

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

SIZE APPEAL OF:

David Boland, Inc.

Appellant

RE: BIS Services, LLC

Appealed from

Size Determination No. 5-2010-091

SBA No. SIZ-5189

Decided: January 31, 2011

APPEARANCES

Denis L. Durkin, Esq., Baker & Hostetler LLP, Washington, DC, for Appellant.

David J. Taylor, Esq., Katherine A. Allen, Esq., Buchanan Ingersoll & Rooney, P.C.,
Washington, DC, for BIS Services, LLC.

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office made clear error of fact or law in concluding that the protested concern is not affiliated with a large concern under the identity of interest, common management, or the totality of the circumstances rules.

III. Background

A. The Solicitation and Protest

On August 12, 2010, the Contracting Officer (CO) for the Department of the Army, New Orleans District, Corps of Engineers, issued Solicitation No. W912P8-10-B-0077 for berm enlargement and foreshore protection. The CO designated it under North American Industry Classification Code (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$33.5 million annual receipts size standard. The solicitation was

unrestricted, but contained Federal Acquisition Regulation (FAR) clause 52.219-4 Notice of Price Evaluation Preference (PEP) for HUBZone small business concerns. BIS Services, LLC (BIS) submitted its bid as a HUBZone small business. Bid opening was on September 14, 2010.

On September 20, 2010, David Boland, Inc. (Appellant) protested the small business size status of the apparent successful offeror, BIS. Appellant alleged that BIS is affiliated with Bertucci Contracting Company, LLC (BCC), a large business, and five other concerns. Thus, BIS is ineligible for the HUBZone PEP.

Specifically, Appellant asserted that BIS is formerly known as Bertucci Industrial Services, L.L.C.; that Mr. Zelenka and Mr. Simon appear on various Florida and Texas State filings as managing members of both BIS and Bertucci; that BIS and BCC are listed on Dun & Bradstreet reports with the same telephone number; that BCC, not BIS, is on the FedBizOpps Interested Vendors List, that Mr. Simon attended two conferences on the instant procurement for BCC, not BIS; and that Mr. Simon has a BCC email.

Also, Appellant's employee made three telephone calls to BCC on September 15, 2010, in which she (1) asked for and was connected to Mr. Simon, (2) asked for and was told that Mr. Simon's title is "Controller," and (3) asked and was told, by an otherwise unidentified "Receptionist (Man answering phone)" that Mr. Simon's title was "one of their 'Managing Members'." Thus, Appellant alleged BIS is affiliated with BCC under the common management, identity of interest, and totality of the circumstances rules.

On September 21, 2010, the CO forwarded the protest to the SBA Office of Government Contracting-Area V (Area Office), for a size determination.

B. The Area Office Investigation and File

On September 22, 2010, the Area Office requested from BIS its completed SBA Form 355 and other documents as well as its response to the protest allegations. On September 28, 2010, BIS provided this information, and responses to follow-up questions.

The Area Office file shows that BIS is a Louisiana company and was established in 1998 under the name Rubark Technical Services L.L.C. (Rubark). In 1999, Anthony J. Zelenka purchased Rubark and sold a 50% interest to Crane Street, L.L.C. (Crane), then a holding company owned by Eugene K. Simon, Jr.¹ In 2001, Rubark was renamed Bertucci Industrial Services, L.L.C. (Bertucci Industrial). On January 1, 2008, Bertucci Industrial redeemed all of Mr. Zelenka's interest, leaving Mr. Simon as its sole owner. On June 17, 2009, Bertucci Industrial was renamed BIS Services, LLC (BIS). In its response, BIS emphasized it went to great lengths to separate itself from BCC, including the 2009 name change to eliminate a family name of Mr. Zelenka's.

BIS has its own line of credit and bonding capacity, as shown by letters from BIS's bank and insurance companies and the Bid Bond for the instant procurement, which contains no surety

¹ Mr. Simon dissolved Crane in 2002; since then, he has owned BIS directly. He later established another holding company with the same name. It has no revenues.

or indemnitor other than Mr. Simon and the insurance company. BIS also has no standing agreements with BCC, but does bid with BCC on some projects, just as it does with other potential subcontractors, some of whom are BCC's direct competitors. BIS noted 25% of its recent bids included BCC as a subcontractor, but that nearly half included a BCC competitor as subcontractor.

BIS, by itself, is below the \$33.5 million annual receipts size standard, as shown by Federal income tax returns for the applicable years 2009, 2008, and 2007.

BCC, started in 1993, is owned by Mr. Zelenka and by Zelenka Management Services, L.L.C. (ZM) a concern owned by Mr. Zelenka and his wife. BCC is other than small. Mr. Simon is BCC's controller, handling its accounting operations. He previously was BCC's Chief Financial Officer (CFO). For that reason, he is the contact listed in Dun & Bradstreet reports and was the CFO in State filings.

Bertucci Materials, L.L.C. (Materials), De Zaire Holdings, L.L.C. (De Zaire) and Das Marine, Inc. (DMI) are other companies owned and/or managed by Mr. Zelenka. Neither BIS nor Mr. Simon has any relationship with these four alleged affiliates. The other alleged affiliate is Bertucci Ship Services, L.L.C. (Ship), which was established in 2007 by Mr. Simon (through Crane) and Mr. Zelenka. It has no assets or revenue and has always been inactive.

C. The Size Determination

On October 13, 2010, the Area Office issued Size Determination No. 5-2010-091 (Size Determination) concluding Appellant is an eligible small business under the \$33.5 million annual receipts size standard. The Size Determination sets out the history of BIS, describes the alleged affiliates, and notes it was the intention of BIS to separate itself from Mr. Zelenka's companies so that BIS could comply with SBA's size regulations.

The Area Office found that, as of the September 14, 2010, self-certification date, BIS is affiliated with Crane and Ship only. The Area Office concluded, despite Mr. Simon's continued involvement as BCC's controller, that there was no affiliation between BIS and BCC under common management, identity of interest, newly organized concern, or totality of the circumstances rules because Mr. Simon's role in BCC is not controlling.

Also, BIS is a former affiliate of BCC (and of ZM, Materials, De Zaire, and DMI) because Mr. Zelenka had sold his 50% ownership in BIS back in 2008. Thus, these five concerns' receipts are not counted in calculating BIS's size status.

D. The Appeal

Appellant received the Size Determination on October 13, 2010, and filed its size appeal with OHA on October 28, 2010. Appellant asserts the Area Office made clear errors of fact and law in the Size Determination, by ignoring and misapplying key evidence Appellant had supplied in the protest.

Appellant expands upon its arguments, made in its protest, that BIS is affiliated with BCC on the grounds of common management, identity of interest, and the totality of the circumstances. Appellant also asserts, regarding Mr. Simon's employment with BCC, that he must have been involved with management, since BCC is a large company and Mr. Zelenka cannot run it alone; that Mr. Simon is dependent upon BCC for employment; and that, since BIS did not "register" for the solicitation, "this begs the obvious question of whether [BCC] put together BIS' prime contractor bid for this Solicitation."

As relief, Appellant requests OHA to vacate and remand the Size Determination.

E. BIS's Response to the Appeal

On November 9, 2010, BIS filed its Response to the Appeal. BIS asserts that the Area Office correctly found Appellant not affiliated with BCC. BIS objects to Appellant's assertions regarding Mr. Simon's employment with BCC, as new issues improperly raised on appeal.

BIS emphasizes that Mr. Simon's position with BCC is merely administrative, and that his position as BCC's CFO ended when he became the single controlling member of BIS, in January 2008. BIS also states it and BCC have corrected the out-of-state filings cited by Appellant, and includes copies of these various filings.²

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction 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).

The size appeal regulations provide that the Judge will not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(a). Here, Appellant presents three new substantive issues in this appeal: that Mr. Simon must be a manager of BCC because Mr. Zelenka cannot run it alone; that Mr. Simon is dependent upon BCC for employment; and that BCC put together the bid. Because I may not decide these new issues, I EXCLUDE them.

² These filings were not part of the Area Office file and, thus, may not be considered in this appeal. 13 C.F.R. § 134.308.

B. Merits of the Appeal

There is no dispute that BIS, by itself, is small and that BCC is other than small. Therefore, the only issue in this appeal is whether BIS is affiliated with BCC. As shown below, each alleged ground for affiliation is meritless.

1. Identity of Interest

Under the identity of interest rule: “Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.” 13 C.F.R. § 121.103(f).

Here, Appellant asserts there is identity of interest affiliation; however, the Area Office file shows no indicia of identity of interest. There is no family relationship between the principals of BIS and BCC. The only common “investment” as of the date of self-certification is Ship, an inactive company with no assets or revenue. There is no economic dependence through contractual or other relationships, because BIS relies on itself for bonding, it bids not only with BCC but also its competitors, and there are no other financial relationships between BIS and BCC or their principals. The outdated filings upon which Appellant relies are no longer relevant here; they document ties between the firms which no longer exist. Thus, BIS is not affiliated with BCC under the identity of interest rule.

2. Common Management

This rule provides that affiliation arises “where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.” 13 C.F.R. § 121.103(e). Here, Mr. Zelenka has no managerial role in BIS and, in fact, has not been involved at all in BIS since 2008. Mr. Simon’s only role in BCC is as a non-managerial employee. Thus, BIS is not affiliated with BCC under the common management rule.

3. Totality of the Circumstances

The size regulation states that, in determining whether affiliation exists, “SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.” 13 C.F.R. § 121.103(a)(5). Mr. Simon’s employment at BCC would have been considered under the former “common facilities” ground for affiliation. *See* 13 C.F.R. § 121.401(i) (1995). This ground for affiliation, however, was eliminated in the 1996 revision of the size regulations. 60 Fed. Reg. 57982, 57985 (Nov. 24, 1995) (preamble to proposed rule). Thus, the only ground for affiliation under which it may be considered is the totality of the circumstances, where this single factor is not enough to create affiliation.

The allegations Appellant makes of affiliation simply are not enough to support a totality of the circumstances finding, when compared to the evidence presented by BIS to the Area Office. The former affiliation between BIS and BCC and Mr. Simon’s part-time employment

with BCC account for all the instances of alleged affiliation Appellant presented to the Area Office. The well-documented and sworn-to evidence presented by BIS must be given greater weight than Appellant's allegations. *Size Appeal of General Engineering Svcs., Inc.*, SBA No. SIZ-3809 (1993). BIS has demonstrated a clear fracture with BCC, establishing that BCC is no more than a former affiliate, and therefore, cannot now be counted as an affiliate. *Size Appeal of C2G, Ltd. Co.*, SBA No. SIZ-5186 (2011). Thus, BIS is not affiliated with BCC under the totality of the circumstances rule.³

As demonstrated above, BIS is not affiliated with BCC under the identity of interest, common management, or the totality of the circumstances rule as of the date of BIS's self-certification as a HUBZone small business concern, September 14, 2010.

4. Calculation of Receipts

Under the size regulations, the annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. 13 C.F.R. § 121.104(d)(4). Further, the exclusion of annual receipts of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. *Id.* The Area Office concluded that BCC is BIS's former affiliate because Mr. Zelenka had sold his 50% ownership in BIS back in 2008, over three years before the applicable date, September 14, 2010. Thus the Area Office correctly excluded the receipts of BCC (and those of BCC's affiliates ZM, Materials, De Zaire, and DMI) when calculating the size status of BIS.

Accordingly, because Appellant has not shown the Area Office's Size Determination was not based on clear error of fact or law, I must DENY the instant Appeal.

III. Conclusion

The Area Office's Size Determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this Appeal is DENIED.

This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge

³ Appellant does not contest the Area Office's conclusion the newly organized concern rule is inapplicable because BIS is not newly organized. An additional reason is that the facts before the Area Office do not support finding the fourth mandatory element of this rule is present here, that the first concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, bond indemnification and/or other facilities. *See* 13 C.F.R. § 121.103(g).