United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: BR Construction, LLC, Appellant, Appealed From Size Determination No. 6-2011-114	SBA NO. SIZ-5303 Decided: November 21, 2011

APPEARANCES

John W. Dreste, Esq., and Thomas K. O'Gara, Esq., Ernstrom & Dreste, LLP, Rochester, N.Y., for BR Construction, LLC

DECISION

I. Introduction and Jurisdiction

This appeal arises from a Small Business Administration (SBA) size determination issued to BR Construction, LLC (Appellant) in connection with Appellant's offer on a procurement set aside for service disabled veteran owned small businesses. In the size determination, SBA's Office of Government Contracting, Area VI (Area Office) found Appellant to be other than small. For the reasons discussed below, the appeal is denied.

SBA's Office of Hearings and Appeals (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. 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

A. The Solicitation and Protest

On May 12, 2011, the Department of Veterans Affairs (VA) Medical Center in Erie, Pennsylvania, issued Solicitation No. VA244-11-RQ-0243 seeking a contractor to furnish and install telecommunications cable. The Contracting Officer (CO) set aside the procurement entirely for service disabled veteran owned small businesses, and assigned North American Industry Classification System (NAICS) code 237130, Power and Communication Line and Related Structures Construction, with a corresponding size standard of $33.5 million in average

annual receipts. Quotations were due June 3, 2011.

On August 4, 2011, the CO announced that Appellant was the apparent successful offeror. On August 8, 2011, RB VetCo (RBV), an unsuccessful offeror, protested Appellant's size. Among other allegations, RBV claimed that Appellant is affiliated with concerns owned or controlled by Mr. David Christa, Appellant's minority owner. The CO forwarded the protest to the Area Office for a size determination.

B. The Area Office Investigation and File

On August 17, 2011, Appellant submitted its SBA Form 355 and other documents to the Area Office. Subsequently, Appellant submitted additional information and documents and responded to the Area Office's follow-up questions. The Area Office file shows that Appellant was founded in Nevada by Myron Rinasz in 1983 and became a limited liability company in 1998. Mr. Rinasz remained Appellant's sole owner until December 31, 2007, when he sold Appellant to Zackary Doane. Mr. Rinasz subsequently reacquired Appellant from Mr. Doane in November 2008.

Appellant submitted tax returns for 2010, 2009, and part of 2008, but stated that it was unable to obtain tax returns or financial statements from Mr. Doane covering his 10-month ownership of Appellant. In lieu of this information, Appellant submitted a declaration from its attorney indicating that Mr. Doane had informed him that Mr. Doane did not transact any business in Appellant's name.

Appellant was reorganized in 2010 and Mr. Christa became Appellant's minority owner. Since 2010, Mr. Rinasz has owned 51% of Appellant's Class A voting interests and 51% of its Class B non-voting interests. Mr. Christa has owned the remaining 49% of Appellant's Class A voting and Class B non-voting interests. Mr. Christa is Chief Executive Officer and majority owner of Christa Construction, LLC (Christa Construction), of Rochester, N.Y. Appellant advised the Area Office that it could not provide information on Christa Construction's size, or on Mr. Christa's other business interests, because it has no access to that information.

Appellant adopted an Amended and Revised Operating Agreement (Operating Agreement), which became effective January 1, 2010. Operating Agreement, § 2.4. The Operating Agreement was in effect on June 3, 2011, when Appellant self-certified for the instant procurement.

Section 1.41 of the Operating Agreement provides that control of the day-to-day management rests with the Managing Member, Mr. Rinasz. Section 7.3, however, grants all Class A Members, and other authorized signatories, the authority to bind Appellant in various business decisions, subject to Section 6.1. Section 6.1 sets forth the following decision-making requirements:

> No action may be taken by [Appellant] without the approval or consent, in writing by a Majority of the Class A Members. Notwithstanding any provisions in this

> Agreement to the contrary, the following decisions shall require the unanimous consent of the Class A Members:
> a. Approving of the Operating Budget or any changes in the approved Operating Budget;
> b. Incurring any expenses not provided for in the Operating Budget in one transaction or a series of transactions in excess of Five Thousand Dollars ($5,000);
> c. Submitting a bid on any Project in excess of $250,000
> d. Merging or consolidating [Appellant] with or into any other entity;
> e. Dissolving [Appellant];
> f. Guaranteeing, securing or collateralizing any loan made by a third party;
> g. Loaning any funds to any Member or any Related Person of a Member;
> h. Executing any contract in excess of $250,000; or
> i. Borrowing money on behalf of [Appellant] or the mortgage or pledge all or any portion of [Appellant's] Property to secure payment of a loan or loans.

Operating Agreement, § 6.1.

The next two sections of the Operating Agreement indicate that Members have one vote per unit of Class A membership interest, and that voting may be in person or by proxy. Operating Agreement, §§ 6.2, 6.3. Another provision in the Operating Agreement states:

> Everything within this Agreement is to be construed in the spirit of, and in compliance with, all Federal Regulations and United States Codes relating to the operation and management of Service Disabled Veteran-Owned Small Business. To the extent that any provision within the Agreement is in conflict with any Federal Regulations or United States Codes relating to the operation and management of Service Disabled Veteran-Owned Small Business, the Federal Regulation or United States Code governs.

Operating Agreement, § 17.5.

In addition to the Nevada office in Mr. Rinasz's home, Appellant has had a Rochester, N.Y. office since 2010, in space subleased from Christa Construction. Appellant told the Area Office that Mr. Rinasz works out of the Rochester, N.Y., office one week per month. Appellant reportedly contracts with Christa Construction for general office support services at market rates, including temporary staffing, to help with payroll, estimating, and marketing. Appellant told the Area Office that its relationship with Christa Construction ends with this general office assistance, and that each company maintains its own business and financial records.

Appellant's Executive Vice President at the Rochester, N.Y., office since January 1, 2010, is James Kingsley, who is formerly Christa Construction's Vice President of Business Development. Mr. Kingsley is a “special employee” paid by Christa Construction with reimbursement by Appellant for salary and benefits. Appellant told the Area Office that the special employment relationship was created because “due to a pre-existing medical condition” of Mr. Kingsley's it would be difficult for him to reapply for insurance in a different company.

Explanation to Part V of Form 355. The "Special Employment Agreement" states that Appellant will have "complete control and authority over the work performed by [Mr.] Kingsley," but that "[o]nly Christa [Construction] will have the authority to terminate [Mr.] Kingsley."

Appellant explained in its Form 355 that Mr. Christa's minority membership "has provided [Appellant] with advantages with respect to [Appellant's] bonding limit. For example, to help [Appellant] to obtain additional bonding, [Christa Construction] became an indemnitor of any bond written on behalf of [Appellant] as a principal." Explanation to Part V of Form 355. According to Appellant, this was "done solely to facilitate bonding for [Appellant] at a higher limit." *Id.*

C. The Size Determination

On September 8, 2011, the Area Office issued Size Determination No. 6-2011-114 concluding that Appellant is not a small business.

The Area Office first observed that Appellant certified as small on June 3, 2011, and that Appellant's fiscal year ends December 31. Therefore, data from Appellant's three most recently completed fiscal years (2008, 2009, and 2010) would be used to determine Appellant's size.

The Area Office found that Appellant did not furnish complete information for fiscal year 2008. In particular, Appellant advised the Area Office that it "could not provide financial statements or tax returns for the period during which [Mr. Rinasz] was not the owner." Size Determination at 2. The Area Office noted that Appellant did submit a declaration from counsel indicating that Mr. Doane told him that Mr. Doane did not contract work under Appellant's name in 2008. Nevertheless, because Appellant did not provide complete tax returns or financial statements for 2008, the Area Office applied an adverse inference that the missing information would have been unfavorable. 13 C.F.R. § 121.1008(d).

The Area Office next determined that Mr. Christa, as the minority owner of Appellant, could exercise "negative control" over the firm. The Area Office found that Section 6.1 of Appellant's Operating Agreement requires unanimous approval for many basic types of business decisions. "Consequently, both Messrs. Rinasz and Christa have the power to control [Appellant] since a unanimous vote is required to conduct the simplest of transactions, i.e., incurring any expense in excess of $5,000." Size Determination at 3.

Having determined that Mr. Christa has ability to control Appellant, the Area Office found that Appellant would be affiliated with other companies that Mr. Christa controls. The Area Office noted that Mr. Christa is the CEO and majority owner of Christa Construction, and that Mr. Christa has other business interests, the details of which were not fully disclosed. Furthermore, apart from Mr. Christa's negative control over Appellant, the Area Office also found that Appellant is affiliated with Christa Construction based on common management and contractual ties, pointing to Mr. Kingsley's involvement, the sublease, and the bonding arrangement. *Id.* at 4 - 5.

Appellant informed the Area Office that it did not have access to financial records for

Christa Construction or Mr. Christa's other interests, but that Appellant likely would exceed the size standard if its receipts were combined with those of Christa Construction. *Id.* at 5. Because Appellant did not provide a Form 355 or other data on Christa Construction's receipts, the Area Office applied an adverse inference that the missing information would have shown that Appellant was not a small business. *Id.*

Appellant received the size determination by email on September 8, 2011.

C. The Appeal

On September 20, 2011, Appellant appealed the size determination to OHA. Appellant asserts that the Area Office misinterpreted Appellant's Operating Agreement to conclude that Mr. Christa has negative control over Appellant. Appellant further argues that the Area Office improperly applied adverse inferences with respect to Appellant's 2008 receipts and with respect to Christa Construction's size, although Appellant now "concedes that revenues of Christa Construction would exceed the applicable size standard." Appeal at 11, fn.2.

With regard to Appellant's 2008 receipts, Appellant argues that "[Mr.] Doane, who was the sole member of [Appellant] for a period in 2008, refused to cooperate by providing his personal tax return for 2008." *Id.* at 7. Appellant maintains that it has no access to Mr. Doane's financial information, and therefore cannot be faulted for failure to produce this material. In addition, Appellant indicates that it understands Mr. Doane generated no revenue for Appellant during his ownership. *Id.* at 2. Thus, according to Appellant, Mr. Doane's "2008 tax return is irrelevant in any event, as no [ ] business would be reflected." *Id.* at 7. In the event that OHA is not satisfied with Appellant's explanation, Appellant moves that OHA subpoena Mr. Doane's 2008 tax information. *Id.* at 10.

Regarding the Area Office's finding of negative control, Appellant contends that it operates independently of Christa Construction and "has never subcontracted work to Christa Construction, nor does it plan to do so." *Id.* at 8. Appellant emphasizes that Mr. Rinasz is Appellant's majority owner and exercises actual day-to-day control over Appellant's operations. *Id.* at 6, 13. Appellant asserts that Mr. Christa, by contrast, has minimal involvement with Appellant's business. Appellant contends that "[Mr.] Rinasz meets with Mr. Christa approximately once a quarter to update him on [Appellant's] current and potential projects and, while Mr. Christa occasionally provides advice, he makes no decisions relating to the operations of [Appellant], including construction of current projects or the bidding future projects. Those decisions, and all other day-to-day operations are made exclusively by [Mr.] Rinasz." *Id.* at 4.

Appellant asserts that the provisions of its Operating Agreement must be read in light of the governing Nevada state law, which provides that contract terms are interpreted according to the parties' mutual intentions. *Id.* at 11. Here, argues Appellant, the parties' mutual intentions are shown in Section 17.5, which provides that the Operating Agreement is to be read as in compliance with Service Disabled Veteran-Owned Small Business Concern regulations.*Id.* at 5. Appellant contends that because the "manifest intent" of the Operating Agreement is that Mr. Rinasz has full control of Appellant's operations, any "seemingly contrary provision that causes ambiguity" must be "construed so that it is deemed in compliance with the applicable

requirements for a small business." *Id.* at 13. Appellant asserts that the Area Office improperly relied on isolated provisions of the Operating Agreement and extrapolated from them that Mr. Christa has negative control over Appellant, an approach contrary to rules of contract interpretation.

Appellant next asserts that, notwithstanding the language of Section 6.1 of the Operating Agreement, Mr. Rinasz still has ultimate control of Appellant, because he controls 51% of the votes required to confirm or control Appellant's action. Appellant contends that Section 6.1 should be understood to mean that "unanimous consent is desired" — but not required — for the actions listed. *Id.* at 14. In support, Appellant cites *Size Appeal of The Clement Group, LLC*, SBA No. SIZ-5146 (2010), in which OHA determined that the minority owners of a company could not exercise negative control over a board of directors on which they appeared to be able to block a quorum.

Alternatively, Appellant asserts that the actions and decisions listed in Section 6.1 do not interfere with Mr. Rinasz's ability to manage Appellant on a day-to-day basis, but exist only to protect the minority owner's interests. *Id.* at 14-15.

Appellant also challenges the Area Office's finding of common management affiliation, asserting Mr. Kingsley's service in Appellant does not affiliate Appellant with Christa Construction.

As relief, Appellant requests that OHA reverse the size determination and conclude that Appellant is a small business.

With its appeal petition, Appellant moved to expand the record to include three documents as new evidence. This proposed new evidence includes a sublease executed September 14, 2010 (Exhibit A), the affidavit of James C. Kingsley dated September 19, 2011 (Exhibit B), and a letter from Dr. Richard Rudick dated December 3, 2009 (Exhibit C). As good cause for the admission of Exhibit A, Appellant asserts that the sub-lease was inadvertently omitted from Appellant's original submission to the Area Office. As good cause for the admission of Exhibits B and C, Appellant asserts that these documents would explain the purpose of Mr. Kingsley's special employment status. Appellant contends that, although it had submitted other information on this subject to the Area Office, the Area Office did not credit that information but, rather, made various incorrect inferences and assumptions on this subject.

RBV, the original protester, did not respond to the appeal.

IV. Discussion

A. Standard of Review

Appellant has the burden of proving all elements of its appeal. Specifically, Appellant must demonstrate that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). 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."). 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 Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

I find that Appellant has not shown good cause to admit new evidence. Exhibits A and C were at available at the time of the size protest and therefore could have been presented to the Area Office. Similarly, Exhibit B sets forth factual information that could have been communicated to the Area Office. Moreover, Appellant offers the three exhibits in response to the Area Office's determination that Appellant is affiliated with Christa Construction through common management and contractual ties. As discussed below, however, it is unnecessary to reach that issue in this case, because the record fully supports the Area Office's finding of affiliation through negative control. Accordingly, the new evidence is not relevant to the central issues before OHA.

Appellant's motion to expand the record is DENIED. Exhibits A, B, and C were not considered in deciding this appeal.

C. Negative Control

SBA regulations provide that concerns are affiliated when one "controls or has the power to control" the other, or a third party "controls or has the power to control both." 13 C.F.R. § 121.103(a). Control may be affirmative or negative. Negative control "includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders." 13 C.F.R. § 121.103(a)(3).

In interpreting these provisions, OHA has recognized that a minority shareholder's power to veto extraordinary actions outside the ordinary course of business — such as the issuance of additional stock, amendment of the concern's charter or bylaws, or entry into a substantially different line of business — does not necessarily constitute "negative control." *Size Appeal of EA Engineering Science, and Technology, Inc.*, SBA No. SIZ-4973, at 9-10 (2008). Rather, a requirement that minority shareholders consent to extraordinary actions may simply protect the minority shareholder's investment. *Id.* Conversely, negative control exists when a minority

shareholder can block "ordinary actions essential to operating the company." *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023, at 10 (2009);*Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977, at 14 (2008). OHA has determined that the creation of debt and the payment of dividends are among such "ordinary actions," as these matters are fundamental to the daily operation of a business. *Eagle Pharmaceuticals*, at 11.

In this case, the Area Office correctly observed that Section 6.1 of Appellant's Operating Agreement requires the consent of both Mr. Rinasz and Mr. Christa for many basic decisions, including: approval of, or changes to, Appellant's operating budget; incurring any expense over $5,000 not in the operating budget; submission of any bid over $250,000; execution of any contract over $250,000; and the borrowing of money or pledging of Appellant's property to secure a loan. Each of these decision types is vital Appellant's daily business operations. Because Appellant cannot conduct ordinary business without the consent of Mr. Christa, the Area Office correctly determined that he exerts negative control over Appellant.

Appellant emphasizes that Mr. Christa is a passive investor who plays no active role in the company. SBA regulation indicates, however, that "[i]t does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. § 121.103(a). Since Mr. Christa has the power to exert negative control over Appellant, it is immaterial whether or not he has actually utilized that power.

Appellant also asserts that, under Section 6.1 of the Operating Agreement, unanimous consent is merely preferred, but not required. Appellant maintains that Mr. Rinasz retains ultimate control because, if Mr. Christa were to refuse consent under Section 6.1, the process would then proceed to a majority vote under Sections 6.2 and 6.3, which Mr. Rinasz (as majority owner) would win. The problem with Appellant's argument is that it is plainly inconsistent with the text of Section 6.1 itself: "Notwithstanding any provisions in this Agreement to the contrary, the following decisions shall require the unanimous consent of the Class A Members." Thus, Section 6.1 not only indicates that the specified decisions "require ... unanimous consent," but also states that Section 6.1 takes precedence over "any provisions in this Agreement to the contrary." There is simply no way around the fact that Appellant's Operating Agreement requires both Mr. Rinasz and Mr. Christa to approve any of the decisions listed in Section 6.1.

I must also reject Appellant's contention that Section 6.1 is ambiguous, and should be interpreted according to the parties' mutual intent that the Operating Agreement be deemed in compliance with applicable legal requirements. It is well-settled that, to be "ambiguous," a contractual instrument must be susceptible to two or more reasonable interpretations. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). If there is only one reasonable interpretation, the instrument is not ambiguous. *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996)("A contract term is unambiguous when there is only one reasonable interpretation."). Here, the only reasonable interpretation of Section 6.1 is that unanimous approval is required for each of the decisions listed. I therefore find that Section 6.1 is not ambiguous.

Finally, Appellant's reliance on *Size Appeal of The Clement Group, LLC*, SBA No. SIZ-5146 (2010) in support of the proposition that Mr. Rinasz holds ultimate control of Appellant is

unavailing. In *Clement*, OHA determined that directors of a corporation did not exert negative control over the firm, because, under Alabama state law, the majority owner could unilaterally remove those directors without cause. By contrast, in this case, Appellant has not established that Mr. Rinasz could unilaterally divest Mr. Christa of the right to veto decisions under Section 6.1 of the Operating Agreement.

Accordingly, the Area Office did not err in concluding that Mr. Christa has negative control over Appellant, and that, therefore, Appellant and Christa Construction are affiliated. Appellant now acknowledges that Christa Construction is not a small business under the applicable size standard. Appeal at 11, fn.2. Thus, affiliated with Christa Construction, Appellant also is other than small. 13 C.F.R. § 121.103(a)(6).

D. Other Issues

Because I am affirming the Area Office's finding of affiliation between Appellant and Christa Construction on the ground of negative control, it is unnecessary to discuss the Area Office's finding of affiliation based on the additional ground of common management and contractual ties. In addition, because affiliation with Christa Construction renders Appellant other than small, it is unnecessary to determine the exact amount of Appellant's 2008 receipts. Thus, I need not rule on Appellant's motion to subpoena Mr. Doane's 2008 tax information, or decide whether the Area Office properly applied an adverse inference due to Appellant's failure to produce complete tax returns and financial statements for 2008.

V. Conclusion

Appellant has not established any material error of law or fact in the Area Office's size determination. Accordingly, the appeal is DENIED.

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

KENNETH M. HYDE
Administrative Judge