

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

SIZE APPEAL OF:

G&C Fab-Con., LLC,

Appellant,

Appealed From  
Size Determination No. 1-SD-2018-37

SBA No. SIZ-5960

Decided: September 25, 2018

APPEARANCES

Edward T. DeLisle, Esq., Offit Kurman, P.A., Philadelphia, Pennsylvania, for G&C Fab-Con, LLC.

DECISION

I. Introduction and Jurisdiction

On July 31, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area I (Area Office) issued Size Determination No. 1-SD-2018-37 concluding that G&C Fab-Con, LLC (Appellant) is not a small business. 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 *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 received the size determination on August 1, 2018 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. Request for Size Determination

On June 19, 2018, the U.S. Department of Veterans Affairs, Center for Verification and Evaluation, requested a formal review of Appellant's size pursuant to 13 C.F.R. § 121.1001(b)(6). Appellant's size came into question because Appellant's affiliate, GC&V Construction, LLC (GC&V), had recently been found other than small in Size Determination No. 3-2018-036.

### B. The Instant Size Determination

On July 31, 2018, the Area Office issued Size Determination No. 1-SD-2018-37, concluding that Appellant is not a small business.

The Area Office found that Dr. James Carter Griffith is Appellant's President and Managing Member and that he owns 51% of Appellant. (Size Determination at 2-3.) Appellant has four other Members: Richard E. Creter, who owns 17.5% of Appellant; Richard K. Creter (son of Richard E. Creter), who owns 17.5% of Appellant; Matthew Creter (son of Richard E. Creter), who owns 9% of Appellant; and Cole Vettranio, who owns 5% of Appellant. (*Id.*) The Area Office determined that Dr. Griffith controls Appellant through his majority ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

Next, the Area Office explained that Dr. Griffith is GC&V's President and Managing Member. (*Id.* at 3.) Dr. Griffith also owns 52% of GC&V. (*Id.*) GC&V has two other Members, Richard E. Creter and Mr. Vettranio, each of whom owns 24% of GC&V. Both Appellant and GC&V are controlled by Dr. Griffith, so the two companies are affiliated. (*Id.* at 1, 3.)

The Area Office reviewed Appellant's Amended and Restated Operating Agreement (“the Operating Agreement”), dated January 4, 2017. The Operating Agreement 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. . . .” (*Id.*, quoting Operating Agreement at ¶¶ 1(p) and 4.01.) The Operating Agreement 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.*, quoting Operating Agreement at ¶ 4.01.)

The Operating Agreement stated 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.*, quoting Operating Agreement at ¶ 6.01(b).) The Area Office interpreted 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, whether it is in person or by proxy.” (*Id.*) As a result, “[t]hrough the power of negative control, Richard E. Creter (father), Richard K. Creter (son), and Matthew Creter (son) (‘Creter Family’) have the power to control [Appellant].” (*Id.* at 5.)

The Area Office found that Richard E. Creter shares an identity of interest with his sons, and that they collectively own and control several companies. (*Id.* at 4.) The combined average annual receipts of Appellant, GC&V, and the Creter family companies exceed \$36.5 million, the size standard associated with Appellant's primary industry. (*Id.* at 5.) Therefore, Appellant is not a small business.

### C. Appeal

On August 16, 2018, Appellant filed the instant appeal. Appellant highlights that, in *Size Appeal of GC&V Construction, LLC*, SBA No. SIZ-5952 (2018), OHA overturned Size

Determination No. 3-2018-036 and found that GC&V is not affiliated with the Creter family companies. (Appeal at 2.) More specifically, OHA held that GC&V's Operating Agreement did not convey negative control to minority Members. There are no significant differences between Appellant's Operating Agreement and GC&V's, Appellant asserts, so the instant case presents “nearly identical issues of fact and law.” (*Id.*) “As such, [Appellant] challenges the determination made by the Area Office in this matter and posits that the result should, and must, be identical [to *GC&V Construction*], that is, that the determination is deemed to be clearly erroneous necessitating reversal.” (*Id.*)

Appellant argues that GC&V's Operating Agreement is discussed in detail in *GC&V Construction* and is “identical in all material respects” to Appellant's Operating Agreement. (*Id.* at 3.) Both Operating Agreements contained the same language stating that “[i]n lieu of holding a meeting, the Members may vote or otherwise take action by written instrument indicating the unanimous consent of Members.” (*Id.* at 4.) OHA analyzed this provision in *GC&V Construction*, and found that it merely permits the Members of each company to take action by unanimous agreement in lieu of holding a meeting. The provision does not enable minority Members to exert negative control over the company, because Members can take action through the ordinary meeting process, and “[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.* at 5.)

Appellant insists that “none of the Creter family members have the power to control [Appellant],” so it is irrelevant to consider what other companies are controlled by the Creter family. (*Id.* at 8.) Further, the Area Office's analysis of negative control is inconsistent with its conclusion that Dr. Griffith controls Appellant. (*Id.*)

Based on *GC&V Construction*, the Area Office clearly erred in finding that Appellant's minority Members can wield negative control over Appellant. (*Id.* at 13.) OHA noted in *GC&V Construction* that the combined receipts of Appellant and GC&V (its only affiliate) do not exceed \$36.5 million. (*Id.* at 9.) Therefore, OHA should reverse the size determination and conclude that Appellant is a small business.

### 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 *Size Appeal of GC&V Construction, LLC*, SBA No. SIZ-5952 (2018) is controlling here. As Appellant observes, Appellant's Operating Agreement is identical in all material respects to GC&V's. See *GC&V Construction*, SBA No. SIZ-5952, at 2-3 (quoting Operating Agreements of Appellant and GC&V). Furthermore, *GC&V Construction* interpreted the exact language at issue here, specifically the provision at ¶ 6.01(b) stating 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.” OHA explained in *GC&V Construction* that ¶ 6.01(b) does not grant negative control to minority Members:

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. 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 [GC&V] and [Appellant].

*GC&V Construction*, SBA No. SIZ-5952, at 6 (citations omitted). Accordingly, the Area Office clearly erred in concluding that Creter family members could exert negative control over Appellant through ¶ 6.01(b) of the Operating Agreement. The Area Office did not find Appellant affiliated with the Creter family companies on any alternate grounds, and did not find that Appellant has any other affiliates besides GC&V. Section II.B, *supra*. This appeal therefore must be granted.

The only remaining question is whether the combined receipts of Appellant and its affiliate GC&V exceed the \$36.5 million size standard. Although the Area Office did not address this point in Size Determination No. 1-SD-2018-37, the record includes Appellant's tax returns, which demonstrate that Appellant's average annual receipts for the years 2015-2017 are well below \$36.5 million. GC&V was established on October 24, 2017 and has generated modest revenues since its inception, so Appellant's average annual receipts, when aggregated with those of GC&V, do not approach \$36.5 million. Thus, Appellant is a small business under a \$36.5 million size standard. This result is consistent with *GC&V Construction*, which noted that, according to Size Determination No. 3-2018-036, “the combined average annual receipts of [GC&V] and [Appellant] do not exceed the \$36.5 million size standard.” *GC&V Construction*, SBA No. SIZ-5952, at 3.

IV. Conclusion

For the above reasons, the appeal is GRANTED and Size Determination No. 1-SD-2018-37 is REVERSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge