United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Grantco Pacific, Inc., Appellant, Appealed From Size Determination No. 6-2010-142	SBA No. SIZ-5205 Decided: February 22, 2011

APPEARANCES

Wayne A. Keup, Esq., Washington, D.C., for Appellant

DECISION [1]

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 there was clear error of fact or law in the Area Office's determination of Appellant's size status. *See* 13 C.F.R. § 134.314.

III. Background

A. The 8(a) Application and Size Investigation

On May 15, 2010, Grantco Pacific, Inc. (Appellant) applied for admission into the Small Business Administration's (SBA) 8(a) Business Development (BD) program. On September 8,

[1] Appellant requested confidential treatment under 13 C.F.R. § 134.205(f). On February 22, 2011, OHA served the unredacted decision on only Appellant and Government parties, with an order directing Appellant to recommend redactions and to describe the competitive harm that would occur if particular information was publicly released. Appellant had no recommended redactions. Thus, OHA now publishes the decision in its entirety.

2010, SBA's Office of Certification and Eligibility (OCE) requested the Office of Government Contracting - Area VI (Area Office) to conduct a size determination on Appellant. On September 21, 2011, the Area Office commenced its size investigation by letter informing Appellant that "SBA believes there may be an issue of affiliation between your firm and Electricians Hawaii, Inc., a firm owned by your father." On October 15, 2010, Appellant submitted its completed SBA Form 355 and other documents to the Area Office, and provided additional information in response to the Area Office's follow-up questions.

The information in the Area Office file shows Appellant, established in 1998, is wholly owned by Derik G. Takai. Mr. Takai's parents, Theodore and Ethel Takai, own Electricians Hawaii, Inc. dba Tek Pacific (EHI). EHI was established in 1978 and graduated from the 8(a) BD program in 2008. Both Appellant and EHI work in electrical contracting, and both reported the same business activity code, 238210, "Contracting, Electrical" on their Federal income tax returns. Appellant's "List of Projects" submitted to OCE lists 11 projects, eight of which are designated "Interior/Exterior Housewiring." Three of the smaller projects are designated "Photovoltaic." The 2009, 2008, and 2007 tax returns show that Appellant, by itself, is below the applicable $14 million size standard, while EHI is above the size standard.

Before founding Appellant, Mr. Takai worked full-time for EHI. Mr. Takai returned to work there part-time for eight months in 2007 when EHI needed his help. Appellant did a significant amount of subcontracted prefab work for EHI in 2007-2008. Appellant also borrowed significantly from EHI over several years, until 2009; however, as of May 2010, all loans had been paid back, with the last payment on May 14, 2010. Appellant leases its office/warehouse space from EHI, pursuant to a written lease which commenced on January 1, 2010. Appellant has its own equipment, work crews, and office staff.

Prior to May 2010, Mr. Takai's sister, Kathie Okuda, owned half of Appellant and was a director, officer, and employee. On May 7, 2010, a week before Appellant filed its 8(a) application, Ms. Okuda resigned her positions with Appellant, and sold her stock back to Appellant for cash and a five-year consulting contract. Ms. Okuda then took a position with EHI as a project manager, but continued on as a signatory for one of Appellant's bank accounts. She and Mr. Takai's father continued to be listed on Appellant's Central Contractor Registration (CCR) as Points of Contact (POC). In response to a question about Appellant's relationship with Ms. Okuda, Appellant responded that the relationship had been terminated as of May 7, 2010.

B. The Size Determination

On October 28, 2010, the Area Office issued Size Determination No. 6-2010-142 (Size Determination), concluding that Appellant is not a small business as of the date Appellant applied for the 8(a) BD program. The Area Office determined that Appellant and EHI are presumed affiliated under the identity of interest rule because of the family relationship between Mr. Takai and his parents, and that the presumption of affiliation had not been rebutted by a showing of clear fracture between the firms.

Supporting its conclusion that the presumed affiliation had not been rebutted, the Area Office cited several key facts. Among these facts were that Appellant and EHI are both in the

electrical contracting business, that they share the same physical address, that EHI is a graduate of the 8(a) BD program, that Mr. Takai is a former employee of EHI, that Appellant did subcontracting work for EHI, that EHI had lent money to Appellant, that Appellant leases space from EHI, that Appellant's former employee Ms. Okuda now works for EHI, and that Ms. Okuda and Mr. Takai's father are listed in the CCR as POCs for Appellant. The Area Office did not discuss the consulting agreement with Ms. Okuda.[2]

The Area Office concluded, "there is a continuing relationship, involvement, and cooperation" between Appellant and EHI. Thus, Appellant and EHI are affiliated and Appellant therefore is other than small.

Appellant filed the instant appeal on November 26, 2010.

C. The Appeal

Appellant asserts it presented to the Area Office compelling evidence to show that it and EHI are not closely involved in each other's business transactions. Thus, the Area Office erred in concluding that Appellant had not rebutted the presumption of affiliation with EHI based on identity of interest.

Appellant asserts that, despite all the discussion of the history and relationship between Appellant and EHI, the Size Determination is premised on just two "specific findings." These are: (1) the EHI people listed as Appellant's POCs on the CCR; and (2) Appellant's lease with EHI. As for the CCR listing, Appellant asserts that it was out-of-date but since corrected to include no EHI personnel, and that the Area Office erroneously placed more emphasis on the outdated CCR listing than on the evidence that Ms. Okuda had clearly broken her off relationship with Appellant by selling her interest in Appellant before joining EHI. As for the lease, Appellant asserts it is an arm's-length transaction and stands apart from instances in OHA caselaw where family members had been provided space rent-free.

Further, Appellant asserts the Area Office ignored all of the evidence that there is not a continuing relationship between Appellant and EHI, such as the fact that there are no common owners, directors, or officers, and the fact that Appellant does not rely on EHI for bonding or credit. Moreover, Appellant asserts it specializes in photovoltaics, a type of work about which EHI has no knowledge or performance capacity, distinguishing its line of business from EHI's.

Appellant moves to supplement the record to include Mr. Takai's Second Declaration and a new CCR listing that omits Ms. Okuda and Mr. Takai's father as POCs. As good cause for this new evidence, Appellant asserts that SBA's OCE never raised any concerns regarding the CCR listing while Appellant's 8(a) BD application was being processed, although SBA's OCE raised

[2] Apparently the Area Office could not resolve the conflict between the May 7, 2010, Stock Purchase Agreement naming the 5-year consulting agreement among the consideration and Appellant's statement to the Area Office that its relationship with Ms. Okuda had ended on May 7, 2010.

many other points of concern. If raised, Appellant would have acknowledged its "administrative oversight" and corrected the errors in its CCR listing at that time.

IV. Discussion

A. Timeliness, New Evidence, and Standard of Review

Appellant filed the instant appeal within 30 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(2).

The regulations governing size appeals disallow evidence not previously presented to the Area Office unless on motion establishing good cause. 13 C.F.R. § 134.308(a)(2). Here, Appellant's motion essentially blames SBA's OCE for not catching Appellant's error in neglecting to revise its CCR listing. Appellant's motion does not establish good cause. The new evidence is EXCLUDED.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the 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. The Merits of the Appeal

It is undisputed that Appellant, by itself, is below the size standard an that EHI is above it. Therefore, the only issue is whether Appellant and EHI are affiliated. The identity of interest 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, ...) 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.

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 Jenn-Kans, Inc.*, SBA No. SIZ-5114, at 7 (2010). The presumption arises not from active involvement in each other's business affairs, but from the family relationship itself. *Id.* A challenged firm may rebut the presumption of affiliation based upon family relationship by demonstrating a clear line of fracture among the family members. *Id.*

Here, the presumed identity of interest affiliation is due to the family relationship between Mr. Takai and his parents. Thus Appellant, which Mr. Takai controls through ownership (13 C.F.R. § 121.103(c)(1)), and EHI, which his parents control through ownership (*id.*), are presumed affiliates. Appellant does not dispute the family relationship exists, but asserts it has rebutted the identity of interest presumption.

Contrary to Appellant's assertions, the Area Office considered more than two facts (the CCR listing and the lease) in coming to its conclusion that Appellant had not shown clear fracture between itself and EHI. Despite Appellant's efforts to distinguish its line of business from EHI's based on the small percentage of photovoltaic work Appellant does, both firms are in the same industry, electrical contracting. Further, they share the same physical address, and EHI is a recent 8(a) BD program graduate. Moreover, in the recent past, Appellant has turned to EHI for financial assistance in the form of loans, the last of which was paid off in full only on May 14, 2010, the day before the day as of which Appellant's size status was to be determined.

The Area Office correctly considered the recent history of the relationship between Appellant and EHI, a relationship which continued right up to May 2010. *See Jenn-Kans*, at 8. This relationship included Mr. Takai's part-time work for EHI and the not insignificant amounts of subcontracting and borrowed money. Further, the fact Ms. Okuda, a current employee of EHI, had sold her stock in Appellant for, among other things, a five-year consulting contract whose details remain unexplained, also suggests the relationship between Appellant and EHI still has not ended, although the Area Office did not (and needed not) include this fact in its analysis.

The Area Office correctly determined that Appellant has not shown clear fracture from its presumed affiliate. Appellant is affiliated with EHI and therefore is other than small as of May 15, 2010, the date of its application for the 8(a) BD program. Accordingly, Appellant has failed to prove the Area Office's Size Determination was based on clear error of fact or law.

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. 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge