

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

SIZE APPEAL OF:

Saint George Industries, LLC,

Appellant,

Appealed From
Size Determination No. 3-2013-034

SBA No. SIZ-5474

Decided: June 5, 2013

APPEARANCES

Patrick A. Stallings, President, Saint George Industries, LLC, Hialeah, Florida, for Appellant

DECISION

I. Introduction and Jurisdiction

On March 15, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2013-034 finding that Saint George Industries, LLC (Appellant) is not a small business under the applicable size standard of 500 employees. The Area Office specifically determined that Appellant is affiliated with Point Blank Enterprises, Inc. (PBEI) under the newly organized concern rule, 13 C.F.R. § 121.103(g), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). In addition, the Area Office found Appellant affiliated with Athena Technologies, Inc. (Athena) through common ownership, 13 C.F.R. § 121.103(c)(1), and identity of interest, 13 C.F.R. § 121.103(f).

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse, and conclude that Appellant is a small business. 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 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. Procedural History

On July 18, 2012, the U.S. Department of the Army (Army) issued Solicitation No. W91CRB-12-R-0050 (RFP) for the purchase of concealable body armor vests. The vests consisted of a cloth carrier and flexible ballistic inserts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 315999, Other Apparel Accessories and Other Apparel Manufacturing, with a corresponding size standard of 500 employees. Appellant and Short Bark Industries, Inc. (SBII) submitted timely proposals. There were no proposal revisions.

On September 12, 2012, SBII received notice that Appellant was an apparent awardee. That same day, SBII submitted a size protest alleging that Appellant was not an eligible small business due to affiliation with Point Blank Body Armor under the newly organized concern rule. On October 3, 2012, the Area Office issued Size Determination No. 3-2012-116. The Area Office found Appellant affiliated with PBEI under the newly organized concern rule, 13 C.F.R. § 121.103(g), and the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

On October 17, 2012, Appellant appealed Size Determination No. 3-2012-116 to OHA, claiming that Appellant's president and founder, Mr. Patrick Stallings, was not a former key employee of PBEI, because he was employed at PBEI only for three months before being discharged involuntarily. On January 18, 2013, OHA issued its decision in *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5440 (2013) (*Saint George I*), granting the appeal in part. OHA found the issue of affiliation under the ostensible subcontractor rule to be moot, because Appellant's contract had since been terminated. *Saint George I*, SBA No. SIZ-5440, at 8. OHA remanded the issue of the newly organized concern rule for further review and investigation. *Id.*, at 8-9.

B. The Instant Size Determination

On March 15, 2013, the Area Office issued Size Determination No. 3-2013-034 finding that Appellant is affiliated with PBEI and Athena. Upon aggregating Appellant's employees with those of its affiliates, the Area Office determined that Appellant exceeds the 500 employee size standard.¹

The Area Office first explained that Mr. Stallings owns 90% of Appellant and serves as its president. Mr. Stallings's wife, Mrs. Karan Cerutti, owns the remaining 10% of the company. (Size Determination No. 3-2013-034, at 3.) Mrs. Cerutti also owns 100% of Athena. Because they are a married couple, Mr. Stallings and Mrs. Cerutti share an identity of interest under 13

¹ Appellant does not dispute affiliation with Athena, but argues that Athena is a new company with no revenues and no employees. Appellant's Form 355 indicates that Appellant itself has approximately 30 employees. Thus, absent affiliation with PBEI, Appellant clearly qualifies as a small business under the 500 employee size standard.

C.F.R. § 121.103(f). The Area Office concluded that Mr. Stallings and Mrs. Cerutti have the power to control both Appellant and Athena based on their ownership interests, and that Appellant and Athena are affiliated through common ownership.

Next, the Area Office examined Appellant's potential affiliation with PBEI under the newly organized concern rule. Mr. Stallings founded Appellant in January 2012, and Appellant commenced operations in May 2012, four months after Mr. Stallings left PBEI, so Appellant is “newly organized.” (*Id.* at 6.)

The Area Office explained that in 2007 Mr. Stallings joined Point Blank Solutions, Inc. (PBSI), a manufacturer of body armor, and served as an officer or key employee of PBSI during most of his tenure there. (*Id.* at 4.) The Area Office explained that Mr. Stallings ran operations between October 2008 and October 2009, and later became Executive Vice President for Department of Defense (DoD) Business Operations. Mr. Stallings also served as a vice president of other business units while employed at PBSI. (*Id.*)

The Area Office noted that, on April 14, 2010, PBSI petitioned for Chapter 11 reorganization in U.S. Bankruptcy Court for the District of Delaware. (*Id.*) As part of the bankruptcy proceedings, Sun Capital Partners, Inc. (SCP) established PBEI and on October 27, 2011 “bought substantially all the assets of PBSI out of bankruptcy.” (*Id.*) The Area Office found that Mr. Stallings continued to serve as Executive Vice-President of DoD Business Operations after PBSI's assets were acquired by PBEI. Mr. Stallings states that he was then involuntarily terminated from PBEI, departing from the company on January 31, 2012. (*Id.*)

The Area Office found that Mr. Stallings was a key employee at PBEI, despite his relatively short tenure with that company. The Area Office found that Mr. Stallings' role as Executive Vice-President of DoD Business Operations included responsibilities normally reserved for key employees, including reporting directly to the CEO. (*Id.* at 5.) Further, Mr. Stallings' position was of particular significance “[s]ince a large part of PBEI's market is [military] agencies.” (*Id.*) According to the Area Office, Mr. Stallings' position with PBEI “was a continuation of the position he held at PBSI for the previous year and a half.” (*Id.*) “Therefore, [the Area Office] finds [that Mr. Stallings] was a key employee even though he only worked for PBEI for approximately 90 days.” (*Id.*)

Next, the Area Office found that PBEI is the successor-in-interest of PBSI under 13 C.F.R. § 121.105(c). The Area Office determined that PBEI purchased “substantially all the assets related to the operation of PBSI's bullet, fragmentation and stab resistant apparel and related ballistic accessories manufacturing business.” (*Id.* at 5-6.) The Area Office found that the “sale included leases, contracts, personal property, intangibles such as patents, processes, trademarks, good will, government permits, accounts receivables, inventory, claims and insurance rights related to the business.” (*Id.* at 6.) Additionally, the Area Office determined that PBEI assumed many of PBSI's obligations under “leases and contracts, employee liabilities, and trade payables.” (*Id.*) Although PBEI did not accept all of PBSI's liabilities, the Area Office noted that 13 C.F.R. § 121.105(c) applies when one firm acquires “a substantial portion of the assets and/or liabilities” of another concern. (*Id.*) The Area Office observed that “[t]he company names are very similar, the company addresses are the same and companies are in the same line

of business.” (*Id.*) Based on these factors, the Area Office found that PBEI is the successor-in-interest of PBSI. (*Id.*)

Next, the Area Office determined that Appellant and PBEI are in the same or related industries. The Area Office found that PBEI engages in body armor manufacturing whereas Appellant “produces a variety of cloth carriers for body armor ballistic protection packages.” (*Id.*) Due to this similarity, and the fact that Appellant did not dispute that it operates in an industry related to PBEI’s, the Area Office found that the second element of the newly organized concern rule is met. (*Id.*)

The Area Office proceeded to state that Mr. Stallings founded Appellant, and that he is a former key employee of PBSI and PBEI, thus the third element of the newly organized concern rule is met. (*Id.* at 7.)

The Area Office next explained that Appellant and PBEI had a teaming agreement in place, as of August 7, 2012, the date for determining size. Under the agreement, PBEI was to provide substantial assistance to Appellant. *Id.* at 7-9. Accordingly, the Area Office stated, the fourth and final element of the newly organized concern rule is met. (*Id.* at 9.)

Lastly, the Area Office determined that, even if the facts here did not show affiliation under the newly organized concern rule, Appellant and PBEI also are affiliated under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). The Area Office reviewed and summarized the various ties between Appellant and PBEI. (*Id.* at 9-10.)

C. Appeal

On March 29, 2013, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant argues the Area Office failed to follow OHA’s remand instructions in *Saint George I* to determine whether PBSI and PBEI share ownership and management. (Appeal, at 1.) Appellant contends that PBSI is a public company and PBEI is a privately-held concern owned by SCP. Appellant further states that PBSI and PBEI have different management structures, different CEOs, and different directors. (*Id.* at 1-2.)

Appellant then challenges the Area Office’s use of 13 C.F.R. § 121.105(c) to justify the link between PBEI and PBSI. Appellant argues that this regulation is utilized to compute the size of a successor-in-interest company, not to treat a successor-in-interest and its predecessor as one unified entity for all purposes. (*Id.* at 2.) Appellant reiterates that Mr. Stallings was only employed at PBEI for 90 days, and states that during that period of time he did not wield substantive authority or influence over PBEI. (*Id.*)

Next, Appellant argues the Area Office failed to establish that a “substantial portion” of PBEI’s assets and/or liabilities are the same as PBSI’s. Appellant contends that PBEI is a new company comprised of the assets of four different body armor companies. Appellant asserts that PBEI’s government contracts are larger than those formerly held by PBSI, and the facilities used

by PBEI are bigger than PBSI's facilities. (*Id.*) Given these distinctions, Appellant argues that PBEI is a different company altogether from PBSI. (*Id.*)

Appellant complains that the Area Office erroneously relied upon Mr. Stallings's job titles in concluding that he was a key employee or officer of PBEI and PBSI. Appellant argues the Area Office failed to give sufficient weight to *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403 (2012), a case referenced in *Saint George I*. Appellant contends that the fact that Mr. Stallings reported directly to PBEI's CEO is immaterial, because PBEI's Director of Human Resources also reported to the CEO, yet did not have any critical influence or control over operations. (*Id.* at 3.) Appellant asserts that Mr. Stallings was not an officer of PBSI or PBEI and after leaving his position as Executive Vice-President of Operations in 2009, he did not actively participate in board meetings and other executive-level decision making. (*Id.*) Appellant further contends that PBSI and PBEI both require officers to be elected by the board of directors, and Mr. Stallings was never so elected. Thus, Appellant reasons, Mr. Stallings was not a key employee or an officer of PBEI.

Next, Appellant contends the Area Office failed to recognize that the teaming agreement between Appellant and PBEI was terminated on October 4, 2012. Appellant adds that PBEI is its largest but not its only customer, and that Appellant performs work for PBEI on an order-by-order basis, without any long-term commitments or agreements. (*Id.*) Appellant characterizes itself as a ““cut and sew” apparel manufacturer, creating products unrelated to its work for PBEI, such as chair covers and cocktail dresses. (*Id.*) Appellant contends that PBEI operates predominantly in the body armor market, whereas Appellant is involved in other endeavors. (*Id.*) Appellant notes that PBEI identifies its primary NAICS codes as 315999, Other Apparel Accessories and Other Apparel, and 339113, Surgical Appliance and Supplies. (*Id.*) Appellant has no involvement with — and has no plans to enter — the latter industry.

Appellant questions the Area Office's decision to include Athena in this size determination. Appellant asserts that Athena is a new company, wholly-owned by Mrs. Cerutti, and that Athena has no “employees, assets, liabilities or sales.” (*Id.* at 4.) Appellant asks that Athena be removed as an affiliate. Appellant further argues that the newly organized concern rule is not intended to restrict individuals from setting up their own small businesses, so finding Appellant affiliated with PBEI is contrary to public policy. (*Id.*) Appellant explains that it purposefully did not avail itself of a mentor/protégé arrangement with PBEI in an effort to distance itself from PBEI, which had previously discharged Mr. Stallings. (*Id.*)

Appellant concludes that a clear line of fracture exists between itself and PBEI, and between PBSI and PBEI. (*Id.* at 5.) Appellant requests that, if OHA affirms the size determination, OHA limit its ruling to work within NAICS code 315999, so that Appellant may continue to pursue other Government procurement opportunities as a small business. (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of

the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The Area Office determined that Appellant is affiliated with PBEI under the newly organized concern rule, 13 C.F.R. § 121.103(g). As discussed below, Appellant has not persuasively established that this finding is clearly erroneous. As a result, the appeal must be denied.

The newly organized concern rule consists of 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 Rio Vista Mgmt., LLC, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010). If these four elements are met, affiliation may be rebutted by demonstrating a clear line of fracture between the two concerns. The purpose of the newly organized concern rule is to prevent circumvention of the size standards by the creation of “spin-off” firms that appear to be small, independent businesses but are, in actuality, affiliates or extensions of large firms. *Size Appeal of Coastal Management Solutions, Inc.*, SBA No. SIZ-5281, at 4 (2011).

In this case, there is essentially no dispute that the second, third, and fourth elements of the above test are met. The second element of the test is met because Appellant and PBEI operate in related industries. PBEI is a body armor manufacturer, whereas a large portion of Appellant's business is devoted to producing body armor carriers for PBEI. *See* Section II.B, *supra*. The third element of the test is met because Appellant's founder, Mr. Stallings, is Appellant's president and majority shareholder. *Id.* The fourth element of the test is met because Appellant and PBEI entered into a teaming agreement, whereby PBEI would provide substantial assistance to Appellant. *Saint George I*, SBA No. SIZ-5440, at 3-4. Although Appellant emphasizes that the teaming agreement is no longer in existence, the agreement was in effect on August 7, 2012, the date for determining size. 13 C.F.R. § 121.404(a). Moreover, irrespective of the teaming agreement, Appellant also concedes that it performs substantial subcontracting work for PBEI; indeed, PBEI is Appellant's largest customer. (Appeal at 5.) OHA has previously held that high levels of subcontracting are sufficient to meet the fourth element of the test. *E.g.*, *Sabre88*, SBA No. SIZ-5161, at 3, 8 (fourth element of newly organized concern test is met when challenged

firm derived one third of its revenues from alleged affiliate).

Because the second, third, and fourth elements of the newly organized concern rule are met, the dispositive issue presented here is whether the first element of the test is also met — in other words, whether Mr. Stallings is a former officer or key employee of PBEI.² The Area Office found that Mr. Stallings is a former key employee of PBEI. Specifically, Mr. Stallings served as PBEI's Executive Vice-President of DoD Business Operations. In this capacity, Mr. Stallings reported directly to PBEI's CEO, and was responsible for overseeing the military aspects of PBEI's business. (Size Determination No. 3-2013-034, at 5.) The Area Office recognized that Mr. Stallings served only a 90-day tenure at PBEI, but found that his position was a continuation of very similar position he had held at PBSI for the preceding year and a half.

In seeking to overturn the size determination, Appellant relies upon *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403 (2012) for the proposition that actual authority rested with higher-level officials, not Mr. Stallings. In *Willow*, OHA found that an employee who had held the title “Government Services Manager” was not a former key employee, because she exerted no substantive control or influence over her former employer. *Willow*, SBA No. SIZ-5403, at 7. In *Willow*, however, the challenged firm introduced three sworn declarations, including two from managers at the former employer, attesting to the limited nature of the former employee's job responsibilities. *Id.*, at 5-6. Appellant here offers no similar evidence beyond mere assertions. Appellant states, for example, that Mr. Stallings was no longer an “active participant” in executive decision-making after 2009, but provides no specific details or corroborating evidence. I find, then, that Appellant has not carried its burden to show error in the size determination. As the challenged firm, Appellant was responsible for persuading the Area Office that it is a small business. 13 C.F.R. § 121.1009(c). Similarly, on appeal, it is Appellant's burden to prove that the size determination is clearly erroneous. 13 C.F.R. § 134.314. Mere unsupported assertions are not sufficient to refute, or establish error, in a size determination.

Appellant's best evidence that Mr. Stallings was not a key employee at PBEI is his short tenure with that company. It is true that the fact that Mr. Stallings was with PBEI for only 90 days suggests that he may not have had significant control over PBEI's operations or management. On the other hand, the fact that Appellant received subcontracts and other assistance from PBEI following Mr. Stallings's departure, and that Appellant was offered the opportunity to enter into a mentor-protégé relationship with PBEI, suggest that Mr. Stallings may have had significant influence within PBEI. Further, Appellant evidently does not dispute that Mr. Stallings was a key employee at PBSI, and his position at PBEI appears to be nearly identical. Thus, Mr. Stallings's short tenure with PBEI is not conclusive in determining whether or not he was a key employee. Similarly, SBA regulations do not specify any minimum time period to qualify as a key employee. *Cf.*, *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 12 (2013) (finding that no “waiting period” is necessary to apply SBA regulations). Accordingly, the Area Office's finding that Mr. Stallings was a key employee of PBEI, albeit only for a short period, is sufficient to meet the first element of the newly organized concern rule.

² By regulation, a “key employee” is defined as “an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.” 13 C.F.R. § 121.103(g).

Appellant also takes issue with the notion that PBEI is the successor-in-interest to PBSI under 13 C.F.R. § 121.105(c). Appellant highlights purported differences between the structures of the two companies. I find it unnecessary to resolve this question because the Area Office found that Mr. Stallings was a key employee of PBEI, and Appellant has not established that this finding is erroneous. Finding that PBEI is the successor-in-interest to PBSI serves only to further strengthen the size determination.

Lastly, I note that Appellant has not established any clear fracture between itself and PBEI. As of the date to determine size, several ties between the companies were still extant, including the teaming agreement and the subcontracting arrangements discussed above. *Sabre88*, SBA No. SIZ-5161, at 8-9 (finding no clear fracture when some, but not all, ties had been severed as of the date to determine size); *Size Appeal of Vortec Development, Inc.*, SBA No. SIZ-4866, at 9 (2007) (no clear fracture shown when there is a “continuing business relationship” between the firms). Accordingly, there was no clear fracture between Appellant and PBEI as of August 7, 2012, the date for determining size.

IV. Conclusion

Appellant has not demonstrated that the Area Office clearly erred in finding Appellant affiliated with PBEI. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge