

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

SIZE APPEAL OF:

Tesecon, Inc.

Appellant,

Appealed From
Size Determination No. 03-2018-074

SBA No. SIZ-5985

Decided: February 19, 2019

APPEARANCES

Megan C. Connor, Esq., Julia Di Vito, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Tesecon, Inc.

DECISION¹

I. Introduction and Jurisdiction

On October 18, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office), issued Size Determination No. 03-2018-074, concluding that Tesecon, Inc. (Appellant), is not an eligible small business for the procurement at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that Appellant is an eligible small business for this procurement. For the reasons discussed *infra*, I affirm the size determination and deny the appeal.

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 Appellant requested confidential treatment of this appeal. *See* 13 C.F.R. § 134.205. After reviewing the original decision, Appellant proposed redactions to protect its confidential information. I have considered these, and now issue this redacted decision for public release.

II. Background

A. Solicitation and Protest

On May 23, 2018, the U.S. Army Corps of Engineers, Mobile District, issued Request for Proposals (RFP) No. W91278-18-R-0057 for the construction of Chilled Water Piping Redundancy at Maxwell Air Force Base in Alabama. The Contracting Officer (CO) set the procurement aside for small business and assigned to it North American Industry Classification System (NAICS) code 236220, with a \$36.5 million annual receipts size standard. Offers were due on July 10, 2018.

On August 22, 2018, the CO notified Hollon Contracting, LLC (Hollon), that the apparently successful offeror is Tesecon, Inc. (Appellant). On August 24, 2018, Hollon filed a size protest against Appellant with the CO. Hollon alleged that Appellant is affiliated with [Firm-4], [Firm-5], and [Firm-6], due to shared ownership and offices. The protest specifically mentioned Richard Miller's ownership in these companies. The CO referred the protest to the SBA Area Office for a size determination.

On September 14, 2018, the Area Office wrote to Appellant, through its in-house counsel, notified Appellant that its size had been protested, included a copy of the protest, and informed Appellant that the protest had asserted it was other than small "because you are affiliated with several other companies thus exceeding the size standard for the procurement." (Letter, C. Thompson to [In-house counsel] at 1, Sept. 14, 2018.) The Area Office included the affiliation regulation, 13 C.F.R. § 121.103, and a link to SBA's size home page on the Internet. (*Id.* at 2-4.) The letter required Appellant to provide information on all affiliates or subsidiaries, and to indicate the owners' business interests in any entity not already listed. (*Id.* at 5.)

Appellant submitted an SBA Form 355, identifying its alleged affiliates. In the course of performing the size determination, the Area Office conducted extensive correspondence with Appellant. After learning Appellant's owner, Richard Miller, was involved in other businesses with his brothers, [Brother-1] and [Brother-2], the Area Office inquired about the business arrangements of all the firms. In one email, the Area Office enquired extensively about the relationships between the brothers, noted their ownership of the various entities, enquired as to the officers and directors of the various concerns, and enquired as to the brothers' other ownership interests. (email, I. Bascumbe to [In-house counsel], Sept. 27, 2018.) The next day, Appellant provided the requested information. (email, [In-house counsel] to I. Bascumbe, Sept. 28, 2018.) [In-house counsel] referred some questions to other individuals with more detailed knowledge.

On October 17, 2018, the Area Office asked Appellant to identify the interaffiliate transactions that are the fees paid to [Firm-1] and [Firm-2] by Appellant, [Firm-4], and [Firm-7] for employer services. These are as follows: Appellant - \$[xxx] in 2017; [Firm-7] - \$[xxx] in 2017, and [Firm-4] - \$[xxx] per year in 2015-2017. (email, I. Bascumbe to [Affiliate's Employee], Oct. 17, 2018.) On that same day, Appellant provided this information. (email, [Affiliate's Employee] to I. Bascumbe, Oct. 17, 2018.)

B. The Size Determination

On October 18, 2018, the Area Office issued Size Determination No. 03-2018-074 concluding that Appellant is not an eligible small business for this procurement.

The Area Office found Appellant is wholly-owned by Richard Miller and, by itself, is a small business. Richard Miller and his wife are all of Appellant's officers and directors, and Ms. Miller has no other business interests. (Size Determination at 3.) Richard Miller has other business interests. Richard and his brother [Brother-1] each own 50% of [Firm-5], which is Appellant's landlord and the former landlord of [Firm-4]. (*Id.*) [Brother-1], a licensed engineer, wholly-owns [Firm-4], an engineering firm. (*Id.* at 5.) Richard and an unrelated individual each own 50% of [Firm-7]. (*Id.* at 6.)

Richard and his two brothers, [Brother-1] and [Brother-2], are involved in three related companies: [Firm-1], [Firm-2], and [Firm-3]. (*Id.* at 3-4.) Richard owns 40% of [Firm-1], [Firm-2], and [Firm-3], and is Vice President of [Firm-1] and [Firm-2]. (*Id.*) [Brother-1] owns 40% of [Firm-1], [Firm-2], and [Firm-3], and is Secretary/Treasurer of [Firm-1] and [Firm-2]. (*Id.*) [Brother-2] owns 20% of [Firm-1], [Firm-2], and [Firm-3], and is President of [Firm-1] and [Firm-2]. (*Id.*) [Firm-1] is a Professional Employment Organization (PEO), and [Firm-2] is [Firm-1]'s Administrative Service Organization (ASO). (*Id.*) [Firm-3] is the landlord for [Firm-1] and [Firm-2]. Appellant, [Firm-4], and [Firm-7] all have contracts with [Firm-1] or [Firm-2] for employer services. (*Id.*)

The Area Office concluded Richard, [Brother-1], and [Brother-2], as brothers, share an identity of interest based on their family relationship and may be treated as one party with their interests aggregated. The Area Office noted that where an identity of interests exists, and SBA has determined that the interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate. (*Id.* at 4.) The Area Office then concluded that because of their identity of interest and the ownership of the three entities together, and Richard and [Brother-1]'s ownership of [Firm-5], all three brothers have the power to control [Firm-1], [Firm-2], and [Firm-3]. The brothers are officers of these entities and are in business together. [Firm-2] has an Administrative Employer Services Agreement with Appellant under which [Firm-2] provides “client-funded” wages, salaries, and handles Appellant's payroll. The Area Office concluded [Firm-1], [Firm-2], and [Firm-3] are affiliated with Appellant through identity of interest. (*Id.*)

The Area Office further found Richard and [Brother-1] also have the power to control [Firm-1], [Firm-2], and [Firm-3] because while each owns equal minority interests, when aggregated, these are large compared to any other stock holdings, and thus they are presumed to have the power to control. The Area Office thus found [Firm-1], [Firm-2], and [Firm-3] affiliated with Appellant due to ownership interest and common management because of the officer positions the brothers hold in the entities. (*Id.* at 5.) Further, the Area Office found Richard and [Brother-1] have an identity of interest due to the family relationship and their four common investments and may be treated as one party with the interests aggregated. The Area Office again noted that an individual or firm may rebut the presumption of affiliation due to identity of interest. (*Id.*) The Area Office then pointed to an email from Appellant stating: “Tesecon is not

challenging the minority ownership interest of Mr. Richard Miller in these firms nor how you choose to calculate the numbers to be applied.” (*Id.* at 5, quoting email from [In-house counsel] to I. Bascumbe, Oct. 10, 2018.)

The Area Office concluded [Brother-1], a licensed engineer, and sole shareholder of [Firm-4], has the power to control that concern, located at the same address in Mobile, AL, as Appellant. Appellant informed the Area Office that [Firm-4] is a “one-man operation.” [Brother-1] works in Houston, TX, and Lake Charles, LA. He does receive mail at the Mobile address and keeps some items there. Appellant maintained it is not engaged in any way with [Firm-4]. (*Id.* at 5, citing email from [In-house counsel] to I. Bascumbe, Sept. 28, 2018.)

The Area Office concluded Appellant had failed to rebut the presumption of an identity of interest. The brothers own four entities together, [Firm-5], [Firm-1], [Firm-2], and [Firm-3], which establishes a close relationship. [Firm-1] and [Firm-2] have agreements with Appellant, [Firm-4], and [Firm-7] to provide employer services. The Area Office concluded there is no separation of interests and the family members are working together. (*Id.*)

The Area Office also concluded that [Firm-4], owned by [Brother-1], is affiliated with Appellant based upon familial identity of interest and common investments. Richard Miller and an unrelated individual each own 50% of [Firm-7], and both have the power to control it. Thus, [Firm-7] is affiliated with Appellant due to Mr. Miller's ownership interest. (*Id.* at 6.)

Based on the family identity of interest and common investments, the Area Office found Appellant affiliated with [Firm-5], [Firm-4], [Firm-1], [Firm-2], [Firm-3], and [Firm-7]. Because the combined average annual receipts of Appellant and its affiliates, less interaffiliate transactions, exceed the \$36.5 million size standard, the Area Office determined Appellant is not an eligible small business for the instant procurement.² (*Id.* at 6.)

C. The Appeal

On October 18, 2018, Appellant received the size determination, and, on November 2, 2018, Appellant filed the instant appeal.

Appellant alleges first, that the Area Office failed to give Appellant the opportunity to rebut the presumption of an identity of interest among the Millers due to the familial relationship between them. Appellant maintains the Area Office was required to notify Appellant of the presumption and to give it the opportunity to rebut this presumption. Appellant maintains that although the Area Office asked about the relationships among the owners of [Firm-1], [Firm-2], and [Firm-3], there is nothing in the record that suggested to Appellant that the Area Office presumed the Millers affiliated based upon identity of interest through familial relationships and common investments. (Appeal at 6-8, citing *Size Appeal of Gregory Landscape Servs., Inc.*, SBA No. SIZ-5793 (2016); *Size Appeal of Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571 (2014)). Similarly, the Area Office failed to give Appellant the opportunity to rebut the presumption that

² [Firm-6], owned by Richard Miller and an unrelated individual, had been dissolved on April 26, 2017, so the Area Office treated it as a former affiliate. (*Id.* at 6.)

Richard Miller controls [Firm-1], [Firm-2], and [Firm-3] based upon his minority interest. (*Id.* at 9, citing 13 C.F.R. § 121.103(c)(2).)

Appellant further argues the Area Office erroneously concluded Appellant is affiliated with [Firm-1], [Firm-2], and [Firm-3] based upon common management without actually finding that the officers in question could control the concerns. (*Id.* at 9-10.) The Area Office did not examine who are the officers of [Firm-3], and yet it made a common management finding. Appellant maintains that the Area Office must first determine that the officers or directors in question must control a company before finding affiliation based upon common management. SBA should determine whether the officers have actual power to control, or merely illusory control. The Area Office did not examine whether Richard Miller actually has the power to control [Firm-1], [Firm-2], or [Firm-3] before concluding Appellant was affiliated with those entities based on common management. Therefore, the OHA should overturn the size determination. (*Id.* at 9-11.)

Appellant further argues the Area Office failed to properly identify the interaffiliate transactions it excluded from the calculation of Appellant's receipts. (*Id.* at 11.) Appellant engages in transactions with some of the concerns the Area Office identified as its affiliates, and these transactions should have been excluded to avoid double-counting. (*Id.*) For example, [Firm-5] owns the building where Appellant is located, and the rent payments should have been excluded from the calculation of Appellant's annual receipts. (*Id.* at 12.) [Firm-1] is a PEO and Appellant is one of its clients. [Firm-2] is an ASO and Appellant is one of its clients. A remand is appropriate for the Area Office to properly exclude all interaffiliate transactions. (*Id.* at 11-12.)

Finally, Appellant asserts there is no indication the Area Office properly excluded from Appellant's annual receipts amounts collected for another. [Firm-1] and [Firm-2] provide administrative services for clients, but the Area Office did not eliminate amounts collected for these other entities when calculating size. Both firms collect funds for other entities, such as funds to pay the salaries of the clients' employees. The Area Office should have excluded amounts collected by [Firm-2] and [Firm-1] for other entities. (*Id.* at 12-13.)

As relief, Appellant asks that OHA reverse the size determination or remand it to the Area Office for further proceedings.

Hollon, the original protestor, did not respond to the appeal.

III. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within fifteen days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5

(1999). OHA will disturb the size determination only if the judge, after reviewing the record and pleadings, has a definite and firm conviction 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

The Area Office found Appellant affiliated with [Firm-1], [Firm-2], [Firm-3], [Firm-5], [Firm-4], and [Firm-7] on two grounds of identity of interest. The 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 with evidence showing that the interests deemed to be one are in fact separate.

(1) Firms owned or controlled by married couples, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with each other, such as subcontracts or joint ventures or share or provide loans, resources, equipment, locations or employees with one another. This presumption may be overcome by showing a clear line of fracture between the concerns. Other types of familial relationships are not grounds for affiliation on family relationships.

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). OHA has explained that “[t]he regulation creates a rebuttable presumption that family 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).) The underlying rationale for the rule is that persons will, because of their common interests, act in concert as one. *Size Appeal of RBG Group, Inc.*, SBA No. SIZ-5351, at 7 (2012).

A challenged concern may rebut the presumption of identity of interest if it shows “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.” (*Carwell* at 8, citing *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217, at 6 (2011).)

The Area Office also found affiliation among the Millers on a second ground of identity of interest based upon their common investments. Identity of interest may be found among those who have common investments in more than one concern, whose common business interests cause the parties to act in union for their common benefit. *Size Appeal of W. Harris, Govt. Svcs. Contractor, Inc.*, SBA No. SIZ-5717, at 6 (2016). OHA has held that to find affiliation on this ground, the common investments of the persons must be substantial, either in number of individual investments, or in total value. *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 11 (2015).

Here Richard Miller is sole owner of Appellant. He also owns 50% of [Firm-5] and [Firm-7] which gives him control of those firms and makes them Appellant's affiliates. 13 C.F.R. § 121.103(c)(1). Richard Miller also owns 40% of [Firm-1], [Firm-2], and [Firm-3], with [Brother-1] also owning 40% of each firm and [Brother-2] owning 20% of each firm. Richard is Vice President of [Firm-1] and [Firm-2], and [Brother-2] is President. [Brother-1] is sole owner of [Firm-4].

It is thus clear that the Miller brothers are involved together in three firms: [Firm-1], [Firm-2], and [Firm-3]. They share officer positions and have investments in the same proportion in each firm. Further, Richard and [Brother-1] own [Firm-5] together. The brothers are clearly involved in their common businesses, and they hold common investments together. These common investments are substantial, both in total amount, and in proportion to all of the Miller brothers' investments. It is clear that, given their common involvement in several businesses, they will act in concert in pursuit of their common business interests. *Knight Networking*, at 5. They are thus properly treated as one party, with their interests aggregated, under the identity of interest rule, on two grounds -- familial relationships and common investments.

Appellant argues the size determination should be reversed and remanded because, it alleges, the Area Office failed to specifically notify Appellant that the presumption of affiliation based upon familial identity of interest was an issue, and Appellant thus did not have the opportunity to address this issue. Appellant relies on *Size Appeal of Gregory Landscape Servs., Inc.*, SBA No. SIZ-5793 (2016) and *Size Appeal of Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571 (2014), where OHA remanded size determinations for that reason.

A review of the Area Office's communications with Appellant shows it informed Appellant, through its in-house counsel, that its size had been protested, and that it was alleged to be affiliated with other concerns. The Area Office provided Appellant with a copy of the affiliation regulation. Once Appellant responded to the protest, the Area Office followed up with questions about the ownership of the various concerns, their interaffiliate transactions, and the relationships among the brothers and their operation of the businesses. It was clear that the focus of the Area Office's inquiry was the relationship between the brothers, their various investments, and whether this would result in a finding of affiliation. The issues should therefore have been clear to a firm with counsel. I therefore find that the Area Office provided sufficient notice to

Appellant for it to show that the Miller brothers did not have an identity of interest due to the family relationship and their common investments.

Appellant's reliance on *Size Appeal of Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571 (2014) is misplaced. There, the area office had ignored the family relationships which might give rise to an identity of interest finding. The Area Office did not do so here. In *Size Appeal of Gregory Landscape Servs., Inc.*, SBA No. SIZ-5793 (2016), there were significant factual disputes. This is not the case here. Indeed, while Appellant argues it did not have the opportunity to rebut the presumption of identity of interest, it makes no effort to do so in this appeal. The connections between the Millers and their common investments are so clear that it is difficult to see what rebuttal could be made, and Appellant makes no proffer to the contrary. I therefore conclude the Area Office did not err in finding the Miller brothers affiliated under the identity of interest rule, due to both family relationships and common investments. Accordingly, they are treated as one party with their interests aggregated. Appellant is therefore affiliated with [Firm-1], [Firm-2], [Firm-3], [Firm-5], [Firm-4], and [Firm-7].³

Appellant's argument that the Area Office failed to account for interaffiliate transactions is baseless. The Area Office file reflects that the Area Office inquired as to the amount of the interaffiliate transactions, and Appellant provided fee amounts, *supra*, and the tax returns and financial statements make clear the amounts to be excluded as rent paid to [Firm-3] and [Firm-5] by their affiliates. The Area Office clearly did take account of these exclusions in calculating Appellant's annual receipts. Appellant fails to identify any other specific transactions or amounts that should have been excluded from the calculation of its receipts.

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

³ The exclusion from affiliation for PEOs is not applicable because [Firm-1] is affiliated with Appellant on other grounds. 13 C.F.R. § 121.103(b)(4); *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006). Further, having determined the Area Office properly concluded Appellant is affiliated with [Firm-1], [Firm-2], [Firm-3], and [Firm-5] under identity of interest, I need not determine whether the Area Office erred in finding them affiliated under common management.