United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: MDW Associates, LLC, Appellant, Appealed From Size Determination No. 2-2016-101-102-103	SBA No. SIZ-5794 Decided: December 5, 2016

APPEARANCES

Pamela J. Mazza, Esq., Patrick T. Rothwell, Esq., Megan C. Connor, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant

Mark J. Nackman, Esq., Carrie F. Apfel, Esq., Carla J. Weiss, Esq., Jenner & Block LLP, Washington, D.C., for Allied Associates International, Inc.

Benjamin G. Chew, Esq., Rory E. Adams, Esq., Manatt, Phelps & Phillips LLP, Washington, D.C., for JRC Integrated Systems, Inc.

DECISION[1]

I. Introduction

On October 7, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2016-101-102-

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

103 concluding that MDW Associates, 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 or remand. 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.

II. Background

A. Solicitation and Protests

On August 31, 2015, the U.S. Department of Defense, Missile Defense Agency (MDA) issued Request for Proposals (RFP) No. HQ0147-15-R-0024 for international affairs and foreign military sales support for the development and execution of a ballistic missile defense system. (RFP, Performance Work Statement § 1.1.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services. NAICS code 541330 ordinarily is associated with a size standard of $15 million, but the RFP indicated that the work fit within the exception for Military and Aerospace Equipment and Military Weapons, which utilizes a size standard of $38.5 million. Appellant submitted its initial offer, including price, on October 13, 2015, self-certifying as a small business.

On September 7, 2016, MDA announced that Appellant was the apparent awardee, and the Area Office subsequently received three size protests. The first was from the CO questioning Appellant's size status. The basis for the CO's protest was OHA's decision in *Size Appeal of Veterans Technology, LLC*, SBA No. SIZ-5763 (2016), in which OHA determined that Appellant is affiliated with ECS Federal, LLC (ECS), a large business, through economic dependence. The second protest was filed by Allied Associates International, Inc. (Allied), a disappointed offeror, alleging that Appellant's profile in the System for Award Management identified Appellant as other than small. In addition, Appellant's SBA profile stated that Appellant is affiliated with ECS. The third protest was filed by JRC Integrated Systems, Inc. (JRC), another disappointed offeror. JRC alleged that Appellant is not a small business because it is affiliated with ECS through economic dependence and the newly organized concern rule.

B. Response to the Protests

On September 23, 2016, Appellant responded to the protests. Appellant contended that it is not affiliated with ECS and is therefore a small business.

Appellant explained that it was formed on February 10, 2012. Mr. Mark Maguire is Appellant's President and Chief Executive Officer and owns [XX]% of Appellant. Mr. William “Brad” Walker is Vice President and Chief Operating Officer and owns [XX]%. Mr. Lee Dixson,

Vice President and Chief Financial Officer, also owns [XX]%. Ms. Stephanie Jordan, Director of Business Development and Marketing, owns [XX]%. (Protest Response at 6.)

Messrs. Maguire, Walker, and Dixson all are former employees of Paradigm Technologies, Inc. (Paradigm), which ECS acquired on December 30, 2011. Mr. Maguire was Vice President until he left in 2012, Mr. Walker was a Senior Analyst until he left in 2008, and Mr. Dixson was a task lead until he left in 2012. (*Id.* at 6-7.)

Appellant explained that in July 2012, Paradigm subcontracted work to Appellant on Paradigm's Missile Defense Agency Engineering and Support Services (MiDAESS) contract. After Messrs. Maguire and Dixson notified Paradigm that they had formed Appellant and planned to resign, Paradigm fired them. However, when MDA learned that Messrs. Maguire and Dixson would no longer work on the MiDAESS contract, MDA informed Paradigm that Messrs. Maguire and Dixson were key personnel on a task order then in performance, so they were required to remain for its duration. Messrs. Maguire and Dixson remained at Paradigm for a short time until Paradigm could negotiate a subcontract with Appellant. (*Id.* at 7.)

Appellant argued that it is not in violation of the newly organized concern rule because Messrs. Maguire, Walker, and Dixson were not officers, directors, principal stockholders, or key employees at Paradigm. Although Mr. Maguire was Vice President at Paradigm, he was not a corporate officer or key employee. Paradigm's only officers, Appellant maintained, were Mr. Rob Koch, its President, and Mr. Gerry Zimmerman, its Secretary and Treasurer. Mr. Maguire was not a key employee because he did not have any critical influence or substantive control over Paradigm's business operations. (*Id.* at 19-20.)

Alternatively, Appellant argued, even if Mr. Maguire were considered a key employee of Paradigm, Appellant still would not be affiliated with ECS. Appellant highlighted that "while Mr. Maguire was employed by Paradigm after the acquisition, he was never an employee of ECS, nor was he ever an officer, director, principal stockholder, or managing member of ECS." (*Id.* at 19.)

Appellant argued further that it is not economically dependent on ECS. To support this assertion, Appellant offered the following table of its revenues since it began operations:

Fiscal Year	[Appellant's] Revenue from ECS Subcontracts	[Appellant's] Total Revenue	ECS Subcontract Revenue/Total Revenue (%)
2012[a1]	$[XX]	$[XX]	100%
2013	$[XX]	$[XX]	100%
2014	$[XX]	$[XX]	95.14%
2015	$[XX]	$[XX]	85.57%
2016[a2]	$[XX]	$[XX]	80.99%
TOTAL	$[XX]	$[XX]	95.50%
2016[a3]	$[XX]	$[XX]	74.43%

(*Id.* at 10.) Appellant added that, as of October 2015, when it self-certified for the instant RFP, Appellant's revenues from ECS subcontracts represented 84% of its total revenue. (*Id.*) Furthermore, during August and September 2016, Appellant began performing two new contracts that do not involve ECS, demonstrating that "[Appellant] is continuing to shift its work from ECS to other contracting partners." (*Id.* at 10-11.)

Appellant argued it had rebutted the presumption of affiliation through economic dependence because, although Appellant has derived more than 70% of its revenues from ECS in each year since its inception, Appellant is a new company that has only been able to secure a limited number of contracts. Appellant argued further that it is not actually dependent on ECS, as "it has always [XXXX], has its own line of credit, has been awarded prime contracts and subcontracts with other prime contractors, and is capable of relying on its own personnel and resources to win contracts." (*Id.* at 13.)

C. Size Determination

On October 7, 2016, the Area Office issued Size Determination No. 2-2016-101-102-103[2] concluding that Appellant is not a small business for the instant procurement because Appellant 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).

The Area Office explained that, in *Veterans Technology*, OHA affirmed a finding that Appellant was economically dependent on ECS as of August 26, 2015. Because there is no authority that would allow an area office to disturb an OHA decision, the Area Office stated it could only review revenues Appellant incurred between August 26, 2015 and October 13, 2015, the date that Appellant self-certified for the instant procurement. The Area Office was unpersuaded by the fact that Appellant was awarded contracts from other sources after August

[a1] [Appellant]'s revenues in 2012 do not reflect a full fiscal year because [Appellant] was formed in February 2012 and did not start generating revenues until August 2012.

[a2] Figures based on revenues earned from January 1, 2016 through August 31, 2016.

[a3] Figures based on estimates of revenues for the remainder of 2016.

26, 2015, because "[t]he key factor is revenue received and not future or projected revenue." (Size Determination at 5.) More than 85% of Appellant's revenues during 2015 were from contracts with ECS, so Appellant is economically dependent on ECS.

The Area Office went on to consider the newly organized concern rule, noting that OHA did not reach the merits of this issue in *Veterans Technology*. The Area Office was unmoved by Appellant's contention that Mr. Maguire was not a key employee at ECS. ECS, the Area Office noted, [XXXX] key role on the MiDAESS contract. "This factor alone demonstrate[s] his importance to ECS and [that he] was a key employee." (*Id.* at 6.) As further support, the Area Office cited an e-mail referenced in the size determination appealed in *Veterans Technology*. According to this email, Mr. Maguire was an employee of ECS.

The Area Office then explained that ECS's receipts exceed the $38.5 million size standard. (*Id.*) Because Appellant and ECS are affiliated, their revenues are combined for purposes of calculating size. Appellant, therefore, is not a small business under the $38.5 million size standard.

D. Appeal

On October 19, 2016, Appellant filed the instant appeal. Appellant argues that the Area Office clearly erred in finding Appellant affiliated with ECS, so OHA should reverse or remand the size determination.

Appellant argues the Area Office disregarded evidence showing that Appellant had rebutted the presumption of economic dependence on ECS. As SBA recently stated in the preamble of a final rule revising the regulation on economic dependence, "firms should be permitted to make any arguments and provide any evidence that they believe demonstrates no affiliation should be found." (Appeal at 13, quoting 81 Fed. Reg. 34,242, 34,252 (May 31, 2016) (emphasis Appellant's).) Despite this policy, the Area Office ignored all arguments and evidence that were not based on revenue. According to Appellant, "[n]o consideration was given to the experience of [Appellant's] owners, [Appellant's] short time in business, the number of proposals it submitted, the contracts and subcontracts it was awarded, the unique nature of its business with MDA, or its independent financial condition." (*Id.* at 14.)

In addition, although Appellant has been in business for only a short time, Appellant represents that it was actively pursuing and capturing procurement opportunities with firms other than ECS. Appellant argues that it submitted evidence establishing as much, which the Area Office was required to examine. (*Id.*, citing *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451 (2013).) Because the Area Office did not conduct such an analysis, it did not see that Appellant's revenues derived from ECS continue to diminish, that Appellant has reduced the number of employees working on the MiDAESS subcontract, or that Appellant developed contract and subcontracts with firms besides ECS. (*Id.* at 15.)

Moreover, the Area Office did not consider the evidence Appellant offered showing that ECS has no power to control Appellant, because Appellant is [XXXX], and ECS does not provide any financing, technical assistance, indemnification, bonding support, or facilities to

Appellant. (*Id.* at 16.) Appellant's own personnel have the experience necessary to perform the services sought by MDA.

Appellant maintains it operates in a unique industry and has a unique business relationship with ECS. Appellant claims that MDA insisted that the companies work together, and there were restrictions on cross-teaming in re-competitions of MiDAESS task orders. The Area Office did not consider this evidence either. (*Id.* at 15-16.)

With regard to the newly organized concern rule, Appellant contends that Mr. Maguire was not a key employee of either ECS or Paradigm. The Area Office's reliance on an e-mail in the record of a different size determination is improper, Appellant contends, given that Mr. Maguire submitted a sworn declaration attesting that he was an employee of Paradigm, not ECS. The fact that Paradigm [XXXX] Mr. Maguire likewise does not support finding that he was a key employee at Paradigm. At most, it establishes he had a key role on one task order. It does not mean that he had critical influence and substantive control over Paradigm's "overall business operations." (*Id.* at 19 (emphasis in original).)

Appellant further criticizes the Area Office for "brush[ing] off the fact that ECS and Paradigm are independent entities." (*Id.*) Appellant argues that the Area Office could not properly treat ECS and Paradigm as the same entity for purposes of the newly organized concern rule.

E. Allied's Response

On November 10, 2016, after reviewing the record under the terms of an OHA protective order, Allied responded to the appeal. Allied contends that Appellant has not shown any error in the size determination, so OHA should deny the appeal.

Appellant has not rebutted the presumption of economic dependence for a number of reasons. First, although Appellant's reliance on ECS has declined modestly in recent years, Appellant still derived more than 70% of its revenues from ECS in every year since its inception. Next, Appellant's contention that it is a startup company is unpersuasive because, in *Veterans Technology*, OHA rejected this exact argument. Third, Appellant's descriptions of its efforts to diversify its customer base reinforce the notion that Appellant remains economically dependent on ECS, because Appellant has struggled to secure contracts beyond its relationship with ECS. Fourth, contrary to Appellant's claims, Appellant does not operate in a unique industry. Rather, according to its website and operating agreement, Appellant is a financial management services company. Fifth, Appellant's work with ECS on the MiDAESS contract demonstrates economic dependence, because Appellant agreed to engage in a long-term partnership exclusively with ECS and not to cross-team with other prime contractors. Finally, Appellant's argument that ECS cannot control Appellant misunderstands the law on economic dependence. As OHA explained in *Veterans Technology*, "a contractual relationship between two concerns with one heavily dependent for revenues on another is alone sufficient to support a finding of affiliation, even if there are no other ties between the firms." (Allied Response at 10, quoting *Veterans Tech.*, SBA No. SIZ-5763, at 5.)

Allied contends further that the Area Office correctly found Appellant affiliated with ECS under the newly organized concern rule. The Area Office determined that Mr. Maguire was a key employee of Paradigm, an entity owned and controlled by ECS, due to his role on the MiDAESS contract. Allied argues that Appellant "has not raised any error of fact or law" that would warrant sustaining the appeal. (*Id.* at 13.)

Allied also disputes Appellant's contention that the Area Office disregarded evidence Appellant provided. Allied observes that the Area Office referenced Appellant's sworn statements and other information in the size determination. (*Id.*)

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 agree with the Area Office and Allied that OHA's decision in *Size Appeal of Veterans Technology, LLC*, SBA No. SIZ-5763 (2016) is dispositive of this case. In *Veterans Technology*, OHA affirmed a size determination which found that Appellant was economically dependent upon — and therefore affiliated with — ECS as of August 26, 2015. OHA explained that, under 13 C.F.R. § 121.103(f) and long-standing OHA precedent, concerns are affiliated through economic dependence when one depends on the other for 70% or more of its revenue. *Veterans Tech.*, SBA No. SIZ-5763, at 5. There was no dispute in *Veterans Technology* that Appellant derived more than 70% of its receipts from ECS during the years 2012 through 2014, and that Appellant continued to exceed the 70% threshold as of the date to determine size, August 26, 2015. *Id.* Given Appellant's heavy economic dependence upon ECS, it was unnecessary to find any additional, or alternate, grounds for affiliation. *Id.* OHA also found no merit to the notion that Appellant was in the nature of a start-up business and therefore should be eligible for the exception outlined by OHA in *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011). *Id.* at 6. OHA concluded that "based on 13 C.F.R. § 121.103(f) and OHA case precedent, the Area Office properly found that [Appellant] was affiliated with ECS through economic dependence as of August 26, 2015." *Id.* at 5.

In the instant case, the date to determine Appellant's size is October 13, 2015, less than two months after the date to determine size in *Veterans Technology*. Appellant, though, has not shown that any significant change of circumstances occurred during this interval. Rather, Appellant merely renews arguments that OHA previously considered and rejected in *Veterans Technology*. As a result, this appeal must fail.

Appellant contends that the Area Office should have attached greater weight to Appellant's efforts to obtain additional non-ECS customers. It is true that, if Appellant were able to demonstrate that it was no longer dependent upon ECS prior to the date for determining size, ECS might then be considered a former, rather than current, affiliate. *E.g., Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 12 (2013) (reversing size determination because the challenged firm had severed its longstanding economic dependence upon an alleged affiliate one month before the date to determine size, and "[s]o long as affiliation ceases before the date for determining size, the firms are former affiliates and their receipts will not be aggregated."). Here, though, Appellant does not argue that its arrangements with ECS had ceased by October 13, 2015, and Appellant informed the Area Office that ECS still represented 84% of Appellant's revenues as of that date. Section II.B, *supra*. The Area Office therefore reasonably found that Appellant remained economically dependent upon ECS as of October 13, 2015.

Appellant also complains that the Area Office did not specifically comment on Appellant's contention that, aside from economic dependence, ECS lacks any mechanism to control Appellant. Appellant highlights, for example, that Appellant does not share facilities with ECS, nor rely upon ECS for technical assistance. Such issues were addressed in *Veteran's Technology*, though, and OHA noted 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." *Veterans Tech.*, SBA No. SIZ-5763, at 5 (quoting *Size Appeal of Incisive Tech., Inc.*, SBA No. SIZ-5122, at 4 (2010)); *see also Size Appeal of Strategic Def. Solutions, LLC*, SBA No. SIZ-5475, at 6 (2013). Thus, Appellant has not established that the Area Office erred in finding that Appellant is economically dependent upon ECS.

Appellant also repeats the argument, rejected in *Veterans Technology*, that because Appellant was founded in 2012, Appellant should be eligible for the exception discussed in *Argus and Black*. As OHA explained in *Veterans Technology*, though, *Argus and Black* held that a challenged firm is not economically dependent upon an alleged affiliate, even if the percentage of revenue derived from the alleged affiliate exceeds 70%, "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." *Veterans Tech.*, SBA No. SIZ-5763, at 6 (quoting *Argus and Black*, SBA No. SIZ-5204, at 6-7). Such facts are not present in the instant case, both because Appellant was not a startup business in October 2015, and because Appellant'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*. As a result, the *Argus and Black* exception is not applicable here. *Veterans Tech.*, SBA No. SIZ-5763, at 6 (citing *Size Appeal of Core Recoveries, LLC*, SBA No. SIZ-5723, at 6 (2016) and *Size Appeal of Ma-Chis Project Controls, Inc.*, SBA No. SIZ-5486 (2013)).

I need not decide whether Appellant also is affiliated with ECS under the newly organized concern rule, because, as discussed above, Appellant 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