

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

SIZE APPEAL OF:

Crosstown Courier Service Incorporated,

Appellant,

RE: STAT Courier Service, Inc.

Appealed From
Size Determination No. 04-2014-022

SBA No. SIZ-5571

Decided: June 17, 2014

APPEARANCES

Jonathan T. Williams, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, D.C.
for Appellant

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Cresskill, New Jersey, for STAT Courier Service, Inc.

DECISION¹

I. Introduction

On April 4, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2014-22 finding that STAT Courier Service, Inc. (SCS) is an eligible small business for the procurement at issue. Crosstown Courier Service Incorporated (Appellant), which had previously protested SCS's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is granted and the size determination is affirmed in part and remanded in part.

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. The record reflects that Appellant

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. 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.

received the size determination on April 22, 2014, and filed the instant appeal within fifteen days thereafter, 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 November 26, 2013, the U.S. Department of Veterans Affairs issued Request for Quotations (RFQ) No. VA-260-14-Q-0001 for courier services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 492110, Couriers and Express Delivery Services, with a corresponding size standard of 1,500 employees. Quotations were due December 17, 2013. On February 19, 2014, the CO announced that SCS had been selected for award.

On February 21, 2014, Appellant filed a size protest alleging that SCS is acting as a “pass thru” for Medical Transportation Management, Inc. (MTM). (Protest at 1.) Appellant observed that the President and owner of SCS, Ms. Natasha Boekholt, is also Vice President of Operations at MTM. In addition, Appellant asserted, SCS will be dependent upon MTM to perform the contract, in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h). The CO forwarded Appellant's protest to the Area Office for consideration.

On March 19, 2014, SCS responded to the protest and provided a sworn SBA Form 355, corporate documents, and other information. With regard to Ms. Boekholt's connection with MTM, SCS stated:

[Ms.] Boekholt is the daughter of MTM founders and sister of MTM's CEO. [Ms.] Boekholt recently became [Vice President] of Operations at MTM as a family member in a family owned business. [Ms. Boekholt] is one of 17 members of the MTM Executive staff. [Ms. Boekholt] was gifted [XX]% non-voting ownership interest in MTM in December 2012, as w[ere] her 5 siblings as a result of estate planning.

(Protest Response at 2.) SCS further stated that it has performed courier services for MTM, and that MTM has performed call center services for SCS, but that these arrangements represent very small percentages of each company's revenues. (*Id.* at 4.) SCS denied any plans to engage MTM as a subcontractor for the instant procurement. (*Id.* at 3.)

SCS's Form 355 indicated that SCS currently has [XX] employees and has had, on average, [XX] employees over the preceding twelve months. (Form 355, responses to questions 10a and 10b.) SCS attached a worksheet to justify this calculation. According to SCS's Form 355, MTM has [XX] employees. (*Id.*, response to question 13c.)

B. Size Determination

On April 4, 2014, the Area Office issued Size Determination No. 04-2014-22 concluding

that SCS is an eligible small business for the instant procurement. The Area Office explained that Ms. Boekholt has the power to control SCS by virtue of her 100% ownership. (Size Determination at 2.)

The Area Office next discussed the connections between SCS and MTM. Ms. Boekholt serves as Vice President of Operations at MTM, and holds a modest ownership interest in MTM. Nevertheless, the Area Office found, Ms. Boekholt has no power to control MTM. The Area Office determined that “MTM's by-laws expressly provide that the Board of Directors controls and manages MTM's business,” and Ms. Boekholt is not a member of MTM's board. (*Id.* at 2- 3.) Furthermore, Ms. Boekholt has only a non-voting ownership stake in MTM, and her interest is too small to confer any measure of control. In addition, MTM has several other executives and officers besides Ms. Boekholt, and the Area Office found “no evidence that [Ms. Boekholt] can even exercise any influence on the direction or management of [MTM].” (*Id.* at 2.) As a result, the Area Office concluded, SCS is not affiliated with MTM through common ownership or common management.

The Area Office also found no affiliation through identity of interest, 13 C.F.R. § 121.103(f). While noting that Ms. Boekholt's sister is MTM's Chief Executive Officer, the Area Office explained that “there is no evidence that [[Ms. Boekholt] has the power to control MTM (see above). Without the ability to *control* both firms, an identity of interest does not create affiliation.” (*Id.* at 3, emphasis in original.) The Area Office quoted *Size Appeal of US Builders Group*, SBA No. SIZ-5519, at 6 (2013), for the proposition that “the affiliation question in an identity of interest case is whether, given the aggregated interests, one concern controls another.” (*Id.* at 4.)

The Area Office found no violation of the ostensible subcontractor rule because MTM will not be a subcontractor on the instant procurement. (*Id.*) The Area Office calculated that SCS's employees do not exceed the applicable size standard, so SCS is a small business for this procurement. (*Id.* at 5.)

C. Appeal

On April 29, 2014, Appellant appealed the size determination to OHA. Appellant contends that the Area Office inadequately analyzed the issue of identity of interest between family members.

Appellant states that Ms. Boekholt's parents, Lynn and Peggy Griswold, own MTM and serve as two of the three members of its board of directors. (Appeal at 3-4.) Furthermore, Ms. Boekholt's sister, Ms. Alaina Macia, is President and CEO of MTM. (*Id.* at 4.) Ms. Boekholt owns shares of MTM and works for MTM as its Vice President of Operations. (*Id.*) In addition, SCS and MTM conduct business with one another; operate in similar lines of business; and are tenants in the same office building. Appellant asserts that the building itself also is owned by the Griswold family. (*Id.*)

In Appellant's view, “[o]n these facts, there should be no question that [SCS] and MTM are affiliated through their familial identity of interest.” (*Id.* at 2.) The size determination,

though, barely mentions the family relationships, and does not address how SCS could have rebutted the presumption of affiliation in 13 C.F.R. § 121.103(f) given the many circumstances that show a lack of estrangement and close business connections. Appellant asserts that “the Area Office provided no meaningful analysis of familial identity of interest affiliation in the size determination, which was clear error.” (*Id.* at 6.)

Attached to its appeal petition, Appellant moves to introduce new evidence, which Appellant describes as “readily available public information about [SCS] and MTM.” (*Id.* at 3.) Appellant maintains that this evidence “should already be contained in the record, but much of it was left out of the size determination.” (Motion at 3.)

D. SCS Response

On May 15, 2014, SCS responded to the appeal. SCS contends that the appeal should be dismissed or denied for three reasons.

First, even assuming SCS and MTM are affiliated, the two companies together do not exceed the applicable size standard of 1,500 employees. SCS references its sworn SBA Form 355, which indicated that SCS has [XX] employees and MTM has [[XX] employees. (Response at 2.) The Area Office did not question the employee count of either company. Because SCS and MTM together do not exceed the size standard, SCS urges OHA to “summarily dismiss this appeal as moot.” (*Id.*)

Second, SCS emphasizes that OHA will not entertain new substantive arguments raised for the first time on appeal. Here, the appeal focuses entirely on affiliation through family relationships, an issue not raised in Appellant's protest. (*Id.*) Although the size determination discussed affiliation through identity of interest, the applicable regulation — 13 C.F.R. § 121.103(f) — indicates that family relationships are only one of several possible grounds for an identity of interest. As a result, SCS maintains, “the gravamen of the Area Office's decision below does not depend on family relationships at all.” (*Id.* at 3.)

Third, SCS argues that the Area Office correctly determined that SCS and MTM are independent companies and are not affiliated. In addition, OHA has held that a minimal amount of business activity between two concerns does not preclude a finding of clear fracture. (*Id.* at 6, citing *Size Appeal of GPA Techs., Inc.*, SBA No. 5307 (2011).). “As such, OHA should find, if necessary, that a clear line of fracture does exist between MTM and [SCS] given that they do not, and cannot, control each other.” (*Id.* at 7.)

SCS opposes Appellant's motion to supplement the record because “(i) the family affiliation issue is moot since [SCS] and MTM are small even if affiliated, [[and] (ii) the family affiliation issue is outside OHA's jurisdiction since it was not raised below.” (*Id.*) Alternatively, in the event that OHA nevertheless accepts the new evidence, SCS contends that some of the exhibits are irrelevant and too old to have any probative value.

E. Supplemental Appeal

On May 15, 2014, after reviewing the record under the terms of an OHA protective order, Appellant moved to supplement its appeal.

Appellant reiterates its contention that “the Area Office committed a clear error by failing to analyze familial identity of interest in the size determination.” (Supp. Appeal at 1.) According to Appellant, the record establishes that members of the Griswold family control both SCS and MTM. As a result, the Area Office should have applied a rebuttable presumption of affiliation pursuant to 13 C.F.R. § 121.103(f). Had the Area Office done so, the Area Office could only conclude that the presumption was not rebutted, because the family members here “are not estranged and have not fractured their business relationships. Quite the opposite, the Griswolds run their family of companies collectively, including by giving the family members roles in both firms.” (*Id.* at 3.)

Appellant asserts that the Area Office further erred in accepting SCS's reported employee count without obtaining supporting documentation, such as payroll records. SCS reported [XX] employees on its SBA Form 355, and Appellant questions whether SCS could successfully perform the instant contract with so limited a workforce. (*Id.* at 5-6.) Appellant posits that “drivers and couriers are often independent contractors,” and that the Area Office “should have looked into whether [SCS] uses independent contractors and if [SCS] included those individuals as part of its employee count.” (*Id.* at 6.)

Appellant also complains that SCS did not fully apprise the Area Office of all potential affiliates, such as other companies owned and controlled by Lynn and Peggy Griswold. Appellant claims that “simple internet searches” reveal that the Griswolds are associated with a number of other concerns, including LPG Acquisitions, LLC; LPG Ambulance Services, LLC; LPG Sales & Leasing, LLC; LPG Enterprises, LLC; and LPG Holdings, Inc. (*Id.* at 7.)

As relief, Appellant asks that OHA reverse the size determination and hold that SCS and MTM are affiliated based on familial identity of interest. (*Id.* at 8-9.) OHA must, however, remand to the Area Office the question of SCS's small business status, because “it is not clear how many employees work for [SCS] and MTM, whether both firms are including independent contractors in their employee counts, or how many employees work for the various other companies affiliated with [SCS] and MTM through the Griswolds and the other principals of MTM.” (*Id.*)

F. SCS Supplemental Response

SCS requested, and was granted, leave to respond to the supplemental appeal, and on May 21, 2014 filed its supplemental response.

SCS argues that “[n]either Appellant's protest to the Area Office, nor its petition for appeal, alleged that [SCS's] couriers should be treated as employees rather than independent contractors.” (Supp. Response at 2.) Therefore, OHA should disregard this argument as

untimely. Even if timely, Appellant's argument is meritless, because unsupported speculation about SCS's workforce cannot overcome the sworn statements in SCS's SBA Form 355.

SCS insists that, contrary to Appellant's arguments, “the business interactions between [SCS] and MTM are minimal and do not result in affiliation by family relationship.” (*Id.* at 3.) Moreover, the record supports the Area Office's conclusion that SCS and MTM operate in different lines of business, do not rely upon each other for significant revenues, and do not control one another. (*Id.* at 5.)

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

Having reviewed the record and the arguments of the parties, I must agree with Appellant that the Area Office's analysis of the identity of interest rule was flawed. In particular, the Area Office focused solely on whether Ms. Boekholt alone could control MTM, but essentially ignored the family relationships that may give rise to an identity of interest. SCS's response to the protest revealed that Ms. Boekholt is the daughter of MTM's founders and the sister of MTM's CEO, and characterized Ms. Boekholt's role at MTM as “a family member in a family owned business.” *See* Section II.A, *supra*. In addition, SCS stated that Ms. Boekholt's five siblings also hold ownership interests in MTM. *Id.* Thus, while the Area Office correctly determined that Ms. Boekholt could not, by herself, control MTM, she conceivably might do so if her interests were combined with those of her family members, such as parents or siblings. In, for example, *Size Appeal of SolarCity Corporation*, SBA No. SIZ-5257 (2011), OHA aggregated interests of family members to analyze control, and concluded that the family members collectively held a sufficiently large block of stock to control the challenged firm. Thus, the real issue here is not whether Ms. Boekholt alone has the power to control MTM. Rather, after learning of the close family relationships between the principals of SCS and MTM, the Area Office should have considered who does control MTM, and if MTM is controlled by close relatives of Ms. Boekholt, whether there is sufficient evidence of clear fracture to overcome the presumption of identity of interest, 13 C.F.R. § 121.103(f).

SCS contends that Appellant is precluded from arguing the question of affiliation through family relationships because Appellant's protest did not specifically allege affiliation on this basis. It is settled law, however, that a protester “has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest.” *Size Appeals of BA Urban Solutions, LLC, et al.*, SBA No. SIZ-5521, at n.5 (2013)

(quoting *Size Appeal of Professional Performance Development Group, Inc.*, SBA No. SIZ-5398, at n.1 (2012)). Thus, Appellant is not barred from arguing affiliation through family relationships, because that issue is discussed in the size determination. Nor was it improper for the Area Office to have considered the issue, as SBA regulations expressly permit an area office to investigate matters “not raised in the protest.” 13 C.F.R. § 121.1009(b). Furthermore, SCS's suggestion that the size determination addressed only identity of interest but not family affiliation is unpersuasive. Although it is true that identity of interest may arise through various other grounds — such as economic dependence or common investments — there is no indication here that any such alternate basis would be applicable.

SCS also argues that the appeal should be dismissed because, even if SCS is affiliated with MTM, the two firms together still do not exceed 1,500 employees. *E.g.*, *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected the outcome). This argument fails because it assumes that there are no other possible affiliates that could influence the employee count. It is notable in this regard that, according to Appellant, Griswold family members are associated with a number of other entities, including LPG Acquisitions, LLC; LPG Ambulance Services, LLC; LPG Sales & Leasing, LLC; LPG Enterprises, LLC; and LPG Holdings, Inc. *See* Section II.E, *supra*.

The parties also debate whether or not a clear fracture has been demonstrated on the existing record. SCS emphasizes that *de minimis* business dealings will not preclude a finding of clear fracture, whereas Appellant points to additional ties beyond the business dealings, such as Ms. Boekholt's position at MTM and the fact that SCS and MTM are both located in an office building purportedly owned by the Griswold family. I find it appropriate to remand this question for further analysis and investigation. In *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5442 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR), OHA concluded that it was improper to find an identity of interest through family relationships without permitting the challenged firm an opportunity to rebut the presumption of identity of interest. Similarly, in the instant case, it does not appear that SCS was specifically notified of the presumption of affiliation and given the opportunity to address the issue. As SCS observes in its response to the appeal, family affiliation was not the basis for Appellant's protest, and the issue therefore was not discussed in detail in SCS's protest response.

C. Remand

On remand, the Area Office should solicit a narrative response from SCS as to whether MTM is controlled by close family members of Ms. Boekholt, and whether SCS is affiliated with MTM on the basis of family relationships pursuant to 13 C.F.R. § 121.103(f). If the Area Office does find affiliation, the Area Office should determine whether the combined size of SCS, MTM, and any other affiliates exceeds 1,500 employees.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The Area Office clearly erred in its analysis of identity of interest, and that issue is REMANDED to the Area Office for further

review and investigation. The size determination otherwise is affirmed. In light of this outcome, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *Size Appeal of DefTec Corporation*, SBA No. SIZ-5540, at 9 (2014); *Size Appeal of Patriot Constr., Inc.*, SBA No. SIZ-5439, at 5 (2013) (recognizing that the proponent “may submit [the new] information to the Area Office for consideration as part of the remand process”).

KENNETH M. HYDE
Administrative Judge