

SIZE APPEALS OF: G&C FAB-CON, LLC, APPELLANT

SBA No. SIZ-5649, 2015

2015 WL 1870695

March 23, 2015

SBA No. SIZ-5649, 2015 (S.B.A.), 2015 WL 1870695

Small Business Administration (S.B.A.)

Office of Hearings and Appeals

[Size Appeal]

***1 SIZE APPEALS OF: G&C FAB-CON, LLC, APPELLANT**

*1 | SBA No. SIZ-5649

*1 | Size Determination Nos. 1-SD-2015-08,-09, and -10

*1 | March 23, 2015

APPEARANCES

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- *1 For Freedom Contracting Group, LLC.
- *1 Constance M. Kobayashi, Esq.
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- *1 For the Agency.

REDACTED DECISION FOR PUBLIC RELEASE

DECISION¹

I. Introduction and Jurisdiction

*1 These appeals arise from three size determinations in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) concluded that G&C Fab-Con, LLC (Appellant) is not a small business under the size standard associated with the subject procurements. Appellant maintains that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and find that Appellant is a small business. For the reasons discussed *infra*, the appeals are denied and the size determinations are affirmed.

*1 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 appeals within fifteen days of receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitations and Protests

*1 Between March 27, 2014 and July 2, 2014, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. VA786A-14-R-0014, RFP No. VA786A-14-R-0018, and RFP No. VA786A-14-R-0037 for construction projects at national cemeteries. Each of the procurements was set aside entirely for service-disabled veteran-owned small businesses (SDVO SBCs). Two of the procurements were assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, and the third procurement was assigned NAICS code 236220, Commercial and Institutional Building Construction. All three procurements utilized a size standard of \$33.5 million average annual receipts.²

*1 In late September and early October 2014, VA announced that Appellant was the apparent awardee for all three procurements. Disappointed offerors timely protested Appellant's size, claiming that Appellant is other than small due to affiliation with companies associated with the Creter family. VA forwarded the protests to the Area Office for review.

B. Size Determinations

*2 On January 22, 2015, the Area Office issued Size Determination No. 1-SD-2015-08, No. 1-SD-2015-09, and No. 1-SD-2015-10 concluding that Appellant is not a small business.³

*2 The Area Office found that Dr. James Carter Griffith owns 51% of Appellant and is Appellant's Managing Member. (Size Determination No. 1-SD-2015-10, at 3.) [A minority ownership] interest is held by three members of the Creter family, who are also officers of Appellant. Specifically, [XXXXXXX] is Appellant's Vice President of Construction; [XXXXXXX] is Appellant's Vice President of Operations; and [XXXXXXX] is Appellant's Quality Assurance/Quality Control Manager, Senior Project Manager, Secretary and Treasurer. (*Id.*) The Area Office determined that the Creters share an identity of interest with one another due to their family relationships and common investments. (*Id.*) Apart from their interest in Appellant, the Creters control [XXX] other businesses (collectively, "the Creter companies") [including a concern referred to as "Company 1" for purposes of this redacted decision]. (*Id.*)

*2 The Area Office next explained that Appellant's size has been reviewed on four prior occasions. In a size determination issued November 2012, the Area Office found Appellant affiliated with the Creter companies through economic dependence and the totality of the circumstances. (*Id.* at 3-4.) Appellant subsequently addressed the Area Office's concerns, and in a size determination issued February 2013, the Area Office concluded that Appellant was not affiliated with the Creter companies. (*Id.* at 4.) In December 2014, the Area Office issued two size determinations finding that Appellant was affiliated with the Creter companies, this time on the basis of common management. (*Id.*)

*2 The Area Office determined that Appellant remains affiliated with the Creter companies through common management, as had been determined in December 2014. (*Id.* at 5.) The Area Office emphasized that three members of the Creter family hold key positions with Appellant and therefore have critical influence or the ability to substantively control Appellant. These same individuals also control the Creter companies, so the concerns are affiliated. The Area Office further noted that Appellant and the Creter companies have shared other key employees "from time to time through the years with and without monetary compensation." (*Id.*)

*2 The Area Office then computed the average annual receipts of Appellant and the Creter companies for fiscal years 2011, 2012, and 2013. Appellant maintained that business dealings between the Creter companies should be excluded as inter-affiliate transactions pursuant to 13 C.F.R. § 121.104(a). The Area Office rejected this argument, however, finding that the inter-affiliate transaction exclusion applies only to transactions between a challenged firm and its affiliates. "Here [Appellant's] claimed 'inter-affiliate transactions' are in fact not transactions between [Appellant] and its affiliates. Therefore, based on the plain language of the regulation the claimed transactions do not constitute 'inter-affiliate transactions' for purposes of the size regulations." (*Id.* at 6.)

*3 Appellant also urged the Area Office to exclude transactions between Appellant and [Company 1]. The Area Office determined, though, that the purpose of the inter-affiliate transactions exclusion is to avoid double-counting transactions between a parent company and a subsidiary. (*Id.*, citing *Size Appeal of Columbus Technologies and Services, Inc.*, SBA No. SIZ- 4831 (2007).) In this case, there could be no such double-counting because Appellant and [[Company 1] are not parent and subsidiary. "Although SBA has determined [[Appellant] and [the] Creter Companies to be affiliated, the basis of this affiliation is not based on ownership but rather on common management." (*Id.*) The Area Office also found that Appellant did not offer persuasive evidence to prove the amount of the proposed exclusion, nor adequately explain how these transactions would give rise to double-counting.

*3 The Area Office concluded that Appellant's average annual receipts, when combined with those of the Creter companies, exceed \$33.5 million, so Appellant is not a small business. (*Id.* at 7.)

C. Appeals

*3 On February 6, 2015, Appellant appealed the size determinations to OHA. Appellant maintains that the size determinations are clearly erroneous and should be reversed.

*3 Appellant first argues that the Area Office erred in finding that Appellant is affiliated with the Creter companies. Appellant highlights that the same Area Office reached the opposite conclusion in February 2013. (Appeal at 6-7.) Moreover, since February 2013, there have been no changes in Appellant's corporate or ownership structure, and the Creters' managerial positions at Appellant have remained constant. (*Id.*) Thus, Appellant reasons, "[i]t is unclear how these companies could now, not quite two years later, be considered 'affiliated' when there has been no change in the manner in which [[Appellant] operates." (*Id.* at 6.)

*3 Appellant goes on to argue that the mere fact that the Creters hold managerial positions at Appellant does not establish that they control Appellant. On the contrary, the Area Office found that Dr. Griffith owns the majority interest in Appellant and that he is Appellant's Managing Member. Appellant also maintains that the Area Office should have considered that VA has repeatedly reviewed Appellant's SDVO eligibility and has concluded that Dr. Griffith unconditionally controls Appellant. (*Id.* at 7.) Appellant asserts that "'control' of the company is primarily a SDVO eligibility issue within the purview of the VA, not a size issue within the SBA's jurisdictional authority." (*Id.*)

*3 Appellant disputes the notion that Appellant and the Creter companies share other key employees besides the Creters. According to Appellant, the companies have not shared any other key employees since 2013. (*Id.* at 8.)

*4 Appellant next argues that the Area Office admits that the regulatory definition of "receipts" excludes transactions between a concern and

its affiliates, and that the purpose of the inter-affiliate transactions exclusion is to avoid double-counting. Nevertheless, Appellant contends, the Area Office improperly refused to apply this exclusion to transactions among the Creter companies, or to transactions between Appellant and [Company1]. (*Id.* at 9-10.)

*4 Appellant maintains that the Area Office misinterpreted the exclusion as applying only to transactions between a challenged firm and its affiliates, and even then, only if the concerns in question have a parent-subsidary relationship. The plain language of 13 C.F.R. § 121.104(a), though, does not stipulate that a parent-subsidary relationship must exist. Moreover, although the regulation previously stated that affiliates must file consolidated tax returns in order to benefit from the exclusion, SBA eliminated this requirement in 2004.

*4 Appellant asserts that the Area Office's interpretation renders the exclusion so narrow as to be essentially meaningless. In this case, Appellant seeks to exclude sales of concrete and other construction materials between the Creter companies and between Appellant and [Company 1]; in both situations, these materials are then re-sold to other concerns. (*Id.* at 11- 12.) Including these transactions in the receipts of more than one of the affiliated companies results in double-counting. In Appellant's view, "[s]uch double counting does not occur only in parent-subsidary relationships — it occurs in any situation in which revenue passing through a group of affiliates is added to the 'total gross receipts' calculation twice." (*Id.* at 10.)

*4 Appellant distinguishes *Size Appeal of Columbus Technologies and Services, Inc.*, SBA No. SIZ-4831 (2007), cited in the size determinations. Appellant argues that OHA held in *Columbus Technologies* that the dealings at issue were not inter-affiliate transactions but instead were a "one way reassignment of assets from a subsidiary to the books of its parent." (*Id.* at 14, quoting *Columbus Technologies*, SBA No. SIZ-4831, at 7.) Conversely, Appellant argues, the instant case involves "a company purchasing an item from another company, and then reselling it to a third — the precise type of transaction that the revised regulatory language was meant to cover." (*Id.* at 14-15.)

*4 Appellant insists that it provided the Area Office with ample proof of double-counting, in the form of financial statements, tax documents, and narrative descriptions. Therefore, OHA should reject any suggestion that Appellant failed to prove the amount of the exclusion.

*5 Appellant emphasizes that "nothing in the regulations requires that inter-affiliate transactions be recorded as a specific tax form line item." (*Id.* at 15.) Further, the Area Office did not find that Appellant provided fraudulent or false information. (*Id.* at 16.)

*5 Lastly, Appellant maintains that, even if OHA were to conclude that transactions among the Creter companies cannot be excluded from the calculation of average annual receipts, Appellant will still fall under the \$33.5 million size standard so long as transactions between Appellant and [Company 1] are excluded. (*Id.* 18-19.)

D. Freedom's Response

*5 On February 25, 2015, Freedom Contracting Group, LLC (Freedom), one of the protesters, responded to the appeals. Freedom contends that the appeals have no merit and should be denied.

*5 Freedom observes that the Creters founded Appellant, and that they continue to hold substantial ownership and managerial interests in Appellant. In addition, the financial resources of the Creters have been crucial in enabling Appellant to obtain bonding. Appellant, though, attempts to minimize the "broad web of Creter family involvement and ownership," and has failed to establish a clear line of fracture between itself and the Creter companies. (Freedom Response at 6-7.)

*5 Moreover, Freedom argues, affiliation through common management does not require total control of a concern, only critical influence or the ability to exert substantive control over a concern's operations. Here, the Creters exercise this degree of control over Appellant through their managerial positions at Appellant. (*Id.* at 8.) Freedom highlights in this regard that Appellant is primarily engaged in construction and "[t]he Creters collectively hold all key positions in the company associated with construction." (*Id.* at 9.)

*5 Freedom also argues that Appellant improperly relies on extrinsic evidence and exhibits, not tax returns, to prove the amounts of the inter-affiliate transactions. According to Freedom, "[Appellant] has not established that it is entitled to adjust its revenue downward based on alleged inter-affiliate transactions not shown in its tax returns. Accordingly, the alleged exclusions must be disregarded." (*Id.* at 11.)

E. SBA's Response

*5 On February 25, 2015, SBA responded to the appeals. SBA maintains that the appeals should be denied and the size determinations affirmed.

*5 SBA argues that the Area Office properly found that Appellant is affiliated with the Creter companies. The fact that the Area Office found no such affiliation in February 2013 is immaterial, SBA contends, because it is well-settled that prior size determinations which are not appealed to OHA are not binding precedent. (SBA Response at 2.) Similarly, SBA asserts, it is irrelevant that VA has found that Dr. Griffith unconditionally controls Appellant. VA does not review questions of size and affiliation, and such matters are plainly beyond VA's jurisdiction. Further, insofar as Appellant believed that the Area Office is bound by VA's determinations, Appellant should have voiced this argument to the Area Office during the size review. (*Id.*)

*6 SBA contends that the Area Office did not err in calculating average annual receipts. The applicable regulation provides that "[r]eceipts do not include ... proceeds from transactions between a concern and its domestic or foreign affiliates." (*Id.* at 3, quoting 13 C.F.R. § 121.104(a).) Thus, by its express terms, the exclusion does not apply to transactions among the Creter companies. Further, although Appellant urges OHA to broadly construe the exclusion, OHA has long held that exclusions must be interpreted strictly. (*Id.*)

*6 SBA argues that the Area Office also properly did not exclude transactions between Appellant and [Company 1], because Appellant and [Company 1] do not have a parent- subsidiary relationship and are not eligible to file a consolidated tax return. SBA summarizes the regulatory history of the exclusion and concludes that its purpose is “to allow exclusion of double-counted receipts in the case of parent- subsidiary relationships even when the parent does not file consolidated tax returns.” (*Id.* at 4.) Therefore, for the exclusion to apply, concerns must be eligible to file consolidated tax returns, even if they do not actually do so. Moreover, SBA maintains, it is sound policy for the exclusion to apply only if the affiliates have a parent- subsidiary relationship. SBA reasons that “[r]evenue that ultimately goes into the pockets of different owners does not constitute double-counting.” (*Id.* at 5.)

III. Discussion

A. Standard of Review

*6 Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellant must prove the size determinations are 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

*6 Appellant has not shown any reversible error in the size determinations. As a result, the appeals must be denied.

1. Affiliation

*6 Appellant first argues that the Area Office improperly found Appellant affiliated with the Creter companies. As Freedom correctly observes, however, the Area Office based its decision on common management, and OHA has long held that affiliation through common management “does not require total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations.” *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488, at 6-7 (2013); *Size Appeal of Env'tl. Quality Mgmt., Inc.*, SBA No. SIZ-5429, at 6 (2012); *Size Appeal of DMI Educational Training LLC*, SBA No. SIZ-5275, at 6 (2011). Here, the Area Office found — and Appellant does not dispute — that Creter family members share an identity of interest with one another and hold several high-level positions at Appellant, including Vice President for Construction, Vice President for Operations, Secretary and Treasurer. See Section II.B, *supra*. On these facts, then, the Area Office could reasonably conclude that the Creters have critical influence or the ability to substantively control Appellant's operations, notwithstanding that the Creters do not wield complete control over Appellant.

*7 Appellant also contends that the Area Office was precluded from reaching this conclusion because VA has determined that Dr. Griffith unconditionally controls Appellant, and because the Area Office itself found no affiliation between Appellant and the Creter companies in its February 2013 determination. I find no merit to these arguments. VA reviews eligibility for VA's programs, not questions of size or affiliation. Accordingly, VA's determinations have no bearing on the Area Office's analysis. Nor is the Area Office bound by its own prior size determination from February 2013. It is well-settled that a concern's circumstances may change significantly over time; consequently, prior size determinations, particularly if not appealed to OHA, “are not binding precedent, and are not controlling in any other case.” *Size Appeal of Phoenix Environmental Design, Inc.*, SBA No. SIZ-5591, at 4 (2014) (quoting *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 11 (2012)); *Size Appeal of Advanced Projects Research, Inc.*, SBA No. SIZ-5504, at 7-8 (2013). Here, the February 2013 size determination was not appealed to OHA. Further, it appears that the February 2013 size determination was not focused on common management, but on whether Appellant had resolved concerns previously identified by the Area Office, such as economic dependence and the totality of the circumstances. See Section II.B, *supra*. It therefore is immaterial that the Area Office did not find affiliation through common management in the February 2013 size determination.

2. Inter-Affiliate Transactions

*7 Appellant also argues that the Area Office should have excluded transactions between the Creter companies, and between Appellant and [Company 1], as inter-affiliate transactions. A review of the exclusion and its regulatory history, however, confirms that neither of these categories qualifies for the exclusion. As a result, Appellant has not shown clear error in the size determinations.

*7 As the Area Office noted, transactions among the Creter companies do not fall under the exception because the exception applies only to “transactions between a concern and its domestic or foreign affiliates.” 13 C.F.R. § 121.104(a). Thus, by its plain language, the exception does not apply to transactions to which the challenged firm is not a party. This interpretation is bolstered by OHA case precedent which has recognized that “exclusions are to be interpreted strictly and are limited to those enumerated in the regulation.” *Size Appeal of J.M. Waller Assocs., Inc.*, SBA No. SIZ-5108, at 4 (2010). In addition, although Appellant argues that double-counting of receipts could arise even when the challenged firm is not a party to the transaction, 13 C.F.R. § 121.104(a) makes clear that “the only exclusions from receipts are those specifically provided for in this paragraph,” and OHA has similarly held that “there is no general ‘catch-all’ exclusion for double-counting in the regulation.” *Size Appeal of The Associated Construction Company*, SBA No. SIZ-5314, at 7 (2011).

*8 Appellant also seeks to exclude transactions between itself and [Company 1]. Having reviewed the regulatory history of the exclusion, however, I must agree with the Area Office that the inter-affiliate transaction exclusion applies only if the concerns in question have a parent- subsidiary relationship and are eligible to file a consolidated tax return.

*8 Prior to 1995, the text of the inter-affiliate transaction exclusion indicated that “the term *receipts* excludes ... proceeds from transactions between a concern and its domestic and foreign affiliates....” 13 C.F.R. § 121.402(b)(2) (1995) (emphasis in original). In 1996, the regulation

was renumbered and the language was amended to add a parenthetical to read: “the term receipts excludes ... proceeds from the transactions between a concern and its domestic and foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS)” 13 C.F.R. § 121.104(a)(1) (1996).

*8 In 2004, SBA revised the language of the exclusion into its current form by deleting the parenthetical. In the *Federal Register* commentary accompanying the final rule, SBA confirmed that this deletion was intentional and noted that a commenter had asked SBA to clarify “whether there is a return to the SBA’s previous policy (pre-1996) of allowing exclusions for interaffiliate transactions even in situations where the business concern has not filed a consolidated return or whether the SBA simply does not feel the parenthetical is necessary because other areas of the current or proposed regulation address the situation.” 69 Fed. Reg. 29,192, 29,196 (May 21, 2004). SBA responded that it understood that not all firms file consolidated returns, but that these amounts should nevertheless be excluded. SBA stated: “Whether a consolidated return is filed should have no bearing on whether properly documented interaffiliate transactions are excluded from annual receipts. To do otherwise would be to count such amounts twice.” *Id.* at 29,197.

*8 The phrasing of SBA’s response is telling. In particular, SBA declined to state that it was returning to the original pre-1996 policy, but instead indicated that inter-affiliate transactions should be excluded even in the absence of a consolidated tax return. It thus appears that SBA’s intent was to allow the exclusion of inter-affiliate transactions in situations where the concerns in question would be eligible to file a consolidated tax return, even if they did not actually do so.

*8 As the Area Office noted, this interpretation is supported by OHA’s decision in *Size Appeal of Columbus Technologies and Services, Inc.*, SBA No. SIZ-4831 (2007). In that case, OHA found the exception inapplicable because the underlying transactions “d[id] not involve, for example, a parent company purchasing an item manufactured by its subsidiary and then reselling the item to a third party, which is the kind of transaction 13 C.F.R. § 121.104(a) addresses.” *Columbus Techs.*, SBA No. SIZ-4831, at 7.

*9 I conclude, therefore, that the exclusion for inter-affiliate transactions is intended to prevent double-counting of receipts received by both a parent company and its subsidiary, irrespective of whether a consolidated tax return was filed. Because Appellant and [Company 1] are not parent and subsidiary, the Area Office correctly found that the exception is not applicable.

IV. Conclusion

*9 Appellant has not shown that the size determinations are clearly erroneous. I therefore DENY the appeals and AFFIRM the size determinations. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

*9 Kenneth M. Hyde
*9 Administrative Judge

Footnotes

- 1 This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.
- 2 Effective July 14, 2014, SBA increased the size standard for NAICS codes 236220 and 237990 to \$36.5 million. 79 Fed. Reg. 33,647 (June 12, 2014). The Area Office determined, however, that the RFPs were not amended to incorporate the new size standard, and Appellant does not challenge these findings on appeal. Accordingly, the applicable size standard remains \$33.5 million. 13 C.F.R. § 121.402(a); *Size Appeal of Dawson Technical, LLC*, SBA No. SIZ- 5476 (2013).
- 3 The Area Office issued three separate size determinations, each pertaining to one of the three procurements, and Appellant filed a separate appeal challenging each size determination. Because the issues presented in the cases are substantively identical, and involve the same challenged firm and size standard, OHA hereby consolidates the appeals. Except as otherwise indicated, citations are to Size Determination No. 1-SD-2015-10 and the pleadings filed in response thereto.

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