

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

SIZE APPEAL OF:

Technical Center, LLC d/b/a
BC Engineered Products,

Appellant,

Appealed From
Size Determination No. 01-SD-2023-09

SBA No. SIZ-6263

Decided: January 19, 2024

APPEARANCE

Julie M. Nichols, Esq., Roeder, Cochran Phillips, PLLC, McLean, Virginia, for BC
Technical Center, LLC

DECISION¹

I. Introduction and Jurisdiction

On August 2, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 01-SD-2023-09, concluding that BC Technical Center, LLC d/b/a BC Engineered Products (Appellant) is not a small business for the subject procurement. On appeal, Appellant contends 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.

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. Appellants filed the instant appeals within 15 days after receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was initially 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 one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. BACKGROUND

A. Solicitation and Protest

On April 18, 2023, the U.S. Defense Logistics Agency Land and Maritime, Land Supply chain (DLA) in Columbus, Ohio, issued Solicitation No. SPE7L1-23-T-252J to procure 2,585 gun cleaning kits. The solicitation was processed under simplified acquisition procedures as a 100% small business set aside. The designated North American Industry Classification System (NAICS) code is 332994, Small Arms, Ordnance, and Ordnance Accessories Manufacturing, with a corresponding 1,000 employee size standard.

On April 20, 2023, Appellant submitted its offer. On May 11, 2023, DLA awarded the contract to Appellant. On May 18, 2023, Otis Defense Inc. (Otis) protested the award, alleging Appellant was other than small, advancing that Appellant is a newly spun off company from Brighton Cromwell, LLC (BC) and is affiliated with Triman Industries, Inc. (Triman), a company owned by AE Industrial Partners, LP (AE), which was rebranded as Blue Raven Solutions (Blue Raven) on May 1, 2023. Otis alleged Appellant was affiliated with Blue Raven due to common ownership, common management and contractual relationships, the ostensible subcontractor rule, and the totality of the circumstances. (Size Determination, at 1.)

B. The Size Determination

On August 2, 2023, the Area Office issued Size Determination No. 01-SD-2023-09, finding Appellant was other than small for this procurement. The Area Office found that Rob Van Etten, [Owner 3], and [Owner 4] established BC in 2005. Appellant was established on April 27, 2021, as a wholly owned subsidiary of BC. On November 2, 2021, BC's owners formed a limited liability holding company, [Company A]. BC transferred its [X] assets to Appellant, just prior to Triman's acquisition of BC. BC and its wholly owned subsidiaries [XXXXXXXXXX] are wholly owned subsidiaries of [Company A]. On December 20, 2021, Triman acquired BC, and [Company A] became Appellant's sole equity holding member. (Size Determination, at 2-3.)

As of April 20, 2023, the date to determine Appellant's size, [Company A] was owned by:

Willian Robert (Rob) Van Etten	[X]%
Glenn Van Etten	[X]%
[Owner 4]	[X]%
[Owner 3]	[X]%

The Van Ettens are brothers, both on Appellant's Board of Managers, and have common investments. The Area Office found that they had an identity of interest and aggregated their holdings for the size determination. (*Id.*, at 3.) The Van Ettens, Rob and Glenn, own [X]% and [X]% of Triman, respectively. (*Id.*, at 4; Response to Protests, at 4.)

The [Company A] Operating Agreement vests responsibility for management of the company in its Class A Members, the Van Ettens, who have the power to control the firm, and its wholly owned subsidiaries. They also own [XXXXXXXXXX]. This firm is affiliated with [Company A] and its subsidiaries. (*Id.*)

Blue Raven owns 100% of Triman, which owns BC and CTG. Blue Raven is owned by [Company B]. [Company B] is managed by a Board of Managers, designated by [Company C]. There are [XXXXXX] Managers. [Company C] is [XXXXXXXXXX]. On July 23, 2023, [Company C]'s principal provided a statement that the owners of [Company A] are not investors or employees of [Company C]. [Company C] is not an owner, officer, or director of [Company A] or any of its subsidiaries. (*Id.*)

The Van Ettens, owning [X]% of [Company B] Class A shares, have no power to control [Company B]. Rob Van Etten had a consultant agreement with Triman, which ended on December 20, 2022. Glenn Van Etten is Triman's CIO, which does not give him power to control the firm. He is also on [Company B]'s Board of Managers but is not [XXXXXXXXXX] required to constitute a quorum; therefore, he does not have power to control [Company B]. (*Id.*, at 5.)

The Area Office rejected Otis's allegations that Appellant is affiliated with Triman/Blue Raven and its subsidiaries based on common ownership, common management, identity of interest based upon economic dependence, the ostensible subcontractor rule, and the totality of the circumstances. The Area Office noted that Triman/Blue Raven and its subsidiaries were not involved in the procurement at all. (*Id.*, at 5-6, 9-10.)

In addressing the question of affiliation under the newly organized concern rule, the Area Office indicated the Van Ettens formed Appellant when they were BC's principal stockholders on April 21, 2021. BC was sold to [Company B] in December of 2021. After the sale, Glenn Van Etten became [Company B]'s CIO and a Member of [Company B]'s Board of Managers. The Area Office found this meets the first element of the rule, the former officers, directors, principal stockholders or key employees of one concern organize a new concern. Next, the Area Office found that Appellant is in the same or related field of operation as Triman/Blue Raven, meeting the second element of the rule. The Van Ettens are Appellant's principal stockholders and are current Board members, meeting the third element of the rule. (*Id.*, at 7.)

Turning to the fourth element of the rule, that the one concern furnishes the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise, the Area Office found that prior to BC's sale, its engineering and [X] business was transferred to Appellant. [XXX] is Appellant's distributor and will furnish contracts to Appellant by purchasing their products. The Area Office also relied on Appellant's [X] revenue, which showed that [X]% of Appellant's receipts came from contracts from [XXX]. (*Id.*)

The Area Office also found that [XX] provides technical assistance to Appellant. Under the Van Ettens, BC had created [XXXX] system, [X]. After the sale, Triman hired Glenn Van Etten as CIO. His Triman employment letter tasked him with [XXXXXXXXXXXXXXXXXXXXXXX] [XXX] during his employment. (*Id.*) Appellant needs to use [XXXX] system, which Triman

allows Appellant to use [XXX]. [XXX] leases space from the Van Ettens at Appellant's location, but it is an arm's length lease and they do not share office space with Appellant. (*Id.*, at 8.)

The Area Office noted Appellant's argument it was not economically dependent on Triman/Blue Raven and thus could not be deemed an affiliate. However, the newly organized concern rule is a separate ground of affiliation from economic dependence. The record shows that since the sale of BC, Appellant has received orders from [XXX] which represent [X]% of its revenue, a significant amount, even if it does not reach the 70% figure, which triggers a finding of economic dependence. This meets the fourth element of the newly organized concern rule. (*Id.*)

On July 27, 2023, the Area Office offered Appellant the opportunity to rebut the finding of affiliation based on the newly organized concern rule by demonstrating a clear line of fracture between the two concerns. Appellant responded that it is not a new concern, because it existed as a separate entity long before the sale of BC to Triman, and it focuses on the sale of new product lines not performed by Triman/Blue Raven. Appellant argued it is not reliant upon Triman/Blue Raven. It asserted it received no financial assistance, technical assistance, indemnification support or any other support from Triman/Blue Raven. (*Id.*)

The Area Office was unconvinced by Appellant's response. The Area Office noted that Appellant was registered in April 2021 and BC was sold in December 2021. Appellant is a new company under the newly organized concern rule. Appellant was created by former officer/current director of BC/Triman/Blue Raven/[Company C]. Appellant is in the same line or related industry as BC/Triman/Blue Raven/[Company B], and the Van Ettens are current Board members and principal stockholders of Appellant. As Appellant's distributor, they are furnishing and will continue to furnish contracts and orders to Appellant. Triman furnishes technical assistance to Appellant by allowing it to use proprietary software and allowing its CIO to work on Appellant's business. All four elements of the rule are present. (*Id.*, at 8-9.)

As of the date to determine size, the Area Office also found that there remained ties between the companies, [XXXX], technical assistance from Glenn Van Etten, and the [XX]. (*Id.* at 9, citing *Size Appeal of Sabre88*, SBA No. SIZ-5161, at 8-9, (2010)). There was no evidence of a clear line of fracture between Appellant and Triman/Blue Raven as of April 20, 2023, the date for determining size. Accordingly, the Area Office found Appellant affiliated with Triman/Blue Raven under the newly organized concern rule. Appellant did not dispute that Triman had more than 1,000 employees. Thus, the Area Office determined that Appellant was other than small. (*Id.*, at 10.)

C. Appeal

On August 16, 2023, Appellant filed the instant appeal from the Size Determination. Appellant first argues the Otis' protest fails to include specific facts to support its allegations and should have been dismissed. The protest was based upon publicly available information from Government forms or websites, LinkedIn profiles for the Van Ettens, which Appellant argues this is mere speculation and does not support a protest. (Appeal, at 8.)

Appellant first argues it is not a new organization. Once a concern has been active for an extended period, it is not appropriate to apply the newly organized concern rule without considering whether the challenged concern can still be reasonably considered a new business. (*Id.*, at 9, citing *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477 (2013) and *Size Appeal of Coastal Mgmt. Solutions, Inc.*, SBA No. SIZ-5281 (2011).) BC Engineered Products, as part of Appellant, was originally registered in SAM.gov on May 26, 2018. Appellant argues the Area Office noted it was registered in April 2021 and the sale of BC occurred in December 2021, and thus concluded Appellant was a new company. Appellant asserts it had been an independent operational concern for [X] years, from [XXXXXXXX], and was a mature business at the time to determine size. Appellant had been a business division of BC since [X], but the Area Office chose to focus only on the date Appellant registered as a “formal company” (Appellant's phrase) with the state. (*Id.*, at 9-10.)

Appellant points to the Area Office's acknowledging that Appellant had manufacturing capabilities well before BC's sale to Triman. (*Id.*, at 10, citing *Size Determination* at 6-7, fn. 2.) Appellant argues it could not have achieved its development of its manufacturing capabilities if it were just getting off the ground. (*Id.*, at 10-11.)

Appellant further argues the first element of the newly organized concern test is not met here. The Area Office found Appellant was formed by the Van Etten brothers when they were BC's principal stockholders in April 2021. BC was then sold to Triman/Blue Raven in December 2021. After the sale of BC, Glenn Van Etten became a Chief Information Officer and a Member on [Company B]'s Board of Managers. The Area Office found this met the first element. (*Id.*, at 11, citing *Size Determination* at 7.) The first element is that the challenged concern must be founded by an officer, director, principal stockholder, managing member or key employee of the alleged affiliate. If the founder of the concern is not in one of these categories, there cannot be a violation. (*Id.*, citing *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803 (2017); *Size Appeal of Human Learning systems, LLC*, SBA No. SIZ-5769 (2016).)

Appellant asserts Rob Van Etten had a consultant agreement with Triman, which expired on December 22, 2022. He held none of the officer positions described in the regulation and had no connection with Triman when Appellant was formed. Appellant points out the Area Office acknowledged this. Therefore, Rob's relationship does not meet the test. (*Id.*, at 12, citing *Size Determination* at 5.)

Further Glenn Van Etten was not an officer, director, principal stockholder, managing member or key employee of Triman before the sale or before the organization of Appellant. He had no connection to Triman when Appellant was formed to operate the existing BCTC business as a separate entity under BC. His only post-sale connection to Triman is of a short-term employee with no influence or control over the company. After the sale, he was given the title of Triman's CIO, and his only duty was to transition and merge the firms' IT systems. His employment is “at will” and expected to last 24 months. It is not enough that an employee has a responsible position to be considered one of the persons covered by the rule, they must have actual influence or control over the firm as a whole. (*Id.*, at 13, citing *Size Appeal of Human Learning Systems, LLC*, SBA no. SIZ-5769 (2016).) Therefore, the first element of the newly organized concern rule has not been met here.

Appellant further argues the second element of the test has not been met, because Appellant and Triman are not in the same line or related industry or field of operation. The Area Office found that they were but failed to provide any explanation or analysis for its conclusion. The Area Office noted that Appellant is a manufacturer while Triman/BC and its affiliates are distributors. The Area Office also acknowledged that the manufacturing operations of the original BC was carved out and stayed with Appellant when BC was sold to Triman. Prior to BC's sale, all engineering and [X] business was transferred to Appellant. Appellant and Triman are engaged in different businesses. While they both may serve DOD, they provide different products and services and do not compete for the same contracts. (*Id.*, at 13-14, citing Size Determination at 6, 7.)

While for the second element to be met, it is sufficient that both concerns engage in the industry that is the subject of the procurement, that is not the case here. Triman did not bid on this procurement, and the Area Office observed it was not involved in the procurement at all. Triman is not a manufacturer, but provides supply chain, quality control, trade compliance services, packaging, logistics, kitting and program and management support and analysis. (*Id.* at 14-15, citing *Size Appeal of Vortec Development*, SBA No. SIZ-4866 (2007).)

Appellant further asserts, contrary to the Size Determination, no Board members or principal stockholders of Triman formed or are running Appellant. It is true the Van Ettens are managing members and principal equity holders of [Company A], Appellant's owner. Appellant maintains the intent of the third element, that the creators of the new company serve as the new concern's officers, directors, principal stockholders, managing members or key employees, is to show persons connected with a large company have created a small company and are on the Board controlling the small company. That is not the case here. Appellant is not a "spin out" of Triman/Blue Raven. It was created as a subsidiary of BC in 2021 to house and operate its manufacturing capabilities well before BC was sold to Triman/Blue Raven. Appellant argues it was not a spin off from Triman/Blue Raven. (*Id.*, at 15-16.)

Appellant argues the Area Office erred in its interpretation of the ongoing relationship between Triman/Blue Raven and itself. The Area Office found the fourth element of the newly organized concern rule was met, that Triman/Blue Raven furnished Appellant with contracts, financial or technical or other assistance. The Area Office found that, as Appellant's distributor, Triman would furnish Appellant with contracts or orders, that Triman/Blue Raven provided Appellant with technical and software assistance, and that Appellant was economically reliant upon Triman/Blue Raven. (*Id.*, at 16, citing Size Determination at 7-8.) Appellant disputes each finding.

Here, Appellant argues the intent of the element is not to find affiliation from any contractual relationship between a large and small business, but to determine whether the large business is propping up the small with contract support. Triman/Blue Raven is not Appellant's only distributor. Appellant maintains it is the unique approved source of supply, and Triman or any other distributor must purchase from it to provide the specific part to the Government. It is Triman/Blue Raven which is dependent upon Appellant. The Area Office notes that while [X]%

of Appellant's revenues come from [XX], [X]% come from other sources, including [XXX]. (*Id.*, at 17.)

Appellant asserts the Area Office interprets the [X] software sold to Triman/Blue Raven in the BC deal as assistance to Appellant. Appellant does not use this software. The support Glenn Van Etten gives Triman/Blue Raven is not assistance for Appellant. He is compensated as an employee, Appellant is not. While there is a license agreement between Triman/Blue Raven, it is meant to provide clarity around ownership of any changes to the software. (*Id.*, at 18.)

Appellant concludes that any assistance here is flowing from it to Triman/Blue Raven, supplying and approved part so Triman/Blue Raven may service its customers, and from Appellant's officers/employees to Triman/Blue Raven to help it get off the ground after its purchase of BC. (*Id.*, at 18-19.)

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

The appeal was filed and served within 15 days after Appellant received the size determinations. Thus, the appeal is timely for this procurement. 13 C.F.R. § 134.304(a).

Appellant maintains the Area Office should have dismissed Otis's protest for lack of specificity. The regulation requires:

A protest must include specific facts. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

13 C.F.R. § 121.1007(b).

The purpose of this provision is to ensure that a protested concern receives adequate due process so it may craft a meaningful response to the protest. *Size Appeal of Razor Consulting Solutions, Inc.*, SBA No. SIZ-6249, at 21 (2023). In determining the sufficiency of protests OHA

focuses on (1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor is contesting the challenged concern's size, and (2) whether the protest included factual allegations as a basis for these grounds. *Id.* Here, Otis clearly alleged Appellant was other than small due to affiliation with other firms. Otis identified these firms, and the basis for the alleged affiliation. Accordingly, the Area Office did not err in finding the protest sufficiently specific.

The sole basis upon which the Area Office found Appellant affiliated with Triman and its affiliated companies was the newly organized concern rule. The rule states:

[A]ffiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. . . . A “key employee” is one who, because of his/her position in the concern, has critical in or substantive control over the operations or management of the concern.

13 C.F.R. § 121.103(g)

OHA has distilled the newly organized concern rule into four required elements: (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. *Size Appeal of Lsinc Corp.*, SBA No. SIZ-5856, at 21 (2017). The purpose of the rule is to prevent circumvention of the size standards by the creation of spin-off firms that appear to be small but are really the affiliates of large firms. *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466, at 11 (2001).

The first element of the test is that the challenged concern must be founded by an officer, director, principal stockholder, managing member or key employee of the alleged affiliate. Because this is a necessary condition for a finding of affiliation, if the founder(s) of the new concern are not in one of these categories, it is unnecessary to examine the other requirements, there cannot be a violation of the newly organized concern rule. *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5769, at 9 (2016); *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507, at 9 (2013); *Size Appeal of J.W. Mills Management*, SBA No. SIZ-4909, at 4 (2008).

Here, the Area Office found Appellant was affiliated with Triman and its subsidiaries under the rule. However, the record shows that Appellant was not “spun off” from Triman, Blue Raven or **[Company B]**. Appellant was originally established in April 2021 as a wholly owned subsidiary of BC, which transferred its engineering assets to Appellant prior to Triman acquiring

it. The record also shows that Triman/Blue Raven/[Company B] acquired BC on December 21, 2021. Appellant was not part of that transaction. [Company A] was created on November 2, 2021, and became Appellant's sole owner at that time. Further, when Appellant was created, none of its officers, directors, principal stockholders, managing members, or key employees held any of those positions with Triman/Blue Raven/[Company B]. The Van Ettens held positions with BC, which they then left upon selling it to Triman. At the time they organized Appellant, the Van Ettens had no positions with Triman/Blue Raven/[Company B].

Accordingly, I conclude the Area Office erred in finding the first element of the newly organized concern rule was met here. Appellant was a "spin off," not from its alleged affiliate Triman/Blue Raven/[Company B], but from BC. Appellant was not "newly organized" from Triman. Rather, it was organized by the Van Ettens from BC, which they subsequently sold to Triman, which they do not control, while they continue to control [Company A]. At the time of Appellant's organization, no former or current officers, directors, principal stockholders, managing members, or key employees of Triman/Blue Raven/[Company B] were involved in its organization. Rob Van Etten had a consultant agreement with Triman, which has expired. Glenn Van Etten was Chief Information Officer for Triman, only as a short-term employee with no influence over the company as a whole. It is clear that the Van Ettens were not key employees of Triman/Blue Raven. *Size Appeal of CJW Construction, Inc.*, SBA No. SIZ-5254, at 7 (2011).

Therefore, I must conclude that the Area Office erred in finding that Appellant was affiliated with Triman/Blue Raven/[Company B] under the newly organized concern rule. Consequently, the Area Office erred in finding Appellant was other than small. Based on this finding of clear error, I must GRANT the instant Appeal and REVERSE the Size Determination.

IV. Conclusion

I conclude that Appellant BC Technical Center, LLC d/b/a BC Engineered Products has met its burden of establishing that the Size Determination is based upon an error of fact or law. The one ground of the Size Determination, Appellant's affiliation with Triman/Blue Raven under the newly organized concern rule, is based upon error of fact or law. Accordingly, I GRANT the instant appeal and REVERSE the Size Determination. Appellant is an eligible small business for the subject procurement.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge