United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: RGB Group, Inc., Appellant, Appealed From Size Determination No. 3-2012-036	SBA No. SIZ-5351 Decided: May 7, 2012

APPEARANCES

Bob De La Fuente, Esq., Jerry Campos, Esq., and Jesse Unruh, Esq., Tew Cardenas LLP, Miami, Florida, for Appellant

Antonio R. Franco, Esq., and Patrick T. Rothwell, Esq., PilieroMazza PLLC, Washington D.C. for Aloha Health Joint Venture 8a, LLC.

DECISION

I. Introduction and Jurisdiction

On February 9, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2012-036, finding that RGB Group, Inc. (Appellant) is not a small business under the size standard associated with Solicitation No. FA8053-11-R-0002. The Area Office found that Appellant is affiliated with RLM Services, Inc. (RLM), One Fountainhead Center, LLC (OFC), and Bragio, LLC (Bragio).

Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that Appellant is a small business. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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 the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the Area Office made a clear error of law or fact in determining Appellant's size? 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On November 19, 2010, the U.S. Department of the Air Force (Air Force) issued Solicitation FA8053-11-R-0002 for the Clinical Acquisition for Support Services (CLASS) program. The overall objective of CLASS is to fill permanent clinical staffing shortages at Air Force Military Treatment Facilities throughout the United States. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 622110, General Medical and Surgical Hospitals, with a corresponding size standard of $34.5 million in average annual receipts. The solicitation indicated that the Air Force planned to award multiple indefinite-delivery indefinite-quantity contracts. On May 25, 2011, Appellant submitted its initial proposal, self-certifying as a small business.

On December 21, 2011, the CO notified offerors that Appellant was selected for the award. Aloha Health Joint Venture 8a, LLC (Aloha), a disappointed offeror, protested Appellant's size on December 29, 2011, alleging that Appellant and RLM are affiliated because they are controlled by members of the same family and operate from the same location.

B. Size Determination

On February 9, 2012, the Area Office issued its size determination finding that Appellant is affiliated with OFC, Bragio, and RLM.

The Area Office first explained that Mr. Roberto Bravo is the President and sole owner of Appellant. (Size Determination at 3.) Mr. Bravo's wife, Mrs. Ana Bravo, is President and sole owner of RLM. (*Id.*) Mr. and Mrs. Bravo each owns 50% of OFC and Bragio, and are managers of those companies. Based on these findings, the Area Office determined that Mr. Bravo alone has the power to control Appellant; that Mrs. Bravo alone has the power to control RLM; and that both Mr. and Mrs. Bravo have the power to control OFC and Bragio. (*Id.* at 4.) The Area Office found that Appellant is affiliated with OFC and Bragio through common ownership and control by Mr. Bravo. (*Id.* at 5.)

The Area Office next determined that Appellant is affiliated with RLM based on familial identity of interest. Because Mr. and Mrs. Bravo are a married couple, they are presumed to share an identity of interest under 13 C.F.R. § 121.103(f). The Area Office indicated that the presumption had not been rebutted in this case, explaining that Mr. and Mrs. Bravo are not only closely related, but also own and manage OFC and Bragio together. (*Id.*)

The Area Office went on to discuss several other factors which contributed to the finding of affiliation between Appellant and RLM. (*Id.* at 6.) Appellant and RLM are located in the same office building, which is owned by OFC. Between 2003 and 2005, Appellant and RLM entered into three subcontracting agreements, and the firms currently have an agreement whereby Appellant provides staffing services to RLM. Appellant proposed to subcontract a substantial portion of the CLASS procurement to RLM.[1] Until March 1997, Mrs. Bravo owned 25% of Appellant and served as its Vice President and Secretary. Finally, the Area Office determined that Appellant was financially reliant on RLM because RLM loaned approximately $1.2 million to Appellant in 2011. The Area Office considered that these factors, viewed collectively, support the conclusion that Appellant is affiliated with RLM under the "totality of the circumstances," 13 C.F.R. § 121.103(a)(5).

The Area Office found that the combined average annual receipts of Appellant and its affiliates exceed the applicable size standard. As a result, Appellant is not a small business. The Area Office further noted that, even if the annual receipts of OFC and Bragio were excluded, the combined average annual receipts of Appellant and RLM would exceed the applicable size standard. (Size Determination at 7.)

C. Appeal Petition

On February 23, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.[2]

Appellant contends the Area Office erred in finding Appellant affiliated with RLM because a family relationship, by itself, does not create affiliation. (Appeal at 10.) Appellant further argues that it rebutted the presumption of affiliation by demonstrating that Appellant and RLM are not involved in each other's business transactions. Appellant emphasizes that the two concerns share no officers or directors, and never have. (*Id.* at 7.) Nor do the firms share key employees or personnel, other than two common employees who perform work that is "inconsequential" to the companies' overall operations. (*Id.* at 9-10.) Appellant underscores that Mrs. Bravo has not held an ownership interest in, or position with, Appellant since March 1997. RLM was not incorporated until 2000, and Mr. Bravo owns no interest in it.

---

[1] The size determination indicates that Appellant only "intends to perform 25% of the work" on the CLASS procurement. (Size Determination at 6.) Appellant vigorously contests this statement, insisting that, as the prime contractor, Appellant would in fact perform a majority of the work. (Appeal at 18-19.) Appellant does not dispute, however, that RLM also would play a significant role in contract performance. On its SBA Form 355, Appellant acknowledged that RLM was expected to perform "more than 25%" of the contract. (SBA Form 355, Response to Question 27.)

[2] Nearly all of the appeal petition is devoted to challenging Appellant's alleged affiliation with RLM. Appellant does not appear to dispute the Area Office's findings that Mr. Bravo has the power to control Appellant, OFC, and Bragio, and that Appellant therefore is affiliated with OFC and Bragio by virtue of common control by Mr. Bravo.

Appellant next argues the Area Office erred by considering stale information that preceded the date of Appellant's self-certification. Specifically, Appellant contends that Mrs. Bravo's prior ownership interest in Appellant, and the subcontracts between the firms from 2003 to 2005, are irrelevant considerations. Appellant argues that, as of the date of self-certification, Appellant and RLM had no common ownership and did not share directors, officers, or bank accounts; further, Appellant's and RLM's client bases are separate and distinct. (*Id.* at 9.)

Appellant argues the Area Office erred in finding Appellant was affiliated with RLM based on the Bravos' joint involvement with OFC and Bragio. Because Bragio did not exist at the time of self-certification, Appellant maintains that the Area Office should not have considered it when examining size. According to Appellant, had the Area Office considered OFC alone, the Area Office should have found that Mr. and Mrs. Bravo share only a single common investment. It is well-settled that a joint investment in only one firm is not enough to support a finding of affiliation based upon "common investments." *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244 (2011).

Appellant argues that OFC's status as a real-estate company makes the instant case "strikingly similar" to OHA's decision in *Manroy*. (Appeal at 13.) In *Manroy*, an area office found an identity of interest between the challenged firm's co-owners based on their joint ownership of the challenged firm and a piece of real estate. OHA held that "joint ownership of [the challenged firm] and a piece of real estate used by [the challenged firm] are insufficient to create 'substantially identical business or economic interests,' as the identity of interest rule requires." *Manroy*, SBA No. SIZ-5244, at 4 (quoting 13 C.F.R. § 121.103(f)). Appellant contends that, as in *Manroy*, OFC is a common real estate investment that the Area Office improperly used to find affiliation between Appellant and RLM. Thus, in Appellant's view, the Area Office erred by finding affiliation between Appellant and RLM based on the Bravos' joint ownership of OFC.

Lastly, Appellant argues that the other factors cited by the Area Office do not establish affiliation. Appellant maintains that the agreement whereby Appellant provides services to RLM is an arms-length transaction which constitutes just 4.9% of Appellant's gross income. (Appeal at 15.) According to Appellant, such limited business ties provide little incentive for the firms to act in concert with one another, and offer no grounds to conclude either firm can control the other. Further, OHA has recently opined that "a subcontracting relationship that represents only a small portion of each firm's business does not preclude a finding of clear fracture." *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 8 (2011). Next, Appellant reiterates its contention that the subcontracting agreements from 2003 to 2005 and Mrs. Bravo's prior ownership interest in Appellant are irrelevant, because those factors precede the date of self-certification. Appellant insists that the loans made by RLM to Appellant do not show financial reliance because Appellant "did not use any of the funds lent to it by RLM," and because Appellant agreed to repay that money over two years with interest. (Appeal at 17-18.) Additionally, Appellant argues the Area Office improperly analyzed Appellant's subcontracting arrangement with RLM for the instant procurement. Appellant asserts that, as the prime contractor, Appellant intends to perform at least 51% of the services associated with the CLASS procurement.

D. Aloha's Response

On March 14, 2012, Aloha filed its opposition to the appeal. Aloha contends that the appeal should be denied because there is no clear error of fact or law in the size determination. Alternatively, in the event OHA finds the appeal meritorious, Aloha requests that OHA remand the case to the Area Office for a determination of whether Appellant and RLM are affiliated under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

Aloha argues that the Area Office properly concluded that Appellant and RLM are affiliated based on a presumed identity of interest arising from the Bravos' spousal relationship. Aloha points out that the Area Office did not base its affiliation finding on joint investments, as Appellant suggests in its appeal. Rather, the Area Office determined that Appellant and RLM are affiliated based on the identity of interest arising from the familial relationship. The applicable regulation, 13 C.F.R. § 121.103(f), indicates that affiliation may be found based on familial identity of interest alone; it is unnecessary that common investments also be shown. Indeed, *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217 (2011), which Appellant itself cites, makes clear that:

> OHA has consistently held that a family relationship is sufficient to create an identity of interest between two concerns, unless, as noted in 13 C.F.R. § 121.103(f), a party has rebutted the presumption of an identity of interest by showing a clear fracture between the two entities. *See, e.g., Size Appeal of Technical Support Servs.*, SBA No. SIZ-4794 (2006). Such "clear fracture" may be shown if family members are "either estranged or not involved with each other's business transactions." *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003).

Hal Hays, SBA No. SIZ-5217, at 6.

Aloha argues that there is no evidence that the couple is estranged or that they are not involved in each other's business transactions. On the contrary, Appellant, controlled by Mr. Bravo, rents office space from OFC; RLM, controlled by Mrs. Bravo, is Appellant's subcontractor for the instant procurement; and the spouses are jointly involved with OFC and Bragio. According to Aloha, these facts demonstrate that the couple is actively involved in each other's business transactions, precluding a finding of clear fracture. (Response at 4-5.)

Next, Aloha addresses Appellant's argument that the Area Office should not have considered the couple's joint involvement with OFC and Bragio in determining that Appellant was affiliated with RLM. Aloha maintains that *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995), which Appellant cited in support of its argument, is inapposite. Moreover, Aloha asserts that Appellant's argument is directly counter to the identity of interest concept that "individuals or firms with identical ... business or economic interest and entities ... may be treated as one party with such interests aggregated." 13 C.F.R. § 121.103(f).

Aloha contends that the Area Office reasonably found affiliation between Appellant and

RLM based on the totality of the circumstances. (Response at 5-6.) According to Aloha, Appellant's argument that there is insufficient evidence to find affiliation on independent grounds misconstrues the analysis of the totality of the circumstances. Aloha recites language from a recent decision in which OHA explained:

> SBA may find firms affiliated under the totality of the circumstances if "the interactions between the businesses are so suggestive of reliance as to render the firms affiliates. Although the evidence in the record may not establish affiliation under one of the specific factors enumerated in the regulation, a review of all factors may lead to the conclusion one business has the power to control the other and, thus, both are affiliated."

Size Appeal of Rio Vista Mgmt., LLC, SBA No. SIZ-5316, at 12 (2012) (quoting *Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112, at 7 (2010)). Therefore, according to Aloha, even if Appellant were correct that each factor, standing alone, does not establish affiliation, the Area Office could still find affiliation when the factors are considered collectively.

IV. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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 in this case found that Appellant is affiliated with RLM based on an identity of interest between family members. Specifically, the Area Office reasoned that, because Mr. and Mrs. Bravo are a married couple, they are presumed to share an identity of interest under 13 C.F.R. § 121.103(f). The applicable 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. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination by showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). OHA's long-standing case precedent interprets this regulation as creating a rebuttable presumption that family members have identical interests and must be treated as one

person. *See, e.g., Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222, at 6 (2011); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899, at 7 (1984). The underlying rationale for the rule is that persons will, because of their common interests, act in concert or as one. *Size Appeal of DooleyMack Govt. Contracting, LLC*, SBA No. SIZ-5085, at 6 (2009); *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059, at 5 (1995).

A challenged firm may rebut the presumption of identity of interest "if it is able to show a clear line of fracture among the family members." *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 17 (2006) (citing *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003)). A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or if the family members are estranged. *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217, at 6 (2011); *Size Appeal of Jenn-Kans, Inc.* SBA No. SIZ-5114, at 7 (2010), *recons. denied*, SBA No. SIZ-5128 (2010) (PFR). It is not necessary, however, that there be the complete absence of any business ties between the family members or their firms. Rather, OHA has recognized that "a minimal amount of economic or business activity between two concerns does not prevent a finding of clear fracture." *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011) (finding no affiliation between two sibling-owned firms when the only ties between them were a handful of non-managerial employees, and subcontracts representing less than 5% of each firm's business). Factors that may be pertinent in examining clear line of fracture include whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and whether the family members participate in multiple businesses together. *GPA Techs.*, SBA No. SIZ-5307, at 8-10; *Hal Hays*, SBA No. SIZ-5217, at 6-7; *Jenn-Kans*, SBA No. SIZ-5114, at 8; *McLendon Acres*, SBA No. SIZ-5222, at 6; *Size Appeal of Grantco Pacific, Inc.*, SBA No. SIZ-5205, at 5 (2011).

In this case, the Area Office identified numerous ties between Mr. and Mrs. Bravo and their respective companies. (Size Determination at 5-6.) While there is no common ownership or management of Appellant and RLM, the spouses do jointly own, manage, and control two other companies, OFC and Bragio. Thus, Mr. and Mrs. Bravo are business partners, directly collaborating in the operation of OFC and Bragio. Appellant and RLM are located in the same office building, which in turn is owned by OFC, one of the jointly-controlled concerns. Appellant and RLM entered into three subcontracting agreements between 2003 and 2005, and continue to have an arrangement whereby Appellant provides staffing services to RLM. Appellant proposed to subcontract a large portion (more than 25%) of the instant procurement to RLM. Furthermore, RLM loaned approximately $1.2 million to Appellant in 2011, a very sizeable sum in comparison with Appellant's own total revenues. In its appeal, Appellant does not dispute the existence of a family relationship, nor challenge the factual accuracy of the above findings.

Accordingly, the record establishes that there is substantial and ongoing involvement by Mr. and Mrs. Bravo in one another's business affairs. I find, therefore, that a clear line of fracture has not been established, and that the Area Office did not err in finding Appellant affiliated with RLM. It is worth noting that Appellant's plan to subcontract at least 25% of the CLASS procurement to RLM is, by itself, arguably sufficient to find no clear line of fracture. In *Jenn-*

Kans, supra, the challenged firm and its alleged affiliate were owned by siblings, and the challenged firm intended to subcontract 32% of the protested procurement to the alleged affiliate. OHA determined that "[e]ven though [the challenged firm's] plan may change, the fact that it intended to subcontract such a large portion of the contract to [the alleged affiliate] establishes that no clear fracture has occurred." *Jenn-Kans*, SBA No. SIZ-5114, at 8.

In seeking to overturn the size determination, Appellant emphasizes that it shares no common ownership or management with RLM. Appellant further contends that the ties between Mr. and Mrs. Bravo and their respective companies are insufficient to conclude that either firm has the power to control the other. Appellant's arguments reflect a misapprehension of 13 C.F.R. § 121.103(f). Under the regulation, a family relationship alone creates a presumption of identity of interest. The presumption arises "not from the degree of family members' involvement in each other's business affairs, but from the family relationship itself." *Size Appeal of SP Techs., LLC*, SBA No. SIZ-5319, at 5 (2012). Thus, in the instant case, Appellant and RLM are presumed affiliated, based on the identity of interest between Mr. and Mrs. Bravo. The presumption is rebuttable, but only if the challenged firm were to demonstrate a "clear line of fracture" between the family members. Accordingly, in order to find affiliation based on identity of interest, it is not necessary to find that either firm can control the other on alternate grounds beyond 13 C.F.R. § 121.103(f).

OHA considered and rejected arguments similar to those advanced by Appellant in *Jenn-Kans, supra*. In that case, the area office found two sibling-owned firms affiliated through identity of interest. A clear line of fracture was not demonstrated due to the substantial subcontracting arrangements between the firms. On appeal, the challenged firm argued that the two firms shared no common ownership or management, and that the business dealings between them were not so extensive as to give rise to economic dependence. OHA found these arguments, and the appeal, meritless, explaining that under 13 C.F.R. § 121.103(f), no independent grounds are required to find firms controlled by family members affiliated under the identity of interest rule. *Jenn-Kans*, SBA No. SIZ-5114, at 9.

Appellant also argues at length that the Area Office should not have considered certain information in the record. Appellant maintains that some of this information — such as Mrs. Bravo's prior ownership stake in Appellant, and the previous subcontracts between Appellant and RLM — is too old to have any possible relevance at this time. This argument fails because, when determining whether there has been clear fracture, it is proper to consider the longitudinal relationship between the allegedly affiliated firms. *Jenn-Kans*, SBA No. SIZ-5114, at 8 ("to determine whether an identity of interest exists between the family members, it is necessary to examine the history of the firms ..."). Conversely, Appellant also argues that the Area Office erred in finding Appellant affiliated with Bragio because Bragio did not exist as of the date of self-certification. Appellant is correct that SBA determines size status as of the date of self-certification. 13 C.F.R. § 121.404(a). Nevertheless, any error was harmless, because the Area Office specifically determined that Appellant would exceed the applicable size standard even if the revenues from Bragio (and OFC) were excluded from the calculation. (Size Determination at 7.) Thus, whether or not Appellant is affiliated with Bragio does not affect the outcome of the case.

Appellant also argues, citing *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244 (2011), that the spouses' joint ownership of OFC is an insufficient basis for finding affiliation based on common investments. I agree with Aloha that *Manroy* has no bearing here because the Area Office did not find affiliation between Appellant and RLM based on common investments. Instead, the Bravos' familial relationship gave rise to a presumption of identity of interest. Unless Appellant could establish clear fracture, there was affiliation as a matter of law. For the reasons discussed *supra*, the Area Office did not err in finding Appellant affiliated with RLM.[3]

V. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

[3] Because the Area Office properly found affiliation between Appellant and RLM under 13 C.F.R. § 121.103(f), it is unnecessary to consider whether Appellant and RLM are also affiliated under the totality of the circumstances.