

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

SIZE APPEAL OF:

Global Native Services, Inc.

Appellant,

RE: Center for the Education, Testing, and
Research of Language, LLC

Appealed From
Size Determination No. 02-2017-114

SBA No. SIZ-5865

Decided: November 6, 2017

APPEARANCES

Zuzan Barwari, President, Global Native Services, Inc.,

David P. Ellis, Executive Director, Center for the Education, Testing, and Research of
Language, LLC.

DECISION

I. Introduction and Jurisdiction

On August 17, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office), issued Size Determination No. 02-2017-114 finding Center for the Education, Testing, and Research of Language, LLC (CENTRL), is an eligible small business for the procurement at issue.

Global Native Services, Inc. (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 that CENTRL is not an eligible small business for the instant procurement. For the reasons discussed *infra*, I affirm the size determination and deny the appeal.

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 May 18, 2017, the Department of the Army, Mission Installation and Contracting Command (MICC), at Fort Leavenworth, Kansas, issued Solicitation No. W9124N-17-R-0100 (RFP) for language testing services. The Contracting Officer (CO) set the procurement aside for small business and designated North American Industry Classification System (NAICS) code 611710, Educational Support Services, with a corresponding \$15 million annual receipts size standard, as the appropriate code for this procurement. Offers were due on June 6, 2017.

On July 14, 2017, the CO notified Appellant that CENTRL is the apparent successful offeror. On that same day, Appellant filed a size protest with the CO alleging CENTRL is not a small business. Appellant alleged CENTRL is “a sham business and ‘front’D’ for the University of Maryland (University), a “large government contractor” which was awarded over \$66 million in government contracts in 2016 alone. (Protest at 1-2.) Further, CENTRL “is clearly connected to, supported by and staffed by” the University. (*Id.* at 1.) CENTRL's physical address is adjacent to the University's campus, and Dr. David Ellis, CENTRL's listed point of contact, is employed by the University. (*Id.* at 1-2.) Appellant noted public information is limited, but suggested “knowledge transfer via shared staff, underwritten salaries and/or benefits and/or the sharing of other administrative and incidental resources and budgets” would show non-independence. (*Id.* at 2.) The CO referred the protest to the Area Office for a size determination.

On July 18, 2017, CENTRL responded to the protest. CENTRL was organized as a limited liability company in the State of Maryland in August 2016, has not yet filed a Federal income tax return that reports revenue, and has no affiliates. (CENTRL's SBA Form 355.). Dr. David Ellis is 50% owner and Executive Director. Kathleen Kilday, Jenny Kirkbride, and Mujgan Matterson own 15% each and are Directors. Michael Freeman holds a 5% interest. (*Id.*)

CENTRL acknowledged that its members/directors are also employees of the National Foreign Language Center (NFLC) at the University; however, none of them is a key employee of the University itself. (Response at 1.) None of them has, in their capacity as University employees, the authority to make purchases, to submit responses to solicitations, or to execute contracts on the University's behalf. None of them has any power to control the University. (*Id.*)

Further, the University is not a subcontractor for CENTRL on this procurement. The University does not provide CENTRL with office space, financing, equipment, subcontracts or other resources. CENTRL's principals work for CENTRL on their own time and are providing the financing for this contract. (*Id.* at 1-2.)

B. The Size Determination

On August 17, 2017, the Area Office issued Size Determination No. 02-2017-114. The Area Office found the University has no ownership interest in CENTRL, is not involved in its management or its operations, and does not provide it with any resources. (Size Determination at 2.) CENTRL's only connection to the University is that its owners/officers are also employed

there. (*Id.*) Because the basis for affiliation is control, and because employment with an alleged affiliate absent any other indicia of affiliation is not grounds for finding affiliation, the Area Office concluded CENTRL is an independent entity, unaffiliated with the University. (*Id.* at 3.)

The Area Office also noted OHA's precedents that the Area Office has no obligation to investigate issues beyond those raised in the protest, and that more weight is given to signed and sworn statements made by the challenged concern on its Form 355 submission than is given to unsupported statements of other parties. (*Id.* at 3.) Thus, the Area Office determined that CENTRL is an eligible small business for this procurement. (*Id.* at 4.)

C. The Appeal

On August 28, 2017, Appellant filed the instant appeal. Appellant asserts the Area Office erred by not finding CENTRL affiliated with the University under the newly organized concern rule, arguing that the evidence it provided with its protest shows CENTRL meets all four conditions for this rule to apply. (Appeal at 3.)

One condition is met where former key employees of one firm organize a new firm. CENTRL's Executive Director, Dr. Ellis, is a key employee of both the NFLC and the University, because “[t]he Executive Director is, per its title, an executive role.” (*Id.*) As NFLC's most senior member, he must have critical influence or substantive control over its operations, must be able to hire and fire employees, and to negotiate contracts. (*Id.*) Appellant attaches information purporting to show the prominence of NFLC's parent, the University's College of Arts and Humanities, within the University system, and information purporting to show Dr. Ellis's prominence in the University system. (*Id.* at 4.) For example, out of 1200 total faculty and staff, Dr. Ellis is one of 21 voting members on the University's Administrative Council. Thus, Dr. Ellis is a key leader of the University. (*Id.* at 4-5.)

Appellant maintains the second condition of the newly organized concern rule is met here, because Dr. Ellis formed CENTRL and will serve as its Executive Director. (*Id.* at 8-9.) Appellant argues the third condition is met, because CENTRL and NFLC/the University are in the same or a related industry or field of operation. (*Id.* at 9.) The fourth condition, that the one concern is furnishing the other with financial or technical assistance, is also met here. The University pays Dr. Ellis and the other members of CENTRL salaries and benefits, which “has the same effect as if” the University provided CENTRL with working capital. (*Id.* at 10.) Appellant further asserts the University provides CENTRL with assistance in the form of shared technical knowledge, awareness of pricing and performance strategies, industry contacts, and other assets. (*Id.* at 9-11.) Thus, CENTRL and the University are affiliated under the newly organized concern rule.

Appellant additionally asserts CENTRL and the University are affiliated by common management and under the totality of the circumstances rule. (*Id.* at 11-12.)

Appellant also maintains the Area Office erred in giving greater weight to CENTRL's signed, sworn statements than to the information submitted by Appellant and available to the

Area Office on the internet. (*Id.* at 6-7.) As relief, Appellant requests that OHA either reverse the size determination or remand it to the Area Office for further investigation. (*Id.* at 2-3.)

With its appeal, Appellant files a motion to submit new evidence. The proposed new evidence include printouts of information from the University's and NFLC's websites, a copy of the University's policy and procedures regarding conflict of interest, printouts of Google searches on CENTRL's owners, CENTRL's State of Maryland registration, and an email documenting a telephone call to the University staff. Appellant argues that these documents establish that the size determination is erroneous.

D. CENTRL's Response

On September 14, 2017, CENTRL responded to the appeal. CENTRL maintains Appellant is raising new arguments on appeal, submitting what is in essence a new protest, rather than pointing to errors in the size determination. (Response at 4.) CENTRL also opposes all of Appellant's new evidence, because it was publicly available at the time of the protest. (*Id.* at 1-2.) In support, CENTRL cites several OHA decisions in which OHA declined to admit new evidence, particularly that which was publicly available at the time of the protest. (*Id.* at 4.)

CENTRL reiterates statements from its response to the protest, that at the time of bid opening, CENTRL performed no services for the University or any of its affiliates, and the University performed no services for CENTRL. (*Id.* at 2.) There is no financial relationship between the University and CENTRL. (*Id.*) There is no connection between the University and CENTRL other than that the four individual Members of CENTRL are also employees of the University. (*Id.* at 2.)

CENTRL asserts NFLC is not a business concern, but part of the University, and discusses the limitations on Dr. Ellis's authority there, specifically, that he cannot hire and fire personnel without extensive reviews. (*Id.* at 5.) CENTRL maintains Dr. Ellis is not a key employee of the University. (*Id.* at 6-8.) CENTRL also denies it has received assistance of any kind from the University. (*Id.* at 9-10.)

CENTRL also seeks to admit, as new evidence on appeal, an August 4, 2017 letter from the University to Appellant, and a string of emails dated September 7, 2017.

III. Discussion

A. Standard of Review and New Evidence

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).

Appellant and CENTRL both submit new evidence on appeal. New evidence on appeal is not considered unless it is ordered by the Judge or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308; *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5839, at 5 (2017). All of the evidence Appellant seeks to submit was available at the time it filed its protest, and could have been submitted then. Here, I find Appellant has not established good cause for the submission of its new evidence, and so I EXCLUDE it. I reach the same conclusion as to the new evidence CENTRL seeks to submit, which was available at the time of CENTRL's response to the protest. I therefore also EXCLUDE CENTRL's proffered new evidence.

B. Analysis

I find this appeal completely meritless. First, Appellant seeks to argue CENTRL is affiliated with the University under the newly organized concern rule and the common management rule. However, Appellant did not raise these substantive issues in its protest; rather, it attempts to raise them now, for the first time, on appeal. OHA's governing regulations do not permit the judge to consider substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Lost Creek Holdings*, SBA No. SIZ-5839, at 6. Accordingly, I may not consider Appellant's arguments on these issues.

Appellant's protest raised allegations that CENTRL is a "a sham business" and "front" for the University; and that CENTRL "is clearly connected to, supported by and staffed by" the University. (Protest at 1.) Taking into account that Appellant appeared *pro se*, this is essentially an argument that CENTRL and the University are affiliated under the totality of the circumstances rule, pursuant to 13 C.F.R. § 121.103(a)(5). Under this rule, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation; however, even under this affiliation rule, Appellant's evidence is insufficient for the Area Office to have concluded CENTRL and the University are affiliated.

The basis of any rule of affiliation is that one concern controls, or has the power to control, another concern. 13 C.F.R. § 121.103(a)(1). Here, the only record evidence that connects CENTRL and the University is the fact that CENTRL's owners are also employees of the University. I can find no regulation or OHA case law holding that the mere fact of shared employees, by itself, is sufficient to show that one entity controls the other, and Appellant has not pointed out any such precedent. Even if the additional evidence, that Dr. Ellis is one of 21 voting members on the University's Administrative Council (Council), had been presented in the protest, there still would not be sufficient evidence to show that CENTRL controls the University or that the University controls CENTRL, without further information showing that the Council has control over the University as a whole, and that Dr. Ellis, as one of 21 voting members, has control over the Council.

CENTRL's submissions to the Area Office make clear that it has no connection to the University other than that its members are also employed there. The University has no ownership interest whatever in CENTRL. The University does not provide CENTRL with any assistance in the form of contracts, financing, facilities, or equipment. The University is not a subcontractor for this procurement. All the ties Appellant alleges to exist between CENTRL and the University

are based on no more than speculation and supposition, and have no basis in fact. It is settled that SBA will give greater weight to the signed, sworn submissions by a challenged concern than to the unsupported allegations of a protestor. *E.g., Size Appeal of Stellar Innovations and Solutions, Inc.*, SBA No. SIZ-5851 (2017).

Appellant also suggests the Area Office should have done further investigation on CENTRL. This contention, however, is without any legal support. An Area Office is under no obligation to expand the scope of its review beyond the matters specifically raised by Appellant in its protest, and it had no obligation to investigate further. *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803, at 11 (2017).

Accordingly, I find that Appellant's appeal has failed to establish any clear error of law or fact in the size determination. Therefore, I must deny the appeal.

IV. Conclusion

Appellant has failed to demonstrate 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. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge