

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

SIZE APPEAL OF:

Potomac River Group, LLC,

Appellant,

Appealed From
Size Determination No. 02-2016-048

SBA No. SIZ-5844

Decided: July 24, 2017

APPEARANCES

David S. Cohen, Esq., Laurel A. Hockey, Esq., Cohen Mohr, LLP, Washington, D.C.
for Appellant

DECISION

I. Introduction and Jurisdiction

This appeal challenges Size Determination No. 02-2016-048, in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) determined that Potomac River Group, LLC (Appellant) is not an eligible small business for the procurement at issue. Size Determination No. 02-2016-048 was predicated upon an earlier size determination of Appellant, Size Determination No. 02-2015-084, which SBA's Office of Hearings and Appeals (OHA) subsequently affirmed in *Size Appeal of Potomac River Group, LLC*, SBA No. SIZ-5689 (2015) ("*Potomac River P*").

Appellant contends that Size Determination No. 02-2016-048 is clearly erroneous, and requests that OHA reverse and find Appellant to be an eligible small business. 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 received Size Determination No. 02-2016-048 on June 2, 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. Other Proceedings

On August 27, 2015, the Area Office issued Size Determination No. 02-2015-084 finding that Appellant was not an eligible small business as of April 16, 2015.¹ The Area Office explained that Appellant was owned by three parties: Intelligent Decisions, Inc. (ID) and Mr. Frank J. Frysiek each owned 48.54%, and the remaining 2.92% was held by Ms. Jacqueline D. von Wodtke. The Area Office determined that, based on Appellant's Second Restated and Amended Operating Agreement, ID's ownership interest and concomitant voting rights conferred on ID the power to exercise negative control over Appellant, so Appellant and ID were affiliated and their receipts combined for purposes of determining size. The receipts of Appellant alone did not exceed the \$20.5 million size standard; however, because Appellant acknowledged that ID was not a small business under this size standard, Appellant did not qualify as a small business for the procurement.

On September 11, 2015, Appellant appealed Size Determination No. 02-2015-084 to OHA. On this same date, Appellant filed a request for recertification based on changes it had made to its operating agreement. On October 21, 2015, OHA issued its decision in *Potomac River I*, affirming Size Determination No. 02-2015-084.

On April 15, 2016, the Area Office issued Size Determination No. 02-2015-128 in response to Appellant's request for recertification. The Area Office determined that, based on the revisions to Appellant's operating agreement, ID could no longer exercise negative control over Appellant. Appellant was therefore an eligible small business under the \$20.5 million size standard. The Area Office noted that Appellant's Third Amended and Restated Operating Agreement was signed on June 11, 2015.

B. Instant Procurement and CO's Protest

On May 1, 2015, the U.S. Department of the Navy, Naval Supply Systems Command issued Request for Proposals (RFP) No. N00189-15-R-Z001 for polygraph examination support services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561611, Investigation Services, with a corresponding \$20.5 million annual receipts size standard. Initial proposals were due June 5, 2015. Appellant submitted a timely proposal, self-certifying as a small business.

On August 20, 2015, the CO announced that Appellant was the awardee, and Appellant subsequently began performance of the contract. On January 20, 2016, the CO received a copy of Size Determination No. 02-2015-084, in which the Area Office had determined that Appellant

¹ Appellant self-certified as small on April 16, 2015, when it submitted its offer, including price, for Solicitation No. HHM402-15-R-0036.

was not an eligible small business. On April 7, 2016, the CO requested a size determination of Appellant.²

C. Protest Response

In response to the protest, Appellant submitted a declaration from Mr. Frysiek, Appellant's president, CEO, and managing member, dated May 11, 2016. Mr. Frysiek attested, under penalty of perjury, that during the course of the proceedings for Size Determination No. 02-2015-084, Appellant's counsel informed him that the Area Office might construe certain language in Appellant's Second Restated and Amended Operating Agreement as granting ID negative control over Appellant. (Frysiek Decl. ¶ 3.) “Immediately upon learning about this language . . . , [Appellant] and ID negotiated amendments to the [operating agreement] to eliminate the provisions that could be viewed by [the Area Office] as giving ID control over [Appellant] and retain only the supermajority voting requirements protecting ID's investment in [Appellant].” (*Id.* ¶ 4.) Mr. Frysiek represented that when Appellant submitted its proposal for the instant procurement on June 5, 2015, Appellant “understood which provisions had to be eliminated. [Appellant] and ID shared a serious intent to amend the [operating agreement]. Less than a week later, on June 11, 2015, [Appellant and ID] formally executed the Third Amended and Restated [Operating Agreement].” (*Id.* ¶ 5.) Mr. Frysiek stated further that, also on June 11, 2015, he and Ms. von Wodtke executed a voting agreement through which Ms. von Wodtke gave Mr. Frysiek “the right to vote a majority of [Appellant's] voting units.” (*Id.*)

Based on Mr. Frysiek's declaration, Appellant urged the Area Office to conclude that Appellant's Third Amended and Restated Operating Agreement was in effect on June 5, 2015, pursuant to SBA's “present effect” rule, 13 C.F.R. § 121.103(d). (Protest Response at 2-4, citing *Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324 (2012), *Size Appeal of WRS Infrastructure and Env't, Inc.*, SBA No. SIZ-5007 (2008), and *Size Appeal of Syro Steel Co.*, SBA No. SIZ-3800 (1993).)

D. Instant Size Determination

On May 23, 2017, the Area Office issued Size Determination No. 02-2016-048. The Area Office declined to give present effect to Appellant's Third Amended and Restated Operating Agreement. The Area Office noted that the cases cited by Appellant in its protest response contained a key fact not present in this case—that is, “**tangible evidence** that an agreement in principle had been reached.” (Size Determination at 4, quoting *Nuclear Fuel Servs.*, SBA No. SIZ-5324, at 7 (emphasis added by the Area Office).) Here, “there was no signed agreement or tangible document prior to June 11, 2015.” (*Id.*) OHA precedent, moreover, makes clear that Appellant's assertion that Appellant and ID were “negotiating and had serious intent” to amend the operating agreement does not constitute tangible evidence. (*Id.*, citing *Size Appeal of Tech. Sys. Assocs., Inc.*, SBA No. SIZ-3963, at 6 (1994).) As of the date Appellant self-certified as small for the instant RFP, then, Appellant's Second Amended and Restated Operating Agreement remained in effect. Under this iteration, ID had the power to exercise negative control over

² The CO may initiate a size determination at any time. 13 C.F.R. § 121.1004(b); *see also Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5469, at 2 (2013) (contracting officer's size protest filed “more than a year after contract award” was nevertheless timely).

Appellant, so the firms are affiliated, and ID's status as a large business renders Appellant ineligible for the subject RFP. (*Id.* at 5.)

E. Appeal

On June 15, 2017, Appellant filed the instant appeal. Appellant argues that the Area Office erred in determining that Appellant did not submit tangible evidence of an agreement in principle to revise the Second Amended and Restated Operating Agreement. OHA therefore should grant the appeal and determine that Appellant is a small business for the subject RFP.

Appellant contends that the Area Office gave no weight to Mr. Frysiek's declaration and thus ignored tangible evidence of Appellant's and ID's agreement in principle. This declaration and the fact that Appellant and ID actually did amend the operating agreement just six days after the date for determining size demonstrate that, as of June 5, 2015, Appellant and ID clearly intended to revise the operating agreement. (Appeal at 6-8.)

Appellant argues that the Area Office's reliance on Size Determination No. 02-2015-084 and *Potomac River I* was misplaced. While those decisions discussed Appellant's operating agreement, they involved different procurements with different dates for determining size. The date for determining size in Size Determination No. 02-2015-084 was April 16, 2015, nearly two months before the date for determining size for the instant procurement. As of April 16, 2015, Appellant and ID had not identified any need to amend their operating agreement, and they did not intend to do so. By June 5, 2015, though, they had "serious intent" to amend the operating agreement and had reached an agreement in principle to amend it. (*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 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

I find no merit to this appeal. There is no legal basis to conclude that Appellant's Third Amended and Restated Operating Agreement, dated June 11, 2015, applies to Appellant's relationship with ID on June 5, 2015, the date Appellant self-certified as a small business for the instant RFP. SBA regulations make clear that size is determined as of the date a concern self-certifies as small with its initial offer including price. 13 C.F.R. § 121.404(a). As a result, affiliation is assessed as of this same date. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 10 (2013) ("because size is determined as of the self-certification date, a size determination must determine affiliation—in this case, economic dependence—as of that date."). In keeping with

this rule, OHA has repeatedly held that documents created after the self-certification date are not relevant for purposes of determining affiliation. *Potomac River I*, SBA No. SIZ-5689, at 4 (finding Appellant's Third Amended and Restated Operating Agreement “completely irrelevant” in assessing Appellant's relationship with ID, because the agreement was not in existence as of the self-certification date); *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646, at 11 (2015); *Size Appeal of Brown & Pipkins LLC*, SBA No. SIZ-5621, at 6 (2014); *Size Appeal of Alterity Mgmt. and Tech. Solutions, Inc.*, SBA No. SIZ-5514, at 7 (2013); *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010). In the instant case, Appellant does not dispute that its Second Amended and Restated Operating Agreement was still in effect as of June 5, 2015, and was not supplanted until nearly one week later. I therefore see no reason to disturb the size determination.

Appellant's contentions that Appellant and ID jointly intended to amend the operating agreement on June 5, 2015 are unpersuasive. By its plain terms, the regulation that allows an area office to give present effect to agreements in principle, 13 C.F.R. § 121.103(d), applies only to affiliation based on “stock options, convertible securities, and agreements to merge.” Appellant cites no authority to extend the present effect rule to the situation presented here, a purported agreement in principle to amend an operating agreement. The present effect rule, then does not apply to the facts of this case.

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