**DECISION FOR PUBLIC RELEASE**

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

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| SIZE APPEAL OF:<br><br>MCH Corporation,<br><br>Appellant,<br><br>RE: Synergy Solutions, Inc.<br><br>Appealed From<br>Size Determination No. 3-2015-012 | SBA No. SIZ-5622<br><br>Decided: December 8, 2014 |

## APPEARANCES

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[1]

### I. Introduction and Jurisdiction

On October 23, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2015-012, finding that Synergy Solutions, Inc. (Synergy) is a small business under the size standard associated with the subject procurement. On October 29, 2014, MCH Corporation (Appellant), which had previously protested Synergy's size, appealed the size determination to SBA's Office of Hearings and Appeals (OHA). Appellant argues that the size determination is clearly erroneous, and urges OHA to reverse or remand. 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

[1] 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.

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. Business Relationships

The following facts are undisputed.

The challenged firm, Synergy, is a participant in the 8(a) Business Development (BD) program. Synergy is wholly-owned by Ms. Thu-Anh L. Nelson. She is also Synergy's President, Secretary, Treasurer, and sole member of the board of directors.

PAI Corporation (PAI) is 51% owned by Ms. Nelson's mother, Ms. Thu-Le Doan, and 49% owned by her father, Dr. Doan L. Phung. Ms. Doan and Dr. Phung are now divorced. PAI is a non-operating entity but has not been formally dissolved.

Ms. Doan and Dr. Phung control several nonprofits: the Vietnamese American Scholarship Foundation (VASF), the Fund for Encouragement of Self-Reliance (FESR) and the Institute for Vietnam Future Foundation (IVFF).

### B. 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 8(a) BD participants, 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, New Milan Partnership (NMP), Triple Canopy, Inc. (TCI), VASF, FESR, and 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 and are located in the same building owned by NMP. Further, Appellant asserted, Synergy is a spin-off of PAI and has been managing PAI's operations. Appellant submitted more than 900 pages of argument and evidence.

### C. Prior Size Determination and Remand

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 determined that Ms. Nelson controls Synergy through her ownership interest. 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. As a result, Ms. Nelson's parents jointly control PAI. (Size Determination No. 3-2014-064, at 3.)

The Area Office determined that PAI and Synergy are not affiliated under the newly organized concern rule, 13 C.F.R. § 121.103(g) 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 through 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. In addition, 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 annual receipts do not exceed the $7 million size standard, so Synergy is a small business. (*Id*. at 5.)

In Size Determination No. 3-2014-064, 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.)

Appellant appealed Size Determination No. 3-2014-064 to OHA on August 7, 2014. On October 15, 2014, OHA issued its decision in *Size Appeal of MCH Corp*., SBA No. SIZ-5605 (2014) (*MCH Corp. I*). Although rejecting many of Appellant's arguments, OHA agreed with Appellant that the Area Office should have considered whether the identity of interest between Ms. Doan and Dr. Phung also extended to their daughter, Ms. Nelson. OHA noted in particular that Appellant's protest alleged identity of interest between Ms. Nelson and Ms. Doan, but the size determination was silent on this question. *MCH Corp. I*, SBA No. SIZ-5605, at 7. Therefore, because it was not evident from the record that the Area Office had fully considered familial identity of interest, OHA remanded that issue to the Area Office for further review. OHA otherwise affirmed the size determination. *Id*.

## D. The Instant Size Determination

On October 23, 2014, the Area Office issued Size Determination No. 3-2015-012, again concluding that Synergy is a small business with no affiliates. The Area Office recounted its findings from the previous size determination, and explained that Ms. Nelson presumably shares a familial identity of interest with her parents, Ms. Doan and Dr. Phung. However, Ms. Nelson is estranged from her father, Dr. Phung. Furthermore, the Area Office determined, Synergy rebutted the presumption of identity of interest by demonstrating clear fracture between Synergy and PAI.

The Area Office stated that "a minimal amount of economic or business activity between two concerns does not prevent a finding of clear fracture." (Size Determination No. 3-2015-012 at 3-4, citing *Size Appeal of GPA Techs., Inc*., SBA No. SIZ-5307 (2011).) In this case, Synergy and PAI no longer do business together and are not co-located, so the presumption of identity of interest was rebutted. The Area Office did not find or discuss any connection between Synergy and the nonprofits.

## E. Appeal

On October 29, 2014, Appellant filed the instant appeal with OHA. Appellant argues that Size Determination No. 3-2015-012 is flawed, and requests that OHA reverse or, in the alternative, remand to the Area Office for additional investigation. (Appeal at 14-15.)

Appellant argues that the Area Office committed two principal errors. First, the Area Office should have found that NMP, VASF, FESR, IVFF are affiliated with PAI based on common ownership by Ms. Nelson's parents. 13 C.F.R. § 121.103(a)(1). Appellant claims that, according to FESR's 2012 tax information, IVFF is FESR's asset and PAI its liability, and VASF, FESR, and IVFF are "sister organizations." (Appeal at 6-7.)

Moreover, Appellant continues, VASF and FESR are also affiliated with Synergy. On this point, Appellant argues that FESR uses Ms. Nelson's home address to receive applications for funds and that Ms. Doan, as VASF's trustee, lists Ms. Nelson's home address as a business address. Appellant reasons that, because PAI and Synergy are both affiliated with VASF and FESR, PAI and Synergy are therefore affiliated. (*Id*. at 8.)

Appellant's second assignment of error is that the Area Office did not properly consider the familial relationship between Ms. Nelson and Ms. Doan, and that Synergy did not rebut the presumption of identity of interest. Appellant repeats that Ms. Doan and Ms. Nelson share an address, Synergy and PAI are in the same line of business, Synergy has subcontracted work to PAI, Ms. Nelson previously worked at PAI, and Synergy and PAI were co-located from 2003 to 2011. (*Id*. at 9-12.) Although some of these ties no longer exist, Appellant argues that the Area Office was required to give weight to the historical connections. (*Id*. at 12, quoting *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5114, at 8 (2010), *recons. denied*, SBA No. SIZ-5128 (2010) (PFR).) Had the Area Office done so, Appellant argues, the Area Office could only have found no clear fracture between Ms. Nelson and Ms. Doan.

Appellant contends that the Area Office misconstrued *GPA Technologies*. In that case, Appellant argues, "OHA emphasized the need to look beyond minimal business activity and review a number of other factors." (*Id*. at 13.) Appellant argues that the historical factors it identified demonstrate that there is no clear fracture between Synergy and PAI. In addition, Appellant asserts, Synergy has the burden of proving clear fracture but has provided no such evidence. (*Id*. at 14.)

F. Synergy's Response

On November 14, 2014, Synergy responded to the appeal. Synergy argues that no clear errors of fact or law have been shown, so OHA should deny the appeal.

Synergy contends that the Area Office was correct to assess whether a clear fracture existed as of February 11, 2014, the date Synergy self-certified as small for the subject procurement. *Size Appeal of Innovative Constr. & Mgmt. Servs., LLC*, SBA No. SIZ-5202, at 7 (2011) (discussing the importance of pinpointing the date for determining size because "[a] firm's size may vary over time" and "[r]elationships with other firms may change in a manner that strengthens or weakens affiliation."). Further, Synergy argues, Appellant provides an incomplete discussion of the holding in *Jenn-Kans*. In the initial *Jenn-Kans* decision, OHA remarked that "to determine whether an identity of interest exists between the family members, it is necessary to examine the history of the firms" up to the date of self-certification. *Jenn-Kans*, SBA No. SIZ-5114, at 8. On reconsideration, though, OHA clarified that historical ties are only context for determining whether clear fracture occurred as of the date the challenged firm self-certified as a small business. *Size Appeal of Jenn-Kans, Inc*., SBA No. SIZ-5128, at 5 (2010) (PFR). For the same reason, Synergy contends, Appellant misapplies *GPA Technologies* in arguing that the historical relationship bears on the determination of whether there was clear fracture as of February 11, 2014. (Response at 4, n.2.)

Synergy next argues that the Area Office correctly found clear fracture between Synergy and PAI. The information Synergy submitted to the Area Office demonstrated that clear fracture existed as of February 11, 2014, because, by this date, Synergy derived no revenues from PAI; the firms did not share officers, employees, or facilities; and there was no common ownership, investments, financial interests, or loans between the firms. *Size Appeal of Trailboss Enters., Inc*., SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR) (summarizing criteria relevant to a clear fracture analysis). On these facts, it was reasonable for the Area Office to find clear fracture. (Response at 4-5.)

Synergy contends that, although Appellant points to evidence suggesting that the nonprofit entities are affiliated with each other, Appellant offers no reason to believe that the nonprofit entities are connected to Synergy or Ms. Nelson. The only evidence Appellant cites to support a finding of affiliation between Synergy and the nonprofits is the fact that Ms. Doan receives mail at Ms. Nelson's home address. Synergy points out that this fact has already been considered twice by the Area Office, and found to be immaterial. Synergy then repeats its justification that "Ms. Doan 'has used [Ms. Nelson's home address] as a mailing address only, as she travels extensively for her charitable work and does not want mail to accumulate at her actual

residence in Las Vegas."' (*Id*. at 6, quoting Protest Response at 4.) In Synergy's view, Appellant misunderstands the standard for clear fracture. Synergy argues that it only needs to demonstrate a lack of business relationships between Synergy and the nonprofit entities. Synergy does not also need to establish that Ms. Nelson and Ms. Doan are completely uninvolved in each other's lives.

Clear fracture exists between Synergy and the nonprofit entities, Synergy argues, because neither Synergy nor Ms. Nelson has any ownership interest in the nonprofit entities. Further, Synergy does not share facilities with the nonprofit entities, and the Area Office determined that Synergy does rent space from them either. As a result, in Synergy's view, there is no merit to Appellant's argument that the Area Office did not adequately consider whether there was clear fracture between Synergy and the nonprofits. More in-depth discussion of this issue would be fruitless, Synergy maintains, because the record supports the Area Office's conclusion that Synergy has no affiliates. (*Id*.)

### G. New Evidence

On November 14, 2014, the date of the close of record, Appellant moved to supplement the record with new evidence. Specifically, Appellant seeks to introduce a statement by Ms. Sandy C. Lewis, who previously worked at Synergy from 2005 to 2009; Ms. Lewis's performance review for the period October 2006 to December 2007; and an April 2009 email from Ms. Nelson to Ms. Lewis and another individual. Appellant argues that there is good cause to admit this evidence because it demonstrates ties between Synergy and PAI, does not unduly enlarge the issues, and clarifies the facts and issues on appeal. Appellant states that it "did not submit the New Evidence during the Area Office's initial review of the case because [Appellant] was unaware that Ms. Lewis was employed with Synergy." (Motion at 3.)

Synergy opposes the motion. Synergy argues that it provided Ms. Lewis's resume to the Area Office in response to Appellant's protest, and Appellant's counsel had access to this document during the *MCH Corporation I* proceedings. Thus, contrary to Appellant's contentions, Appellant could have submitted the new evidence to the Area Office much sooner in the process. Moreover, the new evidence is irrelevant as it pertains to events that occurred in 2009 or earlier, "over five years prior to the date Synergy self-certified for the [instant procurement]." (Opposition at 3.)

## III. Analysis

### 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 that 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has not shown good cause to admit the new evidence. Appellant has not persuasively shown that it could not have submitted the new evidence to the Area Office with the protest or after the remand, and OHA has long held that it "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp*., SBA No. SIZ-5604, at 9 (2014). Moreover, the new evidence appears to have little, if any, relevance to the case. This is true because Synergy's size is determined as of February 11, 2014, but the new evidence pertains to events occurring in 2009 or earlier. *See* Section II.G, *supra*. As a result, it is not necessary to consider this new evidence in order to resolve the appeal. *Size Appeal of Eagle Consulting Corp., Inc*., SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR) (finding evidence to be inadmissible when it was probative only of issues that OHA did not reach). For these reasons, Appellant's motion to supplement the record is DENIED, and the proffered evidence is EXCLUDED.

C. Analysis

SBA regulations provide that:

> 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 has extensive case precedent interpreting this regulation as creating a rebuttable presumption that close family members have identical interests and must be treated as one person. *See, e.g., Size Appeal of Knight Networking & Web Design, Inc*., SBA No. SIZ-5561 (2014). 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 Carwell Prods., Inc*., SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of Tech. Support Servs*., SBA No. SIZ- 4794,

at 17 (2006).). "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." *Size Appeal of Trailboss Enters., Inc*. SBA No. SIZ-5442, at 6 (2013), *recons. denied,* SBA No. SIZ-5450 (2013) (PFR).

Based on this case law, I find no error in the Area Office's conclusion that Synergy demonstrated a clear line of fracture between itself and PAI. Although Synergy and PAI are presumed affiliated based on the family relationship between Ms. Nelson and her parents, the Area Office found that, as of the date for determining size, Synergy and PAI had no business dealings with one another, did not have common owners or managers, and did not share employees or facilities. *See* Section II.D, *supra*. Indeed, PAI was no longer even an operating entity. Section II.A, *supra*. As a result, the presumption of identity of interest was rebutted.

Appellant challenges this determination on the grounds that Synergy and PAI previously had more extensive ties. Appellant emphasizes that Synergy formerly derived revenues from PAI; that Synergy's principal, Ms. Nelson, was employed at PAI for several years; and that Synergy and PAI were located at the same address until 2011. As Synergy points out, though, affiliation in this case is determined as of February 11, 2014, the date of Synergy's self-certification, and none of these factors were still in existence as of that date. Accordingly, while Synergy and PAI may well have been affiliated in the past, Appellant falls short of proving the Area Office erred in concluding that clear fracture existed between Synergy and PAI as of February 11, 2014. *Size Appeals of Real Estate Resource Servs., Inc., et al*., SBA No. SIZ-5522, at 8-9 (2013) ( "OHA has repeatedly held that historic ties between a challenged firm and an alleged affiliate do not establish current affiliation when the historic ties no longer exist as of the date to determine size."); *Size Appeal of A & H Contractors, Inc*., SBA No. SIZ-5459 (2013); *Size Appeal of OBXtek, Inc*., SBA No. SIZ-5451 (2013).

Appellant also complains that the Area Office failed to consider whether Synergy is affiliated with the nonprofit entities. While it is true that the size determination offers no real analysis of this issue, Appellant's only argument on this point—that Ms. Doan receives mail on behalf of VASF and FESR at Ms. Nelson's home address—does not amount to a showing that Synergy and the nonprofits have an ongoing business relationship, or that Ms. Nelson and Synergy are somehow involved in the nonprofits' affairs. To the extent such an arrangement can be viewed as business activity, rather than a personal agreement between Ms. Nelson and Ms. Doan, it is *de minimus* and does not arise to a level that would prevent a finding of clear fracture. *E.g., Carwell Prods*., SBA No. SIZ-5507, at 8 (recognizing that "a minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture."). Thus, Appellant has not established reversible error in the size determination.

Lastly, I reject Appellant's contention that PAI and the nonprofit entities are affiliated with one another. Even if true, the issue is immaterial, as it does not affect whether any of these firms are affiliated with Synergy or whether the Area Office erred in finding that Synergy is a small business.

## IV. 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