

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

SIZE APPEAL OF:

Colt Defense LLC

Appellant

Appealed from
Size Determination No. 1-2008-018

SBA No. SIZ-4943

Decided: April 16, 2008

APPEARANCES

Jeffrey S. Grody, Esq., Senior Vice President and General Counsel, Colt Defense LLC,
for Appellant.

Sam Q. Le, Esq., Office of the General Counsel, U.S. Small Business Administration, for
the Agency.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a January 28, 2008 size determination (Case No. 1-2008-018) (size determination) issued by the U.S. Small Business Administration (SBA), Office of Government Contracting, Area I (Area Office) finding Colt Defense LLC (Appellant) to be other than small for the applicable size standard of 1,000 employees.

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.

II. Issue

Whether the Area Office made a clear error of law or fact in finding Appellant to be affiliated with Blackstone Mezzanine Partners II-A L.P. (BMP) and thus The Blackstone Group based upon:

a. BMP's 22.1% ownership stake in Appellant (when another concern held a 44.2% ownership stake);

- b. Certain restrictions in Appellant's Limited Liability Company Agreement giving BMP the right to disapprove certain actions by Appellant; and
- c. BMP's right to name two of the nine members of Appellant's Governing Board.

III. Background

A. Facts

1. On September 10, 2007, the U.S. Army, Rock Island, Illinois (Army) issued Request for Proposals No. W52H09-07-R-0205 (RFP) for a multi-year Indefinite Delivery/ Indefinite Quantity (ID/IQ) contract for the purchase of rifles. The RFP's Executive Summary explained that the Army anticipated making multiple awards with 30% of the initial guaranteed minimum quantity being reserved for small businesses and the remaining 70% unrestricted. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 332994, Small Arms Manufacturing, with a 1,000 employee size standard for the procurement. Initial offers were due October 9, 2007.

2. On December 21, 2007, the Army made the following contract awards:

- a. An unrestricted contract to FN Manufacturing LLC;
- b. Contract No. W52H09-08-D-0120 to Bushmaster Firearms International, LLC (Bushmaster) (small business set-aside); and
- c. Contract No. W52H09-08-D-0122 to Appellant (small business set-aside).

3. On December 26, 2007, Saber Defense Industries, LLC (Saber) protested the size status of both Bushmaster and Appellant to the CO. On January 2, 2008, AO Precision Manufacturing, LLC (Precision) also protested the size status of both Bushmaster and Appellant to the CO. On January 3, 2008, the CO forwarded both protests to the Area Office.

4. The Area Office dismissed both Saber's and Precision's protests as non-specific. On January 9, 2008, the SBA Area Director initiated her own size protest against Appellant, stating:

[T]here is evidence that your firms [sic] affiliation with other firms may lead your firm to be other than small. These potential affiliates include Colt Defense Holding LLC, Colt Canada Corp., Colt Defense Inc., Sciens Capital Management, Colts Manufacturing Co., New Colt Holding Corp., Zilkha and Company, Saco Defense and Colt Rifle, Inc.

On January 22, 2008, Appellant responded to the protest.

5. On January 15, 2008, the Area Office determined Bushmaster was other than

small. Consequently, the CO terminated Bushmaster's contract. Hence, Appellant is the last remaining offeror potentially eligible to perform the set-aside portion of this procurement.

6. Appellant's submissions to the Area Office admit affiliation with Colt Canada Corporation (Colt Canada), Colt Rapid Mat LLC (Colt Rapid Mat), and Rapid Mat S.a.r.l. (the admitted affiliates). Appellant and the admitted affiliates together have 547 employees.

7. Appellant's submissions state that Appellant was once owned by Colt's Manufacturing Company, Inc. (CMC), which is owned by New Colt Holding Corp. (New Colt), but that Appellant was spun off in 2003. Also, Colt Defense Inc. (CDI) and Colt Rifles, Inc. (CRI) are inactive firms with no employees. Further, Appellant's 44.2% owner, Colt Defense Holding LLC (Colt Defense Holding, CDH, or C-Defense Holding) is managed by Sciens Management LLC (Sciens), an admitted affiliate of Sciens Capital Management (SCM). Appellant contested affiliation with CMC, New Colt, CDI, CRI, CDH, Sciens, and SCM, but stated that these seven firms together have only 112 employees.

8. Appellant's submissions also contested affiliation with its 22.1% owner Blackstone Mezzanine Partners II-A, L.P. (BMP), and with The Blackstone Group L.P. (BG). As for the other two alleged affiliates, Appellant noted Saco Defense was sold in 2000 and that Zilkha and Company does not exist, but Appellant did describe some former and current relationships with Donald Zilkha.

9. Appellant also provided its Limited Liability Company Agreement (LLC Agreement) governing its operations. The LLC Agreement, Section 6.1.1, provides for the designation of members of Appellant's Governing Board as follows:

(a) During the Blackstone Ownership Period, BMP shall be entitled, . . . to designate two (2) members . . .

(b) So long as the Employee Plan owns . . . the number of members of the Governing Board . . . shall be increased by two . . . and the Union shall have the . . . right to designate two individuals . . . to fill such newly created seats . . .

(c) During the Sciens Ownership Period, C-Defense Holding shall be entitled . . . to designate *the members of the Governing Board* (each, a "Colt Designee") *that are not designated by:* (i) Blackstone . . . and (ii) the Union

(emphases added).

B. The Size Determination

On January 28, 2008, the Area Office issued its size determination finding Appellant other than small under the 1,000 employee size standard. The foundation of the Area Office's determination was that Appellant is affiliated with Blackstone Mezzanine Partners II, A L.P. (BMP) and, through BMP, The Blackstone Group, (BG) and thus is other than small because BG employs in excess of 20,000 individuals.

The facts underlying the Area Office's determination that Appellant is affiliated with BMP and BMP's alleged affiliate, BG, are as follows:

- a. Appellant's ownership is based on Common Units;
- b. BMP owns 22.1% of Appellant's Common Units;
- c. Colt Defense Holding LLC owns 44.2% of Appellant's Common Units;
- d. The remaining 33.7% of Appellant's Common Units are owned by 26 different individuals and entities, each of whom owns less than 10% of Appellant;
- e. The LLC Agreement defines the "Blackstone Ownership Period" as any time BMP (or affiliate) owns at least a set percentage of Appellant. Similarly, the "Sciens Ownership Period" is any time CDH (or affiliate) owns at least a set percentage of Appellant.
- f. The LLC Agreement vests Appellant's management exclusively in a Governing Board that acts by majority vote and may have up to twelve members. At the time of self-certification, there were nine members and, because the "Blackstone Ownership Period" was in effect, two members are BMP designees.
- g. Also because the "Blackstone Ownership Period" is in effect, Appellant requires BMP's approval for "Fundamental Transactions," which are: (1) Sale or lease substantially all of Appellant's assets, (2) merger with another concern, (3) any merger causing Appellant's securities to become publicly traded, (4) the incurrence of indebtedness for borrowed funds, other than indebtedness incurred in the ordinary course of business under the Senior Credit Facility, the Mezzanine Notes, or other indebtedness up to \$20,000,000 in the aggregate at any time outstanding, but exclusive of loans from Sciens, BMP, or any of their respective affiliates, (5) the purchase of assets greater than \$30 million, (6) entry into a new line of business, (7) the termination of or appointment of a new CEO, (8) a Bankruptcy Event, or (9) the dissolution of the company. (Size Determination at 3-4).

Accordingly, the Area Office found:

Based on the above stated substantial involvement of [BMP] in the operations of [Appellant], which includes substantial minority ownership, representation by Merck on [Appellant's] Governing Board, and restrictive provisions listed in [Appellant's] Limited Liability Agreement which provide [BMP] with substantial power over the business decision making processes of [Appellant], it is concluded that [Appellant] is affiliated with [BMP], and [BG], through the totality of the circumstances.

(Size Determination at 4). The Area Office then cited various OHA decisions in support of its totality of the circumstances holding.

The Area Office concluded Appellant is affiliated with CDI, CRI, Colt Canada, Colt Rapid Mat, Rapid Mat S.a.r.l., New Colt, and CMC.

After addressing the various Colt entities, the Area Office addressed Appellant's affiliation with Sciens Management LLC (Sciens). It concluded that because Sciens is Appellant's manager,¹ Sciens was affiliated with Appellant based on the totality of the circumstances and identity of interest affiliation. The Area Office also found that Sciens is affiliated with Sciens Capital Management (SCM) because Appellant admitted the principals of Sciens were affiliated with SCM. However, the Area Office did not associate Appellant's affiliation with Sciens or SCM with any particular number of employees² and thus did not explain how Sciens/SCM's employees caused Appellant to exceed the size standard.

The Area Office concluded:

[Appellant] is affiliated with [BMP], which is an affiliate of [BG]. [BG] is a known large business which employs in excess of 20,000 and has a net worth in excess of \$4 billion. Even if [Appellant] were not affiliated with the firms listed in the previous paragraph [the various Colt entities and Sciens], the affiliation of [Appellant] with [BG] causes [Appellant] to be an other than small business for the size standard in question.

(Size Determination at 7).

C. The Appeal

Appellant's counsel submitted a Memorandum in Support of Appeal Petition (Appeal Memorandum) as an attachment to Appellant's Appeal Petition. In the Appeal Memorandum, Appellant generally argues the Area Office made clear errors of fact and law when it determined that:

- a. Appellant is affiliated with BMP through the totality of the circumstances;
- b. Appellant is affiliated with BG and that BG employs 20,000 people; and
- c. Appellant is affiliated with concerns other than BMP and BG³ and that this alleged affiliation is relevant when the aggregate number of Appellant's and these entities' employees is only 659 people.

Appellant disputes that BMP has the power to exert negative control over its operations.

¹ Sciens is actually the manager of Colt Defense Holdings, LLC, not Appellant.

² In its SBA Form 355 response, Appellant states SCM has 23 employees.

³ Colt Canada, Colt Rapid Mat, Rapid Mat S.a.r.l., New Colt, Sciens Capital Management, CDI and CRI.

Appellant notes BMP owns only 22.1% of its Common Units and can designate only two members of Appellant's nine-member Governing Board. Further, BMP's designees can neither prevent a quorum nor block any board action.

Appellant further argues the approval rights that BMP holds under the LLC Agreement concerns only transactions outside of Appellant's ordinary course of business. Consequently, Appellant asserts BMP lacks sufficient power to control and thus be affiliated with Appellant.

Appellant further asserts the Area Office merely concluded BMP had the power to control Appellant under the totality of the circumstances without analysis. In addition, Appellant notes the Area Office ignored that BMP's ownership stake is only half of that held by another owner, Colt Defense Holding, and thus is hardly a substantial minority ownership interest.

Appellant also objects to the Area Office's finding of affiliation based upon the totality of the circumstances because it avers the Area Office did not consider the totality of the circumstances. Rather, the Area Office merely considered BMP's 22.1% ownership stake, its two designees on the Governing Board, and restrictions on extraordinary transactions without requesting information from Appellant, which would have revealed that (1) BMP is a "debt" (lender) fund that does not manage entities it lends money to; and (2) the restrictions stated in the LLC Agreement address matters that occur only rarely and outside the normal course of business.

Appellant then asserts the OHA decisions cited by the Area Office are inapplicable and factually distinguishable (*e.g.*, none of the cases involve a passive minority investor) from the facts in the record.

Next, Appellant argues the size determination is clearly erroneous to the extent that it presumed Appellant's affiliation with concerns other than BMP and BG because the aggregate employment of Appellant and all the named concerns⁴ is only 659 employees. Thus, these alleged affiliations (some admitted affiliates and some Appellant disputes) do not cause Appellant to exceed the size standard.

Finally, Appellant disputes the Area Office's finding of affiliation with Sciens. Appellant notes the Area Office erred in finding Sciens was the manager of Appellant, because Sciens is actually the manager of Colt Defense Holding.

D. SBA's Response to the Appeal Petition

I ordered SBA's Office of General Counsel (SBA) to respond to issues presented in the appeal. However, in responding, SBA also moved to introduce new evidence, including SEC filings, concerning BG.

SBA argues the restrictions in the LLC Agreement requiring BMP's approval of various actions justify a finding of affiliation under the totality of the circumstances. SBA disputes

⁴ *See supra* n.1.

Appellant's assertion that the LLC Agreement only describes "fundamental" or "extraordinary" events. Instead, SBA contends the size determination lists a wide range of corporate actions requiring BMP approval, such as a sale or merger, incurrence of debt over \$20 million, purchase of assets over \$30 million, an initial public offering, entry into a line of business outside of the provision of products or services to the military or law enforcement markets, dissolution, and change of CEO. SBA argues: (1) the right to reject Appellant's entry into a new line of business could greatly affect Appellant's corporate planning; and (2) the right to terminate and approve CEOs grants BMP strong influence over Appellant's top executive who is in charge of Appellant's day-to-day management and affairs.

SBA then asserts "BMP's significant financial investment in Appellant is a 'non-controlling significant financial interest' that OHA has found to be an 'indicia of affiliation.'" (Response at 14). Because BMP can remove large amounts of capital from Appellant, SBA argues BMP can threaten Appellant's viability and thus BMP has the power to control Appellant.

SBA argues "BMP's presence on Appellant's Governing Board and its powers to approve and block management decisions," when combined with BMP's investments, cause Appellant to be financially dependent upon BMP. (Response at 15). SBA argues BMP's power to block certain corporate actions is similar to a "veto power" OHA has found to evince negative control, citing *Size Appeal of Jensco Marine, Inc.*, SBA No. SIZ-4330 (1998).

SBA also asserts the Area Office reasonably "inferred" Appellant is affiliated with BG. SBA bases its assertion on information in the record, including Dun & Bradstreet reports, allegedly showing BG controls BMP.

E. Appellant's Reply to the SBA Response

Appellant filed an opposition to SBA's motion to admit new evidence. Appellant argues SBA should not be allowed to introduce new evidence for the purpose of repairing deficiencies in the record.

Appellant also filed a Reply⁵ to SBA's Response contending the size determination is clearly erroneous because the Area Office misapplied the "totality of the circumstances" test. More specifically, Appellant asserts that without finding Appellant is dependent upon BMP, the Area Office is precluded from finding that the two entities are affiliated under the totality of the circumstances.

Appellant's core argument is that there is no factual basis in the record for the Area Office to determine Appellant is dependent upon BMP. Without evidence of dependence, Appellant contends an indicia of affiliation has no meaning in a totality of the circumstances analysis. Moreover, Appellant asserts there is a distinction between drawing reasonable inferences from the record and assuming facts. Appellant asserts the Area Office inappropriately assumed that BMP was affiliated with BG and that BG employs 20,000 people. Appellant argues that SBA's proffer of new evidence relating to the alleged BMP-BG affiliation and the

⁵ On February 13, 2008, I allowed Appellant to reply to SBA's response.

number of BG employees – critical issues to the size determination – is an admission by SBA of the inadequacy of the size determination and ample reason for remand.

IV. Discussion

A. Timeliness

Appellant timely filed its appeal within 15 days of receiving the size determination. 13 C.F.R. § 134.304(a)(1).

B. New Evidence

I do not find good cause under 13 C.F.R. § 134.308(a)(2) for SBA's submission of new evidence because the new evidence: (1) enlarges the issues by adding new factual allegations to the record; and (2) was readily available to the Area Office and should have been included in the record. Accordingly, SBA's motion for the introduction of new evidence is DENIED.

C. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

D. The Merits

1. Introduction

The evidence in the record shows that the aggregate number of employees of Appellant, Colt Canada, Colt Rapid Mat, Rapid Mat S.a.r.l., New Colt, CMC, SCM, CDI and CRI is 659. Appellant's affiliation with any or all of these entities does not cause Appellant to exceed the applicable 1,000 employee size standard. Thus, the Area Office's size determination depends on Appellant's affiliation with BMP and BG. Further, Appellant's affiliation with BG is premised on Appellant's affiliation with BMP. Accordingly, if Appellant is not affiliated with BMP, Appellant is not affiliated with BG.

I note that both parties ignore "the elephant in the room." Specifically, the Record establishes Sciens has the power to control Appellant under 13 C.F.R. § 121.103(c)(1), (e) because Sciens manages Colt Defense Holding, whose ownership interest in Appellant (44.2%) not only is far and away the largest ownership interest, but also is twice the size of BMP's. In addition, the LLC Agreement shows that Colt Defense Holding names all of the governing board members not named by BMG and the Union, which is currently five (5) of the nine (9) members.

Thus, Sciens has the power to control Appellant's day-to-day operations. Evidence in the Record further establishes that Mr. John Rigas is affiliated with Sciens because he owns 23.2% of Colt Defense Holdings, 100% of Sciens, and 100% of Sciens Capital Management, LLC. However, what is missing is an analysis and evidence pertaining to all the other concerns the evidence suggests are affiliated with Mr. Rigas and how many employees these affiliates may have.

2. Affiliation with BMP

Findings of affiliation through the totality of the circumstances are authorized by 13 C.F.R. § 121.103(a)(5). The specific independent bases of affiliation, *i.e.*, those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h), are the nucleus of a finding of affiliation through the totality of the circumstances. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817, at 13-14 (2006) (*Lance Bailey*). Moreover, as explained in *Lance Bailey*:

Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor (13 C.F.R. § 121.103(c), (d), (e), (f), or (g)), the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates. 13 C.F.R. § 121.103(a)(5). In making this kind of determination, the SBA must evaluate all factors and regulatory criteria in determining whether affiliation is present. Thus, while the evidence in the record may not establish affiliation under one of the specific factors enumerated in 13 C.F.R. § 121.103(a), (b), (c), (d), (e), (f), (g), or (h), an area office's review of the totality of circumstances may lead it to conclude one business has the power to control another and, thus, both are affiliated. This means affiliation can arise where business or personal ties, combinations, or relationships, leads an area office to a reasonable conclusion that businesses are affiliates. But, our preference is that area offices find affiliation based upon the specific factors enumerated in 13 C.F.R. § 121.103, *i.e.*, 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h). . . .

(*Lance Bailey* at 14 (internal citations omitted)).

The Record contains insufficient evidence to establish affiliation between Appellant and BMP under 13 C.F.R. § 121.103(c), (d), (e), (f), or (g). Since the Area Office realized necessary proof under the specific factors establishing affiliation was absent, it chose to find affiliation between Appellant and BMP based upon the totality of the circumstances. However, in so doing, the Area Office made a clear error, for it based this finding upon at least two factors that do not give BMP the power to control Appellant and upon a third factor that is, at best, only mildly suggestive of a power to control.

Affiliation based on stock ownership is governed by 13 C.F.R. § 121.103(c)(1), which provides:

A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, *or a block of voting stock which is large compared to other outstanding blocks of voting stock*, controls or has the power to control the concern.

(emphasis added). Here, the record shows Colt Defense Holding owns 44.2% of Appellant's Common Units; BMP owns 22.1%, and the remaining 33.7% are owned by 26 different individuals and entities, each of whom owns less than 10% of Appellant.

Compared to Colt Defense Holding's 44.2% ownership of Appellant's Common Units, BMP's 22.1% ownership of Appellant's Common Units is insufficient to constitute the power to control. *See Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896, at 5 (2008). Colt Defense Holding's ownership, in combination with its ability to name five or more members to the Governing Board, is so dominant that it denies BMP any realistic ability to have the power to control Appellant under 13 C.F.R. § 121.103(c)(1). Instead, BMP is merely a minority owner who has half the ownership of the largest shareholder, Colt Defense Holding. Thus it is Colt Defense Holding, and its manager Sciens, that have the power to control Appellant under 13 C.F.R. § 121.103(c)(1). Accordingly, Colt Defense Holding, and not BMP, is affiliated with Appellant.

Contrary to SBA's argument, BMP's substantial ownership is not sufficient here to confer power to control because Colt Defense's ownership stake obliterates that of BMP. Accordingly, I find a 22.1% ownership stake under the facts of this appeal is not significant enough to imply control when another owner owns twice as much and has a working majority of the Governing Board. Accordingly, I find it was clear error for the Area Office to base any finding of affiliation under the totality of the circumstances upon BMP's 22.1% ownership of Appellant's Common Units.

BMP's two members of Appellant's Governing Board do not control Appellant's management. Having only two of nine votes is insufficient to afford BMP any power to control Appellant when compared to Colt Defense Holding's ability to name five (5) or more. Moreover, as correctly noted by Appellant, BMP's participation on the Board is not necessary for a quorum and BMP's designees cannot act to block any action that is approved by the majority of the Governing Board. Accordingly, BMP has no realistic power to control Appellant through its Governing Board membership and I find it was clear error for the Area Office to base any finding of affiliation under the totality of the circumstances upon that membership.

BMP does have the power to exercise some control over Appellant's activities under the LLC Agreement. Although BMP's right to disapprove or approve of Appellant's transactions is limited to events that typically occur outside the normal course of business, the LLC Agreement restrictions do afford BMP limited power to control some of Appellant's ordinary business activities. Consequently, I cannot say it was clear error for the Area Office to use the restrictions in the LLC Agreement as part of its totality of the circumstances criteria.

In finding the Area Office could use the LLC Agreement restrictions as part of a totality of the circumstances analysis, I do not find that the LLC Agreement restrictions are sufficient by

themselves to sustain a determination of affiliation based upon the totality of the circumstances. When combined with BMP's ownership stake in Appellant and BMP's Governing Board membership, I hold there is still insufficient proof to sustain a finding of affiliation under the totality of the circumstances.

My review of the OHA decisions Appellant and SBA cite concerning affiliation based upon the totality of the circumstances reveals substantially stronger facts supporting the power to control than those present in this appeal. As suggested by Appellant, these cases reference other factors and undoubtedly are in Appellant's favor. This is particularly true of *Kansas City LLC* and *Point Precision* (both are cited by Appellant and SBA); *Size Appeal of Southwind Construction Corp.*, SBA No. SIZ-4462 (2001); *Size Appeal of Procurement Automation Institute, Inc.*, SBA No. SIZ-4236 (1997); *Size Appeal of Olmec Toys, Inc.*, SBA No. SIZ-4077 (1995); and especially *Size Appeal of Jensco Marine, Inc.*, SBA No. SIZ-4330 (1998) (where the minority shareholder also had veto power over *ordinary* business transactions). These cases are either inapposite or undoubtedly aid Appellant.

3. Affiliation with BG

The Area Office does not explain BMP's affiliation with BG. Rather, the Area Office merely concludes that Appellant is affiliated with BMP and BG under the totality of the circumstances. While SBA suggests the Area Office was correct to "infer" such a relationship, there is no explanation in the size determination of how the Area Office inferred such a relationship or what evidence might possibly support such an inference. Therefore, I hold it is a clear error of fact and law for the Area Office to hold Appellant is affiliated with BG.

4. Affiliation with Sciens

I note the Area Office has committed clear error in finding Sciens no longer owns any Common Units of Appellant (size determination at 6). Sciens' ownership (or no longer) of Appellant is nowhere in the Record. This finding, therefore, is a clear error of fact. This finding also ignores Mr. Rigas' ownership of Sciens, his ownership stake in Colt Defense Holdings, and Sciens power to control Appellant.

Even though the Area Office correctly found affiliation between Appellant and Sciens, this affiliation has no significance based upon the Record before me. The Area Office did not investigate or analyze the effect of the affiliation between Appellant and the entities affiliated with Sciens and Mr. Rigas (Sciens' 100% owner). That is, the Area Office did not determine who else is affiliated with Appellant, Sciens, and Mr. Rigas as of October 9, 2007⁶ submission of Appellant's offer and how many people these affiliates employed. Hence, the Record necessarily lacks evidence sufficient for the Area Office to evaluate the consequences of the affiliation between Appellant, Sciens, and Mr. Rigas.

⁶ Some of the Common Unit certificates in the Record state ownership as of a date beyond October 9, 2007. They should have no relevance for this size determination.

Based upon the foregoing I must Remand the issue of affiliation between Appellant, Sciens and Mr. Rigas to the Area Office. The Area Office must evaluate how many affiliates Sciens and Mr. Rigas have and aggregate the employees of these affiliates with those of Appellant and its admitted affiliates, plus Colt Defense Holding.

Therefore, to ensure proper development of the Record upon remand, Appellant is ORDERED, pursuant to 13 C.F.R. §§ 121.1008(d), 1009(c) and 1009(d) to respond to any Area Office request for information and to fully explain the scope of the Sciens/Rigas relationship with Appellant and any potential affiliates, including detailing the number of people employed by all of the affiliated entities.⁷ Therefore, at a minimum, the Area Office should obtain information that establishes and verifies:

- a. The complete ownership of Appellant's and Colt Defense Holding's Common Units as of the date of the Appellant's self-certification;
- b. The LLC Agreement for Colt Defense Holding (to fully understand its unit ownership scheme);
- c. Any and all relationships between those owning Appellant's and Colt Defense Holding's Common Units as of the date of the self-certification;
- d. All entities and individuals affiliated with Sciens and Mr. Rigas, including a copy of all documents specifying such relationships; and
- e. An employee count of all concerns affiliated with Appellant, Sciens, and Mr. Rigas and their relationships with one another.

In addition, if the Area Office's investigation identifies other matters relevant to the Sciens/Rigas affiliation with Appellant, Appellant must comply with any further requests from the Area Office related to those matters.

If Appellant declines or otherwise fails to comply with the Area Office's requests for information and these requests meet the standard described in *Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255, at 7 (1997), then the Area Office is directed to take an adverse inference pursuant to 13 C.F.R. § 121.1008(d) and to determine any missing evidence would have demonstrated Appellant to be other than small. *See Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008).

5. Summary

The Area Office's determination that Appellant is an other than small concern because it is affiliated with BMP and BG under the totality of the circumstances is based upon clear errors of fact and law. Specifically, there is insufficient proof to sustain a finding of affiliation under the totality of the circumstances and no proof to sustain any affiliation with BG. In addition, the Record lacks information concerning the relevancy of the Sciens/Rigas affiliation with Appellant and its consequences.

⁷ *See Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4847, for a decision with some similar issues.

V. Conclusion

Based upon the foregoing, I hold the Area Office made clear errors of fact and law in finding Appellant: (1) Is affiliated with BMP through the totality of the circumstances; and (2) Appellant is affiliated with BG. Accordingly that part of the size determination is REVERSED.

I also hold: (1) the Area Office made a clear error of fact concerning Sciens' relationship with Appellant; and (2) the Record does not contain enough information to evaluate the consequences of Appellant's affiliation with Sciens and Mr. Rigas. Therefore, the part of the size determination addressing Sciens is VACATED and REMANDED for further action consistent with the text of this decision.

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

THOMAS B. PENDER
Administrative Judge