

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

SIZE APPEAL OF:

CoSTAR Services, Inc.,

Appellant,

RE: Mark Dunning Industries, Inc.

Appealed From
Size Determination Nos. 3-2016-041, and
-042

SBA No. SIZ-5745

Decided: May 25, 2016

APPEARANCES

Michael A. Gordon, Esq., Michael A. Gordon, PLLC, Washington, D.C., for Appellant

Douglas P. Hibshman, Esq., Sean Milani, Esq., Fox Rothschild LLP, Washington, D.C.,
for Mark Dunning Industries, Inc.

DECISION¹

I. Introduction and Jurisdiction

On March 17, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 3-2016-041 and -042, denying size protests filed by CoSTAR Services, Inc. (Appellant) and Inuit Services, Inc. (Inuit) against Mark Dunning Industries, Inc. (MDI). In their protests, Appellant and Inuit alleged that MDI is not an eligible small business due to affiliation with various other concerns.

On appeal, Appellant maintains that the Area Office improperly rejected Appellant's size protest, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is granted and the size determination is affirmed in part and remanded in part.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA offered the parties the opportunity to propose redactions to the decision. Each party indicated that it did not wish to propose redactions to the decision. OHA now issues the decision for public release.

OHA decides appeals of size determinations 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 Protests

On August 6, 2015, the U.S. Department of the Navy, Naval Facilities Engineering Command Southeast, issued Request for Proposals (RFP) No. N69450-15-R-2106 for base operations support services. (RFP § A.2.) The RFP stated that the agency planned to award a single indefinite delivery-indefinite quantity contract with a one-year base period and four one-year option periods. (*Id.* §§ A.1 and F.2.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, 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. Proposals were due September 23, 2015. Appellant, Inuit, and MDI submitted timely offers.

On February 11, 2016, the CO announced that MDI was the apparent awardee. On February 19, 2016, Appellant and Inuit filed timely size protests, each alleging that MDI is affiliated with various other companies. Between them, Appellant and Inuit contended that MDI is affiliated with 24 different entities: (1) Alabama Motor Express, Inc. (AME); (2) AMX Logistics, LLC; (3) BDS Realty, LLC; (4) Boyd Brothers Transportation, Inc.; (5) Bubba's of Dothan, Inc.; (6) CFC Group, Inc. d/b/a Container First Services (CFS); (7) Coastal Staffing, LLC; (8) Cumberland Services, LLC; (9) C&D Disposal, Inc.; (10) Dothan Outdoor Equipment, Inc.; (11) Duncor Development, Inc.; (12) Dunning Air Corporation; (13) Dunning-White Air, Inc.; (14) Dynamic Developments, LLC; (15) Logistic Realty, LLC; (16) LTI Services, LLC; (17) Mark Dunning Industries Recycling, LLC; (18) Metro Auto Sales, Inc.; (19) Quality Lumber & Millworks, LLC; (20) Rose Hill Landfill, LLC; (21) The Woodpile, Inc.; (22) Turf Logistics, LLC; (23) Woodpile Properties, LLC; and (24) WDL Rentals, LLC.

MDI is affiliated with AME, Appellant alleged, based on common management and familial identity of interest. To support this contention, Appellant argued that Mr. James Franklin is Chief Financial Officer (CFO) of both companies, and that MDI's president, Mr. James Mark Dunning, is related to Mr. Gregory Scott White, AME's president. (Protest at 2, 4-5.) With regard to CFS, Appellant alleged that CFS is affiliated with MDI because CFS acquired MDI's assets on August 1, 2014. Appellant also maintained that CFS is a large company, and that MDI is CFS's subsidiary. (*Id.* at 12.) Appellant alleged further that MDI is not an eligible small business because the receipts of MDI and its acknowledged affiliates exceed the \$38.5 million size standard. (*Id.* at 9-10.)

On March 3, 2016, Appellant supplemented its protest. Appellant contended that MDI is affiliated with an additional concern, White & Dunning, LLP, because Messrs. Dunning and White co-own it. Appellant alleged further that Messrs. Dunning and White “own significant

property together.” (Supp. Protest. at 1.) Appellant attached records showing that White & Dunning, LLP owned properties at 207 Roney Road and 1929 Wise Drive in Dothan, Alabama, and that Messrs. Dunning and White jointly own land investments in Henry and Houston counties, Alabama. (*Id.*, Ex. 3.) The Roney Road address is for Dothan Outdoor Equipment, Inc., one of the alleged affiliates identified in the protests. The Area Office forwarded Appellant's supplemental protest to MDI with instructions to “consider this additional information in your response to SBA.” (Email from I. Bascumbe to D. Hibshman (Mar. 3, 2016).)

B. Response to Protests

On March 8, 2016, MDI responded to the protests. MDI contended that Appellant's supplemental protest was untimely and “should be dismissed and disregarded in its entirety.” (Protest Response at 3-4.) Turning to the merits of the protests, MDI acknowledged affiliation with Cumberland Services, LLC and Mark Dunning Industries Recycling, LLC, but denied affiliation with the other firms identified in the protests. (*Id.* at 4-11.) Attached to the response were sworn affidavits from Messrs. Dunning and Franklin. Mr. Dunning stated:

Neither I nor MDI holds any ownership interest in, position with, or ability to control [AME], AMX Logistics, LLC, WDL Rentals, LLC, or LTI Services, LLC. Likewise, these entities hold no ownership interest in, position with, or ability to control MDI. These entities are wholly separate and distinct entities with no relationship to MDI. The exhibits produced by [the protesters] attempting to show affiliation between MDI and these entities are erroneous.

(Dunning Aff. ¶ 7.) Mr. Franklin declared that he has been “the financial officer” of MDI since 2015. (Franklin Aff. ¶ 2.) Before he began working at MDI, he was the financial officer at AME for 13 years until his voluntary departure in 2014. (*Id.* ¶¶ 3-4.) He clarified that he “was never employed by [AME] or MDI at the same time.” (*Id.* ¶ 5.)

On March 11, 2016, the Area Office requested more information from MDI. The Area Office inquired, *inter alia*, whether “Mr. Dunning ha[s] any ownership interest or serve[s] as director or officer in any company with Mr. Scott White?” (Email from I. Bascumbe to D. Hibshman (Mar. 11, 2016).) MDI's counsel responded:

Mr. Dunning's sole business association to Mr. White is that they are owners / members of White & Dunning, LLP, which is an entity formed for the sole purpose of collecting rent for a single piece of property, a hunting cabin. Mr. Dunning and Mr. White are 50/50 owners of White & Dunning and the hunting cabin. White & Dunning owns no other property or assets.

Mr. Dunning and Mr. White have no other business relationships or shared ownerships in any other entities. Neither Mr. Dunning nor Mr. White ha[s] any officer positions in, ownership of, or ability to control the other's business interests. Their sole link is their limited association with White & Dunning, which is not an active business of any kind. It is a passive entity formed for the sole purpose of collecting rental payments on the hunting cabin.

(Email from D. Hibshman to I. Bascumbe (Mar. 14, 2016).) MDI's counsel also explained that “[n]either Mr. Dunning nor Mr. White are related by blood, marriage, civil union or adoption.” (*Id.*)

C. Size Determination

On March 17, 2016, the Area Office issued Size Determination Nos. 3-2016-041 and -042 concluding that MDI is an eligible small business.

The Area Office found that MDI is 100% owned by Mr. Dunning, who is also MDI's president and sole board member. In addition to his interest in MDI, Mr. Dunning owns at least 50% of Bubba's of Dothan, Inc.; Cumberland Services, LLC; Dothan Outdoor Equipment, Inc.; Duncor Development, Inc.; Dynamic Developments, LLC; MDI Air, LLC; Quality Lumber & Millworks, LLC; The Woodpile, Inc.; White & Dunning, LLP; and Woodpile Properties, LLC. Because Mr. Dunning holds majority ownership stakes in each of these firms, the Area Office determined he has the power to control them. The firms are therefore affiliated with MDI based on common control by Mr. Dunning. (Size Determination at 4.)

The Area Office explained that Mr. Dunning and two other investors each own 33.3% of Mark Dunning Industries Recycling, LLC. As an equal minority shareholder, the Area Office determined, Mr. Dunning has the power to control Mark Dunning Industries Recycling, LLC. Accordingly, it too is affiliated with MDI. (*Id.*)

Next, the Area Office determined that MDI is not affiliated with AME; AMX Logistics, LLC; LTI Services, LLC; and WDL Rentals, LLC. Although Mr. Dunning previously held ownership and managerial interests in these firms, he resigned and sold his interests to Mr. White on December 12, 2012. (*Id.* at 5.)

The Area Office rejected Appellant's allegation that MDI and AME are affiliated based on Mr. Franklin's common management. Mr. Franklin, the Area Office explained, worked for AME until 2014 and began working for MDI in 2015. The Area Office then recited MDI counsel's statement that other than White & Dunning, LLP, Messrs. Dunning and White “have no other business relationships or shared ownerships in any other entities.” (*Id.*, quoting email from D. Hibshman to I. Bascumbe (Mar. 14, 2016).)

The Area Office dispatched of other allegations of affiliation because the alleged affiliates either were sold or were dissolved prior to September 23, 2015, the date for determining size. The Area Office determined that Metro Auto Sales, Inc. was dissolved in 1990; Dunning Air Corporation was dissolved in 2000; Rose Hill Landfill, LLC was sold in 2003; Logistic Realty, LLC was sold in 2004; C&D Disposal, Inc. filed its final taxes in 2004; Dunning-White Air, Inc. was dissolved in 2005; Turf Logistics, LLC was dissolved in 2010; and BDS Realty, LLC filed its final taxes in 2011. (*Id.* at 5-6.)

As for Coastal Staffing, LLC, the Area Office accepted Mr. Dunning's sworn statement that he has “never heard of this company” and has no interest in, or power to control, the firm. (*Id.* at 5.)

MDI is not affiliated with Boyd Brothers Transportation, Inc., the Area Office explained, because Mr. Dunning resigned from its board of directors in 2004. Neither MDI nor Mr. Dunning has any remaining connection to the firm. (*Id.* at 6.)

The Area Office found that MDI is not affiliated with CFS, either. The only connection between these firms is MDI's August 2014 sale of equipment to CFS in an arms-length transaction. No other contractual relationship exists between MDI and CFS. (*Id.*)

The Area Office then calculated the combined receipts of MDI and its affiliates, Bubba's of Dothan, Inc.; Cumberland Services, LLC; Dothan Outdoor Equipment, Inc.; Duncor Development, Inc.; Dynamic Developments, LLC; Mark Dunning Industries Recycling, LLC; MDI Air, LLC; Quality Lumber & Millworks, LLC; The Woodpile, Inc.; White & Dunning, LLP; and Woodpile Properties, LLC. Their collective receipts for the years 2012, 2013, and 2014 do not exceed the \$38.5 million size standard. MDI therefore is an eligible small business for the subject procurement. (*Id.* at 6-7.)

D. Appeal

On April 1, 2016, Appellant filed the instant appeal. Appellant argues that the record contains evidence, unaddressed in the size determination, which undermines the conclusion that MDI is not affiliated with AME or CFS. Appellant argues that the Area Office should have conducted a more thorough investigation and gathered more and better evidence to support its findings. Appellant requests that OHA reverse the size determination or remand it for further investigation.

Appellant emphasizes that, according to public information, Messrs. Dunning and White are officers and “partners” in AME, which they founded in 1989, and they reside in the same town. In light of their lengthy association, the Area Office should not have accepted MDI's blanket statement that Messrs. Dunning and White have no ties. “At a minimum, the Area Office should have required additional documentary evidence of the alleged sale of Mr. Dunning's interests in [AME] and LTI Services, [LLC].” (Appeal at 5.)

Appellant also points to statements made by Mr. Franklin on Linked-In in January 2015, in which he stated that he became MDI's CFO in November 2013. (*Id.*) Appellant argues that the Area Office should have obtained harder evidence—such as Mr. Franklin's personal tax return—to support its findings that Mr. Franklin did not work at both MDI and AME contemporaneously.

Further, although the Area Office determined that White & Dunning is a passive entity, Appellant argues that the Area Office should have commented on the other business property that Appellant, in its supplemental protest, alleged was owned jointly by Messrs. Dunning and White. Appellant posits that Dothan Outdoor Equipment, Inc. is a service and repair facility

likely used by both MDI and AME, which “is indicative of an ongoing transportation business relationship.” (*Id.* at 6.)

As for CFS, Appellant points to a statement by CFS's president and CEO that MDI is CFS's subsidiary. The Area Office should have gathered evidence to investigate this statement, Appellant argues. (*Id.*)

E. Response

On April 19, 2016, MDI responded to the appeal. MDI contends that Appellant has failed to meet its burden of proving clear error, so OHA should deny the appeal.

The size determination is supported by voluminous evidence, according to MDI. MDI submitted over 75 exhibits in its response to the protests demonstrating that MDI is a small business. Four of the exhibits were sworn statements, which carry more evidentiary value than non-affidavit evidence, such as publicly-available information. (Response at 8, citing *Size Appeal of Hallmark-Phoenix, Joint Venture*, SBA No. SIZ-4870 (2007).)

MDI contends that the appeal merely restates Appellant's protest allegations. To MDI, Appellant's arguments that the size determination is deficient fail because there is “no requirement that an Area Office comment directly on every protest allegation . . . especially those that are factually unfounded.” (*Id.* at 6, quoting *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 7 (2011).) With respect to AME and CFS, the Area Office investigated, considered, and dispatched of these allegations. “The fact that [Appellant] does not agree with those rulings does not constitute an error of fact or law.” (*Id.* at 7, citing *Size Appeal of STA Techs., Inc.*, SBA No. SIZ-4790 (2006).)

Moreover, this is not the first time the Area Office and OHA have considered similar allegations against MDI and found them to be meritless. In Size Determination No. 3-2015-084 (Aug. 25, 2015), the Area Office determined that MDI was not affiliated with CFS, stating “CFS did purchase some equipment from MDI, but CFS has no ownership in MDI. In fact, CFS and MDI are fierce competitors.” (*Id.* at 9.) In Size Determination No. 3-2013-107 (Oct. 28, 2013), the Area Office determined that MDI was not affiliated with AME and LTI Services, LLC. (*Id.* at 9-11.) Size Determination No. 3-2013-107 was subsequently affirmed by OHA in *Size Appeal of Dorado Services, Inc.*, SBA No. SIZ-5515 (2013).

F. Supplemental Appeal

On April 19, 2016, after reviewing the Area Office file under the terms of a protective order, Appellant supplemented its appeal. Appellant acknowledges that the Area Office “made more inquiries than was evident from its decision,” but insists that “the record remains incomplete.” (Supp. Appeal at 1.) For example, the record contains no actual written agreements showing that Mr. Dunning divested himself of his ownership and control of AME and several other concerns in December 2012. This omission contravenes the instructions in the SBA Form 355, which requires the challenged firm to submit “all documentary materials” pertaining to alleged affiliates. (*Id.* at 2, quoting Form 355, question 13.)

Another reason the record is still deficient is that the Area Office did not ask Mr. Franklin to explain his Linked-In posting suggesting that he worked at AME and MDI simultaneously. Nor did the Area Office ask MDI why CFS's president and CEO publicly stated that CFS was servicing MDI accounts and that MDI was CFS's subsidiary. (*Id.* at 3.)

Appellant then reiterates that the record contains other information showing that Messrs. Dunning and White continue to co-own a repair and service station and land investments. To Appellant, these jointly-owned properties reveal an ongoing business relationship between MDI and AME. (*Id.* at 3.)

G. New Evidence

Accompanying its appeal, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit the 2014, 2015, and 2016 Business Entity Annual Reports for GSW Transportation, Inc. (GSW) showing that Messrs. Dunning and White are both officers of GSW. Based on this evidence, Appellant challenges MDI counsel's assertion that "Mr. Dunning and Mr. White have no other business relationships or shared associations in any other entities" and that their "sole link" is a "limited association" with White & Dunning, LLP. (Motion at 1.) Appellant argues there is good cause to admit this evidence because it calls into question MDI's "blanket claims" and suggests that Mr. Dunning's sale of his interest in AME was a sham transaction. (*Id.* at 1-2.)

MDI opposes the motion. MDI argues that OHA should deny the motion for three reasons. (Response at 11-13.) First, the evidence Appellant seeks to admit was publicly available during the course of the size investigation, so Appellant should have submitted it then. Second, Appellant is attempting to raise a new issue for the first time on appeal. Third, MDI and GSW are not affiliated, and the Area Office found as much in Size Determination No. 3-2013-107 (Oct. 28, 2013).

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

Having reviewed the record and the arguments of the parties, I agree with Appellant that the Area Office did not fully examine the issue of whether Messrs. Dunning and White share an identity of interest. As a result, it is appropriate to remand this issue for further review. *E.g.*, *Size*

Appeal of MCH Corp., SBA No. SIZ-5605 (2014); *Size Appeal of Crosstown Courier Service, Inc.*, SBA No. SIZ-5571 (2014).

In its original protest, Appellant alleged that MDI and AME are affiliated based on an identity of interest between their respective owners, Messrs. Dunning and White. Section II.A, *supra*. Appellant then supplemented its protest to assert that Messrs. Dunning and White have significant common property investments, and included evidence to substantiate this claim. *Id.* Although the supplemental protest was untimely, and MDI urged the Area Office to reject it on this basis, the Area Office accepted the supplemental protest and undertook an investigation of the issues raised, as is permitted under SBA regulations. *Size Appeals of Excalibur Laundries, Inc.*, SBA No. SIZ-5317, at 4 (2012) (recognizing that “while an area office is at liberty to consider untimely protest allegations, nothing in the regulations requires the area office to do so.”).

As Appellant observes, though, the investigation was partial and the analysis incomplete. The Area Office asked MDI whether “Mr. Dunning ha[s] any ownership interest or serve[s] as director or officer in any company with Mr. Scott White?” Section II.B, *supra*. The Area Office did not directly inquire into whether Messrs. Dunning and White have common investments in entities that are not companies, nor ask MDI specifically to address the properties in Henry and Houston counties, Alabama. When MDI counsel responded that White & Dunning, LLP owns a hunting cabin but “no other property or assets”, and that the “sole link” between Messrs. Dunning and White is their association through White & Dunning, LLP, the Area Office accepted these representations without further inquiry, although these statements appear inconsistent with the evidence submitted by Appellant in the supplemental protest, such as the records showing that White & Dunning, LLP owned properties at 207 Roney Road and 1929 Wise Drive. This omission is significant because an identity of interest may arise through common investments, 13 C.F.R. § 121.103(f), and Appellant alleged that Messrs. Dunning and White share an identity of interest in its initial, timely protest. On remand, then, the Area Office is instructed to render a more complete analysis as to whether Messrs. Dunning and White share an identity of interest based on common investments, such that their interests should be aggregated.

Appellant's other contentions are unpersuasive. SBA regulations provide that “SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” 13 C.F.R. § 121.1009(d). The Area Office considered Appellant's protest allegation that Mr. Franklin worked at MDI and AME simultaneously, but gave greater weight to Mr. Franklin's signed and sworn statement attesting that he did not. Likewise, the Area Office considered the allegations that Mr. Dunning holds ownership interests in AME, AMX Logistics, LLC, LTI Services, LLC, and WDL Rentals, LLC, and that MDI is a subsidiary of CFS, but again gave greater weight to the sworn statements in the SBA Form 355 and its accompanying documents. Contrary to Appellant's suggestions, the Area Office was under no duty to independently verify these statements. Given the time constraints associated with size reviews, to impose such a requirement would be unrealistic and unduly burdensome.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The Area Office did not fully examine the issue of whether Messrs. Dunning and White share an identity of interest, and that issue is REMANDED to the Area Office for further review and investigation. The size determination otherwise is affirmed. In light of this outcome, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *E.g.*, *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721, at 16 (2016); *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 9 (2014).

KENNETH M. HYDE
Administrative Judge