

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

FOR PUBLIC RELEASE

SIZE APPEAL OF:

CoSTAR Services, Inc.

Appellant,

RE: Mark Dunning Industries, Inc.

Appealed From
Size Determination No. 3-2016-064

SBA No. SIZ-5765

Decided: July 27, 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 June 10, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-064, finding Mark Dunning Industries, Inc. (MDI) is a small business concern.

CoSTAR Services, Inc. (Appellant) contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find MDI is not an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal, and affirm the size determination.

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, the parties informed OHA that there were no requested redactions. Therefore, I now issue the entire 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. Procedural History

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 \$38.5 million average annual receipts size standard. 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.) 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).)

On March 17, 2016, the Area Office issued Size Determination Nos. 3-2016-041 and -042 finding MDI is a small business concern. The Area Office rejected Appellant's contention MDI and AME are affiliated based upon common management by Mr. Franklin. The Area Office determined that Mr. Dunning sold his interests in AME; AMX Logistics, LLC; LTI Services, LLC; and WDL Rentals, LLC to Mr. White in December 2012. The Area Office also found that Messrs. Dunning and White do not have any shared interests beyond White & Dunning, LLP. (Size Determination Nos. 3-2016-041 and -042, at 5.)

On April 1, 2016, Appellant filed an appeal with OHA challenging Size Determination Nos. 3-2016-041 and -042. The appeal argued, among other things, that the Area Office's determination failed to properly investigate the possible affiliation between Messrs. Dunning and White based on identity of interest due to their common investments.

On May 25, 2016, OHA issued *Size Appeal of CoSTAR Services, Inc.*, SBA No. SIZ-5745 (2016). OHA found unpersuasive Appellant's challenges to the Area Office's finding that MDI and AME were affiliated through Mr. Franklin's common management. OHA also upheld the Area Office's findings that Appellant was not affiliated with AME, AMX Logistics, LLC, LTI Services, LLC, WDL Rentals, LLC, and CFS. Nevertheless, OHA partially remanded the case back to the Area Office with instructions "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." *Size Appeal of CoSTAR Services, Inc.*, SBA No. SIZ-5745, at 8 (2016) (*CoSTAR I*). The issue of whether Mr. Dunning and Mr. White share an identity of interest was the sole issue remanded to the Area Office.

B. Instant Size Determination

On June 10, 2016, the Area Office issued Size Determination No. 3-2016-064 finding MDI is a small business concern despite its affiliation with numerous entities.

The Area Office analyzed whether Messrs. Dunning and White have an identity of interest based on common investments. The Area Office once again found that MDI is owned and controlled by Mr. Dunning, and no other individual has the power to control it. Additionally, Mr. Dunning holds over 50% interest in: (1) The Woodpile, Inc.; (2) Quality Lumber & Milworks, LLC; (3) Dothan Outdoor Equipment, Inc.; (4) Duncorp Development, Inc.; (5) Dynamic Developments, LLC; (6) Woodpile Properties, LLC; (7) Cumberland Services, LLC; (8) MDI Air, LLC; (9) White & Dunning, LLP; (10) Bubba's of Dothan, Inc.; and (11) Dunning Holdings, LLC. (Size determination, at 5.) Given Mr. Dunning's ownership in these concerns, the Area Office found them all affiliated with MDI. Further, MDI is affiliated with Mark Dunning Industries Recycling, LLC based on Mr. Dunning's 33.3% ownership interest, and with Cumberland Services, LLC, where Mr. Dunning owns 50%. (*Id.* at 5.)

The Area Office noted that Mr. Franklin, on remand, submitted an affidavit stating that he resigned from AME in December 2014 and then joined MDI as CFO. Mr. Franklin's affidavit also states that he never worked for AME and MDI at the same time. (*Id.* at 4.)

Next, the Area Office found that on December 12, 2012, Mr. Dunning sold Mr. White his ownership interest in the following concerns: (1) AME; (2) AMX Logistics, LLC; (3) WDL Rentals, LLC; and (4) LTI Services, LLC. (*Id.* at 5-6.) Messrs. Dunning and White, who are not related by blood, marriage, civil union or adoption, previously were part owners of properties on Roney Road and Wise Drive. However, Mr. White transferred his ownership interests in those properties to Mr. Dunning on December 11, 2012. The Area Office further determined that no affiliation exists between MDI and CFC Group, Inc. d/b/a Container First Services (CFS) because their relationship extends to MDI selling its equipment to CFS in 2014. According to Mr. Dunning's attorney, no further business relationship exists between the two concerns. (*Id.* at 6-7.)

Regarding Mr. Dunning's interest in GSW Transportation, Inc. (GSW), Mr. Dunning explained to the Area Office that he sold his interest to Mr. White on December 31, 2012, and resigned as GSW's Secretary. (*Id.* at 7.) Additionally, MDI, in its response to the Area Office, stated that Mr. White, nor any of his companies, do business with Dothan Outdoor Equipment, Inc.

The Area Office concluded that beyond their ownership in White & Dunning, LLP, which held the ownership in the Roney Road and Wise Drive properties, which have since been transferred to Dunning Holdings, LLC, Messrs. Dunning and White do not have any common investments or management, and are not affiliated with each other. (*Id.* at 7-8.) After calculating the average annual receipts for MDI and all of its affiliates, the Area Office found that MDI meets the applicable size standard for the instant procurement.

C. Appeal

On June 21, 2016, Appellant filed the instant appeal. Appellant states that on remand, the Area Office failed to obtain a complete record of Mr. Dunning's divestiture of his interests in GSW and the jointly owned property with Mr. White. Appellant contends that absent a written agreement between MDI and AME of this divestiture, an adverse inference should have been found as it would indicate the parties "continued to have oral common interests and investment." (Appeal, at 4.) Because MDI has not provided any written evidence as to its terminated relationship with AME, Appellant argues further investigation is required on remand.

Appellant points to a past OHA decision in arguing that a declaration characterizing the content of a document that should exist is not sufficient evidence. (*Id.* at 5; citing *Size Appeal of Kadix Systems LLC*, SBA No. SIZ-5016 (2008).) Here, MDI has failed to provide any documentation regarding the sale of interests in numerous concerns between Messrs. Dunning and White. Appellant challenges the Area Office's failure to obtain written agreement regarding the divestiture of Mr. Dunning's ownership interests in concerns also owned by Mr. White. Further, Appellant notes that statements by Mr. Dunning to the Area Office regarding his role and ownership with GSW contradicts information provided by Mr. Dunning in a previous protest

that was later appealed to OHA. (*Id.* at 5-6; citing *Size Appeal of Dorado Services, Inc.*, SBA No. SIZ-5515 (2013).)

Regarding Mr. Franklin's employment with MDI and AME, Appellant emphasizes that the Area Office could have obtained tax returns from Mr. Franklin that would corroborate Mr. Franklin's statements that he has been working at MDI since 2015 after leaving AME, despite his Linked-In website statements to the contrary. Appellant argues that Mr. Franklin's co-employment with MDI and AME “represents an ongoing link that would facilitate continuing control by Mr. Dunning and Mr. White of AME and MDI.” (*Id.* at 6.)

Lastly, Appellant disputes the Area Office's acceptance of MDI's counsel's statement regarding MDI's role as a subsidiary of CFS. Appellant maintains that public statements by CFS's President and CEO indicate that MDI is a subsidiary of CFS. (*Id.*)

On July 7, 2016, Appellant filed a supplemental appeal. Appellant explains that after reviewing the Area Office file, it is apparent that MDI failed to provide the written agreement showing MDI's divesting of all interest in the companies owned by Mr. White. Additionally, the Area Office failed to gather evidence in order to “resolve conflicts between the public records relating to co-owned properties and other matters.” (Supplemental Appeal, at 1.)

Appellant contends the record fails to show any evidence of Mr. Dunning's resignation of management and Member positions in companies owned by Mr. White, as well as any document that shows the divesting of Mr. Dunning's interest in AME, AMX Logistics LLC, WD Rentals, LLC, and LTI Services, LLC. (*Id.* at 3.) Appellant adds that Mr. Dunning's affidavit to the Area Office failed to provide any explanation regarding public records showing that he owns additional properties with Mr. White in Henry County and Houston County.

Again, Appellant argues that the Area Office erred by not requesting the best available evidence of Mr. Dunning's divestiture from companies owned by Mr. White, which would be the written agreement of December 2012, repeatedly referenced by MDI. Appellant contends that reliance on affidavits and statements was a material error by the Area Office. (*Id.* at 7; citing *Size Appeal of Kadix Systems, LLC*, SBA No. SIZ-5016 (2008).) Any such document memorializing the fracture between Mr. Dunning and Mr. White would have been required by SBA Form 355. Appellant maintains that failure to provide such an agreement requires a finding of adverse inference. (*Id.* at 8.)

Appellant adds that the Area Office should not rely on affidavits by Mr. Dunning, as he has shown to not be fully forthcoming with the truth regarding his role position as Secretary of GSW. (*Id.* at 9; citing *Size Appeal of Dorado Services, Inc.*, SBA No. SIZ-5515 (2013).) Further, MDI did not fully answer the Area Office's inquiries regarding property co-owned by Mr. Dunning and Mr. White, which include the properties and Henry and Houston County, where public records show co-ownership by Messrs. Dunning and White. (*Id.*) Lastly, MDI again failed to provide an answer to the Area Office regarding public statements made by CFS regarding MDI's role as a subsidiary of CFS.

D. MDI's Response

On July 7, 2016, MDI responded to the appeal. MDI contends that Appellant's supplemental appeal should be dismissed and the size determination upheld.

MDI maintains that *CoSTAR I* remanded the case to the Area Office to consider only one issue, whether Messrs. Dunning and White shared an identity of interest. Appellant's supplemental appeal goes beyond this issue to address other issues which were not included in the remand order. MDI argues that the evidence it provided to the Area Office upon remand clearly establishes that Messrs. Dunning and White have no active common business interests. (Response, at 3.) MDI contends that OHA previously rejected Appellant's allegations regarding Mr. Dunning's relationship with GSW, AME, AMX Logistics, LLC, LTI Services, LLC, and WDL Rental, LLC in *CoSTAR I*. Contrary to Appellant's argument, OHA specifically stated the Area Office committed no error in relying upon written affidavits as evidence disputing the size protest allegations. This finding contradicts Appellant's claims that the Area Office erred by not requesting contracts and other documents regarding the alleged affiliation of Messrs. Dunning and White. (*Id.* at 4.)

MDI argues that Appellant's supplemental appeal went beyond the scope of the issues on remand, as it rehashed arguments that OHA previously considered and rejected. Specifically, Mr. Franklin's role as an employee of AME, and later MDI; and MDI's alleged position as a subsidiary of CFS. These issues were previously considered by OHA and rejected, with no instruction on remand for the Area Office to reconsider. (*Id.* at 6.) Therefore, such issues are beyond the scope of the appeal at hand, and should be dismissed by OHA.

III. Discussion

A. Standard of Review and New Evidence

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

MDI is correct that the sole issue before the Area Office on remand was whether Mr. Dunning and Mr. White had an identity of interest. OHA upheld the Area Office's other findings that MDI was not affiliated with those firms Appellant alleged it was affiliated in *CoSTAR I*. Therefore, those issues are *res judicata*. The Area Office should not have re-examined those issues, and Appellant should not raise them here. Accordingly, I will not consider them.

On remand, Mr. Dunning submitted an affidavit dated June 2, 2016, stating that these deeds represent the properties at 207 Roney Road and 1929 Wise Drive in Dothan, Alabama, and

that these deeds establish that Mr. White transferred all of his interest in these properties to Dunning Holdings, LLC, of which Mr. Dunning is sole owner. He stated in this affidavit that neither he nor MDI share any ownership of any concern or any property with Mr. White, except for the hunting cabin mentioned previously. Mr. Dunning stated he was not a director, officer or manager in any concern with Mr. White. Mr. Dunning stated he had no interest in, and held no position in, GSW. Attached to the affidavit is a stock power agreement executed by Mr. Dunning, dated December 11, 2012, transferring all 600 of his shares of GSW to Mr. White. Also attached is a deed dated December 11, 2012, conveying the parcels of land in Dothan, Alabama from White & Dunning, LLP to Dunning Holdings, LLC. Further attached is Mr. Dunning's final Schedule K-1 for 2012, which establishes Mr. Dunning's GSW ownership interest terminated on December 31, 2012.

On June 7, 2012, Mr. Dunning filed an additional affidavit. Here he states Mr. White has never been an owner, officer, employee or had any connection with Dothan Outdoor Equipment, Inc. He stated there are no family relationships of any kind between Mr. Dunning and Mr. White. He further stated that despite the Alabama Secretary of State reports he is not an officer of GSW and had no connection with the firm since 2012.

It thus seems clear that the Area Office has asked the questions required to determine whether Mr. White and Mr. Dunning have an identity of interest due to common investments. The record includes the document which transferred Mr. Dunning's interest in GSW to Mr. White. It includes the deed where Mr. White transferred his interest in the real estate in Dothan, Alabama to Mr. Dunning. It includes Mr. Dunning's sworn statements that there are no common investments between the two individuals.

Appellant argues that there are more documents to be submitted, but can offer no more than speculation that such documents exist. MDI has submitted documentation to establish that Mr. Dunning and Mr. White have no common investments in GSW or Dothan real estate. Mr. Dunning's sworn statements further establish there are no common investments, other than a cabin. OHA has already held that Mr. Dunning's sworn statements are adequate to establish that there was no affiliation between MDI and AME, AMX Logistics, LLC, LTI Services, LLC, WDL Rentals, LLC, and CFS. *CoSTAR I*, at 8; ("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).) OHA held that the Area Office was under no duty to independently verify Mr. Dunning's statements, because, given the time constraints associated with size reviews, it would be unrealistic and unduly burdensome to impose such a requirement. (*Id.*) I make the same finding here, that the documentation MDI has submitted, together with Mr. Dunning's sworn statements, are sufficient to establish that Mr. Dunning and Mr. White no longer have any common investments in GSW, Dothan real estate, or any property or concern except the hunting cabin. Again, to require further documentation from MDI would be unrealistic, because there is only Appellant's speculation that it exists, and unduly burdensome given the time constraints of the size protest process.

Accordingly, I conclude the Area Office, on remand, properly considered the one issue before it, whether Mr. Dunning and Mr. White were affiliated due to common investments, and

concluded that they were not. Appellant has failed to meet its burden of establishing clear error on the part of the Area Office. I therefore deny the appeal, and affirm the size determination.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge