

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

SIZE APPEAL OF:

Portacool, LLC,

Appellant,

Appealed From
Size Determination No. 05-2023-025

SBA No. SIZ-6251

Decided: October 24, 2023

APPEARANCES

Seth J. Moen, Esq., Tiffany S. Beerman, Esq., Dvorak Law Group, LLC, Omaha, Nebraska, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On August 17, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2023-025, concluding that Portacool, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. The Area Office found that Appellant did not adequately respond to the Area Office's requests for information, and therefore drew an adverse inference that the missing information would have shown that Appellant is not small. On appeal, Appellant contends that the adverse inference was improper, and urges that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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 15 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.

¹ This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. After receiving and considering one or more requests for redactions, OHA now issues this redacted decision for public release.

II. Background

A. The Solicitation

On September 1, 2022, the Defense Logistics Agency (DLA) issued Request for Quotations (RFQ) No. SPE8E9-22-T-4435 for evaporative coolers. (RFQ at 5.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 333415, Air Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing, with a corresponding size standard of 1,250 employees. (*Id.* at 2.) Quotations were due September 12, 2022. (*Id.* at 1.) Appellant and Portable Air Group, LLC (PAG) submitted timely quotations. On May 25, 2023, the CO announced that Appellant was the apparent awardee.

B. Protest and Area Office Proceedings

On May 31, 2023, PAG filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant is not small because Appellant was acquired in April 2012 by [a large business]. The CO forwarded the protest to the Area Office for review.

On July 19, 2023, the Area Office notified Appellant of the protest and instructed Appellant to provide “[a] response to each of the allegations in the protest,” a completed SBA Form 355, and other supporting documents. (Letter from M. Fagley to [XXXX] (July 19, 2023), at 1-2 (emphasis in original).) The Area Office cautioned that “[i]f you fail to submit the information within the specified time or obtain an extension, [the Area Office] will determine the firm to be ‘other than small.’” (*Id.* at 2.)

On July 27, 2023, Appellant submitted various documents to the Area Office, including: a “Certificate of Amendment” reflecting a name change from “Port-A-Cool, L.L.C.” to “Portacool, LLC,” dated October 2014; Appellant's Second Amended and Restated Limited Liability Company Agreement (LLC Agreement), effective May 1, 2012; a Certificate of Amended Registration for [Company 1], dated August 2014; a calculation worksheet indicating that Appellant had an average of 130 employees over the period from July 2021 to July 2023; a document entitled “Portacool Group Entity Structure 2211,” dated November 28, 2022; and a partially-completed SBA Form 355, signed by Appellant's Director of Human Resources, [XXXX], on July 27, 2023.

Appellant's LLC Agreement indicates that [XXXX], through a U.S. subsidiary, [XXXX], “acquired substantially all of the membership interest” in Appellant pursuant to a “Membership Interest Purchase Agreement” in April 2012. The LLC Agreement identifies [XXXX] as Appellant's sole Member with a 100% ownership interest. (LLC Agreement, § 3.1 and Exh. A.) The LLC Agreement stipulates that “[t]he business and affairs of the Company shall be managed under the direction of the Board,” who are elected by the Member(s). (*Id.* §§ 6.1 and 6.2.) The Board initially is comprised of two individuals, [XXXXXXXXXX]. (*Id.*, § 6.2(b).) “A majority of the board” is needed to establish a quorum for Board meetings. (*Id.*, § 6.4(b).) The officers, including Appellant's President and Vice President, “have the authority to take actions and

execute and deliver documents to carry on the ordinary business and affairs of the Company to the extent authorized by the Board.” (*Id.* § 6.6(a).)

The Bylaws of [XXXX] state that “[t]he property and business of the corporation shall be managed by or under the direction of its board of directors.” (Bylaws, Art. III § 2.) [XXXX's] initial Board consists of “two (2) directors” and “the directors shall be elected at the annual meeting of stockholders.” (*Id.*, Art. III § 1.) “A majority of the whole board” is needed to establish a quorum. (*Id.*, Art. III § 8.) With regard to decisions of the Board, “[t]he act of the majority of the directors present at any meeting at which there is a quorum shall be the act of the board of directors.” (*Id.*)

According to the “Portacool Group Entity Structure 2211” document:

[REDACTED]

In its SBA Form 355, Appellant represented that it is an LLC, established on October 10, 2006. (SBA Form 355 at 3.) In response to Question 4 regarding its ownership structure, Appellant stated that it is 100% owned by [Company 1]. (*Id.* at 4.) Appellant did not disclose further information about its ownership structure beyond stating that it is owned by [Company 1], notwithstanding the instructions on the form that:

If the [concern] is owned by one or more entities (i.e., not individuals), provide the names of all owners of the entities and their percentage of ownership. This information must be provided for owners of all entities until the [concern] identifies the ultimate owners who are natural persons.

(*Id.*) In response to Question 6 regarding the members of its Board of Managers, Appellant listed [XXXX]. (*Id.*) In response to Part IV regarding acknowledged affiliates (domestic and foreign), Appellant identified [Company 1] as its sole acknowledged affiliate. (*Id.* at 6.) Appellant did not answer Question 13(b) about the “owners, partners, directors, members, and principal stockholders of each” acknowledged affiliate. (*Id.*)

On August 7, 2023, after reviewing Appellant's document submission, the Area Office instructed that Appellant respond to the protest allegations; to explain its relationship with all alleged affiliates, specifically [XXXX]; to provide a new or revised SBA Form 355 that identifies “any and all affiliates up to individuals that own the firms that own [Appellant]”; and to disclose any other concerns that may be affiliated with Appellant through common management. (E-mail from M. Fagley to [XXXX] (Aug. 7, 2023).) The Area Office specifically demanded the following eight items from Appellant:

- (1) A response to *each* of the allegations in the protest;
- (2) Completed SBA Form 355 from [Appellant]
- (3) A copy of any teaming agreements associated with the listed potential affiliates;

- (4) An [e]xplanation of the relationship between all affiliates, both present and past;
- (5) A list of any subcontractors and what product[s] or services will be subcontracted to each;
- (6) A copy of organizational documents (i.e., Articles of Organization and Operating Agreement or Bylaws) for [Appellant] and all potential affiliates;
- (7) If [Appellant] is not the manufacturer [of the evaporative coolers], an explanation of [Appellant's] compliance with each of the four elements of the manufacturer rule in 13 CFR 121.406(b) is required; [and]
- (8) Completed employee calculation worksheet for [Appellant] and all of the potential affiliates, each affiliate will need to prepare a [worksheet].

(*Id.*) The Area Office instructed that Appellant must submit all requested information by 3PM MST on August 9, 2023, and warned that failure to produce the information, or the submission of “incomplete information,” could result in an adverse inference under 13 C.F.R. § 121.1008(d).

(*Id.*) In a separate e-mail that same day, the Area Office noted that, based on the Area Office's own research into Appellant's corporate structure, Appellant could have as many as “192 potential other affiliates.” (E-mail from M. Fagley to [XXXX] (Aug. 7, 2023).)

Appellant requested an extension of time until August 14, 2023 to respond to the Area Office, which the Area Office granted. On August 14, 2023, Appellant transmitted several e-mails to the Area Office. With regard to the Area Office's request for a response to the protest allegations, Appellant stated:

We believe the only allegation is that [Appellant] is too big to qualify as a [small business] because [XXXX] has 1,285 employees. [XXXX] was the former owner of [XXXX] but [Individual 1] that owns [XXXX] has shares of stock ([XX]%) with [XXXX] and is a non-executive Chairman on the Administrative Board. [XXXXXXXXXXXXXXXXXXXX]. [Individual 1] [o]wns [XXXX] though that also owns [XXXX] and previously [XXXX]. I am not sure if [XXXX] or [XXXX] are affiliates but I did include their total employee count on the entity structure. [XXXX] is the only company other than [Appellant] that has [U.S.] employees, and their total is 23. Not sure if you total the employees from [XXXX] down but if they are included it is still an [average] less than 600.

(E-mail from [XXXX] to M. Fagley (Aug. 14, 2023) (emphasis in original).) In a separate e-mail, Appellant claimed that “[Appellant], [XXXX], [XXXX] nor [Individual 1] have anything to do with [XXXX] and we are not sure why the complainant brought it up.” (E-mail from [XXXX] to M. Fagley (Aug. 14, 2023).)

The Area Office responded that, according to documentation already produced by Appellant, [XXXX] acquired a [XX]% ownership interest in Appellant in April 2012; as a result, “there is clearly a direct relationship between [Appellant] and [XXXX].” (E-mail from M.

(E-mail from [XXXX] to [XXXX] (Aug. 15, 2023).) On August 15, 2023 at 12:04PM, Appellant e-mailed the Area Office, forwarding its correspondence with [XXXX]. The Area Office responded that the size review had already been completed “based on the information that was provided as of [] yesterday's deadline.” (E-mail from M. Fagley to [XXXX] (Aug. 15, 2023).)

C. Size Determination

On August 17, 2023, the Area Office issued Size Determination No. 05-2023-025, concluding that Appellant is not a small business. The Area Office found that Appellant did not adequately respond to the Area Office's requests for information posed on July 19, 2023, August 7, 2023, and August 14, 2023, and therefore drew an adverse inference that the missing information would have shown that Appellant is not small. (Size Determination at 4.)

Based on the information submitted by Appellant, the Area Office found that Appellant is an LLC based in the state of Delaware. (*Id.* at 3.) Appellant claimed that it is 100% owned by [Company 1]. (*Id.*) However, Appellant did not disclose the owners of [Company 1] nor identify other potential affiliates. (*Id.*)

The Area Office noted that, while Appellant produced some documents in response to the protest, Appellant failed to coherently respond to the protest allegations or to explain its relationship with [XXXX]. (*Id.* at 2.) Appellant's SBA Form 355s were “incomplete” because Appellant did not include “all affiliates, the individuals who own the firms, and those who own parent companies affiliated with [Appellant].” (*Id.*) The Area Office found that Appellant also “did not explain [its] compliance with 13 [C.F.R.] § 121.406(b),” and did not provide “a full 24-month [employee] calculation worksheet for all affiliates.” (*Id.*) Appellant's proffered documents lacked the necessary detail for the Area Office to determine “who ultimately owned and controlled” Appellant. (*Id.* at 3.) Additionally, the Area Office's own research “identified several other potential affiliates,” which Appellant neither addressed nor acknowledged. (*Id.*)

The Area Office reviewed the chronology of its requests for information. After Appellant failed to completely respond to the Area Office's July 19, 2023 letter, the Area Office directed Appellant to produce additional information by August 14, 2023. (*Id.*) In conjunction with these requests, the Area Office repeatedly warned that failure to produce the requested information, or submission of “incomplete information,” could result in an adverse inference under 13 C.F.R. § 121.1008(d). (*Id.*)

Appellant eventually provided “a group entity structure” on August 14, 2023, but Appellant failed to disclose the “full scope of the ownership on the SBA Form 355” and did not provide “24-month employee calculations for all affiliates,” such as [XXXX]. (*Id.* at 4.) Appellant never clearly explained its relationship with [XXXX] and [XXXX]. (*Id.*) In addition, although Appellant suggested that it ultimately is owned by [Individual 1], Appellant did not identify “what other entities [Individual 1] owns” or controls. (*Id.* at 4-5.)

D. Appeal

On August 31, 2023, Appellant appealed Size Determination No. 05-2023-025 to OHA. Appellant contends that the size determination is erroneous and should be reversed. (Appeal at 4.)

Appellant maintains that the Area Office improperly drew an adverse inference because Appellant “provided all information and documentation to prove that it was a small business.” (*Id.* at 5.) Appellant complains that a chart identifying other potential affiliates of Appellant, which the Area Office provided to Appellant on August 7, 2023, “did not even include [XXXX].” (*Id.*) Further, the Area Office requested “additional documentation only **after** the deadline for [Appellant] to respond had expired.” (*Id.*, emphasis Appellant’s.) The Area Office’s requests, in any event, were “unduly burdensome” and not relevant to determining Appellant’s size. (*Id.*)

Appellant attacks the size determination on two principal grounds. (*Id.* at 7.) First, Appellant’s alleged affiliates had “a total of four employees at the time of bid.” (*Id.* at 8.) Appellant reasons:

[REDACTED]

(*Id.*)

Second, irrespective of their ownership interests, none of the above-referenced entities have any power to control Appellant. In Appellant’s view, “even [Appellant’s] owner, [Company 1], does **not** have the power to control it.” (*Id.* at 8 (emphasis Appellant’s.) Appellant contends that its LLC Agreement “makes clear that full control of [Appellant] rests with [Appellant’s] Board of [Managers].” (*Id.*) Because Appellant is controlled by its Board, the Area Office “went beyond the scope of affiliation rules” by requesting information about “*other* companies owned by [Individual 1].” (*Id.* at 9 (emphasis Appellant’s.) Furthermore, the Area Office’s claim that Appellant could have as many as 192 additional potential affiliates based the Area Office’s research is “patently inaccurate.” (*Id.*) Appellant asserts that “the only possible affiliates” of Appellant are [Company 1], [XXXX], and [XXXX]. (*Id.* at 10.) Apart from these three entities, “[n]o other entity or concern exercises control over [Appellant], nor does [Appellant] exercise control over any other entity or concern,” and Appellant “presented no evidence suggesting that it was dependent on or depended on by any other entity or concern.” (*Id.*) Contrary to the Area Office’s finding that Appellant did not clearly address its relationship with [XXXX], Appellant indicated that it had “never” severed ties with [XXXX]. (*Id.*) Rather, the proffered Certificate of Amended Registration shows that [XXXX] was renamed [Company 1]. (*Id.*) Appellant, thus, “did not need to explain any severance with [XXXX].” (*Id.*)

Appellant lastly argues that it “does not share common management with other business entities,” because any such business entities “do not primarily operate in the United States.” (*Id.* at 12.) Referring to the entity structure diagrams Appellant provided to the Area Office, Appellant contends that only two of the entities are based in the United States and the rest are

overseas entities. (*Id.*) Accordingly, Appellant did not need to submit documentation regarding other entities controlled by [Individual 1]. (*Id.* at 13.)

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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

SBA regulations stipulate that, when a concern's small business status is protested, “[t]he concern whose size is under consideration has the burden of establishing its small business size.” 13 C.F.R. § 121.1009(c). The challenged firm must produce a “completed SBA Form 355” together with “its answers to the allegations contained in the protest” and “any supporting material.” *Id.* § 121.1008(c). Furthermore:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

Id. § 121.1008(d); *see also* § 121.1009(d). OHA has developed a three-factor test to determine whether an area office may appropriately impose an adverse inference: (1) the information sought by the area office is relevant to an issue in the size determination; (2) there is a level of connection between the entity being protested and the entity the area office is seeking information from; and (3) the area office's request for information was specific. *Size Appeal of D & B Homecare, Inc.*, SBA No. SIZ-5096, at 2 (2009). “If all of these criteria are met, the challenged business must submit the information to the area office or suffer an adverse inference that the information would show that the challenged business was other than small.” *Id.* (quoting *Size Appeal of Firewatch Contracting of Florida, LLC*, SBA No. SIZ-4994, at 6 (2008)).

Here, all three elements of the above test are met. The Area Office found, and Appellant does not dispute, that PAG raised a specific and credible protest allegation, *i.e.*, that Appellant is not small because Appellant was acquired in April 2012 by [XXXXXXXXXXXXX]. Sections II.B

and II.D, *supra*. Under SBA regulations, then, Appellant was required to produce a “completed SBA Form 355” and “responses to the allegations of the protest,” and to address the Area Office's other requests for information. 13 C.F.R. § 121.1008(c). Appellant, though, plainly did not do so. Although Appellant disclosed that it is owned by [Company 1], which in turn [ultimately is owned by Individual 1], Appellant failed to disclose specific information about other concerns that may be owned or controlled by Appellant's parent companies or by [Individual 1]. Section II.B, *supra*. Appellant's response to the protest, for example, consisted of a single paragraph in which Appellant apparently acknowledged that, in addition to owning [XXXX], [Individual 1] also holds a controlling interest in [XXXX]. *Id.* Appellant provided no information, however, about the size of [XXXX] or about the other business interests of [Individual 1], and only scant information about the other holdings of [XXXX]. *Id.* It is well-settled that “when a challenged firm fails to produce enough information to properly assess whether there are grounds for affiliation, an adverse inference may appropriately be applied.” *Size Appeal of Step Constr., Inc.*, SBA No. SIZ-5483, at 6 (2013); *see also Size Appeal of Juliet Constr., LLC*, SBA No. SIZ-5974 (2018); *Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707 (2016); *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016). Accordingly, the Area Office properly drew an adverse inference in the instant case, because the information provided by Appellant was inadequate to determine whether Appellant is affiliated with additional concerns through [XXXX] and/or [Individual 1].

On appeal, Appellant maintains that the adverse inference was improper because “the only possible affiliates” of Appellant are [Company 1], [XXXX], and [XXXX]. Section II.D, *supra*. Appellant reasons that “[n]o other entity or concern exercises control over [Appellant], nor does [Appellant] exercise control over any other entity or concern.” *Id.* This argument reflects a misunderstanding of SBA regulations. Under applicable rules, concerns are affiliated not only when “one controls or has the power to control the other,” but also when “a third party or parties controls or has the power to control both.” 13 C.F.R. § 121.103(a)(1). Furthermore, “[a]ffiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.” *Id.* § 121.103(a)(4). As a result, insofar as [XXXX] (and, ultimately, [Individual 1]) “exercises control over [Appellant],” Appellant also would be affiliated with all other concerns in which [XXXX] and/or [Individual 1] hold controlling interests, such as [XXXX]. The fact that [XXXX] and/or [Individual 1] may control Appellant only indirectly (through holding companies or various subsidiaries) has no bearing on the analysis. Appellant simply is incorrect, then, that its “only possible affiliates” are [Company 1], [XXXX], and [XXXX].

Appellant also contends, alternatively, that the Area Office need not have examined the other holdings and business interests of [Company 1], [XXXX], [XXXX], and [Individual 1], because Appellant is controlled solely by its own Board of Managers. Section II.D, *supra*. This argument is meritless, for two principal reasons. First, the notion that Appellant is controlled solely by its own Board of Managers is contradicted by Appellant's sworn SBA Form 355. Specifically, Appellant acknowledged in its SBA Form 355 that it is controlled by, and affiliated with, [Company 1]. Section II.B, *supra*. Having acknowledged affiliation with [Company 1] during the size review, Appellant is not at liberty on appeal to “disclaim this affiliation.” *Size Appeal of Asklepion Pharms., LLC*, SBA No. SIZ-5410, at 6 (2010).

Second, contrary to Appellant's contention that is controlled only by its Board, SBA regulations are clear that Appellant is controlled by and affiliated with [Company 1] as a matter of law. SBA regulations provide:

A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.

13 C.F.R. § 121.103(c)(1). Furthermore, OHA has held that control through ownership under § 121.103(c)(1) “is not rebuttable.” *Size Appeal of Civitas Group, LLC*, SBA No. SIZ-5424, at 5 (2012) (quoting *Size Appeal of Forterra Sys., Inc.*, SBA No. SIZ-5029, at 10 (2009)). Here, there is no dispute that [Company 1] owns 100% of Appellant, so [Company 1], as a matter of law, controls Appellant pursuant to § 121.103(c)(1). Notably, [Company 1] also is Appellant's lone Member, and therefore would have the power to elect Appellant's Board under the terms of Appellant's LLC Agreement. Section II.B, *supra*. In short, then, Appellant is not controlled solely its own Board of Managers. Appellant rather is controlled by [Company 1] under § 121.103(c)(1), and consequently also is controlled by concerns or individuals that control [Company 1]. Because [Company 1] is controlled by [XXXX], [XXXX], and [Individual 1], Appellant was required to disclose complete information about their other holdings and business interests, or suffer an adverse inference.

Lastly, Appellant maintains that it cannot be affiliated with entities such as [XXXXXX XXX], because these companies are not based in the United States. Section II.D, *supra*. This argument, again, lacks any basis in SBA regulations. While it is true that foreign-owned companies themselves generally are not eligible to participate in SBA programs, it does not follow that foreign businesses cannot be affiliated with domestic ones. Indeed, SBA regulations specifically state that “[i]n determining [a] concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” 13 C.F.R. § 121.103(a)(6).

IV. Conclusion

Appellant has not demonstrated that the Area Office erred in applying an adverse inference. The Area Office properly concluded that Appellant did not respond to specific protest allegations, submitted incomplete information, and failed to meet its burden of establishing that it is a small business. The appeal therefore 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).

KENNETH M. HYDE
Administrative Judge