

Cite as: *Size Appeal of Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions*,
SBA No. SIZ-5839 (2017)

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

SIZE APPEAL OF:

Lost Creek Holdings, LLC d/b/a All-STAR
Health Solutions,

Appellant,

RE: Dentrust Dental International, Inc.

Appealed From
Size Determination Nos. 2-2017-035 and -
062

SBA No. SIZ-5839

Decided: June 29, 2017

APPEARANCES

Corey L. Tomlinson, Esq., Gressley, Kaplin & Parker, LLP, Toledo, Ohio, for Appellant

Theodore P. Watson, Esq., Watson & Associates, LLC, Aurora, Colorado, for Dentrust
Dental International, Inc.

DECISION

I. Introduction and Jurisdiction

On April 17, 2017, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received the instant appeal from Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions (Appellant). The appeal challenges amended Size Determination Nos. 2-2017-035 and -062, in which SBA's Office of Government Contracting, Area II (Area Office) determined that Dentrust Dental International, Inc. (DDI) is a small business. Appellant maintains that the size determination is clearly erroneous, and requests that OHA reverse or remand. For the reasons discussed *infra*, the appeal is denied.

OHA decides appeals of size determinations 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 of 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 Protest

On December 13, 2016, the U.S. Department of the Army, National Guard Bureau issued Request for Proposals (RFP) No. W91242-17-R-0002 for “Periodic Health Assessment and Ancillary Laboratory, Audiology and Medical Support Services” at military installations in North Carolina. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621498, All Other Outpatient Care Centers, with a corresponding size standard of \$20.5 million average annual receipts. Offers were due December 28, 2016. Appellant and DDI submitted timely proposals, self-certifying as small businesses.

On January 13, 2017, the CO announced that DDI was the apparent awardee. That same day, Appellant, an unsuccessful offeror, filed a timely size protest. Appellant alleged that DDI is affiliated with 17 firms (collectively, “the Dentrust Entities”), including ACC Health, LLC (ACC);¹ Onsite Health, Inc. (Onsite Health); and Onsite Dental Care, Inc. (Onsite Dental), based on common management and ownership by Dr. Lawrence B. Caplin, and the totality of the circumstances. (Protest at 2-4.) To support the contention that DDI and the Dentrust Entities are affiliated based on the totality of the circumstances, Appellant noted that the firms share a physical address and list Dr. Caplin as the primary point of contact. (*Id.* at 5.) Appellant also alleged that, based on Dr. Caplin's testimony in other litigation, “[DDI] (through DOCS MSO, LLC) now operates ACC Health, LLC pursuant to a Management Services Agreement.” (*Id.* at 6, citing Bernalillo County, New Mexico Second Judicial District Court, Case No. D-202-CV-2016-02439.) “Dr. Caplin also testified that [DDI] operates [Onsite Health] under a Management Services Agreement.” (*Id.* at 9.)

B. Size Investigation

In response to the protest, DDI explained that it is owned and managed by Dr. Caplin, its CEO, who also has ownership interests in 14 of the 17 firms Appellant identified in the protest. DDI explained that Dr. Caplin does not hold any ownership interest in ACC, Onsite Health, or Onsite Dental and denied affiliation with these firms; however, DDI disclosed, Dr. Caplin has ownership interests in several firms that Appellant did not allege to be DDI's affiliates. In total, he has ownership interests in 37 entities, including Dentrust New Mexico, P.C. (Dentrust NM) and DOCS MSO, LLC (DOCS MSO). Of these 37 entities, DDI acknowledged affiliation with all but one, Caplin Family Charities, Inc. (CF Charities). DDI asserted that the combined average annual receipts of DDI and its affiliates do not exceed the size standard.

¹ Appellant alleged that ACC is affiliated with Talisman Capital Partners (Talisman), based on ACC's minority ownership, and eight other companies in which Talisman holds ownership interests. (Protest at 7-9.) The Area Office determined that this allegation was irrelevant to the instant size determination, which considered the affiliates of DDI, the challenged firm, not ACC. (Size Determination at 9-10.) Appellant does not challenge this finding on appeal, so further discussion of the issue is unnecessary. *E.g.*, *Size Appeals of MPC Containment Sys., LLC et al.*, SBA No. SIZ-5802, at 11 (2017).

C. Size Determination

On April 14, 2017, the Area Office issued amended² Size Determination Nos. 2-2017-035 and -062.³ The Area Office concluded that DDI's receipts, with those of its affiliates, do not exceed the size standard. Accordingly, DDI is a small business.

The Area Office determined that DDI is not affiliated with CF Charities, ACC, Onsite Health, or Onsite Dental. As for CF Charities, the Area Office explained that it is exempt from Federal income taxation under § 501(c)(3) of the Internal Revenue Code. Therefore, pursuant to 13 C.F.R. § 121.103(b)(5)(iv), DDI and CF Charities are not affiliated. (Size Determination at 7.)

The Area Office rejected the notion that DDI is affiliated with ACC through DOCS MSO, for several reasons. First, there is no affiliation between ACC and DOCS MSO. According to Dr. Caplin's sworn statements, there are no current contractual relationships between ACC and DOCS MSO, such as a management services agreement. Further, such an agreement could presumably be cancelled, so it would not serve as a basis for finding control or affiliation. Although ACC Trust owns 100% of ACC and 15% of DOCS MSO, ACC Trust's ownership interest in DOCS MSO is insufficient to confer control over DOCS MSO, so ACC and DOCS MSO are not under common control. Moreover, even assuming that ACC and DOCS MSO were affiliated, OHA has recognized that “a firm is not automatically affiliated with the affiliates of its affiliates, ‘particularly in the absence of any common ownership or control between the challenged firm and the affiliates of the affiliate.’” (*Id.* at 9, quoting *Size Appeal of BryMak & Assocs., Inc.*, SBA No. SIZ-5789, at 4 (2016) (PFR).) Therefore, even if both DDI and ACC individually were affiliated with DOCS MSO, it does not follow that their joint association with DOCS MSO would render them affiliated with each other. Because there is no common ownership or control between DDI and ACC, the firms are not affiliated.

The Area Office also determined that DDI is not affiliated with Onsite Health. Appellant's allegation that the firms are affiliated through DOCS MSO is unavailing because a firm is not automatically affiliated with the affiliates of its affiliates. Moreover, according to sworn statements from Dr. Caplin and Onsite Health's CEO, Mr. Ernest A. Blackwelder, Onsite Health and DOCS MSO do not share ownership, voting rights, control, customers, contracts, facilities, or employees. Although DOCS MSO and Onsite Health entered into an asset purchase

² The Area Office initially issued the size determination on March 31, 2017, but later reopened and amended it to address potential affiliation between DDI and CF Charities. (Size Determination at 1.) Unless otherwise indicated, citations refer to the amended version of the size determination.

³ The Area Office explained that it had previously dismissed similar size protests against other Dentrust entities, after learning that the protester's proposals were considered technically unacceptable. For the instant RFP, though, the Area Office was unable to ascertain whether Appellant's proposal was acceptable. To ensure that the size determination would not be vacated if Appellant were later found to have lacked standing to protest, the Area Director adopted Appellant's protest as her own and assigned a second case number. (Size Determination at 3.)

agreement for Onsite Health's assets, including its name, no equity changed hands. “[W]ith a few minor exceptions due to logistics, all employees were terminated by Onsite Health upon closing.” (*Id.* at 10.) Therefore, the Area Office reasoned, “[t]he relationship between Onsite Health and DOCS MSO does not appear to extend beyond the sale and accompanying transition agreement.” (*Id.*)

The allegation that DDI is affiliated with Onsite Dental lacks merit, the Area Office determined, because it was not specific. (*Id.* at 11.)

D. Appeal

On April 17, 2017, Appellant filed the instant appeal. Appellant contends that the size determination is clearly erroneous and should be reversed or remanded.

Appellant argues that DDI is affiliated with ACC based on the totality of the circumstances. Appellant observes that ACC and two of DDI's affiliates, Dentrust NM and DOCS MSO, were co-plaintiffs in a lawsuit filed last year. In their complaint, the plaintiffs asserted that “[t]hrough their affiliated operations, Plaintiffs are a leader in portable dental and medical care for military personnel, delivering a proprietary system of patient-centered care services for Military, Corrections, and Professional Staffing, **throughout the United States.**” (Appeal at 4-5, quoting Compl. ¶ 6 (emphasis Appellant's).) The complaint also includes a sworn statement from Dr. Caplin verifying this allegation as true and correct to the best of his knowledge. (*Id.* at 5, citing Compl. at 28.) In a subsequent motion, plaintiffs alluded to shared facilities. Because these statements are sworn, OHA should afford them significant weight. Further evidence of affiliation can be found in “the possible existence of a certain Management Services Agreement” and in ACC Trust's 15% ownership of DDI's affiliate, DOCS MSO. (*Id.* at 5-6.)

Appellant challenges the Area Office's reliance on *BryMak*. Although affiliation may not arise automatically between a challenged firm and the affiliates of its affiliates, Appellant argues that affiliation still may be found here “after full review of the long history of interconnected relationships, control mechanisms, contractual obligations, and shared ownership present under the Dentrust umbrella.” (*Id.* at 6.)

Because DOCS MSO purchased Onsite Health's assets, Appellant argues that DOCS MSO is Onsite Health's successor-in-interest. “It is anathema to the purposes of small business set-asides for a large business to sell its assets, including its trade name, to a small business and the small business retains its small business size status.” (*Id.*) Further, “if a substantial portion of [a firm's] assets and/or liabilities are the same as those of a predecessor entity,” SBA will aggregate both firms' receipts or employees when determining size. (*Id.*, quoting 13 C.F.R. § 121.105(c); *Size Appeal of Andrews Moving and Storage of Philadelphia, Inc.*, SBA No. SIZ-4070 (1995).)

Accompanying its appeal, Appellant attached a copy of the complaint filed last year by ACC, Dentrust NM, and DOCS MSO. Appellant did not submit a motion to supplement the

record, and did not explain why the complaint was not, or could not have been, provided to the Area Office during the size review.

E. Response

On May 30, 2017, DDI responded to the appeal. DDI maintains that Appellant has not met its burden of proving that the size determination is clearly erroneous. Therefore, OHA should deny the appeal.

Appellant's arguments based on the civil suit are improperly raised for the first time on appeal, DDI complains, and Appellant did not first submit the material in question to the Area Office for review. The argument that ACC, DOCS MSO, and Dentrust NM share facilities is likewise new argument on appeal. DDI highlights that Appellant has not moved to introduce as new evidence the pleadings it attached to the appeal, so OHA must exclude them from the record. (Response at 3-4, citing 13 C.F.R. § 134.308(a).) Besides, the pleadings unduly enlarge and are not relevant to the issues on appeal, and they do not clarify material facts.

Apart from introducing the pleadings too late in the process, Appellant also misconstrues their contents. The complaint does not establish that ACC, DOCS MSO, or DDI share facilities or are affiliated within the meaning of SBA regulations. Further, the mere fact that ACC, Dentrust NM, and DOCS MSO jointly filed a lawsuit has no bearing on whether the firms are affiliated for size purposes. (*Id.* at 10.)

The Area Office fully considered whether there was a management services agreement between ACC and DOCS MSO, but determined that there were no current contractual arrangements between DOCS MSO and ACC. “[E]ven if there were ongoing relationships between the two companies, Appellant's proposition would still fail because ‘[s]imply showing an ongoing business relationship between two firms is not enough to establish that one controls or has power to control the other.’” (*Id.* at 13, quoting *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 12 (2015).) Historical ties, furthermore, shed no light on whether there is present affiliation.

Appellant does not argue that any of the alleged affiliates have the ability to control DDI or *vice versa*, and the record does not support such a conclusion. ACC Trust's 15% ownership interest of DOCS MSO does not confer the ability to exercise negative control, and Appellant does not explain how the Area Office's determination on this point is clear error. (*Id.* at 13-15.)

As for Onsite Health, Appellant offers no argument or evidence to rebut the Area Office's conclusion that the relationship between DOCS MSO and Onsite Health does not extend beyond the asset sale. Nor does Appellant refute that the firms do not share ownership, voting rights, control, customers, contracts, facilities, or employees. (*Id.* at 15-19.)

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 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 DDI that Appellant has not shown any error of fact or law in the size determination. As a result, this appeal must be denied.

Appellant contends that DDI and ACC are affiliated under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5), because according to pleadings in separate litigation, ACC and two of DDI's affiliates share facilities and describe themselves as affiliates. This argument is flawed for multiple reasons. First, as DDI points out, Appellant's entire line of argument is premised on evidence that is not in the record. Appellant did not file the requisite motion to supplement the record, and OHA has held such an omission may be “fatal” to an attempt to introduce new evidence. *Size Appeal of Quigg Bros., Inc.*, SBA No. SIZ-5786, at 8 (2016). Moreover, the new evidence was available to Appellant at the time of the protest, and Appellant offers no rationale as to why this material could not have been provided to the Area Office. OHA has consistently held that it “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Because OHA cannot consider the new evidence Appellant offers, Appellant's arguments based on this material fail for lack of evidentiary support. *E.g.*, *Size Appeal of Wescott Elec. Co.*, SBA No. SIZ-5691, at 5 (2015); *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”).

Appellant's argument also fails as a legal matter. The Area Office found no common ownership or control between DDI and ACC, nor any evidence that both firms are controlled by a third party, such as DOCS MSO. Accordingly, no basis exists to conclude that DDI and ACC are directly affiliated. 13 C.F.R. § 121.103(a)(1); *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 11 (2007) (in order to find affiliation through the totality of the circumstances, “an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.”). While Appellant suggests that ACC is affiliated with DDI through DOCS MSO, OHA has rejected the notion that a firm is automatically affiliated with the affiliates of its affiliates where there is no common ownership or control between the challenged firm and the affiliates of the affiliate. *Size Appeal of BryMak & Assocs., Inc.*, SBA No. SIZ-5789, at 4 (2016) (PFR). Further, Dr. Caplin's sworn statements indicate that there are no current contractual relationships between ACC and DOCS MSO, and Appellant presented no evidence to the contrary to the Area Office. Any contracts that may have existed prior to the date DDI

self-certified as small for the instant RFP bear only on former affiliation and thus are not relevant to whether affiliation existed as of the date for determining size. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 12 (2013) (“So long as affiliation ceases before the date for determining size, the firms are former affiliates and their receipts will not be aggregated.”). In short, then, Appellant has not demonstrated that the Area Office erred in concluding that DDI and ACC are not affiliated.

Appellant's contention that DOCS MSO is Onsite Health's successor-in-interest fails as a procedural matter. Appellant did not make this allegation to the Area Office, and OHA cannot consider new substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of K4 Solutions, Inc.*, SBA No. SIZ-5775, at 4 (2016); *Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 13 (2016) (“OHA will not consider an issue that was neither raised to, nor investigated by, the Area Office.”).

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge