

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Erickson Helicopters, Inc.,

Appellant,

Appealed From
Size Determination No. 06-2015-026

SBA No. SIZ-5672

Decided: August 26, 2015

APPEARANCES

David M. Nadler, Esq., Justin A. Chiarodo, Esq., Stephanie M. Zechmann, Esq.,
Dickstein Shapiro LLP, Washington, D.C., for Appellant

DECISION¹

I. Introduction and Jurisdiction

On May 26, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2015-026 finding that Erickson Helicopters, Inc. (Appellant) is not a small business due to affiliation with several concerns. Appellant maintains that the size determination is flawed and should be overturned. For the reasons discussed *infra*, the appeal is granted in part, and the matter is remanded to the Area Office for further review.

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. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the

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

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On November 24, 2014, the United States Transportation Command issued Request for Proposals (RFP) No. HTC711-15-R-R007 for rotary wing air transportation services at Fort Irwin, California. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 481211, Nonscheduled Chartered Passenger Air Transportation, with a corresponding size standard of 1,500 employees. Appellant submitted a timely proposal self-certifying as a small business.

On January 28, 2015, the CO announced that Appellant was the apparent awardee. On February 4, 2015, a disappointed offeror, CHI Aviation (CHI), protested Appellant's size, and the Area Office began a size investigation of Appellant. On March 4, 2015, Appellant informed the Area Office that it was withdrawing its offer for the RFP and therefore was no longer the apparent awardee. Consequently, the Area Office dismissed CHI's size protest against Appellant. (Size Determination No. 06-2015-021, at 1.)

On March 5, 2015, the Area Director initiated his own size protest against Appellant pursuant to 13 C.F.R. § 121.1009(b)(9). The Area Director observed that, according to the System for Award Management, Appellant represented itself as a small business under NAICS code 481211. However, “during the process of conducting Size Determination 06-2015-021 on [Appellant], information came to light concerning [Appellant's] affiliation to multiple entities (including Erickson Inc., Centre Lane Partners, among others) and the possibility that [Appellant's] affiliation with these entities could cause the concern's size to exceed the 1500 employee size standard.” (Memorandum from J. Gambardella, at 1 (March 5, 2015).)

B. Response to Area Director's Protest

On March 20, 2015, Appellant responded to the Area Director's protest. Appellant stated that four entities (collectively, the “ZM entities”) hold ownership interests in Appellant's parent company: ZM EAC, LLC (ZM EAC); ZM Private Equity Fund I, LP (Fund I, LP); ZM Private Equity Fund II, LP (Fund II, LP); and 10th Lane Finance Co. (10th Lane Finance). (Response at 2.) According to Appellant, Messrs. Quinn Morgan and Kenneth Lau “handle day to day affairs of the ZM entities, [but] they do not control ownership of any ZM entity.” (*Id.*) Thus, Appellant reasoned, “notwithstanding [Appellant's] ownership structure, which includes certain ZM entities, [Appellant] . . . still falls below the 1500 employee threshold.” (*Id.* at 1.) Appellant went on to argue:

1. The ZM entities are not affiliates of [Appellant] because the ZM Funds do not control [Appellant] through ownership or management. Consequently, [Appellant] do[es] not believe that [it] should include in its employee count the employees of the ZM Funds or any employees of its family companies.

2. Quinn Morgan and Ken Lau do not control the Board of Directors of [Appellant] or otherwise control [Appellant]. They hold no controlling ownership position in any ZM entity, and as disclosed, disclaim beneficial ownership of the shares held by the ZM entities in [Appellant], except for their pecuniary interests therein, which is less than 1.0%; and

3. Even if one or more of the ZM entities is found to control [Appellant], the ZM entity portfolio companies should not be deemed affiliates of [Appellant] because there is a clear fracture of interests between [Appellant] and those companies.

(*Id.* at 1-2.) Appellant elaborated that there was clear fracture between Appellant and the ZM entities because Appellant and the ZM entities do not share resources and operate in distinct lines of business. (*Id.* at 3.)

C. Instant Size Determination

On May 26, 2015, the Area Office issued Size Determination No. 06-2015-026 finding that Appellant is not a small business due to affiliation with a number of concerns, including the ZM entities.

The Area Office found that Appellant is 100% owned by EAC Acquisition Corporation (EAC), which in turn is 100% owned by Erickson Incorporated (EI). (Size Determination No. 06-2015-026, at 3-4.) Based on this ownership, the Area Office found Appellant to be affiliated with EAC, EI, and several other companies in which EAC and EI have ownership interests.²

The Area Office then explained that 54.7% of EI is owned by the four ZM entities. Specifically, ZM EAC owns 33.7%; Fund I, LP owns 11.5%; Fund II, LP owns 4.9%; and 10th Lane Finance owns 4.6%. (*Id.* at 4.) The Area Office observed that, although each of the ZM entities individually holds only a minority interest in EI, “these minority holdings, when combined, represent a 54.7% block.” (*Id.* at 5.) The ZM entities are affiliated with one another through common management, the Area Office determined, because Mr. Morgan is the managing director of each and has 100% voting power for each. (*Id.* at 5-6.) Further, because the aggregated voting block represents more than 50% of the voting stock in EI, Mr. Morgan has the power to control EI—and therefore Appellant—based on this ownership. (*Id.*)

² In addition to Appellant, EAC owns 100% of Evergreen Unmanned Systems, Inc.; Evergreen Equity, Inc.; Evergreen Helicopters International, Inc.; and Erickson Transport, Inc. (Size Determination No. 06-2015-026, at 3.) In addition to its ownership interest in EAC, EI owns 100% of Dutch Air-Crane B.V. and Canadian Air-Crane LTD; 99% of Erickson Aviation Peru, S.A.C. and Air Amazonia LTDA; 98% of Erickson Air-Crane, which owns 49% of Layang Layang Services; and 49% of European Air Crane, which owns 60% of SIMA. (*Id.* at 4.) The Area Office determined Appellant, EAC, and EI are affiliated with these firms based on ownership interests. 13 C.F.R. § 121.103(c).

Mr. Morgan controls many other companies, too. Specifically, he owns [more than 50]% of [Affiliate 1], which is the managing member of [Affiliate 2]; [Affiliate 3]; and [Affiliate 4]. Through [Affiliate 1], then, Mr. Morgan has the power to control [Affiliate 2], [Affiliate 3], and [Affiliate 4]. (*Id.* at 6.)

The Area Office explained that [Affiliates 2, 3, and 4] control three of the ZM entities. [Affiliate 2] is the general partner of Fund I LP, [Affiliate 3] is the general partner of Fund II LP, and [Affiliate 4] is the managing member of 10th Lane Finance. Through [Affiliate 1], then, Mr. Morgan has the ability to control these three of the ZM entities. (*Id.* at 6.)

Mr. Lau is a partner at [Affiliates 2 and 3] and 10th Lane Finance. The Area Office found that, based on their joint business interests, Messrs. Morgan and Lau share an identity of interest such that they are treated as one party with their interests aggregated. (*Id.*)

The Area Office next determined that the ZM entities are affiliated with Centre Lane Partners (Centre Lane) and ZM Equity Partners, LLC (ZMEP) based on the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). In reaching this conclusion, the Area Office noted that Centre Lane and ZMEP share an address in New York City with the ZM entities, and web searches for “ZM Equity Partners LLC” led searchers to Centre Lane's website. (*Id.* at 7.)

The Area Office explained that Fund I, LP owns [more than 50]% of CLP Industrial Holdings (CLP) and therefore is affiliated with CLP. Fund I, LP and Fund II, LP, which are affiliated, own a combined [more than 50]% interest in CNA Holding Corporation (CNA) and a combined [more than 50]% interest in MG Distribution Holdings, LLC (MG). Accordingly, Fund I, LP; Fund, II, LP; CLP; CNA; and MG are affiliated based on ownership. (*Id.*)

The Area Office then proceeded to calculate the total employees of Appellant and its affiliates. Although Appellant itself is small under the 1,500-employee size standard, Appellant exceeds the size standard once its employees are combined with those of its affiliates, including CLP, CNA, and MG. (*Id.* at 8-9.)

D. Appeal

On June 9, 2015, Appellant appealed the size determination to OHA. Appellant argues that the size determination is clearly erroneous, and urges OHA to reverse.

Appellant seeks to sever the link between EI and the ZM entities. Appellant argues that if Appellant is not affiliated with the ZM entities, it is not affiliated with companies in which the ZM entities invest, either. In such a case, Appellant does not exceed the size standard despite being affiliated with EAC, EI, and all the other companies they own. (Appeal at 2-3.)

Appellant argues it is not affiliated with the ZM entities because, under Delaware state law, EI is controlled by its board of directors. 8 Del. C. §§ 141(a), (b). EI's board, moreover, is chaired by an independent director, and has six directors, one of whom is Mr. Morgan. Although Mr. Lau was an EI director as of the date for determining size, he no longer holds this position. As one of six directors, then, Mr. Morgan cannot control EI's board. (Appeal at 5.)

Appellant next contests the Area Office's finding that Mr. Morgan has the power to control all of the shares held by the ZM entities. Although he manages the ZM entities, "he does not actually hold the vast majority" of their shares. (*Id.* at 6.)

Appellant charges that the Area Office erred in aggregating the ZM entities' shares of EI. "While it is true that the ZM entities may, indeed, be affiliated with one another, on the theory that they are subject to common management, this fact does not establish that the ZM entities also exercise any common control over EI." (*Id.*) Rather, for the Area Office to aggregate the ZM entities' shares in EI, it would have had to find an identity of interest, which it did not. Appellant maintains that "the mere fact of affiliation does not establish that affiliated entities have such an identity of interests that they should be treated as one party for purposes of determining whether they together exercise control of another entity." (*Id.*)

E. Appeal Supplement

At OHA's request, Appellant supplemented its appeal on August 12, 2015, to address whether EI is controlled by ZM EAC, the single largest shareholder of EI. Appellant asserts that, although ZM EAC's block of stock in EI is large compared with the other blocks of stock, ZM EAC does not control EI under 13 C.F.R. § 121.103(c)(1). ZM EAC does not control EI, Appellant reasons, because EI is controlled by its board of directors, and Mr. Morgan, as only one of six directors, cannot exercise affirmative or negative control of EI. (Supplement at 1-2.)

Even if EI were controlled by ZM EAC, Appellant continues, the relationship would be immaterial because ZM EAC has no employees. Further, although the Area Office found that ZM EAC is affiliated with the other ZM entities based on Mr. Morgan's common management, the other ZM entities also lack employees. ZM EAC's stock is "widely held by numerous unknown investors," and Mr. Morgan does not manage any other companies with employees; thus, the affiliation inquiry stops with the ZM entities. (*Id.* at 2-3.)

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's principal argument in this case is that the Area Office erred in finding that EI, Appellant's ultimate parent company, is controlled by, and affiliated with, the ZM entities. Appellant does not dispute that the ZM entities collectively hold majority ownership of EI.

Specifically, ZM EAC owns 33.7%; Fund I, LP owns 11.5%; Fund II, LP owns 4.9%; and 10th Lane Finance owns 4.6%. *See* Section II.C, *supra*. Appellant argues, however, that the Area Office improperly aggregated these interests without finding that the ZM entities share an identity of interest with each other. *Cf.*, *Size Appeal of AcelRx Pharms., Inc.*, SBA No. SIZ-5501 (2013) (aggregating the interests of four venture capital funds after determining that they had an identity of interest). Appellant maintains that, although the Area Office found that the ZM entities are affiliated with one another through common management, 13 C.F.R. § 121.103(e), that regulation does not provide for an aggregation of ownership interests, unlike affiliation based on identity of interest, 13 C.F.R. § 121.103(f).

With regard specifically to EI, Appellant's argument fails because the record clearly establishes that EI is affiliated with the ZM entities through ZM EAC's large minority interest in EI. SBA regulations provide that a concern is affiliated with a shareholder which owns a block of stock that is "large compared to other outstanding blocks," even though that block is less than 50% of the concern's stock. 13 C.F.R. § 121.103(c)(1); *Size Appeal of The H.L. Turner Group, Inc.*, SBA No. SIZ-4896, at 4-5 (2008). Here, ZM EAC is EI's single largest shareholder (33.7%), and Fund I, LP is EI's next largest shareholder (11.5%). OHA has found affiliation based on ownership where the largest block of stock is 1.59 times as large, or more, as the next largest block of stock. *Size Appeal of Civitas Group, LLC*, SBA No. SIZ-5424 (2012). In the instant case, ZM EAC's share of EI is nearly three times as large as the next largest shareholder. For purposes of affiliation, then, ZM EAC has the ability to control EI under 13 C.F.R. § 121.103(c)(1) based on ZM EAC's large minority ownership interest. The Area Office found, and Appellant does not dispute, that the four ZM entities are affiliated with one another through common management by Mr. Morgan. *See* Section II.C, *supra*. Thus, irrespective of whether the ZM entities share an identity of interest with each other, EI is affiliated with the ZM entities due to ZM EAC's large ownership interest in EI.

Appellant's contention that EI is controlled by its board of directors, rather than by ZM EAC, is also unavailing. Appellant's argument rests on Delaware corporate law, and SBA does not defer to state law in determining issues of affiliation and control. *Size Appeal of SIGA Techs., Inc.*, SBA No. SIZ-5201, at 11 (2011) ("SBA has consistently applied this single-largest minority shareholder rule for many years despite arguments that legal control of the concern does not rest with a minority shareholder under state corporate law."); *Size Appeal of Novalar Pharms., Inc.*, SBA No. SIZ-4977, at 13 (2008). Moreover, Appellant's argument is at odds with the regulatory scheme. SBA only presumes that the board of directors has the power to control a company if its "voting stock is widely held and no single block of stock is large as compared with all other stock holdings." 13 C.F.R. § 121.103(c)(3). Here, as discussed above, ZM EAC's block of stock is large as compared to the next largest block, so 13 C.F.R. § 121.103(c)(3) is inapposite. Instead, the applicable regulation is 13 C.F.R. § 121.103(c)(1), and EI is controlled by ZM EAC, not by EI's board of directors.³

³ Appellant argues that Mr. Lau no longer serves on EI's board of directors, so the inquiry of who controls the board should not include Mr. Lau. This argument is meritless because size is determined as of March 5, 2015, the date of the Area Director's protest. 13 C.F.R. § 121.1001(b)(9). Mr. Lau's departure from EI's board occurred after March 5, 2015 and is irrelevant to the size inquiry.

Nevertheless, although Appellant has not demonstrated clear error in the Area Office's conclusion that the ZM entities control EI, Appellant's argument that the Area Office improperly aggregated the ownership interests of the ZM entities also applies to other concerns in which the ZM entities hold ownership stakes, such as CNA and MG. In particular, the Area Office found that two of the ZM entities — Fund I, LP and Fund II, LP — own a combined [more than 50]% interest in CNA and a combined [more than 50]% interest in MG. Section II.C, *supra*. The Area Office did not find an identity of interest between Fund I, LP and Fund II, LP, however, or otherwise explain why their ownership interests in CNA and MG should be aggregated. *Id.* Nor is it clear that the Area Office considered whether CNA and MG have other large shareholders. Thus, the existing record is not sufficient to conclude that CNA and MG are controlled by the ZM entities. The issue is pivotal to the outcome of the case because the employee counts of CNA and MG were significant in causing Appellant to exceed the size standard.

C. Remand

The Area Office properly determined that Appellant is affiliated with the ZM entities, but it is not evident from the record that Appellant also is affiliated with CNA and MG. On remand, the Area Office should determine whether the ZM entities have the power to control CNA and MG, and if so, on what basis. If the Area Office finds an identity of interest between Fund I, LP and Fund II, LP, such that their interests in CNA and MG are aggregated, the Area Office should afford Appellant an opportunity to rebut this finding by showing that interests deemed to be one are actually separate. *E.g., Size Appeal of Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571, at 7 (2014) (remanding for further consideration of identity of interest because “it [did] not appear that [the challenged firm] was specifically notified of the presumption of affiliation and given the opportunity to address the issue”).

IV. Conclusion

For the above reasons, the appeal is GRANTED in part, and the matter is REMANDED to the Area Office for further review and investigation consistent with this decision.

KENNETH M. HYDE
Administrative Judge