

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

SIZE APPEAL OF:

S3-RQ JV,

Appellant,

RE: Shuyler Line Navigation Company,  
LLC

Appealed From  
Size Determination No. 02-2024-034

SBA No. SIZ-6297

Decided: July 22, 2024

APPEARANCES

Richard J. Pinto II, Esq., Mike Banks, Esq., Marks & Pinto LLP, San Diego, California,  
for S3-RQ JV

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On May 3, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2024-034, concluding that Shuyler Line Navigation Company, LLC (SLNC) is a small business. On appeal, S3-RQ JV (Appellant), which had previously protested SLNC's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is granted and the matter is remanded to the Area Office for further review.

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 15 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.

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<sup>1</sup> This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

## II. Background

### A. The RFP

On September 8, 2023, the U.S. Department of the Navy (Navy), Military Sealift Command Norfolk, issued Request for Proposals (RFP) No. N3220523R4218, seeking a contractor to provide logistics support vessel charters at Andros Island in the Bahamas. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 483111, Deep Sea Freight Transportation, with a corresponding size standard of 1,050 employees. (RFP at 1.) Initial proposals were due October 19, 2023, and Appellant and SLNC submitted timely offers. On March 7, 2024, the Navy notified unsuccessful offerors, including Appellant, that SLNC was the apparent awardee.

### B. Protest

On March 14, 2024, Appellant filed a protest with the CO challenging SLNC's size. In its protest, Appellant alleged that SLNC is not small due to its affiliation with several other concerns. (Protest at 2.)

Appellant first noted that, according to SAM.gov, SLNC's immediate owner is Bold Ocean LLC (Bold Ocean), which in turn is owned by NOVA Infrastructure Management, LLC (NOVA). (*Id.*) Appellant provided further documentation indicating that NOVA is 100% owned by NOVA Infrastructure Holdings, LP (NOVA Holdings). (*Id.* and Exh. 3.) NOVA Infrastructure Capital Advisors, LLC (NOVA Advisors) is majority owner of NOVA Holdings. (*Id.*)

Appellant noted that Bold Ocean's website lists several subsidiaries beyond SLNC, including "Schuyler Services, Schuyler Technical, Chesapeake Crewing, [and] Argent Marine Operations, Inc." (Protest at 2.) NOVA's website also claims association with Integrated Waste Solutions Group, LLC; telMAX, Inc.; Harbor Logistics, LLC; Hawthorne Global Aviation Services (Hawthorne); Xchange Telecom, LLC; Nopetro Renewables (NR); and A&R Bulk-Pak (A&R). (*Id.* at 3.) Due to these potential affiliates, Appellant contended that SLNC likely exceeds the size standard of 1,050 employees for this procurement. (*Id.*)

### C. Protest Response

The CO forwarded Appellant's protest to the Area Office for review. On March 28, 2024, SLNC responded to the protest. Of the 11 alleged affiliates named in Appellant's protest, SLNC acknowledged affiliation with eight of them but denied affiliation with Hawthorne, NR, and A&R. (Protest Response at 1.) SLNC provided an employee headcount, which showed that SLNC and its acknowledged affiliates collectively have less than 1,050 employees. (*Id.* at 2.)

SLNC denied affiliation with Hawthorne because NOVA does not own a majority interest in Hawthorne and controls only three seats on Hawthorne's nine-member board. (*Id.*) More specifically, "NOVA owns approximately [XX]%" of Hawthorne, an "unrelated

investment fund also owns approximately [an equal share]”, and the remaining ownership is held by other investors who are not associated with NOVA. (*Id.*) Since NOVA selects only three of the nine board members, SLNC contended that NOVA has no means to control the management of Hawthorne. (*Id.* at 3.) SLNC offered a redacted capitalization table for Hawthorne purporting to confirm the claimed ownership amounts. (Protest Response, Hawthorne Capitalization Table.) SLNC also submitted a copy of Hawthorne's Amended and Restated Limited Liability Company Agreement, dated March 15, 2022, and two subsequent amendments. (Protest Response, Hawthorne LLC Agreement.)

SLNC claimed that NOVA is not affiliated with NR because it owns only a small minority interest and has no seats on NR's board. (Protest Response at 3.) SLNC asserted that NOVA owns only [XX]% of NR with the remaining interest held by “founders and investors” that are not associated with NOVA. (*Id.*) As for NR's management, SLNC maintained that NOVA does not have a say over any of the seven seats nor does it have any other mechanism to control NR. (*Id.*) To support these claims, SLNC provided a copy of the Amended and Restated Limited Liability Company Agreement of Nopetro Energy Holdings, LLC (NEH). (Protest Response, NEH LLC Agreement.)

Lastly, with regard to A&R, SLNC denied affiliation since NOVA acquired A&R only after SLNC submitted its offer for the instant procurement. (Protest Response at 3.) The transaction was finalized on December 8, 2023, approximately two months after SLNC submitted its offer. (*Id.*)

#### D. Size Determination

On May 3, 2024, the Area Office issued Size Determination No. 02-2024-034, concluding that SLNC is a small business.<sup>2</sup> The Area Office concluded that SLNC is not affiliated with Hawthorne or NR, and thus did not include the employee count of those concerns in SLNC's size. (Size Determination at 6, 8.)

Because SLNC acknowledged affiliation with eight of the 11 alleged affiliates, the Area Office only needed to analyze whether SLNC is affiliated with Hawthorne, NR, and/or A&R. (*Id.* at 2.) The Area Office explained that “concerns are affiliates of each other when one controls, or has the power to control the other, or a third party or parties controls or has the power to control both, regardless of whether control is exercised.” (*Id.* at 3, citing 13 C.F.R. § 121.103(a)(1).) Appellant's protest alleged that SLNC is affiliated with the three companies through NOVA. (*Id.* at 4.) Thus, the Area Office was tasked with determining whether NOVA controls Hawthorne, NR, and/or A&R. (*Id.*)

With respect to Hawthorne, the Area Office reviewed the documentation submitted by SLNC and agreed with SLNC that NOVA does not control Hawthorne. (*Id.* at 6.) The Area Office found that NOVA does not own a majority interest in Hawthorne, although “there is another single block equal in size to that of NOVA's.” (*Id.*) The Area Office further found that

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<sup>2</sup> Although dated April 4, 2024, the size determination was transmitted to Appellant, via e-mail, on May 3, 2024. (E-mail from H. Goza to R. Pinto (May 3, 2024).)

“nothing in the legal documentation provided for [Hawthorne] indicates that NOVA, as a minority member, has either positive or negative control over that firm.” (*Id.*, citing *Size Appeal of S. Cont. Sols. III, LLC*, SBA No. SIZ-5956 (2018).) Accordingly, since NOVA does not control Hawthorne, no affiliation exists between SLNC and Hawthorne. (*Id.*)

As for NR, the Area Office reviewed NEH's Amended and Restated LLC Agreement to conclude that NOVA is not affiliated with NR. (*Id.*) NOVA has a “minimal ownership” interest in NR, and does not control NR's Board of Managers. (*Id.*) NOVA thus is not affiliated with NR. (*Id.*)

Lastly, with regard to A&R, SLNC denied affiliation because NOVA acquired A&R almost two months after SLNC submitted its offer for the subject procurement. (*Id.*) The Area Office reasoned, though, that under 13 C.F.R. § 121.404(g)(2)(iii), affiliation may still exist if an affiliate of a concern acquires another concern less than six months after the date for determining size. (*Id.* at 7.) Here, NOVA acquired A&R approximately two months after SLNC submitted its offer, so A&R is affiliated with NOVA and SLNC as of the date for determining size. (*Id.*)

The Area Office then reviewed the employee counts of SLNC, its acknowledged affiliates, and A&R. (*Id.* at 8.) Because the 24-month average did not exceed 1,050 employees, SLNC is small for this procurement. (*Id.*)

#### E. Appeal

On May 17, 2024, Appellant filed the instant appeal. Appellant contends that the Area Office erred in assessing NOVA's affiliation with Hawthorne and NR. (Appeal at 3.)

Appellant argues, first, that the Area Office did not correctly apply 13 C.F.R. § 121.103(c)(2) when considering whether NOVA controls Hawthorne through stock ownership. (*Id.*) This regulation provides that:

If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(*Id.*, quoting 13 C.F.R. § 121.103(c)(2).) Here, the Area Office itself found that NOVA and another firm “each own less than 50% of Hawthorne, their minority holdings are equal in size, and the aggregate of their minority holdings is large when compared with any other stock holding.” (*Id.* at 4.) As such, the Area Office should have presumed that both NOVA and the other concern control Hawthorne. (*Id.*)

Although the presumption is rebuttable, the size determination reflects that the Area Office merely saw no evidence of control based on Hawthorne's governing documents. (*Id.*)

Appellant contends that the Area Office should instead have required that SLNC demonstrate that NOVA does not control Hawthorne. (*Id.*) OHA has held that “[i]n the absence of clear evidence demonstrating control or the power to control by another party, it is presumed that each minority shareholder has equal control over the subject concern, regardless of the size of the shareholder's interests.” (*Id.* at 5, quoting *Size Appeal of Melton Sales & Serv., Inc.*, SBA No. SIZ-5893, at 12 (2018).) Furthermore, given that all concerns must be controlled by someone or some group at all times, the presumption is rebutted only by “establishing that some party other than the minority shareholder has the power to control.” (*Id.* at 6, quoting *Size Appeal of Allied Tech. Servs. Grp., LLC*, SBA SIZ-5373, at 7 (2012).)

Regarding affiliation with NR, Appellant alleges error by the Area Office in this determination since it was premised on a governing document of NEH. (*Id.* at 7.) The Area Office reviewed this document to determine that NOVA is not affiliated with NR. (*Id.*) However, NR and NEH are different legal entities. (*Id.*) Appellant asserts that NEH appears to own NR and Nopetro RNG, LLC. (*Id.*) While it may be true that NOVA is not affiliated with NEH, NOVA could still be affiliated with NR, and it was improper for the Area Office to rely on a document concerning NEH to conclude that no affiliation existed with NR. (*Id.* at 7-8.)

Appellant observes that NEH's website states that it created NR as a partnership with NOVA. (*Id.* at 8.) SLNC's claim that NOVA has no representation on NR's board is contradicted by NOVA's website, which identifies three individuals as board members of NR — Messrs. Eric Ludtke, Stephen Denis, and Faisal Choudhury. (*Id.*) Additionally, NEH's corporate filings identify its manager as Mr. Chris Beall, the founder and managing partner of NOVA. (*Id.*) Appellant contends that SLNC apparently did not disclose complete information as to NOVA's connections with NR, which contributed to the flawed size determination. (*Id.*)

SLNC did not respond to the appeal.

### 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

Appellant has persuasively shown that the Area Office did not fully explore whether NOVA may be affiliated with Hawthorne and/or NR. Accordingly, I find it appropriate to remand this matter for further review.

In its determination, the Area Office found that NOVA is not affiliated with Hawthorne through stock ownership because NOVA owns [less than 50]% of Hawthorne, another concern owns an equal interest in Hawthorne, and Hawthorne's governing documents do not clearly establish that NOVA has the power to control Hawthorne. Section II.D, *supra*. As Appellant correctly observes, however, the Area Office apparently did not consider whether NOVA controls Hawthorne under the multiple minority shareholder rule set forth at 13 C.F.R. § 121.103(c)(2).

OHA has explained that, under this rule, if two or more shareholders hold equal, or approximately equal, minority interests, and those interests together are large as compared with any other stock holding, each minority owner is presumed to control the concern based on their minority interests. *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 13-15 (2015) (three 33.33% owners each had the power to control); *Size Appeal of ADVENT Env't, Inc.*, SBA No. SIZ-5325, at 6-9 (2012) (four 25% owners each had the power to control); *Size Appeal of VoCare Servs., Inc.*, SBA No. SIZ-5266, at 6 (2011) (“The Area Office correctly determined that the three individuals who own [an affiliate] can control that firm because they each hold equal shares of [the affiliate's] stock.”); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049, at 9 (2009) (affirming finding that one of four individuals, each of whom owned 25% of an affiliate, had the power to control that firm based on his minority interest). Because the Area Office determined that both NOVA and an unrelated concern own approximately [XX]% of Hawthorne, the Area Office should have found that a presumption of control applies under 13 C.F.R. § 121.103(c)(2). This presumption is potentially rebuttable, but the Area Office must review any arguments by SLNC and whether evidence in the record shows that some party other than NOVA has the power to control Hawthorne. *See, e.g., Size Appeal of Gov't Cont. Res., Inc.*, SBA No. SIZ-5706, at 7-8 (2016); *Size Appeal of Allied Tech. Servs. Grp., LLC*, SBA No. SIZ-5373, at 6-7 (2012); *Size Appeal of Technibilt, Ltd.*, SBA No. SIZ-5304, at 3-4 (2011).

The Area Office also determined that NOVA is not affiliated with NR based on the Area Office's review of NEH's governing documents. Section II.D, *supra*. This too was done in error since NR and NEH are separate legal entities. While NOVA may not have the ability to control NEH, it does not follow that NOVA cannot be affiliated with NR. On remand, the Area Office should request information from SLNC that directly relates to NOVA's relationship with NR rather than its relationship with NEH.

SLNC did not provide information as to the employee headcounts for Hawthorne or NR. Thus, at this juncture, OHA cannot determine whether affiliation with Hawthorne and/or NR might render SLNC other than small.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The Area Office did not fully analyze whether SLNC, through NOVA, may be affiliated with Hawthorne or NR, and if so, whether the combined employee count of SLNC and its affiliates exceeds the size standard. Accordingly, the matter is REMANDED to the Area Office for further review.

KENNETH M. HYDE  
Administrative Judge