

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

SIZE APPEAL OF:

Government Contracting Resources, Inc.,

Appellant,

Appealed From
Size Determination Nos. 3-2015-077 and
3-2015-078

SBA No. SIZ-5687

Decided: October 15, 2015

APPEARANCES

Pamela J. Mazza, Esq., Peter B. Ford, Esq., Kelly A. DiGrado, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant.

DECISION¹

I. Introduction

On August 20, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 3-2015-077 and 3-2015-078 concluding that Government Contracting Resources, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the Area Office incorrectly found that Appellant is affiliated with Valley Indemnity, Ltd. (Valley), and requests that the SBA Office of Hearings and Appeals (OHA) reverse the size determinations or remand for further consideration. For the reasons discussed *infra*, the appeal is granted, and the size determinations are affirmed in part and remanded in part.

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 after receiving the size determinations, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. 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.

II. Background

A. The Solicitation

On November 21, 2014, the U.S. Department of the Navy, Naval Facilities Engineering Command Southeast (Navy) issued Request for Proposals (RFP) No. N69450-15-R-2104 for base operating support services. The RFP indicated that the Navy planned to award a hybrid firm-fixed-price, indefinite-delivery/indefinite-quantity contract with a base period of one year and four, one-year options. (RFP at 28, 44.) The Contracting Officer (CO) set aside the procurement entirely for service-disabled veteran-owned small business concerns (SDVO SBCs), and assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of \$38.5 million average annual receipts. Appellant submitted its initial proposal, including price, on January 5, 2015.

B. Protests and Response

On June 29, 2015, the CO announced that Appellant was the apparent awardee. On July 1, 2015, Davis-Paige Management Systems, LLC (DPMS), an unsuccessful offeror, filed a size protest against Appellant. On July 6, 2015, a second unsuccessful offeror, Bacik Group, LLC (Bacik), also protested Appellant's size. The CO forwarded the protests to the Area Office for review.

Appellant responded to multiple requests from the Area Office for information about Valley. Appellant explained that Valley is “[XXXXXXX],” which, according to Appellant, is a company “[XXXXXXXXXXXXXXXXX].” (Letter from B. Thompson and J. Borders to G. Holman (Aug. 10, 2015), at 1.) Appellant stated that each Valley shareholder is required to contribute to Valley's capital by purchasing one common share and one preferred share (collectively, one “Unit”). (*Id.*) The owner of each Unit is entitled to appoint one member to Valley's board. (*Id.* at 1-2.) Appellant stated that it had appointed Mr. Jeffrey Don Albritton to be its representative on Valley's board. (*Id.*) Mr. Albritton is also the President, CEO, and majority owner of Appellant. (*Id.* at 3.)

Appellant stated that it is one of [XX] shareholders of Valley, and holds a [less than 5%] ownership interest. (*Id.*) Appellant provided a list of the [XX] companies owning shares in Valley as of September 2015. (*Id.*, Ex. 41.)

In response to a follow-up inquiry from the Area Office, Appellant claimed that Valley's stock is widely held. (Letter from B. Thompson to G. Holman (Aug. 11, 2015), at 2.) Therefore, Appellant maintained, Valley “is controlled by its Board of Directors and its President, and only the Board and the President have the power to control [Valley].” (*Id.* at 2-3.)

In subsequent correspondence, Appellant denied that Appellant or Mr. Albritton has the power to control Valley under 13 C.F.R. § 121.103(c)(2). (Letter from B. Thompson and J. Borders to G. Holman (Aug. 14, 2015), at 3.) Indeed, Appellant contended, “no single vote or single shareholder can ‘control’ Valley Indemnity.” (*Id.* at 4.) Appellant urged the Area Office to follow *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013) and conclude

that Appellant “cannot exercise control [of Valley] due to the quorum and voting requirements [in Valley's Articles of Association].” (*Id.*) In addition, Appellant asserted, Mr. Albritton is not a member of Valley's “executive team,” which manages Valley's day-to-day operations. (*Id.*)

In a final letter to the Area Office, Appellant stated that Valley has an Executive Committee, which consists of six individuals. These individuals, the shareholders they represent, and their titles are as follows: Steve Simony (Dixie Construction Products, Inc.) – President; Steve Frohbieter (Southworth-Milton, Inc.) – Vice President and [XXXX]; John Kupko (Wyoming Machinery Co.) – [XXXX]; Brian Verhoeven (Hawthorne Machinery Co.) – [XXXX]; Dave Black (Northeast Skyland LLP) – [XXXX]; and Craig Mathis (G.E. Mathis Co.) – [XXXX]. (Letter from B. Thompson and J. Borders to G. Holman (Aug. 17, 2015), at 2.) Valley also utilizes a consultant, [Consultant], to “assist[] with day-to-day operations and management of Valley Indemnity on behalf of its shareholders.” (*Id.*)

Appellant submitted Valley's Articles of Association to the Area Office. The Articles provide that “the business of the Company shall be managed by the Directors.” (Articles, B-20 ¶ 88.) Further, “[t]he Directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit.” (*Id.* at B-21 ¶ 91.) The Articles also impose certain quorum requirements. For directors to conduct business, the Articles provide that “[t]he quorum necessary for the transaction of the business of the Directors may be fixed by the Directors, and unless so fixed, if there be two or more Directors shall be two, and if there be one Director the quorum shall be one.” (*Id.* at B-24 ¶ 104.) For a quorum at general shareholder meetings, the Articles require “at least a majority of the paid up voting share capital of the Company.” (*Id.* at B-17 ¶ 60.) For their special resolutions, the Articles require two-thirds. (*Id.* at B-3.)

C. Size Determinations

On August 20, 2015, the Area Office issued the size determinations. DPMS's protest resulted in Size Determination No. 3-2015-077, and Bacik's protest resulted in Size Determination No. 3-2015-078. In both size determinations, the Area Office found that Appellant is affiliated with Valley.²

The Area Office determined that Appellant and Valley are affiliated based on Appellant's minority ownership interest in Valley. The Area Office explained that where two or more entities each owns less than 50% of a concern's voting stock, such minority holdings are equal or approximately equal in size, and the aggregate of those minority holdings is large as compared to any other stock holdings, SBA presumes that such entities control or have the power to control the concern whose size is at issue. (Size Determination No. 3-2015-077, at 6-7 (citing 13 C.F.R. § 121.103(c)(2).) The Area Office stated that, according to information submitted by Appellant,

² The Area Office also found Appellant to be affiliated with numerous other firms. Appellant, however, does not challenge these findings on appeal, so further discussion of them is unnecessary. *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”).

Valley is not widely held but rather “is held by a small number of concerns.” (*Id.* at 7.) Because each shareholder has one equal vote, each presumably has the power to control Valley.

The Area Office stated that “[a] Member is a holder of any type of share” and that “Mr. Albritton is one of those Members.” (*Id.* at 6-7.) Therefore, Mr. Albritton too presumably has the power to control Valley.

The Area Office went on to explain that the presumption in 13 C.F.R. § 121.103(c)(2) may be rebutted where the firm whose size is at issue can demonstrate that no such control exists. The Area Office rejected the notion that the Executive Committee controls Valley, stating that the Executive Committee “is actually part of Valley's agent and not part of Valley itself.” (*Id.* at 7.)

Turning to Appellant's argument that no single shareholder can control Valley, the Area Office noted that “[t]he mere fact that a minority shareholder cannot individually control a concern is not sufficient to overcome the presumption under 121.103(c)(2).” (*Id.*, citing *Size Appeal of ADVENT Environmental, Inc.*, SBA No. SIZ-5325 (2012).) Indeed, the minority shareholder rule exists to address this very situation. Where “all the owners have an equal amount of control as all the other owners[,] . . . all are presumed to have the power to control.” (*Id.*, citing *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794 (2006).) Accordingly, the Area Office concluded, Appellant did not rebut the presumption that it controls Valley.

The Area Office then aggregated Appellant's receipts with those of its affiliates. Without including Valley's receipts, the combined receipts for Appellant and its other affiliates do not exceed the \$38.5 million size standard. (*Id.* at 8.) Once Valley's receipts are included, though, the combined receipts exceed the size standard. (*Id.*)

D. Appeal

On September 4, 2015, Appellant filed the instant appeal. Appellant argues that the Area Office erred in concluding that Appellant did not rebut the presumption in 13 C.F.R. § 121.103(c)(2).

Appellant contends the Area Office's reliance on *ADVENT Environmental* is misplaced. Unlike the alleged affiliate in that case, Valley is not held by a small number of concerns, as the Area Office found. Rather, when Appellant self-certified its size in connection with the subject procurement, Valley had [XX] shareholders, and Mr. Albritton was one of [XX] directors on Valley's board. With [less than 5%] ownership interest in Valley, and no involvement with Valley's Executive Committee, Appellant “is merely a passive investor with no control over Valley.” (Appeal at 2.) Mr. Albritton, for his part, “has no personal involvement whatsoever in managing Valley's day-to-day business operations and he does not, by any means, personally oversee Valley's most important strategic decisions.” (*Id.* at 7.)

Appellant argues that the Area Office should have relied upon *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013). In that case, the challenged firm had nine owners with equal one-ninth ownership interests; its board had five directors. A quorum required

a majority in ownership, and action required majority vote. OHA found that this quorum requirement rebutted the presumption that each owner had control based on their one-ninth ownership interest. (*Id.* at 8.)

Appellant contends that the operative facts of *Mark Dunning* are analogous to those at issue here. Appellant, which holds a [less than 5%] interest in Valley, does not have the power to control Valley based on this minority ownership. Further, a quorum for a general meeting requires a majority of shareholders, and a quorum for a special meeting requires two-thirds. (*Id.*, citing Articles, at B-3 and B-17 ¶ 60.) Where a quorum is present, some actions require a majority vote and others require unanimity; ties are broken by the chairman of the board. (*Id.* at 8-9, citing Articles, at B-2, B-3, B-18 ¶ 68.) Appellant, then, “cannot create a quorum, prevent a quorum, cause any vote to pass, block any vote nor cast a tie-breaking vote.” (*Id.* at 9.) Likewise, Mr. Albritton, as one of [XX] directors, cannot control Valley because the board is subject to quorum and majority vote requirements with ties broken by the chairman, a role which Mr. Albritton has never served. (*Id.* at 9, citing Articles at B-23 ¶¶ 102-104.)

Appellant contends that the Area Office factually erred in finding that Mr. Albritton is a shareholder of Valley. Appellant maintains that Mr. Albritton does not personally have any ownership interest in Valley. He “merely serves as [Appellant’s] appointed Director.” (*Id.* at 10.) Appellant argues that the Area Office also erred in finding that the Executive Committee is part of [Consultant] rather than Valley itself. Appellant insists that “[w]hereas [Consultant] is Valley’s agent, the Executive Committee is an internal governing committee composed of representatives of Valley’s member companies, not [Consultant].” (*Id.* at 11.)

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 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

The Area Office correctly recognized that, when a concern is owned by multiple owners with equal minority interests, all of those owners are presumed to control the concern. This presumption may, however, be rebutted by showing that such control or power to control does not actually exist. The applicable regulation states:

If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern’s voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other

stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

13 C.F.R. § 121.103(c)(2). In its case decisions, OHA has repeatedly rejected arguments that a concern with multiple owners is not controlled by any person or entity. *Size Appeal of Technibilt Ltd.*, SBA No. SIZ-5304 (2011); *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 15 (2006) (“[A]ll concerns must be controlled by someone or some group at all times. The alternative, to consider none of the minority stockholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved.”); *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986). Nevertheless, a minority owner, and particularly if that owner is merely a passive investor, may rebut the presumption by showing that control rests with a different party. *Allied Tech. Servs. Group, LLC*, SBA No. SIZ-5373, at 7 (2012); *Size Appeal of ADVENT Envt'l.*, SBA No. SIZ-5325, at 8 (2012) (finding that presumption was not rebutted due to challenged firm's “direct, personal involvement in [the affiliate's] affairs, including oversight of its most important strategic decisions.”).

In the instant case, the record is not sufficiently developed for OHA to determine whether Appellant rebutted the presumption that it is affiliated with Valley. Appellant claimed that no person or entity controls Valley, and the Area Office properly dispatched that argument as meritless. Appellant went on to argue, however, that Valley is controlled by a six-person Executive Committee, which, Appellant maintained, does not include Appellant's principal, Mr. Albritton. Section II.B, *supra*. The Area Office apparently misunderstood the Executive Committee to be part of [Consultant] rather than Valley itself; as a result, the Area Office did not explore whether Appellant's argument was valid. On remand, the Area Office is instructed to investigate the role of the Executive Committee in Valley's day-to-day operations and determine whether the six shareholders appointing the directors to the Executive Committee control Valley through the Executive Committee.

Further, the record does not reflect whether Appellant plays more than a passive role in Valley's affairs. The Area Office observed that Mr. Albritton is a director of Valley, and Valley's Articles of Association provide that “the business of the Company shall be managed by the Directors.” Section II.B, *supra*. It therefore is possible that Appellant, through Mr. Albritton, plays an active role at Valley. The Area Office, however, made no findings concerning the extent and nature of Mr. Albritton's involvement with Valley, or whether other persons associated with Appellant may have such involvement. Likewise, the Area Office did not address the business relationships between Appellant and Valley, except to note that Appellant described Valley as a “[XXXXXXXXXXXXXXXXXXXXX].”³ The size determinations also mistakenly stated that Appellant and Mr. Albritton both hold ownership interests in Valley, thereby potentially exaggerating the magnitude of the ownership interest controlled by Appellant. Section II.C, *supra*. In sum, it is unclear from the record whether Appellant rebutted the presumption that it is affiliated with Valley. OHA cannot determine from the record whether Valley is controlled by its Executive Committee, or whether Appellant is a passive investor with no direct involvement in Valley's affairs. Appellant also argues that the Area Office should have followed OHA's decision in *Size*

³ [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX].

Appeal of Mark Dunning Industries, Inc., SBA No. SIZ-5488 (2013). In *Mark Dunning*, though, the minority owner apparently was merely a passive investor in the challenged firm, and the two firms had essentially no business dealings with one another. *Mark Dunning*, SBA No. SIZ-5488, at 3. OHA further found that the minority owner could not possibly control day-to-day management of the challenged firm because “quorum for day-to-day management is a majority and action requires a majority vote.” *Id.* at 7. Conversely, in the instant case, OHA cannot ascertain whether Appellant is more than a passive investor in Valley. Moreover, while Appellant cites quorum provisions that it contends are analogous to those in *Mark Dunning*, the provisions cited by Appellant pertain to shareholder votes, not to the day-to-day management of Valley. Section II.B, *supra*. Based on Valley's Articles of Association, there appear to be substantial differences between the quorum provisions for shareholder votes and the quorum provisions for meetings of the directors. *Id.* Thus, Appellant has not established that *Mark Dunning* is controlling here.

IV. Conclusion

Appellant has demonstrated significant errors and omissions in the determination that Appellant is affiliated with Valley. Therefore, the appeal is GRANTED, and the findings in the size determinations with respect to Valley are VACATED, and the matter is REMANDED to the Area Office for further review. The size determinations are otherwise AFFIRMED.

KENNETH M. HYDE
Administrative Judge