

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

**REDACTED DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Team Waste Gulf Coast, LLC,

Appellant,

Appealed From  
Size Determination No. 3-2017-045

SBA No. SIZ-5864

Decided: November 6, 2017

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Candace M. Shields, Esq., Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant

Doug P. Hibshman, Esq., Nicholas Solosky, Esq., Fox Rothschild LLP, Washington, D.C., for Mark Dunning Industries, Inc.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On August 9, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2017-045, concluding that Team Waste Gulf Coast, LLC (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 or remand. For the reasons discussed *infra*, the appeal is denied.

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

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<sup>1</sup> This decision was initially 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. OHA received one or more requests for redactions and considered such requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

fifteen days after 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 March 31, 2017, the U.S. Department of the Navy, Naval Facilities Engineering Command Southeast, issued Request for Proposals (RFP) No. N69450-17-R-1710 for integrated solid waste management services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of \$38.5 million average annual receipts. Offers were due May 10, 2017.

On June 28, 2017, the CO notified unsuccessful offerors, including Mark Dunning Industries, Inc. (MDI), that Appellant was the apparent awardee. MDI filed a timely size protest with the CO, alleging that Appellant is not a small business due to affiliation with the Team Waste network of entities. MDI alleged affiliation through common ownership, common management, identity of interest, the newly organized concern rule, and the totality of the circumstances. The CO forwarded MDI's protest to the Area Office for review.

### B. Size Determination

On August 9, 2017, the Area Office issued Size Determination No. 3-2017-045 concluding that Appellant is not a small business.

The Area Office explained that Appellant is wholly owned by Team Waste of Mississippi, LLC (TWM). Appellant's CEO is [XXXX], who is also a member of the board of managers. [XXXX] is Appellant's President, [XXXX] is Vice President and a member of the board, and [XXXX] is Appellant's Secretary. (Size Determination, at 5.)

TWM is wholly owned by Team Waste, LLC (TW). TWM and TW have the same officers as Appellant. The Area Office determined that TW is 49.88% owned by Team Waste Holdings II, LLC (TWHII), and 49.88% owned by Energy Hardware Holdings, Inc. (EHH). TWHII holds common units of ownership, whereas EHH has preferred units. The remaining 0.24% interest in TW is in Class P units held by four individual employees. (*Id.*) The Class P shareholders have no voting power.

The Area Office next found that TWHII is 80% owned by Team Waste Holdings, LLC (TWH), which has the same officers as Appellant, TWM, and TW. The remaining 20% of TWHII is owned by "Entity 2", an investment firm equally owned by two unnamed individuals. [XXXX] owns 70% of TWH, while an investment firm owned by [XXXX] owns 15%, and the remaining 15% is owned by an individual investor. (*Id.* at 6.) Due to [XXXX]'s 70% ownership of and control over TWH — which in turn controls Appellant, TWM, TW, and TWHII — the Area Office found that Appellant is affiliated with TWM, TW, TWHII, and TWH based on common ownership. These firms are also affiliated due to common management by

[XXXXXXXXXXXX XXXXXXXXXXXX]. In addition, any business concerns in which [XXXXXXXXXXXXXXXXXXXX] hold a majority ownership interest or own the single largest block of stock are also affiliates of Appellant. The Area Office identified 20 such entities owned by [XXXX]. (*Id.* at 6-7.) The Area Office noted that [XXXXXX] share an identity of interest, and there is no clear line of fracture between them. (*Id.* at 7.)

Next, the Area Office determined that EHH, which owns 49.88% of TW, is 100% owned by Triangle Capital Corporation (Triangle), a large business with annual revenues exceeding \$100 million. The Area Office found that EHH's interest in TW is the same as that of TWHII, with each entity owning slightly less than half of TW. Pursuant to 13 C.F.R. § 121.103(c)(2), both EHH and TWHII are presumed to have the power to control TW. (*Id.* at 8.)

Appellant argued that EHH holds a non-voting interest in TW, and that TW's board is responsible for managing and controlling TW's operations. Additionally, Appellant maintained, TWHII has the right to appoint four of the five board members, with EHH responsible only for one.

The Area Office, after reviewing TW's Third Amended and Restated Limited Liability Company Agreement (the "Operating Agreement"), noted that EHH could adjourn a board meeting if a quorum is not present. (*Id.* at 9.) In addition, EHH and TWHII have equal ownership interests, and equal voting rights as shareholders. Thus, "[w]hile the board in this case may be controlled by TWHII through its ability to install four of five board members, as owners, EHH and [TWHII] also have the power to vote their ownership units which provides both EHH and [TWHII] with the power to control [TW]." (*Id.*) Notwithstanding Appellant's claim that EHH's ownership interest is non-voting, the Area Office found that TW's Operating Agreement does not state that EHH's preferred class units are non-voting. Nor did Appellant identify any provisions in the Operating Agreement that support this proposition. To the contrary, section 6.5 of the Operating Agreement indicates that certain actions require the consent of both TWHII and EHH. These actions include changes in TW's strategic direction; termination of [XXXX]'s services or an increase in his compensation; and the redemption or repurchase of TW units other than the preferred units. (*Id.* at 9-10.) The Area Office remarked that "these are just a few examples of how EHH has the power to affirmatively take action to amend, alter or modify the documents and direction of TW, or exert negative control over proposed actions." (*Id.* at 10.) The Operating Agreement "clearly gives EHH the power to control TW"; in fact, "EHH actually has greater power over TW than TWHII under certain circumstances." (*Id.*)

The Area Office addressed Appellant's contention that EHH is not affiliated with Triangle because Triangle is a Small Business Investment Company (SBIC). According to the Area Office, Triangle is not a licensed SBIC. Although Triangle Mezzanine Fund, LLP is a licensed SBIC, this is a separate entity from Triangle. (*Id.* at 10-11.)

The Area Office concluded that Appellant is controlled by, and affiliated with, both EHH and TWHII based on their joint ownership of TW. The combined receipts of Appellant and its affiliates, including EHH and Triangle, exceed the \$38.5 million size standard. Therefore, Appellant is not a small business.

### C. Appeal

On August 18, 2017, Appellant filed the instant appeal, contending that the size determination is clearly erroneous and requesting that OHA reverse or remand. Specifically, Appellant maintains that the Area Office misinterpreted TW's Operating Agreement and erroneously determined that EHH has the power to control TW and Appellant. Appellant challenges only the Area Office's finding that Appellant is affiliated with EHH and Triangle, because “the remaining corporate relationships do not cause [Appellant] to exceed the relevant size standard.” (Appeal at 4.)

Appellant acknowledges that section 6.5 of the Operating Agreement “requires EHH's consent before [TW] takes 16 specific actions.” (*Id.* at 7.) However, Appellant emphasizes, “[a]ll other actions are decided by a majority vote (or majority written consent) of the Board, which TWHII controls by virtue of its four-to-one advantage in Board membership.” (*Id.*) As a result, EHH lacks any power to affirmatively control TW, and “EHH's rights are limited solely to blocking the TWHII-controlled Board from taking a limited number of specific actions.” (*Id.* at 10.) Appellant observes that TW's Operating Agreement specifically grants the Board the power to appoint officers, including the CEO, as well as full control over day-to-day and long-term decisions. (*Id.* at 17.) Further, except as discussed in section 6.5 of the Operating Agreement, the Board can act without the need to consult with, or obtain the consent of, the shareholders. (*Id.*)

Appellant argues that a proper analysis of negative control focuses on “whether such control impedes or otherwise inhibits ordinary actions essential to operating the company.” (*Id.* at 10, citing *Size Appeal of EA Engineering, Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008).) Conversely, the power to veto extraordinary corporate actions in order to protect a minority shareholder's investment does not create affiliation through negative control. OHA has recognized that actions such as “amending or changing aspects of a business's certification of incorporation or bylaws, issuing additional shares of capital stock, and entering a substantially different line of business” are extraordinary events for which negative control does not give rise to affiliation. (*Id.*) Other extraordinary situations that do not create affiliation include: (i) disposal of a firm's assets; (ii) receiving capital contributions from a member; (iii) admitting new members; (iv) materially altering the rights of existing shareholders; (v) filing for bankruptcy or receivership; and (vi) admitting that the firm is insolvent. (*Id.* at 11, citing *Size Appeal of DooleyMack Government Contracting, LLC*, SBA No. SIZ-5086, at 7 (2009).)

In the instant case, Appellant contends, the Area Office did not properly consider whether EHH's veto rights impede TW's daily operations. The size determination does not explain how [XXXX] or the Board could be prevented from operating TW, which is at the heart of a negative control analysis. Further, the Area Office did not consider whether EHH's veto rights are limited to extraordinary situations necessary to protect its investment. (*Id.* at 12.)

Appellant reviews section 6.5 of TW's Operating Agreement, and highlights that most of EHH's veto rights pertain to (i) amending TW's organizational documents; (ii) prohibiting other than arm's length transactions; (iii) increasing or decreasing the number of authorized membership interests; (iv) entering a different line of business; (v) pledging an owner's interest; (vi) selling all or substantially all of TW's assets; (vii) reclassification of interests; (viii) making

capital securities senior to preferred units; and (ix) dissolving TW altogether. (*Id.* at 13.) Thus, the majority of EHH's veto rights relate to extraordinary corporate actions, similar to those previously recognized by OHA in prior cases. Although section 6.5 does afford EHH some additional veto rights, most of the remaining veto rights allow EHH veto power when the actions to be taken are of high dollar value. These are also extraordinary situations, Appellant maintains, because such actions have the potential to jeopardize a large portion of TW's total revenue. (*Id.* at 14.) Finally, section 6.5(e) grants EHH the power to object to [XXXX]'s termination or to an increase in his annual compensation. According to Appellant, objecting to [XXXX]'s termination is essentially meaningless, because [XXXX] controls TW and the Operating Agreement does not limit his ability to resign. (*Id.* at 15.) As for [XXXX]'s compensation, EHH's veto rights apply only to [XXXX], not to any other officer or employee of TW, and serve merely to “prevent [XXXX] from paying himself an exorbitant amount and thereby bankrupting the company.” (*Id.*)

Even if OHA considers section 6.5(e) to be evidence of negative control, OHA has suggested that a single indication of negative control is not, by itself, sufficient to find affiliation. (*Id.* at 15-16, citing *Size Appeal of Q Integrated Companies, LLC*, SBA No. SIZ-5778 (2016).) Likewise, 13 C.F.R. § 121.103(a)(3) apparently contemplates more than one instance of negative control. (*Id.* at 16.)

Lastly, Appellant argues that any power EHH may have to exert negative control over TW is illusory. This is true because section 8.7 of the Operating Agreement permits TW to require investors to sell back their units to the company if they withhold consent for certain actions found in Section 6.5. (*Id.* at 17-18.) Specifically, if EHH does not consent to actions that fall under subsections (g)-(j) and (l)-(n), TW may utilize the call option on the preferred units, held by EHH. Thus, “while Section 6.5 requires prior written consent from common and preferred interest holders, including EHH, to undertake the actions outlined, these veto rights are illusory as applied to subsections (g)-(j) and (l)-(n).” (*Id.* at 19.) Appellant highlights that OHA has previously found negative control illusory when a majority shareholder can convene a meeting and remove all directors without cause. (*Id.* at 18, citing *Size Appeal of U.S. Builders Group, Inc.*, SBA No. SIZ-5519 (2013).)

#### D. MDI's Response

On September 8, 2017, MDI responded to the appeal. MDI contends that the Area Office correctly concluded that Appellant is affiliated with EHH and that Appellant is not a small business. Therefore, OHA should affirm the size determination.

MDI maintains that under 13 C.F.R. § 121.103(c)(2), EHH is presumed to control TW because EHH and TWHII hold large minority interests that are equal in size. Although the presumption is rebuttable, “[s]uch a rebuttal is not possible in this case based on the ‘powerful voting rights’ vested in EHH by the TW Operating Agreement that give EHH the power to control TW.” (Response, at 3.) Moreover, the Area Office correctly found that EHH can exert negative control over TW due to the veto powers described in section 6.5 of the Operating Agreement. OHA has held that certain veto powers do not give rise to negative control, but only if the veto power is narrowly tailored to protect the minority shareholder's interest and does not disrupt the daily operations of the concern. (*Id.* at 4-5, citing *Size Appeal of EA Engineering,*

*Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008).) On the other hand, “veto powers that prevent the concern from conducting business as it sees fit create sufficient control to cause affiliation.” (*Id.* at 5, citing *Size Appeal of Firewatch Contracting of Florida, LLC*, SBA No. SIZ-4994 (2008).)

MDI contends that, due to the fact that EHH and TWHII have large and approximately equal minority interests in TW, both EHH and TWHII presumed to have the power to control TW. Appellant fails to address this issue in the appeal. EHH's ability to appoint a member to the Board gives EHH the power to take measures that can impact TW's operations. According to MDI, the terms of the Operating Agreement “demonstrate that EHH has the power to control TW by virtue of its Preferred Units of voting stock and position on the TW Board of Managers.” (*Id.* at 7.)

Appellant's argument that the Area Office failed to consider whether EHH's veto rights are limited to extraordinary situations is meritless, according to MDI. Given that EHH has veto power over any change in the strategic direction of TW, EHH has the power to prevent TW from conducting business as it chooses. This plainly constitutes enough power to control to find affiliation. (*Id.* at 8.) MDI adds that EHH's power to veto [XXXX]'s termination and compensation falls under actions OHA has previously deemed to show negative control. (*Id.* at 9, citing *Size Appeal of DHS Systems, LLC*, SBA No. SIZ-5211 (2011).)

Finally, MDI disputes the notion that EHH's control over TW is illusory. While it is possible that the call option found in Section 8.7 may negate EHH's veto powers as it relates to subsections (g)-(j) and (l)-(n) of Section 6.5, this is insufficient to overturn the size determination. (*Id.* at 9-10.)

### 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

Appellant challenges only one aspect of the size determination — *i.e.*, the conclusion that EHH, which is wholly owned by Triangle, has the power to control TW. The issue is significant because it is undisputed that TW controls Appellant through TWM. Therefore, if EHH does control TW, Appellant is not a small business due to affiliation with EHH and Triangle.

In determining that EHH has the power to control TW, the Area Office observed that EHH and TWHII hold large minority ownership stakes in TW, and that these interests are equal

or approximately equal in size. As a result, both EHH and TWHII are presumed to control TW pursuant to 13 C.F.R. § 121.103(c)(2). Section II.B, *supra*. The Area Office further determined that EHH could exert negative control over TW based on section 6.5 of TW's Operating Agreement. Section II.B, *supra*. This provision requires EHH's prior written consent before TW may take various actions, which include “terminat[ing] the services of [XXXX] or increas[ing] [XXXX]'s annual compensation above the annual compensation provided in the Employment Agreement” and “effect[ing] any changes in the strategic direction or lines of business of the Company's landfill, waste hauling and related businesses”. Operating Agreement, § 6.5(e) and (f). Other actions require EHH's consent above certain dollar thresholds, such as “mak[ing] any distribution on any Units of the Company”; “assign[ing], terminat[ing] or materially alter[ing], amend[ing] or modify[ing] the rights of the Company or any Subsidiary under any agreement”; and “creat[ing] or permit[ting] any lien, mortgage, security interest or similar restrictions on any assets of the Company or any subsidiaries.” *Id.*, § 6.5(b), (g), and (i).

I agree with the Area Office and MDI that section 6.5 of TW's Operating Agreement does permit EHH to exert negative control over TW. It is true, as Appellant emphasizes, that OHA has drawn a distinction between the power to block “extraordinary” actions in order to protect the interests of a minority investor, which do not constitute negative control, and the power block ordinary actions essential to operating a company, which do create negative control. Thus, OHA has explained:

[A] minority shareholder's power to veto extraordinary actions outside the ordinary course of business — such as the issuance of additional stock, amendment of the concern's charter or bylaws, or entry into a substantially different line of business — does not necessarily constitute “negative control.” *Size Appeal of EA Engineering Science, and Technology, Inc.*, SBA No. SIZ-4973, at 9-10 (2008). Rather, a requirement that minority shareholders consent to extraordinary actions may simply protect the minority shareholder's investment. *Id.* Conversely, negative control exists when a minority shareholder can block “ordinary actions essential to operating the company.” *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023, at 10 (2009); *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977, at 14 (2008). OHA has determined that the creation of debt and the payment of dividends are among such “ordinary actions,” as these matters are fundamental to the daily operation of a business. *Eagle Pharmaceuticals*, at 11.

*Size Appeal of Carntribe-Clement 8AJV # 1, LLC*, SBA No. SIZ-5357, at 14-15 (2012) (quoting *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 8 (2011)).

Here, as discussed above, section 6.5 of TW's Operating Agreement grants EHH the power to block several types of actions that OHA has deemed essential to operating a business, including the creation of debt and the payment of dividends. Although these veto powers apply only over certain dollar thresholds, OHA has previously found negative control even when a veto power is accompanied with a dollar limit. *BR Constr.*, SBA No. SIZ-5303, at 8 (negative control existed when minority owner's consent was required for “incurring any expense over \$5,000 not in the operating budget; submission of any bid over \$250,000; [and] execution of any contract

over \$250,000”). Similarly, OHA has expressly held that “the hiring and firing of executive officers and the setting of compensation” are ordinary actions essential to operating a company. *Size Appeal of DHS Systems, LLC*, SBA No. SIZ-5211, at 8 (2011) (citing *Size Appeal of Firewatch Contracting of Florida, LLC*, SBA No. SIZ-4994, at 5 (2008)). Therefore, the provision pertaining to the removal of [XXXX] and modification of his compensation is a form of negative control. Moreover, EHH also has broad power to block to “any changes in the strategic direction or lines of business of the Company's landfill, waste hauling and related businesses”. Appellant maintains that this power is analogous to a provision in *EA Engineering*, which OHA considered to be extraordinary. The provision in *EA Engineering*, though, permitted the minority investor to veto “enter[ing] into any business substantially different from the business engaged in by the Company as of the date of this Agreement.” *EA Engineering*, SBA No. SIZ-4973, at 3. Conversely, the provision in question here goes well beyond the power to object to a new line of business. Indeed, in addition to vetoing any new line of business, EHH also may block “any changes in the strategic direction” of TW's existing lines of business. Changes in “strategic direction” may include the establishment of new goals for TW's existing businesses, as well as new methods or plans for realizing those goals. Such matters are fundamental to operating a business, and EHH's power to block them constitutes negative control.

Lastly, I find no merit to Appellant's claim that EHH's power to exercise negative control over TW is illusory. As Appellant acknowledges, the call option in section 8.7 of TW's Operating Agreement applies only to certain subsections of section 6.5, specifically subsections (g)-(j) and (l)-(n). Notably, then, the call option does not apply to several of the subsections at issue here — particularly (b), (e), and (f) — and the negative control EHH may exert through those subsections is not illusory.

#### IV. Conclusion

Appellant has not shown clear error of fact or law in the size determination. Therefore, the appeal is DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge