

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

SIZE APPEAL OF:

INV Technologies, Inc.,

Appellant,

Appealed From
Size Determination No. 01-SD-2017-11

SBA No. SIZ-5818

Decided: March 6, 2017

APPEARANCES

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On January 10, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-SD-2017-11 concluding that INV Technologies, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed below, the appeal is granted and the size determination is reversed.

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 received the size determination on January 11, 2017 and filed the instant appeal within fifteen days thereafter, 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, Protest, and Size Investigation

On March 15, 2016, the U.S. Department of the Air Force, Air Force Materiel Command issued Request for Proposals (RFP) No. FA8125-16-R-0010 for training services and support at the Oklahoma City Air Logistics Complex. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 611430, Professional and Management Development Training, with a

corresponding size standard of \$11 million average annual receipts. Proposals were due May 9, 2016. (RFP, Amendment 0001, at 2.) Appellant and Coley & Associates, Inc. (Coley) submitted timely proposals.

On July 18, 2016, the CO announced that Appellant was the apparent awardee. On July 22, 2016, Coley protested Appellant's size. Coley asserted that Appellant appeared to have several different addresses and websites, and that its president, Mr. Chandan Jhunjhunwala, also “goes by the name Monty Jhunjhunwala.” (Protest at 4.) In addition, one of the addresses Coley found for Appellant is associated with ICON EXIM, Inc. (ICON). (*Id.* at 3.) The CO forwarded the protest to SBA's Office of Government Contracting, Area II for review.¹

On December 14, 2016, Appellant provided the Area Office a copy of Mr. Jhunjhunwala's resume. The resume indicates that Mr. Jhunjhunwala currently holds two positions. Since April 2014, he has been the president/owner of Appellant, and since November 2015, he has served as Program Management Office (PMO) manager at SNAP, Inc. (SNAP). As PMO manager, he “[p]rovides [PMO] level support to human resources, accounting, and operational activities”. (Resume at 1.) The resume shows that Mr. Jhunjhunwala also worked at SNAP prior to his current position at Appellant. From May 2007 to March 2014, he was SNAP's vice president of operations, a role in which he “[p]rovide[d] operational level support to human resources, accounting, and marketing/business development and customer relations management activities”. (*Id.* at 2.)

B. Size Determination

On January 10, 2017, the Area Office issued Size Determination No. 01-SD-2017-11 finding that Appellant is not a small business.

The Area Office dispatched of Coley's protest allegations, explaining that Mr. Jhunjhunwala acquired Appellant in April 2011, and that he is the sole owner. Mr. Jhunjhunwala's nickname is Monty, and he does not have ownership interests in any other firms. Appellant's revenues do not exceed the \$11 million size standard, so Appellant alone is a small business. (Size Determination at 2-3.)

The Area Office then considered Appellant's relationships with ICON and SNAP, and determined that Appellant and SNAP are affiliated under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). The Area Office did not decide whether or not Appellant is affiliated with ICON.

In reaching the conclusion that Appellant and SNAP are affiliated, the Area Office relied on the following findings of fact: (1) ICON and SNAP currently share a location at 4080 Lafayette Center Drive in Chantilly, Virginia, and from 2012 to 2014, Appellant was located there too; (2) while Appellant was located in Chantilly, Virginia, Mr. Jhunjhunwala provided business consulting services to ICON; (3) ICON's president and CEO, Mr. Navneet Gupta, is

¹ The case was subsequently reassigned to Area I and given a new number for purposes of recordkeeping. (Letter from S. Liu to C. Jhunjhunwala (Dec. 6, 2016).)

also the founder and CEO of SNAP, and his wife, Mrs. Neeti Gupta, along with two other people, incorporated Appellant in 2006; (4) according to Mr. Jhunjhunwala's resume, he has worked at SNAP from 2015 to present as PMO manager, so he is a key employee at SNAP; and (5) Appellant and SNAP have conducted business with one another since at least 2007. The Area Office found that Appellant was awarded the predecessor contract in 2012, but had no employees until 2014, so Appellant relied heavily on SNAP to fulfill requirements during this time. In 2013, 78% of Appellant's total subcontracts were issued to SNAP. In 2014 and 2015, the figures were 1% and 21%, respectively. SNAP has issued subcontracts to Appellant, too. These subcontracts accounted for 53% of Appellant's revenues in 2015, 67% in 2014, and 0% in 2013, the year in which Appellant had no employees. (*Id.* at 2-4.)

The Area Office then sought to calculate the combined receipts of Appellant and SNAP, but noted that Appellant could not produce tax returns for SNAP. As a result, the Area Office drew an adverse inference that the missing information would have shown that SNAP is other than small. (*Id.* at 4-5, citing 13 C.F.R. §§ 121.1008(d) and 121.1009(d).) In addition, SNAP represented in the System for Award Management that it is not a small business under an \$11 million size standard. (*Id.* at 5.) Because Appellant and SNAP are affiliated, Appellant is not a small business.

C. Appeal

On January 26, 2017, Appellant filed its appeal of the size determination with OHA. Appellant asserts that the size determination is comprised of “a medley of seemingly trivial facts and meritless findings (unrelated to the initial protest grounds)”. (*Appeal* at 2.) Therefore, OHA should reverse the size determination.

Appellant takes issue with several of the Area Office's factual findings. For instance, Appellant charges, the Area Office exaggerated the significance of Appellant's subcontracts to SNAP during 2013. (*Id.* at 3.) Appellant maintains that its 2013 revenues were a small fraction of its cumulative revenues for 2013 — 2015. Considering this period as a whole, only 29% of Appellant's revenues were subcontracted to SNAP. (*Id.* at 3-4.) As for the subcontracts Appellant received from SNAP, these subcontracts do not create affiliation through economic dependence because they are below the 70% threshold stated in 13 C.F.R. § 121.103(f). (*Id.* at 4.)

Appellant argues that the finding that Mr. Jhunjhunwala is a key employee of SNAP lacks support, because “[n]othing in the record supports a finding that Mr. Jhunjhunwala had any critical influence or any substantive control over the operations or management of SNAP, or that he had any authority over substantive decision-making or that he had authority to hire and fire or enter into contracts.” (*Id.* at 5.) Although Appellant historically did share an address with ICON and SNAP, Appellant had no business dealings with ICON during this time. Further, “[t]here is nothing in the record to suggest that SNAP had access to [Appellant's] proprietary information or in any way could exercise control over [Appellant] because of the shared address.” (*Id.* at 6.) Following Mr. Jhunjhunwala's acquisition of Appellant, neither Mrs. Gupta nor any other individual associated with SNAP has had any involvement in Appellant's ownership or management. (*Id.*)

Appellant argues that the Area Office clearly erred in finding that Appellant and SNAP are affiliated. To support a determination that firms are affiliated under the totality of the circumstances, an area office must find that one firm has the power to control another or that a third party has the power to control both. (*Id.* at 7, citing 13 C.F.R. § 121.103(a)(1) and *Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692 (2015).) Here, although the Area Office identified various connections between Appellant and SNAP, “[t]he Size Determination is bereft of an analysis of how the connections between [Appellant] and SNAP lead to a conclusion that SNAP has the power to control [Appellant].” (*Id.* at 8.) Because the size determination “fails to recite sufficient facts to support a conclusion that SNAP has the power to control [Appellant],” OHA should reverse the size determination.

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

The Area Office found that Appellant is affiliated with SNAP solely under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5), and further determined that Appellant alone is a small business. Section II.B, *supra*. Because I agree with Appellant that the Area Office clearly erred in finding Appellant affiliated with SNAP under the totality of the circumstances, the appeal must be granted and the size determination reversed.

OHA has explained that SBA may find businesses affiliated under the totality of the circumstances “where the interactions between them are so suggestive of reliance as to render the businesses affiliates.” *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 15 (2015). OHA has repeatedly held, though, that “[a]s in all affiliation analysis, the touchstone issue is control. A connection between two concerns does not necessarily cause affiliation. There must be an element of control present.” *Id.* (quoting *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 11 (2013)); *see also Size Appeal of Q Integrated Cos.*, SBA No. SIZ-5778, at 13 (2016) (“A review of the totality of the circumstances may lead an area office to conclude one concern has the power to control the other, and that both are affiliated.”). “Stated differently, in order to find affiliation through the totality of the circumstances, ‘an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.’” *Med. Comfort.*, SBA No. SIZ-5640, at 15 (quoting *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 11 (2007)). OHA has made clear that “[a] finding of affiliation under the totality of the circumstances will be overturned if the record does not support the conclusion that any such power to control exists.” *Size Appeal of Global, A 1st Flagship Co.*, SBA No. SIZ-5462, at 11 (2013) (citing *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA

No. SIZ-5132 (2010) and *Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112 (2010)); *see also Size Appeal of First Nation Group, d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807 (2017).

In this case, the Area Office did not explain why the facts it recited conferred on either Appellant or SNAP the power to control the other, and the record does not support such a conclusion. *E.g.*, *Size Appeal of Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 11 (2016) (affiliation based on the totality of the circumstances was clear error when it was “based upon “all of the facts described above” and there was only “a conclusory statement that [the firms] were affiliated”). The Area Office found that Appellant is owned and controlled solely by Mr. Jhunjhunwala, whereas Mr. Gupta apparently controls SNAP as its president and CEO. Section II.B, *supra*. There is no indication that Messrs. Jhunjhunwala and Gupta share an identity of interest. *Id.* The subcontracting between the two firms does not give rise to affiliation because it does not approach the 70% threshold. *See* 13 C.F.R. § 121.103(f); *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007). In addition, much of the subcontracting was from Appellant to SNAP, and thus would not suggest that Appellant is dependent upon SNAP. *E.g.*, *Size Appeal of Harbor Servs., Inc.*, SBA No. SIZ-5579, at 8 (2014); *Size Appeal of Accent Serv. Co.*, SBA No. SIZ-5237, at 7 (2011) (“That a challenged concern grants subcontracts to another concern is not evidence of dependence upon the second concern.”). While Appellant and SNAP have business dealings with one another, “[s]imply showing an ongoing business relationship between two firms is not enough to establish that one controls or has power to control the other.” *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 12 (2015) (affirming finding of no affiliation under the totality of the circumstances). Similarly, “historic ties between a challenged firm and an alleged affiliate do not establish current affiliation when the historic ties no longer exist as of the date to determine size.” *Size Appeals of Real Estate Resource Servs., Inc., et al.*, SBA No. SIZ-5522, at 8-9 (2013); *Size Appeal of A & H Contractors, Inc.*, SBA No. SIZ-5459 (2013); *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451 (2013). Accordingly, the fact that Appellant and SNAP previously were located in the same building has no bearing on whether the firms are currently affiliated, because this connection ended approximately two years before the date for determining size.

Likewise, the record does not support the conclusion that a third party, such as Mr. Jhunjhunwala, could control both Appellant and SNAP. In particular, the finding that Mr. Jhunjhunwala is a key employee of SNAP lacks evidentiary support. The Area Office did not explain how it arrived at this conclusion, other than by noting Mr. Jhunjhunwala's title as PMO manager. Such a conclusion, though, is at odds with SBA regulations and OHA precedent. As OHA recently explained:

A key employee is one who, because of his position in the concern, has a critical influence or substantive control over the operations or management of the concern. Key employees are those who have influence or control over the operations of a concern as a whole, such as a Director of Operations. An employee who is not an owner, officer or executive of a concern and who supervises only 4% of its business is not a key employee. A Government Services Manager with no authority over substantive decision-making is not a key employee. A Human Resources Manager is not a key employee. An employee

with no authority to hire and fire or to enter into contracts is not likely to be a key employee. Conversely, an employee who is critical to a concern's control of day-to-day operations is a key employee. A key employee then, is not merely an employee with a responsible position or a particular title. A key employee is one who actually has influence or control over the operations of the concern as a whole.

Human Learning, SBA No. SIZ-5769, at 9 (internal citations omitted). Here, the record contains no evidence demonstrating that the Area Office considered Mr. Jhunjhunwala's role, duties, or authority at SNAP. Rather, the determination that he is a key employee appears to be based merely on his title. Further, the record does not support finding him to be a key employee, either. According to his resume, he provides PMO support, but there is no indication that he has the authority to hire and fire, enter into contracts, or otherwise control the operations of SNAP as a whole. Section II. A, *supra*. I therefore agree with Appellant that this finding constitutes clear error.

In sum, because the Area Office did not explain how—and the record does not support finding that—either Appellant or SNAP can control the other or a third party controls both, the finding that Appellant and SNAP are affiliated is clearly erroneous. Absent this affiliation, Appellant is a small business under the size standard associated with the subject procurement.

Although the Area Office did not state whether Appellant was affiliated with ICON, this omission does not constitute reversible error. Coley alleged only that Appellant and ICON share an address. Section II. A, *supra*. The Area Office investigated this claim and found that, although it was true at an earlier point in time, it was no longer the case as of the date for determining size. Accordingly, the Area Office reasonably explored the allegations raised in Coley's protest.

IV. Conclusion

Appellant has demonstrated that the Area Office clearly erred in finding that Appellant is affiliated with SNAP. Accordingly, the appeal is GRANTED and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge