

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

SIZE APPEAL OF:

MCH Corporation,

Appellant,

RE: Synergy Solutions, Inc.

Appealed From

Size Determination No. 3-2014-064

SBA No. SIZ-5605

Decided: October 15, 2014

APPEARANCES

G. Gerard Jabaley, Esq., Ashley R. Griffith, Esq., Wimberley Lawson Wright Daves & Jones, PLLC, Knoxville, Tennessee, for Appellant

Isaias “Cy” Alba, IV, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, D.C., for Synergy Solutions, Inc.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On July 25, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2014-064, finding that Synergy Solutions, Inc. (Synergy) is a small business under the size standard associated with the instant procurement. MCH Corporation (Appellant), which had protested Synergy's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted, and the size determination is 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. 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.

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<sup>1</sup> This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205(f), OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

## II. Background

### A. Solicitation and Protest

On September 23, 2013, the U.S. Department of Energy issued Request for Proposals (RFP) No. DE-SOL-0005724 for technical and administrative support services. The Contracting Officer (CO) set aside the procurement entirely for participants in the 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 561110, Office Administrative Services, with a corresponding size standard of \$7 million average annual receipts.

On June 24, 2014, the CO announced that Synergy was the apparent awardee. On June 30, 2014, Appellant, an unsuccessful offeror, protested Synergy's size. Appellant alleged that Synergy is affiliated with PAI Corporation (PAI), New Milan Partnership (NMP), Triple Canopy, Inc. (TCI), the Vietnamese American Scholarship Foundation (VASF), the Fund for Encouragement of Self-Reliance (FESR), and the Institute for Vietnam Future Foundation (IVFF). Appellant maintained that Synergy is affiliated with these concerns through common ownership, common management, the newly organized concern rule, familial identity of interest, economic dependence, and the totality of the circumstances. With regard to PAI, Appellant contended that PAI and Synergy share contracts, are located in the same building owned by NMP, and that Synergy is a spin-off of PAI and has been managing PAI's operations. Appellant submitted more than 900 pages of argument and evidence.

### B. Size Determination

On July 25, 2014, the Area Office issued Size Determination No. 3-2014-064, finding that Synergy is a small business and is not affiliated with any of the concerns alleged in Appellant's protest.

The Area Office explained that Ms. Thu-Anh L. Nelson owns 100% of Synergy, serves as the company's President, Secretary, Treasurer, and is the sole member of Synergy's board of directors. (Size Determination at 3.) Ms. Nelson has the power to control Synergy by virtue of her ownership interest. (*Id.*)

The Area Office next determined that PAI is 51% owned by Ms. Nelson's mother, Ms. Thu-Le Doan, and 49% owned by her father, Dr. Doan L. Phung. Although Ms. Doan and Dr. Phung are now divorced, the Area Office found that they share a familial identity of interest, such that their interests are aggregated. (*Id.*) As a result, Ms. Nelson's parents jointly control PAI. PAI is “currently a non-operating entity” but has not been formally dissolved. (*Id.*)

The Area Office did not address whether Ms. Nelson has a familial identity of interest with her parents. The Area Office noted, however, that Ms. Nelson has had no contact with Dr. Phung for more than a year. (*Id.* at 3-4.) The Area Office did not state whether Ms. Nelson is estranged from Ms. Doan.

The Area Office determined that PAI and Synergy are not affiliated through the newly organized concern rule. Ms. Nelson, the Area Office explained, has never held an ownership interest in PAI and has never been a key employee of PAI, although she did work at PAI from 1995 to 2003. (*Id.* at 4.) Furthermore, Synergy was founded in 2003 and is not a new entity. Thus, because Ms. Nelson was never a key employee of PAI, and because Synergy is not newly organized, there is no affiliation under the newly organized concern rule. (*Id.* at 3-5.)

The Area Office next addressed the allegation that Synergy and PAI have business dealings with one another. Since 2011, the Area Office determined, PAI subcontracted only once to Synergy, and the resultant revenue made up only 1% of Synergy's annual receipts. Because this contracting was *de minimis*, there is no affiliation through economic dependence. (*Id.* at 4.)

The Area Office also dispatched of Appellant's claim that Synergy and PAI are co-located in NMP's building. Although this previously was true, Synergy signed a new lease in 2012 with an entity unrelated to Ms. Nelson's parents or their foundations. (*Id.*)

The Area Office explained that VASF, FESR, and IVFF are non-profits in which Ms. Nelson has no ownership interest. Furthermore, neither Synergy nor Ms. Nelson has any connection to TCI. (*Id.* at 3.) NMP, the Area Office stated, dissolved in 2011, and Ms. Nelson donated her ownership interest in NMP to VASF. Because NMP dissolved before the date for determining size, NMP is, at most, a former affiliate of Synergy. (*Id.*)

The Area Office then calculated Synergy's size. For the years 2011, 2012, and 2013, Synergy's average receipts do not exceed the \$7 million size standard, so Synergy is a small business.<sup>2</sup> (*Id.* at 5.)

### C. Appeal

On August 7, 2014, Appellant filed the instant appeal with OHA, and requested a protective order so that Appellant's counsel could access the Area Office record. Appellant alleges nine errors of fact and law, and contends that these errors warrant reversal of the size determination.

Appellant takes issue with the fact that the Area Office allowed Synergy extra time to respond to the protest. While SBA regulations permit an area office to grant an extension of time to file the Form 355, Appellant argues that there is no provision for a challenged firm to file additional documents once the Form 355 is submitted. (Appeal at 3.)

Second, Appellant argues, it is unclear from the size determination whether Synergy submitted the SBA Form 355 within three working days, as 13 C.F.R § 121.1008(c) stipulates. The size determination also is silent as to whether the Area Office deemed the submission timely. (*Id.* at 4.)

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<sup>2</sup> The Area Office initially misstated the size standard as \$10 million. The Area Office subsequently corrected and reissued the size determination with the \$7 million size standard.

Next, Appellant contends that it was clear error for the Area Office to find that PAI and NMP are former affiliates of Synergy. Appellant cites OHA precedent for the proposition that “if the liquidation or dissolution was not completed prior to the date as of which size is determined, the firm is not a former affiliate.” (*Id.* at 5, quoting *Size Appeal of Hallmark- Phoenix 8, LLC*, SBA No. SIZ-5046 (2009).) Here, Appellant argues, the size determination specifically states that PAI has not yet been dissolved. Thus, PAI cannot be a former affiliate.<sup>3</sup>

Fourth, Appellant takes issue with the Area Office's incorrect reference to the \$10 million size standard. While the Area Office corrected and retransmitted the size determination, Appellant argues that analyzing Synergy's size under the wrong size standard “made the majority of the legal arguments and facts appear moot.” (*Id.* at 7.) Moreover, creating more than one version of a size determination is unusual and constitutes clear error. (*Id.* at 6-7.)

Fifth, Appellant argues the Area Office disregarded relevant evidence submitted by Appellant, contravening SBA Standard Operating Procedure (SOP) 90 01 3, Size Determination Program, Ch. 5, ¶ 7. In particular, the Area Office clearly erred in its analysis of familial identity of interest between Ms. Nelson and her parents. (*Id.* at 8.) In Appellant's view, the Area Office should have considered that Ms. Nelson resides with her mother, Ms. Doan, and that the addresses for Ms. Nelson's home, FESR, PAI's corporate secretary, and Synergy are identical. (*Id.* at 8-9.) The Area Office also should have discussed that Ms. Nelson has received tax notices and information for PAI's private foundations, represented PAI for many years after her resignation, and manages Synergy's books with Ms. Doan's assistance. (*Id.* at 9-10.) Appellant complains that “[g]iven the presence of identity of interest between [Ms.] Nelson's parents, as stated in the determination, it was clearly an error not to discuss this evidence as required by SBA procedure (SBA SOP 90 01 3) and to at least attempt to describe, in writing, the logical reasoning regarding that identity of interest not extending to [Ms.] Nelson.” (*Id.* at 10.)

Sixth, the Area Office ignored the protest allegation that Synergy and PAI share a common manager, Ms. Kimberlee Davis, who has substantial responsibilities and significant control over both companies. The Area Office also failed to address the allegation that Synergy and PAI are completing a merger, which is why PAI's revenues have declined. (*Id.* at 11.)

Seventh, the Area Office relies on facts that undermine its legal conclusions and support the protest allegations. One example Appellant offers is the fact that Ms. Nelson “resigned in 2003” from PAI. This statement, Appellant argues, “offers no value in assessing whether [Ms.] Nelson . . . still works for PAI.” (*Id.* at 13.) Appellant asserts that Ms. Nelson continued to represent PAI in a business development role after 2003, which further demonstrates familial identity of interest. Another example of facts that do not support the Area Office's conclusion is the statement that “in 2012 Synergy executed a new three year lease agreement to rent office space from an . . . entity not related to Ms. Nelson's parents.” (*Id.* at 15.) Appellant contends that this statement is irrelevant to the allegation that Synergy and PAI have common addresses. If anything, the notion that Synergy is no longer paying rent to share an address heightens the possibility of familial identity interest. (*Id.* at 14-15.)

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<sup>3</sup> Appellant does not explain why it was erroneous to find NMP to be a former affiliate.

Eighth, Appellant takes issue with the Area Office's finding that Synergy is not affiliated with NMP. In Appellant's view, the Area Office did not adequately examine Ms. Nelson's transfer of her interest in NMP. Appellant argues this fact is relevant to whether Ms. Nelson and her mother have an identity of interest. (*Id.* at 16.)

Appellant's final assignment of error is that the Area Office failed to comply with 13 C.F.R § 121.1009(b), which instructs that “[t]he size determination will be based primarily on the information supplied by the protestor. . . .” Here, Appellant contends, there is almost no discussion of the evidence Appellant offered in exhibits. (*Id.* at 17-18.)

#### D. Synergy's Response

On August 26, 2014, Synergy responded to the appeal. Synergy argues that no clear errors of fact or law have been demonstrated, so OHA should deny the appeal.

According to Synergy, Appellant “dedicates the bulk of its appeal to discussing what it believes to be ‘procedural errors.’” However, Synergy argues, “these alleged errors . . . have no merit whatsoever.” (Response at 1.)

Synergy challenges Appellant's reliance on SOPs, and insists that they are not legal authority. Thus, the argument that the Area Office did not comply with SOPs is irrelevant. (*Id.* at 3.)

Synergy addresses Appellant's complaint that Synergy submitted information after it had already submitted its SBA Form 355. Appellant, Synergy argues, cites no legal authority prohibiting Synergy from supplementing its response. Synergy adds that area offices frequently have additional questions that must be addressed before a size determination can be rendered. Synergy then explains that it timely submitted the Form 355. (*Id.* at 4.)

Synergy argues that the Area Office did, in fact, consider the allegation that Synergy and PAI share Ms. Davis as a key employee. Synergy states that, in its response to the protest, Synergy represented that Ms. Davis worked for PAI before starting with Synergy, but that the two firms have never shared her as an employee. (*Id.*, citing Protest Response at 16.) Synergy also addresses why Ms. Nelson represented PAI after her resignation. As Synergy stated in its response to the protest, Ms. Nelson was representing PAI under an arms-length subcontract to provide business development support. (*Id.* at 4-5, citing Protest Response at 16.)

Appellant's complaint about the incorrect size standard, Synergy argues, is “completely baseless.” Appellant's belief that the error somehow rendered the Area Office's analysis invalid is erroneous. (*Id.* at 5. n.2) As for the complaint that Synergy did not refute the allegation regarding identical addresses, Synergy retorts that it did exactly that. (*Id.* at 5, citing Protest Response at 22.) Further, Synergy argues, Ms. Nelson's transfer of her interest in NMP demonstrates that she has no ability to control NMP. As such, Synergy and NMP are not affiliated. (*Id.*)

Synergy then addresses Appellant's argument that the Area Office did not adequately consider whether Ms. Nelson and her parents have a familial identity of interest. Synergy

contends the Area Office did presume a familial identity of interest, but found a clear line of fracture between Synergy and the alleged affiliates. As a result, the presumption of identity of interest was rebutted. (*Id.* at 6.)

In any event, Synergy contends, the record clearly establishes that Synergy and the alleged affiliates have no power to control one another. To support this argument, Synergy reiterates representations it made in its response to the protest. (*Id.*, citing Protest Response at 2, 8, 19, 22, 31, 37.)

### 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 did not adequately examine the alleged identity of interest between Ms. Nelson and her parents, Ms. Doan and Dr. Phung. As Appellant emphasizes, the Area Office determined that Ms. Nelson's parents share a familial identity of interest with one another. *See* Section II.B, *supra*. The Area Office did not address, however, whether Ms. Nelson similarly has an identity of interest with her parents. *Id.* It is well-settled that identity of interest may exist between a parent and child. *E.g.*, *Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014) (finding identity of interest between father and son). Moreover, pursuant to 13 C.F.R. § 121.103(f), a close family relationship gives rise to a presumption of affiliation, which then may be rebutted. The presumption of affiliation 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). In this case, Appellant's protest alleged affiliation through familial identity of interest and highlighted in particular Ms. Nelson's relationship with Ms. Doan, but there is no indication that the Area Office applied the presumption of affiliation or considered whether the presumption had been rebutted. As a result, it is appropriate to remand this matter for further review and investigation. *E.g.*, *Size Appeal of Crosstown Courier Service, Inc.*, SBA No. SIZ-5571 (2014) (remanding for further consideration of familial identity of interest).

Synergy maintains that the Area Office did presume a familial identity of interest, yet found a clear line of fracture. Such analysis, though, is completely absent from the size determination, and Synergy's response to the protest likewise did not argue against the presumption of affiliation. It therefore is not evident from the record that the Area Office considered the issue at all or that Synergy has had the opportunity to argue that there is clear

fracture.

Apart from the issue of familial identity of interest, I find no merit to this appeal. The procedural irregularities Appellant identifies are trifling, and Appellant has not demonstrated that such irregularities might have altered the substance of the Area Office's analysis. Further, the Area Office did address Appellant's remaining protest allegations, and was not required to explore other potential grounds for affiliation beyond those raised in the protest. *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012).

#### IV. Conclusion

For the above reasons, the appeal is GRANTED. The Area Office clearly erred in its analysis of familial identity of interest, and that issue is REMANDED to the Area Office for further review and investigation. The size determination otherwise is affirmed.

KENNETH M. HYDE  
Administrative Judge