

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

SIZE APPEAL OF:

Eagle Support Services Corporation,

Appellant,

Appealed From
Size Determination No. 3-2018-062

SBA No. SIZ-5972

Decided: November 14, 2018

APPEARANCE

J. Randolph MacPherson, Esq., Halloran & Sage LLP, Washington, D.C., for Appellant

DECISION¹

I. Introduction and Jurisdiction

On August 10, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-062, concluding that Eagle Support Services Corporation (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 dismissed in part and denied in part.

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 timely filed the appeal within fifteen days of receiving the size determination. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On August 3, 2017, the U.S. Department of the Air Force (Air Force), Air Force Reserve Command, issued Request for Proposals (RFP) No. FA6648-17-R-0006 for base operating support services at Homestead Air Reserve Base, Florida. The Contracting Officer (CO) set aside

¹ This Decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA now issues a redacted version of the decision for public release.

the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industrial Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of \$38.5 million average annual receipts. Appellant submitted its initial proposal on November 2, 2017, and its final proposal revisions on April 16, 2018. On August 20, 2018, the CO posted a notice on FedBizOpps canceling the RFP in its entirety. The CO explained that “[t]he requirements have materially changed and the solicitation no longer reflects the customer's requirements.”

B. Protest

On June 1, 2018, the Air Force announced that Appellant was the apparent awardee. An unsuccessful offeror, Phoenix Management, Inc. (PMI), filed a timely size protest, challenging Appellant's size. PMI alleged that Appellant is affiliated with a subcontractor, Maytag Aircraft Corporation (Maytag), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (Size Protest at 1, 4.) In addition, PMI contended, Appellant is located at the same address, and shares officers with, another company. (*Id.* at 2, 5.) The CO forwarded PMI's protest to the Area Office for review.

In response to the protest, Appellant acknowledged affiliation with five concerns: Talon Technical Services, LLC (Talon); Eagle Global Services, LCC (Eagle Global); Eagle Global Training & Technology, LLC (Eagle T&T); Eagle-mTX, LLC (Eagle-mTX); and Troysgate Eagle, LLC (Troysgate). (SBA Form 355, Exhibit 6.) Appellant identified each of these affiliates as a separate business entity. (*Id.*)

C. Size Determination

On August 10, 2018, the Area Office issued Size Determination No. 3-2018-062 concluding that Appellant is not a small business due to affiliation with BCUBE, Inc. (BCUBE) and other concerns. BCUBE is a wholly-owned subsidiary of a large business based in Italy. (Size Determination at 4, 8 n.1.) The Area Office further determined that Appellant is affiliated with Maytag under the ostensible subcontractor rule. (*Id.* at 9-13.)

The Area Office explained that Appellant is 51% owned by Mr. James C. Spencer, who is also Appellant's President and CEO. (*Id.* at 4.) Appellant has three other shareholders: BCUBE owns 20%; SSI-Eagle I, LLC (SSI-Eagle I) owns 16.17%; and SSI-Eagle II, LLC (SSI-Eagle II) owns 12.84%. (*Id.*) SSI-Eagle I is wholly-owned by [Individual A], and SSI-Eagle II is wholly-owned by [Individual B]. (*Id.*) [Mr. Spencer, Individual A, and Individual B] are unrelated to one another by blood, marriage, civil union or adoption. (*Id.*) Appellant's board of directors consists of [Mr. Spencer], [Individual B], [Individual C], [Individual D], and an individual appointed by BCUBE. (*Id.*) The Area Office found that Mr. Spencer has the power to control Appellant by virtue of his majority ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

Next, the Area Office determined that Appellant owns 100% of Talon, which has the same officers and directors as Appellant. Appellant therefore is affiliated with Talon. (*Id.*, citing 13 C.F.R. § 121.103(a)(1), (a)(2), (c)(1), and (e).)

The Area Office found that Mr. Spencer holds controlling interests in three other companies. Specifically, Eagle Global, Eagle T&T, and Eagle-mTX are all 49% owned by Mr. Spencer, 28% owned by BCUBE, 13.17% owned by [Individual A], and 9.83% owned by [Individual B]. (*Id.* at 4-5.) [Mr. Spencer] and [Individual B] are also the officers and directors of these concerns. (*Id.* at 5.) The Area Office found that Mr. Spencer holds a large ownership stake in Eagle Global, Eagle T&T, and Eagle-mTZ as compared with the other ownership interests. Therefore, Mr. Spencer controls Eagle Global, Eagle T&T, and Eagle-mTZ, and these three companies are affiliated with Appellant through common ownership and common management. (*Id.*) Eagle Global owns 50% of Troysgate and therefore has the power to control Troysgate. (*Id.*) As a result, Appellant is affiliated with Troysgate through Eagle Global. (*Id.*)

The Area Office next analyzed affiliation under identity of interest, 13 C.F.R. § 121.103(f), specifically common investments. The Area Office found that Mr. Spencer, [Individual A], [Individual B], and BCUBE share an identity of interest based on their common investments. (*Id.* at 5, 7-8.) In addition to their joint interest in Appellant, Mr. Spencer, [Individual A], [Individual B], and BCUBE have common investments in Eagle Global, Eagle T&T, and Eagle-mTX. In fact, the four owners collectively hold 100% of each of these companies. (*Id.* at 5.) The companies share office space, and Appellant subcontracts work to Eagle Global, Eagle T&T, Eagle-mTX, and Troysgate. Thus, their interests are not separate. (*Id.*) The Area Office reiterated that Appellant owns 100% of Talon, and Eagle Global owns 50% of Troysgate. Therefore, the Area Office concluded, the four investors have common investments in six concerns: Appellant; Talon; Eagle Global; Eagle T&T; Eagle-mTX; and Troysgate. (*Id.* at 6.)

In response to the protest, Appellant argued that Appellant does not share common management, facilities, or equipment with BCUBE, and that Appellant receives no financial, bonding, or technical assistance from BCUBE. (*Id.*) The Area Office found such arguments irrelevant to the whether there is an identity of interest between investors. (*Id.* at 7, citing *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701 (2015).) The Area Office found no basis to conclude that Appellant had rebutted the presumption of identity of interest, based on the inter-connected relationships between the investors and the companies. (*Id.* at 8.)

The Area Office also examined affiliation through negative control, defined at 13 C.F.R. § 121.103(a)(3). The Area Office explained that Appellant's bylaws provide for a board of five directors, one of which must be an outside director without a prior relationship with Appellant. (*Id.*) The outside director is [Individual C]. (*Id.*) According to Appellant's bylaws, a quorum for the transaction of business is a majority of the total number of the directors, and must include the outside director. (*Id.* at 9.) Mr. Spencer, [Individual B], and BCUBE are three of Appellant's five directors, and they share an identity of interest based on their common investments. Therefore, Mr. Spencer, [Individual B], and BCUBE can exert negative control over Appellant because they constitute a majority of Appellant's board and could prevent a quorum.

The Area Office reviewed the average annual receipts of Appellant and its affiliates. (*Id.* at 13.) The combined average annual receipts of Appellant, Talon, Eagle Global, Eagle T&T, Eagle-mTX, and Troysgate do not exceed the \$38.5 million size standard. (*Id.*) Appellant acknowledged, however, that BCUBE is a large business. (*Id.* at 14.) As a result, Appellant is not a small business due to its affiliation with BCUBE.

D. Appeal

On August 24, 2018, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in finding an identity of interest between Mr. Spencer and BCUBE. (Appeal at 2-3.) Further, the Area Office should have found that BCUBE cannot control Appellant due to a Security Control Agreement between Appellant, BCUBE, and the U.S. Department of Defense. (*Id.*) Appellant also challenges the conclusion that Appellant is affiliated with Maytag under the ostensible subcontractor rule. (*Id.* at 3.)

Appellant contends that the Area Office incorrectly determined that Mr. Spencer and BCUBE have six common investments. (*Id.* at 13.) On the contrary, Appellant maintains, Mr. Spencer and BCUBE share common investments only in Appellant and Eagle Global. (*Id.*) Appellant reasons that Eagle Global, Eagle T&T, and Eagle-mTX “file a consolidated tax return and thus for investment and revenue purposes are a single entity.” (*Id.* at 14.) Appellant and Talon similarly should be treated as only one investment. (*Id.* at 13.) In addition, BCUBE does not invest directly in Troysgate, but instead indirectly holds an interest through its 28% stake in Eagle Global. (*Id.* at 14.) Appellant highlights that there is no evidence to show that BCUBE actively participates in, or has control over the day-to-day operations of, Appellant, Talon, Eagle Global, Eagle T&T, Eagle-mTX, or Troysgate. (*Id.*)

Appellant argues that the Security Control Agreement restricts BCUBE and its designated board member from accessing classified and other sensitive information, and thus limits BCUBE from participating in Appellant's business activities. (*Id.*) Appellant also notes that SBA's Acting Director of Government Contracting (AD/GC) recently denied a status protest alleging that Appellant is not an SDVO SBC. (*Id.* at 15.) In reaching this decision, the AD/GC found that Mr. Spencer, a service-disabled veteran, controls Appellant. (*Id.*)

Appellant contends that OHA has found affiliation through common investments only where the parties whose shares are to be aggregated have common investments or ties, beyond their interests in the challenged concern. (*Id.* at 15, citing *Size Appeal of Cypress Pharmaceutical, Inc.*, SBA No. SIZ-5078, at 6 (2009) (PFR).) In addition, three common investments are insufficient to justify affiliation through common investments. (*Id.*, citing *Size Appeal of SolarCity Corporation*, SBA No. SIZ-5257, at 8 (2011).) The common investments must be substantial in number or in total value in order to conclude that there is an identity of interest between investors. (*Id.*, citing *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 11 (2015).) Appellant reiterates its view that, although BCUBE is interested in Appellant's success, BCUBE does not share an identity of interest with Mr. Spencer. Indeed, the Area Office itself found that Mr. Spencer alone controls Appellant. Further, Appellant files consolidated tax returns with Talon, and Eagle Global files consolidated tax returns with Eagle T&T and Eagle-mTX, so there are only two joint investments, not six. (*Id.*)

Appellant contends that the Area Office also incorrectly concluded that BCUBE can wield negative control over Appellant. (*Id.* at 17.) There is no identity of interest between Mr. Spencer and BCUBE, so the lone director appointed by BCUBE could not prevent a quorum or otherwise interfere with Appellant's operations. (*Id.*)

E. Show Cause Order

On October 30, 2018, after learning that the underlying RFP had been cancelled, OHA ordered Appellant to show cause why the portion of its appeal pertaining to the ostensible subcontractor rule should not be dismissed as moot. OHA explained that, under OHA precedent, “[t]he ostensible subcontractor rule is a contract-specific issue, which is rendered moot by cancellation or termination of the underlying procurement.” *Size Appeal of Velocity Training, LLC*, SBA No. SIZ-5916, at 2 (2018); *see also Size Appeal of Bridgeway Professionals, Inc.*, SBA No. SIZ-5827, at 2 (2017); *Size Appeal of Saint George Indus., LLC*, SBA No. SIZ-5440, at 7 (2013). On November 2, 2018, Appellant responded to OHA's order and acknowledged that the ostensible subcontractor issue is now moot. Accordingly, because the procurement at issue here been cancelled, the portion of Appellant's appeal pertaining to the ostensible subcontractor rule is DISMISSED.

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

The key issue presented here is whether the Area Office correctly found that Appellant is affiliated with BCUBE through identity of interest, 13 C.F.R. § 121.103(f). More specifically, the Area Office determined that Appellant's principal, Mr. Spencer, shares an identity of interest with BCUBE due to their multiple common investments. Section II.C, *supra*. The issue is significant because the combined receipts of Appellant and its acknowledged affiliates do not exceed the applicable size standard. *Id.* Thus, Appellant apparently would qualify as a small business if not affiliated with BCUBE.

In seeking to overturn the size determination, Appellant argues that, contrary to the Area Office's analysis, Mr. Spencer and BCUBE do not have six joint investments. Rather, Appellant asserts, many of the joint investments are in concerns that file consolidated tax returns, and, in Appellant's view, such concerns should be treated as a single investment. For this reason, Appellant maintains, Mr. Spencer and BCUBE actually share only two investments, not six. Appellant further argues that two common investments are insufficient, as a matter of law, to create an identity of interest.

I find no merit to Appellant's arguments. Each of the concerns in question (*i.e.*, Appellant, Talon, Eagle Global, Eagle T&T, Eagle-mTX, and Troysgate) is a separate

corporation or LLC, Appellant likewise identified the six concerns as separate business entities in its sworn SBA Form 355. Section II.B, *supra*. Thus, the Area Office could reasonably find that investments in these concerns represent six common investments. Moreover, Appellant cites no authority in SBA regulations or in OHA case law for treating concerns that file consolidated tax returns as one unified entity. While this may be true for tax purposes, it is well-settled that IRS rules “are inapposite to size cases”. *Size Appeal of TLS Contracting, Inc.*, SBA No. SIZ-5527, at 2 (2014) (quoting *Size Appeal of Phillips Nat'l, Inc.*, SBA No. SIZ-4332, at 6 (1998)). I therefore see no basis to construe the six investments here as only two larger investments.

It is worth noting that, even if OHA were to accept the premise that Mr. Spencer and BCUBE share only two common investments, it does not follow that this necessarily would be insufficient to find an identity of interest. In *Size Appeal of W. Harris, Government Services Contractor, Inc.*, SBA No. SIZ-5717 (2016), OHA affirmed a determination of identity of interest based on two common investments. OHA explained that the “[t]he common investments of the persons must be substantial, either in number of individual investments, or in total value, in order to find that there is an identity of interest between the investors.” *W. Harris*, SBA No. SIZ-5717, at 5 (quoting *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 11 (2015)). Two common investments may be a substantial number depending on the size of the investors' portfolios. *Id.* at 6. Further, even if not substantial in number, the two investments in *W. Harris* were substantial in value, and thus supported the determination of identity of interest through common investments. *Id.* OHA noted that the investors together held controlling ownership interests in the two investments. *Id.* at 7. In addition, “[t]he fact that prior cases generally have involved more than two common investments does not establish that two common investments cannot create an identity of interest.” *Id.*

Similarly, in the instant case, the Area Office found that Mr. Spencer and BCUBE jointly invest in six concerns, and Appellant has not persuasively explained why these six common investments should be treated as only two. Moreover, regardless of how the investments are counted, Appellant has not demonstrated that the investments are not substantial in number or in value. If anything, combining six investments into two larger investments would logically make those two investments even more substantial in value. Nor does Appellant dispute that Mr. Spencer and BCUBE together hold controlling interests in each of the six concerns. Based on this record, then, the Area Office reasonably concluded that Mr. Spencer and BCUBE share an identity of interest based on their common investments. Appellant therefore is affiliated with BCUBE through identity of interest.

I need not decide whether Appellant also is affiliated with BCUBE through negative control, because, as discussed above, Mr. Spencer and BCUBE share an identity of interest, and Appellant is not a small business due to affiliation with BCUBE. *E.g.*, *W. Harris*, SBA No. SIZ-5717, at 8 (declining to rule on issues that were “immaterial to the outcome of this case”); *Size Appeal of BR Constr. LLC*, SBA No. SIZ-5303, at 9 (2011).

IV. Conclusion

For the above reasons, the portion of the appeal pertaining to the ostensible subcontractor rule is DISMISSED as moot. The appeal otherwise is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge