Cite as: *Size Appeal of Speegle Construction, Inc.*, SBA No. SIZ-5147 (2010)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Speegle Construction, Inc.	SBA No. SIZ-5147
Appellant	Decided: August 3, 2010
Appealed from Size Determination Nos. 3-2010-81 and 3-2010-90	

APPEARANCE

Steven L. Reed, Esq. and Douglas P. Hibshman, Esq., Smith, Currie & Hancock LLP, Washington, D.C., for Appellant.

DECISION[1]

I. Introduction and Jurisdiction

On June 11, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued a Size Determination for case numbers 3-2010-81 and 3-2010-90 (Size Determination) finding that Speegle Construction, Inc. (Appellant) is other than a small concern under the $33.5 million size standard applicable to Solicitation Nos. W91278-10-R-0012 and W91278-10-R-0014 (RFPs), which were issued by the U.S. Army Corps of Engineers, Mobile District (Corps).

Due to an error in forwarding the Size Determination, Appellant was first notified of the Size Determination on July 2, 2010 and did not receive the Size Determination until July 6, 2010. On July 12, 2010, Appellant appealed the Size Determination. For the reasons discussed below, Appellant's appeal is denied.

[1] This Decision was initially issued with a legend indicating that it was confidential and not to be released outside the government except to Appellant. This was done at Appellant's request to prevent the inadvertent disclosure of its confidential or proprietary information. On August 3, 2010, I issued an Order for Redactions directing counsel for Appellant to file a request for redactions by August 10, 2010, if Appellant desired to have any information redacted from the published Decision. OHA has received no timely request that the original Decision be redacted in any way. Thus, OHA now publishes the Decision in its entirety.

OHA decides 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. Appellant filed its appeal within fifteen days of receiving the Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA.

II. Issues

Did the Area Office err in presuming that there is an identity of interest between James Speegle and Troy Speegle due to their father/son relationship? *See* 13 C.F.R. § 121.103(f).

Did the Area Office commit a clear error of fact or law in finding there was no clear fracture between James Speegle and Troy Speegle and in consequently concluding that Appellant is affiliated with Speegle Construction II? *See id.*

III. Background

A. Facts

I find the Record establishes the following facts by the preponderance of the evidence:

1. On December 7, 2009, the Corps issued RFP No. W91278-10-R-0012 (RFP 1) for an Indefinite Delivery/Indefinite Quantity Multiple Award Task Order Contract (IDIQ MATOC) for construction within the Mobile District's North Region Construction Program. The Contracting Officer (CO) set-aside the procurement for small business concerns and designated North American Industrial Classification System (NAICS) code 236220, with a corresponding size standard of $33.5 million. Appellant submitted its offer under RFP 1 on January 20, 2010.

2. On December 10, 2009, the Corps issued RFP No. W91278-10-R-0014 (RFP 2) for an IDIQ MATOC for construction within the Mobile District's Gulf Coast Regional Construction Program. The CO set-aside the procurement for small business concerns and designated NAICS code 236220, with a corresponding size standard of $33.5 million. Appellant submitted its offer under RFP 2 on February 2, 2010.

3. On March 25, 2010, the CO notified all RFP 1 offerors of her intent to make award to various offerors. Among those the CO identified as successful awardees was Appellant.

4. Reams Enterprises Inc. (Reams), an unsuccessful offeror under RFP 1, protested the size of several concerns, including Appellant, to the CO on April 1, 2010. The CO forwarded Reams's protest to the Area Office in a letter dated April 5, 2010, which was received by the Area Office on April 12, 2010. Based upon publicly available information, Reams alleged that Appellant's average annual receipts exceed the size standard applicable to RFP 1. In addition, Reams noted there are two concerns doing business under the name "Speegle," Appellant and Speegle Construction II (Speegle II), and that the State of Florida lists them as having common officers.

5. On March 31, 2010, the CO notified all RFP 2 offerors of her intent to make award to various offerors. Among those the CO identified as successful awardees was Appellant.

6. Reams, also an unsuccessful offeror under RFP 2, protested the size of several concerns, including Appellant, to the CO on April 7, 2010. The CO forwarded Reams's protest to the Area Office in a letter dated April 21, 2010. Based upon publicly available information, Reams reiterated that Appellant's average annual receipts exceed the applicable size standard. In addition, Reams reiterated that there are two concerns doing business under the name Speegle, Appellant and Speegle II, and that the State of Florida lists them as having common officers.

7. The Area Office notified Appellant of Reams's size protest concerning RFP 1in an April 15, 2010, letter. As with all such notifications, the Area Office forwarded a copy of the protest and requested that Appellant provide information concerning potential affiliates consistent with 13 C.F.R. § 121.103.

8. The Area Office notified Appellant of Reams's size protest concerning RFP 2 in a May 6, 2010, letter similar in all respects to the April 15, 2010 letter.

9. Appellant provided substantial information applicable to RFP 1, including a completed SBA Form 355, on April 19, 2010. Appellant provided an additional SBA Form 355, in response to the protest concerning RFP 2, on May 11, 2010. Pursuant to additional requests from the Area Office, Appellant provided more information and explanations on May 27, 2010, and again on June 7, 2010. (As a practical matter, information submitted in response to both protests is responsive to either.)

10. Information provided by Appellant establishes:

a. James Speegle is the father of Troy Speegle. James Speegle transferred complete ownership of Appellant to Troy Speegle in 2002 and retained no ownership interest in Appellant.

b. Troy Speegle is Appellant's sole Director, President, and owner. As President, Appellant's corporate by-laws provide he shall be the chief executive officer of Appellant and have the power to run the corporation subject to the Board of Directors (of which he is the only member).

c. Appellant performs construction contracts for the Army Corps of Engineers and other Federal entities in the areas of Western Florida, Southern Georgia and Southern Alabama.

d. Appellant acknowledges it is affiliated with Better Built of N.W. Florida, Inc., (Better) and Site and Utility Solutions, Inc. (Site), both of Niceville Florida. Troy Speegle has the power to control both Better and Site.

e. Appellant and its acknowledged affiliates do not exceed the $33.5 million size standard applicable to both RFP 1 and RFP 2.

f. In Appellant's most recent For Profit Corporation Annual Report to the State of Florida, both James Speegle and Jeffrey Page are listed as Vice Presidents of Appellant, albeit James Speegle's name precedes that of Jeffrey Page. The same is also true of Site.

g. Appellant's corporate by-laws describe the powers of a Vice President as follows:

> During the absence and inability of the President to render and perform his duties or exercise his powers, as set forth in these By-Laws or in the acts under which this corporation is organized, the same shall be performed and exercised by the Vice President; and when so acting, he shall have all the powers and be subject to all the responsibilities hereby given to or imposed upon such President.

h. In documents dated May 2, 2008, Appellant and its acknowledged affiliates (Better and Site) each designated James Speegle and Jeffrey Page to have the power to collectively assume the managerial responsibility for completing all business affairs of each firm in the event of the untimely demise or total disability (as determined by James Speegle and Patricia Speegle, the spouse of Troy Speegle) of Troy Speegle.

i. In 2000, James Speegle formed Speegle II as its sole owner. Speegle II is headquartered in Cocoa, Florida and concentrates on performing municipal and NASA construction contracts in the Space Coast Region of Florida. The President of Speegle II is Lu Anne Willis. Troy Speegle has no ownership rights or managerial role in Speegle II.

j. Speegle II, by itself, does not exceed the size standard applicable to the RFPs.

k. Appellant and Speegle II are completely distinct and independent concerns with no commercial ties. Appellant and Speegle II do not share any equipment, employees, or leased space, nor do they rent space from one another.

B. The Size Determination

On June 11, 2010, the Area Office issued the Size Determination concluding Appellant is other than small. The Area Office found Appellant is affiliated with Speegle II based upon a familial identity of interest. 13 C.F.R. § 121.103(f). I note the Area Office found facts consistent with Facts 1 – 10, above.

In finding affiliation based upon familial identity of interest, the Area Office recited the facts alleged by Appellant, including Appellant's claim that James Speegle's role as its Vice President is honorary and that it is very unlikely that James Speegle would ever have an opportunity to control Appellant because he is much older than his son. The Area Office also found: (1) James Speegle has no involvement in Appellant's management; (2) Troy Speegle has no role in the management of Speegle II; and (3) Neither Appellant nor Speegle II have any prime or subcontracts with the other firm. Nevertheless, the Area Office applied the presumption of a familial identity of interest because it is presumed family members will work closely

together for the good of the family and have a vested interest in the success of family concerns.

The Area Office examined whether there was a clear fracture and concluded there was not. Instead, the Area Office noted James Speegle's role as a Vice President of Appellant and his designation as the completion official by his son indicate a lack of clear fracture. The Area Office thus concluded it is likely the Speegle family may work together to ensure the success of Appellant and its affiliates. Therefore, the Area Office found Appellant and Speegle II affiliated pursuant to an identity of interest under 13 C.F.R. § 121.103(f).

C. The Appeal Petition

On July 6, 2010, Appellant received the Size Determination. On July 12, 2010, Appellant filed its size appeal with OHA. In its Appeal Petition, Appellant moved for an expedited decision, for a protective order, and to supplement the Record.

Appellant alleges the overriding issue in the appeal is whether Appellant is affiliated with Speegle II through common ownership, common control, or identity of interest. Throughout its petition, Appellant concentrates on the relationship between James Speegle and Troy Speegle and argues that, based upon their actual relationship, there is no identity of interest.

Appellant emphasizes that neither James Speegle nor Speegle II has any ownership interest in or ability to manage/control Appellant and that neither Troy Speegle nor Appellant possesses any ownership interest in or ability to manage/control Speegle II. The core of Appellant's argument is that Appellant and Speegle II share no identity of interest, notwithstanding the familial relationship between James Speegle and Troy Speegle, because the entities are completely separate and distinct business enterprises with different business models, management, markets, offices, employees, equipment, resources, and clients. Thus, according to Appellant, the Area Office made clear errors of fact and law in finding affiliation based upon an identity of interest because there is a clear fracture between Appellant and Speegle II. Appellant argues previous OHA decisions support its argument. *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995) and *Size Appeal of Barbara B.H. Skelton*, SBA No. SIZ-2534 (1986).

Appellant alleges there is a clear fracture between James Speegle and Troy Speegle and the companies they each own and control because James Speegle has only a nominal connection with Appellant. Appellant claims James Speegle's title as Appellant's Vice President is "honorary" and that his power to provide assistance in wrapping up Appellant's business affairs is dormant and contingent. Thus, the only connections between Appellant and Speegle II are dormant and contingent and are not sufficient to justify a finding of affiliation.

Appellant emphasizes there have been virtually no business discussions between Troy Speegle and James Speegle since the transfer of ownership to Troy Speegle occurred. Moreover, once James Speegle transferred Appellant to Troy Speegle, James Speegle had nothing to do with running Appellant. The firms do different work for different people, work in different areas, and do not team with one another. Thus, the interests of James Speegle and Troy Speegle diverged and were completely fractured when James Speegle sold Appellant to Troy Speegle.

Appellant also explains that the power granted to James Speegle to complete its business

is logical aside from any business considerations—Troy Speegle wants a family member to take care of his family in the event he dies.[2] Appellant asserts the completion nomination grants no power or compensation to James Speegle. Appellant also argues the fact that the power to complete its business was granted collectively to both James Speegle and Jeffrey Page (Appellant's other Vice President) indicates that James Speegle's title is a title in name only. Appellant further claims James Speegle's "Honorary Vice President" title confers upon him no authority to manage or control Appellant. Instead, all power vests with Troy Speegle.

Appellant argues that because there is a clear line of fracture between the business affairs of Appellant and Speegle II, there is a clear fracture precluding an identity of interest finding. Appellant concludes this lack of business relationship between Appellant and Speegle II removes the familial tie for the purpose of finding an identity of interest, and thus the Area Office erred when it failed to find a clear line of fracture exists between Appellant and Speegle II.

IV. Analysis

A. Standard of Review

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314. It is Appellant's burden to prove that the Area Office committed an error. *Id.* Clear error means the position of an area office lacks reason or is contradicted by the evidence in the record. Under the clear error standard, I must affirm the judgment of an area office unless I have 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 10-11 (2006).

B. The Merits

1. Supplementation of the Record

Appellant moved to supplement the Record. Appellant's new evidence consists of the declarations of Troy Speegle and James Speegle along with correspondence from the SBA and the Corps concerning the receipt of the Size Determination. I decline to admit this evidence because I view it as cumulative, tardy, or, in the case of the correspondence, irrelevant to this appeal.

With regard to the declarations, Appellant was well aware that the Area Office was considering the identity of interest rule, as demonstrated by its June 7, 2010, letter to the Area Office. Hence, Appellant was obligated to provide all evidence concerning any clear fracture to the Area Office, and I will not admit the declarations at this late juncture. In so ruling, I note that it is patently paradoxical to hold that an area office erred on the basis of evidence it did not have the chance to review. In addition, I note that Troy Speegle's declaration is self-serving, and its

[2] Letter from Troy Speegle, President, Speegle Construction Inc., to Scott Nirk, SBA Procurement Center Representative (June 7, 2010). Appellant offers an additional reason for the completion nomination in its Appeal Petition, which I cannot consider because I have not admitted the statement in issue. *See infra*, Part IV.B.1.

reference to the title of "Honorary Vice President" is specifically contradicted by Appellant's filings with the State of Florida as well as the fact that there is no provision in Appellant's by-laws for such a position. Hence, even if I were to admit Troy Speegle's declaration, I would have afforded it little, if any, weight.

2. Presumption of an Identity of Interest

Appellant is, including its acknowledged affiliates, a small business under the applicable size standard. The question on appeal is whether the Area Office erred in finding Appellant affiliated with Speegle II under the identity of interest rule because of the father/son relationship between James Speegle and Troy Speegle. The regulation 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.
>
> 13 C.F.R. § 121.103(f).

OHA'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) (citing *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.* (citing *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 6 (1998)).

The identity of interest regulation does not require that the firms have common ownership or common management to be considered affiliates. Affiliation based on those grounds is governed by 13 C.F.R. § 121.103(a)(2) & 121.103(e). "[F]amily membership is a separate ground from economic dependence for finding an identity of interest, and, therefore, the Area Office need not find economic dependence to find firms controlled by family members affiliated under the identity of interest rule." *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5114 (2010). Accordingly, based upon the Record, the Area Office was obligated to find there was a presumption of an identity of interest between the concerns controlled by Troy Speegle and James Speegle.

3. Clear Fracture

Because the Area Office was required to apply the presumption of an identity of interest, the only remaining question is whether Appellant has offered sufficient evidence to overcome the presumption. Specifically, "[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 *Osirus*, SBA No. SIZ-4546, at 4). "[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).

Appellant has proven: (1) Troy Speegle has the sole power to control Appellant as long as he is present and able to exercise his powers as Appellant's President; (2) Appellant and Speegle II are completely distinct and independent concerns with no commercial ties; (3) Neither James Speegle nor Troy Speegle own any stake in the concerns controlled by the other; and (4) Appellant and Speegle II do not share equipment, markets, offices, clients, or employees.

Nevertheless, the Record is also clear that on May 2, 2008, Troy Speegle or his spouse, as appropriate, designated James Speegle to complete the business affairs of each of the concerns controlled by Troy Speegle in the event of the death or disability of Troy Speegle. In addition, Appellant's most recent Corporation Annual Report to the State of Florida identifies James Speegle, in addition to Jeffrey Page, as Appellant's Vice President, without limitation.[3] In other words, the position is not "honorary." Moreover, Appellant's own by-laws describe the powers of a corporate Vice President as follows:

> During the absence and inability of the President to render and perform his duties or exercise his powers, as set forth in these By-Laws or in the acts under which this Corporation is organized, the same shall be performed and exercised by the Vice President; and when so acting, he shall have all the powers and be subject to all the responsibilities hereby given or imposed upon such President.

I find the powers granted to James Speegle are significant. If Troy Speegle, for whatever reason, cannot manage Appellant, then James Speegle has exactly the same total ability to control Appellant that Troy Speegle has as Appellant's President. Moreover, there is no evidence James Speegle cannot use his grant of Vice Presidential authority to control Appellant as provided in the by-laws. That is, there is absolutely no indication outside of Troy Speegle's claims that the title is merely "honorary." Hence, I cannot find James Speegle is not involved with Appellant's business affairs. Instead, I find the Record establishes it would be error to hold that James Speegle is not involved in the business affairs of Appellant.

In *Osirus*, OHA held there must be no business relationship or involvement between family members for a protested concern to prove clear fracture. Upon this premise, I must hold that the 2008 designation of James Speegle to complete Appellant's affairs and his current designation as Appellant's Vice President preclude Appellant's showing a clear fracture. Although I note that Appellant has argued the powers granted James Speegle are unlikely to be exercised, it is the mere fact that these significant powers exist at all that establishes the lack of clear fracture. In other words, neither I nor the Area Office can ignore Appellant's recent and continued designation of James Speegle as a Vice President and completion agent, no matter the reason, because these very acts show a continued and substantial right of involvement by James Speegle in the business affairs of the concern he founded.

[3] James Speegle is also designated as Vice President for other concerns controlled by Troy Speegle.

I have considered the cases argued by Appellant as supporting its arguments, *i.e.*, *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995), and *Size Appeal of Barbara B.H. Skelton*, SBA No. SIZ-2534 (1986). *Bob Jones* is distinguishable on the facts because Troy Speegle designated James Speegle: (1) Vice-President with certain and complete power to control Appellant under its by-laws; and (2) Appellant's closing agent with real powers upon the happening of a specified condition. In contrast, *Bob Jones* involved only an isolated outside director with no power to control the corporation that existed.

There is also no similarity between *Skelton* and the present Record. In *Skelton*, the only business relationship between the ranching businesses of the husband and wife was the provision of voluntary secretarial services. There is nothing in *Skelton* that suggests any formal grant of authority as is present in this Appeal. Appellant also argues *Skelton* for the proposition that if an event that triggers the ability to control is unusual or unlikely, then the power is speculative or not real. (Appeal Petition 25.) However, in *Skelton*, OHA was discussing the inheritance of a business by one spouse or the other (which would be based upon a will or inheritance laws not in the record), not operation of a business based upon specific grants of authority authorized by company by-laws or formal grants of completion authority that are in the Record. Moreover, I am not persuaded that absence, total disability, or the death of a principal are unusual occurrences—they very plainly are not. Thus, I reject any suggestion that *Skelton* is relevant to this appeal and hold the powers granted to James Speegle as Appellant's Vice President or as its completion agent (through the completion nomination) are not based upon unusual events.

Finally, I note that unless the facts of a previous decision are exactly on point, previous decisions have limited precedential value, for each area office (or regional offices in days past) has the right to exercise discretion within the bounds of applicable regulations and case law. In reviewing an area office's use of discretion, OHA can only reverse upon the showing of clear error. Thus, whether OHA agrees with the decision of the area office is irrelevant. Instead, Appellant must establish that an area office erred in its use of discretion. Based upon the Record in this case, I cannot say Appellant has established that the Area Office committed clear error in finding that these facts show the absence of clear fracture.

V. Conclusion

For the above reasons, I DENY the appeal and AFFIRM the Size Determination.

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

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THOMAS B. PENDER
Administrative Judge