United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Norris Professional Services, Inc., Appellant, Appealed From Size Determination No. 3-2011-109	SBA No. SIZ-5289 Decided: November 1, 2011

APPEARANCE

Luschane Norris. President/CEO, Norris Professional Services, Inc., Douglasville, Georgia, for Appellant

REDACTED VERSION FOR PUBLIC RELEASE

DECISION[1],[2]

I. Introduction

This appeal arises from a Small Business Administration (SBA) size determination issued to Norris Professional Services, Inc. (Appellant) in conjunction with Appellant's application for 8(a) Business Development (BD) certification.

On June 24, 2011, SBA's Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-72 finding Appellant to be other than small based upon affiliation with Professional and Scientific Associates, Inc. (PSA). Due to an apparent error in service, Appellant did not receive the size determination until July 19, 2011. On August 3, 2011,

[1] 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.

[2] This decision was initially issued on October 6, 2011. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

Appellant appealed the size determination to the Office of Hearings and Appeals (OHA). On August 12, 2011, at the request of SBA, OHA vacated the size determination and remanded the matter to the Area Office. *Size Appeal of Norris Prof'l Servs., Inc.*, SBA No. SIZ-5268 (2011). Appellant did not oppose SBA's request for remand.

On August 26, 2011, the Area Office issued Size Determination No. 3-2011-109 again finding Appellant other than small, on essentially the same grounds as the initial size determination. On September 14, 2011, Appellant filed an appeal of the revised size determination. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

II. Background

A. 8(a) BD Program Application and Size Determination

On July 27, 2010, Appellant completed its application for SBA's 8(a) BD program. On April 11, 2011, SBA's Division of Program Certification and Eligibility (DPCE) requested a formal size determination of Appellant. DPCE expressed concern that Appellant appeared to be heavily dependent upon PSA for revenues.

On August 26, 2011, following remand of the initial size determination, the Area Office issued its revised size determination, finding that Appellant is other than small for its primary North American Industry Classification System (NAICS) code, 561920, Convention and Trade Show Organizers, with an associated size standard of $7 million in average annual receipts. The Area Office explained that Appellant's President and Chief Executive Officer (CEO) owns 90% of Appellant, and Appellant's Chief Financial Officer (CFO)—who is also the President/CEO's daughter—owns the remaining 10%. The Area Office also noted that Appellant's President/CEO was employed by PSA from 1992-2008, and Appellant's CFO was employed by PSA from 1998-2008. The Area Office next discussed Appellant's revenue stream. In 2007, Appellant earned "minimal revenues" as a prime contractor for [XXXXXXXXXXXXXXXXXXXXXXXXX]. (Size Determination 3.) Appellant's revenues were more substantial in 2008 and 2009, and in those years, 75% and 95% of Appellant's revenues, respectively, were earned as a subcontractor to PSA. Appellant's other 2008 and 2009 revenues were derived from its contract with [XXXXX]. Appellant continued to derive the majority of its revenues from PSA in 2010. Based upon these facts, the Area Office determined that Appellant is economically dependent upon PSA, and, therefore, the firms share an identity of interest. 13 C.F.R. § 121.103(f); *Size Appeal of Incisive Tech., Inc.*, SBA No. SIZ-5122 (2010). The Area Office reasoned that Appellant has derived more than 70% of its revenues from PSA since its inception and continues to do so. The Area Office also remarked that Appellant's owners were formerly key employees of PSA, but noted that Appellant's economic dependence upon PSA was sufficient ground to find affiliation, regardless of the prior relationship.

Because Appellant's application to the 8(a) BD program was filed on July 27, 2010, the Area Office calculated Appellant's average annual receipts using data for the years 2007, 2008, and 2009. 13 C.F.R. §§ 121.104(c)(1), 121.404(b). Upon aggregating Appellant's average annual

receipts with those of PSA, the Area Office concluded that Appellant exceeds the size standard applicable to its primary NAICS code.

B. Appeal Petition

On September 14, 2011, Appellant filed the instant appeal. Appellant claims the size determination is flawed and should be reversed. Appellant first argues that the Area Office erred by failing to comply with OHA's remand order. Appellant contends that, pursuant to the order, the Area Office should have given Appellant an opportunity to present additional evidence to rebut the Area Office's finding of affiliation. Appellant also complains that the Area Office requested its 2010 tax return but based its size determination on the firm's 2007, 2008, and 2009 tax returns and other "old information."

Appellant explains that neither Appellant President/CEO nor Appellant's CFO were ever ?key employees? of PSA. Appellant asserts that neither its President/CEO nor its CFO ever served as officers or directors of PSA, ever owned stock in PSA, or ever had the authority to obligate PSA in any way. Appellant also sets forth a description of the marketing and procurement efforts it has undertaken entirely independent of PSA. Specifically, Appellant explains that it expects to be awarded a GSA Schedule contract in the near future and that it has had a consulting services contract with another entity since July 2010. Additionally, Appellant asserts that it regularly markets its services independently of PSA by exhibiting at various trade shows. Appellant offers examples of such events, all of which occurred in 2010 and 2011. Appellant also states that it has submitted proposals for various procurements throughout the past year without PSA's participation. Appellant concludes that it does not rely on PSA.

Appellant next points out that the size determination explicitly states that Appellant's revenues from 2007 were derived entirely from [XXXXX]. Appellant asserts that it is significant that Appellant did not work for PSA during one of the three years used to calculate size. Appellant also asserts that it does not plan to do further business with PSA after September 20, 2011, when the current projects reportedly end.

Appellant goes on to offer other reasons why it is not affiliated with PSA. Appellant explains that PSA has no ownership interest in Appellant, holds no management position in Appellant, cannot dictate Appellant's decisions, and cannot access Appellant's bank accounts. Appellant indicates that it has held only two contracts with PSA, both of which specified that Appellant is an independent contractor that cannot be controlled by PSA. Appellant explains that PSA uses other subcontractors and argues this fact undermines the Area Office's conclusion that there is economic dependence between the firms. Appellant asserts that it performs work for [XXXXXXXXXXXXXXXXXX], and that PSA merely provides the contractual vehicle through which Appellant can perform services. Appellant contends that it could go to another company with a similar contract vehicle, which supports its contention that it is not dependent upon PSA. Appellant also emphasizes that it has other contracts with which PSA is not involved. Finally, Appellant contends that both it and PSA are small businesses, so the OHA cases upon which the Area Office relied, which involved affiliation with large businesses, are distinguishable. Appellant concludes there is no control or reliance between it and PSA and, thus, no affiliation. Appellant therefore requests that OHA reverse the size determination.

III. Discussion

A. Standard of Review

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 upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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. Analysis

The Area Office determined that Appellant shares an identity of interest with PSA based upon Appellant's economic dependence on PSA. The applicable 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. 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). Appellant asserts the Area Office erred in its conclusion.

Appellant first argues that the Area Office failed to provide Appellant with an additional opportunity to prove that its interests are separate from those of PSA, as Appellant maintains was contemplated by OHA's remand order and the regulation set forth above. OHA's remand order stated, in pertinent part:

> I GRANT SBA's Motion to Remand, and REMAND the instant appeal to the Area Office, and ORDER the Area Office to VACATE Size Determination No. 3-2011-72, WITHOUT PREJUDICE to the Area Office's processing of a new size determination, and WITHOUT PREJUDICE to Appellant's presentation of additional argument to the Area Office and Appellant's ability to appeal any resulting adverse size determination.

Size Appeal of Norris Prof'l Servs., Inc., SBA No. SIZ-5268, at 1 (2011). It is well-settled that the dismissal of an appeal without prejudice leaves the parties "as if the action had never been brought." *Bonneveille Assocs., Ltd. Partnership v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999). Thus, by vacating the initial size determination and dismissing the appeal "without prejudice," OHA essentially returned the case to its status before the initial size determination was issued. Furthermore, the fact that the matter was remanded to the Area Office "without

prejudice to Appellant's presentation of additional argument to the Area Office" indicates that Appellant was at liberty to submit additional evidence to the Area Office. Such language does not signify that the Area Office was obliged to solicit or obtain additional information from Appellant.[3]

The remand order was issued on August 12, 2011, and the new size determination was not forthcoming until August 26, 2011. Nothing prevented Appellant from submitting new evidence or argument to the Area Office during that interval, especially since Appellant was already well aware of the issues under consideration. I thus find Appellant had ample opportunity to submit new evidence if it wished to do so. Although Appellant complains that the Area Office did not invite Appellant to present new evidence, it was Appellant's responsibility to prove its size, 13 C.F.R. § 121.1009(c), and Appellant cannot blame the Area Office for its own failure to act. Furthermore, Appellant has not identified any new relevant information that was not available to the Area Office when it issued its revised size determination. Thus, even supposing that the Area Office should have requested additional information from Appellant, it does not appear that such an omission would have had any effect on the outcome of this case.

Appellant also argues that the Area Office relied upon ?old information? to issue its size determination. Specifically, the Area Office calculated Appellant's size based upon Appellant's 2007, 2008, and 2009 tax returns, even though the Area Office also was in possession of Appellant's 2010 tax returns. Appellant's argument has no merit. The Area Office was required to base its calculation on Appellant's 2007, 2008, and 2009 tax returns. Specifically, SBA's regulations require that an applicant to the 8(a) BD program "must qualify as a small business for its primary industry classification as of the date of its application." 13 C.F.R. § 121.404(b). The regulations further require the Area Office to calculate a firm's average annual receipts based upon the firm's tax returns from the "most recently completed three fiscal years."13 C.F.R. § 121.104(a)(1), (c)(1). Appellant applied to the 8(a) BD program in July 2010, so the previous three completed fiscal years were 2007, 2008, and 2009. The Area Office thus used the proper information to calculate Appellant's size.

Based upon the financial information submitted by Appellant, as well as OHA case precedent, the Area Office concluded that Appellant is economically dependent upon PSA within the meaning of 13 C.F.R. § 121.103(f). OHA has previously held, as a matter of law, that one firm is economically dependent upon another if it derives 70% or more of its revenue from that firm. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007); *see also Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 5 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). Furthermore, OHA has recognized that "a contractual relationship between two concerns with one heavily dependent for its revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms." *Size Appeal of Incisive Tech. Inc.*, SBA No. SIZ-5122, at 4 (2010). A finding of affiliation through economic dependence is proper only in the context of a long-term relationship between the firms. *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204, at 6-7 (2011).

[3] I note that Appellant did not oppose SBA's request to remand the initial size determination. If Appellant expected the Area Office to obtain new information following the remand, Appellant could have made its consent conditional upon such action.

In this case, the information submitted by Appellant to the Area Office offers the following depiction of the contractual relationship between Appellant and PSA:

Contract	2007	2008	2009	3 Year Total
PSA subcontracts	$[XXXX]	$[XXXX]	$[XXXX]	$[XXXX]
[XXXX] prime contract	$[XXXX]	$[XXXX]	$[XXXX]	$[XXXX]
Total revenue	$[XXXX]	$[XXXX]	$[XXXX]	$[XXXX]
% derived from PSA	0%	75.38%	95.05%	85.00%

Appellant does not dispute that 85% of its revenues over the years in question have been derived from its subcontracts with PSA. Nor does Appellant dispute that it has had a long-term contractual relationship with PSA. The record reflects at least a three to four year period during which PSA subcontracted work to Appellant. Likewise, Appellant does not challenge the Area Office's calculation of its average annual receipts or those of PSA.[4]

Instead, Appellant's primary argument is that Appellant is an independent business entity, and PSA cannot exercise control over Appellant in any way. As support for its argument, Appellant indicates it has a 2010 contract with another entity and anticipates award of a GSA Schedule contract in 2011. Appellant also offers examples of the marketing and procurement efforts it has undertaken independent of PSA. Unfortunately for Appellant, however, all of this information is irrelevant to this appeal. Once the size determination process was initiated, Appellant had the burden to prove that it was a small business *as of the date of its 8(a) BD application—i.e.*, July 27, 2010. 13 C.F.R. §§ 121.404(b), 121.1009(c). Contracts that were awarded or performed after this date could not have affected Appellant's revenue stream for the years in question (2007 - 2009). Likewise, the list of procurements for which Appellant has recently competed cannot alter Appellant's size in July 2010. The fact that Appellant's contracts with PSA describe Appellant as an independent contractor does not change the fact that Appellant relied upon PSA for the vast majority its revenues from 2007 through 2009.

Appellant emphasizes that PSA has no ownership interest in Appellant and argues that PSA cannot control its business operations. However, this argument is belied by the fact that more than 80% of Appellant's revenues are derived from its subcontracts with PSA. Control need not be exercised through direct ownership or management. Rather, a finding of economic dependence indicates that Appellant and PSA share an identity of interest — *i.e.*, that the "two

[4] Appellant does note that it did not work for PSA during 2007 and contends this fact is "significant." Appellant does not elaborate as to why it considers this fact significant but, in any case, the record reveals that Appellant derived 85% of its revenues from PSA over the three-year period, even though there were no such revenues in 2007.

concerns have identical or nearly identical business or economic interests." *Faison* at 9; *see also* 13 C.F.R. § 121.103(f). Because Appellant is heavily reliant upon PSA for revenues, and the firms' business interests are closely aligned, PSA in effect has the power to control Appellant.

Appellant argues it could perform work for [XXXX] through a different prime contractor if PSA terminated its subcontract. OHA has repeatedly rejected such arguments in prior cases. *Eagle Consulting*, SIZ-5267, at 6 ("While it is possible that Appellant could become less dependent upon [the alleged affiliate] in the future, such matters are largely speculative and, in any event, have no bearing on whether Appellant was economically dependent during the time period in question."); *Incisive Tech.*, SIZ-5122, at 4 (finding the challenged firm's argument that it could subcontract for other contractors in the future to be meritless because the firm's size must be determined as of the date of its 8(a) BD program application). Consequently, I find no error with the Area Office's conclusion that as of July 2010, Appellant is economically dependent upon, and therefore affiliated with, PSA.

Appellant also argues that neither its President/CEO nor its CFO were ever key employees of PSA. The term "key employee" is mentioned only once in the size determination, however, and it does not appear that the Area Office attached particular significance to this issue. In any case, it is not necessary to decide whether Appellant's President/CEO and CFO were key employees of PSA because the Area Office is correct that Appellant's economic dependence upon PSA is, by itself, sufficient to establish an identity of interest between the firms. A prior employment relationship, regardless of whether or not Appellant's President/CEO and CFO were "key" employees, would only serve to strengthen the conclusion that the firms are affiliated. *E.g., Size Appeal of Wireless Tech. Equipment Co., Inc.*, SBA No. SIZ-4204 (1996). Based upon the foregoing analysis, I cannot conclude that the Area Office committed any clear error based upon the record before it.

IV. Conclusion

Appellant has failed to demonstrate that the size determination contains any clear error of fact or law. I therefore DENY this 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(d).

KENNETH M. HYDE
Administrative Judge