

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

SIZE APPEAL OF:

Government Contracting Resources, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2016-018

SBA No. SIZ-5706

Decided: January 13, 2016

APPEARANCES

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

Constance M. Kobayashi, Esq., Office of General Counsel, U.S. Small Business
Administration, San Francisco, California, for the Agency

DECISION¹

I. Introduction

On November 6, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-018 concluding that Government Contracting Resources, Inc. (Appellant) exceeds the size standard associated with the subject procurement due to affiliation with Valley Indemnity, Ltd. (Valley). Appellant maintains that the size determination is clearly erroneous, and requests that the SBA Office of Hearings and Appeals (OHA) reverse. 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 after 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.

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. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

II. Background

A. Procedural History

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.

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

On August 20, 2015, the Area Office issued Size Determination Nos. 3-2015-077 and 3-2015-078 concluding that Appellant exceeds the \$38.5 million size standard. The Area Office reasoned that Valley is owned by Appellant and approximately 20 other companies, each with an equal minority interest, so all of those owners are presumed to control Valley under 13 C.F.R. § 121.103(c)(2). Further, Mr. Jeffrey Don Albritton — the President, CEO, and majority owner of Appellant — serves on Valley's Board of Directors.

On September 4, 2015, Appellant filed an appeal with OHA challenging Size Determination Nos. 3-2015-077 and 3-2015-078. On October 15, 2015, OHA issued its decision in *Size Appeal of Government Contracting Resources, Inc.*, SBA No. SIZ-5687 (2015) (*GCR I*) granting the appeal in part. OHA found the record unclear as to whether Appellant had rebutted the presumption of affiliation with Valley, and remanded the matter to the Area Office for further analysis. With regard to Appellant's argument that Valley is controlled by an Executive Committee, OHA instructed the Area Office to investigate the role of the Executive Committee in Valley's day-to-day operations and consider whether the shareholders appointing the directors to the Executive Committee control Valley through the Executive Committee. *GCR I*, SBA No. SIZ-5687, at 6.

Following the remand, Appellant submitted Valley's Articles of Association to the Area Office. The Articles indicate that “the business of the Company shall be managed by the Directors.” (Articles at 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.)

In a letter to the Area Office, Appellant asserted that “[p]ursuant to § 88 of Valley's Articles of Association, the Company is managed by its Board.” (Letter from P. Mazza to G. Holman (Oct. 26, 2015), at 2.) However, Appellant maintained, the Executive Committee “manage[s] and control[s] the critical day-to-day functions of Valley, a captive insurance

company.” (*Id.*) Appellant stated that Appellant has only a 4.16% ownership interest in Valley and that Mr. Albritton is just one of 26 Board members. Therefore, Appellant argued, Appellant's interest in Valley is not large enough to “create a quorum, prevent a quorum, cause any vote to pass, block any vote nor cast a tie-breaking vote.” (*Id.* at 4.)

B. The Instant Size Determination

On November 6, 2015, the Area Office issued Size Determination No. 3-2016-018 again finding Appellant affiliated with Valley.

The Area Office explained that Valley considers any company holding a share to be a “Member,” with each Member appointing a “Participant Director” to Valley's Board of Directors; each Member has an equal ownership interest and one vote. (Size Determination No. 3-2016-018, at 3.) The Area Office found that Valley's Executive Committee “generally hears committee updates then discusses new business, which includes actions such as reviewing and revising documents/agreements and officer rotation, then the next meetings are scheduled.” (*Id.* at 4.) In contrast, Valley's Board of Directors is responsible for “establishing committees (which currently consists of Executive, Finance, Underwriting and Risk Control Committees); approving meeting minutes; adding and removing Members and Directors; approving the use of specific ‘professional partners’ (consultants, insurers, etc.); approving policy terms, conditions and costs; and approving or ratifying the activities and recommendations from each committee.” (*Id.*)

The Area Office determined that Appellant did not rebut the presumption that each of Valley's owners has the power to control Valley under 13 C.F.R. § 121.103(c)(2). The Members, acting through the Board of Directors, oversee and approve Valley's “key strategic activities” such as adding and removing Members and establishing policy terms. Further, while the Board may have delegated certain “daily administrative activities” to Valley's officers and to various committees, such as the Executive Committee, this “does not change the fact that the owners, through the Directors they elect, are ultimately in control of the company and committees, and that individuals or entities all having equal ownership and equal votes in a company control or have the power to control the company.” (*Id.*) The Area Office noted that Executive Committee meetings are infrequent, so Valley could not function if it were obliged to wait for the Executive Committee to meet before it could take action. (*Id.*)

The Area Office stated that “even if [the Area Office were to] find that Valley is controlled by its Executive Committee, it would not preclude a finding that the owners also control.” (*Id.* at 5.) The Area Office cited to *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-4603 (2004) for the proposition that a concern may be controlled by both its owners and its officers/directors at the same time, and thus affiliated with additional concerns based on affiliation through both groups.

The Area Office next addressed whether Appellant and Mr. Albritton play an active role at Valley. The Area Office found that every Director must participate in Board of Directors meetings, in effect ensuring that each Director takes part in controlling Valley. In fact, “Mr. Albritton personally or through a representative attended the Director's meetings in 2014 and

2015, and took an active part in the meeting[s].” (*Id.*) Further, Valley's Articles of Association allow for a quorum of the Board when two or more Directors are present. Thus, Appellant is not a passive investor in Valley because Mr. Albritton actively participates in Board meetings, where Members vote on significant company decisions and day-to-day actions are approved or ratified. (*Id.* at 5-6.) As a result, the Area Office concluded, Appellant did not rebut the presumption that each Member controls, or has the power to control, Valley.

The Area Office noted that Appellant cannot overcome the presumption at 13 C.F.R. § 121.103(c)(2) merely by claiming that Appellant individually does not control Valley. (*Id.* at 6, citing *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325 (2012).) The Area Office reiterated that Appellant is not a passive investor because Mr. Albritton serves on Valley's Board, which has the power to control Valley. Whether Appellant and Valley have business dealings with one another is immaterial, the Area Office asserted, as such ties are not necessary to find affiliation under 13 C.F.R. § 121.103(c)(2).

The Area Office found that the average annual receipts of Appellant and its affiliates, including Valley, exceed the size standard. Therefore, Appellant is not a small business for this procurement.

C. Appeal

On November 23, 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 that the Area Office has taken the position that the presumption found at 13 C.F.R. § 121.103(c)(2) is not rebuttable. Such an interpretation is contrary to the plain language of the rule, however, and OHA likewise has recognized that the presumption may be rebutted “by establishing that some party other than the minority shareholder has the power to control.” (Appeal at 8, quoting *Size Appeal of Allied Tech. Servs. Group, LLC*, SBA No. SIZ-5373, at 7 (2012).) In the instant case, Appellant argued to the Area Office that Valley is controlled by its Executive Committee, but the Area Office did not seriously consider this possibility, and instead “brazenly assert[ed] that, even if the Executive Committee did control Valley, this would be of no consequence to its analysis under 13 C.F.R. § 121.103(c)(2).” (*Id.* at 9.) Appellant urges OHA to reverse the size determination on grounds that the Area Office misapplied or misunderstood the law.

Appellant claims that Valley is controlled by its Executive Committee because the committee “serves to oversee, manage and direct the day-to-day operations of Valley.” (*Id.* at 10.) Although the committee meets as a collective body only twice a year “to document, for the Board's review, its activities over the prior six months,” the members of the Executive Committee nevertheless “make important decisions affecting the company's daily operations and long-term strategy on a daily basis.” (*Id.* at 11, emphasis in original.)

Next, Appellant argues the Area Office further erred by not following the precedent established by OHA in *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013).

According to Appellant, in *Mark Dunning*, the challenged firm had nine owners with equal ownership interests. One of these shareholders was an individual who also controlled a large business. OHA found no affiliation under 13 C.F.R. § 121.103(c)(2) because the quorum and voting requirements of the challenged firm prevented the shareholder from exercising control. Similarly, in the instant case, Appellant holds only a 4.16% ownership stake in Valley, and a quorum for a shareholder vote requires a majority of Valley's paid-up voting share capital. (*Id.* at 12, citing Valley's Articles of Association at B-3.) As in *Mark Dunning*, then, Appellant lacks a large enough interest to “create a quorum, prevent a quorum, cause any vote to pass, block any vote nor cast a tie-breaking vote.” (*Id.*) Indeed, Appellant's ownership stake is too small even to convene a shareholder meeting. Appellant argues that the Area Office should have followed *Mark Dunning* and concluded that Appellant had rebutted the presumption of affiliation.

Appellant observes that the Area Office's decision rested, in part, on the fact that Mr. Albritton has been appointed to Valley's Board of Directors, and that he attends meetings and places votes during those meetings. Similar facts were present in *Mark Dunning*, however, because the shareholder in question was a director and an officer of the challenged firm. Appellant reasons that “any ability to control that Mr. Albritton might have by virtue of his status as a director is even more diluted than that held by the shareholder in *Mark Dunning*, given that the *Mark Dunning* shareholder was one of five directors, while Mr. Albritton is one of 26 directors.” (*Id.* at 14-15.)

Because the Area Office misapplied the minority shareholder presumption, and disregarded evidence showing that the Executive Committee controls Valley's day-to-day activities, Appellant requests that OHA reverse the size determination.

D. SBA's Response

On December 9, 2015, SBA timely intervened² and responded to the appeal. SBA contends the Area Office properly followed OHA's decision in *GCR I*, and correctly found Appellant affiliated with Valley.

SBA maintains that, under 13 C.F.R. § 121.103(c)(2), “an approximately equal distribution of voting power among minority shareholders is sufficient to accord the power to control to each minority owner, even though in such a situation no single minority shareholder has the power to affirmatively or negatively control the concern.” (Response at 3.) In the instant case, Appellant has an ownership interest in Valley equal to that of all other owners. Appellant therefore is presumed to be affiliated with Valley.

SBA denies that the Area Office took the position that the minority shareholder rule is not rebuttable. On the contrary, SBA states, the Area Office carefully considered the information offered by Appellant as well as OHA precedent, but found that Appellant had failed to rebut the presumption of affiliation.

² SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first.” 13 C.F.R. § 134.210(a).

SBA asserts that Mr. Albritton is appointed to Valley's Board of Directors, which approves and ratifies the actions of the Executive Committee, and which created the Executive Committee, along with at least three other committees. Like the other committees, the Executive Committee reviews, reports, and proposes actions for the Board's consideration, while the Board also finalizes "decisions on monetary distributions to members, the budget, open claims, etc." (*Id.* at 4.) Thus, the Executive Committee does not control Valley, because "[a]lthough the [Executive] Committee apparently takes actions in the running of Valley, it must obtain approval and ratification of its actions by the Board." (*Id.*) The Board of Directors further controls Valley's funds since it is responsible for reviewing the actions taken by Valley's professional advisor in charge of investing funds. (*Id.* at 5.) In SBA's view, Appellant's claim that the Executive Committee controls Valley through daily decisions that affect Valley's activities is not persuasive. "[T]he Executive Committee is just one of several committees delegated to review, report and propose actions to the Board." (*Id.* at 4.)

SBA likens the instant appeal to OHA's decision in *Size Appeal of Allied Technical Services Group, LLC*, SBA No. SIZ-5373 (2012), where OHA found that the challenged firm failed to show that it was controlled exclusively by only one of its minority shareholders. Likewise, SBA argues, the Area Office here did not err in determining that the Executive Committee does not have the exclusive power to control Valley. SBA urges that "if some other party besides an owner is found to have control, that other party must have the exclusive power to control in order for the presumption to be rebutted." (*Id.* at 6.) Were this not the case, the presumption would be rendered meaningless as most companies have officers, managers, or key employees that control certain aspects of the daily business of the firm. (*Id.*)

SBA asserts that Appellant's arguments concerning *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013) are meritless because OHA distinguished *Mark Dunning* from the instant case in *GCR I*, and did not instruct the Area Office to apply *Mark Dunning* on remand. (*Id.* at 7.) In any event, Appellant's inability to form or prevent a quorum, or to singlehandedly pass any action, are not valid grounds to find the presumption rebutted, because every other shareholder could make this same argument. (*Id.* at 7-8.) SBA reiterates that Board members, including Mr. Albritton, "play an active and responsible role in managing the company as [the Board] reviews and votes on proposals and resolutions submitted by the various committees, including the Executive Committee." (*Id.* at 8.)

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 sole issue presented here is whether Appellant is affiliated with Valley under the minority shareholder rule, 13 C.F.R. § 121.103(c)(2). There is no dispute that Appellant's average annual receipts, when combined with those of Valley and Appellant's other affiliates, exceed the size standard. Consequently, if Appellant is affiliated with Valley, Appellant is not a small business for this procurement.

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). Applying this rule, OHA has held that when a concern is owned by multiple owners with equal minority interests, all of those owners are presumed to control the concern. The presumption is rebuttable, but “the mere fact that a minority shareholder cannot individually control a concern is not sufficient to overcome the presumption.” *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 7 (2012); *see also Size Appeal of Technibilt, Ltd.*, SBA No. SIZ-5304 (2011); *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794 (2006); *Size Appeal of Ceramatec, Inc.*, SBA No. SIZ-3040 (1989); *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986). Rather, a minority shareholder may rebut the presumption by showing that a party other than the minority shareholder has the power to control. *GCR I*, SBA No. SIZ-5687, at 6; *Size Appeal of Allied Tech. Servs. Group, LLC*, SBA No. SIZ-5373, at 7 (2012).

In the instant case, Appellant is one of approximately 20 owners of Valley, each with an equal ownership interest. Section II.A, *supra*. Pursuant to 13 C.F.R. § 121.103(c)(2), then, each of Valley's owners, including Appellant, is presumed to control Valley. The burden shifts to Appellant to rebut the presumption.

Appellant argued to the Area Office that the presumption is rebutted because Appellant holds only a 4.16% ownership interest in Valley, and because Appellant's appointed director, Mr. Albritton, is just one of Valley's 26 directors. Section II.A, *supra*. Thus, Appellant does not have a large enough interest in Valley to create or prevent a quorum, or to cause any vote to pass or fail. This argument, though, amounts to an assertion that Appellant cannot individually control Valley, and as discussed above, OHA has repeatedly rejected such arguments in prior cases. “Indeed, the very purpose of the [minority shareholder] rule is to address situations in which no single person or entity has actual affirmative or negative power to control a concern.” *ADVENT*, SBA No. SIZ-5325, at 7. Notably, if Appellant's interests are too small to control Valley, the same could also be said for each of Valley's other owners, with the result being that no party would control Valley. OHA, though, will not accept an argument that a firm is not controlled by any party. *Tech. Support Servs.*, SBA No. SIZ-4794, at 15 (“[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.”); *Zygo Corp.*, SBA No. SIZ-2514, at 6. Accordingly, the Area Office properly concluded that Appellant's inability to control Valley individually did not rebut the presumption in 13 C.F.R. § 121.103(c)(2).

Appellant also contends that Valley is controlled by an eight-person Executive Committee, a group comprised of various officers and directors of Valley, but which does not include Appellant's principal, Mr. Albritton. In rejecting this contention, the Area Office found that Mr. Albritton is a director of Valley, and Valley's Articles of Association make clear that “the business of the Company shall be managed by the Directors.” Section II.A, *supra*. The Area Office further found — and Appellant does not dispute — that the Board is responsible for Valley's most crucial strategic decisions, such as adding and removing members and directors; approving the use of subcontractors and other partners; establishing Valley's committees; and approving policy terms, conditions and costs. Section II.B, *supra*. Although Appellant emphasizes that day-to-day activities are managed by the Executive Committee, such activities are themselves subject to approval and ratification by the Board. *Id.* Given the preeminent role of the Board in the operations of Valley, the Area Office reasonably found that Appellant did not show that Valley is controlled by the Executive Committee. As a result, Appellant did not rebut the presumption in 13 C.F.R. § 121.103(c)(2).

On appeal, Appellant argues that the Area Office took the position that the presumption in 13 C.F.R. § 121.103(c)(2) is not rebuttable. Appellant points in particular to statements in the size determination that the Area Office would have reached the same decision even if the Area Office had been persuaded that the Executive Committee did control Valley. I see no merit to Appellant's argument. Read in context, the Area Office was merely stating that Appellant did not show that the Executive Committee alone (*i.e.*, not the Board) had the power to control Valley. Thus, the Area Office was not opining that the presumption could never be rebutted, but merely explaining that Appellant here did not rebut the presumption because ultimate control over Valley rests with the Board, notwithstanding that the Board may have delegated certain functions to the Executive Committee.

Lastly, Appellant also renews its arguments from *GCR I* that the Area Office should have applied OHA's decision in *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013) and concluded that Appellant lacks the power to control Valley due to Valley's quorum and voting requirements. As SBA observes, though, OHA distinguished *Mark Dunning* from the instant case in *GCR I*. See *GCR I*, SBA No. SIZ-5687, at 7. Moreover, in a decision issued last month, OHA expressly overruled *Mark Dunning* as it pertains to the minority shareholder rule, after determining that *Mark Dunning* is at odds with the intent of the regulation and with long-standing OHA precedent. *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 14-15 (2015). Accordingly, insofar as the Area Office departed from *Mark Dunning* in reaching its decision, the Area Office did not err in doing so.

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. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge