

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

SIZE APPEAL OF:

GC&V Construction, LLC,

Appellant,

Appealed From
Size Determination No. 3-2018-036

SBA No. SIZ-5952

Decided: August 15, 2018

APPEARANCES

Edward T. DeLisle, Esq., Offit Kurman, P.A., Philadelphia, Pennsylvania, for GC&V Construction, LLC

Joseph A. Camardo, Jr., Esq., Camardo Law Firm, Auburn, New York, for Patriot Construction, Inc.

DECISION¹

I. Introduction and Jurisdiction

On May 30, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area III (Area Office) issued Size Determination No. 3-2018-036 concluding that GC&V Construction, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains 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 granted and the size determination is reversed.

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 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.

¹ This Decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the Decision, counsel for Appellant informed OHA it had no requested redactions. Therefore, I now issue the entire Decision for public release.

II. Background

A. Solicitation and Protest

On December 4, 2017, the U.S. Department of Veterans Affairs issued Invitation for Bids (IFB) No. VA261-17-B-0515 for renovations at the VA Northern California Healthcare System. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with an associated size standard of \$36.5 million average annual receipts. On January 25, 2018, bids were opened and Appellant was identified as the apparent awardee.

On February 1, 2018, Patriot Construction, Inc. (Patriot), an unsuccessful bidder, filed a size protest against Appellant with the CO. Patriot alleged that Appellant “does not exist as an independent company and would be totally controlled by affiliates as ostensible subcontractors.” (Protest at 1.) Appellant's officers own other companies, Patriot maintained, and these other companies will be used to perform the contract. (*Id.*) In support, Patriot averred that the street address provided on Appellant's SBA Profile is vacant, and that the email address provided there goes to alleged affiliate G&C Fab-Con, LLC (GCFC), a concern that in 2014 SBA had found was not a small business. (*Id.* at 2.) Patriot attached to its protest copies of Appellant's SBA Profile and System for Award Management (SAM) registration, as well as the size determination on GCFC. The CO added her own allegation that Appellant and GCFC share common officers, and then forwarded the protest to the Area Office for review. (Letter from D. Groves to C. Thompson (Feb. 5, 2018).)

Appellant responded to the protest and to the Area Office's request for information on February 16, 2018, and provided additional material on February 28, March 1, March 22, March 28, and May 14, 2018. Appellant acknowledged affiliation with GCFC through their common majority owner, Dr. James Carter Griffith, but denied affiliation with companies associated with minority owner Richard E. Creter or his family. In response to the allegation that its address is a vacant lot, Appellant provided the Area Office with the lease indicating that Appellant uses the property to conduct business. Appellant also explained the changes made to GCFC and to the Creter Family Trust following the December 4, 2014 size determination, and noted the differences in the way Appellant itself is organized.

Appellant provided copies of the Operating Agreements of Appellant and GCFC. Both Operating Agreements contained language naming Dr. Griffith as Managing Member, and stating that “[t]he Managing Member shall have full, exclusive and complete discretion in the management and control of the Company. . . .” (Operating Agreements at ¶¶ 1(p) and 4.01.) Both Operating Agreements further stated that “[w]ith respect to any matters requiring a decision of the Members, the Members shall vote in accordance with their respective Membership Interests.” (*Id.* at ¶ 4.01.) The Operating Agreements stated that “[a] meeting of the Members may be called at any time by any Member” and that “at a meeting of Members, the presence in person or by proxy of Members holding not less than a Majority Interest shall constitute a quorum.” (*Id.* at ¶ 6.01(a).) “In lieu of holding a meeting, the Members may vote or otherwise take action by a written instrument indicating the unanimous consent of Members.” (*Id.* at ¶ 6.01(b).)

B. The Size Determination

On May 30, 2018, the Area Office issued Size Determination No. 3-2018-036, concluding that Appellant is not a small business.

The Area Office explained that Dr. Griffith is Appellant's President and Managing Member. (Size Determination at 6.) Dr. Griffith also owns 52% of Appellant. (*Id.*) Appellant has two other Members, Richard E. Creter and Cole Vettranio, each of whom owns 24% of Appellant. The Area Office determined that Dr. Griffith controls Appellant by virtue of his majority ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

Next, the Area Office found that Dr. Griffith is President and Managing Member of GCFC and owns 51% of GCFC. (*Id.*) GCFC has four other Members: Richard E. Creter, who owns 17.5% of GCFC; Richard K. Creter (son of Richard E. Creter), who owns 17.5% of GCFC; Matthew Creter (son of Richard E. Creter), who owns 9% of GCFC; and Mr. Vettranio, who owns 5% of GCFC. (*Id.* at 6-7.) The Area Office determined that Dr. Griffith controls GCFC through his majority ownership interest. (*Id.* at 7.) Both Appellant and GCFC are controlled by Dr. Griffith, so the two companies are affiliated. (*Id.* at 15.)

The Area Office reviewed the Operating Agreements of Appellant and GCFC. Both Operating Agreements state that “[i]n lieu of holding a meeting, the Members may vote or otherwise take action by a written instrument indicating the unanimous consent of Members.” (*Id.* at 7-8, quoting Operating Agreements at ¶ 6.01(b).) The Area Office interpreted this provision to mean:

In other words, all of the Members have the power of negative control over any meeting matters since there has to be unanimous consent of all Members at a meeting, whether it be in person or by proxy. In summary, any of the Members may exercise negative control over [Appellant and GCFC].

(*Id.*)

The Area Office determined that Richard E. Creter shares an identity of interest with his sons, and that they collectively own and control several other companies. (*Id.* at 8-11.) The Area Office requested tax returns and corporate documents for these other companies, but Appellant declined to produce this information, insisting that “none of the Creter Family Member[s] firms are affiliated with either [Appellant] or GCFC and that the documents were irrelevant.” (*Id.* at 13.) The Area Office therefore drew an adverse inference that the missing information would have shown that Appellant is not a small business. (*Id.* at 13-14.) The Area Office noted that the combined average annual receipts of Appellant and GCFC do not exceed the \$36.5 million size standard. (*Id.* at 15.) The Area Office found no merit to the protest allegation that Appellant is affiliated with other concerns through the ostensible subcontractor rule. (*Id.* at 11-12, 15.)

C. Appeal

On June 13, 2018, Appellant filed the instant appeal. Appellant contends that the Area Office misinterpreted the evidence before it, and compounded these errors by misapplying the identity of interest rule. (Appeal at 1-2.)

Appellant agrees with the Area Office's findings that the Operating Agreements of both Appellant and GCFC provide that Dr. Griffith, as Managing Member and majority owner, has complete control over each company. (*Id.* at 2-4.) The Area Office erred, however, by making the contradictory finding that the Operating Agreements cede “negative control” to any Member by means of the action by written consent provision at ¶ 6.01(b). (*Id.* at 4-6.) This provision merely permits the Members of each company to take corporate action by unanimous agreement “[i]n lieu of holding a meeting.” (*Id.* at 4, quoting Operating Agreements at ¶ 6.01(b).) Appellant contends that the written consent provision “would never prevent” Dr. Griffith from controlling both companies, because while it could restrict him from acting without a meeting, the provision does not empower the minority Members “to prevent a quorum or otherwise block action” at a meeting. (*Id.* at 5, quoting 13 C.F.R. § 121.103(a)(3).) Appellant emphasizes that, according to ¶ 6.01(a) of the Operating Agreements, Dr. Griffith's presence at any meeting will constitute a quorum. Thus, “[i]f Dr. Griffith ever wished to take corporate action by written instrument, in lieu of a meeting, and the minority Members refused, he could call for a meeting and act, even if such a meeting included no one other than himself.” (*Id.*)

Turning to identity of interest, Appellant highlights that although Creter family members may share an identity of interest with one another, “the touchstone issue is control” and control is not present here. (*Id.* at 9-10, quoting *Size Appeal of INV Technologies, Inc.*, SBA No. SIZ-5818 (2017).) As minority owners, the Creter family members control neither Appellant nor its affiliate GCFC, despite the Area Office's erroneous “negative control” finding. (*Id.* at 10-11.) Indeed, the Area Office itself determined that Dr. Griffith alone controls these companies. (*Id.* at 11.) Dr. Griffith is not related to any Creter family members and, therefore, the Area Office's familial identity of interest analysis must fail. (*Id.* at 12.) Further, under the current version of the identity of interest regulation, the presumption of affiliation arises only when alleged affiliates conduct business with one another, a situation that does not exist here. (*Id.*)

Appellant contends that, because there should have been no presumption of identity of interest, clear fracture analysis is unnecessary. Nevertheless, Appellant notes that, as of January 25, 2018, the date of bid opening, Appellant shared no employees, equipment or facilities, and had no contracts with any Creter family company. (*Id.* at 12-13.) Also by then, Richard E. Creter had completely disassociated himself from all Creter management and employment positions. (*Id.* at 13.) The Area Office erred in relying on findings from earlier size investigations rather than the facts as they existed on January 25, 2018, which are that the Creter family members hold no majority interest in Appellant or in GCFC, and have no negative control over either company; nor is there any business relationship between Appellant and any Creter company. (*Id.* at 13-14.) Thus, the size determination is fundamentally flawed. (*Id.* at 14.)

As relief, Appellant requests that OHA reverse the size determination and conclude that Appellant is a small business. (*Id.* at 14.) Alternatively, Appellant requests that OHA remand the matter to the Area Office to review any business ties between the companies. (*Id.*)

D. Patriot's Response

On June 29, 2018, Patriot, the original protester, responded to the appeal. Patriot notes its response is limited since Patriot “w[as] not provided copies of the numerous documents referenced” in the size determination and appeal.² (Response at 1.) Patriot praises the size determination as “a masterful job” that thoroughly identified the relevant affiliations and correctly applied an adverse inference when Appellant did not produce essential documents. (*Id.* at 1-2.) Patriot urges OHA to uphold the size determination and deny the appeal. (*Id.* at 3.)

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 that 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 agree with Appellant that the Area Office clearly misinterpreted ¶ 6.01(b) of the Operating Agreements. As a result, the Area Office incorrectly found that minority Members could exert negative control over Appellant and GCFC, and improperly drew an adverse inference when Appellant failed to produce information about other concerns owned and controlled by minority Members, specifically the Creter family companies. The record reflects that, but for these errors, Appellant would qualify as a small business. Accordingly, the appeal must be granted and the size determination reversed.

The Area Office based its finding of negative control on ¶ 6.01(b) of the Operating Agreements, which states that “[i]n lieu of holding a meeting, the Members may vote or otherwise take action by a written instrument indicating the unanimous consent of Members.” Section II.A, *supra*. The Area Office understood this provision to mean that “all of the Members have the power of negative control over any meeting matters since there has to be unanimous consent of all Members at a meeting.” Section II.B, *supra*.

² Documents in the Area Office file are available to counsel for all parties through OHA's protective order procedure. *See* 13 C.F.R. § 134.205. OHA noted the availability of protective orders in its initial Notice and Order. (Notice and Order at 2 (June 14, 2018).)

Contrary to the Area Office's analysis, ¶ 6.01(b) does not require the unanimous consent of all Members at a meeting. Indeed, ¶ 6.01(b) does not pertain to meetings at all. Rather, this provision permits the Members, “[i]n lieu of holding a meeting,” to take action by unanimous agreement. Absent unanimous agreement, votes and decisions may still occur via the normal meeting process, which is described in the preceding paragraph of the Operating Agreements. According to the Operating Agreements, a meeting of the Members may be convened at any time, and no other Members besides Dr. Griffith, the majority owner, need attend a meeting in order to achieve a quorum. Section II.A, *supra*. Thus, ¶ 6.01(b) merely provides an alternate mechanism for actions and decisions to be made without a meeting, but does not in any way enable minority Members to block or interfere with Dr. Griffith's control over Appellant and GCFC.

Because the Area Office clearly erred in determining that minority Members could control Appellant and GCFC, it was also clear error for the Area Office to draw an adverse inference after Appellant did not produce information about other companies owned and controlled by the minority Members. As discussed above, the minority Members do not control Appellant or GCFC, whether through negative control or otherwise, so any other companies controlled by minority Members are not relevant in deciding whether Appellant is a small business. OHA will overturn an adverse inference when there is no significant connection between the challenged firm and the concern(s) from which information is requested. *See, e.g., Size Appeal of Action Services Group, Inc.*, SBA No. SIZ-5208 (2011); *Size Appeal of PRO SERVICES-Teltara Joint Venture, LLC*, SBA No. SIZ-5115, at 5 (2010) (“Because the Haas Family has no power to control [the challenged firm], the annual receipts of any Haas Family-controlled entity has no relevance to the size determination. Hence, the Area Office had no right to: (1) acquire any financial information concerning the Haas Family; or (2) take an adverse inference when it did not receive financial information concerning the Haas Family.”).

IV. Conclusion

Appellant has proven that the size determination is clearly erroneous. The Area Office misinterpreted ¶ 6.01(b) of the Operating Agreements as permitting minority Members to exert negative control over Appellant and GCFC, and improperly drew an adverse inference based on this flawed interpretation. Appellant otherwise qualifies as a small business, as the Area Office found that the average annual receipts of Appellant and GCFC do not exceed the size standard. Section II.B, *supra*. Accordingly, the appeal is GRANTED and the size determination is REVERSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge