United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
The ORASA Group, Inc.	SBA No. SIZ-4966
Appellant	Decided: June 13, 2008
Appealed from Size Determination No. 03-2008-33	

APPEARANCES

Vanida Jariyatepthavon, President, The ORASA Group, Inc., Ft. Walton Beach, Florida, for Appellant.

Jonathan M. Bailey, Esq., Bailey & Bailey, P.C., San Antonio, Texas, for Hallmark-Phoenix 4, LLC.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from an April 14, 2008 size determination (Case No. 3-2008-33) finding The ORASA Group, Inc. (Appellant) to be an other than small business for a $6.5 million size standard. The size determination arose from protests filed by Hallmark-Phoenix 4, LLC and Starlight Corporation. For the reasons discussed below, I grant Appellant's appeal.

OHA has jurisdiction to decide 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. Issues

Whether the size determination finding Appellant to be other than small because of its identity of interest with its SBA-approved mentor was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

Whether the size determination finding Appellant to be other than small based upon the

totality of the circumstances was based upon a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Findings of Fact

1. On January 28, 2008, the Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia issued Request for Proposals No. N00189-08-R-0007 (RFP) for Transient Line Management Support Services at Andrews Air Force Base as a total small business set-aside.

2. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 488119, Other Airport Operations, as the applicable NAICS code for this procurement, with a corresponding $6.5 million annual receipts size standard. Proposals were due February 25, 2008.

3. On February 28, 2008, the CO notified unsuccessful offerors that the apparent successful offeror was The ORASA Group, Inc. (Appellant). On March 5, 2008, Starlight Corporation (Starlight) and Hallmark-Phoenix 4, LLC (Hallmark) protested Appellant's size with the CO.

4. Starlight's protest alleged that Appellant is affiliated with the incumbent contractor, Northwest Florida Facilities Management, Inc. (Northwest) and other companies owned and controlled by Saras Taveprungsenkul (Saras), causing Appellant to exceed the $6.5 million size standard. Hallmark's protest alleged that despite Appellant and Northwest's mentor/protégé agreement, Appellant is affiliated with Northwest under the ostensible subcontractor rule. Hallmark alleged that Appellant has no experience performing the type of work in the solicitation, Northwest is the incumbent contractor with the requisite technical expertise, and Northwest would supply the key personnel to perform the work.

5. On March 7, 2008, the CO referred the size protest to the SBA Office of Government Contracting, Area III, in Atlanta, Georgia (Area Office) for a size determination.

6. On March 13, 2008, the Area Office notified Appellant of the protests and requested certain information. On March 18, 2008, Appellant responded to the protests and supplied its SBA Form 355, its income tax returns, its technical and cost proposals, its mentor/protégé agreement with Northwest, and a copy of its corporate charter and bylaws. Appellant asserted that it is an 8(a) firm that entered into an SBA-approved mentor/protégé agreement with Northwest, an admitted large concern, on August 14, 2001 and therefore is insulated from any finding of affiliation. Appellant also asserted that it has the experience and expertise necessary to perform the contract as it has performed transient aircraft services at Eglin Air Force Base, Florida.

B. The Size Determination

On April 4, 2008, the Area Office issued its size determination finding Appellant to be other than a small business concern under the $6.5 million size standard. The Area Office found that Appellant and Northwest have an SBA-approved 8(a) mentor/protégé agreement. The Area Office stated that while a protégé firm is not an affiliate of its mentor solely because the protégé firm receives assistance from its mentor, affiliation may nonetheless be found for other reasons.

The Area Office found the ostensible subcontractor rule inapplicable because Appellant's proposal indicates that Appellant will perform the contract and not utilize any subcontractors. The Area Office, however, found Appellant was affiliated with Northwest under the identity of interest rule at 13 C.F.R. § 121.103(f), and thus aggregated Appellant and Northwest's receipts to find Appellant exceeded the $6.5 million size standard. The Area Office concluded that Appellant and Northwest shared a familial identity of interest because Appellant's owner, Vanida Jariyatephavon (Vanida), is the sister-in-law of Northwest's owner, Saras.

The Area Office also found Appellant and Northwest shared an identity of interest based on substantially identical economic interests. Specifically, the Area Office found (1) Vanida used to work at Northwest, (2) Appellant borrowed significant start-up money from Northwest in a transaction that was not arm's-length, (3) Appellant leases office space from Northwest, in a building owned by Saras, under a verbal, cancelable lease, (4) Vanida was a registered agent for a non-profit organization owned by Saras, and (5) Northwest, as the incumbent contractor on the subject procurement, "solicited [Appellant] to submit a proposal. . . ." Size Determination, at 5.

The Area Office thus determined that based on the identity of interest rule and the totality of the circumstances, Appellant was affiliated with Northwest and thus other than small for the $6.5 million size standard.

C. The Appeal

On May 14, 2008, Appellant filed the instant appeal. First, Appellant asserts that the caveat found at 13 C.F.R. § 121.103(b)(6), allowing a mentor and protégé to be found affiliated for reasons other than assistance under federal mentor/protégé programs, is in conflict with the language of 13 C.F.R. § 124.520. Specifically, the mentor/protégé regulation states that no determination of affiliation or control may be found between a protégé and mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement. *See* 13 C.F.R. § 124.520(d)(4). Appellant therefore asserts that SBA's affiliation rules are in conflict with the principles espoused by the mentor/protégé program.

Appellant also contends the Area Office focuses on facts that should be irrelevant. For example, the fact that Vanida once served as a registered agent for Saras's non-profit organization should not be a factor in the Area Office's totality of the circumstances analysis. With regard to family ties indicating an identity of interest, Appellant asserts that Vanida and Saras's familial relationship was fully disclosed to the SBA before its mentor/protégé agreement was approved and both Vanida and Saras are 100 percent owners of their respective companies.

Appellant next asserts that the Area Office should not find anything suspicious about Northwest encouraging Appellant to compete for the contract. Indeed, encouraging your protégé to pursue business opportunities is exactly what is contemplated by SBA's mentor/protégé program. Finally, Appellant argues the Area Office's conclusion that Appellant is economically dependent upon Northwest is "contrary to the tenants of the Mentor-Protégé Program at 13 C.F.R. § 124.520 whereby the mentor is encouraged to provide various forms of assistance to include financial assistance in the form of equity investment and/or loans and subcontracts." Appeal Petition, at 4.

D. Hallmark's Response

On May 30, 2008, Hallmark filed its response to the appeal petition. First, Hallmark states that Appellant's appeal appears to be untimely. Hallmark then asserts that SBA's approval of Appellant's mentor/protégé agreement does not preclude a finding of affiliation between Appellant and Northwest. Hallmark cites *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546 (2003) to support the proposition that two firms separately owned by two family members and operating under an SBA-approved mentor/protégé agreement may nonetheless be found affiliated. Further, Hallmark asserts that a familial relationship is always sufficient to support a finding of affiliation.

IV. Discussion

A. Timeliness

The size determination was issued on April 4, 2008. The record, however, contains a memorandum from the Area Office stating that SBA's fax confirmation does not indicate that SBA faxed the size determination to Appellant on April 4, 2008. Instead, SBA faxed the size determination to Appellant on May 1, 2008, after it received a phone call from Appellant inquiring about the status of the size protest. Thus, I find the record establishes Appellant did not receive the size determination until May 1, 2008, and the timeline for filing its appeal at OHA thus began on May 1, 2008.

Appellant filed the instant appeal within 15 days of receiving the size determination, *i.e.*, May 1, 2008, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon a 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 Consultants, Inc.*, SBA No. SIZ-4775 (2006). 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.

C. The Merits

SBA's mentor/protégé program anticipates that a mentor will provide a wide array of assistance to its protégé. Specifically, 13 C.F.R. § 124.520(a) states:

> The mentor/protégé program is designed to encourage approved mentors to provide various forms of assistance to eligible Participants. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements. The purpose of the mentor/protégé relationship is to enhance the capabilities of the protégé and to improve its ability to successfully compete for contracts.

SBA's regulations provide the following affiliation exception for participants in SBA's 8(a) mentor/protégé program: "A protégé firm is not an affiliate of a mentor firm solely because the protégé firm receives assistance from the mentor firm under Federal Mentor/protégé programs. Affiliation may be found for other reasons." 13 C.F.R. § 121.103(b)(6). Further, "No determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement." 13 C.F.R. § 124.520(d)(4).

Based upon these provisions, OHA has held that area offices may not consider business transactions or relationships occurring after SBA approves a mentor/protégé agreement to find a lack of clear fracture and thus affiliation between a mentor and protégé based on an identity of interest. *Size Appeal of Technical Support Services*, SBA No. SIZ-4794, at 19 (2006) (*Technical Support Services*).

SBA approved the mentor/protégé agreement between Appellant and Northwest on August 14, 2001, and approved its continuation for another calendar year on September 7, 2007. Therefore, Appellant may not be found affiliated with Northwest based upon any assistance provided by Northwest pursuant to the approved mentor/protégé agreement from August 14, 2001, until the present.

The Area Office found Appellant affiliated with Northwest based on Appellant and Northwest's familial and economic identity of interest. 13 C.F.R. § 121.103(f). With regard to the presumed identity of interest based on the familial relationship of Vanida and Saras, I find this relationship alone cannot be used to justify a finding of affiliation in the context of a mentor/protégé relationship. First, this relationship was fully disclosed to the SBA when it approved Appellant and Northwest's mentor/protégé agreement. Second, an area office's finding of affiliation between a mentor and protégé based solely upon a familial relationship would have the effect of undoing every mentor/protégé relationship involving family members. If SBA intended to never allow family members to form mentor/protégé agreements, it should make this requirement a part of the regulation and not approve the relationship in the first place.

The Area Office also found Appellant and Northwest affiliated based on their economic identity of interest, specifically:

a. A non-arm's-length loan of $230,060 from Northwest to Appellant;

b. A loan of $48,419 from Appellant to Northwest;

c. Appellant's non-arm's-length verbal lease for 2000 square feet of office space (at $11,448 per year) from Northwest, which is adjacent to Northwest's office and is cancellable at any time; and

d. Vanida's former role as a registered agent for Saras Commercial Condominium Owners Association, Inc., a non-profit organization owned by Saras that has been dissolved.

First, business transactions occurring after SBA approved Appellant and Northwest's mentor/protégé agreement cannot be used to evince affiliation. *See Size Appeal of Technical Support Services*, SBA No. SIZ-4794 (2006). In *Technical Support Services*, I held that the one exception to this rule is if the business transaction were not at arm's-length or were so extraordinary as to raise suspicion in a reasonable person that the approval of the mentor/protégé agreement was contrary the law. This other than arm's-length reference did not refer to transactions that were specifically permitted under 13 C.F.R. § 124.520(a), such as loans. This is because permitting area offices to use loans between a mentor and a protégé to prove a lack of clear fracture would be contrary to the purpose and plain meaning of 13 C.F.R. § 124.520(a), which authorizes loans. Therefore, because 13 C.F.R. § 124.520(a) permits loans between a mentor and a protégé and does not require them to be at arm's-length, I will not imply such a requirement.[1]

The issue of Appellant's oral lease of office space from Northwest is complex. The Record shows Appellant leased the space before the approval of the mentor/protégé agreement. Therefore, it could be argued that the continuing lease may be reviewed for lack of clear fracture and thus affiliation. The parties, however, have continued the lease during the term of the mentor/protégé agreement and because it is effectively a month-to-month oral lease, I find the lease occurred during the period of the mentor/protégé agreement.

The next issue is whether the lease is the type of financial assistance permitted by 13 C.F.R. § 124.520(a). If so, the Area Office cannot consider it. If the lease is not the kind of assistance contemplated by 13 C.F.R. § 124.520(a), the Area Office may consider the lease if it is not arm's-length. Assuming *arguendo* the oral lease between Appellant and Northwest is not the kind of assistance sanctioned by 13 C.F.R. § 124.520(a), the Record must still support a finding that the lease is not arm's-length. Ultimately, the only evidence in the Record is the square footage, location, and price of the office space. There is no analysis or comparison to the local market. Consequently, there is nothing in the Record to sustain the Area Office's assertion that the lease was other than arm's-length. Therefore, it is not necessary to rule on whether the lease is the type of assistance contemplated by 13 C.F.R. § 124.520(a).

[1] The Record supports the Area Office's finding that Appellant's $230,060 loan from Northwest is not arm's-length because it is below the prime rate and there are no repayment terms.

Next, I find irrelevant Vanida's service as a registered agent for Saras's defunct non-profit association. Vanida served as a registered agent in her personal capacity. Her service did not involve Appellant and the non-profit has since been dissolved. Hence, it is not probative of a lack of clear fracture between Appellant and Northwest and is not relevant to whether Appellant and Northwest share an economic identity of interest.

Accordingly, I find the above-listed reasons supporting the Area Office's finding of affiliation based on an economic identity of interest to be based on clear error of fact and law.

I also find insufficient proof in the Record to sustain the Area Office's determination that Appellant and Northwest are affiliated based upon the totality of the circumstances as described by 13 C.F.R. § 121.103(a)(5). The only factors that bear on affiliation involve affiliation based upon an identity of interest under 13 C.F.R. § 121.103(f), *i.e.*, the familial and economic relationship between Vanida and Saras. Regardless, because 13 C.F.R. § 121.103(b)(6) and 13 C.F.R. § 124.520(d)(4) prohibit the Area Office from finding affiliation or control between a mentor and a protégé firm based upon the mentor/protégé agreement or any assistance provided under the agreement, these factors may not be considered to prove affiliation based upon the totality of the circumstances either.

The Record does not support the Area Office's determination that Appellant and Northwest are affiliated. Instead, I hold the size determination is based upon clear errors of fact and law that are not susceptible to correction because: (1) the most significant proof underlying the size determination cannot be used to find affiliation; and (2) other matters cited by the Area Office as proving affiliation are insufficient as a matter of law to be probative of affiliation. Accordingly, I find the Area Office based its size determination upon clear errors of fact and law.

V. Conclusion

For the above reasons, the Area Office's size determination is REVERSED and Appellant's appeal is GRANTED.

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

THOMAS B. PENDER
Administrative Judge