and 561621. The respective size standards for these NAICS codes are $15 million, 750 employees, $15 million, and $20.5 million. 13 C.F.R. § 121.201. The Area Office notified Appellant that it questioned whether Appellant was a small business under any of these NAICS codes.

B. The Size Determination

On June 3, 2015, the Area Office determined that Appellant is not a small business due to its affiliation with Stanley Convergent Security Solutions, Inc. (Stanley), a large public company that is a part of Stanley Black & Decker, Inc. The Area Office determined Appellant's size as of April 8, 2015, the day the Area Director requested the size determination. (Size Determination at 1.)

The Area Office explained that, although Appellant is wholly-owned by ODL and OC, Appellant is not affiliated with these parent companies, because "business concerns owned and controlled by . . . ANCs . . . are not considered affiliates of such entities," nor are they "considered to be affiliated with other concerns owned by these entities because of their common ownership or management." (*Id*. at 2-3, citing 13 C.F.R. §§ 121.103(b)(2) and 124.109(c)(2))(iii).)

While Appellant is not affiliated with its parent companies, the Area Office determined that Appellant is affiliated with Stanley, which is neither an ANC nor owned by an ANC, based on economic dependence. 13 C.F.R. § 121.103(f). Appellant and Stanley have entered into three teaming agreements, the Area Office explained, one of which is for the purpose of responding to solicitations for electronic security upgrade projects from the Veterans Administration (VA). VA awarded a five-year Blanket Purchase Agreement (BPA) to Stanley in early 2014. According to the teaming agreement, Appellant will be Stanley's subcontractor and will perform $450,000 worth of work over the course of the BPA. (Size Determination at 3.)

The Area Office noted that Appellant was organized in 2012, and did not begin operations until July 2013. (*Id*. at 3-4, 6.) In the latter half of 2013, Appellant generated revenues of $47,204, 85% of which was from its business with Stanley. (*Id*. at 4.) In 2014, Appellant's revenue was $89,879, all of which derived from business with Stanley. (*Id*.) In the first quarter of 2015, Appellant's revenue was $26,000, all of which again came from Stanley. (*Id*.) Because Appellant derived more than 70% of its revenues from Stanley, the Area Office found that Appellant is economically dependent on Stanley. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007); *see also Size Appeal of Ma-Chis Project Controls, Inc*., SBA No. SIZ-5486 (2013); *Size Appeal of Strategic Defense Solutions, LLC*, SBA No. SIZ-5475 (2013); *Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427 (2012); *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306 (2011).

In reaching this conclusion, the Area Office rejected Appellant's contention that the exception OHA described in *Size Appeal of Argus and Black, Inc*., SBA No. SIZ-5204 (2011) applies to Appellant. (Size Determination at 4-5.) Appellant had argued that that it was a start- up and that nearly every new firm begins with a single source of revenue. Appellant emphasized that its dealings with Stanley were at arms-length and that all the work Appellant performed was from one BPA that Stanley had with VA. Aside from the subcontract under this BPA, Appellant and Stanley have no other ties. Appellant represented that it has worked diligently to generate new business with firms other than Stanley, and Appellant submitted a list of 59 business development meetings it had pursued to generate this other business. These business development activities had started to bear fruit. Appellant recently was awarded two new subcontracts, valued at $131,560 and $93,600, from companies not associated with Stanley. (*Id*.) In 2014, moreover, Appellant had a net loss of $509,092, so the revenues Appellant derived from Stanley were insufficient to sustain business operations. The only reason Appellant could continue operating was because its parent, ODL, is committed to funding Appellant until its operations are viable. (*Id*.) The Area Office was unmoved by these arguments. The Area Office found *Argus and Black* is distinguishable because the challenged firm in that case had been dormant for an extended period and "had one contract of less than four months duration which generated less than $11,000 in revenue." (*Id*. at 5.) Unlike that firm, Appellant derived approximately $156,000 from multiple purchase orders with Stanley from July 2013 to March 2015. "[T]his does not constitute one contract, a small amount of revenue, or a short duration of time." (*Id*.)

The Area Office then sought to calculate the combined receipts and employees of Appellant and Stanley, but Stanley did not provide this information to Appellant or the Area Office. Instead, Stanley stated that the Area Office could consult available public resources to obtain Stanley's financial information. (*Id*. at 7.) The Area Office noted that Appellant has the burden of persuasion, and that where a firm whose size status is at issue does not furnish requested information, SBA may presume that such information would demonstrate that the concern is not a small business. 13 C.F.R. §§ 121.1008(c) and 121.1009(c). The Area Office stated that the information requested was relevant, that there was a connection between Appellant and Stanley, and that the request was specific. Accordingly, it was proper to draw an adverse inference against Appellant. Further, Stanley represents itself as a large business under NAICS codes with size standards ranging from $15 million to $38.5 million and from 150 employees to 500 employees. Therefore, although Appellant alone is a small business, when its receipts and employees are combined with those of Stanley, Appellant is not a small business under NAICS codes 238210, 334290, 541512, 541690, and 561621. (Size Determination at 8.)

C. The Appeal

On June 17, 2015, Appellant filed the instant appeal. Appellant argues that *Argus and Black* does apply to this case. In *Argus and Black*, OHA stated that, "where the contract by itself is not enough to sustain business operations, a finding of economic dependence based upon it is not warranted." (Appeal at 9, quoting *Argus and Black*, SBA No. SIZ-5204, at 6.) Here, Appellant argues, the revenues Appellant derived from Stanley "fall woefully short of providing an adequate revenue stream to sustain the company." (*Id*.) Appellant repeats that in 2014 it had a net loss before income tax of $509,092, and was dependent on its parent, ODL—not Stanley—

for financial support. (*Id*. at 4-5.) Thus, "[i]t is [ODL] that is carrying the financial burden and allowing [Appellant] to maintain its business development activities." (*Id*. at 9.) Moreover, Stanley has no ownership or management interest in Appellant, and the companies have no exclusive agreements. (*Id*. at 7, 10.) Appellant does not depend on Stanley for financial assistance, and has worked vigorously to develop business other than Stanley. If Stanley were to terminate its subcontract with Appellant, Appellant's viability would not suffer. For these reasons, Stanley does not have the power to control Appellant, as 13 C.F.R. § 121.103(a)(1) requires. *See Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244, at 5 (2011); *Size Appeal of Jenn-Kans, Inc*., SBA No. SIZ-5128, at 5 (2010). By concluding to the contrary, the Area Office engaged in "a mechanical exercise of counting revenue beans." (Appeal at 10.)

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

Pursuant to 13 C.F.R. § 121.103(f), affiliation may arise when firms are "economically dependent through contractual or other relationships." In interpreting this provision, OHA has held, as a matter of law, that a firm is economically dependent upon another if it derives 70% or more of its revenue from that firm. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007); *see also Size Appeal of Ma-Chis Project Controls, Inc*., SBA No. SIZ-5486 (2013); *Size Appeal of Strategic Defense Solutions, LLC*, SBA No. SIZ-5475 (2013); *Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427 (2012); *Size Appeal of Norris Prof'l Servs., Inc*., SBA No. SIZ-5289 (2011); *Size Appeal of Eagle Consulting Corp*., SBA No. SIZ-5267, at 5 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). OHA has recognized that "affiliation through contractual relationships may be based on findings from a single fiscal year." *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 14 (2011) (quoting *Size Appeal of Supreme-Tech., Inc*., SBA No. SIZ-4092, at 5 (1995)). Furthermore, "a contractual relationship between two concerns with one heavily dependent for its revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms." *Size Appeal of Incisive Tech. Inc*., SBA No. SIZ-5122, at 4 (2010).

Nevertheless, as Appellant points out, OHA has recognized a narrow exception to the 70% rule for relatively new businesses, stating that "where the challenged firm has only recently begun operations either initially or after a period of dormancy, and is dependent upon its alleged affiliate for only one small contract of short duration, which by itself could [not] sustain a business, that a finding of economic dependence is not warranted." *Size Appeal of Argus and Black*, SBA No. SIZ-5204, at 6-7 (2011). In reaching this conclusion, OHA distinguished

previous cases in which OHA found economic dependence. Whereas those firms maintained relationships with their affiliates over multiple years, the challenged firm in *Argus and Black* was akin to a start-up business, and had had little opportunity to develop revenue outside of its relationship with the alleged affiliate. *Id*. at 6. Further, the revenues that the challenged firm derived from the alleged affiliate in *Argus and Black* were not sufficient to sustain business operations. *Id*. at 6-7.

Subsequently, OHA reiterated its holding from *Argus and Black*, and explained that:

> despite [the 70% rule from] *Faison*, a concern may be found not to be affiliated with a concern which is responsible for all or nearly all of its revenue if the "mechanical application of the rule . . . would be an injustice" . . . "places too large a significance on too small a contract" and "would unduly penalize start-up operations, which may have had a chance to obtain only one or two contracts at the time they face a size determination."

Size Appeal of SP Techs., SBA No. SIZ-5319, at 5 (2012) (quoting *Argus and Black*, SBA No. SIZ-5204, at 6). OHA therefore affirmed an area office's conclusion that two companies were not affiliated through economic dependence. *Id*. Applying this approach in *Size Appeal of Cherokee Nation Healthcare Services, Inc*., SBA No. SIZ-5343 (2012), OHA noted that the challenged firm was "formed in 2008 yet did not start receiving revenues until 2010." *Cherokee Nation*, SBA No. SIZ-5343, at 2. OHA determined that, although by the end of 2011 the challenged firm had received two subcontracts from its alleged affiliate valued at $678,091 and $1,492,272.73 which accounted for 99% of the challenged firm's revenues, the exception from *Argus and Black* applied. "To find [the challenged firm] affiliated using a mechanical application of the [70%] rule would unduly penalize a startup and work an injustice. The Area Office clearly erred in doing so here." *Id*. at 6.

In a later case, OHA explained that, "the contract at issue in *Argus and Black* did not suggest economic dependence because it was 'not enough to sustain business operations.'" *Size Appeal of Ma-Chis Project Controls, Inc*., SBA No. SIZ-5486, at 4 (2013) (quoting *Argus and Black*, SBA No. SIZ-5204, at 6). In *Ma-Chis*, though, "the exact opposite" scenario was presented, because the contract at issue was a "multi-million dollar arrangement over the course of several years, and the Area Office found that [the challenged firm] would not be a viable business without the [ ] contract." *Id*. As a result, OHA affirmed an area office's conclusion that *Argus and Black* did not apply, and that the firms were affiliated through economic dependence.

Turning to the instant case, the Area Office cited OHA's decision in *Ma-Chis* and noted that this case does not involve one contract, a small amount of revenue, or a short duration of time. The Area Office therefore determined that the exception to the 70% rule from *Argus and Black* does not apply. *See* Section II.B, *supra*. There are two problems with this reasoning. First, the Area Office did not address the fact that the revenues Appellant derived from Stanley are insufficient to sustain business operations. As Appellant explains, during the period for determining size, Appellant incurred far greater losses than the revenues it derived from Stanley. Appellant was able to continue business operations due to the financial support of its parent

company, ODL, a wholly-owned subsidiary of an ANC. Thus, Appellant is viable without its revenues from Stanley because Appellant can rely heavily on its ANC-owned parent companies. Second, the Area Office did not consider similarities with *Cherokee Nation*, a case that involved more than one contract and over $2 million in revenues in a two-year period after recently starting operations. Thus, the fact that Appellant derived approximately $156,000 from multiple purchase orders with Stanley from July 2013 to March 2015 does not necessarily preclude application of *Argus and Black*.

Based on this record, I must agree with Appellant that the Area Office erred in determining Appellant is economically dependent upon Stanley. As in *Argus and Black*, Appellant is a relatively new business and the revenues it received from its alleged affiliate are not sufficient to sustain business operations. Thus, a mechanical application of the 70% rule would be unjust, as it penalizes new concerns that have only had the opportunity to work with one company. Nor is it logical to conclude that Appellant is economically dependent upon Stanley, given that Appellant actually derives far greater support from ODL than from Stanley.

The case for applying the exception is further bolstered by the fact that Appellant has worked diligently to pursue business beyond Stanley. OHA has declined to find economic dependence where a firm diversifies the sources of its revenue, even though the firm received more than 70% of its revenue from one firm. *SP Techs*., SBA No. SIZ-5319, at 5 (finding no economic dependence because the challenged firm severed its relationship with the alleged affiliate and had obtained a new subcontract from another firm). Here, Appellant has had 59 business development meetings, and has been awarded two new subcontracts with firms unconnected to Stanley. Thus, unlike situations where a challenged firm receives the vast majority of its revenues from a single source for an extended period, Appellant has been pursuing business with many other companies. As a result, Appellant has demonstrated that it would be unjust to apply the 70% rule in this case.

IV. Conclusion

The Area Office determined that Appellant itself is a small business and that Appellant exceeds the applicable size standards only if Appellant is affiliated with Stanley. As discussed above, Appellant has met its burden of proving that the Area Office clearly erred in finding Appellant economically dependent upon Stanley. Accordingly, this appeal is GRANTED, and the size determination is REVERSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge