

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Gregory Landscape Services, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2016-081

SBA No. SIZ-5793

Decided: November 28, 2016

APPEARANCE

Bethany Kellis, President, Gregory Landscape Services, Inc., Lexington, South Carolina

DECISION¹

I. Introduction and Jurisdiction

On September 12, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-081 concluding that Gregory Landscape Services, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains 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 for further review.

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.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA afforded Appellant 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.

II. Background

A. Solicitation and Protest

On March 10, 2016, the U.S. Army Contracting Command issued Invitation for Bids No. W9124G-16-B-0002 for grounds maintenance of airfields and stage fields at Fort Rucker, Alabama. The Contracting Officer (CO) set aside the procurement entirely for women-owned small businesses (WOSBs), and assigned North American Industry Classification System code 561730, Landscaping Services, with a corresponding size standard of \$7.5 million average annual receipts. Bids were opened on April 14, 2016, and the CO announced that Appellant was the apparent awardee.

On June 22, 2016, Draughon, LLC (Draughon), a disappointed bidder, filed a size protest against Appellant with the CO. Draughon alleged that a large business, NaturChem, Inc. (NaturChem), is “using [Appellant] as a vehicle to bid on WOSB set aside contracts”, and that Appellant is dependent upon NaturChem for “equipment and herbicide product.” (Protest at 2-3.) Draughon further contended that Appellant and NaturChem are affiliated because Rhett Kellis, who is married to Appellant's majority owner, is both an officer of Appellant and an employee of NaturChem. (*Id.* at 1-2.) The protest noted that Rhett Kellis also is related to NaturChem's owner. (*Id.* at 1.) The CO forwarded Draughon's protest to the Area Office for review.

On August 9, 2016, the Area Office dismissed the protest as untimely. However, after concluding that Draughon's protest raised valid concerns, the Area Director adopted Draughon's protest and directed that a size determination be performed on Appellant pursuant to 13 C.F.R. § 121.1001(a)(9)(iii). The Area Office informed Appellant that it would investigate whether “NaturChem is using [Appellant] to bid on WOSB set asides”, and whether “there are familial and ownership interests between [Appellant] and NaturChem, which may mean [Appellant] and NaturChem are affiliated.” (Letter from C. Thompson to B. Snyder (Aug. 10, 2016), at 1.)

In response to the Area Office's letter, Appellant acknowledged that Rhett Kellis is married to Appellant's majority owner, Bethany Kellis, and that Rhett Kellis is employed by NaturChem. Appellant asserted, however, that Appellant is controlled solely by Bethany Kellis, and that Rhett Kellis has not been an officer or employee of Appellant since 2013. (Letter from B. Kellis to S. Nirk (Aug. 12, 2016), at 1.) Appellant noted that Appellant and NaturChem “have separate offices, separate employees, and separate equipment”, and do not operate in the same line of business. (*Id.* at 1-2.) Appellant maintained that it would self-perform [XX]% of the instant procurement, but that Appellant planned to subcontract the remaining [XX]% to NaturChem or another company specializing in herbicide application. (*Id.* at 2.) Appellant vehemently denied that it acts as a pass-through vehicle for NaturChem. (*Id.* at 2-3.)

Upon reviewing the information provided by Appellant, the Area Office posed additional questions concerning Rhett Kellis's role at NaturChem, the business interests of Rhett Kellis's family members, and Appellant's dealings with NaturChem. (E-mail from S. Nirk to B. Kellis (Aug. 31, 2016)). Appellant responded to these questions on September 2, 2016.

B. Size Determination

On September 12, 2016, the Area Office issued Size Determination No. 3-2016-081, concluding that Appellant is not a small business.

The Area Office found that Bethany Kellis owns 51% of Appellant and her husband, Rhett Kellis, owns the remaining 49%. Bethany Kellis is Appellant's president and holds all of Appellant's other officer positions. Bethany Kellis and Rhett Kellis also own equal shares in two other companies, RBK Company, LLC (RBK) and Pine Straw Supply Company, LLC (PSS). (Size Determination, at 4.) In addition, Rhett Kellis is part owner of a real estate holding company called Kellis Joint Venture, LLC (KJV). Bethany Kellis does not have an ownership interest in KJV.

The Area Office found that Rhett Kellis is employed by NaturChem, a company owned by Rhett Kellis's parents and brother. Specifically, Rhett Kellis serves as NaturChem's Vice-President of Sales, supervising one employee. NaturChem has two other vice presidents aside from Rhett Kellis. (*Id.*) In response to the protest allegation that Appellant would rely upon NaturChem to perform the contract, Appellant stated that commercial herbicide application will be subcontracted to a company of Appellant's choosing, and Appellant's bid included documentation from both NaturChem and another small business, Kellis Vegetation Management, Inc. (KVM), which is owned by Zack Kellis, Rhett Kellis's cousin. (*Id.* at 4-5.) The Area Office concluded that Appellant planned to subcontract the herbicide portion of the procurement either to NaturChem or to KVM. Thus, “in either instance, [Appellant] is intent on subcontracting to a firm which is owned by family members of Rhett Kellis.” (*Id.*) The Area Office identified other business dealings between Appellant and NaturChem. Specifically, NaturChem hired Appellant to perform landscaping work at NaturChem's corporate office, as well as landscaping work for two NaturChem customers.

The Area Office explained that, as a married couple, Bethany and Rhett Kellis share an identity of interest, so their interests are aggregated and they are treated as one party. (*Id.* at 5-6, citing 13 C.F.R. § 121.103(f).) Therefore, both Bethany and Rhett Kellis have the power to control Appellant. Both also have the power to control RBK and PSS based on their stock ownership and familial identity of interest. (*Id.* at 6.) Appellant therefore is affiliated with RBK and PSS.

The Area Office next determined that Appellant is affiliated with KJV. Each of Rhett Kellis's parents owns [XX]% of KJV, and Rhett Kellis and his six siblings each own [XX]% of KJV. The Area Office stated that “[s]ince the owners of KJV are a father, mother and seven siblings and there appears to be no clear line fracture between them, they may be treated as one party with their interests aggregated.” (*Id.*)

With regard to NaturChem, the Area Office noted that Rhett Kellis's parents, Rom Kellis III and Robin Kellis, are the majority owners of NaturChem and have the power to control NaturChem. (*Id.* at 7.) Rhett Kellis's brother, Rom Kellis IV, holds the remaining minority interest in NaturChem. Rhett Kellis shares an identity of interest with his parents and brother based on their family relationship. The Area Office found that Appellant and NaturChem “share

a common employee (Rhett Kellis)”, and that “Rhett Kellis's business ([Appellant]) actively pursues business with his family's concern, NaturChem.” (*Id.*) In addition, as Vice President of Sales at NaturChem, Rhett Kellis “has a vested interest in assuring the success of NaturChem.” (*Id.*) Citing *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984), the Area Office found that Appellant is affiliated with NaturChem.

The Area Office determined that the combined average annual receipts of Appellant, RBK, PSS, KJV, and NaturChem exceed the applicable \$7.5 million size standard. (*Id.* at 8.) Therefore, Appellant is not a small business for this procurement.

C. Appeal

On September 26, 2016, Appellant filed the instant appeal. Appellant contends that the size determination is erroneous and should be reversed.

Appellant states that in 2013, Rhett Kellis decided to re-join NaturChem for the first time in close to a decade. However, Rhett Kellis holds no ownership interest in NaturChem, nor is he an officer of that company. (Appeal at 1-2.) Appellant disputes the notion that Appellant and NaturChem share common employees, arguing that Rhett Kellis's extensive job duties at NaturChem preclude him from doing any work for Appellant. Further, NaturChem has no involvement in Appellant's operations, management, or finances, nor does NaturChem provide any assistance to Appellant. (*Id.* at 2.) Appellant and NaturChem also perform different types of services, Appellant contends, which is why Appellant contemplated subcontracting a portion of the instant procurement to NaturChem. The Area Office's assertion that Appellant actively pursues business with NaturChem is false because Appellant engages in similar subcontracting work with many concerns. (*Id.* at 3.) Appellant highlights that during 2015, only 0.5% of its total gross revenue came from business dealings with NaturChem. This amount is far below the threshold needed to show economic dependence under 13 C.F.R. § 121.103(f).

Appellant disputes the Area Office's finding that NaturChem hired Appellant to provide herbicide applications for two of NaturChem's clients. Rather, Appellant states, NaturChem engaged Appellant to perform lawn maintenance for two clients. (*Id.* at 4.) Appellant further disputes the Area Office's statement that Appellant will subcontract herbicide work on the instant procurement to a company owned by Rhett Kellis's family members. Appellant explains that KVM is located close to where the instant procurement work will take place, so it made business sense for Appellant to seek a quote from a local business that could perform the specialized herbicide work. (*Id.* at 5.) Because KVM and NaturChem are competitors, Appellant argues, the suggestion that Appellant seeks to benefit members of Rhett Kellis's family is illogical. Appellant simply sought the best financial arrangement to provide the herbicide work in order to protect Appellant's own financial interests. (*Id.*)

Next, Appellant contends that Bethany and Rhett Kellis do not benefit financially from KJV, as it is “basically a shell company” used for real estate holdings. Appellant adds that Rhett Kellis has no involvement in KJV. (*Id.*) Since NaturChem and Appellant have separate financial interests, no affiliation between them exists, and the lack of financial ties establishes a clear line of fracture between Appellant and NaturChem. Appellant argues that the Area Office incorrectly

found the companies affiliated based on family ties that do not benefit Appellant financially. (*Id.* at 6.) Appellant maintains that revoking Appellant's WOSB status would severely harm Appellant's future business prospects, and requests that OHA reverse the size determination.

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 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. Analysis

SBA regulations create a rebuttable presumption that close family members have identical interests and will be treated as one person. 13 C.F.R. § 121.103(f); *Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014). The challenged firm may rebut this presumption by demonstrating “a clear line of fracture among the family members.” *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 8 (2013). OHA has held that it is improper to find an identity of interest under 13 C.F.R. § 121.103(f) without first permitting the challenged firm an opportunity to rebut the presumption of identity of interest. *Size Appeal of Crosstown Courier Serv. Inc.*, SBA No. SIZ-5571, at 7 (2014) (remanding case for further review because “it does not appear that [the challenged firm] was specifically notified of the presumption of affiliation and given the opportunity to address the issue”); *Size Appeal of Trailboss Enters., Inc.*, SBA No. SIZ-5442 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR). An opportunity for rebuttal is particularly important if the underlying size protest does not clearly raise the issue of identity of interest. *Id.*

In the instant case, neither Draughon's protest nor the Area Office's letter adopting that protest specifically raised the question of identity of interest. Section II.A, *supra*. Although Draughon's protest briefly noted that Rhett Kellis is related to NaturChem's owners, the protest did not allege affiliation on this basis, and instead focused on the relationship between Rhett Kellis and Bethany Kellis. *Id.* The Area Office's letter broadly indicated that the Area Office would examine “familial and ownership interests” between Appellant and NaturChem. *Id.* Based on Draughon's protest and the Area Office's letter, then, it does not appear that Appellant would have understood that the Area Office planned to examine whether Rhett Kellis shares an identity of interest with his parents and siblings. Moreover, the Area Office posed additional questions to Appellant after reviewing Appellant's protest response, but did not notify Appellant that it intended to presume an identity of interest between Rhett Kellis and his parents and siblings, nor offered Appellant an opportunity to rebut the presumption. *Id.* The issue is significant here because the Area Office seemingly based its determination of identity of interest, at least in part, on factual findings that Appellant disputes. The Area Office determined, for example, that Rhett Kellis is employed by both Appellant and NaturChem, a finding which Appellant insists is

factually incorrect. Sections II.B and II.C, *supra*. Similarly, whereas the Area Office determined that Appellant “actively pursues business” with NaturChem, Appellant contends that its business dealings with NaturChem are minor, and 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 RGB Group Inc.*, SBA No. SIZ-5351, at 7 (2012) (quoting *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011)). Accordingly, on this record, I cannot conclude that failure to offer Appellant the opportunity to rebut the presumption of identity of interest was harmless error.

IV. Conclusion

For the above reasons, the appeal is GRANTED, and the matter is REMANDED to the Area Office for further review. On remand, the Area Office should solicit a narrative response from Appellant as to whether Rhett Kellis shares an identity of interest with his parents and siblings, and whether Appellant is affiliated with NaturChem pursuant to 13 C.F.R. § 121.103(f).

KENNETH M. HYDE
Administrative Judge