

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

SIZE APPEAL OF:

W. Harris, Government Services
Contractor, Inc.,

Appellant,

Appealed From
Size Determination No. 06-2016-011

SBA No. SIZ-5717

Decided: March 7, 2016

APPEARANCES

Joseph G. Billings, Esq., Miles & Stockbridge P.C., Baltimore, Maryland, for Appellant

Pamela J. Mazza, Esq., Peter B. Ford, Esq., Megan C. Connor, Esq., Piliero Mazza
PLLC, Washington, D.C., for LaMain Crescent Joint Venture, LLC.

DECISION

I. Introduction and Jurisdiction

On November 17, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2016-011 finding that W. Harris, Government Services Contractor, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains 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 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. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On June 4, 2015, the U.S. Department of Defense, Defense Commissary Agency (DeCA) issued Request for Proposals (RFP) No. HDEC08-15-R-0024 for shelf stocking services, receiving/storing/holding area, and custodial services at Davis-Monthan Air Force Base, Arizona. The Contracting Officer (CO) set aside the procurement entirely for service-disabled veteran owned small businesses, and assigned North American Industry Classification System (NAICS) code 561990, All Other Support Services, with a corresponding size standard of \$11 million average annual receipts. Offers were due July 16, 2015.

On October 8, 2015, DeCA announced that Appellant was the apparent awardee. On October 13, 2015, LaMain Crescent Joint Venture, LLC (LaMain), a disappointed offeror, filed a size protest against Appellant. LaMain alleged that Appellant is not a small business because it is affiliated with FCS Consulting, Inc. (FCS), Q Services & Technologies, Inc. (QST), TK West, LLC (TK), TKN West, LLC (TKN), and Ultimate Image, LLC (UI) through common management, 13 C.F.R. § 121.103(e). LaMain further alleged that Appellant is affiliated with several additional concerns based on identity of interest, 13 C.F.R. § 121.103(f). The CO forwarded the protest to the Area Office for review.

In response to the protest, Appellant acknowledged affiliation with FCS, QST, TK, TKN, and UI. (Protest Response at 1.) Appellant further indicated that the combined average annual receipts of Appellant and these affiliates exceed the \$11 million size standard for the three fiscal years under review (2012 — 2014). (Form 355, response to question 13d.) However, Appellant asserted, once inter-affiliate transactions are subtracted from FCS's receipts, Appellant and its affiliates do not exceed the size standard. Appellant offered no evidence or explanation to support its proposed adjustments.

B. Size Determination

On November 17, 2015, the Area Office issued Size Determination No. 06-2016-011 sustaining LaMain's protest.

The Area Office found that Mr. Wesley E. Harris owns 100% of Appellant and is Appellant's President and sole director. As a result, Mr. Harris controls Appellant. (Size Determination, at 7.) Mr. Harris is also 100% owner of FCS, QST, TK, and UI. In addition, Mr. Harris owns 50% of TKN, while Mr. Robert Raynor holds the remaining 50% interest in TKN. Appellant acknowledged affiliation with FCS, QST, TK, TKN, and UI. The Area Office determined that Appellant is affiliated with FCS, QST, TK, TKN, and UI based on common ownership and control. (*Id.*)

The Area Office next presumed that Messrs. Harris and Raynor share an identity of interest due to their common investments in TKN and another concern, Outpost Investments #302, Inc. (Outpost). (*Id.*) The Area Office explained that Mr. Raynor owns 55% of Outpost and Mr. Harris the remaining 45%. Although Mr. Raynor controls Outpost by virtue of his majority

ownership, Appellant is affiliated with Outpost because Messrs. Harris and Raynor have an identity of interest. (*Id.* at 7-8.)

In finding Appellant and Outpost affiliated, the Area Office noted that identity of interest through common investments requires more than a single joint investment. (*Id.* at 8, citing *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291 (2011), *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244 (2011), *Size Appeal of Eagle Pharms., Inc.*, SBA No. SIZ-5023 (2009) and *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822 (2006).) Here, Messrs. Harris and Raynor jointly invest in — and together own 100% of — two companies, Outpost and TKN. (*Id.*) The Area Office rejected Appellant's contention that two common investments are insufficient to give rise to an identity of interest, reasoning that under OHA precedent “identity of interest may be found among those who have common investments in at least two concerns.” (*Id.* at 9.)

The Area Office distinguished *Size Appeals of Safety and Ecology Corporation*, SBA No. SIZ-5177 (2010), a case cited by Appellant. The Area Office explained that, unlike the instant case, the investors in *Safety and Ecology* were not individuals. Rather, the investors were two companies that also were parties to “an SBA-approved mentor-protégé agreement between the concerns.” (*Id.*) In addition, the instant case involves common investments in “permanent concerns, not temporary entities (joint ventures) that were at issue in *Safety and Ecology*.” (*Id.*)

The Area Office next considered the family relationship between Mr. Harris and his sister, Ms. Cheryl Fullilove. (*Id.* at 10.) The Area Office found that Ms. Fullilove controls Trace, Inc. (Trace), but that Trace has no business dealings with any of the concerns controlled by Mr. Harris. (*Id.* at 11.) The Area Office concluded that Appellant had proven a clear line of fracture, and is not affiliated with Trace.

Regarding LaMain's assertion that Appellant is affiliated with Renhill Staffing Services of Texas, Inc. (Renhill) and Perkins & Associates, LLC (Perkins), the Area Office found that FCS provides consulting and payroll services to Renhill and Perkins, but that is the extent of their relationship. (*Id.* at 12.) FCS derives 23.4% of its revenues from Renhill, and 7% from Perkins. The Area Office determined that such ties do not establish economic dependence, so Appellant is not affiliated with Renhill or Perkins. (*Id.*)

The Area Office found that the combined average annual receipts of Appellant, FCS, QST, Outpost, TK, TKN, and UI exceed the \$11 million size standard applicable to the RFP. The Area Office noted that Appellant proposed its own calculation of receipts, in which Appellant “deducted certain amounts from FCS' annual receipts due to [Appellant's] assertion that FCS reported revenue on its Federal tax returns that was due to inter-affiliate transactions with [Appellant] and QST.” (*Id.*) These proposed exclusions are unallowable, the Area Office found, because “[Appellant], QST, and FCS do not appear to have a parent-subsidary relationship as each firm is owned 100% by Mr. Harris.” (*Id.* at 12-13, citing *Size Appeals of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015).) In any event, the Area Office continued, even if the Area Office were to accept Appellant's proposed deductions, the result would “still exceed [] the \$11 million size standard” once Outpost's receipts are combined with those of Appellant and the other concerns controlled by Mr. Harris. (*Id.* at 12 fn.2.)

The Area Office noted that Mr. Harris also holds minority interests in additional companies, which potentially could be affiliated with Appellant. (*Id.* at 13.) Further, the receipts Appellant reported for TK and TKN are likely understated because Appellant made no allowance for the fact that TK and TKN had been in business for less than three complete fiscal years. (*Id.* at 13 fn.3.) The Area Office found it unnecessary to explore these issues, however, because the combined average annual receipts of Appellant, its acknowledged affiliates, and Outpost already exceed \$11 million.

C. Appeal

On November 25, 2015, Appellant filed the instant appeal with OHA.¹ Appellant contends that the size determination is erroneous and should be reversed.

Appellant disputes the Area Office's finding that Messrs. Harris and Raynor share an identity of interest. Appellant emphasizes that, except for the joint investments in TKN and Outpost, the Area Office found no other ties between Messrs. Harris and Raynor, or between Outpost and the companies controlled by Mr. Harris. (Appeal at 9.) In Appellant's view, the OHA cases referenced in the size determination bolster Appellant's position, because these cases found that an identity of interest will arise if there are multiple common investments which “cause the parties to act in unison for their common benefit.” (*Id.* at 10.)

Appellant renews its arguments that the instant appeal is analogous to *Safety and Ecology*. Appellant maintains that, similar to *Safety and Ecology*, there are only two common investments here, revenues generated by the two investments account for a modest portion (less than 12%) of the combined revenues of the Harris companies, and no concern controlled by Mr. Harris can control Outpost or *vice versa*. (*Id.* at 12.) Therefore, Appellant asserts, “the material facts in [*Safety & Ecology*] are the same as in the instant case.” (*Id.* at 12.)

Appellant argues that the Area Office applied “an irrebuttable presumption that two common investments result in an identity of interest.” (*Id.* at 14) This was improper, Appellant contends, because common investments do not automatically trigger an identity of interest. Instead, the common investments must rise to a level where the “parties act in unison for their common benefit.” (*Id.*, quoting *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523, at 8 (2013).) Appellant observes that, in *Seacon Phoenix*, there were common investments in a “multitude of companies,” not just two as the Area Office found here. (*Id.*)

Appellant also attacks the Area Office's decision to disregard Appellant's proposed inter-affiliate transactions when determining Appellant's size. Appellant argues specifically that *G&C Fab-Con*, the OHA decision referenced in the size determination, was incorrectly decided because OHA reached its decision after consulting the regulatory history of 13 C.F.R. §

¹ Appellant initially filed a 30-page appeal petition, exceeding the page limit specified in OHA's regulations. 13 C.F.R. § 134.203(d)(2). Appellant subsequently submitted an amended appeal petition that was 20 pages in length. Citations here are to Appellant's amended appeal petition.

121.104(a), which cannot overcome the clear language of the regulation, and because OHA misinterpreted the regulatory history. (*Id.* at 17-18.) Appellant cites to *Size Appeal of Crown Moving & Storage Co.*, SBA No. SIZ-4872 (2007) and *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5344 (2012), *modified on recons.*, SBA No. SIZ-5394 (2012) (PFR), for the proposition that concerns need not be eligible to file a consolidated tax return in order to enjoy the inter-affiliate transaction exclusion. (*Id.* at 18-19.)

D. LaMain's Response

On January 22, 2016, LaMain responded to the appeal. LaMain argues that the Area Office committed no clear error of law or fact in determining that Appellant is affiliated with Outpost and is not a small business. Therefore, OHA should affirm the size determination. (Response at 1.)

LaMain asserts that Appellant and Outpost may be found affiliated on different grounds than specified in the size determination. (*Id.*) Specifically, Messrs. Harris and Raynor each own 50% of TKN, while Mr. Harris owns 100% of Appellant. Therefore, TKN and Appellant are affiliated because both are controlled by Mr. Harris. Mr. Raynor owns a controlling interest in Outpost, and LaMain maintains that Outpost and TKN are affiliated based on Mr. Raynor's ownership. Thus, LaMain reasons, TKN is affiliated both with Appellant and with Outpost, and Appellant consequently is affiliated with Outpost through TKN. (*Id.* at 2.) LaMain urges that "because OHA should easily find that [Appellant] and Outpost are affiliated based on stock ownership, it need not consider whether the Area Office erred in finding affiliation through common investments or determining that [Appellant] was not eligible to deduct from its revenues inter-affiliate transactions." (*Id.* at 2.)

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 key issue presented in this case is whether the Area Office erred in finding an identity of interest between Messrs. Harris and Raynor based on their common investments. The applicable regulation states that:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common

investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). Interpreting this provision, OHA has recognized that identity of interest through common investments requires more than a single joint investment. *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244, at 4 (2011); *Size Appeal of Eagle Pharms., Inc.*, SBA No. SIZ-5023, at 9 (2009). Further, “common investment only in the challenged firm is not enough to support a finding of affiliation based upon common investments.” *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA No. SIZ-5132, at 6 (2010). “[T]he common investments of the persons must be substantial, either in number of individual investments, or in total value, in order to find that there is an identity of interest between the investors.” *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 11 (2015).

In the instant case, the Area Office could reasonably determine that Messrs. Harris and Raynor share an identity of interest. Although OHA has made clear that one common investment is not enough to support a finding of identity of interest, particularly if that one investment is in the challenged firm itself, OHA has not taken the position that two common investments are necessarily insufficient. On the contrary, OHA has emphasized that “more than one” common investment must exist. *E.g.*, *Size Appeal of The H.L. Turner Group, Inc.* SBA No. SIZ-4896, at 5 (2008) (“Identity of interest may be found among those who have common investments in more than one concern.”); *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822, at 5 (2006) (“This Office has held that an identity of interest may be found among those who have common investments in more than one concern, whose common business interests cause the parties to act in union for their common benefit.”). As discussed above, in considering whether there is an identity of interest, OHA has focused on whether the common investments are “substantial,” either in the number of individual investments or in their total value. Here, Messrs. Harris and Raynor have two common investments, neither of which is in the challenged firm (*i.e.*, Appellant). Viewed from the standpoint of Mr. Harris, these common investments arguably are substantial in number because they represent two of the seven companies identified in the size determination in which Mr. Harris invests.² Even if not substantial in number, though, the common investments apparently are substantial in value. The Area Office determined that Messrs. Harris and Raynor together own 100% of both Outpost and TKN, and Outpost alone generates more revenue than all but two of Mr. Harris's other investments. Further, Appellant did not attempt to establish that the joint investments are not substantial when viewed from the standpoint of the other investor, Mr. Raynor, and Appellant advised the Area Office that Mr. Raynor holds controlling interests in just three other companies besides Outpost and TKN. (Letter from W. Harris to M. Guerzon (Nov. 17, 2015), at 1.) Accordingly, the record was sufficient for the Area Office to conclude that Messrs. Harris and Raynor have “identical or substantially identical business or economic interests,” as contemplated by 13 C.F.R. § 121.103(f), and that Appellant had not persuasively shown that the interests are actually separate.

² The Area Office noted that Mr. Harris holds minority interests in additional companies, but found it unnecessary to discuss them in detail. Section II.B, *supra*.

Appellant cites *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010) for the proposition that two common investments are not enough to give rise to an identity of interest. As the Area Office correctly observed in the size determination, however, *Safety and Ecology* involved unusual facts that are quite dissimilar from those presented here. In *Safety and Ecology*, an SBA-approved mentor and protégé formed several joint ventures, two of which succeeded in winning contracts. The area office determined that the two profitable joint ventures were in the nature of established companies, and that the involvement of the mentor and protégé in those joint ventures was akin to investments. *Safety and Ecology*, SBA No. SIZ-5177, at 4. As a result, the area office found, the mentor and protégé constructively held two common investments in their joint ventures. On appeal, OHA declined to accept this reasoning as a valid basis for finding an identity of interest, noting, among other issues, that an SBA-approved mentor and protégé typically are exempt from affiliation with one another. *Id.*, at 24. Further, even accepting the premise that participation in joint ventures may be construed as investments, the mentor and protégé “each derive[d] the vast majority of their income from ventures unrelated to their common investments.” (*Id.* at 5.) Accordingly, I must agree with the Area Office that *Safety and Ecology* is not controlling here. As the Area Office explained, the decision in *Safety and Ecology* appears to have been influenced by the fact that the two joint investors were an SBA-approved mentor and protégé, and by the fact that the “common investments” were not substantial in number or in value.

The instant case is more analogous to OHA's decision in *Tenax Aerospace*. There, OHA found that two individual investors held common investments in eight concerns, and held combined ownership exceeding 50% in two of those eight concerns. *Tenax Aerospace*, SBA No. SIZ-5701, at 3-4. These investments were substantial enough to support an identity of interest, notwithstanding that there were no other ties between the concerns. *Id.* at 10-11. Similarly, in the instant case, Messrs. Harris and Raynor have two common investments, but these investments are substantial, and Messrs. Harris and Raynor together hold controlling (100%) ownership interests in the two investments.

Appellant further argues that the Area Office improperly concluded that an identity of interest flows automatically from common investments, and that the cases cited in the size determination differ from instant case because they involved common investments in multiple concerns. These arguments have no merit. A fair reading of the size determination does not support the conclusion that the Area Office considered its findings non-rebuttable. Rather, the Area Office afforded Appellant the opportunity to rebut the presumption, and addressed Appellant's arguments, but ultimately concluded that Appellant had failed to rebut it. Section II.B, *supra*. Similarly, the Area Office reviewed prior OHA case decisions and found that any number more than one common investment could, potentially, lead to a finding of identity of interest. The fact that prior cases generally have involved more than two common investments does not establish that two common investments cannot create an identity of interest.

Appellant also highlights that the Area Office made no finding that Mr. Harris controls Outpost, or that Outpost can control Appellant. Indeed, the Area Office specifically found that Mr. Raynor — not Mr. Harris — controls Outpost by virtue of his majority ownership. Section II.B, *supra*. Nevertheless, a showing of control is unnecessary here as the identity of interest

regulation itself provides for aggregating the interests of Messrs. Harris and Raynor once an identity of interest is found. *See* 13 C.F.R. 121.103(f) (common investors that share an identity of interest “may be treated as one party with such interests aggregated.”); *Size Appeal of AcelRx Pharms., Inc.*, SBA No. SIZ-5501 (2013) (aggregating the interests of four venture capital funds after determining that they shared an identity of interest). When their interests are aggregated, Messrs. Harris and Raynor together own, and control, Outpost as well as all of the Harris companies.

Lastly, I agree with the Area Office and LaMain that it is unnecessary to consider Appellant's arguments with regard to the exclusion of inter-affiliate transactions. Although Appellant's protest response listed certain dollar amounts that Appellant claimed should be deducted from FCS's receipts, Appellant did not offer explanation or evidence to support these exclusions. Section II.A, *supra*. As a result, the Area Office did not err in rejecting Appellant's proposed adjustments. *Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 9 (2015) (refusing to accept proposed inter-affiliate transactions on appeal because the challenged firm did not clearly argue the issue to the area office during the size review). Moreover, as the Area Office noted, Appellant's own calculations would place it slightly under the \$11 million size standard considering only the receipts of Appellant and its acknowledged affiliates, but not Outpost. Once Outpost's receipts are added to those of Appellant and the other companies controlled by Mr. Harris, Appellant exceeds the \$11 million size standard, irrespective of any inter-affiliate transactions. Section II.B, *supra*. As a result, the issue of inter-affiliate transactions is immaterial to the outcome of this case, and need not be decided here.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge