

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Veterans Technology, LLC,

Appellant,

Appealed From
Size Determination No. 3-2016-050

SBA No. SIZ-5763

Decided: July 20, 2016

APPEARANCES

Kenneth B. Weckstein, Esq., Pamela A. Reynolds, Esq., Brown Rudnick LLP,
Washington, D.C., for Appellant

DECISION¹

I. Introduction

On May 2, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-050 concluding that Veterans Technology, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ OHA originally issued this decision under a protective order. On August 5, 2016, counsel for Appellant informed OHA that no information need be redacted from the published decision. Thus, OHA now publishes the decision in its entirety.

II. Background

A. Solicitation and Protest

On June 26, 2015, the U.S. Department of Defense, Missile Defense Agency (MDA) issued Request for Proposals (RFP) No. HQ0147-15-R-0019 for business operations support services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$15 million average annual receipts. Appellant submitted its initial offer, including price, on August 26, 2015, self-certifying as a small business.

On April 1, 2016, MDA announced that Appellant was the apparent awardee. On April 6, 2016, Middle Bay Solutions II (Middle Bay), a disappointed offeror, filed a size protest against Appellant. Middle Bay alleged that Appellant is not a small business because it is affiliated with ECS Federal, LLC (ECS), a large business, under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). The CO forwarded the protest to the Area Office for review.

B. Size Determination

On May 2, 2016, the Area Office issued Size Determination No. 3-2016-050 concluding that Appellant is not a small business for the instant procurement.

The Area Office explained that Appellant is a joint venture between Defense Acquisition, Inc. (DAI) and MDW Associates, LLC (MDW). (Size Determination at 4.) As a general rule, concerns submitting an offer as a joint venture are affiliated for purposes of that procurement. (*Id.* at 5, citing 13 C.F.R. § 121.103(h)(2).) SBA regulations do, however, permit a joint venture to qualify as a small business if each member of the joint venture is a small business. (*Id.* at 5-6, citing 13 C.F.R. § 121.103(h)(3)(i).) The Area Office proceeded to consider whether DAI and MDW are small businesses. The Area Office found that DAI is a small business. (*Id.* at 6.) MDW, though, is not a small business because MDW is affiliated with ECS through economic dependence, 13 C.F.R. § 121.103(f), and the newly organized concern rule, 13 C.F.R. § 121.103(g).

With regard to the issue of economic dependence, the Area Office stated that, under long-standing OHA precedent, concerns are affiliated through economic dependence when one depends on the other for 70% or more of its revenue. (*Id.* at 7, citing *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007).) Appellant's size is determined as of August 26, 2015, the date of Appellant's self-certification, so the Area Office reviewed MDW's receipts for its three prior fiscal years, 2012 — 2014. The Area Office found that MDW derived 100% of its revenues from ECS during 2012, and more than 90% of its revenues from ECS during 2013 and 2014. (*Id.*) The percentage declined during fiscal year 2015, but still was greater than 70%. (*Id.*) The Area Office also noted that MDW and ECS entered into a new teaming agreement on February 1, 2016. The Area Office concluded that “[MDW's] contractual relationship with ECS and a recent Teaming Agreement signed February 1, 2016, indicate a relationship that is strong

and continuing.” (*Id.*) The Area Office found no “significant change in [MDW's] relationship with ECS to show economic independence as of the date size is determined.” (*Id.* at 8.)

Appellant contended that, because MDW was founded in February 2012, MDW is akin to a start-up business and is eligible for the exception established by OHA in *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011). (*Id.* at 7-8.) The Area Office rejected this argument, stating that *Argus and Black* is not applicable because “MDW has been in business for more than a year, [and] the contracts with ECS are not a small contract of short duration but rather subcontracts of at least three years and earning millions.” (*Id.* at 8.)

Turning to the newly organized concern rule, the Area Office determined that ECS acquired Paradigm Technologies, Inc. (Paradigm) on December 31, 2011, and that the founder of MDW, Mr. Mark Maguire, was Vice President and Subject Matter Expert at Paradigm from July 2003 to June 2013. (*Id.* at 6, 8.) Other high-level MDW employees also were previously employed by Paradigm. (*Id.* at 6.) The Area Office found no merit to Appellant's claim that Mr. Maguire “did not have any role in decision making or corporate strategy development or approval,” explaining that “Mr. Maguire is the former Vice President (officer) of Paradigm, which was wholly acquired by ECS.” (*Id.* at 9.) The Area Office determined that MDW is a relatively new concern, established in February 2012; that ECS and MDW are in the same line of business; and that ECS provides significant subcontracting opportunities to MDW. (*Id.*) As a result, all elements of the newly organized concern rule are met, and MDW is affiliated with ECS under that rule.

The Area Office reiterated that DAI alone is a small business. (*Id.* at 11.) However, because Appellant is a joint venture between DAI and MDW, and MDW is not a small business due to affiliation with ECS, Appellant is not a small business for this procurement. (*Id.* at 11-12.)

C. Appeal

On May 17, 2016, Appellant filed the instant appeal. Appellant argues that the Area Office clearly erred in finding MDW affiliated with ECS. Therefore, OHA should reverse the size determination.

Appellant argues that the Area Office construed *Argus and Black* too narrowly. In *Argus and Black*, OHA recognized an exception to *Faison* in situations where the challenged firm had recently begun operations and had only one small contract of short duration. Appellant contends that this exception can also be extended to concerns, such as MDW, which have been in business longer than a year and which have earned significant revenues from a single company. (Appeal at 12-13, citing *Size Appeal of Cherokee Nation Healthcare Services, Inc.*, SBA No. SIZ-5343 (2012) and *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015).) Appellant highlights that MDW was founded in February 2012 and therefore may be considered a “newly formed government contracting company.” (*Id.*) Further, although MDW historically has derived the large majority of its revenues from ECS, MDW has “rigorously pursued” non-ECS work. (*Id.* at 9.) As a result of these efforts, the total percentage of revenue that MDW derives from ECS has declined from 100% in 2012 to 78.5% in the first quarter of 2016. (*Id.* at 10, 14.) The

percentage would decline further if MDW were awarded additional non-ECS work, such as the instant contract. (*Id.* at 14.) In Appellant's view, “[a]pplying the 70% rule in the circumstances of this case doesn't make sense and is bad policy.” (*Id.* at 15.)

Appellant argues that the Area Office improperly relied upon the new teaming agreement between MDW and ECS as evidence of their strong and continuing relationship. (*Id.* at 15.) Appellant observes that the teaming agreement was executed on February 1, 2016, more than five months after the date of Appellant's self-certification, and thus has no bearing on whether MDW was economically dependent upon ECS as of the date to determine size. Moreover, the Area Office could not reasonably focus on the teaming agreement while ignoring other events that occurred after the date of self-certification, such as MDW's efforts to obtain non-ECS work. (*Id.*)

Appellant criticizes *Faison* and the line of OHA decisions following it. Whereas SBA regulations specifically state that an identity of interest may be rebutted, OHA case law has essentially treated the presumption as non-rebuttable once the 70% threshold is exceeded. (*Id.* at 16.) Further, although small businesses can appropriately be charged with knowledge of SBA regulations, “[i]t is not fair to expect that small businesses will read OHA cases before submitting certifications to look for cases that invalidate or expand on the SBA regulations.” (*Id.* at 16.)

Appellant contends that, if the Area Office had properly reviewed the record, it would have found that Appellant had rebutted the presumption of identity of interest. Appellant emphasizes that, apart from the business dealings between MDW and ECS, the Area Office did not find additional ties suggestive of economic dependence, such as common ownership or financial and technical assistance. (*Id.* at 7, 17.)

Appellant also challenges the Area Office's determination that MDW and ECS are affiliated under the newly organized concern rule. According to Appellant, the first element of the rule is not met, because Mr. Maguire was not a corporate officer of Paradigm. (*Id.* at 18.) Nor was he a director, stockholder, managing member, or key employee of Paradigm. (*Id.* at 5, 18-19.) Appellant concedes that “Mr. Maguire was designated as a key person on one Paradigm task order,” but insists that “he was not in a position to critically influence or have substantive control over ECS's operations.” (*Id.* at 19.) Appellant points out that, upon his departure from Paradigm, ECS did not require Mr. Maguire to sign a non-compete agreement because “ECS did not even believe that Mr. Maguire was an important employee.” (*Id.* at 20.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction

that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

I find no merit to this appeal. As the Area Office recognized, SBA regulations provide for affiliation between “firms that are economically dependent through contractual or other relationships.” 13 C.F.R. § 121.103(f). In interpreting this provision, OHA has long held, as a matter of law, that a firm that derives 70% or more of its revenue from another firm is economically dependent upon that firm. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007); *see also Size Appeal of Ma-Chis Project Controls, Inc.*, SBA No. SIZ-5486 (2013); *Size Appeal of Strategic Defense Solutions, LLC*, SBA No. SIZ-5475 (2013); *Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427 (2012); *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306 (2011); *Size Appeal of Norris Prof'l Servs., Inc.*, SBA No. SIZ-5289 (2011); *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 5 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). Furthermore, although the 70% threshold historically was not stated in SBA regulations, SBA recently amended its affiliation regulations to incorporate the 70% threshold, effective June 30, 2016. 81 Fed. Reg. 34,243 (May 31, 2016). As a result, SBA regulations now state that “SBA may presume an identity of interest based upon economic dependence if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years.” 13 C.F.R. § 121.103(f)(2) (2016).

In the instant case, the Area Office determined, and Appellant does not dispute, that MDW derived more than 70% of its revenues from ECS from 2012 through 2015. Section II.B, *supra*. Specifically, MDW derived 100% of its revenues from ECS during 2012, more than 90% of its revenues from ECS during 2013 and 2014, and more than 70% of its revenues from ECS during 2015. *Id.* While Appellant emphasizes that the Area Office found no other indicia of affiliation between MDW and ECS, OHA has made clear that “a contractual relationship between two concerns with one heavily dependent for its revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms.” *Size Appeal of Incisive Tech., Inc.*, SBA No. SIZ-5122, at 4 (2010). Accordingly, based on 13 C.F.R. § 121.103(f) and OHA case precedent, the Area Office properly found that MDW was affiliated with ECS through economic dependence as of August 26, 2015, the date of Appellant's self-certification.

Appellant argues that the Area Office could not properly consider the recent teaming agreement between MDW and ECS, because that agreement was executed on February 1, 2016, several months after the date of Appellant's self-certification. I agree with Appellant that MDW's size is assessed as of August 26, 2015, so events occurring after this date are not relevant. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 10 (2013) (explaining that “because size is determined as of the self-certification date, a size determination must determine affiliation—in this case, economic dependence—as of that date.”). Nevertheless, it is clear from the record that MDW continued to derive more than 70% of its receipts from ECS, and therefore was economically dependent upon ECS, as of the date to determine size. As a result, the Area Office's discussion of the teaming agreement was, at most, harmless error, and does not constitute valid grounds to reverse the size determination.

Appellant also argues that the *Faison* line of cases is inconsistent with SBA regulations, and that small businesses cannot be expected to be familiar with legal principles that are not set forth in regulation. These arguments too are meritless. Contrary to Appellant's suggestions, OHA case law has not treated the presumption in 13 C.F.R. § 121.103(f) as non-rebuttable. Indeed, Appellant itself cites decisions — such as *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011) — where OHA has found that the presumption was rebutted. Appellant's complaints about the lack of guidance in SBA regulations may be moot in light of the recent regulatory amendments discussed above. Even if Appellant remains dissatisfied with the regulations as amended, though, such arguments should be directed to SBA policy officials, not to OHA. It is well-settled that OHA “has no authority to determine the validity of the size regulations and can entertain no challenge to them.” *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 9 (2012) (quoting *Size Appeal of Condor Reliability Servs., Inc.*, SBA No. SIZ- 5116, at 6 (2010)).

Appellant also contends that MDW was a newly formed business in 2012, and therefore should be eligible for the exception set forth in *Argus and Black*. In *Argus and Black*, OHA recognized an exception to *Faison* in situations “where the challenged firm has only recently begun operations either initially or after a period of dormancy, and is dependent upon its alleged affiliate for only one small contract of short duration, which by itself could [not] sustain a business.” *Argus and Black*, SBA No. SIZ-5204, at 6-7. In the instant case, though, MDW was not a startup business in August 2015, and MDW's arrangement with ECS was not a small contract of short duration but rather multi-million dollar subcontracts spanning several years. Section II.B, *supra*. Under such circumstances, OHA has declined to apply the exception from *Argus and Black*. *Size Appeal of Core Recoveries, LLC*, SBA No. SIZ-5723, at 6 (2016); *Ma-Chis Project Controls*, SBA No. SIZ-5486, at 4.

OHA's decisions in *Size Appeal of Cherokee Nation Healthcare Services, Inc.*, SBA No. SIZ-5343 (2012) and *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015) do not compel a different result. In *Cherokee Nation*, although the challenged firm was founded approximately three years before the date to determine size, OHA noted that the challenged firm had “only recently come out of its dormant status.” *Cherokee Nation*, SBA No. SIZ-5343, at 5. Conversely, in the instant case, MDW has not been dormant for an extended period, and therefore can no longer be considered a start-up business in August 2015. In *Olgoonik Solutions*, the challenged firm was a subsidiary of an Alaska Native Corporation. OHA found that the challenged firm relied upon the financial support of its parent company, which was not associated with the alleged affiliate, and that the revenues the challenged firm earned from its alleged affiliate were insufficient to sustain business operations. *Olgoonik Solutions*, SBA No. 5669, at 6. By contrast, in the instant case, Appellant has not shown that MDW could remain viable without the revenues derived from ECS.

I need not decide whether MDW is also affiliated with ECS under the newly organized concern rule, because, as discussed above, MDW is not a small business due to economic dependence upon ECS. *Size Appeal of W. Harris, Gov't Servs. Contractor, Inc.*, SBA No. SIZ-5717, at 8 (2016) (declining to rule on issues that were “immaterial to the outcome of this case”); *Size Appeal of BR Constr. LLC*, SBA No. SIZ-5303, at 9 (2011).

IV. Conclusion

Appellant has not proven clear error in the size determination. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge