United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Potomac River Group, LLC, Appellant, Appealed From Size Determination No. 02-2015-084	SBA No. SIZ-5689 Decided: October 21, 2015

APPEARANCES

David S. Cohen, Esq., Laurel Hockey, Esq., Cohen Mohr, LLP, Washington, D.C., for Appellant.

DECISION

I. Procedural History and Jurisdiction

On August 27, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 02-2015-084, finding that Potomac River Group, LLC, (Appellant) is not an eligible small business for the procurement at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal, and affirm the size determination.

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. Solicitation and Protest

On March 10, 2015, the Department of Defense, Virginia Contracting Activity (DOD) issued Solicitation No. HHM402-15-C-0036 for assistance in performing security interviews and

polygraph examinations. The Contracting Officer (CO) designated the procurement as a total small business set-aside, and assigned North American Industry Classification System (NAICS) code 561611, Investigation Services, with a corresponding $20.5 million annual receipts size standard as the appropriate code for this procurement. Offers were due on April 16, 2015.

On April 30, 2015, the CO issued a notice identifying Appellant as the apparent successful offeror. On May 6, 2015, Global Professional Solutions, Inc. filed a size protest against Appellant. The CO referred the protest to the Area Office, which sent Appellant a request for information on May 14, 2015. On June 11, 2015, Appellant responded. On July 15, 2105, the Area Office requested additional information, and on July 31st, Appellant responded.

B. Size Determination

On August 27, 2015, the Area Office issued its size determination finding Appellant is not a small business concern for the procurement at issue.

The Area Office found Frank Frysiek owns 48.54% of Appellant, 48.54% owned by Intelligent Decisions, Inc. (ID) and 2.92% owned by Jacqueline von Wodtke. Mr. Frysiek is President, Manager and CEO while Ms. Von Wodtke serves as Secretary and Vice President of Finance. Another firm, PRG Defense, is a division of Appellant, and its receipts are included in Appellant's tax returns.

As of April 16, 2015, the date Appellant submitted its proposal, its Operating Agreement (the Agreement) provided that:

> [A]ll determinations, discussions, approvals and actions affecting the Company and its business and affairs shall be determined, made, approved or authorized only by the affirmative vote of Members holding at least 75% of all Voting Units represented in person or by proxy and entitled to be voted at a meeting. . . .

Agreement, at § 4.01. The Agreement further authorized delegation of authority to one or more elected Managers (§ 4.02), but imposed a number of restrictions on that Manager's authority (§ 4.03). The Agreement provided that an act of the Members shall require an affirmative vote of Members holding at least 75% of the Voting Units (§ 7.02), and that a Member's voting interests may not be transferred to another Member (§10.01).

Appellant's July 31st submission to the Area Office stated that Appellant had realized the Agreement did not reflect its actual practice, and that Mr. Frysiek, Ms. Von Wodtke and ID had executed a new operating agreement on June 11, 2015. This agreement ends all supermajority voting requirements and removes the prohibition against the transfer of voting rights. Further, Ms. Von Wodtke transferred her voting rights to Mr. Frysiek. Appellant argued that ID had never been involved in its management or day-to-day operations, and Mr. Frysiek makes all management decisions.

The Area Office further found that Mr. Frysiek also holds a 25% interest in Aerospace Holdings, LLC (AH LLC) and a 100% interest in Aries International (AI). Both concerns are holding companies formed for the purpose of owning recreational aircraft.

The Area Office found Appellant affiliated with AH LLC, AI, and ID. The Area Office reasoned that on April 16, 2015, time Appellant submitted its proposal, Mr. Frysiek and ID each held a 48.54% interest and 50 voting units in Appellant, and Ms. Von Wodtke a 2.92% interest and 3 voting units. Accordingly, both Mr. Frysiek and ID had power to control Appellant (13 C.F.R. § 121.103(c)(2)). Further, the Agreement had supermajority voting requirements which prevented Mr. Frysiek from taking action without ID's consent. Accordingly, Appellant was affiliated with ID. Appellant did not provide any affiliate's tax returns, but conceded that ID is a large business. The Area Office therefore concluded Appellant was other than small.

C. Appeal Petition

On September 11, 2015, Appellant filed the instant appeal of the size determination. Appellant contends the size determination is based upon errors of fact and law and should be reversed.

Appellant argues the Area Office erred in finding ID had power to control it. Appellant asserts it submitted extensive evidence rebutting the presumption of control by ID. Sworn Declarations by Appellant's officials attested Mr. Frysiek had final authority and controlled decisions for Appellant. Mr. Frysiek makes all decisions for Appellant without any input, influence or vote by ID. The Area Office elevated form over substance and wrongly concluded ID had the power to control Appellant.

Appellant submitted two sworn declarations in response to the protest, one from Mr. Frysiek, dated July 31, 2015, and one from Ms. Von Wodtke, dated July 30, 2015. They both attested that Mr. Frysiek alone controlled Appellant. They supported their representations with a number of examples, all of which demonstrated that ID played no role whatsoever in Appellant's operations and decision making process.

Appellant asserts that notwithstanding the provisions of the Agreement, Appellant and its Members did not rely upon the Agreement, never voted on any actions, and vested all control in Mr. Frysiek, who ran the concern, made all of Appellant's decisions and was authorized to do so without ID's approval. As of the date of Appellant's submission of its proposal, Mr. Frysiek controlled and managed Appellant, and he alone had final authority and control over Appellant's decisions. Mr. Frysiek decided which sales opportunities to pursue, the pricing on Appellant's products, hiring, firing and employee discipline, determining compensation and benefits, approving company distributions, negotiating contracts and administering contract performance and invoicing. ID has no authority or means to alter or direct any financial decisions or reporting, or decide the timing of Appellant's tax filings. ID is not a signatory on Appellant's bank accounts, does not sign checks, and has no involvement with Appellant's line of credit. ID provides no funding to Appellant, and the two firms have never teamed together or done business together.

ID and its principals have never acted on Appellant's behalf in any capacity; indeed, its principals have never been to Appellant's offices. Appellant has never had any membership meetings, and ID has never voted on any action taken by ID or consented in writing to such action.

Appellant points to its June 11, 2015 Operating Agreement, which removed all supermajority voting requirements, and established that full control rested solely with Mr. Frysiek. Mr. Frysiek's declaration included a personal statement that since Appellant's inception, he alone ran the company even as its members changed. Neither Mr. Frysiek nor ID ever relied on the Agreement in deciding who should or could make decisions for the company. Mr. Frysiek made all decisions. Appellant's Members executed the June 11th Agreement to formalize Appellant's long standing actual practices of operation. This agreement allows a majority vote for all non-extraordinary decisions and gives Ms. Von Wodtke the right to transfer her voting units to Mr. Frysiek. Ms. Von Wodtke executed a Voting Agreement irrevocably transferring her voting rights to Appellant. This ensures Mr. Frysiek has a majority vote so that he may manage and control Appellant's operations, as he has all along.

Appellant argues it has successfully rebutted the presumption of control vested in ID by virtue of its ownership interest. ID is solely a passive investor, and while the Agreement provided that its vote was necessary to take certain actions, in reality that was never the case.

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

This case turns on two regulations:

> SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.

13 C.F.R. § 121.404(a).

> Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party controls or has the power to control

> both. It does not matter whether control is exercised, so long as the power to control exists. (emphasis supplied)

13 C.F.R. § 121.103(a)(1).

Appellant submitted its initial offer, including price, on April 16, 2015. Therefore Appellant's size must be determined as of that date. *Size Appeal of Obxtek, Inc.,* SBA No. SIZ-5451 (2013). That means I must decide the issue of whether Appellant is affiliated with its shareholder, ID, based upon the relationship between the concerns as of April 16th, relying upon the company documents that were in effect at that time. Appellant's July 11th Operating Agreement is completely irrelevant here. It was executed after Appellant's April 16th submission of its initial offer and thus cannot have any bearing as to the relationship between Appellant and ID as of that date. *Size Appeal of Alterity Management and Technology Solutions, Inc.*, SBA No. SIZ-5514 (2013) (recognizing that events occurring after the date to determine size cannot be considered).

An Operating Agreement is a Limited Liability Company's equivalent of Corporate By-laws, it governs the LLC's business and lays out the Members' rights and duties. Virginia Limited Liability Company Act, § 13.1-1001.1. The Agreement, executed December 31, 2011, is the instrument which governed Appellant as of the date to determine size. It provides "All determinations, discussions, approvals and actions affecting the company and its business and affairs shall be determined, made, approved or authorized only by the affirmative vote of Members holding at least 75% of all voting units. . . ." Agreement, § 4.01. Notwithstanding any delegation of authority to the Manager, the Manager cannot, without prior written approval or consent of Members holding at least 75% of all voting units, make any Major Decisions, which include: setting compensation, a number of other decisions involving transfer of Appellant's assets, and provisions designed to protect the Members' investments. Agreement § 4.03. The Agreement provides that in order for a vote to be an act of the Members, there must be an affirmative vote of at least 75% of the voting units. Agreement, § 7.02.

It is clear that the Agreement requires that all actions taken to manage Appellant require a vote of 75% of the Members' voting units. As noted above, it is the Agreement that legally governs this company. The declarations Appellant submitted may reflect Appellant's practice in running the corporation, but that is not the issue here. The regulation makes clear that power of one firm to control another supports a finding of affiliation, and it does not matter whether the control is exercised, so long as the power to control exists. ID has a 48.54% interest in Appellant, which means its assent is necessary in order for any motion to command a 75% vote. ID has the ability to block any "determinations, discussions, approvals and actions affecting the company and its business and affairs", and any act of Appellant's Members requires its approval.

These provisions go far beyond the type of control of extraordinary actions which OHA has recognized as necessary to protect an investment. *See Size Appeal of EA Engineering Science and Technology, Inc.*, SBA No. SIZ-4973 (2008). The actions here which require 75% approval include all decisions necessary to run the company. When a minority owner has the power to block ordinary actions essential to operating the company, that owner has negative control, and

that negative control mandates a finding of affiliation. 13 C.F.R. § 121.103(a)(3); *Size Appeal of Carntribe-Clement 8AJV #1*, SBA No. SIZ-5357 (2012).

ID has this power under the Agreement, whether it has chosen to exercise it or not. Reaching this conclusion is not an elevation of form over substance. Rather, it is a recognition of the actual, legal power given to ID by the Agreement, based upon the plain language of the Agreement itself. ID may choose to be a passive, indeed, even supine, investor, but the fact is that under the Agreement its consent is required for Appellant's every decision. Under SBA's regulations, this degree of negative control mandates a finding that ID is affiliated with Appellant.

Appellant's argument that the declarations it submits vary the terms of the Agreement and rebut a presumption of affiliation is meritless. First, the Agreement speaks for itself, and I need not venture beyond its actual terms to interpret it, and so I do not consider the declarations. *Size Appeal of Washington Patriot Construction, LLC*, SBA No. SIZ-5447 (2013). Second, the finding of negative control here is not a presumption, and the regulation does not permit a rebuttal of a finding of negative control. Rather the regulation mandates a finding of affiliation based upon ID's negative control.[1]

Accordingly, I find the Area Office was correct in finding Appellant affiliated with ID. ID is an admitted large business, and the Area Office thus properly found Appellant other than small. Appellant has failed to meet its burden of establishing that the Area Office's determination was based upon error of fact or law.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

[1] The fact that ID and Mr. Frysiek each own a block of stock of less than 50% of the voting interest, that these holdings are equal in size, and their aggregate is large as compared to the other holdings in Appellant, does result in a rebuttable presumption that both Mr. Frysiek and ID have the power to control Appellant. 13 C.F.R. § 121.103(c)(2); *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646 (2015). However, I need not consider whether Appellant has successfully rebutted the presumption because the case for negative control here is decisive.