

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

SIZE APPEAL OF:

ProSol Associates, LLC,

Appellant,

Appealed From
Size Determination No. 2-2016-072

SBA No. SIZ-5813

Decided: February 13, 2017

APPEARANCES

Sylvia Yi, Esq., Todd Overman, Esq., Bryan R. King, Esq., Bass Berry & Sims PLC,
Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On January 3, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 02-2016-72 finding ProSol Associates, LLC (Appellant) is not a small business concern.

Appellant contends the size determination is erroneous, and requests that the size determination be reversed. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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. RFP and Protest

On September 10, 2015, the Marine Corps Systems Command (MCSC), issued Request for Proposal No. M67854-15-R-7901 (RFP) seeking a contractor to provide IT training. The solicitation was a small business set-aside, under North American Industry Classification System

(NAICS) code 611430, Professional and Management Development Training with a corresponding \$15 million annual receipts size standard. Initial offers were due on October 19, 2015.

On June 20, 2016, the Contracting Officer (CO) notified all offerors that Appellant was the apparent awardee. On June 24, 2016, Professional Solutions Delivered, LLC (PSD), an unsuccessful offeror, filed a size protest. PSD alleged that Appellant was affiliated with ProSol, LLC (ProSol) based on an identity of interest, the newly organized concern rule, and the totality of the circumstances.

On July 14, 2016, Appellant responded to the protest. Michael E. Dean is Appellant's sole shareholder and Chief Executive Officer (CEO). He is also chairman of the Board of PS Charities, a charitable organization raising money for wounded veterans. Mr. Dean has an ownership interest in Rational Roads (RR), a dormant entity. Michael J. Dean, sole owner of ProSol, is Michael E. Dean's father. (Protest Response at 3.) Michael E. Dean acquired Appellant in 2008. Mr. Dean held a number of positions in ProSol from 2002 to 2010, from Help Desk Technician to Director of Business Development. (Supplement to SBA Form 355, pp. 2-4.) Subcontracts from ProSol have represented about 16% of Appellant's revenue since 2009. The instant contract will be the first where Appellant will award a subcontract to ProSol. (*Id.* at 4.) In FY 2015, subcontracts from ProSol represented about 29% of Appellant's revenue. (email, M. Dean to V. Mazzotta, September 6, 2016.)

Appellant stated it subleases office space from ProSol at market rates. "To access the space, one must go through the common area of the building, as well as the common area of the larger office space." Appellant has its own dedicated area within the space. (email, M. Dean to V. Mazzotta, September 6, 2016.)

B. Size Determination

On January 3, 2017, the Area Office issued Size Determination No. 02-2016-72, finding that Appellant and ProSol are affiliates, and therefore Appellant exceeds the applicable size standard.

The Area Office found that Michael E. Dean is Appellant's sole owner and CEO. Mr. Dean is also the Chairman of PS Charities and has an ownership interest in RR. (Size Determination, at 2.)

Regarding the allegations that Appellant and ProSol were affiliated under the newly organized concern rule, the Area Office found that there was not sufficient evidence to find that Michael E. Dean had been a key employee of ProSol, and thus could not find affiliation based on the newly organized concern rule. (*Id.* at 4.)

Next, the Area Office noted that SBA regulations allow for a presumption of identity of interest between father and son; this presumption may be rebutted by a showing of estrangement or a lack of involvement in each other's businesses. (*Id.* at 5.) The Area Office determined that no clear fracture exists between Michael E. Dean, and his father, Michael J. Dean, ProSol's owner.

The Area Office notes that Appellant and ProSol share 13 lines of business according to their System for Award Management (SAM) profiles, including the NAICS code associated with the instant procurement. Additionally, ProSol is the subcontractor listed in Appellant's proposal. Thus, any argument that Appellant and ProSol operate in different lines of business is meritless. (*Id.*)

Appellant and ProSol also share the same business address. While Appellant states that it subleases space from ProSol in accordance with an arms-length lease, the Area Office noted that Appellant's offices must be accessed through space occupied by ProSol. Further, Appellant acknowledges that since 2009, it has received subcontracts from ProSol, including 16% of its revenues for the three years prior to submitting an offer on the instant procurement. (*Id.* at 6.) Citing *Size Appeal of Alleo Corporation*, SBA No. SIZ-5405 (2012), the Area Office reasons that Appellant and ProSol cannot demonstrate a clear fracture in their business ties because they share space despite the existence of a lease, they have an existing continuous subcontracting relationship, they are involved in the same industries, and ProSol is Appellant's subcontractor for the procurement at issue. (*Id.*) Thus, affiliation based on a familial identity of interest exists between Appellant and ProSol. The Area Office declined to reach the issue of whether Appellant and ProSol are affiliated under the totality of the circumstances regulation because it made its affiliation finding under the more specific grounds of identity of interest.

C. Appeal

On January 18, 2017, Appellant filed the instant appeal. Appellant argues that the Area Office erroneously found it was not a small business concern, and now requests that OHA reverse the size determination.

Appellant contends the Area Office erred in finding that Appellant and ProSol share office space. Appellant explains that ProSol advertised its available space in 2014 and then proceeded to enter into an arms-length agreement with Appellant for the office space, with monthly rent payments at market rate. (Appeal at 4.) Appellant acknowledges that the office space does have a common area, but that other space exists that is inaccessible to the other company. Further, Appellant notes that ProSol does not provide any administrative, technical, or financial support to Appellant. Thus, the relationship between Appellant and ProSol is one of lessor and lessee only, and is not an indicia of affiliation. (*Id.*, citing *Size Appeal of Electronic Support Systems, Inc.*, SBA No. SIZ-2656 (1987).)

Appellant further argues that contrary to the Area Office's reasoning, estrangement is not the only way to show a clear fracture between family members. A showing of a lack of involvement in each other's business concerns will also show the necessary clear fracture. (*Id.* at 5.) Here, Appellant asserts that because Michael E. Dean does not own any interest in his father's company, ProSol, and the concerns do not share any equipment or personnel, a clear fracture exists between Michael E. Dean and his father. Even though Appellant and ProSol do engage in subcontracts, Appellant argues that under OHA precedent "it is not necessary for there to be a complete absence of business ties between family members and their companies to demonstrate a clear fracture." (*Id.*; citing *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351 (2012).) Appellant argues the Area Office erred in relying on *Size Appeal of Alleo Corporation*,

maintaining that it has only received approximately 16% of its revenues from subcontracts with ProSol, significantly less than the situation found in *Alleo*. Therefore, the business relationship between Appellant and ProSol is minimal enough to show a clear fracture between Michael E. Dean and his father. (*Id.* at 6.)

In addition, Appellant contends that the procurement in question is the first instance of Appellant subcontracting work to ProSol, and even then, ProSol will only perform approximately 10% of the work. (*Id.* at 7.) Appellant maintains that minimal subcontracting between concerns does not support a finding of affiliation. Appellant notes that a similar situation was present in *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013), wherein the alleged affiliates did not own any ownership interest in each other, did not share equipment, nor did it share employees. The situation here is similar to that of *Size Appeal of Carwell Products, Inc.* because Appellant and ProSol do not share ownership or management, neither has the power to control the other, and their business relationship is minimal enough to show a clear fracture. (*Id.*)

Lastly, Appellant disputes the Area Office's finding that Appellant and ProSol are in the same industry. Appellant maintains its SAM profile lists its primary industry as NAICS 541611, Administrative Management and General Management Consulting Services. ProSol's primary industry is NAICS 541519, Other Computer Related Services. Appellant thus maintains ProSol's primary industry differs from Appellant's, and only in their respective secondary industries does some overlap exist. (*Id.* at 8.) Both Appellant and ProSol's SAM profiles show that they have different primary industries, and Appellant does not list ProSol's primary industry NAICS code as one of the areas it performs work. Thus, the Area Office erred in finding Appellant and ProSol are in the same industry.

D. New Evidence

With its appeal, Appellant moved to introduce as new evidence an affidavit by Appellant's CEO. (Motion at 1.) Appellant asserts the affidavit addresses the current performance of the instant solicitation. Appellant argues the affidavit should be admitted as this information was not available to the Area Office previously. (*Id.* at 1.)

III. Discussion

A. 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 first 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 appeal.” *Size Appeal of Vista Eng'g Techs., LLC*,

SBA No. SIZ-5041, at 4 (2009). OHA “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).

Here, Appellant has not shown there is good cause to admit the affidavit. The affidavit regards the performance of the instant solicitation, and the proportion of the work assigned to ProSol. Appellant could have submitted this information in response to the protest, as it was available at that time, and yet it failed to do so. Therefore, the affidavit is EXCLUDED from the record, and will not be considered for purposes of this decision.

B. 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).

C. Analysis

The issue here is whether the Area Office correctly found Appellant and ProSol affiliated under the identity of interest rule because the owners of the two firms are father and son. SBA's regulation provides:

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).¹

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). OHA has explained that “[t]he regulation creates a rebuttable presumption that family

¹ SBA recently has revised the regulation to include more specific language defining the family relationships that give rise to an identity of interest. The revised regulation became effective June 30, 2016. 81 Fed. Reg. 34243 (May 31, 2016). The prior version of the regulation governs this case.

members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions.” *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 12 (2015) (quoting *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984).) “The presumption arises, not from the degree of family members' involvement in each other's business affairs but, rather, from the family relationship itself.” *Id.* (quoting *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295 (1998).) When one concern is owned and controlled by a father, and the other owned and controlled by a son, the two concerns are presumed to be affiliated by an identity of interest. *Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014).

A challenged concern 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 Products, Inc.*, SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 17 (2006).) “A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged.” *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217, at 6 (2011). “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 Enterprises, Inc.*, SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR). A minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture. *Size Appeal of RBG Group, Inc.*, SBA No. SIZ-5351, at 7 (2012)); *accord Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307, at 6 (2011).

It is not necessary to conclude that one concern exercises near-total control over another in order to find affiliation through family relationships. Rather, the fact of the family relationship creates a presumption that the family members have identical interests and so SBA must treat them as one person. The burden then shifts to the challenged concern to rebut that presumption. *Size Appeal of CTSI-FM, LLC*, SBA No. SIZ-5809 (2017).

Here, Mr. Michael E. Dean worked for ProSol, his father's company, for eight years, the last two of which he also worked at Appellant, his own company. He then transitioned to working full time at Appellant. Appellant has continued to receive subcontracts from ProSol, which account for an average of 16% of its receipts from 2009 to 2015, and 29% as recently as 2015. These are not minimal amounts of subcontracting, but represent a significant portion of Appellant's revenue. Appellant leases its office space from ProSol, and will use ProSol as a subcontractor on the instant procurement. While the two concerns may have different primary NAICS codes, their SAM profiles list some 13 common NAICS codes, and so they cannot be said to be in completely different lines of business.

Mr. Dean clearly never achieved a clear fracture from his father's business interests in ProSol. He worked for his father's firm, then simultaneously for both his and his father's firm, then for his own firm (Appellant), but his firm continued to subcontract for his father's firm. OHA has held that it is pertinent to a clear fracture analysis if the firms in question continue to

subcontract with each other and one proposes the other as a subcontractor on the subject contract. Under these facts, no clear fracture has occurred. *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351, at 7-8 (2012) (citing *Jenn-Kans*, SBA No. SIZ-5114, at 8).

The fact here thus support that Area Office's conclusion that Michael E. Dean cannot be said to have made a break with his father's business interests, and thus has not achieved a clear fracture. Rather, he has continuously been involved with ProSol to a significant extent, from the time he became Appellant's principal until the present. The burden is on Appellant to establish that Mr. Dean has made a clear fracture, and he has failed to meet that burden. *Size Appeal of CTSI-FM, LLC*, SBA No. SIZ-5809 (2017) (finding that a brother who previously was the majority owner of the concern, sold that interest to brother but retained minority interest, continued to consult for concern, and awarded it a subcontract, did not achieve clear fracture.)

I must also note that Appellant's reliance upon *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013) is misplaced. The subcontracts between the concerns in that case were very small, representing 1-5% of the challenged concern's receipts. Further, there was not the continuing business relationship between the concerns that is evident here, where one firm proposes the other as a subcontractor on the subject procurement. Further, in *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011), OHA found a clear fracture based upon subcontracting which represented less than 5% of the challenged concern's revenue. Here, Appellant receives a much larger proportion of its receipts from ProSol, and thus the cases are not apposite here. Appellant is also mistaken in relying upon *Size Appeal of Electronic Support Systems, Inc.*, SBA No. SIZ-2656 (1987). In that particular situation, a sublease was found not to be an indicia of affiliation when the basis for the allegation of affiliation was common ownership and management. Here, the lease is merely one factor which shows the father and son have not completely separated their business interests.

It is clear that Appellant failed to meet its burden of showing there was a clear fracture between the business interests of the Deans. Accordingly, Appellant has failed to meet its burden of establishing that the size determination was based upon a clear error of fact or law.

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. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge