

**REDACTED DECISION FOR PUBLIC RELEASE**

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

SIZE APPEAL OF:

Jenn-Kans, Inc.

Appellant

Appealed from  
Size Determination No. 2-2010-06

SBA No. SIZ-5114

Decided: March 15, 2010

**APPEARANCES**

Andrew L. Hurst, Esq., Jason P. Matechak, Esq., Gregory S. Jacobs, Esq., Reed Smith, LLP for Appellant Jenn-Kans, Inc.

Terry L. Elling, Esq., Dismas N. Locaria, Esq., Venable LLP for Intervenor F & L Construction, Inc.

**DECISION**

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office's determination that Appellant was affiliated with another firm due to identity of interest was based upon clear error of fact or law. *See* 13 C.F.R. § 134.314.

**REDACTED DECISION FOR PUBLIC RELEASE****III. Background****A. The Solicitation and the Protest**

On July 6, 2009, the Department of the Navy (Navy) issued Solicitation No. N40080-08-R-0460 (the solicitation) for regional solid waste collection service. The Contracting Officer (CO) set the procurement aside for firms in the Small Business Administration's (SBA) 8(a) program and designated North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding \$12.5 million annual receipts size standard, as the appropriate NAICS code for this procurement.

On October 5, 2009, the CO notified unsuccessful offerors that Jenn-Kans, Inc. (Appellant) was the apparent successful offeror. On October 13, 2009, F & L Construction, Inc. (F&L), an unsuccessful offeror, filed a protest alleging Appellant is other than small because it is affiliated with the "Goode companies." On October 15, 2009, SBA's Area II Office of Government Contracting in King of Prussia, Pennsylvania (Area Office) notified Appellant of the protest and requested it respond to the protest and submit an SBA Form 355, together with certain other information.

**B. The Size Determination**

On December 1, 2009, the Area Office issued a size determination finding Appellant other than small. Jennifer-Goode Brown is Appellant's President, Treasurer, Secretary, and 100% shareholder. Both Ms. Brown and her brother, Willie Goode, filed declarations. Mr. Goode is the owner of Goode Trash Removal (Goode Trash).

**1. The Brown Declaration**

Ms. Brown stated in her affidavit that she has worked in waste management since she was a child working for her father. As an adult, she worked for Goode Trash until founding Appellant in 2004.

Ms. Brown stated that Mr. Goode assisted her when she started Appellant. Mr. Goode, on behalf of Goode Trash, co-signed for Appellant's bank financing and leased office space to Appellant.

Ms. Brown states that today Mr. Goode and Goode Trash are no longer guarantors on any loan or line of credit for Appellant and that Appellant leases its places of business from an unrelated third party.

Ms. Goode further states that Appellant shares no employees with any firm in which Mr. Goode has an interest, and Appellant has its own permits, licenses, and insurance.

Appellant is the incumbent on this procurement. Appellant occasionally leases equipment from other firms, which is a common industry practice. In 2006, Appellant won a contract previously held by F&L. Mr. Goode contacted F&L and convinced it to lease

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equipment for the contract to Appellant. Appellant's equipment lease was directly with F&L, and it made payments to F&L.

**2. The Goode Declaration**

Mr. Goode stated that Goode Trash is not affiliated with Appellant. Mr. Goode stated that he is [XXX] owner of Goode Trash. He is also [XXX] stockholder of Unity Disposal and Recycling (Unity), [XXX] stockholder of Lawrence Street Industry, LLC (LSI), [XXX] stockholder of RecycleOne C&D Processing, Inc., and [XXX] stockholder of T.A.C. Transportation, LLC.

Mr. Goode stated he has no ownership or financial interest in Appellant. Appellant has its own offices, separate from Goode Trash's. Mr. Goode stated that there have been several minor arms-length transactions between Goode Trash and Appellant, in which Goode Trash has provided small subcontractor services to Appellant at market rates.

**3. Area Office Findings of Fact**

The Area Office made a number of findings of fact. Appellant, by itself, is a small business for under the applicable size standard. Goode Trash is affiliated with LSI and Unity through common ownership. The Area Office made no finding as to Goode Trash's affiliation with the other firms in which Mr. Goode has an ownership interest.

Mr. Goode and Ms. Brown are brother and sister and are not estranged. Ms. Brown worked for Goode Trash for approximately three years. Appellant and Goode Trash are in the same line of business. Appellant leased its first office space from Goode Trash. Mr. Goode guaranteed Appellant's initial financing. Appellant does some subcontracting with Goode Trash, but no different from its subcontracting with other local firms in the same business.

Goode Trash graduated from the 8(a) program on April 17, 2004, and Appellant was approved for the 8(a) program on April 7, 2005. At that time, SBA's Division of Program Certification and Eligibility determined the combined revenue of the two firms was within the size standard applicable to Appellant's primary NAICS code and did not request a size determination.

Appellant maintains its own business operations separate and distinct from Goode Trash. Appellant is located in office space leased from a third party not affiliated with Goode Trash. Appellant does not share employees, equipment, facilities, or other resources with Goode Trash.

Nevertheless, about 22% of Appellant's revenues for 2008 involved subcontracts to Goode Trash and its affiliates. Further, about 32% of the subject contract will be subcontracted to Goode Trash and its affiliates. In addition, Goode Trash leased vehicles to Appellant as recently as 2008.

**REDACTED DECISION FOR PUBLIC RELEASE**4. The Area Office Determination

The Area Office explained that a family relationship is sufficient to create a presumption of an identity of interest between two concerns, unless a challenged firm has rebutted the presumption by showing a clear fracture between the two entities. Here, Mr. Goode and Ms. Brown are siblings who are not estranged, are in the same line of business, and subcontract services with each other. Further, Goode Trash and Mr. Goode provided Appellant with important start-up assistance. Accordingly, the Area Office found Appellant affiliated with Goode Trash under the identity of interest rule and concluded the firms are other than small.<sup>1</sup>

C. The Appeal

On December 10, 2009, Appellant filed the instant appeal.

Appellant acknowledges that Ms. Brown and Mr. Goode are siblings. Appellant asserts Mr. Goode gave Ms. Brown no advice or assistance in founding Appellant, but then states that Mr. Goode guaranteed two lines of credit for Appellant. Appellant admits it subcontracted 22% of its work to Goode Trash and its affiliates in 2008, but states that there were other subcontractors as well, and these subcontracting relationships among competing firms are common in the industry. Further, although Appellant proposes to subcontract 32% of this contract to Goode Trash, there is no formal teaming agreement, and this figure is subject to change.

Appellant further asserts that although it leased office space from Mr. Goode, this was an arm's length transaction with commercially reasonable terms. Appellant occupied this space from its founding in 2004 until August, 2007. It then moved into locations with no connections to Mr. Goode. Appellant currently shares no office space, supplies, or telephone lines with any company associated with Mr. Goode.

Appellant states it leased one truck from Goode from November 2007 to December 2008 for [XXXXX]. Appellant owns [XXX] trucks and rents others from a number of firms, including F&L. In October, 2006, Mr. Goode contacted F&L to arrange for a lease of equipment to Appellant.

Appellant argues that the Area Office erred in finding no clear fracture between Appellant and Goode Trash. Appellant argues a finding of identity of interest based upon the limited connections that exist between it and Goode Trash is not consistent with OHA precedent or the purpose of the rule and would unduly limit family members in their dealings with each other.

First, Appellant argues the subcontracting relationships between the firms do not support a finding of an identity of interest. Appellant argues that in *Size Appeal of Henderson Group*

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<sup>1</sup> The Area Office found no affiliation under the newly organized concern rule. F&L argues in a footnote to its Response that there is affiliation under the newly organized concern rule, but its footnote is not a timely appeal and thus will not be considered here.

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*Unlimited, Inc.*, SBA No. SIZ-5034 (2009), OHA found clear fracture where the two firms did not share facilities or management. *Henderson* held it was not necessary to demonstrate complete estrangement between the family members to establish a clear fracture. *Henderson* also noted there was no suggestion of economic dependence between the firms in that case, and Appellant is not dependent upon Goode Trash. Appellant compares *Henderson* with other cases where no clear fracture was found when one firm was dependent on the other for most of its sales, which is not the case here. Appellant points out the Area Office made no finding it was dependent upon Goode Trash. Appellant further argues that in cases where OHA has found one firm economically dependent upon another, there was much greater evidence of economic dependence than there is here. Appellant also points to *Size Appeal of Jack Faucett Assocs*, SBA No. SIZ-4278 (1997) (cited by Appellant as “Gulf South Research Corporation”), for support. Appellant asserts *Faucett* held a clear fracture could result from firms gradually drawing away from each other. Further, Appellant asserts that in *Faucett*, a finding of identity of interest between firms with closer ties than Appellant and Goode Trash was found to be “an extremely close case.”

Second, Appellant argues that the Area Office erred in finding no clear fracture based on past relationships between the firms. Goode Trash did guarantee [XXXXX] and [XXXXX] lines of credit for Appellant in 2006. In March, 2008 Appellant was able to obtain further financing without the need for an outside guarantor. Therefore, the credit guaranteed by Goode Trash represents less than [XXX] of Appellant’s available credit. Further, Appellant no longer occupies office space leased from Goode Trash. The lease of one truck was not significant. Moreover, it is a common practice in the industry for firms to rent equipment from each other. In addition, Mr. Goode’s intervention to arrange for Appellant to rent equipment from F&L was minimal. Appellant also argues the Area Office erred by considering events which took place long before August 24, 2009, the date as of which it must determine Appellant’s size.

Third, Appellant argues the Area Office misapplied the rebuttable presumption in the identity of interest rule. Appellant argues that clear fracture can occur even though some relationships continue to exist between family members. Appellant further argues that, under Federal Rule of Evidence 301, a presumption imposes on a party against whom it is directed the burden of going forward with the evidence, but does not shift to that party the burden of persuasion, which remains with the party that originally bore it. Appellant argues it needed only to present enough evidence to create a genuine issue of material fact to rebut the presumption, citing *Size Appeal of Technical Support Servs.*, SBA No. SIZ-4794 (2006). Appellant argues it does not have to sustain the burden of proof, and the Area Office erred in requiring it to do so.

Fourth, Appellant asserts the Area Office erred when it found that Mr. Goode provided “invaluable assistance” to Ms. Brown. Ms. Brown established her business on her own. Mr. Goode stated in his declaration that he was not a mentor to her.

Fifth, Appellant asserts the Area Office erred in disregarding evidence regarding customary practices of the waste removal industry. Subcontracting between firms is common in the business, and should not have been considered in determining whether there was a clear fracture between the firms.

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Sixth, Appellant claims the Area Office erred in disregarding evidence that Appellant and Goode Trash are competitors. Both Mr. Goode and Ms. Brown asserted in their declarations that their concerns compete with each other.

Finally, Appellant argues that the Area Office's result is unjust and inequitable. The Area Office's analysis is form over substance, and it would be inequitable to penalize Appellant when Goode Trash's actions here are consistent with the type of assistance commonly provided between small business owners.

D. F&L's Response

On January 11, 2009, F&L responded to the appeal. F&L argues that the Area Office's determination is correct. F&L asserts Ms. Brown and Mr. Goode are not estranged. Further, Appellant and F&L are in the same line of business and have significant ongoing business ties. Appellant also relied on Goode Trash for credit and financing assistance and leased space from Goode Trash. F&L asserts that the ties between the firms are sufficient to uphold a finding of affiliation based upon an identity of interest.

On January 15, 2009, Appellant filed a Motion for Leave to Reply to F&L Response. Appellant disputes the factual statement in the Response that nearly a quarter of Appellant's 2008 revenue came from work provided by Goode Trash. Rather, Appellant asserts it subcontracted 22% of its 2008 work out to Goode Trash and received about [XXX] of its revenue from subcontracts with Goode Trash.

IV. Discussion

A. Timeliness and Motion

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant's Motion for Leave to Reply is GRANTED. Appellant is correcting a factual misstatement in F&L's Response.

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a patent error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

**REDACTED DECISION FOR PUBLIC RELEASE**C. The Merits

Appellant is, by itself, a small business under the applicable size standard. The question on appeal is whether the Area Office erred in finding Appellant affiliated with Goode Trash under the identity of interest rule. The regulation states:

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.

13 C.F.R. § 121.103(f).

This Office's long-standing precedent is that 13 C.F.R. § 121.103(f) 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 Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003) (quoting *Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 6 (1998); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984)). The presumption arises not from active involvement in each other's business affairs, but from the family relationship itself. *Id.*

The regulation does not require that the firms have common ownership or common management to be found affiliated. Affiliation is found on those grounds under 13 C.F.R. §§ 121.103(a)(2) & 121.103(e). Further, family membership is a separate ground from economic dependence for finding an identity of interest, and, therefore, the Area Office need not find economic dependence to find firms controlled by family members affiliated under the identity of interest rule.

"[A] challenged firm may rebut the presumption of affiliation based upon family relationship if it is able to show a clear line of fracture among the family members." *Size Appeal of Technical Support Servs.*, SBA No. SIZ-4794, at 17 (2006) (citing *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003)). "[T]he challenged firm may demonstrate a clear line of fracture by proving there is no business relationship or involvement with each other's business concerns." *Id.* The presumption may also be rebutted by demonstrating the family members are estranged. *Size Appeal of Jack Faucett Assocs.*, SBA No. SIZ-4278, at 7 (1997).

Here, Ms. Brown and Mr. Goode are brother and sister and are not estranged. They both worked in their family's waste disposal business. Ms. Brown worked for Mr. Goode before starting Appellant—which is in the same business as Goode Trash—in 2004. At that time Appellant obtained financing with Goode Trash's guarantee, rented office space from Goode Trash, and benefited from Mr. Goode's intervention in the rental of equipment from F&L. There is no question that there was an identity of interest between Appellant and Goode Trash when Appellant was initially formed. The question is: has there been a clear fracture between the firms since then, such as to overcome the presumption of an identity of interest?

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Appellant cannot point to a break at any time between the firms. Although Appellant is no longer dependent upon Goode Trash for guarantees for its financing,<sup>2</sup> there has been no event that would indicate that there has been any kind of break between the two firms. Further, Appellant still subcontracts work to Goode Trash. Appellant subcontracted 22% of its work to Goode Trash in 2008, and plans to subcontract 32% of this contract to Goode Trash. Even though Appellant's plan may change, the fact that it intended to subcontract such a large portion of the contract to Goode Trash establishes that no clear fracture has occurred.

Appellant's citation to *Henderson* is inapposite because in that case the Area Office was found to have made factual errors as to the ties between the firms, which did not in fact share common management or employees, and had few business dealings with each other. Though there was not complete estrangement between the half-brothers in that case, the two firms were thousands of miles apart and were in different lines of business. Further, there was not the strong initial dependence followed by continuous business ties that exist between Appellant and Goode Trash.

Appellant's reading of *Jack Faucett* relies too heavily on dicta discussing the firms in that case "gradually drawing away from each other" and commenting on the closeness of the case. The holding there concerned two firms, one owned by the adult children of the principals of the alleged affiliate, whose contracting with each other had decreased to 4% of the challenged firm's revenues. These firms were found affiliated, with less subcontracting between them than there is between Appellant and Goode Trash.

Appellant also cites *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995) as holding that there may be a clear fracture even when some business relationships exist between the firms. However, in *Bob Jones* those relationships were merely a son serving as a director of, and holding a small amount of stock in, a father's company. The ties between Appellant and Goode Trash are more substantial—*e.g.*, same line of business, initial financial (and other) assistance, and substantial continuing subcontracting and cooperation.

Appellant's argument that the Area Office erred in relying upon events prior to the date as of which size is determined is meritless. It is true that size is determined as of the date a challenged firm submits its initial offer, including price. 13 C.F.R. § 121.404(a). Nevertheless, to determine whether an identity of interest exists between the family members, it is necessary to examine the history of the firms to that date. An examination of any of the cases cited here will confirm that.

Further, Appellant has misunderstood the burden of proof here. Appellant attempts to convince the parties that all it need do to prevail is raise a genuine issue of material fact regarding clear fracture. Appellant is correct that, under Federal Rule of Evidence 301, the

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<sup>2</sup> It is unclear from the text of the appeal whether Goode Trash's guarantees are still in place on the original financing, but the Record before the Area Office seems to indicate that the guarantees are no longer in place.

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burden of proof, along with the risk of nonpersuasion, remains with the party that initially bore it. However, Appellant is incorrect in claiming that the burden does not lie with it. In a size determination, the burden of proof is on the challenged firm to show that it is small. 13 C.F.R. § 121.1009(c). Thus, the ultimate burden of proof (to prove its size) was initially on Appellant, and it remains with Appellant even after operation of the presumption. Put another way, Appellant must overcome the presumption to meet its ultimate burden to prove it is small.

Thus, although Appellant submitted evidence to support its assertion of the clear fracture, that did not end the inquiry. The Area Office then properly examined the record to determine whether there was contrary evidence to support a finding of identity of interest. *Size Appeal of Technical Support Servs.*, SBA No. SIZ-4794, at 20 (2006). In this case, that evidence exists in the continuing ties between the firms. The Area Office merely required that Appellant meet its burden. It did not transfer any burden to Appellant that was not Appellant's to bear.

Appellant's argument that Goode Trash did not provide it with "invaluable assistance" at its start is belied by the record. Goode Trash's guarantee of Appellant's line of credit must have been vital. In any event, there is no need to establish that the assistance provided was invaluable. Rather, the question is whether Appellant has demonstrated a clear fracture, and it has failed to do so.

Appellant's argument that the Area Office erred in disregarding industry practices is meritless. The fact that a particular business practice is customary in an industry does not exempt it from becoming an indicia of affiliation. *Size Appeal of Garvin Enters., d/b/a, Lloyd Staffing*, SBA No. SIZ-4544, at 14 (2003).

Further, Appellant's argument the Area Office ignored evidence that Appellant and Goode Trash are competitors is not supported by the record. The only bases for this argument are the self-serving declarations Ms. Brown and Mr. Goode filed containing the mere assertions they are aggressive competitors. In contrast, there is the ample evidence of continuing cooperation.

Finally, Appellant's argument that the result is unjust and inequitable is mere rhetoric, unsupported by any legal analysis. Rather, it would be unfair to firms who meet the regulatory standards to permit Appellant to be considered small, when it continues to cooperate with Goode Trash.

In summary, Appellant has failed to meet its burden of establishing clear error on the part of the Area Office. Appellant and Goode Trash are owned by siblings, Appellant received important assistance at its start-up from Goode Trash, and the firms continue to have dealings with each other. Appellant failed to establish a clear fracture between the firms, and they are thus affiliated under the identity of interest rule.

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V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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CHRISTOPHER HOLLEMAN  
Administrative Judge