

REDACTED DECISION FOR PUBLIC RELEASE

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

SIZE APPEAL OF:

Condor Reliability Services, Inc.

SBA No. SIZ-5116

Appellant

Decided: March 18, 2010

Appealed from
Size Determination Nos. 6-2010-52 & 53

APPEARANCES

Punam Patel, President, for Appellant.

Ryan C. Bradel, Esq., Jonathan T. Williams, Esq., PilieroMazza PLLC, Washington, D.C., for Vero Technical Support, Inc.

DECISION

I. Jurisdiction

This appeal is decided 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's determination that Appellant was affiliated with another firm due to identity of interest was based upon clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On March 19, 2008, the Department of the Air Force issued the subject Solicitation No. FA4890-08-R-0004 for weather forecasting and equipment maintenance. The Contracting Officer (CO) set the procurement aside 100% for small businesses, and designated North American Industry Classification System code 541990, All Other Professional, Scientific, and

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Technical Services, with a corresponding \$6.5 million annual receipts size standard, as the appropriate code for the procurement. Offers were due on April 30, 2008.¹

On January 8, 2010, the CO notified offerors that Condor Reliability Services, Inc. (Appellant) was the apparently successful offeror. On January 14, 2010, Vero Technical Support, Inc. (Vero), filed a timely and specific size protest asserting Appellant is affiliated with Alpa Technologies and Services (Alpa), and thus Appellant is other than small. Also on January 14, 2010, the CO filed a size protest.

On January 14, 2010, the Small Business Administration (SBA) Office of Government Contracting-Area VI, in San Francisco, California (Area Office) notified Appellant of the protests, and requested a response, together with a completed SBA Form 355 and certain other information. On January 20, 2010, Appellant responded to the Area Office's request.

B. The Size Determination

On February 2, 2010, the SBA Area Office issued Size Determination Nos. 6-2010-52 & 53 (Size Determination) concluding Appellant is other than small.

The Area Office found that Punam Patel (Punam) and Vidya Patel (Vidya), husband and wife, together own [xx]% of Appellant, and each individually own [xx]% of Appellant, for a total joint ownership interest of [xx]%. Their children, Alka Patel and Tushar Patel (Tushar) own [xx]% each. Alpa is owned [xx]% by Tushar and [xx]% by Punam. Alpa leases its office space from Appellant. Appellant and Alpa both use NAICS code 541990 as their primary NAICS code, and so they are in the same line of business. Accordingly, the Area Office found Appellant and Alpa affiliated under the identity of interest rule. The Area Office found that it did not have sufficient evidence to support the allegation that Appellant and Alpa are affiliated under the ostensible subcontractor rule for the purposes of the subject solicitation.

Appellant's date of self-certification is April 29, 2008, and its fiscal year ends July 31st. Alpa's fiscal year ends December 31st. To determine Appellant's size as of its self-certification date, the Area Office used Appellant's tax returns from 2004, 2005, and 2006, and Alpa's tax returns from 2005, 2006 and 2007. After reviewing these returns, the Area Office determined Appellant is other than small.

C. The Appeal

On February 16, 2010, Appellant filed the instant appeal.

Appellant argues that the Area Office relied on irrelevant facts in making its

¹ This is the fourth case OHA has decided arising from this solicitation. *NAICS Appeal of K-MAR Industries, Inc.*, SBA No. NAICS-4946 (2008) affirmed the appropriateness of the CO's NAICS code designation. In *Size Appeal of Black Box Technology, Inc.*, SBA No. SIZ-5011 (2008), and *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009), OHA affirmed size determinations finding earlier awardees other than small.

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determination. The fact that Alpa and Appellant share a NAICS code is irrelevant. In fact, Appellant and Alpa have different customers and perform services in unrelated NAICS codes. The minority shareholder's interest in each company is less than 10% and thus neither had control of the other's concern. Appellant attaches copies of an 8(a) application and updates filed by Alpa, to document that SBA does not consider a shareholder with less than a 10% interest in a concern to be a major shareholder and to establish that Alpa and Appellant had made full disclosure to SBA of all relevant information.

Neither Appellant nor Alpa has made any changes in its ownership since 1999. Alpa disclosed the familial relationship to SBA as part of the 8(a) application process and annually during its program term. SBA never voiced any concerns, and thus Appellant assumed there was no problem with its corporate structure, or the fact that Appellant's office is co-located with Alpa. Alpa and SBA communicated throughout its 8(a) program participation, and SBA has never raised this issue.

Appellant argues that the familial relationship alone should not be used as a basis for finding affiliation, citing *Size Appeal of The ORASA Group, Inc.*, SBA No. SIZ-4966 (2008).

Appellant asserts Alpa disclosed the lease between the firms as part of its 8(a) application. Further, at the time of proposal submission the lease was between Punam Patel, Lessor, and Appellant as Lessee.

Appellant asserts it and Alpa do not have the same primary businesses and NAICS codes. Appellant asserts its NAICS codes are 541990, Weather Observation, and 561730, Grounds Maintenance. Alpa's NAICS codes are 811219, Electronic Maintenance, and 561210, Housing Maintenance.

D. Response to the Appeal

On March 3, 2010, Vero responded to the appeal. Vero asserts the Area Office was correct to find Appellant affiliated with Alpa. Vero asserts Appellant and Alpa have the same office address and telephone and fax numbers, relying on Alpa's Central Contractor Registration (CCR) listing and Appellant's SBA Form 355. Vero also points out the record here reflects that Tushar contacted the Area Office on Appellant's behalf during its deliberation over the size protest.

Vero asserts Appellant and Alpa are in the same or similar line of business, based on Appellant's statement in its size appeal that 541990 is one of its primary NAICS codes, and Alpa listing that code in its CCR listing. Further, Appellant asserts in its size appeal that one of Alpa's primary industries is NAICS code 822219, and Appellant lists that code in its Form 355 as accounting for over [xx]% of Appellant's sales.

Vero asserts that under this Office's precedents, Appellant and Alpa are affiliated because the familial relationship between Punam and Tushar gives rise to an identity of interest between the firms. Vero further argues that, because the firms are owned by members of the same family and operate out of the same address and are in the same line of business, there is an

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identity of interest between the firms, and they are thus affiliated.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction 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. New Evidence

Appellant presents new evidence not provided to the Area Office, in the form of documents from Alpa's 8(a) program files. Evidence not previously provided to the Area Office will not be considered on appeal unless the Judge, on his or her initiative, orders its submission; or a motion is filed and served establishing good cause for the submission. 13 C.F.R. § 134.308(a)(1) and (2). Here, neither requirement is met. Further, Appellant has failed to show any valid reason why the evidence it seeks to admit was not previously available.

Appellant's new evidence is EXCLUDED.

C. The Merits

Appellant is, by itself, a small business under the applicable size standard. The question on appeal is whether the Area Office erred in finding Appellant affiliated with Alpa under the identity of interest rule. The regulation states:

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.

13 C.F.R. § 121.103(f).

This Office's long-standing precedent is that 13 C.F.R. § 121.103(f) creates "a rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions." *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003) (quoting *Size Appeal*

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of *Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 6 (1998)); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984). The presumption arises not from active involvement in each other's business affairs, but from the family relationship itself. *Id.*

The regulation does not require that the firms have common ownership or common management to be found affiliated. Affiliation is found on those grounds under 13 C.F.R. §§ 121.103(a)(2), 121.103(c) & 121.103(e). Further, family membership is a separate ground from common ownership or economic dependence for finding an identity of interest, and, therefore, the Area Office need not find common ownership or economic dependence to find firms controlled by family members affiliated under the identity of interest rule.

"[A] challenged firm may rebut the presumption of affiliation based upon family relationship if it is able to show a clear line of fracture among the family members." *Size Appeal of Technical Support Servs.*, SBA No. SIZ-4794, at 17 (2006) (citing *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003)). "[T]he challenged firm may demonstrate a clear line of fracture by proving there is no business relationship or involvement with each other's business concerns." *Id.* The presumption may also be rebutted by demonstrating the family members are estranged. *Size Appeal of Jack Faucett Assocs.*, SBA No. SIZ-4278, at 7 (1997).

Here, Appellant's principal shareholders, Punam and Vidya, are a married couple, whose son Tushar is Alpa's principal shareholder. Further, Tushar has an interest in Appellant and Punam has an interest in Alpa. The firms share a common address, and Alpa leases its space from Appellant's principal.² Tushar contacted the Area Office on Appellant's behalf during the size determination process. Despite the denials in the appeal, Vero points to the evidence in the CCR and Appellant's Form 355, together with the appeal itself, which establishes that Appellant and Alpa both do business in NAICS codes 541990 and 822219.

Accordingly, it is clear that there is an identity of interests among the members of the Patel family. There has been nothing like a clear fracture between the members of the family. On the contrary, they continue to be involved in each other's firms. Therefore, there is no evidence to rebut the presumption of an identity of interest between the Patel family members or between the businesses they own.

Appellant's reliance on *Size Appeal of The ORASA Group, Inc.*, SBA No. SIZ-4966 (2008), is misplaced. *ORASA* held that family relationships could not, by themselves, be the basis for the finding of an identity of interest between two firms in a mentor/protégé relationship under 13 C.F.R. § 124.502(a). There is no mentor/protégé relationship between Appellant and Alpa, and so *ORASA* is not applicable here.

Appellant's argument that Punam's minority ownership of Alpa and Tushar's minority ownership of Appellant are not sufficient to support a finding of common ownership is also

² The Area Office erred in describing the lease as being from Appellant. The lease runs from Punam Patel and Vidya Patel to Alpa. Nevertheless, this error is harmless in this case, as a lease from Punam and Vidya individually demonstrates the lack of a clear fracture no less than would a lease from Appellant.

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misplaced. The significance of Punam and Tushar's ownership in each other's companies is not that either is able to control the other, as would be the case if the issue were affiliation due to common ownership. Rather, the issue here is whether there has been a clear fracture between the family members. The fact that Punam and Tushar each own a portion, however small, of each other's companies establishes, not that one controls the other, but that there has been no clear fracture between them, and that there is a continuing identity of interest between the family members such that their interest should be aggregated and treated as one. *Size Appeal of Jack Faucett Assocs.*, SBA No. SIZ-4278, at 8 (1997).

Appellant's reliance on Alpa's continuing participation in the 8(a) program and the disclosures made to SBA of the business ties between the two firms is misplaced as well. Appellant seems to argue that, because either it or Alpa informed SBA of the cross-ownership interest in the two firms and of the lease in the context of Alpa's 8(a) application and updates, that SBA is somehow estopped from considering these facts in the Size Determination.

However, invoking estoppel against SBA requires proof by clear and convincing evidence of affirmative misconduct involving actions related to size determinations. *Size Appeal of Doyon Properties, Inc.*, SBA No. SIZ-4838, at 15 (2007). There has been no allegation of misconduct by SBA, let alone any showing of misconduct. Accordingly, I cannot consider Appellant's argument that SBA should be estopped from considering the evidence of continuing ties between the Patel family members merely because this evidence was earlier submitted to SBA's 8(a) program. Further, any suggestion that the size regulations should not be applied because they are inconsistent with the 8(a) program is utterly meritless. This Office has no authority to determine the validity of the size regulations and can entertain no challenge to them. *Size Appeal of Eagle Helicopter, Inc. dba Kachina Aviation*, SBA No. 4810, at 7-8 (2006).

Accordingly, Appellant has failed to establish clear error on the part of the Area Office. Appellant and Alpa are owned by members of the same family, have the same address, which Alpa leases from Punam, are in similar lines of business, and Alpa's principal has worked on Appellant's behalf. There is no showing of a clear fracture to rebut the presumption that there is an identity of interest between the family members. Accordingly, Appellant and Alpa are affiliated under the identity of interest rule, and Appellant is thus other than small.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

CHRISTOPHER HOLLEMAN
Administrative Judge