United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Jenn-Kans, Inc.	SBA No. SIZ-5128
Appellant	Decided: May 5, 2010
Petition for Reconsideration of SBA No. SIZ-5114 Appealed from Size Determination No. 2-2010-06	

APPEARANCES

Andrew L. Hurst, Esq., Gregory S. Jacobs, Esq., Reed Smith, LLP for Jenn-Kans, Inc.

Terry L. Elling, Esq., Dismas N. Locaria, Esq., Venable LLP for F&L Construction, Inc.

ORDER DENYING PETITION FOR RECONSIDERATION

HOLLEMAN, Administrative Judge:

I. Background

A. Prior Proceedings

On December 1, 2009, in response to a size protest from F&L Construction, Inc. (F&L), the Small Business Administration's (SBA) Area II Office of Government Contracting in King of Prussia, Pennsylvania (Area Office) issued Size Determination No. 2-2010-06 finding Jenn-Kans, Inc. (Appellant) other than small. The Area Office determined that Appellant is affiliated with Goode Trash Removal (Goode Trash) based on the identity of interest rule because Ms. Jennifer-Goode Brown, who owns Appellant, and Mr. Willie Goode, who owns Goode Trash, are siblings who are not estranged, are in the same line of business, and subcontract services with each other. On December 10, 2009, Appellant appealed the Size Determination to the SBA Office of Hearings and Appeals (OHA). On March 15, 2009, OHA issued its Decision affirming the Size Determination.

B. Petition for Reconsideration

On April 5, 2010, Appellant filed the instant Petition for Reconsideration (PFR). Appellant claims OHA made six clear errors: four errors of law and two errors of fact. Appellant first argues that OHA erred by considering past connections between it and Goode Trash when considering whether the entities share an identity of interest. Appellant quotes from 13 C.F.R. § 121.404(a), which provides that size must be determined "as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer." Appellant contends that OHA ignored this regulation when it accepted the Area Office's analysis, which considered past connections as evidence of present affiliation. Specifically, Appellant indicates the Area Office improperly examined:

> (1) lines of credit guaranteed by Mr. Goode in 2006 that closed in March 2008; (2) the lease of office space, which terminated in August 2007; (3) the lease of one truck, which terminated in December 2008; and (4) Mr. Goode's 'intervention' with F&L on behalf of [Appellant], which occurred in October 2006.

(Petition 5.) Appellant alleges that in its Decision in this matter, OHA merely dismissed Appellant's argument on this point without explanation. Appellant again cites S*ize Appeal of Henderson Group Unlimited, Inc.*, SBA No. SIZ-5034 (2009), and *Size Appeal of Jack Faucett Associates*, SBA No. SIZ-4278 (1997), to support its argument that although prior relationships may be discussed to provide necessary context for a decision, a finding of identity of interest may only be based upon present connections.[1] Appellant concludes that OHA clearly contravened the controlling statute by considering past ties between it and Goode Trash to be indicative of a present identity of interest.

Appellant next claims OHA erred by failing to take into account the waste disposal industry context in which the subcontracts between it and Goode Trash were entered into. Appellant asserts it "has provided ample evidence to demonstrate that the use of subcontractual relationships to promote efficiency and lower costs in the provision of waste disposal services is highly common." (Petition 6-7.) Appellant explains that in some cases, such as this, the waste disposal routes cover a large geographical area, and it is more cost-effective to subcontract part of the route to a firm already operating in that part of the route. Appellant further provides that it subcontracts work to many other firms, not just Goode Trash, and the only reason it subcontracted to Goode Trash in this instance was for geographical convenience.

Appellant goes on: "Simply put, the sub-contractual relationship between the firms should have been afforded far less weight in the context of the waste disposal industry, where subcontracts are necessary to promote efficiency and reduce costs." (Petition 7.) Appellant contends that subcontracts in one industry are not necessarily the same indicia of affiliation as in another industry, and it was clear error for OHA to fail to take this nuanced approach. That is, OHA should not have considered only the existence of the subcontracts, but should have

[1] Appellant also references a case by the name "L&S," but fails to offer any citation for the case.

considered the subcontracts in the appropriate context. Appellant argues OHA's rigid approach necessitates the conclusion that firms owned by family members who are not estranged can never have any subcontractual relationship without being considered affiliates, and such an outcome was not contemplated by the identity of interest rule. Appellant also contends that OHA's citation to *Size Appeal of Garvin Enters., d/b/a Lloyd Staffing*, SBA No. SIZ-4544 (2003) was inapplicable to this case because there OHA considered whether one firm had the power to control another, not whether there was a clear fracture between firms.

Appellant then contends OHA erred by failing to consider Appellant's financial independence. Appellant asserts that based upon OHA precedent, economic dependence "is a critical, even necessary, element to a finding that there is no clear fracture" between firms. (Petition 9.) By affirming the Area Office's determination, Appellant argues, OHA failed to address the fact that no economic dependence exists in this case. Appellant's ability to operate is not connected to Goode Trash, and OHA should have found a clear fracture between the firms.

The final legal error Appellant claims is that OHA failed to consider that it has been recertified by SBA as a small business multiple times. Appellant attests that it has been recertified as a qualified small business under the 8(a) Program five times since 2005. Appellant argues OHA should have considered the findings of the SBA officials working most closely with the firm. Appellant indicates it submitted financial and other business information to SBA, and SBA never raised any concerns about its relationship with Goode Trash. Appellant believes OHA should have considered this factor in its decision.

The first factual error Appellant claims is OHA's determination that Appellant would subcontract 32% of the work under the contract at issue to Goode Trash. Instead, Appellant admits that it would subcontract 32% to "Goode [Trash] and companies related to Willie Goode." (Petition 11.) Appellant then makes the distinction that it would subcontract only 17.8% of the work to Goode Trash itself. Appellant argues OHA's failure to make this distinction was a material error "[g]iven the obvious weight that the OHA placed on this proposed sub-contractual relationship, and the significant difference between the amount of subcontracting." (Petition 11.)

Finally, Appellant asserts OHA erred in finding that Goode Trash graduated from the 8(a) Program in 2004. Instead, Appellant asserts that Goode Trash has not participated in the 8(a) Program since the mid-1990s. Appellant argues that this error, coupled with OHA's recognition of the fact that Appellant entered into the 8(a) Program in April, 2005, indicates that "OHA is adopting, by implication, F&L's contention that [Appellant] was founded for the purpose of obtaining contracts under the 8(a) Program for which Goode [Trash] was no longer eligible." (Petition 12.) Appellant asserts that this contention is baseless and inaccurate, and OHA's error prejudiced it.

Appellant concludes that it and Goode Trash are separate and distinct firms that are not affiliated. Appellant also contends OHA made numerous errors of fact and law in its Decision to the contrary. Appellant requests that OHA reconsider its decision and reverse the Area Office's determination.

II. Discussion

A. Jurisdiction & Standard of Review

This PFR 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. Appellant filed the instant PFR within twenty days of the service of the decision in *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5114 (2010), so it was filed timely. 13 C.F.R. § 134.227(c). Accordingly, this matter is properly before OHA for decision.

SBA's regulations provide that OHA may grant a PFR upon a "clear showing of an error of fact or law material to the decision." *Id.* This is a rigorous standard. A PFR must be based upon manifest error of law or mistake of fact and is not intended to give an additional opportunity for an unsuccessful party to argue its case before OHA. *Size Appeal of Envtl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935 (2008) (citing 13 C.F.R. § 134.227(c); *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992)). "A PFR is appropriate only in limited circumstances, such as situations where OHA has misunderstood a party or has made a decision outside the adversarial issues presented by the parties." *Id.* (citing *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (quoting *Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983))). Thus, "[t]he moving party's argument must leave the Administrative Judge with the definite and firm conviction that key findings of fact or conclusions of law of the earlier decision were mistaken." *Size Appeal of TKTM Corp.*, SBA No. SIZ-4905 (2008) (citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006)); *Size Appeal of KVA Elec., Inc.*, SBA No. SIZ-5057 (2009).

B. Analysis

After careful consideration of Appellant's arguments, I have determined that none of them meets the demanding standard for reconsideration. Therefore, I will deny Appellant's PFR. As noted in the original Decision in the matter: 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 *Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 6 (1998); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984)). "[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)). I concluded Appellant did not demonstrate a clear line of fracture between Appellant and Goode Trash, and Appellant has presented nothing sufficient to change that conclusion.

Appellant's primary contention is that the Area Office and I both erred in considering past connections between itself and Goode Trash in determining whether there is an identity of interest between the firms. Appellant has incorrectly framed its argument. The Area Office did not need to consider any past connections to determine an identity of interest currently exists between Appellant and Goode Trash. Rather, that fact is presumptively established because

Ms. Brown and Mr. Goode are siblings. At that point, the burden was on Appellant to demonstrate a clear line of fracture between the firms.

In my analysis, I laid out the context of Appellant's relationship with Goode Trash. I did list the lines of credit guaranteed by Mr. Goode, the lease of office space, and Mr. Goode's 'intervention' with F&L on behalf of Appellant. Then, I concluded: "There is no question that there was an identity of interest between Appellant and Goode Trash when Appellant was initially formed." As I noted thereafter, however, the main question to answer in this Size Determination and appeal was whether there had since been a clear fracture between the firms.

Thus, I did not use the prior connections between Appellant and Goode Trash to conclude that there is currently an identity of interest between the firms. I merely used the past connections for context and to demonstrate that the firms shared an identity of interest based on more than a family relationship in the past. As stated, the fact that there is currently an identity of interest is presumptively established by the fact that Ms. Brown and Mr. Goode are siblings, with or without the past connections. Then, it became Appellant's responsibility to demonstrate that there had been a clear line of fracture between the firms. Whereas Appellant seems to think that I concluded it shares an identity of interest with Goode Trash based on these past connections, in fact I concluded Appellant shares an identity of interest with Goode Trash because the firms share a family connection and Appellant failed to prove any clear line of fracture between the firms.

Appellant is adamant that OHA must consider the context in which the subcontracts between Appellant and Goode Trash were issued. I disagree with Appellant. The context of subcontracts is not relevant to the question of identity of interest. In analyzing the relationship between Appellant and Goode Trash pursuant to the identity of interest rule, I attempted to determine whether Appellant was able to demonstrate a clear line of fracture between the firms. Thus, contrary to Appellant's assertions, it is in fact the existence of the subcontracts that is important, not their context. The fact that Appellant maintains its relationship with Goode Trash through subcontracts amply demonstrates that there has been no clear line of fracture between the firms. Continued subcontracting simply precludes a finding of clear fracture.

Additionally, Appellant claims OHA improperly cited *Size Appeal of Garvin Enters., d/b/a Lloyd Staffing*, SBA No. SIZ-4544 (2003), because there OHA was looking at the issue of control rather than the issue of clear fracture. Appellant misunderstands the concept of affiliation. The ultimate inquiry in any type of affiliation case (including identity of interest) is the power to control. 13 C.F.R. § 121.103(a). Thus, the *Garvin* case does apply here, and I properly cited the case to support the proposition that simply because subcontracting is common in the waste disposal industry does not compel the conclusion that it is not evidence of affiliation.

Appellant also argues OHA erred in failing to consider that Appellant is financially independent. On this point, Appellant is simply wrong. The Decision explicitly provides: "Appellant is no longer dependent upon Goode Trash for guarantees for its financing." There is a footnote indicating that "[i]t is unclear from the text of the appeal whether Goode Trash's guarantees are still in place on the original financing, but the Record before the Area Office

seems to indicate that the guarantees are no longer in place." Thus, contrary to Appellant's argument, I obviously assumed the lines of credit had expired and considered Appellant's financial independence. Nevertheless, I concluded that "there has been no event that would indicate that there has been any kind of break between the two firms" given their continuing cooperation.

Appellant next contends that I should have taken into consideration the fact that it has been recertified as a small business by the 8(a) Program numerous times in recent years. Again, the 8(a) Program Office's recertifications are irrelevant here. I have no way of knowing what information that office may have looked at in determining Appellant's status. Instead, the Area Office was presented specifically with a question about Appellant's identity of interest and examined the relevant information thereto. The only question before me was whether the Area Office erred. Recertification under the 8(a) Program is not relevant to that question.

With regard to the fact that Appellant would subcontract 32% of the instant contract to Goode Trash and its affiliates, but would only subcontract 17.8% to Goode Trash itself, I find any perceived error to have been harmless. First, as Appellant notes, I did acknowledge the distinction in the initial Decision when relating the Area Office findings of fact. I went on to discuss the subcontracting as 32% to Goode Trash because if Appellant were affiliated with Goode Trash, it would be affiliated with Goode Trash's affiliates as well. Second, even if I considered only the 17.8%, and not the 32%, the Decision would not have been changed. The continuing subcontracting relationship between the firms indicates that there is no clear fracture, and the percentage was not a factor weighing heavily on the final outcome of the Decision.

Finally, I also find Appellant's assertion that Goode Trash has not participated in the 8(a) Program since the mid-1990s to be irrelevant. The Decision does note that Goode Trash graduated from the program in 2004, but that was merely a recitation of the facts found by the Area Office. It is clear this fact did not effect the outcome of the Decision, as it is never mentioned again. Appellant's contention that I accepted F&L's assertion that Appellant was only formed to obtain 8(a) contracts for Goode Trash is meritless. To the extent the Area Office erroneously considered this fact, I find such error was harmless because the Record as a whole demonstrates that there has been no clear fracture between Appellant and Goode Trash.

Appellant has failed to meet the high standard applicable to Petitions for Reconsideration. Mostly, Appellant uses the PFR to reargue its case to OHA. Any error committed by OHA or the Area Office was harmless and does not warrant reconsideration.

III. Conclusion

For the foregoing reasons, Appellant's Petition for Reconsideration is DENIED.

CHRISTOPHER HOLLEMAN
Administrative Judge