United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Darton Innovative Technologies, Inc., Appellant, Appealed From Size Determination No. 04-2020-044	SBA No. SIZ-6085 Decided: December 10, 2020

APPEARANCES

Michelle F. Kantor, Esq., William J. Beckley, Esq., McDonald Hopkins, LLC, Chicago, Illinois, for Appellant

J. Bradley Reaves, Esq., Beth V. McMahon, Esq., Paul Hawkins, Esq., ReavesColey, PLLC, for MilSup, LLC

DECISION[1]

I. Introduction and Jurisdiction

On October 20, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2020-044 finding that Darton Innovative Technologies, Inc. (Appellant) is not a small business under the $30 million annual receipts size standard for North American Industry Classification System (NAICS) code 611512 (Flight Training). Appellant maintains 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 fifteen days of 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

[1] This decision was originally 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 no requests for redactions. Therefore, I now issue the entire decision for public release.

A. Solicitation and Protest

On February 18, 2020, the United Stated Air Force issued Solicitation No. FA489020R0006 for RC/OC/WC-135 and E-4B Contract Aircrew Training (CAT) and Courseware Development (CWD). The Contracting Officer (CO) set the procurement aside for Service Disabled Veteran Owned Small Business Concerns (SDVO SBCs) and designated North American Industry Classification System (NAICS) code 611512, Flight Training, with a corresponding $30 million annual receipts size standard as the appropriate code. Proposals were due on March 19, 2020.

The CO notified unsuccessful offerors that Appellant was the apparent successful offeror on September 9, 2020. On September 16, 2020, MilSup, LLC (MilSup) filed a protest with the CO alleging Appellant was affiliated with Sonoran Technology and Professional Services LLC (Sonoran). First, MilSup alleged Appellant was affiliated with Sonoran under the identity of interest rule because all of Appellant's revenue is derived from subcontracts it has received from Sonoran. Second, because Appellant proposed Sonoran as its subcontractor on this procurement, Appellant was affiliated with Sonoran under the ostensible subcontractor rule. The CO subsequently forwarded the protest to the Area Office for review.

B. Size Determination

On October 20, 2020, the Area Office issued Size Determination No. 04-2020-044 finding that Appellant is other than small under the applicable size standard. (Size Determination, at 6.)

First, the Area Office found that 100% of Appellant's receipts for the last three fiscal years were received from Sonoran. (*Id.*, at 2.) The Area Office further noted:

> [Appellant] was incorporated in 2010, registered in the System for Award Management in 2012, and has been a subcontractor on the incumbent contract since 2015. [Appellant] has argued that it was a shell company until 2015 and did not file tax returns until that year. However, [Appellant] has been operating since 2010 and been active as a subcontractor on a federal prime contract since 2015, thus [Appellant] cannot convincingly claim that it has been "in business for a short amount of time."

(*Id.*)

The Area Office thus found that the sole source of Appellant's receipts is its subcontracts with Sonoran. Therefore, the Area Office determined that Appellant was affiliated with Sonoran under the identity of interest rule due to economic dependence. (*Id.*, at 2-3.) The Area Office further determined that Appellant was not affiliated with Sonoran under the ostensible subcontractor rule. (*Id.*, at 6.) Accordingly, because Sonoran is an other than small business, the Area Office determined that Appellant was other than small.

C. Appeal Petition

On November 4, 2020, Appellant filed the instant appeal. Appellant argues the Area Office committed clear error, because it failed to properly apply the 70% rule in the identity of interest regulation. (Appeal, at 5.) Appellant concedes that its sole source of revenue is its subcontract with Sonoran. This is not a case where the two firms have entered into a series of contracts over the years. Rather, Sonoran received this contract five years ago and awarded the subcontract to Appellant. (*Id.*) The Area Office failed to consider Appellant's arguments which rebutted the presumption of affiliation. The regulation provides that SBA *may* make the presumption firms are affiliated if receives more than 70% of its receipts from the other but it does not *require* it. The presumption, however, may be rebutted by a showing that despite the contractual relations with another concern, the challenged concern is not solely dependent upon that other concern, "such as" where the concern has been in business for only a short time. The phrase "such as" opens the possibility of other ways of rebutting the presumption. (*Id.*, at 6, citing 13 C.F.R. § 121.103(f)(2).)

Appellant asserts the Area Office did not explain why it chose to make the presumption, but merely invoked the rule rigidly without disclosing the reasons it did not take any other evidence into consideration as required by the rule. A size determination should not be unclear and should leave no doubt as to the reasons for finding affiliation. (*Id.*, at 6-7, citing *Size Appeal of Atl. Diving Supply, Inc*. SBA No. SIZ-6005 (2019).) Appellant maintains the Area Office incorrectly presumed the amount of time a firm has been in business is the only way the rebut the presumption. The use of the language "such as" reflects that the list that follows is not exclusive. (*Id.*, at 8-9.) The preamble to the rule states that firms should be able to provide any arguments and evidence they believe demonstrates that no affiliation should be found. (*Id.*, at 9, citing 81 Fed. Reg. 34243, 34252 (May 31, 2016).)

Further, in promulgating the rule SBA did not want to adversely impact start-ups or a firm which operates in a unique industry. (*Id.*) Appellant asserts the Area Office failed to consider its argument that it operates in a unique industry. This contract is Air Force's Air Combat Command's largest and most complex. There are only 33 of the aircraft in the world, and the only place they are based is Offutt Air Force Base. The aircraft and their missions are highly specialized and unique. Darton's owners have spent their careers flying these aircraft and building the training programs in the contract. Appellant is providing specialized services and its owners have a unique skill set and expertise. Appellant provides mission critical services through training of crew and development of systems for highly classified aircraft involved in intelligence, reconnaissance, and surveillance. This unique subset requires live flying and top-secret training of foreign nationals. It takes years to get the clearances required, and further years to get the experience required to perform this contract. This is not merely a unique industry, but a unique subset of a unique industry. (*Id.*, at 10-12.)

Appellant maintains this industry is especially unique to small business, as there are obvious barriers to entry. Only 17.24% of awards under this NAICS code are made to small business, and only 0.27% to SDVOSB companies. (*Id.*, at 13.)

Appellant further asserts that it and Sonoran have no common ownership, no common management, have undertaken no joint ventures together, do not provide loans to each other, do not share offices, equipment or other resources, do not share employees, none of the employees of each firm have ever worked for the other. (*Id.*, at 14-15.) Appellant points to the Area Office's analysis that it had complied with the ostensible subcontractor rule as evidence of its independence from Sonoran. (*Id.*, at 15-16.)

Finally, Appellant points to the most recent revision of 13 C.F.R. § 121.103(f)(2), under which it claims it would not be found affiliated. Appellant argues this revised rule clarifies the original intent behind the original rule, and that OHA should apply it here, despite it not being in effect at the time of Appellant's certification that it was small. (*Id.*, at 16-17, citing 85 Fed. Reg. 66146, 66147, 66179 (October 16, 2020).)

Appellant seeks to supplement the record. Appellant moves to admit fact sheets relating to the aircraft, a declaration by its President, a declaration by Sonoran's Managing Member, a copy of the subcontract between Appellant and Sonoran, and copies of the preamble for the current version of 13 C.F.R. § 121.103(f) and of the preamble and final rule for the most recent version of 13 C.F.R. § 121.103(f). (Motion to Supplement, Nov. 4, 2020.)

D. MilSup's Response

On November 18, 2020, MilSup responded to the Appeal. MilSup emphasizes at the beginning of its Response, and repeatedly throughout it, that 100% of Appellant revenues come from Sonoran. (Response, at 1.) A firm economically dependent upon another firm by definition shares interest with the second firm. (*Id.*, at 5, citing *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306 (2011).) Where the great majority of firm's earnings are derived from another firm, the latter firm has the power to control the former. (*Id.*, citing *Size Appeal of Metropolitan Area Contractors*, SBA No. SIZ-4229 (1996).) This alone is enough to establish affiliation, and it is immaterial whether there are any additional ties. (*Id.*, citing *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267 (2011).) While the regulation creates a presumption of affiliation, MilSup maintains it has been interpreted strictly, and has only been rebutted where the firm in question was newly established or had clearly cut its ties to the firm which had been the source of its income. (*Id.*, at 6, citing *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011) and *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5186 (2011).) Once heavy economic dependence is shown, OHA has seldom if ever found the presumption rebutted. In cases where a firm was dependent upon another firm for 80% of its revenue, or for 92%, OHA found the presumption was not rebutted. (*Id.*, at 6-7, citing *Eagle Consulting*, and *Size Appeal of Incisive Technology, Inc.*, SBA No. SIZ-5122 (2010).)

MilSup denies that the Area Office was unclear in its rationale. The Area Office made clear that it was finding Appellant affiliated with Sonoran through economic dependence because it has been dependent on Sonoran for 100% of its revenue. (*Id.*, at 6-8.) MilSup further asserts the Area Office properly considered Appellant's arguments when making the size determination. Just because the Area Office does not discuss every piece of evidence in detail does not mean it failed to review or consider the evidence. (*Id.*, at 10, citing *Size Appeal of iGov Techs, Inc.*, SBA No. SIZ-5359 (2012).)

MilSup dismisses Appellant's "unique industry" argument and points out there is no case law supporting it. Further, the services being procured here are contract aircrew training/courseware development including aviation related training, contract management and course development. These services are provided across all types of aircraft throughout the U.S. military. MilSup further asserts Appellant's claims about the barriers to entry in its field are anecdotal and inaccurate (*Id.*, at 10-13.)

The fact that there are no other ties between Appellant and Sonoran is irrelevant, the 100% dependence upon Sonoran for revenue is enough to support a finding of affiliation. The fact the two firms were not found affiliated under the ostensible subcontractor rule for this procurement does not alter the general affiliation found under economic dependence. (*Id.*, at 13-15.) Finally, the newly published revision to the 70% rule is not relevant here, because the instant size determination was concluded before the effective date. (*Id.*, at 15-17.)

MilSup opposes Appellant's Motion to Supplement the Record. MilSup argues the proffered documents could have been produced at the protest level. (Response to Motion to Supplement, Nov. 18, 2020.)

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. Threshold Issues

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

Appellant seeks to introduce evidence that was not available at the time of the size review. OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. E.g., *Size Appeal of Maximum*

Demolition, Inc., SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review.").

Therefore, I DENY Appellant's motion to supplement the record, and EXCLUDE its proffered evidence from the record. This does not apply to Appellant's proffered excerpts from the Federal Register, as these are legal authority, not evidence.

C. Analysis

Affiliation may arise between concerns based upon an identity of economic interest. 13 C.F.R. § 121.103(f). There is a rebuttable presumption of identity of interest based upon economic dependence if the challenged concern derives 70% or more of its receipts from another concern over the three previous fiscal years. 13 C.F.R. § 121.103(f)(2). A firm which is economically dependent upon another firm by definition shares interest with the second firm. *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 15 (2011). Where the great majority of firm's earnings are derived from another firm, the latter firm has the power to control the former. *Size Appeal of Metropolitan Area Contractors*, SBA No. SIZ-4229, at 6 (1996). A contractual relationship between two firms with one heavily dependent for its revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms. *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 4 (2011); *Size Appeal of Incisive Tech., Inc.*, SBA No. SIZ-5122, at 4 (2010); *Size Appeal of Core Recoveries, LLC*, SBA No. SIZ-5723, at 5 (2016).

Once heavy economic dependence is shown, OHA has seldom if ever found the presumption rebutted. The challenged concern must show it is no longer dependent upon its alleged affiliate. Where there is such heavy dependence during the three years preceding certification, the challenged firm must demonstrate it is no longer economically dependent upon its alleged affiliate, and the alleged affiliate no longer has the power to control it. *Core Recoveries, LLC*, SBA No. SIZ-5723, at 5 (2016). In cases where a firm was dependent upon another firm for 80% of its revenue, or for 92%, OHA found the presumption was not rebutted. *Eagle Consulting* and *Incisive Tech., Inc.*, at 4.

Here, Appellant is, and has been for approximately five years, dependent for 100% of its revenue on its subcontract with Sonoran. There is nothing in the record to show any break with Sonoran, indeed, Sonoran will be subcontracting with Appellant on this procurement.

Appellant's argument the Area Office failed to explain its decision is meritless. The fact that Appellant is wholly dependent upon Sonoran for its revenue and is not taking any steps to separate itself, is more than enough to establish affiliation through identity of interest due to economic dependence.

The regulation does provide that:

> This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business

> for a short amount of time and has only been able to secure a limited number of contracts.

13 C.F.R. § 121.103(f)(2)(i).

Accordingly, the Area Office correctly noted that Appellant had not been in business for a short period of time, and therefore had not rebutted the presumption in the manner provided for in the regulation. Appellant does not dispute this, but argues that the words "such as" in the regulation leave open the possibility of other ways to rebut the presumption, and the Area Office erred in not finding one of them for Appellant. However, Appellant can point to no support in the regulation or the case law for any way to rebut the presumption other than showing that the concern had been in business a short time or showing a break with Sonoran, which Appellant cannot do. Appellant points to the phrase in the preamble to the rule: "SBA does not want this new rule to negatively impact start-ups or any other company that operate in a unique industry." 81 Fed. Reg. 34243, 34252 (May 31, 2016). However, beyond this phrase in the preamble, Appellant can point to nothing in the regulation or case law which supports the use of "unique industry" to rebut the presumption that Appellant is economically dependent upon a firm which provides 100% of its revenue.

Appellant cannot establish that the Area Office erred in drawing the presumption that Appellant was economically dependent upon Sonoran, a firm which provides 100% of its revenue.

Appellant's attempt to rely on a recent revision of the regulation is meritless. The effective date of this regulation is November 16, 2020, and therefore it is not applicable to this case. 85 Fed. Reg. 66146 (October 16, 2020).

Accordingly, I conclude that Appellant has failed to establish that the size determination was based on any error of fact or law.

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).

For CHRISTOPHER HOLLEMAN
Administrative Judge