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

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| SIZE APPEAL OF: | |
| Weidlinger Associates, Inc. | SBA No. SIZ-4846 |
| Appellant | Decided: April 24, 2007 |
| Appealed from<br>Size Determination No. 05-2007-025 | |

APPEARANCES

Daniel B. Abrahams and Howard A. Wolf-Rodda, Epstein Becker & Green, P.C., Washington, D.C., for Appellant.

Pamela J. Mazza and Isaias "Cy" Alba, IV, Piliero Mazza PLLC, Washington, D.C., for Merrick & Company.

DECISION

PENDER, Administrative Judge:

## I. Introduction and Jurisdiction

On April 2, 2007, Weidlinger Associates, Inc. (Appellant) filed an Appeal of Size Determination No. 05-2007-025 (size determination), dated March 16, 2007 with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). In this size determination, SBA's Office of Government Contracting, Area Office V (Area Office), found Merrick & Company (Merrick) to be a business that is "small" under North American Industry Classification System (NAICS) code 541710, Research and Development in the Physical, Engineering, and Life Sciences. NAICS code 541710 has a 500 employee size standard.

Appellant also filed a motion to admit new evidence. Appellant requested I admit copies of two pages of Merrick's proposal for the subject solicitation. After admitting Appellant's proffered documents[1] to the Record, I ordered Merrick to respond to Appellant's submittal and explain what this evidence meant. Merrick provided a timely reply to my order.

Based upon the new evidence it offered, Appellant alleges Merrick exceeds the 500 employee size standard. Appellant also avers that Merrick's business relationship with Coors

[1] The evidence admitted is protected by a Government Accountability Office (GAO) protective order.

Brewing Company (Coors) for the production of ethanol constitutes a joint venture that causes Merrick to be affiliated with Coors and thus Coors employees must be aggregated with Merrick for determining size.

As will be more fully explained below, Merrick's explanation for the number of employees on its proposal establishes it has less than 500 employees. In addition, the relationship between Merrick and Coors is financially insignificant to Merrick. Hence, the relationship does not give Coors the power to control Merrick, which is the most important principle behind SBA's affiliation rules.

OHA decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.,* and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

## II. Issues

Whether the Area Office made a clear error of fact or law when it determined Merrick was not affiliated with Coors because the extent of Merrick's business with Coors accounted for less than 0.1% of Merrick's net revenue.

Whether Merrick's average number of employees is less than 500 based upon the number of employees for each of the pay periods for the 12 months preceding the date of its initial offer under the Request for Proposals (RFP).

## III. Facts

### A. Findings of Fact

1. On March 24, 2006, the Defense Threat Reduction Agency (DTRA) issued RFP HDTRA2-06-R-0001. The RFP provided the procurement would be Set-Aside for Small Business and identified NAICS code 541710, Research and Development in the Physical, Engineering, and Life Sciences, with a 500 employee size standard, as the applicable size standard. Initial proposals were due on May 8, 2006, and Final Proposal Revisions were due December 1, 2006. The Contracting Officer (CO) received timely proposals from Merrick and Appellant.

2. On January 26, 2007, the CO notified Appellant that Merrick would receive award of the contract.

3. On February 2, 2007, Appellant filed a timely protest alleging: Merrick and its affiliates' employees exceed the 500 employee size standard; Merrick is affiliated with Coors; Merrick is affiliated with companies in Mexico and Canada; Merrick is affiliated with BMG Engineers and Constructors; and Merrick and MMI/Etoh, Inc. (Etoh) share common control.

4. On February 6, 2007, the CO forwarded Appellant's protest to the Area Office.

5. On February 7, 2007, the Area Office notified Merrick of Appellant's size protest

and requested it respond to Appellant's allegations. The Area Office asked Merrick to provide: (1) a completed SBA Form 355; (2) a breakdown of the number of its employees by pay period over the 12 months preceding its self-certification for the RFP; (3) organizational documents relevant to Merrick and its affiliates; (4) its Articles of Incorporation and bylaws; and (5) other requested relevant information.

6. On February 13, 2007 and again on February 28, 2007, Merrick responded to the Area Office's request and explained that Merrick is:

a. An architectural, engineering, and geospatial solutions company;

b. An employee-owned corporation where ownership is widely dispersed because it is owned by most of the employees;

c. Governed by a nine-member board of directors of which Mr. Ralph W. Christie Jr., is the Chairman, as well as President and Chief Executive Officer. There are four inside directors (Merrick employees) and four outside directors. Each inside director owns a small percentage of Merrick stock while two of the outside directors own no Merrick stock and the remaining two own less than a fraction of a percent in aggregate; and

d. The whole owner of six other companies, including Etoh.

7. Merrick's payroll records establish, including affiliates, that Merrick averaged less than 350 employees in the 12 months preceding its offer for the RFP.

8. Merrick explained that: (1) Etoh purchased and upgraded a still located on Coors real property; (2) Etoh leases the real property from Coors for a nominal rent, but pays Coors for steam and electricity; (3) The lease cannot be terminated before 2011 unless Coors fails to provide a product; (4) The still is automated and routine monitoring is performed by a part-time employee of Coors; (5) Etoh has no employees; (5) Diamond Shamrock Gasoline Company buys the ethanol and pays Merrick and Coors separately based on a predetermined formula; and (6) Etoh's revenue from the still represents less than 0.1% of Merrick's net revenue.

9. Merrick disputed any implication that it is controlled by Coors. Merrick adamantly asserted there is no commonality of management between Coors and Merrick or any of Merrick's subsidiaries. Merrick also explained that the relationship between Etoh and Coors is an "arms-length" business arrangement from which both parties benefit. Finally, Merrick asserted Etoh's officers and directors are separate from Merrick's and have no ability to control Merrick. The evidence in the Record supports Merrick's statements.

10. Upon receipt of Appellant's Appeal Petition and Motion to Admit Additional Evidence,[2] I determined there was an apparent inconsistency between the evidence Merrick had provided to the Area Office with its SBA Form 355 concerning the average number of individuals employed by Merrick and its affiliates and the number of employees Merrick

[2] As previously indicated, the evidence is protected by a GAO Protective Order.

represented in its proposal. On April 12, 2007, I ordered Merrick to resolve this issue, *i.e.*:

> [E]xplain the apparent inconsistency no later than April 23, 2007. Merrick must provide its explanation under penalty of perjury and not by allegation of counsel. *See* 28 U.S.C. § 1746. In addition to any matter raised by Appellant, Merrick is specifically ORDERED to address the meaning of the word "capacity" in its proposal.

11. Merrick submitted its reply to my April 12, 2007 Order, along with its Response to the Appeal Petition on April 18, 2007, in which it included a declaration executed in accordance with 28 U.S.C. § 1746 by David G. Huelskamp, its Senior Vice President for Business Development. In his declaration, Mr. Huelskamp explained Merrick had made an adding error in its proposal to DTRA. In effect, Mr. Huelskamp stated the number in the proposal should have been 400 and not 501. I find his statement to be credible and deem it to be part of the Record.

## B. The Size Determination

On March 16, 2007, subject to an extension granted by the CO, the Area Office issued size determination 05-2007-025 finding Merrick to be "small" for NAICS code 541710. The Area Office noted Merrick wholly owns six other companies: MAPA; BMG; Etoh; Merrick Management, Inc.; Merrick International Services, Inc.; and Merrick Canada ULC; however, the Area Office did not include Merrick Canada ULC in its determination because the company was not in existence when Merrick submitted its proposal for this procurement. The Area Office sustained Appellant's allegations with respect to Merrick's affiliation with MAPA; BMG; Etoh; Merrick Management, Inc.; and Merrick International Services, Inc.

The Area Office found Merrick is not affiliated with Coors. The Area Office determined the relationship of Merrick's affiliate Etoh with Coors is not a joint venture. Moreover, the Area Office noted Merrick, including its affiliates and Coors have no common directors, managers, ownership, or employees. The Area Office found that neither Coors nor Merrick have control or the power to control the other.

Thus, the Area Office determined Merrick's size by calculating the average number of employees for Merrick and its five affiliates for the twelve months preceding May 8, 2006. Based on this calculation, the Area Office found Merrick and its affiliates had fewer than 500 employees and is small under NAICS code 541710, Research and Development in the Physical, Engineering, and Life Sciences.

## C. The Appeal

Appellant received Size Determination No. 05-2007-025 on March 19, 2007. Appellant filed its appeal of the Area Office's size determination on April 2, 2006.

Appellant alleges the Area Office made clear errors of law and fact and the size determination should be reversed. Appellant argues the Area Office applied the wrong legal

standard. Appellant states Merrick and Coors are engaged in a joint venture that violates joint venture affiliation rules in 13 C.F.R. § 121.103(h) and that there is an improper general affiliation under the totality of the circumstances rule that renders Merrick a large business.

Appellant argues the Area Office erred when it failed to find affiliation between Merrick and Coors under general principles of affiliation. Further, Appellant states the Area Office erred in accepting Merrick's certification that it employed fewer than 500 employees.

D. Motion to Admit New Evidence

As indicated, Appellant filed a motion to admit new evidence on April 2, 2007. Appellant requested that the Record include a copy of an email from GAO Deputy Assistant General Counsel Glenn G. Wolcott (Exhibit 1) and copies of two pages of Merrick's proposal for the subject solicitation (Exhibit 2). As explained in Exhibit 1, the documents submitted in Exhibit 2 are protected by a GAO protective order. Appellant argues Exhibit 2 indicates Merrick's "total capacity" is 501 employees and exceeds the size standard.

On April 12, 2007, I issued an Order admitting Appellant's evidence into the Record. I ordered Merrick to explain the apparent inconsistency created by Exhibit 2 no later than April 23, 2007. Merrick was also ordered to address the meaning of the word "capacity" in its proposal. (Fact 10)

E. Merrick's Response to Appeal Petition and Order

On April 18, 2007, Merrick responded to Appellant's Appeal Petition and my April 12, 2007 Order.

Merrick asserts Appellant has failed to prove the existence of clear error in the Area Office's size determination. Merrick states 13 C.F.R. 121.103(a)(1) reference to a concern's control or ability to control is broader than Appellant's allegations of control based on a single contract with Coors. Merrick argues Appellant's assertion that Merrick controls Coors, a multinational corporation, due to Merrick's ability to terminate a contract that generates only .1% of Merrick's revenue is "absurd." Finally, Merrick states its representations in its Online Representations and Certifications Application (ORCA) that its size is 250-500 are accurate.

Merrick challenges the logic of Appellant's claim of control. Specifically, Merrick asserts that if OHA did find it was affiliated with Coors because of the business relationship between Coors and Etoh that every company would be affiliated with all of its business partners due to that fact that entry into any contractual relationship grants each party a certain amount of control over the other. Merrick points out that Appellant is attempting to argue that one party's ability to control the course of a single contract is sufficient to prove affiliation. Merrick calls this interpretation nonsensical and argues it has no support in regulation or case law.

Merrick also asserts that Appellant is actually saying that because Coors can "control" Merrick's subsidiary, Etoh, it can control Merrick. Merrick claims this is illogical and points out that Etoh has no control over Merrick and that Etoh's contribution to Merrick's net revenue is

less than 0.1%. Hence, Merrick asserts that since there are no indications of control by Etoh over Merrick the relationship of the subsidiary cannot be attributed to the parent.

With respect to the apparent inconsistency created by Appellant's introduction of Exhibit 2, Merrick explains the confusion is due to a mathematical error. Merrick states when the individual entries for "firm capacity" are added together the total should be 400, not 501. Merrick explains its firm capacity includes all full-time and part-time employees and contract personnel currently working at Merrick and its subsidiaries. Merrick's arguments are supported by the declaration of Merrick's Senior Vice President, David G. Huelskamp.

## IV. Discussion

### A. Applicable Law and Regulations

#### 1. Timeliness

Appeals must be filed and served at OHA within 15 days after an appellant receives a size determination. 13 C.F.R. § 134.304(a)(1).

#### 2. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

#### 3. Ability to Control

SBA's size regulations explain that the foremost principle behind affiliation is based upon the power to control a concern. Specifically, 13 C.F.R. § 121.103 begins:

> §121.103 How does SBA determine affiliation?
>
> (a) General Principles of Affiliation. (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.
> (2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

Following these first general principles of affiliation are specific affiliation rules, including the rule that SBA can find affiliation under the totality of the circumstances, even if no

single independent factor (those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h)) is sufficient to constitute affiliation. *See Size Appeal of Lance Bailey and Associates*, SBA SIZ-4817 (2006) at 13-14, for a discussion of this issue. Even when finding affiliation under the totality of the circumstances rule, the ability to control is the vital issue.

The independent bases for affiliation, those described under, 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h), depend upon facts that give one concern the ability to control another. Specifically, when 13 C.F.R. § 121.103(h) addresses affiliations based on joint ventures, there must be an aspect to the relationship that could cause a reasonable person to conclude that one or both concerns have the power to control the other because of their joint ventures. Alternatively, an area office could find affiliation between the two concerns because they have formed so many joint ventures that the independent identity of one or both concerns has become blurred or non-existent. Thus control would be presumed. This is the purpose behind the text in 13 C.F.R. § 121.103(h) that provides:

> (h) Affiliation based on joint ventures. A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. A joint venture may or may not be in the form of a separate legal entity. . . .

In addition to providing that too many joint ventures equates to one or both concerns having the power to control the other, 13 C.F.R. § 121.103(h)(4) contains the ostensible subcontractor rule. Although a contract specific issue, the ostensible subcontractor rule is also based upon the concept that one concern has the power to control the other in performing an individual contract. Here the concept is that the prime contractor is really not the party in control of the work because the concern is unusually reliant upon its subcontractor or because the subcontractor is performing primary and vital contract requirements.

4. Calculating Number of Employees

Area offices determine the number of employees by calculating the average number of individuals employed by a concern and its affiliates, including part-time employees. 13 C.F.R. § 121.106. The specific portion of 13 C.F.R. § 121.106 relevant to this appeal provides:

> (b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:
>
> (1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

B. Analysis

1. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination. Thus, Appellant's appeal is timely.13 C.F.R. § 134.304(a)(1).

2. Affiliation and the Power to Control

Appellant bases its claim of affiliation between Merrick and Coors upon the business relationship between Merrick's subsidiary Etoh and Coors. It is Appellant's position that this business relationship is an improper joint venture that causes Merrick and Coors to be affiliated with one another under 13 C.F.R. § 121.103(h). Alternatively, Appellant argues there is an improper general affiliation under the totality of the circumstances that renders Merrick a large business. Appellant's affiliation arguments fail because Appellant overlooks the overriding principle supporting affiliation, *i.e.*, affiliation requires a concern or individual(s) to control or have the power to control the other.

Appellant's first allegation is that Coors and Merrick are affiliated based on the existence of the Etoh/Coors business arrangement, which Appellant calls a joint venture, 13 C.F.R. § 121.103(h). However, it is important to note a joint venture is typically a one-time association to perform a specific contract. Government Contracting Programs, 64 Fed. Reg. 57,366, 57, 367 (Oct. 25, 1999). In the late 1990s procurements were increasingly being consolidated which created a concern that some contracting officers may feel the requirements were to expansive for a small business to perform; thus, SBA created joint venture exclusions to allow two or more small businesses to join together for a specific procurement and be considered small as long as each concern individually was small. Small Business Size Regulations, 63 Fed. Reg. 35, 726, 35,727 (June 30, 1998).

Here, Appellant is not alleging a joint venture for the purposes of the specific procurement, but argues a joint venture exists between Merrick and Coors because they are engaging and carrying out a specific limited purpose business venture for joint profit over a multi-year period, for which purposes they combine their efforts, property, money, skill, or knowledge. Appeal Petition, at 7. Appellant's allegation is nearly a perfect recitation of 13 C.F.R. § 121.103(h). However, Appellant's allegation stops short of 13 C.F.R. § 121.103(h)'s critical final clause beginning with "but." That is, affiliation based on joint ventures explicitly excludes businesses engaged together on "a continuing or permanent basis for conducting business generally." *Id*. In fact, as indicated in Merrick's response, if this exclusion did not exist, a business could conceivably be considered affiliated with all businesses with which they regularly conduct business. Merrick's Response, at 3.

Regardless of the existence of the word "but" in 13 C.F.R. § 121.103(h), the Record demonstrates that Etoh accounts for less than 0.1% of Merrick's net revenue (Fact 8). In

consequence, Etoh is irrelevant to Merrick's profitability. Therefore, I hold Etoh's irrelevance to Merrick's profitability deprives Coors of any ability to exert control over Merrick through Etoh.

In addition to Etoh's irrelevance to Merrick's profitability, the Record shows that Merrick and Etoh share no common management or directors (Facts 6-9). Thus, I cannot find that Etoh has the power to control Merrick, even presuming its arms-length arrangement with Coors gives Coors the ability to control Etoh.

The Record is void of evidence that would support a finding that Coors has the power to control Merrick. There is no evidence of:

1. Stock ownership of Merrick by Coors (13 C.F.R. § 121.103(c));

2. Stock options held by Coors (13 C.F.R. § 121.103(d));

3. Common management between Coors and Merrick (13 C.F.R. § 121.103(e));

4. Any significant identity of interest between Merrick and Coors (13 C.F.R. § 121.103(f)); or

5. Any joint ventures between Merrick and Coors (13 C.F.R. § 121.103(h)).

When considered with the certainty that there is no evidence in the Record even suggesting that Coors can control Merrick, it means the Area Office could not find affiliation between Coors and Merrick based upon the totality of the circumstances.

3. Number of Employees

The Record before the Area Office supports its determination that Merrick has an average of fewer than 500 employees in the 12 months preceding May 8, 2006. As noted by in the Record, Merrick did not contest Appellant's allegation that its subsidiaries are affiliates and Merrick included employees of affiliates in its self-certification. Merrick provided the Area Office with a signed and certified SBA Form 355 and employee worksheets indicating full-time, part-time, and temporary employees for each of the twelve months preceding May 8, 2006 for Merrick and its affiliates. Based on this information the Area Office determined Merrick did not exceed the 500 employee size standard.

After filing its protest, Appellant received information that could be interpreted as contradicting the Area Office's finding that Merrick and its affiliates had 500 employees. Appellant properly brought this information to the attention of OHA. Next, I ordered Merrick to respond to this information. Merrick responded and explained that it had made an obvious tallying error in its proposal to DTRA and that the number of individuals employed by Merrick and its affiliates is 400. (Facts 10 and 11). In consideration of the foregoing, I hold that in addition to the Area Office not having made an error in the size determination, that Merrick and its affiliates employ fewer than 500 individuals as of May 8, 2006, the date of its initial proposal.

## V. Conclusion

I have considered Appellant's Appeal in light of the Record. The Area Office thoroughly investigated and thoughtfully dispelled Appellant's claim of affiliation between Coors and Merrick. Hence, I hold the Area Office correctly did not include Coors employees in its calculation of Merrick's size. In addition, I hold the Area Office was correct to determine Appellant and its five affiliates are small under the 500 employee size standard for NAICS code 541710. Accordingly, the Size Determination is AFFIRMED and Appellant's Appeal is DENIED.

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

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THOMAS B. PENDER
Administrative Judge