Cite as: *Size Appeal of LSINC Corp.*, SBA No. SIZ-5856 (2017)

United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: LSINC Corporation, Appellant, RE: Veterans Technology, LLC Appealed From Size Determination No. 3-2017-052	SBA No. SIZ-5856 Decided: September 27, 2017

APPEARANCES

David S. Cohen, Esq., Laurel Hockey, Esq., Cohen Mohr LLP, Washington, D.C., for Appellant

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DECISION[1]

I. Introduction and Jurisdiction

This dispute arises from a remand of the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision in *Size Appeal of Veterans Technology, LLC*, SBA No. SIZ-5763 (2016). In that decision, OHA affirmed Size Determination No. 3-2016-050, in which the SBA Office of Government Contracting, Area III (Area Office) determined that Veterans Technology, LLC (Vet Tech), a joint venture between Defense Acquisition, Inc. (DAI) and MDW Associates, LLC (MDW), is not a small business. More specifically, the Area Office

[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 requests for redactions and considered such requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

found that DAI is a small business, but that MDW is not a small business because MDW is affiliated with ECS Federal, LLC (ECS), a large business.

Vet Tech challenged OHA's decision at the U.S. Court of Federal Claims (Court), and on July 31, 2017, the Court remanded the matter to OHA for a time period of 60 days and directed OHA to instruct the Area Office to prepare a new size determination. On August 18, 2017, the Area Office issued Size Determination No. 3-2017-052, reversing its prior determination and concluding that Vet Tech is a small business. On September 1, 2017, LSINC Corporation (Appellant), a competitor with Vet Tech for the subject procurement, appealed Size Determination No. 3-2017-052 to OHA. For the reasons discussed *infra*, the appeal is granted in part and denied in part.

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 on September 1, 2017, the deadline specified by OHA for any appeal of the new size determination, so the appeal is timely. Accordingly, this matter is properly before OHA for decision.

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. Vet Tech submitted its initial offer, including price, on August 26, 2015, self-certifying as a small business. (Administrative Record (AR) 322, 1704, 1724, 2787.)

On April 1, 2016, MDA announced that Vet Tech was the apparent awardee. On April 6, 2016, Middle Bay Solutions II, a disappointed offeror, filed a size protest disputing Vet Tech's size. The CO forwarded the protest to the Area Office for consideration.

B. Area Office Investigation

During the course of its review, the Area Office learned that MDW derived much of its revenues from ECS, and that some of the individuals who founded MDW were previously high-level employees of Paradigm Technologies, Inc. (Paradigm), a company acquired by ECS shortly before MDW was established. The Area Office therefore notified Vet Tech that, in addition to the allegations raised in the protest, the Area Office would consider whether 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). (AR 2393, 2518, 2534.)

With regard to the issue of economic dependence, Vet Tech acknowledged that “a substantial portion of MDW Associates' revenue is in fact derived from ECS Federal

subcontracts." (AR 2594.) Specifically, Vet Tech provided data indicating that MDW derived 100% of its $[XXX] total revenue from ECS during 2012. (AR 2606-2607.) During 2013, MDW derived 100% of its $[XXX] total revenue from ECS. (*Id.*) During 2014, MDW derived $[XXX] of its $[XXX] total revenue, 95.14%, from ECS. (*Id.*) During 2015, MDW derived $[XXX] of its $[XXX] total revenue, 85.55%, from ECS. (*Id.*) And in the first quarter of 2016, MDW derived $[XXX] of its $[XXX] total revenue, 78.54%, from ECS. (*Id.*)

Vet Tech argued that the Area Office should not find economic dependence because MDW's situation presents "a classic start-up scenario" similar to that seen in *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011). (AR 2594.) Vet Tech further maintained that "MDW Associates has rigorously pursued other business, which can typically take from 18 to 24 months or more from issuance of an RFP to award of a contract." (*Id.*) In addition, according to Vet Tech, "neither the completion of the subcontracts nor cancellation of the ECS subcontracts (totally unlikely) would bankrupt or drive [MDW] out of business." (AR 2598-2599.)

In response to an Area Office inquiry about the newly organized concern rule, Vet Tech stated that, after acquiring Paradigm, ECS considered firing two Paradigm employees, Mr. Mark Maguire and Mr. Lee Dixson, upon discovering that they had established MDW. Vet Tech continued:

> The only reason ECS did not carry out the threat is that the government lead for the [Missile Defense Agency Engineering and Support Services (MiDAESS)] Financial Management Task Order informed ECS leaders that Mr. Maguire [was] deemed to have critical skills and knowledge essential to the Task Order execution, and could not be removed on such short notice. Instead, ECS decided to provide MDW a subcontract to continue the critical skills support required by the Agency. While the current business relationship between ECS Federal and MDW Associates is good with a proper arms-length Prime Contractor-Subcontractor relationship, the initial relationship was somewhat acrimonious and facilitated by a Government requirement resulting in a "directed subcontract."

(AR 2393-2394.) Vet Tech stated that MDW's first task order from ECS, DOB-02-10, was awarded to MDW on a sole source basis, but thereafter "MDW Associates was selected as a teammate for these competitive procurements based on MDW Associates' demonstrated performance and to support the RFP requirements for Small business Participation." (AR 2522.)

Vet Tech provided the Area Office with a copy of a Subcontract Agreement between Paradigm and MDW. (AR 2546-2592.) The Subcontract Agreement defined Paradigm as the Prime Contractor and MDW as the Subcontractor, and was signed by representatives of the two companies on July 20, 2012. (AR 2546.) The Subcontract Agreement contained a clause entitled "H-30-15 PROHIBITION ON CROSS TEAMING (MAY 2009)." (AR 2582-2583.) According to the clause, "Cross teaming is prohibited at the prime and subcontract level for the same functional capability group under the basic contracts and the subsequent task orders. This prohibition also applies to affiliated companies." (AR 2583.)

The Area Office informed Vet Tech that "[a]s Vice President Mr. Maguire is considered an officer of Paradigm." (AR 2411.) Vet Tech responded:

> Mr. Maguire was an "operational" Vice President at Paradigm for purposes of managing a specific Task Order under the Paradigm MiDAESS ID/IQ Contract. Mr. Maguire was not a corporate Vice President or Corporate Officer.
>
> As an ECS Federal employee, Mr. Maguire held no titled position as an employee or officer of the corporation and was not considered a "Key Person" by ECS Federal as evidenced by the lack of a requirement to execute a "non-compete" agreement required by ECS Federal for all "Key Personnel" including all directors, principal stockholders, managing members, or key employees.

(AR 2416.) Vet Tech noted that "[a]s an operational Vice President, Mr. Maguire had a signed 'non-compete' agreement with Paradigm during his employment." (AR 2415.)

C. Size Determination No. 3-2016-050

On May 2, 2016, the Area Office issued Size Determination No. 3-2016-050 concluding that Vet Tech is not a small business. The Area Office explained that, because Vet Tech is a joint venture, the receipts of all parties to the joint venture are combined for purposes of determining Vet Tech's size. (AR 2652, citing 13 C.F.R § 121.103(h)(2).) Although DAI is a small business, MDW is not a small business because it is affiliated with ECS through economic dependence and the newly organized concern rule. Therefore, Vet Tech is not a small business.

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 another for 70% or more of its revenue. (AR 2654, citing *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007).) Vet Tech's size is determined as of August 26, 2015, the date of 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 rejected Vet Tech's argument that MDW is start-up business as seen in *Argus and Black* 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." (AR 2655.)

Turning to the newly organized concern rule, the Area Office explained that ECS acquired Paradigm on December 31, 2011, and that one of the founders of MDW, Mr. Maguire, was Vice President and Subject Matter Expert at Paradigm from June 2003 to August 2012. (AR 2653.) Two other founders of MDW were also previously employed by Paradigm. (*Id.*) The Area Office found no merit to Vet Tech'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." (AR 2656.) 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.

D. OHA's Decision

On July 20, 2016, OHA issued its decision in *Size Appeal of Veterans Technology, LLC*, SBA No. SIZ-5763 (2016), affirming Size Determination No. 3-2016-050. OHA concluded that "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 [Vet Tech's] self-certification." (AR 2803.) OHA further agreed with the Area Office that *Argus and Black* did not apply because "MDW's arrangement with ECS was not a small contract of short duration but rather multi-million dollar subcontracts spanning several years." (AR 2804.) In light of this outcome, OHA found it unnecessary to decide whether MDW also was affiliated with ECS under the newly organized concern rule. (AR 2804-2805.)

E. Competitive Range

Following OHA's decision, MDA cancelled the award to Vet Tech and established a competitive range consisting of the most highly rated proposals. Appellant is one of the offerors remaining in the competitive range. (AR 2808.) Vet Tech was excluded from the competitive range, but that exclusion was based solely on the grounds that Vet Tech is no longer eligible for award because SBA had determined that Vet Tech is not a small business. (AR 2809.)

F. The Court's Decision

On July 31, 2017, the Court remanded the dispute to OHA for a time period of 60 days. The Court found that the Area Office and OHA did not adequately consider the arguments and evidence Vet Tech had submitted in an effort to show that MDW was not economically dependent upon ECS. (Court's Memorandum Opinion and Order, at 18.) As a result, Size Determination No. 3-2016-050 "provided no reasonable basis on which the court can review *why* the SBA Area Office [ ] decided not to exercise its [discretion] to find no affiliation" through economic dependence. (*Id.* at 16 (emphasis in original).) Furthermore, "if Missile Defense required MDW to enter into a subcontracting relationship with ECS, and subsequently approved of such continuing subcontracting work, it would be unjust to disqualify Vet Tech from future government contracting opportunities." (*Id.* at 17.)

The Court directed OHA "to instruct the [Area Office] to conduct a new size determination specifically to ascertain whether the actions of [the Department of Defense] and/or Missile Defense were the cause of MDW entering into a subcontracting relationship with ECS, as well as to consider evidence proffered by MDW that, at no time, was MDW economically dependent on ECS." (*Id.* at 18.)

G. Investigation on Remand

On August 4, 2017, OHA ordered the Area Office to prepare a new size determination in accordance with the Court's decision by August 18, 2017. OHA further stated that any appeal of the new size determination was due at OHA by September 1, 2017.

The Area Office asked the CO to "[p]lease fully explain, in detail, all facts and circumstances pertaining to the subcontracting relationship between MDW and ECS, including the subcontracting relationship's formation and whether the actions of MDA were the cause of the subcontracting relationship." (E-mail from I. Bascumbe to G. Erskine (Aug. 9, 2017).) The CO responded that "[a]s the Contracting Officer with cognizance over the MiDAESS contract at issue, I never issued any such direction to ECS with respect to MDW or any other subcontractor; [t]o the best of my knowledge I am not aware of anyone else with contractual authority issuing any such direction. In addition, a review of the contract file revealed no documentation in support of the 'directed subcontractor' assertion." (Letter from G. Erskine to I. Bascumbe (Aug. 10, 2017).)

On August 11, 2017, Vet Tech responded to the remand and submitted new information for the Area Office's review. Among the new materials submitted were sworn declarations from Mr. Maguire and Mr. George H. Wilson, President and CEO of ECS. (Response at Exhibits C and D.) Vet Tech explained that the declarations were prepared during 2016 in conjunction with a separate size investigation of MDW. (Response at 8-9.)

In his declaration, Mr. Maguire attested that:

> 3. [XXXXXXXXXXXXXXXX] without any outside capital or assistance. [XXXXXXXXXXXXXXXX]. No outside capital or assistance has been provided to MDW. In April 2013, MDW received its first line of credit from [XXXXXXXXXX]. At that time, MDW switched banks to [XXXXXXXXXXX]. MDW has never had to draw on its line of credit. [XXXXXXXXX] and its receivables have been sufficient to support operations.
>
> . . .
>
> 6. I was not an officer, director, principal stockholder, managing member or key employee of Paradigm. Although I had the title of Vice President, I was not a corporate officer of Paradigm. I did not have any critical influence or ability to substantively control the overall direction and management of Paradigm, either before or after ECS Federal, LLC's ("ECS") acquisition of Paradigm, including and up to the time I left employment of Paradigm. In addition, I was never an employee of ECS, nor was I ever an officer, director, principal stockholder, or managing member of ECS. Specifically, my role at Paradigm was limited to serving as a Subject Matter Expert manager working directly on a single MiDAESS task order. Messrs. Walker and Dixson have never been employees of ECS. In fact, none of the four owners of MDW have ever been ECS employees.

. . .

8. Mr. Dixson and I [after establishing MDW] informed Paradigm's customer, MDA, that we would no longer be supporting the financial management task order on Paradigm's MiDAESS contract. Subsequently, MDA met with Mr. Wilson and instructed him that Mr. Dixson and I were key personnel on a team for the MiDAESS Task Order and, for that reason, we had to remain as personnel on the task order. Therefore, to satisfy MDA, we agreed to remain employees of Paradigm for a short transition period until a subcontract could be negotiated between Paradigm and MDW.

. . .

23. From the time of MDW's formation through the present, MDW has had no financial or technical assistance, indemnification, bonding support (including bid or performance bonds) or other facilities from ECS. There are no financial, management, or ownership relationships between MDW and ECS. Thus, besides subcontract work, ECS has provided no support to MDW, financial or otherwise, since MDW's formation in 2012. ECS and MDW do not share facilities, employees or resources.

(Maguire Decl. ¶¶ 3, 6, 8, 23.)

In his declaration, Mr. Wilson attested that:

3. Mr. Maguire's role at Paradigm involved working in contract management on a task order under Paradigm's prime contract with MDA for the Missile Defense Agency Engineering and Support Services ("MiDAESS") procurement.

4. Mark Maguire was not an officer, director, principal stockholder, managing member or key employee of Paradigm. Although Mark Maguire had the title of Vice President of Paradigm, he was not a corporate officer of Paradigm.

. . .

6. Mr. Maguire's duties at Paradigm as Vice-President concerned only contract management. Mr. Maguire served as key personnel on the financial management task order issued under Paradigm's MiDAESS prime contract. Mr. Maguire did not have any critical influence or ability to substantively control the overall direction and management of Paradigm from the time of the acquisition up until he left the employment of Paradigm.

. . .

> 8. Shortly [after learning that Mr. Maguire and Mr. Dixson were planning to leave Paradigm], MDA's lead on the MiDAESS financial management task order requested a meeting with me, which took place in April 2012. At this meeting MDA informed me that Mr. Maguire and Mr. Dixson had knowledge and skills essential to supporting MDA. After that meeting, ECS began negotiating a subcontract with MDW, which was ultimately executed and began on August 1, 2012. The lag between April and August was caused by administrative requirements associated with security matters and the contracting process. Mr. Maguire left the employment of Paradigm on August 1, 2012.

(Wilson Decl. ¶¶ 3, 4, 6, 8.)

During the course of its review, the Area Office asked Vet Tech whether ECS or Paradigm had sought approval to replace Mr. Maguire and Mr. Dixson prior to engaging MDW as a subcontractor. Vet Tech responded:

> It is MDW's understanding that Missile Defense's lead told George Wilson of ECS that Paradigm could not fire Messrs. Maguire and Dixson as they were key personnel with knowledge and skills essential to supporting Missile Defense, and that they had to remain as personnel on Task Order DOB-02-10. MDW understands that, given Missile Defense's insistence that Messrs. Maguire and Dixson could not be fired, Paradigm determined that, rather than asking for approval for a new subject matter expert, the easiest path would be to transition Messrs. Maguire and Dixson's positions to a subcontract to MDW without seeking new subject matter experts.

(E-mail from P. Rothwell to I. Bascumbe (Aug. 14, 2017) (internal citations omitted).)

The Area Office also asked Vet Tech to address whether MDW would have been a viable business without the revenues MDW earned from ECS/Paradigm. (E-mail from I. Bascumbe to P. Rothwell (Aug. 14, 2017).) Vet Tech responded that "MDW would have been a viable business even if it had not ever entered into the MiDAESS Subcontract with Paradigm and had not been issued task orders under that subcontract." (E-mail from P. Rothwell to I. Bascumbe (Aug. 14, 2017).) Specifically, "MDW could rely on [XXXXXXX], its line of credit, and its revenues from other contracts to keep its business operations going and generate profits even in the absence of any revenues from Paradigm or ECS." (*Id.*) Vet Tech highlighted that MDW's founders "are all highly skilled professionals with extensive experience who could easily have become billable on other prime contracts or subcontracts but for the MiDAESS level of effort." (*Id.*) Vet Tech maintained that the instant case is analogous to OHA's decision in *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015), where the challenged firm successfully rebutted the presumption of economic dependence by showing that it had had access to other financial resources and support. (*Id.*)

H. The Instant Size Determination

On August 18, 2017, the Area Office issued Size Determination No. 3-2017-052 concluding that Vet Tech is a small business. The Area Office stated that, pursuant to the Court's decision, it would consider whether MDA caused MDW to enter a subcontracting relationship with ECS, and whether MDW was economically dependent upon ECS. (Size Determination No. 3-2017-052, at 2.) In addition, although not discussed in the Court's decision, the Area Office decided to revisit its prior findings with regard to the newly organized concern rule. (*Id.* at 8.)

The Area Office explained that MDW was founded in February 2012 by Mr. Maguire, Mr. Dixson, and Mr. Walker. Prior to establishing MDW, Mr. Maguire was Vice President and a subject matter expert at Paradigm from June 2003 until August 2012. Mr. Walker was a Senior Analyst at Paradigm from January 2006 to January 2008, and Mr. Dixson was a Program Manager at Paradigm from 2009 until August 2012. (*Id.* at 4.) ECS acquired Paradigm in December 2011, and in January 2013 Paradigm was merged into ECS. (*Id.*)

The Area Office found that ECS utilized MDW as a subcontractor on three task orders, DOB-02-10, DOB-07-12, and DOB-02-13. (*Id.*) The first task order was awarded to MDW in August 2012, and the remaining two were awarded in February 2013. The Area Office reviewed the Subcontract Agreement between Paradigm and MDW and found that, under clause H-30-15, "MDW was not able to go to another team's group as a subcontractor." (*Id.*) However, the clause "does not prevent ECS from hiring another subcontractor as long as the subcontractor was outside of the capability group that was already formed for this task order." (*Id.*)

The Area Office noted that, during the original size review, Vet Tech had argued that the government lead for the MiDAESS Financial Management Task Order informed ECS leaders that Mr. Maguire was deemed to have critical skills and knowledge essential to the Task Order execution, and could not be removed on such short notice. (*Id.* at 5.) On remand, Vet Tech asserted that "given Missile Defense's insistence that Messrs. Maguire and Dixson could not be fired, Paradigm determined that, rather than asking for approval for a new subject matter expert, the easiest path would be to transition Messrs. Maguire and Dixson's positions to a subcontract to MDW without seeking new subject matter experts." (*Id.* at 6, quoting E-mail from P. Rothwell to I. Bascumbe (Aug. 14, 2017).) The CO, though, maintained that she did not direct ECS to subcontract with MDW, and further stated that she found no documentation in MDA contract files to support Vet Tech's claim of a directed subcontract. (*Id.*)

The Area Office concluded that "the record reflects that [the] MDA Lead told ECS that they could not fire Messrs. Maguire and Dixson and it was easier for ECS not to seek approval for making changes to key personnel; instead they wrote a subcontractor agreement between Paradigm and MDW." (*Id.*) The Area Office noted that, in his declaration, Mr. Wilson stated that he met with the MDA lead in April 2012, and emerged with the "impression he could not replace in a short notice the key personnel." (*Id.*) The Area Office found that the CO's statement did not "directly contradict" Vet Tech's claim of a directed subcontract. (*Id.* at 6-7.)

The Area Office explained that, under SBA regulations and OHA precedent, a firm is presumed to be economically dependent upon another if it derives 70% or more of its revenues

from that firm, even if there are no other ties between them. However, "[t]he challenged firm can rebut this presumption if it can "prove, by clear and convincing evidence, that its interests are separate from [those of] the other concern."' (*Id.* at 7, quoting *Faison*, SBA No. SIZ-4834, at 8.) Although MDW historically did rely upon ECS for most of its revenues, "Vet Tech has rebutted the 70% presumption of economic dependence with its showing that MDA caused ECS and MDW's subcontracting relationship." (*Id.*) The Area Office also found that MDW is not economically dependent upon ECS. "Vet Tech has rebutted the presumption of MDW's economic dependence on ECS because ECS did not have the power to control MDW at time of determining size. To the contrary, Vet Tech has shown that ECS needed MDW for performance of the MiDAESS contract because of the skills and expertise of MDW's personnel, such as Mr. Maguire." (*Id.* at 8.) The Area Office found it "unnecessary to further examine Vet Tech's other proffered evidence regarding its non-ECS business, revenues, and debt." (*Id.*)

Based upon the new information submitted on remand, the Area Office also reconsidered its previous findings concerning the newly organized concern rule. Specifically, the Area Office reexamined whether Mr. Maguire is a former officer, director, principal stockholder, managing member, or key employee of Paradigm. The Area Office stated that Mr. Maguire, as Paradigm's Vice President of Operations, did not supervise any employees; did not hire, fire or control employee salaries; and did not control Paradigm's operations when it was acquired by ECS. (*Id.* at 9.) Further, Mr. Maguire "was not identified as a Vice President when the acquisition took place, and was not required to sign a non-competition agreement with ECS." (*Id.*) As a subject matter expert and contract manager, Mr. Maguire was not a key employee with critical influence or substantive control over Paradigm's operations or management. (*Id.* at 10.) Therefore, MDW is not affiliated with ECS under the newly organized concern rule.

The Area Office determined that both DAI and MDW are small businesses because their average annual receipts for the years 2012-2014 do not exceed the $15 million size standard. As a result, Vet Tech is eligible for the exception to joint venture affiliation at 13 C.F.R. § 121.103(h)(3)(i). (*Id.*)

I. Appeal

On September 1, 2017, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in finding that Vet Tech is a small business. Therefore, OHA should reverse the size determination.

Appellant first explains that it has standing to bring this appeal because Appellant is an offeror on the subject procurement, and was included in the competitive range. (Appeal, at 2-4.) Appellant is adversely affected by the size determination because Appellant's "chance of receiving an award could be fatally harmed if the Area Office's decision is not reversed." (*Id.* at 4.) Appellant acknowledges that it did not originally protest Vet Tech's size, but references cases in which OHA has accepted appeals from non-protesters, so long as the appellant is an otherwise eligible small business offeror on the procurement. (*Id.* at 5-6, citing *Size Appeal of Straughan Envtl., Inc.*, SBA No. SIZ-5767 (2016), *recons. denied*, SBA No. SIZ-5776 (2016) (PFR) and *Size Appeal of Q Integrated Companies, LLC*, SBA No. SIZ-5743 (2016).)

Appellant attacks the notion that MDA required or caused ECS to award a subcontract to MDW. According to Appellant, the record clearly shows that MDA did not direct ECS to subcontract with MDW. On the contrary, the Area Office quoted the CO as denying that any such direction took place, and her statement is unrebutted. (*Id.* at 6-7.) This categorical denial should have been treated as conclusive proof that ECS received no direction to award a subcontract to MDW, as only the CO may bind the government in relation to contract performance. (*Id.* at 7, citing 48 C.F.R. §§ 43.102(a) and 1.602.) ECS's choice to award a subcontract to MDW was a business decision, apparently stemming from ECS's conclusion that keeping Mr. Maguire and Mr. Dixson on the MiDAESS contract would be easier than locating replacements. "This falls far short of direction, requirement or coercion by the government." (*Id.* at 7-8.) Further, the Area Office overlooked the crucial fact that there is no evidence that MDA in any way directed, required or caused MDW to subcontract with ECS. (*Id.* at 8.) The Area Office therefore should have found that "MDW made its own business decision to accept the revenue that the subcontract provided." (*Id.*)

Next, Appellant maintains that the Area Office's conclusions regarding the second and third task orders awarded to MDW by ECS are also erroneous. Appellant states that the prohibition on cross-teaming, which reportedly prevents MDW from partnering with other MiDAESS prime contractors, shows that MDW voluntarily "accepted a clause that connected it more closely with ECS as an exclusive prime for MiDAESS work, thus making MDW even more dependent on ECS than it was before subcontract execution." (*Id.* at 8-9.) MDW was under no obligation to accept this clause, and had the opportunity to demand more flexibility in the cross-teaming arrangements, yet chose not to do so.

The Area Office's finding that MDW and ECS are not affiliated through identity of interest is also flawed. OHA has twice determined that MDW is economically dependent on ECS. (*Id.* at 9, citing *Size Appeal of MDW Associates, LLC*, SBA No. SIZ-5794 (2016) and *Size Appeal of Veterans Technology, LLC*, SBA No. SIZ-5763 (2016).) Further, the facts here do not show that Vet Tech rebutted the presumption of economic dependence that arises when a concern is reliant on another concern for 70% or more of its revenues. In prior cases, OHA has found the presumption rebutted only in rare situations, such as where the concerns discontinued their business relationship prior to the date to determine size, or where the challenged firm is a start-up enterprise. (*Id.* at 10-11, citing *Size Appeal of SP Technologies, LLC*, SBA No. SIZ-5319 (2012) and *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011).) Here, Appellant argues, none of the exceptions recognized by OHA is applicable. Appellant emphasizes that MDW derived more than 70% of its receipts from ECS during 2012, 2013, 2014, and 2015, and that this heavy economic dependence continued well into 2016, "long after the relevant period for determining size in this case." (*Id.* at 12.)

Lastly, Appellant argues that the Area Office's analysis of the newly organized concern rule was defective. In finding that Mr. Maguire is not a former key employee of Paradigm/ECS, the Area Office failed to substantively investigate whether Mr. Maguire, or Mr. Dixson, were key personnel based on their important roles on the MiDAESS contract or other contracts. Specifically, Appellant argues, the Area Office "should have considered exactly what they did on these contracts, and on other contracts performed by Paradigm/ECS, the significance of such contracts in the ECS/Paradigm contract portfolio and therefore, whether they were, in fact, key

personnel." (*Id.* at 14.) Appellant contends that it is the scope of the duties and the nature of the work performed by the employee(s) in question that is at the center of a newly organized concern rule analysis. (*Id.*) In Appellant's view, the Area Office erred by focusing narrowly on whether Mr. Maguire is a former corporate officer of Paradigm/ECS, while neglecting to consider "what exactly Mr. Maguire (and Mr. Dixson) did for Paradigm/ECS on its contracts, their job descriptions, and whether the scope of their duties made them key employees of Paradigm/ECS." (*Id.* at 15.)

J. Vet Tech's Response

On September 12, 2017, Vet Tech responded to the appeal. Vet Tech contends that OHA should dismiss the appeal for lack of standing. Alternatively, OHA should deny the appeal because the Area Office correctly determined that MDW is not affiliated with ECS.

In arguing that Appellant lacks standing to file this appeal, Vet Tech highlights that Appellant did not file its own size protest against Vet Tech at the time of the initial award decision. Nor did Appellant intervene in the prior litigation at OHA or at the Court. Having "sat on its rights for nearly a year-and-a-half," Appellant "should not be permitted to challenge Vet Tech's size so late in the game by bringing its appeal." (Response at 2-3.)

Next, Vet Tech argues that the record supports the conclusion that MDW is not economically dependent on ECS. Vet Tech contends that the Area Office correctly found that MDA caused the subcontracting relationship between MDW and ECS, and that ECS needed MDW for performance of the MiDAESS contract due to the skills and expertise of MDW's personnel. (*Id.* at 4.) Vet Tech calls attention to Mr. Wilson's declaration, wherein he stated that an MDA official informed him that Mr. Maguire and Mr. Dixson had critical skills and knowledge essential to performing a MiDAESS task order, and that they could not be removed on short notice. (*Id.* at 4-5.) Further, the cross-teaming prohibition in the Subcontract Agreement prevented MDW from partnering with a different MiDAESS prime contractor. (*Id.* at 5.) "This resulted in a steady stream of revenue from ECS to MDW, and MDW was not able to obtain any revenue from any other prime contractor with MDA." (*Id.* at 6.) Additionally, ECS needed the experience of Mr. Maguire and Mr. Dixson when it acquired Paradigm. (*Id.*)

Vet Tech argues that the Court did not instruct the Area Office "to determine whether MDA specifically 'required' or 'directed' ECS to award MDW a subcontract." (*Id.*) Rather, the Court more generally inquired whether MDA caused the subcontracting relationship. (*Id.*) Because an MDA official told Mr. Wilson that Mr. Maguire and Mr. Dixson had knowledge and skills "essential" to supporting MDA, Mr. Wilson would reasonably have understood that "MDA required Paradigm to have Messrs. Maguire and Dixson perform on the MiDAESS contract one way or another (that is, whether through Paradigm or through MDW)." (*Id.*)

Vet Tech disputes Appellant's claim that the CO's statement shows that MDA did not direct ECS to subcontract with MDW. Vet Tech contends that the Area Office correctly found that the CO's statement does not directly contravene Mr. Wilson's sworn declaration. Further, Appellant cannot refute that the meeting between Mr. Wilson and the MDA Lead occurred, and cannot show that the declarations of Mr. Wilson and Mr. Maguire are incorrect. (*Id.* at 7.)

Appellant's contention that OHA has never found the 70% presumption to be rebutted by a procuring agency's action is equally meritless. The Court determined that such a rebuttal could be made when it remanded the case for further review. (*Id.*) Thus, OHA is not prevented from finding that Vet Tech rebutted the presumption of economic dependence.

Next, Vet Tech argues the Area Office properly found that ECS and MDW are not affiliated under the newly organized concern rule. SBA regulations stipulate that a key employee is one who exercises "critical influence in or substantive control over the operations or management" of a concern. (*Id.* at 8, quoting 13 C.F.R. § 121.103(g).) Thus, a key employee must have the ability to influence or control the operations of the concern as a whole. (*Id.* at 9, citing *Size Appeal of Metis Tech. Solutions, Inc.*, SBA No. SIZ-5538 (2014).) Here, Mr. Maguire was not a key employee of Paradigm because he did not exercise critical influence or substantive control over Paradigm. Appellant's attempt to distort the key employee analysis to one regarding the employee's "duties" is thus meritless.

Vet Tech argues that it submitted a substantial amount of information to the Area Office showing that Mr. Maguire did not have a key role at Paradigm, including evidence showing that Mr. Maguire did not work on multiple projects for Paradigm. (*Id.* a 9-10.) Despite Mr. Maguire having an important role on a MiDAESS task order, he still could not influence or control Paradigm's business operations as a whole. Even accepting the notion that an employee's scope of duties is determinative in a key employee analysis, Vet Tech contends that Mr. Maguire's duties did not render him a key employee. The Area Office considered Mr. Maguire's duties, highlighting that Mr. Maguire did not supervise, hire, or fire employees. Thus, the record shows that Mr. Maguire's duties at Paradigm were limited, and that he did not exercise critical influence or substantive control over Paradigm. (*Id.* at 10.)

Lastly, Vet Tech contends that even if Mr. Maguire were found to have been a key employee at Paradigm, this affiliation does not extend to ECS. The newly organized concern rule contemplates affiliation between a new concern and a prior employer. Here, Mr. Maguire worked for Paradigm, and following the acquisition by ECS, Paradigm remained a separate legal entity, albeit wholly owned by ECS. Because the first element of the newly organized concern rule "does not state key employees of one concern, or its affiliates organize a new concern", the Area Office could only find that Mr. Maguire is a former key employee of Paradigm, not ECS. (*Id.* at 10-11, emphasis in original.)

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

1. Standing

I agree with Appellant that Appellant does have standing to bring this appeal. SBA regulations permit that "[a]ny person adversely affected by a size determination" may file a size appeal with OHA. 13 C.F.R. § 134.302(a). In interpreting this provision, OHA has held that a party has standing to appeal, even if that party was not also a protester, if it is "an otherwise eligible small business offeror on the procurement." *Size Appeal of Straughan Envtl., Inc.*, SBA No. SIZ-5767, at 3 (2016), *recons. denied*, SBA No. SIZ-5776 (2016) (PFR) (quoting *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4647, at 7 (2004)). "The rationale behind this policy is that, if an otherwise eligible small business offeror were to prevail on its appeal, there is a chance it could ultimately be awarded the contract. This possibility is what causes an unsuccessful offeror to be adversely affected by a size determination favorable to a rival." *Id.*

Here, Appellant was an offeror on this procurement and is one of the offerors remaining in the competitive range. Section II.E, *supra*. Thus, while not the protester, Appellant is an otherwise eligible small business offeror on the procurement, and is adversely affected by a size determination favorable to Vet Tech, Appellant's competitor and the original awardee.

Vet Tech suggests that Appellant waived its right to bring this appeal because Appellant participated neither in the initial proceedings before OHA nor in the subsequent litigation at the Court. Vet Tech, though, points to no authority, whether in regulation or in OHA case law, that requires a would-be appellant to have joined in prior litigation in order to have standing to appeal to OHA. An additional factor here is that, because Appellant was not the protester, Appellant would not necessarily have received notice of the earlier litigation at OHA or at the Court. OHA's rules of procedure, for example, require that a size appeal be served upon the challenged firm, the CO, any protester(s), and certain SBA officials, but not upon other non-protesting offerors. 13 C.F.R. § 134.305(b). In addition, OHA allows only a limited time window for interested parties to intervene. 13 C.F.R. § 134.210(b). It therefore is not evident that Appellant could have intervened in the prior litigation, even if Appellant had desired to do so. For these reasons, Vet Tech's request that OHA dismiss the appeal for lack of standing is DENIED.

2. Economic Dependence

The principal issue presented in this case is whether MDW is affiliated with ECS because the firms share an identity of interest through economic dependence. Under regulations in effect on August 26, 2015, the date of Vet Tech's self-certification, an identity of interest arises when firms "have identical or substantially identical business or economic interests." 13 C.F.R. § 121.103(f) (2015). One particular circumstance that constitutes an identity of interest is when firms "are economically dependent through contractual or other relationships." *Id.* An individual or firm may, however, rebut the presumption "with evidence showing that the interests deemed to be one are in fact separate." *Id.*

In interpreting this regulation, OHA has long held that, when one concern depends upon another concern for 70% or more of its revenues, a strong presumption arises that the concern is

economically dependent upon, and thus affiliated with, the other. The 70% threshold was first introduced in *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007) and has since been applied in numerous subsequent OHA decisions. *See, e.g., Size Appeal of Core Recoveries, LLC*, SBA No. SIZ-5723 (2016); *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 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR); *Size Appeal of HealthCare Resource Network, LLC*, SBA No. SIZ-5263 (2011). Further, "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).

Historically, the 70% threshold was found only in OHA case law, not in SBA's affiliation regulations. Effective June 30, 2016, though, SBA amended its affiliation regulations to incorporate the 70% threshold. 81 Fed. Reg. 34,243 (May 31, 2016). As a result, SBA regulations now provide 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). The new version of the regulation became effective almost a year after Vet Tech self-certified for the instant procurement, and thus is not applicable here. But in any event, in promulgating the new version of the rule, SBA made clear that it intended to codify existing OHA case law, and the preamble of the new rule discussed several OHA cases by name. 81 Fed. Reg. at 34,252. Accordingly, the new version of the regulation is not inconsistent with, and was not intended to alter, OHA case law on the issue of economic dependence.

In the instant case, the Area Office found, and no party disputes, that MDW derived more than 70% of its revenues from ECS for the three-year period prior to August 26, 2015, the date of Vet Tech's self-certification. Specifically, according to data Vet Tech submitted to the Area Office during the original size review, MDW derived 100% of its revenues from ECS during 2012 and 2013, 95.14% during 2014, and 85.55% during 2015. *See* Section II.B, *supra*. Size is assessed as of the date of self-certification, August 26, 2015, so data from 2016 is, strictly speaking, not relevant to the Area Office's review. *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."). But even during the first quarter of 2016, the last time period for which actual data was available, MDW still derived 78.54% of its revenues from ECS. Section II.B, *supra*. Given this information, and in light of long-standing OHA case precedent interpreting 13 C.F.R. § 121.103(f), the Area Office appropriately presumed that MDW is economically dependent upon, and therefore affiliated with, ECS.

In finding the presumption to have been rebutted, the Area Office relied primarily on Vet Tech's contention that ECS was directed to subcontract with MDW by the procuring agency, MDA. As Appellant emphasizes in its appeal, though, this analysis is flawed for several reasons. First, the Area Office was unable to corroborate Vet Tech's version of events with MDA. On the

contrary, the CO denied that any such direction occurred, at least from any MDA official with contracting authority, and further stated that no documentation was found in MDA contractual records to support this claim. Section II.G, *supra*.

Second, Vet Tech's own submissions to the Area Office do not clearly support the notion that MDA directed, or required, ECS to offer a subcontract to MDW. During the remand, Vet Tech stated that ECS concluded that subcontracting with MDW would be "the easiest path," as an alternative to "asking for approval for a new subject matter expert." Section II.G, *supra*. Similarly, Vet Tech acknowledged that no MDW personnel were in attendance at the April 2012 meeting when MDA purportedly directed ECS to subcontract with MDW, and Mr. Wilson, who was present at the meeting, did not characterize MDA's statements as a directed subcontract. Mr. Wilson instead stated that "[a]t this meeting MDA informed me that Mr. Maguire and Mr. Dixson had knowledge and skills essential to supporting MDA." *Id.* Although Vet Tech did assert, during the initial size review, that the arrangement between MDW and ECS stemmed from a "directed subcontract", Vet Tech also indicated in the same correspondence that ECS voluntarily "decided" to offer MDW a subcontract. Section II.B, *supra*. Insofar as MDA merely encouraged or recommended that ECS subcontract with MDW, or perhaps expressed reservations about the substitution of key personnel on short notice, the ensuing subcontract was the result of voluntary business decisions on the part of ECS and MDW, not a directed subcontract. I agree with Appellant that choosing not to seek MDA's approval for new key personnel, due to the availability of an easier path, does not equate to ECS being directed to subcontract with MDW.

Third, as Appellant correctly observes in its appeal, the Area Office overlooked that any subcontract between ECS and MDW would have been a bilateral arrangement requiring the consent of both parties. Mr. Wilson's declaration, for example, explains that after the April 2012 meeting with MDA, "ECS began negotiating a subcontract with MDW." Section II.G, *supra*. The central question presented, then, is not whether MDA directed ECS to offer a subcontract to MDW, but rather whether MDW was under any obligation to accept such an offer. In its decision, the Court made clear that MDW — not ECS — should be the focus of the analysis. Thus, the Court instructed that the new size determination examine whether "Missile Defense required MDW to enter into a subcontracting relationship with ECS" and later reiterated that additional fact-finding was necessary in order to determine whether MDA's actions "were the cause of MDW entering into a subcontracting relationship with ECS." Section II.F, *supra*.

Here, the orders and subcontracts between MDW and ECS are plainly bilateral instruments, and Vet Tech has not shown that MDA or ECS could have required MDW to accept that work. Although Vet Tech points to a clause in the Subcontract Agreement that restricted MDW from cross-teaming with other MiDAESS prime contractors, the Subcontract Agreement was not signed until July 20, 2012, and thus was not in existence in April 2012, when MDA reportedly instructed ECS to offer MDW a subcontract. Sections II.B and II.G, *supra*. Similarly, Mr. Maguire's declaration suggests that MDW accepted subcontracting work from ECS "to satisfy MDA", but he does not contend that MDW was acting under any Government direction or requirement. Section II.G, *supra*. Indeed, given that MDW was newly formed in February 2012 and had no immediate contracts with MDA or ECS/Paradigm, it is not clear what mechanism could have existed to require that MDW subcontract with ECS/Paradigm. At best,

then, the record demonstrates that an MDA official, who apparently lacked contractual authority to speak for MDA, may have directed or recommended that ECS subcontract with MDW. ECS then made a business decision to offer MDW such a subcontract, and MDW made a business decision to accept that offer. Thus, MDA's actions do not explain or excuse MDW's economic dependence, because MDW was not required to accept that work, let alone additional subcontracts or orders from ECS, and was not required to have entered into the Subcontract Agreement committing MDW to partner exclusively with ECS. This case is therefore analogous to OHA's decision in *Incisive Technologies*, where OHA found that a small business had "chosen to subcontract almost exclusively" with a large business, and thereby "chosen to be dependent upon" that large business. *Incisive Tech.*, SBA No. SIZ-5122, at 3.

While I find no merit to the notion that MDA required MDW to subcontract with ECS, the question then becomes whether other evidence submitted by Vet Tech is sufficient to rebut the presumption of economic dependence. As both parties recognize, although OHA typically will find affiliation if the 70% threshold is exceeded, the presumption is rebuttable and OHA has, in fact, found the presumption rebutted under certain circumstances. In one such line of cases, the presumption has been rebutted when the challenged firm demonstrates that it is no longer dependent on the alleged affiliate as of the date to determine size, such as where the challenged firm severed its relationship with the alleged affiliate prior to the date of self-certification. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451 (2013); *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5186 (2011). In a second line of cases, involving start-up or dormant concerns, OHA has held that a mechanical application of the 70% rule would unduly penalize the challenged firm due to its inability to secure multiple sources of revenue. Thus, in the leading case of *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011), the challenged firm had been dormant for an extended period, and its only source of revenue was "one contract of less than four months duration which generated less than $11,000 in revenue." *Argus and Black*, SBA No. SIZ-5204, at 6. OHA held that it would be inappropriate to apply the presumption of economic dependence "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." *Id.*; *see also Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799 (2016); *Size Appeal of Cherokee Nation Healthcare Servs., Inc.*, SBA No. SIZ-5343 (2012). In another case, OHA found the presumption rebutted when the challenged firm demonstrated that it had access to other resources and therefore was not dependent upon the revenues earned from the alleged affiliate. *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015).

Each case presents its own unique circumstances, so the fact that OHA has found the presumption rebutted only in limited situations does not establish that these are the only possible scenarios. Rather, the limited scope and nature of these exceptions illustrates the difficulty of overcoming the presumption once the 70% threshold has been exceeded over the course of multiple years. As explained in the *Faison* decision itself, "[g]iven the high probative value of this kind of evidence [*i.e.*, the 70% threshold], 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." *Faison*, SBA No. SIZ-4834, at 8.

Here, I agree with Appellant that none of the arguments offered by Vet Tech are persuasive to rebut the presumption of economic dependence. Although Vet Tech highlights that MDW has made efforts to diversify its business away from ECS, these efforts had not borne fruit as of August 26, 2015, the date to determine size. Thus, MDW still derived 85.55% of its revenues from ECS through the end of 2015, and 78.54% during the first quarter of 2016. Section II.B, *supra*. Nor has Vet Tech argued that MDW discontinued or severed its relationship with ECS prior to the date to determine size. As of August 26, 2015, then, MDW remained economically dependent upon ECS. Similarly, Vet Tech's argument that the completion or cancellation of MDW's subcontracts with ECS would not drive MDW out of business misunderstands the law of economic dependence. The issue is not whether MDW could, in the future, become independent of ECS, but rather whether MDW was in fact dependent upon ECS as of August 26, 2015. *E.g., Incisive Tech.*, SBA No. SIZ-5122, at 4 (rejecting as "irrelevant" the argument that the challenged firm "might be less dependent on [its affiliate] at some unspecified later time.").

Vet Tech also argues that MDW may be considered a start-up business similar to that seen in *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011). OHA has addressed similar arguments in prior cases, though, and has explained that a concern which has been in business continuously for multiple years, and which has generated millions of dollars in revenues, is not a "start-up" as described in *Argus and Black. Alphaport*, SBA No. SIZ-5799, at 13; *Core Recoveries*, SBA No. SIZ-5723, at 6; *Ma-Chis Project Controls*, SBA No. SIZ-5486, at 4. Vet Tech also contends that MDW may be considered a start-up business because MDW is relatively new to the defense-contracting industry, where it takes 18 to 24 months to award a prime contract. This argument, though, is premised on the notion that the only possible source of revenue for a start-up business is a new prime contract. Such a contention is plainly incorrect as MDW's own experience shows. Thus, MDW began earning significant revenues the same year it was founded, and was earning nearly $[XXXXX] in revenues by the next year. Section II.B, *supra*. Accordingly, the fact that it may take 18-24 months to award a new DoD prime contract has no bearing here, as this protracted procurement cycle would not, and did not, prevent MDW from earning revenues through subcontracts or other teaming arrangements.

Vet Tech further argues that it has rebutted the presumption of MDW's economic dependence on ECS because ECS lacked the power to control MDW or Vet Tech. These arguments are meritless. With regard to control over MDW, OHA has recognized that "where a great majority of a challenged firm's earnings are derived from a subcontract [or other business arrangement] with a large firm, the latter firm has the power to control the challenged firm." *TPG*, SBA No. SIZ-5306, at 15 (quoting *Size Appeal of Metropolitan Area Contractors*, SBA No. SIZ-4229, at 6 (1996)); *see also Eagle Consulting*, SBA No. SIZ-5288, at 4 ("Because [the challenged firm] relies upon [its affiliate] for revenue, its interests are closely aligned with those of [its affiliate], and [the affiliate] can, in effect, control [the challenged firm]."); *HealthCare Resource Network*, SBA No. SIZ-5263, at 8 ("when the Area Office found an identity of interests between the firms, it did implicitly find control. An identity of interest is simply one means by which one firm can control another."). Similarly, OHA has repeatedly held that no additional evidence of control is necessary beyond economic dependence. *E.g., Core Recoveries*, SBA No. SIZ-5723, at 6 ("given that [the challenged firm] apparently continued to be heavily dependent upon [the affiliate] for revenues as of [the date to determine size], the Area

Office need not have found any additional means whereby [the affiliate] could control [the challenged firm]."); *Incisive Tech.*, SBA No. SIZ-5122, at 4 ("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."). With regard to control over Vet Tech, it is true that ECS is not a member of Vet Tech, and thus could not control Vet Tech. Vet Tech, though, is a joint venture between DAI and MDW, and ECS's revenues are combined with those of MDW if the two firms are affiliated. 13 C.F.R. § 121.104(d). Further, as joint venture partners, the revenues of DAI and MDW are combined unless an exception applies. 13 C.F.R. § 121.103(h)(2). Thus, while ECS has no power to control MDW beyond economic dependence and cannot control Vet Tech at all, ECS's large size adversely affects whether MDW and Vet Tech qualify as small businesses for this procurement, because ECS's revenues are imputed to MDW for size purposes.

Vet Tech's strongest argument, raised during the course of the remand, is that MDW had access to other resources and therefore could have remained a viable business without ECS. Vet Tech noted that MDW was [XXXXX]; that MDW has received no financial or technical assistance from ECS; that MDW has established a line of credit, [XXXXXX]; and that MDW has been awarded non-ECS contracts and subcontracts, which collectively have generated hundreds of thousands of dollars in non-ECS revenues. Section II.G, *supra*. Vet Tech maintained that MDW's situation is analogous to OHA's decision in *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015), where the challenged firm, a subsidiary of an Alaskan Native Corporation, was not economically dependent upon an alleged affiliate because the challenged firm could instead rely upon the resources of its parent and sister companies. *Id.*

There are, however, several problems with Vet Tech's argument. In particular, this argument requires OHA to speculate as to what might have transpired in the absence of MDW's subcontracts with ECS. Vet Tech argues that, without the ECS subcontracts, MDW would not have had the expenses, especially labor, associated with the ECS work. While this is plausible, Vet Tech makes no attempt to quantify the impact of forgoing the ECS subcontracts, and does not point to any documentary evidence to support the notion that MDW had no other significant expenses aside from contract labor. Similarly, although Vet Tech asserts that MDW could easily have obtained non-ECS work in lieu of the ECS subcontracts, Vet Tech has not identified any non-ECS projects that MDW declined due to its commitments with ECS. In his declaration, Mr. Maguire stated that "[XXXXXXX] and [MDW's] receivables have been sufficient to support operations" but the reference to "receivables" suggests that MDW did require income in addition to [XXXXXXXX] to remain a viable business. Section II.G, *supra*. In this regard, it is significant to note that, according to the data Vet Tech submitted to the Area Office, MDW had no other source of revenue besides ECS during 2012 or 2013. Section II.B, *supra*. An additional obstacle here is that, although OHA will not disturb the findings in a size determination unless the appellant proves that those findings are clearly erroneous, the Area Office here did not address this portion of Vet Tech's arguments in the new size determination. Section II.H, *supra*. As a result, the instant size determination contains no findings on this issue to which OHA might defer. On the whole, then, based on the scant evidence supporting Vet Tech's claim that MDW could have remained a viable business without ECS, and mindful of the standard articulated in *Faison* that "the dependent concern . . . prove, by clear and convincing evidence, that its

interests are separate from the other concern," Vet Tech has not rebutted the presumption that MDW is economically dependent upon ECS.

In sum, MDW derived more than 70% of its revenues from ECS for several years leading up to August 26, 2015, the date to determine size, and this heavy economic dependence continued at least into the first quarter of the next calendar year. The record does not support the conclusion that MDA required MDW to enter into a subcontracting relationship with ECS. Rather, MDW made a voluntary business decision to accept this arrangement. Vet Tech's remaining arguments and evidence do not persuasively rebut the presumption of economic dependence. Accordingly, the appeal is granted with regard to the issue of economic dependence, and that portion of the size determination is reversed.

3. Newly Organized Concern Rule

The parties also debate whether MDW is affiliated with ECS under the newly organized concern rule. SBA regulations define affiliation under the newly organized concern rule as follows:

> Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and 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. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

13 C.F.R. § 121.103(g). OHA has distilled the newly organized concern rule into four required elements: (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) 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. *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 10 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 6-7 (2010). 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 businesses but are, in actuality, affiliates or extensions of large firms. *Size Appeal of Coastal Mgmt. Solutions, Inc.*, SBA No. SIZ-5281, at 3 (2011).

In the initial size determination, the Area Office found that each of the four elements of the newly organized concern rule were met. Section II.C, *supra*. The first element was met

because one of MDW's founders, Mr. Maguire, is a former officer and key employee of Paradigm. The second element was satisfied because MDW and Paradigm operate in the same line of business. The third element was met because Mr. Maguire is the President, CEO, and largest shareholder of MDW. The fourth element was met because MDW derived a large proportion of its revenues for the years under review from ECS, the parent company of Paradigm and Paradigm's successor-in-interest. On remand, though, the Area Office reversed course[2] and determined that the first element of the newly organized concern rule is not met. Section II.H, *supra*. The Area Office accepted Vet Tech's argument that, despite his title, Mr. Maguire was not a corporate officer of Paradigm and functioned as a key employee only in the contractual sense.

I agree with Appellant that the findings in the latest size determination are not well documented. In particular, the Area Office did not clearly articulate its rationale for departing from its prior size determination. Further, while there is evidence in the record to support the Area Office's recent findings — most notably, the sworn declarations of Mr. Maguire and Mr. Wilson — there are also some indications in the record that Mr. Maguire, and perhaps Mr. Dixson as well, may have played a more significant role in Paradigm's management and operations. During the remand, for example, Vet Tech submitted to the Area Office a slide presentation, dated August 2011, in which Paradigm identified Mr. Maguire and Mr. Dixson as two of Paradigm's nine "Key Employees". Presentation at 11. Similarly, in its response to the protest, Vet Tech stated that:

> Mr. Mark Maguire and Mr. Lee Dixson of MDW Associates LLC (MDW) have both been part of the management of MDA Business Operations contracts for almost 15 years. In particular, they both were members of the Paradigm management team on the Financial Matrix contract, which employed more than 120 personnel with the same disciplines and geographic diversity as the current contract.

AR 1777. Elsewhere, the record indicates that Paradigm had only 250 total employees at the time of its acquisition by ECS. *See* AR 727 ("At the time of the acquisition, Paradigm had grown to a 250 person company with annual revenue of roughly $50 million."). Thus, while Mr. Maguire and Mr. Dixson may have been responsible only for certain contracts or customers, this would not necessarily demonstrate that they were not key personnel, as such work may have comprised a large proportion of Paradigm's business. The Area Office also attached significance to Vet Tech's representation that Mr. Maguire did not supervise any employees while at Paradigm, but Mr. Maguire's resume describes him as having been "the manager" of a "team of analysts", and Mr. Dixson's resume states that "Mr. Dixson directly supervised four MDA contractor business units and 10 individuals." AR 1069, 1075, 2245, 2248.

Nevertheless, OHA is an appellate forum and may only reverse a size determination if the appellant proves it is clearly erroneous. Here, the Area Office's determination is supported by the

[2] Although the Court directed that a new size determination be prepared to address the issue of economic dependence, the Court did not preclude the Area Office from also reexamining the newly organized concern rule. *See generally* Section II.F, *supra*.

sworn declarations of Mr. Maguire and Mr. Wilson, and OHA has in the past given particularly heavy weight to sworn statements by representatives of the former employer, such as Mr. Wilson's declaration in the present case. *E.g., Size Appeal of Willow Envtl., Inc.*, SBA No. SIZ-5403 (2012). Moreover, the gravamen of Appellant's allegations here is not even that the size determination is clearly incorrect, but rather that the Area Office should have more thoroughly investigated "what exactly Mr. Maguire (and Mr. Dixson) did for Paradigm/ECS on its contracts", as well as "their job descriptions" and the "scope of their duties". Section II.I, *supra*. This information, though, is in the record, and OHA has held that the mere fact that documents or information are not discussed in detail in a size determination does not establish that they were not considered. *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012). Accordingly, Appellant has not carried its burden of proving that the size determination is clearly erroneous with regard to the newly organized concern rule.

IV. Conclusion

Appellant has demonstrated that the Area Office clearly erred in finding that MDW is not affiliated with ECS as a result of economic dependence. Accordingly, the appeal is GRANTED to that extent, and that portion of the size determination is reversed. Because MDW is affiliated with ECS, a large business, the combined receipts of MDW and DAI exceed the size standard. The conclusion that Vet Tech is a small business for this procurement is therefore also reversed. Appellant has failed to show that the size determination is clearly erroneous with regard to the newly organized concern rule, and that portion of 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