Small Business Administration (S.B.A.)
Office of Hearings and Appeals

[Size Appeal]

FAISON OFFICE PRODUCTS, LLC, APPELLANT
SIZ-2006-11-09-68 (RMD), SIZ-2006-06-26-46
Solicitation No. LC-2621-606150
Jet Propulsion Laboratory
California Institute of Technology
Pasadena, California
January 26, 2007

Appearance

John G. Stafford, Jr., Esq.

Greenberg Traurig, LLP

McLean, VA

For Appellant, Faison Office Products, LLC

DECISION

PENDER, Administrative Judge:

Introduction and Jurisdiction

This appeal arises from a subcontract under a prime contract between the California Institute of Technology's Jet Propulsion Laboratory (JPL) in Pasadena, California, and the National Aeronautics and Space Administration.

On June 8, 2006, the Area Office issued Size Determination No. 05-2006-018 (size determination I or the first size determination), finding Faison Office Products, LLC (Appellant or Faison), to be other than a small business under North American Industry Classification System (NAICS) code 424120, Stationery and Office Supplies Merchant Wholesalers. Appellant appealed size determination I, and on September 27, 2006, I issued Size Appeal of Faison Office Products, LLC, SBA No. SIZ-4812 (2006) (the Remand Order), remanding the matter to the Area Office for a new size determination. Subsequently, JPL made award to Catalog Stationery, and the JPL contract is currently being performed by that company. On October 24, 2006, the Area Office issued its size determination on remand (size determination), again concluding that Appellant was "other than small for the subject size standard due to its affiliation with Corporate Express, Inc., a large business." On November 9, 2006, Appellant timely appealed the size determination.

The U.S. Small Business Administration Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. ß 631 et seq., and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

Issues

Whether the Area Office made a clear error of fact or law when it determined that

Appellant was economically dependent, and thus affiliated under the identity of interest rule at 13 C.F.R. ß 121.103(f), with a large concern because Appellant derived 70% of its revenue from the large concern and had a strategic alliance with the large concern.

Whether the Area Office made a clear error of fact or law when it determined the totality of the circumstances (13 C.F.R. ß 121.103(a)(5)) between Appellant and a large concern caused them to be affiliated.

Whether the Area Office made a clear error of fact or law when it determined Appellant to be other than small due to its affiliation with another concern based upon findings that (1) the large concern was to perform primary and vital requirements of the **solicitation;** and (2) Appellant was unduly reliant upon the large concern. 13 C.F.R. ß 121.103(h)(4).

Facts

The Remand Order contains the detailed facts of the case, including the following:

1. The Jet Propulsion Laboratory (JPL) Contracting Officer (CO) issued Request for Proposals (RFP) LC-2621-606150 on November 18, 2005. The RFP was a 100% small business set-aside. The RFP identified NAICS code 424120, Stationery and Office Supplies Merchant Wholesalers, with a 500 employee size standard as being applicable. [FN1] Proposals were due on January 11, 2006.

2. On March 17, 2006, JPL notified an unsuccessful offeror, Office Solutions, that Appellant was the apparent successful offeror. Office Solutions submitted a size protest to the CO on April 18, 2006. On April 25, 2006, the U.S. Small Business Administration, Office of Government Contracting, Area V (Area Office) dismissed the size protest as untimely.

3. On April 25, 2006, the Area Office notified Appellant that Office Solutions had filed an untimely protest regarding Appellant's size. The Area Office informed Appellant that even though the Area Office had denied Office Solution's protest, the Area Director had decided to initiate a size protest based on the information provided by Office Solutions.

4. Appellant's President and Chief Executive Officer, Mr. Jared D. Casey, Jr., owns 55% of Appellant's stock. Corporate Express owns the remaining 45% of Appellant's stock.

5. Appellant had an average of thirty-three employees for the 2005 calendar year. Appellant, without consideration for any potential affiliates of Appellant, meets the size standard for NAICS 424120.

6. Appellant has a corporate Advisory Board that makes recommendations about the furtherance of its business. Corporate Express has one member on this board.

7. Appellant admits that Corporate Express is responsible for generating "an approximate average of seventy percent" (70%) of Appellant's revenue over the past five years.

8. Appellant and Corporate Express share six common locations.

9. Corporate Express is the prime contractor for the University of Colorado (UC) and University of Northern Colorado (UNC) contracts referred to in the Record.

10. Appellant states that it has a "strategic alliance partnership" with Corporate

Express (Appeal Petition at 14). This is consistent with representations contained in Appellant's website and its May 5, 2005 letter to the Area Office. In addition, the State of Colorado Basic Ordering Agreement (BOA) shows award was made to "Corporate Express dba Faison/Corporate Express," and is signed by Gail Morgan of "Faison/Corporate Express."

11. On June 8, 2006, the Area Office issued a size determination finding Appellant to be affiliated with Corporate Express, one of the world's largest office products suppliers with over 200 facilities, 38 distribution centers, and 10,775 employees. Based on affiliation with Corporate Express, Appellant was deemed other than small under NAICS code 424120.

12. Appellant filed an appeal on June 26, 2006. On September 27, 2006, I issued Size Appeal of Faison Office Products, LLC, SBA No. SIZ-4812 (2006), remanding the matter to the Area Office for a new size determination. Subsequently, JPL made award to Catalog Stationery, who is currently performing the JPL contract. On October 24, 2006, the Area Office issued its size determination on remand, again concluding that Appellant was "other than small for the subject size standard due to its affiliation with Corporate Express, Inc., a large business." On November 9, 2006, Appellant appealed this size determination.

The Remand Order

In my September 27, 2006 Remand Order, I held that the Area Office's finding of affiliation based upon the totality of the circumstances was based upon three clear errors of fact or law. Specifically, the Area Office: (1) Incorrectly found facts regarding the Advisory Board; (2) Found facts concerning the RFP without it being part of the Record; and (3) Misunderstood the significance of the UC and UNC contracts. I vacated and remanded the June 8, 2006 size determination for the Area Office to make a size determination that: (1) Properly considers the RFP; (2) Makes correct findings, if any, concerning the Advisory Board; and (3) Makes correct findings, if any, concerning the UC and UNC contracts. I also strongly recommended the Area Office consider whether it believes an identity of interest under 13 C.F.R. ß 121.103(f) exists in recasting its decision upon remand.

SBA Determination Upon Remand

In its October 25, 2006 size determination (size determination), the Area Office provided its clarification of the following three areas specified in the Remand Order:

1. The Area Office clarified that even if Corporate Express had no members on Appellant's Advisory Board and none ever attended any Board meetings, it would still have found affiliation based on other factors, including totality of the circumstances;

2. Its finding of affiliation was not dependent on Appellant's UC and UNC contracts. However, upon review of additional evidence supplied to OHA, it determined that while Corporate Express may have chased the contract, the ultimate award was made to "Faison/Corporate Express." In addition, the Area Office mentioned that "per conversations with UC and UNC, some of the customers ordering off this BOA are counting partial awards to a minority owned firm";

3. The RFP placed weighted importance on management and technical factors and the Area Office found that Appellant was reliant upon Corporate Express to equip it with the vast majority of these factors including: the Oracle iProcurement technology, e-Way, VANS, order fulfillment software, delivery, packaging, its business continuity plan, and four of the seven key personnel positions.

Accordingly, the Area Office noted there was sufficient evidence to justify a finding that Appellant violated the ostensible subcontractor rule since Appellant was unusually reliant upon Corporate Express and because Corporate Express was performing primary and vital requirements of the contract as per 13 C.F.R. ß 121.103(h)(4).

The Area Office found Appellant and Corporate Express affiliated under the identity of interest rule as provided in 13 C.F.R. ß 121.103(f). Among the factors that convinced the Area Office an identity of interest existed between Appellant and Corporate Express were:

1. Appellant derives approximately 70% of its income through its relationship with Corporate Express;

2. Corporate Express represents it has an ongoing collaboration or "strategic alliance" with Appellant that permits customers to say they are awarding contracts to a minority firm by ordering from the Corporate Express/Faison strategic alliance;

3. Corporate Express owns 45% of Appellant's stock; and

4. Appellant is co-located with and relies heavily upon Corporate Express to perform contracts.

Appellant's Allegations Upon Appeal

In its November 9, 2006 Appeal Petition, Appellant makes several arguments why the size determination is clearly in error. Before stating its arguments, Appellant offered the following introductory paragraph:

> In its Order Remanding Size Determination, this Office guided the Area Office to review Faison's proposal for the JPL contract to determine whether, in fact, the Area Office's determination that Faison's services are ancillary to Corporate Express's [sic] for that contract is supported by the evidence, and to consider in greater detail whether an "identity of interest" under 13 C.F.R. ß 121.103(f) arose between Faison and Corporate Express, so that, under a totality of the circumstances test, Faison and Corporate Express could be found to be affiliated. Each of these elements is discussed below.

(Appeal Petition at 4).

The other "elements" Appellant referenced include:

1. The Area Office mischaracterizes the State of Colorado contract to support its finding of identity of interest affiliation. For example, the Area Office continually refers to the contract as a "Faison contract" and "erroneously relies also upon the 'fact' that some State of Colorado customers ordering from the contract are counting partial awards to a minority owned firm. The ... contract was not bid, however, as a SDB set aside." Furthermore, Appellant should not be penalized for the actions of third parties, such as State of Colorado customers, over whom Appellant has no control (Appeal Petition at 5);

2. The Area Office shows a clear and prejudicial predisposition to rule against Appellant because:

a. A Size Specialist informed Appellant that a small business performing at the national level raises "an automatic red flag for the Area Office" (Appeal Petition at 6); and

b. The size determination implies that national contracts "cannot be held by small businesses without dependence upon a large business to such an extent that it rises to the level of affiliation." Id.

Appellant asserts that these beliefs are in "direct conflict with Section 2 of the Small Business Act reflecting the express will of Congress that small businesses be given a fair proportion of Government sales with no mention whatever of limitation to local or regional markets ...." Id.

3. The Area Office makes clear errors of fact with regard to the RFP and Appellant's proposal by:

a. Mischaracterizing Appellant's services as "ancillary" and Corporate Express's services as "core";

b. Inaccurately portraying Corporate Express as supplying order fulfillment services when these services are "sometimes performed by Corporate Express and sometimes contracted to other third party distributors" (Appeal Petition at 7);

c. Utilizing the RFP's proposal evaluation weighting scheme to establish that Appellant's services are ancillary when the weighting criteria were not intended to indicate core versus ancillary services;

d. Ignoring the fact that "JPL issued its **solicitation** as a small business set-aside knowing that small business offerors likely would team with a large business to meet the [Oracle] iProcurement requirements, which were assigned the most weight for evaluation purposes by the JPL." Therefore, by concluding that Corporate Express is performing the core iProcurement functions and this core function must be performed by a small business, the Area Office ignores that "no small business would likely be qualified to perform the JPL contract" (Appeal Petition at 9);

e. Mischaracterizing Appellant and Corporate Express's "partnering initiative" as a joint venture (See 4a-c, below);

f. Erroneously inferring that either Appellant failed to incorporate its own safeguarding procedures or inappropriately relied upon Corporate Express's safeguarding procedures. However, since Corporate Express was responsible for the iProcurement function, only Corporate Express was required to provide safeguarding procedures for confidential information; and

g. Drawing erroneous conclusions from Appellant's list of key personnel in its proposal when the law does not require that all key personnel be employed by the prime contractor.

4. The Area Office makes a clear error of fact and law in finding an identity of interest between Appellant and Corporate Express by:

a. Concluding that a joint venture relationship exists because (1) Appellant has employees working at Corporate Express offices, when only six of Appellant's employees occupy Corporate Express offices; (2) Appellant "relies upon the infrastructure of Corporate Express (inventory, warehousing, delivery vehicles)," when "Corporate Express does not always provide warehousing and delivery services"; and (3) Appellant and Corporate Express's State of Colorado contract was awarded to "Faison/Corporate Express," when the status of this contract as a Corporate Express contract has already been addressed by OHA (Appeal Petition at 11-12);

b. Reiterating eight facts bearing on Appellant and Corporate Express'

relationship despite the fact that OHA found these facts did not result in affiliation based on the totality of the circumstances (Appeal Petition at 15);

c. Erroneously concluding a joint venture relationship exists when Appellant and Corporate Express have a "strategic alliance relationship that is long-term for many opportunities ... extend[ing] beyond the limited definition of a joint venture in 13 C.F.R. ß 121.103(h)" (Appeal Petition at 14);

d. Relying upon Size Appeal of Team Contracting, Inc., SBA No. SIZ-3875 (1994) when the facts are distinguishable. Specifically, Appellant and Corporate Express do not have a joint venture agreement and neither party enjoys management rights in the other party (Appeal Petition at 14-15);

e. Applying the wrong criteria, instead of the regulatory criteria at 13 C.F.R. ß 121.103(f). First, the Area Office relies upon the fact that Appellant and Corporate Express are in the same line of business when that is only relevant to the newly organized concern rule at 13 C.F.R. ß 121.103(g). Second, the Area Office places too much weight on the fact that Appellant and Corporate Express work together to promote the economic interests of each other, when teaming agreements are common in government **solicitations** and not indicative of identical business interests. Third, Appellant is not economically dependent upon Corporate Express but simply teams with them for specific projects. Appellant asserts that it "receives approximately 30% of its revenue from contracts outside the Corporate Express strategic alliance" and "there is no evidence that [Appellant] would cease to do business" if it could no longer team with Corporate Express (Appeal Petition at 16-17).

Discussion

I. Introduction

The Record in this Appeal supports the Area Office's determination that Appellant is other than small because of its identity of interest with Corporate Express (13 C.F.R. ß 121.103(f)). In particular, the evidence that Appellant derives 70% of its revenue from its relationship with Corporate Express and that Corporate Express represents its ongoing relationship with Appellant as a "strategic alliance" is strong evidence of an identity of interest.

There is also sufficient evidence to support the Area Office's determination that Appellant and Corporate Express are affiliated under the totality of the circumstances (13 C.F.R. ß 121.103(a)(5)). For example, although not establishing affiliation in isolation, the fact that Corporate Express owns 45% of Appellant, has an employee that serves on Appellant's Advisory Board, and shares common locations with Appellant can reasonably be viewed as affording Corporate Express the power to control Appellant through the totality of the circumstances, especially when considered with the evidence establishing identity of interest.

The Record also supports the Area Office's determination that Appellant's relationship with Corporate Express in submitting its offer under the instant procurement triggers the ostensible subcontractor rule (13 C.F.R. ß 121.103(h)(4)). The Area Office's careful analysis of the requirements of the **solicitation** and its finding that Corporate Express is performing primary and vital requirements of the **solicitation** is supported by the Record. In addition, the Record supports the Area Office's finding that Appellant was unusually reliant upon Corporate Express in submitting its offer.

In addition, in the introductory paragraph to its arguments in its Appeal Petition, Appellant seemingly fails to recognize that since 2004 [FN2] there is a

difference between identity of interest and totality of the circumstances. Specifically, Appellant argued that I had directed the Area Office to determine whether an identity of interest under 13 C.F.R. ß 121.103(f) arose between Appellant and Corporate Express "so that, under a totality of the circumstances test, [Appellant] and Corporate Express could be found to be affiliated" (Appeal Petition at 4). This argument is contrary to law and the Remand Order, for as I plainly explained, affiliation under 13 C.F.R. ß 121.103(f) (identity of interest) is distinct from affiliation based upon the totality of the circumstances (13 C.F.R. ß 121.103(a)(5)) and not a necessary predicate to finding affiliation under the totality of the circumstances (Remand Order at 8 - 10). See Size Appeal of Lance Bailey and Associates, SBA No. SIZ-4817, at 13-14 (Lance Bailey).

II. Applicable Law

A. Timeliness

Appeals must be filed within 15 days of receipt of a size determination. 13 C.F.R. ß 134.304(a)(1).

B. Standard of Review

It is undisputed that Appellant's size is below the size standard, but if found to be affiliated with Corporate Express, one of the largest businesses in the office product industry, Appellant will exceed the subject size standard. Thus, OHA must review whether the Area Office made a clear error of fact or law when it determined Appellant to be other than a small business due to its affiliation with Corporate Express. 13 C.F.R. ß 134.314. In evaluating whether there is a clear error of fact or law, 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 clear error of fact or law. See Size Appeal of Taylor Consulting, Inc., SBA No. SIZ-4775 (2006). Thus, I will only disturb an area office's size determination if I determine the area office clearly made key findings of law or fact that are mistaken.

C. Identity of Interest

SBA's size regulations recognize affiliation can occur in several specific instances. Under the facts of this appeal, the relevant regulation is 13 C.F.R. ß 121.103(f) (identity of interest), which provides:

> Affiliation based on identity of interest. 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.

The relevant portion of this regulation is "economically dependent through contractual or other relationships." Before SBA promulgated 13 C.F.R. ß 121.103(f) in 2004, OHA recognized affiliation based on economic dependence in the context of the totality of the circumstances, which OHA found because facts suggested dependence by one or both concerns upon the other. OHA affirmed determinations based upon economic dependence when two concerns have identical or nearly identical business or economic interests, e.g., when one or both of the concerns depends upon the other for a high percentage of its revenues. See Size Appeal of Pointe Precision, LLC, SBA No. SIZ-4466, at 9-10 (2001); Size Appeal of J & R Logging, SBA

No. SIZ-4426 (2001) (an example of extreme dependency); Size Appeal of Kansas City LLC d/b/a Best Harvest Bakeries, SBA No. SIZ-4574 (2003) (another example of extreme dependency); Size Appeal of Wireless Technology Equipment Co., Inc., SBA No. SIZ-4204 (1996) (Wireless Technology); Size Appeal of Supreme-Technology, Inc., SBA No. SIZ-4092 (1995).

OHA's past practice is consistent with the plain meaning of 13 C.F.R. ß 121.103(f). Accordingly, if an area office finds a concern depends on another concern for a high percentage of its revenue, then the area office can reasonably determine the two concerns are affiliated because of economic dependence, i.e., that they share an identity of interest. In making this holding, I am not fixing a certain percentage of revenue as being sufficient to prove economic dependence, for it could be as low as 30% or 40%, based upon the facts. However, I do hold, as a matter of law, that when one concern depends on another for 70% or more of its revenue, that the concern is economically dependent on the other. Given the high probative value of this kind of evidence, the only exception to this holding would be if the dependent concern could prove, by clear and convincing evidence, that its interests are separate from the other concern.

I note that there are other facts that strengthen a determination of economic dependence and bear on whether there is an affiliation based upon an identity of interest. For economic dependence, it is relevant whether the two concerns are involved in the same line of business as it is relevant whether the larger concern owns a potion of the smaller or retains some degree of influence within the smaller concern. See Size Appeal of National Welders Supply Co., Inc., SBA No. SIZ-4315 (1998). This could consist of financing, a seat on the Board of Directors, contracts for exclusive dealings, existing subcontractor relationships, supply of raw materials, co-location, claims of a continuing commercial or strategic relationship, or an ownership stake. While all of these factors are plainly relevant to a totality of the circumstances determination, they are also relevant to an economic dependency determination. The key is whether the facts imply dependence. If a reasonable person could conclude there is economic dependence, I would not have a definite and firm conviction that the area office made a clear error of fact or law.

It remains relevant that the protested concern retains the burden of proving its size. 13 C.F.R. ß 121.1009(c). The protested concern must do this when submitting its SBA Form 355 to an area office and answering subsequent requests for information. That is the path to rebutting any possible determination of economic dependency by an area office under 13 C.F.R. ß 121.103(f).

D. Totality of the Circumstances

As mentioned above, affiliation through the totality of the circumstances provides an independent basis for an area office to determine affiliation from, amongst other things, affiliation based on identity of interest. Lance Bailey, at 13-14. Authorization for finding affiliation based upon totality of the circumstances is found at 13 C.F.R. ß 121.103(a)(5). However, to comprehend affiliation through totality of the circumstances, it is necessary to read all the text in 13 C.F.R. ß 121.103 before subparagraph (a)(5), as well as the text of (a)(5). This text states:

> (a) General Principles of Affiliation. (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.
>
> (2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

> (3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.
>
> (4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.
>
> (5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(emphasis added).

As explained in Lance Bailey, the specific independent bases of affiliation, i.e., those described in 13 C.F.R. ß 121.103(c), (d), (e), (f), (g), and (h) can form a non-exclusive basis or "nucleus" of a finding of affiliation through the totality of the circumstances. Thus, while the evidence in the record may not establish affiliation under one of the specific factors enumerated in 13 C.F.R. ß 121.103 or under other indicia of control, an area office's review of the totality of the circumstances arising from proof relevant to various factors may convince the area office that one concern has the power to control another and, thus, both are affiliated.

Based upon 13 C.F.R. ß 121.103(a)(5), if an area office concludes that it is more likely than not that various facts give one concern the power to control another concern, it may find affiliation under the totality of the circumstances. In applying the totality of the circumstances standard for determining affiliation, area offices necessarily must exercise sound discretion. In exercising that discretion, an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.

An area office can consider facts it considered to be insufficient under an independent basis for affiliation and conclude affiliation exists under the totality of the circumstances. Similarly, an area office may aggregate facts that it found support one or more of the independent factors and conclude on a separate basis, that affiliation under the totality of the circumstances is warranted. However, as stated in Lance Bailey, our preference remains that an area office first evaluate whether affiliation should be found under the independent grounds described in 13 C.F.R. ß 121.103(c), (d), (e), (f), (g), and (h).

E. The Ostensible Subcontractor Rule

SBA predicates its affiliation regulations upon the power of one concern to control another. 13 C.F.R. ß 121.103(a). One independent basis of control area offices must consider is the ostensible subcontractor rule. 13 C.F.R. ß 121.103(h)(4). The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements. The ostensible subcontractor rule permits the Area Office to determine a subcontractor and a prime have formed a joint venture (and are thus affiliates) for determining size. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. ß 121.103(h)(4).

The ostensible subcontractor rule provides:

> A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects

> of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that **solicitation.**

13 C.F.R. ß 121.103(h)(4).

The relationship between the prime and its putative subcontractor as reflected in the proposal can trigger the ostensible subcontractor rule. If the proposal shows the subcontractor is performing primary and vital requirements of the **solicitation**, then an area office is correct to find affiliation. Similarly, if the proposal shows the prime is unusually reliant upon the subcontractor, then an area office is correct to find affiliation.

OHA has interpreted the ostensible subcontractor rule many times. However, as explained in Lance Bailey, what is relevant in one decision is not necessarily relevant in the next, for these determinations usually turn on the unique facts presented in an individual RFP and proposal. Lance Bailey, at 16. Still, OHA has often affirmed size determinations where an area office determined that key personnel were subcontractor employees or that key tasks were to be performed by subcontractor employees. See Size Appeal of BAMA Company, SBA No. SIZ-4819 (2006), at 7-8; Size Appeal of B&M Construction, Inc., SBA No. SIZ-4805 (2006), at 15-17.

F. Improper Predisposition

Appellant has accused the Area Office of a predisposition to rule against small businesses competing for very large contracts. This necessarily suggests improper conduct by the Area Office. In evaluating this kind of accusation, I note that SBA does not permit its employees to act upon factors extraneous to the evidence in the record when processing size protests. If a party can show an SBA employee acted out of personal animus, prejudice, or bad faith, that is sufficient to prove a clear error of fact or law. Hence, OHA would take appropriate action in such circumstances.

However, before even reaching the question of improper action by an SBA employee, parties must recognize that OHA presumes all SBA employees act in good faith in the performance of their duties. I hold the presumption that SBA acted in good faith in issuing a size determination can only be overcome by clear and convincing evidence of personal animus, prejudice, or other irregular conduct.

The reason I hold the clear and convincing evidence standard is applicable in this instance is because the Court of Appeals for the Federal Circuit held the clear and convincing evidence standard "most appropriately describes the burden of proof applicable to the presumption of the government's good faith." Am-Pro Protective Agency, Inc. v. U.S., 281 F.3d 1234, 1239 (Fed. Cir. 2002). This burden of proof is appropriate, for Appellant is essentially accusing the Area Office of acting in bad faith in issuing the size determination.

III. Analysis

A. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. ß 134.304(a)(1).

B. Does Appellant Have an Identity of Interest with Corporate Express?

The evidence of an identity of interest due to Appellant's economic reliance upon Corporate Express is overwhelming. In addition to Appellant depending on Corporate Express for 70% of its revenue (which is sufficient to support a determination of economic dependence by itself), the record shows that: (1) Corporate Express claims Appellant and it have a strategic alliance; (2) Appellant is co-located with Corporate Express at several locations; and (3) Appellant relies upon Corporate Express infrastructure for its ability to perform large contracts. This evidence is precisely the kind of evidence of economic dependence anticipated by the plain meaning of 13 C.F.R. ß 121.103(f) and most closely akin to the types of situations OHA addressed in its economic dependency decisions.

Appellant has not challenged or rebutted these facts by proving they are clearly in error as required by 13 C.F.R. ß 134.314. Rather, I find that Appellant generally failed to contest economic dependence beyond arguing that since 30% of its revenue was unrelated to Corporate Express, it would not go out of business if it ceased doing business with Corporate Express. Besides being insufficient to prove a clear error of fact, I hold that Appellant's argument is an admission of the facts found by the Area Office. Since I have held that a concern that depends upon another for 70% of its business is economically dependent upon the other concern for finding an identity of interest, I hold the Area Office made no clear error of fact or law in finding Appellant to be affiliated with Corporate Express on the basis of an identity of interest.

C. Is There Sufficient Evidence to Find Affiliation through Operation of the Ostensible Subcontractor Rule?

I find the Area Office expended significant effort to investigate the ostensible subcontractor rule as it applied to the relationship between Appellant and Corporate Express in Appellant's proposal. Not only did the Area Office carefully review and analyze the RFP, it also compared the RFP's requirements to Appellant's proposal. In its analysis, the Area Office chose to designate functions as "ancillary to the core services of the RFP" to indicate the opposite of the words "primary and vital," used in 13 C.F.R. ß 121.103(h)(4).

In the size determination, the Area Office first recited the Technical Management criteria given the most weight by the RFP. It then identified whether the proposal stated Appellant or Corporate Express would be performing the services that related to each RFP factor. As the result of this analysis, the Area Office concluded Appellant would be performing ancillary tasks and thus found Corporate Express was to perform primary and vital services under the RFP.

The Area Office found that Corporate Express, either acting individually or as part of its strategic alliance with Appellant, would perform all the highest weighted Technical Management requirements of the RFP. For example, in quoting from Appellant's proposal, the Area Office found Corporate Express was to perform the iProcurement requirements, fulfill orders, and report activities. In addition, Appellant's proposal made it clear that it was Corporate Express that would be making the majority of the required deliveries as its strategic alliance partner. According to its proposal. Appellant was to manage the contract, provide customer service and sales support, and perform marketing functions, none of which were weighted factors in the RFP's Technical and Management criteria.

In addition, the Area Office recited language from Appellant's proposal emphasizing the importance of Corporate Express (Size Determination at 4). More specifically, Appellant attributed much of the capability needed to perform the contract, such as managing servers, operating delivery vehicles, utilizing

warehouse replenishment software, and operating a Business Continuity Plan (safeguarding assets and maintaining accurate books) [FN3] to Corporate Express.

The Area Office completed its analysis of Appellant's proposal by assessing the source of key personnel for the performance of the contract arising under the RFP. The Area Office found that four of the seven individuals identified in the "Key Personnel Positions" portion of the RFP were current Corporate Express employees.

The Area Office found that the services Appellant would be performing were ancillary to the core services required by the RFP. It concluded that while Appellant would be performing various administrative functions, such as providing sales representatives, customer service, and account management, Corporate Express was the concern enabling the office products to be stored, available, packaged, and delivered. Accordingly, given the weight placed on various factors by the RFP, Appellant's role was less important than the role Corporate Express was to perform.

Appellant's response to the Area Office's findings on the ostensible subcontractor issue is sparse. Moreover, its primary argument is more of an admission than a rebuttal. Specifically, Appellant argues that "JPL issued its **solicitation** as a small business set-aside knowing that small business offerors likely would team with a large business to meet the [Oracle] iProcurement requirements, which were assigned the most weight for evaluation purposes by the JPL." (Appeal Petition at 9). Accordingly, Appellant argues that the Area Office's finding that Corporate Express was performing the core iProcurement functions and this core function must be performed by a small business, ignores that no small business would be likely to be qualified to perform the JPL contract." Id.

Appellant's logic is flawed. The Area Office did not determine that a small business must perform the iProcurement function. Rather, it found that Corporate Express' performance of this function, along with the "vast majority" of the factors given weighted importance in the RFP, including delivery, packaging and order fulfillment, meant Corporate Express was performing primary and vital (core) requirements of the JPL contract.

In addition, although merely asserted and not proven by Appellant, it is irrelevant that JPL knew small business offerors would team with large businesses to meet the iProcurement requirements of the RFP. This is because whatever JPL intended, Appellant still must comply with SBA's size regulations. That is, Appellant could not assign so much of the primary and vital work evaluated under the RFP's Technical Management factors to an other than small concern and still comply with 13 C.F.R. ß 121.103(h)(4).

The Record proves that the basis of Appellant's qualifications to perform the work required by the RFP were actually the qualifications and experience of Corporate Express, with whom it has a "strategic alliance." That is, Appellant's proposal largely attributed qualifications relevant to the RFP Management Technical factors (Operational Approach, Related Experience, and Management Approach) to Corporate Express. I hold this is sufficient to sustain a finding that Appellant is unusually reliant upon Corporate Express to both qualify for and perform the RFP's requirements.

D. Do the Totality of the Circumstances Support a Finding of Affiliation between Appellant and Corporate Express?

The Area Office considered many facts before determining that Appellant and Corporate Express are affiliated under the totality of the circumstances. In addition to the matters relevant to its identity of interest and ostensible

subcontractor determinations, the Area Office cited other facts relevant to the relationship between Appellant and Corporate Express.

For example, the Area Office also further investigated the relationship between Appellant and Corporate Express as it related to the UC and UNC BOA. From its investigation, the Area Office found that although the contract listed Corporate Express as the contractor, the ordering information on file reflected that the company was listed as "Company: Corporate Express" and "Does Business As: Faison/Corporate Express." In addition, UC and UNC indicated that some customers ordering off of the contract are counting partial awards to a minority owned firm (Appellant).

After reciting clarifications to its original size determination, the Area Office also found eleven (11) facts. While I have already discussed some of these facts in analyzing the identity of interest and ostensible subcontractor issues, these facts do support the Area Office's finding of affiliation through the totality of the circumstances. They are:

1. Appellant's President and CEO owns 55% of Appellant and Corporate Express owns 45% of Appellant;

2. Corporate Express is a large business;

3. Appellant has an average of 33 employees, six of whom share Corporate Express space;

4. Appellant and Corporate Express are in the same line of business (providing office supplies);

5. Appellant repeatedly terms and promotes Corporate Express as its "strategic partner" (since 1994);

6. One Corporate Express employee serves as a member on Appellant's Advisory Board;

7. Approximately 70% of Appellant's revenue over the past five years was generated as a result of its "strategic partnering" with Corporate Express;

8. Appellant and Corporate Express share six common locations;

9. In multiple states, Appellant has its employees in the Corporate Express office to provide "customer care and sales reps" along with Corporate Express staff;

10. For its large contracts, Appellant relies upon the infrastructure of Corporate Express (inventory, warehousing, delivery vehicles); and

11. A contract pursued and won by Corporate Express was awarded to "Faison/Corporate Express."

In addition to these eleven (11) facts, the Area Office noted that Appellant uses Corporate Express as a "subcontractor" in other contracts, including one for Pepsi-Cola advertising.

These eleven (11) facts, plus any independent facts arising under the Area Office's identity of interest and ostensible subcontractor findings, are extensive and material. For example, Corporate Express is not a spectator to Appellant's operation, for it owns 45% of Appellant, has an employee on its advisory board, transports Appellant's orders on its trucks, and accounts for 70% of Appellant's

revenue. What is more, its "strategic alliance" with Appellant formed the basis of Appellant's ability to submit an offer under the RFP. In the aggregate, these facts show a very substantial, dependent, and enduring relationship between Appellant and Corporate Express. Moreover, these facts show the entity with the power to control the relationship is Corporate Express.

When I vacated and remanded the Area Office's June 8, 2006 size determination, I stated that since the Area Office based its totality of the circumstances determination upon some incorrect or undeveloped facts, I had to vacate the size determination. I remanded because the Area Office did not determine there was affiliation under the independent factors in 13 C.F.R. ß 121.103 (whereupon I recommended it consider 13 C.F.R. ß 121.103(f) upon remand) and because I could not tell whether the Area Office would have determined there was affiliation had it known some of the facts it recited were incorrect. Regardless, I did not say the remaining true facts were insufficient to justify a determination of affiliation under the totality of the circumstances.

The Area Office corrected the deficiencies of the June 8, 2006 size determination. For example, through further investigation, it developed additional and relevant facts concerning the UC and UNC contract. The Area Office also examined the RFP and Appellant's proposal in detail. On the whole, its attention to the requirements of the Remand Order was complete.

I hold that Appellant has both failed to identify any material errors of fact or prove there are any clear errors of fact applicable to the facts underlying the size determination. Moreover, I hold the most relevant or probative evidence of affiliation under the totality of the circumstances is so overwhelming that even if the Area Office did make an error of fact, it is very likely to be harmless.

Considering the foregoing, I cannot hold that the Area Office made a clear error of fact or law in concluding that Appellant and Corporate Express are affiliated under the totality of the circumstances.

E. Was the Area Office Improperly Predisposed to Find Appellant was Affiliated with a Large Concern?

The Record contains no evidence of personal animus, prejudice, or bad faith. Arguably, the only suggestion of improper conduct comes from Appellant's statement in its Appeal Petition that the Area Office explained that small businesses attempting to do business on a large or nationwide scale "raises an automatic red flag" (Appeal Petition at 6).

Notwithstanding Appellant's failure to offer clear and convincing evidence of a predisposition by the Area Office, I find that explaining that certain business arrangements "raise a red flag" cannot constitute personal animus, prejudice, or bad faith (predisposition). Rather, I hold that mentioning the existence of a red flag is merely a recitation of what experience has taught area offices over time. Moreover, I take notice that size specialists in area offices are expected to be knowledgeable and are trained to spot various factors or "red flags." See 13 C.F.R. ß 121.1009(b).

I also hold that the size determination does not imply or suggest that national contracts cannot be held by small businesses unless they are affiliated with a large business. Rather, I hold this size determination is supported by the Record.

F. Summary

The facts in the Record are probative of Appellant's economic dependence upon

Corporate Express. The Record also shows that Corporate Express would be performing primary and vital requirements under the RFP and that Appellant was unusually reliant upon Corporate Express to qualify for the RFP and thus violated the ostensible subcontractor rule. Finally, the totality of the circumstances show a very strong and deliberate relationship between Appellant and Corporate Express that gives Corporate Express the power to control Appellant through that relationship.

Conclusion

I have considered Appellant's Petition and the Record. The Record shows the Area Office did not base its size determination upon a clear error of fact or law when it determined:

a. Appellant is an other than small concern because it is economically dependent upon and thus has an identity of interest with Corporate Express;

b. The relationship between Appellant and Corporate Express for the work required by the RFP constitutes a violation of the ostensible subcontractor rule; and

c. Appellant is affiliated with Corporate Express under the totality of the circumstances.

Therefore, the size determination is AFFIRMED.

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

Thomas B. Pender

Administrative Judge

FN1. The size standard for NAICS code 424120 is listed as 100 employees in 13 C.F.R. ß 121. However, in the acquisition of commercial items, the Federal Acquisition Regulation (FAR) provides a 500 employee size standard for a business which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture. 48 C.F.R. ß ß 12.301, 52.212-1(a); see also Size Appeal of GC Micro, SBA No. SIZ-4365 (1999).

FN2. 69 Fed. Reg. 29192, 29202 (May 21, 2004).

FN3. I recognize that Appellant avers this pertains to iProcurement, but find it irrelevant.