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

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| SIZE APPEAL OF: | |
| DMI Educational Training LLC | SBA No. SIZ-5275 |
| Appellant | Decided: August 31, 2011 |
| Appealed from<br>Size Determination No. 6-2011-069 | |

## APPEARANCES

Harry M. Samuels, Vice President, for Appellant.

Magaly Janota, President, for Assessment and Training Solutions Consulting Corporation.

## DECISION

### 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. Issues

Whether the Area Office clearly erred in concluding the protested concern is affiliated with a large concern through common management and the newly organized concern rule.

Whether the Area Office clearly erred in applying the adverse inference rule against the protested concern.

### III. Background

#### A. The Solicitation and Protest

On March 25, 2011, the Contracting Officer (CO) for the U.S. Marine Corps, MCBH-Kaneohe Bay, Hawaii, issued Solicitation No. M00318-11-T-0028 for Basic Combat Trauma

Training with Live Tissue Training Program.[1] The CO set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 611699, All Other Miscellaneous Schools and Instruction, which has a corresponding $7 million annual receipts size standard. DMI Educational Training LLC (DMIET or Appellant) submitted its offer on March 30, 2011.

On April 7, 2011, the CO notified Assessment and Training Solutions Consulting Corporation (ATSCC), an unsuccessful offeror, that Appellant was the awardee. ATSCC then protested Appellant's small business size status alleging Appellant is affiliated with Deployment Medicine Consultants, Inc. (DMI), a large company, based on common management, "other ties," and the ostensible subcontractor rule. On April 19, 2011, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting-Area VI (Area Office), for a size determination.

B. The Area Office Investigation

On April 26, 2011, the Area Office requested from Appellant its completed SBA Form 355 and other documents as well as its response to the protest allegations. On May 9, 2011, Appellant provided this information. The Area Office sent follow-up questions on May 10, May 23, and May 31st, and Appellant responded to them on May 12, May 27th, and May 31st.

In its May 9th response to the protest, Appellant stated it was established in January 2009 and, by itself, is under the $7 million size standard for NAICS code 611699. Appellant has three members: Dr. David Morehouse and Harry Samuels, who own 47.5% interests in Appellant, and one other member who has a 5% interest. Dr. Morehouse and Mr. Samuels both serve as Appellant's Vice Presidents and Managing Members. Appellant stated it received its first contract in 2011, having spent 2009 and 2010 "in the process of organizing and improving its infrastructure and operations."

Appellant asserted there is no common management because Dr. Morehouse resigned his position as DMI's Vice President for Operations on March 31, 2011[2]. Appellant also asserted it does not rely on DMI for experience or certifications, because Appellant's people have decades of experience in the tactical and tactical medical arena, and its leadership are former military special operations officers. Further, Appellant has its own past performance and USDA certification, and its medical instructor subcontractors are fully vetted medical personnel. In its Form 355, Appellant noted DMI did provide a list of suitable local subcontractors.

DMI was established in 2001 and is wholly owned by Dr. John Hagmann. DMI is other than small for NAICS code 611699, as stated in its Central Contractor Registration (CCR) and as shown on its own SBA Form 355. DMI is also known as Deployment Medicine International, and this name is reflected on the CCR as DMI's "mailing name."

[1] The training that is the subject of this procurement took place on April 11-13, 2011.

[2] Dr. Morehouse's resume states that he served as DMI's Vice President Operations from 2008 to 2011.

On May 10th, the Area Office asked Appellant to explain why Dr. Morehouse is listed on DMI's CCR as "Government Business Alternate POC" and why Appellant's personnel have email domains belonging to DMI. The Area Office also requested more information about Appellant's certifications and past performance. On May 12th, Appellant responded, explaining that Dr. Morehouse was still listed on DMI's CCR because DMI "hadn't gotten around to deleting him", one of "numerous clerical oversights." As for the DMI email domains, those were used "inadvertently" because the bid submission templates "had him listed that way."

Also, as requested, Appellant submitted its Vice Presidents' resumes and four contracts showing Appellant's past performance. Two of the contracts are dated November 2010, with "Deployment Medicine International Educat" as contractor, and signed by Dr. Morehouse as "VP OPNS, DMI." The other two contracts are dated February 2011, with "Deployment Medicine International (DMI)" as contractor, and signed by Dr. Morehouse as "VP Operations, DMIET." Each contract contains Appellant's Commercial And Government Entity (CAGE) Code 62HH0 and the same street address in San Marcos, California, listed on Appellant's CCR. The contradiction between the existence of two contracts dated in November 2010 (provided to the Area Office on May 12, 2011) and Appellant's May 9, 2011, statement that Appellant received its first contract in 2011, remains unresolved.

Appellant also informed the Area Office that it has no written subcontractor agreements, and that for the instant procurement oral subcontracts were used. Regarding certifications, Appellant noted its proposal, which is in the Area Office file, contains them. Appellant reiterated that the USDA certification was its own, and pointed out that the AAALAC approval letter includes both Appellant and DMI (along with a third company). Also, Appellant ultimately did not rely on DMI's BUMED certification for the instant procurement because, following the CO's inquiry, a BUMED officer gave oral approval for Appellant to conduct the training. Appellant noted its own BUMED certification was pending.

On May 23, 2011, the Area Office requested more information on DMI and information on Appellant's subcontractors for the instant procurement. The Area Office also requested information on other businesses in which Appellant's principals are involved, naming one entity not reported in Appellant's Form 355 but which Dr. Morehouse's resume states he owns.

On May 27, 2011, Appellant responded to the Area Office's May 23, 2011, requests. Appellant stated that on the instant procurement, DMI provided 4 of the 26 instructors and none of the other 6 staff. Appellant attached two lists containing a total of 23 individuals who staffed the contract. Appellant also submitted a revised Form 355 stating that Dr. Morehouse is involved in two other businesses and that Mr. Samuels wholly owns seven other businesses, five of which Appellant declined to name. The two named businesses of Mr. Samuels' are Appellant's accountant and its registered agent. In addition, Mr. Samuels sits on over a dozen boards of directors. Appellant asserted that, except for the accounting practice and registered agent firm, the other businesses are all unrelated to Appellant or the size determination.

On May 31, 2011, the Area Office requested the tax returns of the businesses listed in Appellant's revised Form 355 and the names of all the businesses on whose boards Mr. Samuels sits, along with other information on his involvement with each of those businesses. The Area

Office also asked about the conflict between Appellant's Form 355 which states Appellant has no employees and its claim to having provided 28 people for the instant procurement.

Appellant responded by letter dated May 31, 2011. Appellant stated that no tax returns have been prepared for any of Mr. Samuels' companies for three years and thus it could not provide them to the Area Office. Appellant did provide a rough figure of the receipts of two of those companies (but no documents supporting that figure), and stated that, except for his accounting practice all of Mr. Samuels' companies are inactive. Further, all of the companies on whose boards Mr. Samuels sits are the companies of his clients and have nothing to do with Appellant. Appellant named one of them, identifying it as a non-profit and referring to Mr. Samuels' "co-director" role as "ceremonial." Appellant refused to identify the others, asserting that to do so would violate his clients' trust.

As for the two other companies in which Dr. Morehouse is involved, Appellant stated that one of them is "not a separate business entity" and thus does not file tax returns, and that the other has not yet filed its 2010 tax return, although prior year tax returns had been filed. Appellant provided a rough figure of this company's receipts, but no documents supporting that figure. As for Appellant's having provided 28 people for the instant contract despite having no employees of its own, Appellant stated that the people provided were "hired as contractors, not as employees." Appellant also provided "revised schedules" of the contract personnel. There are a total of 16 different individuals on these schedules.

C. Size Determination No. 6-2011-069

On June 2, 2011, the Area Office issued Size Determination No. 6-2011-069 (Size Determination) concluding Appellant is not an eligible small business under the $7 million annual receipts size standard. The Area Office found that Appellant is affiliated with DMI under the common management and newly organized concern rules. The Area Office then added Appellant's receipts to those of DMI, and concluded that the combined receipts exceed the $7 million size standard.

Under common management, the Area Office cited *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-5403 (2004) for the proposition that common management affiliation does not require the individual to have total control of the concern, just critical influence. As Vice President of both Appellant and DMI, Dr. Morehouse satisfies this requirement. His March 31, 2011, resignation from DMI had no effect on this finding, as it followed Appellant's March 30, 2011, self-certification as a small business.

Regarding the newly organized concern rule, the Area Office found that the first three elements of that rule were satisfied because of: (1) Dr. Morehouse's officer role in DMI, (2) the fact that both Appellant and DMI provide combat trauma training and management, and (3) Dr. Morehouse's officer role in Appellant. As for the fourth element, the Area Office determined that it was satisfied based on three findings of "ties" between Appellant and DMI: (a) the fact Appellant had included DMI's certification in its offer and admitted it would have relied on DMI's certification if needed; (b) Appellant's use of DMI's email domain; and (c) Appellant's lack of relevant past performance and need for DMI's assistance, citing the fact

that two of Appellant's four prior contracts were in DMI's name, not Appellant's. The Area Office stated that Appellant "clearly has not demonstrated it has the ability to perform the requirements of this procurement with its own resources without assistance from DMI." Noting that these ties "remain in place", the Area Office concluded Appellant also has not demonstrated clear fracture to rebut affiliation under the newly organized concern rule.

The Area Office also applied an adverse inference to conclude Appellant was other than small after Appellant had failed to provide the Area Office with all of the requested information about the other companies with which Appellant's principals are involved, and the identity of the companies on whose boards Mr. Samuels sits and his position in them. Citing 13 C.F.R. §§ 121.1008(d) & 121.1009(d), the Area Office presumed the information not provided would show Appellant is not a small business. The Area Office also noted some contradictions in the information Appellant did provide.

D. The Appeal

Appellant received the Size Determination on June 2, 2011, and filed its size appeal with OHA on June 16, 2011. Appellant presents three arguments.

First, Appellant asserts it is not affiliated with DMI under the common management rule because Dr. Morehouse could not have had any degree of critical influence over DMI on the day immediately preceding his resignation.

Second, Appellant asserts it is not affiliated with DMI under the newly organized concern rule because DMI is not providing Appellant with contracts or other assistance. Further, the two contracts the Area Office identified as DMI's are Appellant's, recognizable by the CAGE Code. Thus, the fourth element of the newly organized concern rule is not satisfied.

Third, Appellant asserts the Area Office incorrectly applied the adverse inference rule against it to find it other than small. Appellant argues that certain tax returns the Area Office requested do not exist. Appellant also argues that the only information relevant to a size determination - the revenue of certain companies - it did provide to the Area Office and also offered to provide it under oath. As for the companies on whose boards Mr. Samuels sits, Appellant argues that their revenue is not relevant to the instant size determination because Mr. Samuels doesn't control those companies, and they are thus not Appellant's affiliates. Appellant also complains about the short timeframes for submitting the requested information, especially on the May 31st request, and that responding to SBA's information requests would breach his clients' confidence and trust.

As relief, Appellant requests the Area Office's Size Determination be reversed.

On June 24, 2011, ATSCC moved to intervene and filed a response in support of the Area Office's Size Determination. ATSCC also asserts Appellant's appeal petition contains new evidence which OHA should not consider.

On July 5, 2011, Appellant filed an opposition to ATSCC's motion to intervene.

## IV. Discussion

### A. Timeliness, Intervention, and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the Size Determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a).

The regulations governing size appeals permit any person served with an appeal petition to file and serve a response. 13 C.F.R. § 134.309(a). ATSCC, the protestor below, was so served. Thus, ATSCC is permitted to file a response to the appeal, as it did, even without first moving for intervention.

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 (1999). OHA will disturb the Size Determination only if the Administrative 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 (2006).

### B. Merits of the Appeal

SBA determines the size status of a concern as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer which includes price. 13 C.F.R. § 121.404(a). Here, Appellant self-certified its size status as a small business when it submitted its offer for the instant procurement on March 30, 2011.

#### 1. Common Management

The size regulations provide that affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of another concern. 13 C.F.R. § 121.103(e). Common management affiliation does not require total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations. *Size Appeal of Active Deployment Systems*, SBA No. 5216, at 6 (2011) (citing *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-5403 (2004)).

Here, as of March 30, 2011, Dr. Morehouse was DMI's Vice President for Operations, a position he has held since 2008 and that clearly has the ability to exercise substantive control over DMI's operations, and at the same time is one of Appellant's two managing members. Dr. Morehouse did not resign from DMI until March 31, 2011, one day after Appellant self-certified as a small business for the instant procurement. The resignation occurring one day after self-certification does not affect Appellant's size status on the self-certification date. *See* 13 C.F.R. § 121.404(a).

Appellant argues on appeal that common management affiliation is inapplicable because Dr. Morehouse could not have had any degree of critical influence over DMI on the day immediately preceding his resignation. I must reject this argument. Size status is determined on the self-certification date. 13 C.F.R. § 121.404(a).

Accordingly, I conclude the Area Office correctly determined that, as of the self-certification date, Appellant and DMI are affiliated under the common management rule.

2. The Newly Organized Concern Rule

The newly organized concern rule provides that concerns are affiliated where four elements are met: (a) Former officers, directors, principal stockholders, managing members or key employees of one concern organize a new concern; and (b) The new concern is in the same or related industry or field of operation; and (c) The individuals who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members or key employees; and (d) The one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(g). A concern may rebut such an affiliation determination by demonstrating that there is a clear line of fracture between the two concerns. *Id.* The purpose of the newly organized concern rule is to prevent circumvention of the size standards by the creation of "spin-off" firms that appear to be small, independent firms but are, in fact, affiliates or extensions of large firms. *Size Appeal of J.W. Mills Management,* SBA No. SIZ-4909, at 5 (2008).

Here, as of March 30, 2011, Dr. Morehouse was DMI's Vice President of Operations, an officer, satisfying the first element of the rule. *See Size Appeal of Sabre88, LLC,* SBA No. SIZ-5161, at 7-8 & n.2 (2010) (holding that a current owner satisfies the first condition just as a former owner would). Appellant does not dispute that the second and third elements of the newly organized concern rule are also satisfied.

Appellant does dispute the Area Office's determination that the fourth element of the newly organized concern rule is satisfied. Appellant asserts (a) the Area Office erred in its finding that Appellant needed DMI's certifications to conduct the required training; (b) the appearance of the DMI name and email domains in the proposal and Appellant's four prior contracts was pure clerical error; and (c) The Area Office erred in finding that two of the contracts Appellant presented to the Area Office were really DMI's contracts and that Appellant needed DMI's assistance. Therefore, because the Area Office erred in making these findings, it erred in determining that the fourth element of the newly organized concern rule is satisfied. Thus, Appellant asserts, the Area Office's conclusion that there is affiliation between Appellant and DMI based on the newly organized concern rule is error.

I agree with Appellant.

To satisfy the fourth element of the newly organized concern rule, DMI would have to furnish Appellant with contracts, financial or technical assistance, indemnification on bid or performance bonds, and or other facilities, whether for a fee or otherwise. *See* 13 C.F.R.

§ 121.103(g). There is no evidence in the Area Office file that DMI has furnished Appellant with any of these types of assistance. To the contrary, it is Appellant that has furnished DMI with a small subcontract, in connection with the instant procurement.

The Area Office here has misinterpreted this element of newly organized concern analysis to mean that the existence of ties between the two concerns satisfies it. Ties alone do not satisfy it; there must be assistance running from the original concern to the new concern. The persistence of ties between the two concerns points instead to the clear fracture rebuttal, a step in newly organized concern analysis that the Area Office would not have reached had it not misinterpreted the fourth element to include it. Another error the Area Office made was to attempt to evaluate Appellant's ability to perform the instant contract, a function that is part of the contracting officer's responsibility determination and, thus, outside the size determination process. *See* 13 C.F.R. § 125.5; FAR subpart 19.6 (certificate of competency program).

Here, the Area Office specifically erred in finding Appellant needed DMI's certifications. The Area Office file contains the two certifications in Appellant's own name as well as the one from DMI that was not used because the certification was given orally by the certifying agency to the CO. The Area Office also erred in being misled by certain of Appellant's typographical errors, the most critical of which were on the two prior contracts the Area Office mistakenly thought were DMI's. These two contracts, as Appellant asserts, do contain Appellant's unique CAGE Code and street address consistent with the other two prior contracts.

Accordingly, I conclude the Area Office made clear errors of fact and law in determining Appellant is affiliated with DMI under the newly organized concern rule.

3. Adverse Inference

Appellant asserts the Area Office misapplied the adverse inference rule after Appellant had failed to submit various requested information. I disagree. The size determination regulations provide:

> If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

13 C.F.R. § 121.1008(d). Further:

> In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

13 C.F.R. § 121.1009(d). These provisions are known as the adverse inference rule.

OHA has long decided cases on the application of the adverse inference rule using a three-part test. The test requires, first, that the requested information be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Finally, the request for information must be specific. If all three criteria are met, the challenged firm or the alleged affiliate must produce the information requested by the Area Office or suffer the consequences of an adverse inference. *E.g., Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008).

Here, the record clearly shows that the Area Office made certain requests for information, through the SBA Form 355 or in follow-up requests, and that Appellant refused to submit that information. For example, Question 9a on Form 355 asks whether the protested concern's owners and officers (here Dr. Morehouse and Mr. Samuels) own any other concern, or serve as a director, manager, principal stockholder, or employee of any other concern. Appellant initially answered "no" to Question 9a. On May 23rd, after the Area Office learned Question 9a had not been answered correctly, it requested Appellant to submit a revised Form 355. On May 27th, Appellant submitted the revised Form 355, with Question 9a answered "yes."

Further, Question 9b on Form 355 asks to identify the other companies the protested concern's owners and officers are involved in, their positions and ownership interests. On its revised Form 355, Appellant identified four concerns by name: one in which Dr. Morehouse has a 50% interest and serves as V.P, one for which the blocks for Dr. Morehouse's position and interest were marked "N/A," and two that Mr. Samuels wholly owns (the accounting practice and registered agent firm). Appellant also noted on the Form 355 that there were "5 Other Non-related businesses" wholly-owned by Mr. Samuels. Appellant mentioned in the same submission that Mr. Samuels sits on the boards of 12 other concerns. Appellant declined to name any of these 17 concerns in Question 9b or anywhere else.

Instead of providing requested information, Appellant argued to the Area Office, and now on appeal, that none of these 17 concerns is relevant to the size determination. Appellant argues, alternatively, that the only relevant information about these concerns is their revenue, which Appellant offers and offers to provide under oath. As for the companies on whose boards Mr. Samuels sits, Appellant argues that even their revenue is not relevant to the size determination because Mr. Samuels doesn't control those companies, and they are thus not Appellant's affiliates. Appellant also complains about the short timeframes for submitting requested information.

All of these arguments are meritless. Contrary to Appellant's view of the process, it is the SBA, and not the protested concern, that makes the affiliation determinations and determines whether particular information is relevant to a size determination. *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008).

Under the three-part test, first, identification of all concerns 50% or 100% owned by the protested concern's principals is relevant, because these concerns also would be the protested concern's affiliates. *See* 13 C.F.R. § 121.103(c)(1). Second, the level of connection between a protested concern and another concern owned by the same principals is so great that it is asked of every protested concern on the Form 355 itself, in Question 9. Finally, the directive for information contained in the Area Office's information request was specific. Appellant certainly understood it, for instead of complying with the directive to provide information, Appellant asserted the information requested was confidential and then failed to provide it.

I agree with the Area Office that Appellant's proffer of the amounts of revenue received by the various companies is insufficient.

Appellant had more than enough time to provide the information. Not only that, but Appellant's responses to the questions clearly indicate Appellant's disagreement with the questions, strongly suggesting that, even with a longer timeframe, Appellant would not have submitted any more information than it actually did.

Appellant sought to benefit from a procurement set-aside for small businesses. Therefore, Appellant, as a firm attempting to take advantage of a federal procurement set-aside, must meet the requirements applicable to a set-aside, including proving its size status as a small business (13 C.F.R. § 121.1009(c)) and providing information when requested (13 C.F.R. § 121.1008(d)). Appellant has failed to do so, and must suffer the consequences of the adverse inference.[3]

Accordingly, I conclude the Area Office was correct to apply the adverse inference rule in its Size Determination to find Appellant other than small under the $7 million size standard.

C. Summary

Based on the record before me, I find:

(1) Appellant has not established that the Area Office's conclusion that Appellant is affiliated with DMI under the common management rule was based on any clear error of fact or law;

(2) Appellant has established that the Area Office's conclusion that Appellant is affiliated with DMI under the newly organized concern rule was based on clear errors of fact and law; and

[3] OHA has also rejected claims of privacy and confidentiality. *Size Appeal of Donovan Travel, Inc. d/b/a Carlson Wagonlit Travel*, SBA No. SIZ-4270, at 7 (1997). First, as provided in 13 C.F.R. § 121.1008(d), SBA will not release information obtained in the course of a size determination except as permitted by Federal law. Second, SBA is aware of the provisions of 28 U.S.C. § 1905 (The Trade Secrets Act), which prohibit SBA's employees from releasing proprietary or confidential information contained in a firm's submissions. Third, there is an exemption to the Freedom of Information Act (FOIA) for this information. § 552(b)(4)). Based upon the foregoing, any concern that SBA would release such information is unfounded.

(3) Appellant has not established that the Area Office's application of the adverse inference rule to conclude Appellant is other than small was based on any clear error of fact or law.

Therefore, I must REVERSE only that portion of the Size Determination pertaining to the newly organized concern rule. I must AFFIRM the portions of the Size Determination pertaining to the common management and adverse inference rules.

## III. 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. 13 C.F.R. § 134.316(d).

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CHRISTOPHER HOLLEMAN
Administrative Judge