

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

Alleo Corporation,

Appellant,

Appealed From  
Size Determination No. 2-2012-138

SBA No. SIZ-5405

Decided: September 26, 2012

APPEARANCE

Milton C. Johns, Esq., Day & Johns PLLC, Manassas, Virginia, for Appellant

DECISION

I. Introduction and Jurisdiction

On August 21, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-138, finding Alleo Corporation (Appellant) is not a small business under the size standard associated with Solicitation No. FA8053-11-R-0003. The Area Office found Appellant affiliated with DP Technologies Services, Inc. (DPTS) based on identity of interest, 13 C.F.R. § 121.103(f).

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be an eligible 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. Background

A. Solicitation and Protest

On May 20, 2012, the U.S. Department of the Air Force (Air Force) issued Solicitation

FA8053-11-R-0003 (RFP) seeking medical support services. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 621999, All Other Miscellaneous Ambulatory Health Care Services, with a corresponding \$10 million average annual receipts size standard. The RFP indicated that the Air Force planned to award multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts. The total dollar amount of the task orders under the IDIQ contracts would not exceed \$494 million. On June 29, 2011, Appellant submitted its offer, self-certifying as a small business.

On June 8, 2012, the Area Office received a size determination request from the CO. The CO protested Appellant's size based on information suggesting Appellant is affiliated with DPTS. On June 25, 2012, the CO awarded a contract to Appellant.

### B. Size Determination

On August 21, 2012, the Area Office issued its size determination finding Appellant is not an eligible small business due to its affiliation with DPTS. The Area Office reasoned Appellant and DPTS share an identity of interest under 13 C.F.R. § 121.103(f), due to the familial relationship of the firms' owners.

The Area Office first explained that Mr. Alan Portillo is the President and sole shareholder of Appellant. Mr. Portillo's mother, Ms. Darla Portillo, is the President and sole shareholder of DPTS. Appellant proposed DPTS as a subcontractor on the subject contract. The proposal represents DPTS will perform 45% of the contract. Appellant and DPTS are in similar lines of business, as they both provide professional healthcare services to Government agencies. The firms do not share an office, but their offices are located in the same building. For its program manager, Appellant hired Mr. Carl Reid, DPTS's program manager on the incumbent contract. DPTS is the incumbent on the prior contract and has exceeded the size standard.

The Area Office then noted the Portillos' mother-son relationship gives rise to a rebuttable presumption that the Portillos have identical interests. *See, e.g., Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217 (2011). The Area Office explained Appellant must demonstrate clear fracture with DPTS to rebut this presumption. *Id.* The Area Office determined Appellant did not demonstrate clear fracture because it received 100% of its revenues in the preceding year-and-a-half from DPTS. As a result, reasoned the Area Office, Appellant is economically dependent on DPTS. The Area Office also cited the firms' common customers and industry classifications and DPTS's incumbent status.

### C. Appeal Petition

On September 5, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains the size determination is clearly erroneous and should be overturned.

Appellant first argues the Area Office erred because it did not make a finding related to control. *See Size Appeal of SP Techs., LLC*, SBA No. SIZ-5319 (2012) (“Without that finding [that either party can control the other or a third party can control both], there can be no

conclusion that the concerns are affiliated.”); *see also* *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128 (2010) (“The ultimate inquiry in any type of affiliation case (including identity of interest) is the power to control.”) Specifically, argues Appellant, the Area Office made no finding that someone other than Mr. Portillo has the power to control Appellant.

Appellant then argues the Area Office erred in concluding Appellant did not demonstrate clear fracture. According to Appellant, the Area Office did not dispute that Appellant and DPTS do not share facilities, equipment, or employees; or assist each other financially. Nor did the Area Office dispute the fact that DPTS is not the only subcontractor on the subject contract. Appellant argues these factors support a finding of clear fracture. *SP Techs.*, SBA No. SIZ-5319 (2012).

According to Appellant, the Area Office concluded, without support, that a firm does not demonstrate clear fracture when it is economically dependent on the alleged affiliate. Appellant contends economic dependence is a separate basis for affiliation, and it was not raised in the protest.

Appellant then argues the finding of economic dependence finding is clearly erroneous because Appellant's relationship with DPTS is too young. *See Size Appeal of Argus and Black*, SBA No. SIZ-5204 (2011). Appellant argues *Argus and Black* established longevity as a threshold element to the economic dependence inquiry and set forth a test for determining whether firms' relationships are of sufficient duration. Appellant contends it does not meet the “*Argus* test” because it had only been in operation for thirteen months prior to submitting its offer on the subject procurement. Thus, argues Appellant, even though it has received all of its revenue from performing as DPTS's subcontractor, it is not economically dependent on DPTS. Appellant stresses, “[A] small amount of economic activity is not sufficient to create a commonality of interests to make firms act in concert or as one.” *Size Appeal of GPA Techs., LLC*, SBA No. SIZ-5307 (2011).

Appellant then argues few startup businesses could survive an economic dependence inquiry of the sort undertaken by the Area Office. In the market for Government contracts, every small business must start with an initial contract. To build past performance references, these startups begin as subcontractors.

#### 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 found Appellant is affiliated with DPTS based on an identity of interest between family members. Specifically, the Area Office reasoned that, because the Portillos have a mother-son relationship, 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). Pertinent to a clear fracture analysis is whether the firms continued to subcontract with each other and whether one proposed the other as a subcontractor on the subject contract. *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351, at 7-8 (2012) (citing *Jenn-Kans*, SBA No. SIZ-5114, at 8).

In this case, the Area Office identified numerous ties between the Portillos and their respective companies. The most significant factor, which Appellant does not dispute, is the subcontracting relationship between Appellant and DPTS. Notably, Appellant has subcontracted 45% of the subject contract to DPTS. As OHA explained in *RGB Group* and *Jenn-Kans*,

subcontracting a large portion of the protested procurement is sufficient to preclude a showing of clear fracture. *Id.* In *Jenn-Kans*, OHA held there was no clear fracture when the prime subcontracted 32% of the protested procurement to the alleged affiliate. *Jenn-Kans*, SBA No. SIZ-5114, at 8. Here, Appellant proposes to subcontract significantly more of the subject contract to DPTS. Thus, I find this reason alone precludes Appellant from demonstrating clear fracture.

Another significant factor is that Appellant has received nearly all its revenue from DPTS. The Area Office found Appellant received 100% of its 2010 revenue, and 94% of its 2011 revenue, through teams or subcontracts with DPTS. This again demonstrates that there was no clear fracture between Appellant and DPTS.

Appellant argues the Area Office was in error, and that there was a clear fracture between the concerns. Appellant argues that there is no common ownership, and that the two concerns do not share facilities, equipment, or employees. Appellant further argues that the Area Office made a finding of affiliation based upon economic dependence, and argues that such a finding is in error, citing *Size Appeal of Argus and Black*, SBA No. SIZ-5204 (2011).

However, the mere fact that Appellant and DPTS do not share facilities, equipment or employees cannot overcome the strong continuing economic ties between the two firms. It is Appellant's burden to rebut the presumption of affiliation based upon the family tie between the principals of the two concerns. The fact that Appellant will subcontract a significant portion of this contract to DPTS and had received nearly all of its revenue from teams or subcontracts with DPTS establishes strong economic ties between the two concerns and makes it impossible for Appellant to meet its burden of establishing a clear fracture between the concerns, even if they have kept portions of their operations separate.

Appellant's reliance upon *Argus and Black* is misplaced. The Area Office did not find Appellant affiliated with DPTS based upon identity of interest due to economic dependence. Rather, the Area Office found Appellant affiliated with DPTS upon identity of interest due to the family relationship between Mr. Portillo and Ms. Portillo. The Area Office then found that Appellant could not establish a clear fracture due to the continuing economic ties between the concerns, which included Appellant's receipt of nearly all its revenue from DPTS. *Argus and Black* is a case dealing with the issue of identity of interest based upon economic dependence, and thus is inapposite here.

Appellant further contends the Area Office erred in not making an explicit finding that Ms. Portillo has the power to control Appellant, citing *Size Appeal of SP Technologies, LLC*, SBA No. SIZ-5319 (2012). All findings of affiliation are based upon control or power to control. 13 C.F.R. § 121.103(a)(1). Here, the Area Office found that the Portillos' interests are aggregated under the identity of interest rule, and so they are treated as one person. 13 C.F.R. § 121.103(f). Mr. Portillo is Appellant's sole shareholder, and Ms. Portillo is DPTS's sole shareholder, and there is thus no question that, when their interests are aggregated, they control both concerns. In *SP Technologies* control was an issue because one of the family members whose interests were aggregated held only a minority interest in one of the alleged affiliates, and therefore was found not to control it. *SP Technologies*, SBA No. SIZ-5319, at 7. *SP*

*Technologies* is thus inapposite here, and Appellant's allegation of error by the Area Office is meritless.

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).

CHRISTOPHER HOLLEMAN  
Administrative Judge