

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

SIZE APPEAL OF:

Blue Cord Construction, Inc.

Appellant

Appealed from
Size Determination No. 3-2009-62

SBA No. SIZ-5077

Decided: October 7, 2009

APPEARANCE

Heather M. Lang, Esq., The Salem Law Group, P.A. Tampa, Florida for Appellant.

DECISION

I. Introduction and Jurisdiction

Blue Cord Construction, Inc. (Appellant) appeals Size Determination 3-2009-62 (Size Determination) issued by SBA's office of Government Contracting, Area Office III (Area Office). The Area Office determined Appellant to be other than small.

On April 27, 2009, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals No. VA-101-09-RP-0101 (RFP) for construction of crypts and development at the Sarasota National Cemetery in Sarasota, Florida. The Contracting Officer (CO) set-aside the procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs) and designated North American Industrial Classification System (NAICS) code 237990, with a size standard of \$33.5 million.

Pursuant to the RFP, Appellant submitted its offer, including a technical proposal, on May 28, 2009. On July 20, 2009, the CO notified unsuccessful offerors that it had awarded the contract arising under the RFP to Appellant on July 10, 2009.¹

On July 21, 2009, Valor Construction Management, LLC (Valor), an unsuccessful offeror under the RFP, protested to the CO Appellant's status both as a SDVO SBC and as a small business. Valor alleged Appellant was affiliated with McCree Construction and Architects, Inc. (MCAI), of Orlando, Florida and that MCAI had revenues exceeding the RFP's size standard.

¹ *Contra* to FAR 15.503(a)(2).

On July 22, 2009, J2A² JV, LLC (J2A), another unsuccessful offeror, protested the award to Appellant to the U.S. General Accountability Office. J2QA also alleged Appellant was affiliated with MCAI. J2A provided a copy of its protest to the CO.

On July 28, 2009, the CO sent these protests to SBA's Office of Government Contracting (OGC). OGC sent these protests to the Area Office on July 30, 2009, and adopted the protests as permitted by 13 C.F.R. § 121.1001(a)(8)(iv).

On July 31, 2009, the Area Office informed Appellant its size had been questioned because of its possible affiliation with MCAI. The Area Office provided copies of the protests and discussed some of the issues that could affect a size determination. The Area Office also requested Appellant to submit a completed SBA Form 355, along with a response to the protest and various other documents.

Appellant provided the requested materials on August 4, 2009, and on August 12, 2009. Among other documents, Appellant provided a copy of its Technical Proposal to the RFP, narrative explanations, a lease agreement with MCAI, corporate documents, and tax returns for McCree, Inc. (MCAI's parent) and Appellant.

OHA decides size 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.

II. Issues

Did the Area Office make a clear error of fact or law when it found Appellant to be affiliated with a large concern based upon the newly organized concern rule (13 C.F.R. § 121.103(g))?

Did the Area Office make a clear error of fact or law when it found Appellant to be affiliated with a large concern based upon an identity of interest (13 C.F.R. § 121.103(f))?

III. Background

A. Facts

1. Michael T. Waldrop is the President, sole Manager Director, and 51% owner of Appellant. Mr. Richard T. McCree, Sr. (Mr. McCree, Sr.), Vice President and Secretary, owns 24.5% of Appellant, and Mr. Richard T. McCree, Jr. (Mr. McCree, Jr.), Vice President and Treasurer, owns 24.5% of Appellant. Appellant has only one director and the majority of the issued stock constitutes a quorum for stockholder meetings.

2. Mr. Waldrop is married to Marnie Waldrop, the daughter of Mr. McCree, Sr., and Mr. McCree, Jr., is Ms. Waldrop's brother.

3. Mr. Waldrop has ten years of general contractor experience and has been

employed by MCAI as Vice President of Construction from 2000 to the present. Mr. Waldrop has been directly involved with \$400 million in contracts for commercial and governmental construction projects. Mr. Waldrop has not only managed numerous large scale construction projects for MCAI, but also has held numerous positions in MCAI, including Vice President of Business Development before becoming Vice President of Construction. MCAI's website lists Mr. Waldrop as a key staff member and identifies him as an officer of MCAI - Vice President of Construction.

4. Mr. McCree, Sr. (50.4%), and Mr. McCree, Jr. (29.3%), are the majority owners of McCree, Inc., and thus of its various subsidiaries, including MCAI. Both McCrees are officers of MCAI.

5. Mr. Waldrop owns 4.3% of McCree, Inc., and is a director of McCree, Inc.

6. MCAI is located in Florida and concentrates on work in Florida. MCAI lists Mr. Waldrop and Mr. Joe O. Robertson as key staff on its website.

7. McCree, Inc., exceeds the size standard for the RFP.

8. Appellant is a nascent concern, having been incorporated on August 18, 2008. Appellant had no financial activity for the year that ended on December 31, 2008. Appellant's first ever scheduled annual meeting was scheduled for August of 2009.

9. On May 28, 2009, Appellant submitted its proposal in response to the RFP. In addition to facts consistent with Fact 3 above, Appellant's proposal represented that:

a. Mr. Waldrop has an extensive construction background, including expertise as an estimator, Project Engineer, Project Manager and Director of Pre-Construction Services. Mr. Waldrop worked his way up to being an Executive and Partner position with one of the largest Design Build Firms in the State of Florida.

b. Mr. Waldrop is MCAI's Vice President of Construction. He has overseen and managed over \$350 million of construction projects in the past 10 years, including several schools, in his capacity as Vice President of Construction, Principal for MCAI.

c. Appellant emphasized its Quality Assurance/Quality Control Plan in its Proposal and identified Mr. Joe O. Robertson to be its Quality Assurance Executive. Mr. Robertson has been employed by MCAI as Vice President of Engineering, Quality Control & Safety since 1984 until present.

d. Four of the six employees identified in Appellant's proposal, including Mr. Waldrop and Mr. Robertson, are MCAI employees.

10. Appellant leases office space from McCree, Inc. Appellant also has a Transitional Support Services Agreement with McCree, Inc., for various services.

11. McCree, Inc., agreed to indemnify Appellant's surety (CNA Surety) on behalf of Appellant, so that Appellant would be able to furnish payment and performance bonds required by the RFP.

B. The Size Determination

On August 14, 2009, the Area Office issued the Size Determination. The Area Office determined Appellant was affiliated with McCree, Inc., because: (1) Appellant shares an identity of interest with MCAI (13 C.F.R. § 121.103(f)); and (2) Appellant is affiliated with MCAI under the newly organized concern rule (13 C.F.R. § 121.103(g)).²

The Area Office found Mr. Waldrop and Mr. McCree, Sr., and Mr. McCree, Jr., share a familial relationship. Hence, because the McCrees control McCree, Inc., and Mr. Waldrop controls Appellant, Appellant is other than small because they share an identity of interest. The Area Office concluded there was no separation of interests. In fact, the Area Office found the opposite because Mr. Waldrop continues to be a MCAI Vice President and a 4.3% owner of McCree, Inc., and because Appellant leases office space from McCree, Inc.

The Area Office also found Appellant is affiliated with MCAI under the newly organized concern rule, which requires it to find affiliation when former officers, directors, or key employees of one firm organize a new firm in the same or related industry and serve as the new concern's officers, directors, principal stockholders, managing members or key employees, and the original concern is furnishing or will furnish the new concern with contracts or financial or technical assistance (13 C.F.R. § 121.103(g)). The Area Office found Appellant's majority stockholder and sole director is employed by MCAI as Vice President of Construction and is listed as a key staff member by MCAI on its website. The Area Office noted that Mr. Joe O. Robertson, a present MCAI employee, key staff member, and McCree, Inc., shareholder, would be the Quality Assurance Executive for the contract, and Appellant claims in its SBA Form 355 that five of its six employees were employed by MCAI.³ Thus, MCAI was certainly providing technical assistance to Appellant.

C. The Appeal

On August 14, 2009, Appellant received the Size Determination. On the same day Appellant filed its size appeal with SBA's Office of Hearings and Appeals (OHA).

Appellant contends the Area Office's determination that it is affiliated with McCree, Inc., is based upon clear error of fact or law and should be reversed. Appellant's initial argument is that it is not affiliated with MCAI under SBA's general principles of affiliation because MCAI

² The Area Office also found affiliation based on the ostensible subcontractor rule and the totality of the circumstances. I do not reach these issues so there is no need to discuss them.

³ The Area Office named four employees as being MCAI employees. All are named in Appellant's Proposal. It is possible, though irrelevant, that Appellant miscounted the MCAI employees when submitting its SBA Form 355.

neither controls nor has the power to control Appellant. Appellant reiterates that only Mr. Waldrop has control of Appellant through ownership of 51% of Appellant's stock and his position as Appellant's sole director. Appellant also argues it is not affiliated with MCAI because it is not dependent upon MCAI and notes MCAI does not: (1) act as a subcontractor to Appellant; (2) hire Appellant as a subcontractor; (3) co-sign loans for Appellant; or (4) serve as a reference for subcontractors and suppliers (Appeal at 3).

1. Identity of Interest

Appellant disputes identity of interest affiliation with MCAI. Even though Appellant admits "there are some familial relationships and common investments between members of [Appellant] and [MCAI]" Appellant notes that 13 C.F.R. § 121.103(f) permits it to rebut a determination of affiliation by proving the interests deemed to be one are in fact separate. Specifically, Appellant contends there is a clear fracture between it and MCAI because MCAI has no involvement in the business affairs of Appellant. (Appeal at 3).

Appellant argues it is a separate entity from MCAI and that the McCrees are merely minority investors and have no power to manage or control Appellant. Appellant also alleges neither Mr. McCree, Sr., or Mr. McCree, Jr., is involved in the business affairs of Appellant, nor are there any contracts between the parties.

Appellant also challenges the Area Office's analysis of the lease and Transitional Support Service Agreement between McCree, Inc., and Appellant. Appellant argues these are arms-length transactions at commercial prices.

Appellant claims it is not economically dependent on MCAI. Appellant also alleges it has only a minimal relationship with MCAI, and thus they cannot be affiliated.

2. Newly Organized Concern Rule

Appellant challenges the Area Office's finding that it is affiliated under the newly organized concern rule by alleging there is a clear line of fracture between Appellant and MCAI. Appellant alleges that Mr. Waldrop is not a key employee of MCAI. Specifically Appellant asserts Mr. Waldrop did not have a critical influence or substantive control over the operations or management of MCAI because he was only one of eight directors and owned only 4.3% of McCree, Inc. Similarly, Appellant alleges neither McCree could exercise control over Appellant.

Appellant again argues clear fracture between itself and MCAI. Appellant denies any relationship between it and MCAI and alleges it has performed no contracts with MCAI nor derived any revenue because of its relationship with MCAI. Appellant reiterates its lease and Transitional Support Services Agreement with McCree, Inc., are arms-length arrangements at the going rate (Appeal at 8).

Appellant alleges the indemnification agreement between McCree, Inc., and the bond surety, on behalf of Appellant, was reasonable and based upon a reasonable fee (Appeal at 8).

Appellant argues an indemnification agreement, where both parties benefit, is not a contractual relationship anticipated under the identity of interest rule.

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 the 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. 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. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

C. Analysis

1. Overview

The Area Office relied upon several separate grounds to determined Appellant is affiliated with MCAI and is thus other than small. Nevertheless, I decline to address more than the Area Office's identity of interest and newly organized concern findings, either of which is sufficient to affiliate Appellant with MCAI. Moreover, the evidence in the Record clearly and convincingly establishes Appellant is affiliated with MCAI. In fact, this Record presents the clearest and most compelling example of the newly organized concern affiliation OHA has ever decided. Similarly, the Record demonstrates one of the most compelling examples of familial identity of interest OHA has ever encountered. This Record demonstrates the antithesis of fracture, let alone a clear fracture.

2. Appellant is Affiliated with MCAI Because They Share an Identity of Interest

SBA's regulations and OHA decisions provide that individuals with substantially identical business interests, such as family members, may be affiliated. 13 C.F.R. § 121.103(f); *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546 (2003). Mr. Waldrop controls Appellant (Fact 1). Mr. Waldrop's father-in-law and brother-in-law control MCAI (Facts 2 and 4). Accordingly, there is a presumption of affiliation between Appellant and MCAI that Appellant can only rebut by showing "clear fracture." *Id.*

Mr. McCree, Sr., Mr. McCree, Jr., and Mr. Waldrop have significant common investments in McCree, Inc., and in Appellant (Facts 1, 4 and 5). *See Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822 (2006). These same individuals are also officers of Appellant

and MCAI (Facts 1, 3, 4, and 9). Hence, there is an identity of interest between Appellant and MCAI.

Rather than establishing a clear fracture, the facts provided by Appellant emphasize the continuing, close, and extensive business relationship between Mr. Waldrop and the McCree family. For example, Mr. Waldrop still owns 4.3% of McCree, Inc., and serves as a director (Fact 5). In addition, MCAI lists Mr. Waldrop as a key staff member and identifies him as its Vice President of Construction (Facts 3 and 9). Appellant's proposal identifies four MCAI employees that will perform important roles for the work required by the RFP, including Mr. Robertson - presently a key MCAI staff member (Fact 9.c., and d.), and Appellant currently relies upon McCree, Inc., to provide it with leased office space and transitional support (Fact 10). These numerous connections are neither minor nor coincidental. Accordingly, I hold the evidence in the Record convincingly establishes there is no fracture between Mr. Waldrop and the McCree family.

3. Appellant is Affiliated with MCAI Under the Newly Organized Concern Rule

Under the newly organized concern rule, two firms are affiliated when (1) former officers, directors, principal stockholders, or key employees of one firm organize a new firm; (2) these individuals serve as the new firms officers, directors, principal stockholders, or key employees; (3) the new firm is in the same or a related industry or field of operation; and (4) the one concern is furnishing or will furnish to the new concern contracts, financial or technical assistance, bid or performance bond indemnification, or other facilities. 13 C.F.R. § 121.103(g). There is no requirement that the concerns share employees, only that former key employees of the large concern are now key employees of the small concern. *Size Appeal of Vortec Development, Inc.*, SBA No. SIZ-4866 (2007).

Mr. Waldrop owns and controls Appellant (Fact 1). Appellant is a nascent concern (Fact 8). Both Mr. McCree, Sr., and Mr. McCree, Jr., own a substantial part of Appellant (Fact 1).

Mr. Waldrop is not merely a former officer and key member of MCAI's staff. He is much more. He is a partial owner and director of McCree, Inc.; he is currently an officer of MCAI; and he is a key staff member of MCAI based upon representations contained on MCAI's website and in Appellant's Technical Proposal (Facts 3, 5, and 9.a. and b.). Further, both MCAI and Appellant are involved in construction and are located in the same geographic area (Fact 6).

Appellant contends Mr. Waldrop is not a key employee of MCAI. I disagree. MCAI is a construction company, and Mr. Waldrop is MCAI's Vice President of Construction. In addition, Appellant represented in its Proposal that Mr. Waldrop is both an Executive and Partner in MCAI and has supervised many major efforts of MCAI (Facts 3 and 9.a. and b.). Thus, I conclude Mr. Waldrop is a quintessential key employee as meant by 13 C.F.R. § 121.103(g).

Appellant's Proposal identifies four current MCAI employees, including Mr. Waldrop and Mr. Robertson, who will perform important roles in the contract to be awarded under the RFP. I find providing these four individuals constitutes technical assistance anticipated by 13 C.F.R. § 121.103(g).

McCree, Inc., agreed to indemnify Appellant's surety so that Appellant could acquire bonds required by the RFP (Fact 11). Regardless of Appellant's characterization of that assistance and its claim that this could not be the kind of contract contemplated by the identity of interest rule - I do find McCree, Inc.'s assistance with Appellant's required bonding serves another purpose, *i.e.*, it constitutes financial assistance as anticipated by 13 C.F.R. § 121.103(g). *Size Appeal of David Boland, Inc.*, SBA No. SIZ-4965 (2008). Regardless of any cross-guarantees, fees, etc., the bonding company is only providing the bond because of McCree, Inc.'s position, history, and reputation, not because of Appellant's position, history, and reputation. This is financial assistance.

I have already found there was no fracture between Appellant and MCAI under the identity of interest section of this decision. Because Appellant is a new concern established by both a key employee and officer of MCAI, and MCAI is providing technical assistance (plus financial assistance), I hold Appellant is affiliated with McCree, Inc., and all of its affiliates under 13 C.F.R. § 121.103(g). Thus, the Area Office was correct to aggregate Appellant's size with McCree, Inc. Accordingly, because McCree, Inc., exceeds the size standard applicable to the RFP (Fact 7), Appellant is other than small and ineligible for contracts under this size standard.

V. Conclusion

I have considered Appellant's Petition, the applicable law, and the Record. The applicable law supports the Area Office's determination. Therefore, the Area Office did not base the Size Determination upon a clear error of fact or law when it determined Appellant was other than a small concern for this procurement.

Accordingly, the Size Determination is AFFIRMED. Appellant's appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge