

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

SIZE APPEAL OF:

Henderson Group Unlimited, Inc.

Appellant

Size Determination No. 03-2009-24

SBA No. SIZ-5034

Decided: April 22, 2009

DECISION

I. Introduction and Jurisdiction

On December 10, 2008, the U.S. Navy, Fleet Industrial Supply Center Norfolk, issued Solicitation No. NOO189-09-Q-Z017 (RFQ) for administrative support services as a HUBZone small business set-aside. The RFQ was assigned North American Industry Classification System (NAICS) code 561110, office administrative services, with a corresponding \$7 million size standard. On February 12, 2009, the Contracting Officer (CO) notified unsuccessful offerors that Henderson Group Unlimited, Inc. (Appellant) was the apparent successful offeror.

On February 17, 2009, Government Contracts Consultants (GCC) protested Appellant's size status. GCC's protest alleged that Appellant was affiliated with Lionel Henderson & Co., Inc. (Lionel).<sup>1</sup>

On March 18, 2009, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2009-24 (size determination), finding Appellant other than small for the \$7 million size standard. On March 31, 2009, Appellant appealed the size determination to the SBA Office of Hearings and Appeals (OHA). For the reasons discussed below, the size determination is reversed.

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. Accordingly, this matter is properly before OHA for decision.

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<sup>1</sup> GCC also protested Appellant's HUBZone status, which was forwarded to the SBA HUBZone program office. On March 13, 2009, the HUBZone program office found Appellant eligible for the HUBZone program as it met the 35% residency requirement. Appellant's HUBZone status is not the subject of this appeal.

## II. Issue

Whether the Area Office's size determination is based on a clear error of fact or law. *See* 13 C.F.R. § 134.314.

## III. Background

### A. Size Determination

The Area Office's size determination found Appellant affiliated with Lionel based on a familial identity of interest and thus other than small as Appellant and Lionel's combined average annual receipts exceed the \$7 million size standard. *See* 13 C.F.R. § 121.103(f).

Appellant's President and sole owner, Mr. Ronald Henderson, is the half-brother of Mr. Lionel Henderson, Lionel's President. Thus, the Area Office found there was a presumption of affiliation between the firms under 13 C.F.R. § 121.103(f). The Area Office found Appellant was not able to rebut that presumption because Appellant and Lionel share facilities as well as management personnel. Specifically, Mr. Withrow is a Lionel employee and consults on projects for Appellant. In addition, Ms. Chung, Lionel's Vice-President, had previously served as Appellant's Project Manager and point of contact on a GSA contract where Lionel was the prime contractor and Appellant was the subcontractor.

The Area Office also noted that Appellant and Lionel have worked together on three contracts. On one expired contract, Lionel was the prime contractor and Appellant was the subcontractor. On the other two active contracts, Appellant is the prime contractor and Lionel is the subcontractor. The Area Office concluded this common economic interest failed to show clear fracture between Appellant and Lionel sufficient to overcome the presumption of affiliation under 13 C.F.R. § 121.103(f). Accordingly, the Area Office found Appellant and Lionel affiliated and aggregated their receipts to find Appellant exceeded the \$7 million size standard.

### B. Motion for Additional Evidence

Appellant argues the size determination contains several factual errors. In support of this contention, Appellant moved for the admission of supplemental evidence that Appellant alleges will demonstrate the Area Office's erroneous factual findings. Appellant moved to admit the following new evidence: (1) Appellant's HUBZone program office determination, (2) the HUBZone office's February 20, 2009 letter to Appellant, (3) Mr. Ronald Henderson's February 26, 2009 declaration in response to GCC's HUBZone protest, (4) the HUBZone office's supplemental request for information from Appellant, (5) Appellant's response to the HUBZone office's supplemental request, and (6) Mr. Ronald Henderson's March 31, 2009 supplemental declaration. Appellant contends this evidence demonstrates that the Area Office made findings based on information it failed to request, which was requested by and provided to the HUBZone office, and also "highlights the hastiness and carelessness with which this investigation and determination were conducted."

### C. The Appeal

Appellant argues it demonstrated a fracture between Appellant and Lionel sufficient to rebut the presumption of affiliation under 13 C.F.R. § 121.103(f). Appellant contends the Area Office relied upon incorrect facts in finding a lack of clear fracture between the two companies. Specifically, Appellant asserts that Ms. Chung is solely a Lionel employee, and merely served as a reference for Appellant on a contract for which Appellant was the subcontractor and Lionel was the prime contractor (Ms. Chung was the project manager on this contract as an employee of the prime contractor, Lionel). Appellant notes the HUBZone program office also found Ms. Chung not to be Appellant's employee in a related HUBZone protest.

Appellant asserts the Area Office correctly found Mr. Withrow a full-time Lionel employee, who also provides consulting services to Appellant. Appellant, however, disputes the Area Office's conclusion that Mr. Withrow is involved in the management of Appellant.

Appellant also asserts the Area Office never requested information on the sharing of office space yet based its determination on a mistaken belief that it requested and reviewed such information. Accordingly, Appellant offers as new evidence a declaration from Mr. Ronald Henderson that he has only visited Lionel's offices a total of three times in three years.

Regarding the business relationship between Appellant and Lionel, Appellant asserts it has been a subcontractor to Lionel only once, and subcontracted work to Lionel twice, in amounts that the Area Office acknowledged were small. Moreover, under the instant contract, Appellant will not be using any subcontractors. Appellant cites *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995) to support that the minimal business relationship between Appellant and Lionel is sufficient to demonstrate clear fracture.

In addition, Appellant asserts there is no evidence that Appellant is dependent upon Lionel in operating its business. Appellant asserts Lionel has never extended credit or provided financial assistance to Appellant. Further, Appellant obtained the instant award on its own without utilizing Lionel as a subcontractor. Accordingly, Appellant urges OHA to reverse the Area Office's size determination.

## IV. Discussion

### A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination. 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. New Evidence on Appeal

New evidence not in the record that was before the area office may be admitted into the record in a size appeal on motion establishing good cause for its submission. 13 C.F.R. § 134.308(a)(2). The appeal contains the following new evidence: (1) Appellant's HUBZone program office determination, (2) the HUBZone office's February 20, 2009 letter to Appellant, (3) Mr. Ronald Henderson's February 26, 2009 declaration in response to GCC's HUBZone protest, (4) the HUBZone office's supplemental request for information from Appellant, (5) Appellant's response to the HUBZone office's supplemental request, and (6) Mr. Ronald Henderson's March 31, 2009 supplemental declaration.

Appellant alleges the Area Office misstated the evidence requested from Appellant during the protest process. Appellant thus introduces this evidence to clarify the issue of common facilities and management personnel, a key factor in the Area Office's finding of affiliation between Appellant and Lionel.

Specifically, based on Appellant's SBA Form 355 responses, the Area Office found Mr. Withrow worked for both Appellant and Lionel, and Appellant used Lionel's office space in Maryland and California. The Area Office then stated that in a March 9, 2009 email, Mr. Henderson was "requested to provide additional information and clarification on his relationship with [Lionel], the sharing of management personnel and office space as well as more detailed information on the contractual relationships that exist between the two firms."

The actual text of the March 9, 2009 email<sup>2</sup>, however, does not support the quoted description. Rather, the Area Office asked Mr. Henderson the following questions: (1) Are there any family members with shared interests in Appellant and Lionel; (2) What is the relationship between Mr. Ronald Henderson and Mr. Lionel Henderson; (3) What relationship, if any, does Mr. Withrow have with either of the Hendersons; (4) Does Mr. Ronald Henderson have any interest in Lionel; (5) Describe the scope of subcontracting efforts between Appellant and Lionel; and (6) Provide a breakdown of all account receivables and payables for FY 2006-2008. Thus, aside from inquiring about Mr. Withrow, there is nothing in the Area Office's March 9, 2009 email requesting clarification on the sharing of management personnel and office space between Appellant and Lionel.

Thus, because Appellant was not asked about the sharing of management personnel and office space as the Area Office contended, Appellant could not present the evidence offered on appeal at the protest level. The information is also highly relevant, as a key factor in the Area Office's finding of affiliation was the commonality of management personnel and office space between Appellant and Lionel. Accordingly, I find good cause for admission of Appellant's

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<sup>2</sup> While this email does not appear to be in the Area Office record, Appellant attached the March 9, 2009 email as Exhibit 1 to its appeal.

evidence as required by 13 C.F.R. § 134.308(a)(2).

While I am admitting this evidence, which happens to have been provided to the HUBZone office, I am not holding that the HUBZone and size protest processes are related or that appellants can expect information to be shared between the two processes.

#### D. Identity of Interest Affiliation

Affiliation based on identity of interest is defined at 13 C.F.R. § 121.103(f), which provides:

Affiliation may arise among two or more persons with an identity of interest. 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. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

The Area Office based its finding of affiliation on familial identity of interest. Mr. Ronald Henderson has the power to control Appellant. Mr. Ronald Henderson's half-brother, Lionel Henderson, has the power to control Lionel. Accordingly, there is a presumption of affiliation between Appellant and Lionel that Appellant can rebut by showing "clear fracture." 13 C.F.R. § 121.103(f).

The Area Office found Appellant failed to rebut the presumption of affiliation, and thus found a lack of clear fracture between Appellant and Lionel, because:

1. Appellant shares facilities and management personnel with Lionel. Specifically, Mr. Withrow is employed by Lionel, yet consults with Appellant. In addition, Ms. Chung, Lionel's Vice-President, was a point of contact for GSA contracts where Lionel was a prime and Appellant was a subcontractor; and

2. There are three contracts where Appellant and Lionel had a relationship. One contract has expired and the other two are active. On both active contracts, Appellant is the prime and Lionel the subcontractor. While the dollar value of the active contracts is small, the contractual relationship shows a lack of estrangement between the two brothers.

The Area Office committed a clear error of fact in finding Appellant and Lionel share facilities and management. As discussed above, and unlike the Area Office suggests, the Area Office did not ask Appellant to clarify the sharing of management personnel and office space beyond the SBA Form 355. After evaluating the evidence provided by Appellant on appeal, I find Appellant and Lionel do not share management personnel or office space in a meaningful way.

Appellant and Lionel's only potential common employee is Mr. Withrow. Mr. Withrow is a Lionel employee that does consulting work for Appellant. Appellant and Lionel developed a quality assurance system for a contract and after the contract ended, both companies continued to use separate versions of that system. Because Mr. Withrow has experience with this system, he consults for Appellant on this system on an as needed basis; he does not control or direct Appellant's business decisions. *See* Appellant's SBA Form 355, Question 17, and Appellant's Exhibit 3. Ms. Chung, Lionel's Vice-President, merely served as a project manager on a contract where Lionel was the prime contractor and Appellant was the subcontractor; Ms. Chung has never been on Appellant's payroll and is not a common employee. I find the commonality of one person, Mr. Withrow, who performs only limited consulting, is insufficient to support the Area Office's finding of lack of clear fracture.

With regard to shared office space, Appellant's corporate office is in Atlanta, Georgia. Appellant's employees work either on government work sites or in Appellant's Atlanta office. Mr. Ronald Henderson avers that he has only utilized Lionel's office in California once in the past three years and Lionel's Maryland office twice in three years. *See* Appellant's Exhibit 6. This establishes only a most limited visiting or sharing of office space. Hence, I cannot affirm that Mr. Ronald Henderson's visits to Lionel's corporate offices demonstrate lack of clear fracture. Accordingly, I find the Area Office committed clear error with regard to this issue.

I also find the Area Office committed clear error in finding Appellant's contractual relationships with Lionel, summarized in (2) above, demonstrate lack of clear fracture. I find that Appellant and Lionel, who are located thousands of miles apart, exist independently of one another and are in different lines of business. In addition, Appellant and Lionel have only two active contracts where Appellant serves as the prime contractor, and Lionel is the subcontractor.<sup>3</sup> Compare *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995) (holding clear fracture can occur even though some business relationships between family members and firms exist), with *Size Appeal of Black Box Technology, Inc.*, SBA No. SIZ-5011 (2008) (finding identity of interest affiliation between firms with substantial ongoing business arrangements, including teaming arrangements on the contract at issue). The degree of business between Appellant and Lionel, while not establishing complete estrangement (which is not necessary), is minimal and does not suggest dependence. Accordingly, I find Appellant has rebutted the presumption of familial identity of interest affiliation under 13 C.F.R. § 121.103(f).

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<sup>3</sup> One of these contracts ended March 31, 2009.

V. Conclusion

For the above reasons, the Area Office's size determination is REVERSED and Appellant's appeal is GRANTED. Accordingly, Appellant is a small business concern for the instant procurement.

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

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THOMAS B. PENDER  
Administrative Judge