

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

SIZE APPEAL OF:

Step Construction, Inc.,

Appellant,

Appealed From  
Size Determination No. 3-2013-057

SBA No. SIZ-5483

Decided: July 11, 2013

APPEARANCE

Christopher R. Shiplett, Esq., Watson and Associates, LLC, Denver, Colorado, for  
Appellant

DECISION

I. Introduction and Jurisdiction

On April 25, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2013-057 finding that Step Construction, Inc. (Appellant) is not a small business under the size standard associated with Appellant's primary industry. The Area Office specifically determined that Appellant is affiliated with several other concerns through familial identity of interest, 13 C.F.R. § 121.103(f).

Appellant did not produce tax records and other information pertaining to these entities, so the Area Office applied an adverse inference that the missing information would have shown that Appellant exceeds the applicable size standard.

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse, and conclude 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. Background

### A. 8(a) BD Application

On July 27, 2012, Appellant applied for admission into the 8(a) Business Development (BD) program. Appellant's primary industry is North American Industry Classification System (NAICS) code 237310, Highway, Street and Bridge Construction, with a corresponding size standard of \$33.5 million average annual receipts. Appellant's application was declined on December 14, 2012, and Appellant sought reconsideration.

On March 13, 2013, SBA's Division of Program Certification and Eligibility (DPCE) requested a formal size review of Appellant in order to assess Appellant's eligibility for the 8(a) BD program. DPCE noted that Appellant "appears to be affiliated with various firms that are owned by family members" of Mr. Kevin Lanier, Appellant's owner and president. (DPCE Letter at 1.) DPCE identified eight potential affiliates, which are "mostly in the same or similar line(s) of business" as Appellant. (*Id.*) Three of the potential affiliates are former participants in the 8(a) BD program.

### B. Area Office Investigation

On April 2, 2013, the Area Office notified Appellant of DPCE's protest, and requested a response. The Area Office provided Appellant with the text of SBA's affiliation regulation, and instructed Appellant to address DPCE's allegations and provide any relevant supporting documentation. Appellant responded on April 8, 2013, denying any affiliation with the alleged affiliates. In its SBA Form 355, Appellant marked "no" to question 21, which inquired whether "any family member" of Appellant's owners or officers has an ownership interest in any alleged affiliate. Appellant's President also submitted one-page letter stating that:

I would like to confirm that there is no affiliation with these firms. [[Appellant] is an establishment owned and operated by me, Kevin Lanier; and I would like to say that I have had no affiliation with; neither have I owned any shares nor any stocks in the [alleged affiliates].

(Protest Response at Attachment B.)

On April 12, 2013, Appellant submitted additional information to the Area Office. Contrary to its SBA Form 355, Appellant acknowledged that many of the alleged affiliates are, in fact, owned by family members of Mr. Kevin Lanier. In addition, Appellant has had business dealings with at least some of the firms. In an unsworn letter to the Area Office, Appellant's President stated:

Global Construction, Inc. was owned by Ricky Lanier (uncle) and Carl Lanier (father). I did my apprenticeship at Global from January 2006 to March 2008 and in 2009, [Appellant] subcontracted a job from Global. I would like to confirm that

I have no affiliation as an owner, partner, officer, member, or stockholder in Global Construction, Inc.

Kinston Contracting, Inc., Lanier Properties, Inc., and Emporium Development Corp. was owned by Linda Lanier (aunt). I would like to confirm that I have no affiliation with these firms. I am not an owner, partner, officer, member, employee, or stockholder in the above-mentioned companies.

Sydney's Care, Inc., and The Foundations Project are owned by Ricky Lanier (uncle). STC Services, LLC is owned by Ricky Lanier and his wife Katrina Lanier. I would like to confirm that I have no affiliation with these firms. I am not an owner, partner, officer, member, employee, or stockholder in the above-mentioned companies.

Lanier Construction Company, Inc. was owned by David Lanier (uncle) and his wife Stephanie Lanier and Benjamin Lanier (uncle). It is now owned by Henry Lanier (uncle) and Benjamin Lanier (uncle). In 2012, [Appellant] subcontracted a job from Lanier. I would like to confirm that I have no affiliation as an owner, partner, officer, member, or stockholder in Lanier Construction Company, Inc.

Lanier Construction Management, Inc. is owned by Henry Lanier (uncle). I would like to confirm that I have no affiliation with this firm. I am not an owner, partner, officer, member, employee, or stockholder in the above-mentioned company.

(Letter of April 12, 2013, at 1-2.)

On April 18, 2013, at 11:22 am, the Area Office notified Appellant by e-mail that “because there is a family relationship between [Mr. Kevin Lanier] and [[his] uncles and aunts, it has been determined that there may be an affiliation by identity of interest.” The Area Office requested SBA Form 355 data for each of the companies owned by Mr. Kevin Lanier's relatives, as well as tax returns for the companies' three most recent completed fiscal years. The Area Office further instructed Appellant to describe in detail its business dealings with each company. Appellant's response was due by close of business that same day.

Appellant's President responded by email at 4:57 pm, stating that “I have no affiliation with the list of firms provided, therefore I do not have any rights or access to the companies' records. Please note that I did contact the owners (my uncles) and they stated that they will not disclose any information about their company.” (Letter of April 18, 2013, at 1.)

On April 19, 2013, the Area Office inquired whether Appellant intended to produce any information about the companies owned by Mr. Kevin Lanier's family members. Appellant reiterated that “They are not willing to provid[e] any information about their company.”

### C. Size Determination

On April 25, 2013, the Area Office issued its size determination. The Area Office found

that Appellant is affiliated with Lanier Properties, Inc., Emporium Development Corporation, Sydney's Care, Inc., The Foundations Project, STC Services, LLC, Lanier Construction Company, Inc., and Lanier Construction Management, Inc. based on familial identity of interest.<sup>1</sup> Appellant failed to provide “basic ownership, organization and revenue information” concerning any of these companies, so the Area Office applied an adverse inference that Appellant exceeds the applicable size standard. (Size Determination at 7.) The Area Office stated that Appellant was warned that it might be found affiliated with companies owned by family members of Mr. Kevin Lanier, and that Appellant had not offered any valid rebuttal. (*Id.* at 3.)

The Area Office first explained that Mr. Kevin Lanier is Appellant's President and only officer. The Area Office found that Mr. Kevin Lanier has the power to control Appellant by virtue of his 100% ownership interest. (*Id.*)

The Area Office proceeded to examine Appellant's possible affiliation with Lanier Properties, Inc. and Emporium Development Corporation. The Area Office found that Appellant acknowledged that these companies are owned by Ms. Linda Lanier, aunt of Mr. Kevin Lanier. Appellant failed to provide any further ownership or revenue information for the two concerns. The Area Office found that Appellant is affiliated with Lanier Properties, Inc. and Emporium Development Corporation based on familial identity of interest. (*Id.* at 4-5.)

Next, the Area Office considered Appellant's potential affiliation with Sydney's Care, Inc., The Foundations Project, and STC Services, LLC. The Area Office found that Appellant acknowledged that these companies are owned by Mr. Ricky Lanier, uncle of Mr. Kevin Lanier. Appellant failed to provide any further ownership or revenue information for the three concerns. The Area Office found that Appellant is affiliated with Sydney's Care, Inc., The Foundations Project, and STC Services, LLC based on familial identity of interest. (*Id.* at 5-6.)

The Area Office proceeded to examine Appellant's affiliation with Lanier Construction Company, Inc. Appellant acknowledged that Messrs. Henry and Benjamin Lanier, uncles of Mr. Kevin Lanier, own Lanier Construction Company, Inc. (*Id.* at 6.) Appellant also alluded to business dealings between Appellant and Lanier Construction Company, Inc., such as a subcontracting agreement during 2012. (*Id.*) Appellant failed to provide any further ownership or revenue information for Lanier Construction Company, Inc. The Area Office found Appellant and Lanier Construction Company, Inc. affiliated based on familial identity of interest. (*Id.*)

Next, the Area Office examined Appellant's potential affiliation with Lanier Construction Management, Inc. Appellant acknowledged that Mr. Henry Lanier, uncle of Mr. Kevin Lanier, owns Lanier Construction Management, Inc. (*Id.*) Appellant was not forthcoming with any further information. Because of Mr. Kevin Lanier's familial relationship with Mr. Henry Lanier, the Area Office found affiliation between Appellant and Lanier Construction Management, Inc.

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<sup>1</sup> The Area Office noted that Appellant might be affiliated with two other companies — Global Construction, Inc. and Kinston Contracting, Inc. — which are also owned by family members of Mr. Kevin Lanier. (Size Determination at 3-4.) Appellant asserted, however, that both companies had been dissolved prior to Appellant's application to the 8(a) BD program. The Area Office declined to further explore the issue, as it would not affect the outcome of the case.

based on familial identity of interest. (*Id.*)

Lastly, the Area Office found that the situation here warrants application of an adverse inference. (*Id.* at 7-8.) The Area Office explained that Appellant failed to produce “basic ownership, organizational, and revenue information” for the alleged affiliates, thereby preventing the Area Office from performing a thorough review. (*Id.* at 7.) “Without any information from [Appellant] regarding the affiliated companies owned by Kevin Lanier's father, uncles, and aunts, [the Area Office] is unable to conduct a size determination and has no choice but to apply the adverse inference rule.” (*Id.* at 8.)

#### D. Appeal

On May 10, 2013, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant argues the Area Office erred in finding affiliation between Appellant and the concerns owned by Mr. Lanier's aunts and uncles. (Appeal, at 6.) Appellant relies on *Size Appeal of A.C. Trans Co., Inc.*, SBA No. SIZ-2144 (1995) and *Size Appeal of Agrigold Juice Products*, SBA No. SIZ-4136 (1996) to establish that affiliation does not arise solely from an uncle/nephew relationship. (*Id.*) Appellant maintains that that “ownership by an uncle does not, without more, create the presumption of affiliation sufficient to trigger the requirement to produce documentation.” (*Id.* at 7.)

Appellant challenges the Area Office's determination of affiliation between Appellant and Lanier Construction Company, Inc. Although the Area Office referenced certain ties between the companies beyond the family relationship between the owners, Appellant maintains that these ties are not of sufficient magnitude to give rise to economic dependence. (*Id.* at 8.)

Next, Appellant argues that the Area Office improperly failed to consider Global Construction, Inc. a former affiliate of Appellant. Appellant contends that Global Construction, Inc. was dissolved in April 2012, prior to Appellant's 8(a) BD application. As a result, Appellant argues that the Area Office erred in not finding Global Construction, Inc. Appellant's former affiliate.

Appellant further argues that the Area Office erred in applying the adverse inference rule. (*Id.* at 12.) Appellant states that, in order for an adverse inference to be appropriate, “there must have been a level of connection between the challenged concern from which the area office sought information.” (*Id.*) According to Appellant, there is no level of connection between Appellant and the alleged affiliates, because the Area Office did not identify significant ties between the companies other than the remote family relationships between the owners.

Appellant complains that the Area Office imposed “impossibly short deadlines” to provide information on the alleged affiliates. (*Id.*) Appellant states that the Area Office demanded complete financial and business data for the alleged affiliates on April 18, 2013, and afforded Appellant only a few hours to respond. Appellant argues that it was willing to cooperate with the Area Office throughout the size determination process, but that it was impossible for

Appellant to comply with the April 18 request for information within the designated time period. (*Id.* at 13.)

Lastly, Appellant argues that upholding this size determination would mean “that any firm which owner comes from a family of entrepreneurs is automatically affiliated with every other firm owned by a member of that family for size determination purposes” and thus creating a “chilling effect” upon entrepreneurial families attempting to conduct business with the Federal government. (*Id.* at 14-15.) Appellant concludes that the Area Office erred in finding affiliation between itself and the companies owned by Mr. Kevin Lanier's family members, and in applying the adverse inference rule.

### III. 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

SBA regulations provide that close family members are presumed to share an identity of interest. 13 C.F.R. § 121.103(f); *Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222, at 6 (2011). As Appellant correctly observes, however, a more remote family relationship — such as that between cousins or between an uncle and a nephew — is not, by itself, sufficient to give rise to an identity of interest. Rather, additional ties must be shown beyond the remote family relationship, such as extensive involvement with one another's business affairs. In *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257 (2011), for example, OHA found an identity of interest between cousins, but only after determining that the cousins shared considerable business ties. By contrast, in the instant case, Appellant asserts that the Area Office did not identify any significant ties between Appellant and the alleged affiliates, except for the remote family relationships between Mr. Kevin Lanier and his uncles and aunts. As a result, Appellant maintains, the size determination is defective and should be reversed.

The problem with Appellant's reasoning is that the Area Office was unable to fully explore the ties between the Lanier family members and their respective companies, because Appellant was not forthcoming with information on these matters. The record establishes that, in its sworn SBA Form 355, Appellant initially denied that any of the alleged affiliates were owned by family members of Mr. Kevin Lanier, even though DPCE's protest raised this exact issue. *See* Section II.B, *supra*. Shortly thereafter, Appellant submitted an unsworn letter acknowledging the family relationships between Mr. Kevin Lanier and the owners of the alleged affiliates, but remaining silent as to the possible existence of other ties. Appellant did not address, for instance, whether Appellant and the alleged affiliates share common management, employees, facilities, or

equipment; whether the firms provide financial or technical assistance to one another; or whether the firms collaborate to jointly perform contracts or projects. *Id.* Nor did Appellant submit an amended, or supplemental, SBA Form 355. When asked for additional information about the ownership and management of the alleged affiliates, and Appellant's connections with those concerns, Appellant replied that the affiliates' owners "are not willing to provid[e] any information about their company." *Id.* Thus, given the lack of information provided by Appellant, the Area Office was unable to consider whether there were other ties between Appellant and the alleged affiliates beyond the family relationships. Under SBA regulations and OHA case precedent, when a challenged firm fails to produce enough information to properly assess whether there are grounds for affiliation, an adverse inference may appropriately be applied. 13 C.F.R. §§ 121.1008(d) and 1009(d); *Size Appeal of DMI Educ. Training, LLC*, SBA No. SIZ-5275, at 8-9 (2011) (upholding adverse inference when challenged firm acknowledged connections with 17 other companies, but refused to identify any of those companies); *SolarCity*, SBA No. SIZ-5257, at 12-13 (adverse inference was proper when challenged firm did not disclose enough information to evaluate whether there were other affiliates). Further, it is the challenged firm's responsibility to persuade the Area Office that it is a small business. 13 C.F.R. § 121.1009(c). Accordingly, the Area Office reasonably applied an adverse inference in this case, and correctly concluded that Appellant had not shown itself to be a small business.

Appellant also contends that the Area Office failed to give Appellant sufficient time to respond to the information requests. Appellant points in particular to the Area Office's e-mail of April 18, 2013, which demanded a response later that same day. Section II.B, *supra*. Appellant's argument fails for two reasons. First, based on DPCE's protest, Appellant was well aware that Appellant was alleged to be affiliated with firms owned by family members of Mr. Kevin Lanier. Thus, the Area Office's e-mail of April 18 merely sought information that Appellant should already have provided in Appellant's response to the protest. Second, Appellant did not seek an extension of time to respond to the April 18 e-mail, and instead stated that the Lanier family members were unwilling to provide further information. *Id.* There is, therefore, no reason to believe that Appellant would have produced the requisite information had Appellant been granted a longer deadline. *Cf.*, *DMI*, SBA No. SIZ-5275, at 10 (rejecting allegation of insufficient time because "even with a longer timeframe, [the challenged firm] would not have submitted any more information than it actually did.").

Appellant also argues that Global Construction, Inc. was dissolved prior to Appellant's 8(a) BD application, and should therefore have been deemed a former affiliate of Appellant. This argument too is meritless. The size determination makes clear that the Area Office did not base its decision, in whole or in part, on Appellant's relationship with Global Construction, Inc. *See* footnote 1, *supra*.

#### IV. Conclusion

The instant appeal might have been meritorious if Appellant had shown that there were no significant ties between Appellant and the alleged affiliates other than the remote family relationships between the owners. The Area Office was unable to properly analyze this issue, however, due to the sparse and contradictory information provided by Appellant. Accordingly, Appellant has not demonstrated that the size determination is clearly erroneous. For these

reasons, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

KENNETH M. HYDE  
Administrative Judge