

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

SIZE APPEAL OF:

Metis Technology Solutions, Inc.

Appellant

Appealed from  
Size Determination No. 06-2014-015

SBA No. SIZ-5538

Decided: March 12, 2014

APPEARANCES

Antonio R. Franco, Esq., Kathryn V. Flood, Esq., PilieroMazza PLLC,  
Washington D.C., for Appellant.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On December 13, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2014-015, concluding that Metis Technology Solutions, Inc. (Appellant), is not an eligible small business under the \$14 million annual receipts size standard. Appellant timely filed this appeal on December 24, 2013.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, the appeal is GRANTED and the size determination is REVERSED.

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.

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<sup>1</sup> This Decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the Decision, Appellant informed OHA it had no requested redactions. Therefore, I now issue the entire Decision for public release.

## II. Background

On September 26, 2012, the Director of SBA's Office of Certification and Eligibility requested a size determination on Appellant, for the purpose of determining its eligibility for SBA's 8(a) Business Development program. On December 20, 2012, the Area Office issued Size Determination No. 6-2012-137, finding Appellant other than small under NAICS code 541690, Other Scientific and Technical Consulting Services, with a corresponding \$14 million annual receipts size standard. The Area Office had found Appellant affiliated with SGT, Inc. (SGT), under the newly organized concern rule, and with Booz Allen Hamilton, Inc. (BAH), under both the newly organized concern rule and the identity of interest (economic dependence) rule. In Size Determination No. 6-2102-137, the Area Office determined Appellant's size as of December 5, 2011.

On November 1, 2013, Appellant applied to the Area Office for re-certification as a small business under NAICS code 541330, Engineering Services, which also has a corresponding \$14 million annual receipts size standard. On December 13, 2013, the Area Office issued Size Determination No. 6-2014-015 in which it determined Appellant's size as of its November 1, 2013 request for recertification.

After reviewing Appellant's provided information to the effect that it no longer has contracts with SGT, the Area Office concluded that Appellant was no longer affiliated with SGT. The Area Office also concluded, based on Appellant's significantly reduced contract revenues with BAH, that Appellant was no longer economically dependent on BAH, so found there was no longer an identity of interest between Appellant and BAH.

Nevertheless, the Area Office concluded Appellant was still affiliated with BAH under the newly organized concern rule. Thus, even though Appellant's Federal income tax returns for 2010, 2011, and 2012 show that, by itself, Appellant is within the size standard, because BAH is a large business, affiliation with BAH causes Appellant to be other than small.

The Area Office noted its earlier findings, that Dr. Colucci, a former key employee of BAH, organized a new concern (Appellant) in same or related field of operation and serves as sole officer and shareholder of that firm. Further, as of December 15, 2011, Appellant had derived 64% of its 2011 revenues from BAH. Information provided with its recertification request showed Appellant received 38% of its 2012 revenues and 35% of its 2013 revenues from BAH.

Reviewing Dr. Colucci's resume, submitted in the 2011 size proceeding, the Area Office noted Dr. Colucci had been BAH's Senior Associate and Manager of NASA Programs from 2003 to 2008. In that role, Dr. Colucci was responsible for developing and implementing BAH's business development strategy for NASA and other public sector information technology programs, and for overseeing BAH's business at seven NASA locations. She reported that she had sold over \$40 million in consulting services to NASA.

Appellant's November 1, 2013 submission described BAH. Appellant described BAH as a corporation managed by a Board of Directors and a Senior Leadership Team. The corporate hierarchy is, in descending order:

Board of Directors  
Senior Vice Presidents  
Vice Presidents  
Principals  
Associates  
Consultants

Appellant stated that Dr. Colucci was in the Associates Corps, at the lower end of the corporate hierarchy, and she managed ten staff members out of BAH's 20,000 employees. The Area Office, however, found that because Dr. Colucci had a rank as a Senior Associate and Manager, her claim that she was on the "low end" of the corporate hierarchy is not evidence she was not a key employee. This rank is just below "Principals" and "Vice Presidents" and is fifth on the corporate hierarchy which is significant in a company of 20,000 employees. BAH displays profiles of Senior Associates on its website which supports a finding Senior Associates are key employees.

While at BAH, Dr. Colucci managed work in the NASA market that represented about \$4 million in annual revenues, at a time when BAH's revenues were in excess of \$4 billion annually. Dr. Colucci also left BAH in 2008 to work for one its competitors, and did not found Appellant until 2010. The Area Office concluded that the fact Dr. Colucci left BAH to work for a competitor has no bearing on whether Appellant is a newly organized concern.

The Area Office also questioned Dr. Colucci's credibility, based upon the perceived discrepancy between the \$4 million and \$40 million figures submitted as representing the NASA accounts she handled. The Area Office also questioned the accuracy of Appellant's assertion BAH's annual revenues exceed \$ 4 billion, because information on BAH's website give the figure of \$3.8 billion for 2008. The Area Office also found the figures Appellant gave for the revenue generated by her are meaningless without comparing it to the revenue generated by all other employees. The Area Office found the definition of key employee does not depend upon the amount of revenue an employee generates, and gave the example of Director of Human Resources as a key employee who does not generate revenue.

The Area Office also relies on the claim in Dr. Colucci's resume that she was responsible for BAH's business development strategy for NASA, and her assertion that she over saw all of BAH's business at seven NASA locations for its conclusion that she had critical influence in and substantive control over this sector of BAH's operations.

Having determined Dr. Colucci was a key employee of BAH, and the other requirements of the newly organized concern rule satisfied, the Area Office thus found Appellant was affiliated with BAH under the newly organized concern rule. This finding led to the conclusion Appellant was other than small, because BAH is a large business.



### C. The Appeal

Appellant contends the Area Office clearly erred in concluding that Dr. Colucci was a key employee of BAE and that, therefore, Appellant is affiliated with BAH under the newly organized concern rule.

Appellant argues the Area Office erred by questioning the credibility of Appellant's submissions. The Area Office confused Dr. Colucci's operational responsibilities for 0.1% of BAH's business with the value of contracts she helped secure. The \$40 million figure represents potential revenues that might be realized over the total value of contract performance. The \$4 million figure represents annual revenue Dr. Colucci managed. The \$4 billion figure on BAH's annual revenue came directly from BAH's annual report.

Appellant further argues that Dr. Colucci was not a key employee of BAH because BAH is controlled by 7 members on its Board of Directors, and by 11 members on its Leadership Team. There are 14 Senior Vice Presidents who report to the Leadership, and 107 Vice Presidents who report to the Senior Vice Presidents. Below the Senior Vice Presidents is a corps of hundreds of Principals. Thousands of Associates report to the Principals, and Dr. Colucci was an Associate.

Appellant asserts the Area Office mischaracterized the \$40 million in BAH work Dr. Colucci was responsible for as a single year's receipts when that figure represents total potential contract value over five years or more. The effect of this mischaracterization was to magnify Dr. Colucci's importance at BAH, contributing to the erroneous finding that she was a "key employee" there. Appellant also pointed to its earlier submission noting that Dr. Colucci managed only a small part of BAH's revenues – one-tenth of one percent – and that her responsibilities comprised only a small part of BAH's business with NASA, not all of it, as the size determination seemed to indicate.

Further, while some Associates were featured on the BAH website, Dr. Colucci was not. Appellant further asserts that it is too old a firm (five years) to be subjected for newly organized concern rule to be applicable to it.

With its appeal, Appellant requests the admission of new evidence in the form of a one-page email.

### III. Discussion

#### A. Standard of Review and New Evidence

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).

Appellant seeks to submit new evidence with its appeal. New evidence on appeal is not considered unless it is ordered by the Judge or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308. Here, I find Appellant has not established good cause for the submission of the evidence, and so I EXCLUDE it.

### B. Analysis

Here, the Area Office found Appellant affiliated with BAH under the newly organized concern rule. The newly organized concern rule provides that concerns are affiliated where four conditions are met: (a) Former officers, directors, principal stockholders, managing members or key employees of one concern organize a new concern; and (b) The new concern is in the same or related industry or field of operation; and (c) The individuals who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members or key employees; and (d) The one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(g).

The first condition set by the rule is that the challenged concern must be founded by an officer, director, principal stockholder, managing member or key employee of the alleged affiliate. This is a necessary condition for a finding of affiliation under the rule. If the founder(s) of the new concern do not fall into one of these categories, the rule does not apply. *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013). Dr. Colucci was clearly not an officer, director, principal stockholder, or managing member of BAH. The issue is, was she a key employee of BAH?

A key employee is one who, because of her position in the concern, has a critical influence or substantive control over the operation or management of the concern. 13 C.F.R. § 121.103(g). I find that Dr. Colucci was not a key employee of BAH and, indeed, there is no evidence whatever to support the Area Office's finding that she was one. BAH is a giant corporation. (The Area Office's focusing on whether its annual revenues are \$3.8 billion or over \$4 billion is truly an irrelevant issue.) Dr. Colucci was a lower level manager of a major corporation, with limited responsibilities. She was on the fifth level down of management, with literally hundreds of officials above her in the corporate hierarchy. Dr. Colucci managed only ten employees out of over 20,000. The revenues from the projects she oversaw represented approximately 0.1% of BAH's annual revenue.<sup>2</sup>

Further, the Area Office has misunderstood the nature of "key employee". It compared Dr. Colucci's position to that of Human Resource Manager, a position which OHA has specifically held not to be that of a key employee. *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013); *Size Appeal of CJW Construction, Inc.*, SBA No. SIZ-5254 (2011). Further, key employees are those who have influence or control over the operations of a concern as a whole, such as a Director of Operations. *Size Appeal of Alterity Management & Technology*

<sup>2</sup> As Appellant points out, the Area Office erred in confusing the annual revenues from her projects with total contract value over the entire period of contract performance, and therefore the Area Office's question of Dr. Colucci's credibility was entirely without merit.

*Solutions, Inc.*, SBA No. SIZ-5514 (2013). Dr. Colucci managed only a small portion of BAH's business. The finding that Dr. Colucci had critical influence or substantive control over BAH's operations or management is simply ludicrous.

The Area Office has clearly erred in its finding that Dr. Colucci was a key employee of BAH during her employment there.<sup>3</sup> Thus, the Area Office clearly erred in concluding that Appellant is affiliated with large concern BAH under the newly organized concern rule.

Accordingly, because Appellant has shown the Area Office has clearly erred in its size determination concluding Appellant is other than small, I must reverse the size determination and grant the appeal. Appellant is an eligible small business under the \$14 million annual receipts size standard applicable to NAICS codes 541330 and 541690.

#### IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is REVERSED. Appellant is an eligible small business under the \$14 million annual receipts size standard applicable to NAICS codes 54690 and 541330. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).



CHRISTOPHER HOLLEMAN  
Administrative Judge

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<sup>3</sup> I need not reach the issue of whether the fact that Dr. Colucci left BAH to work for a competitor for over two years prior to founding Appellant means the newly organized concern rule is not applicable here.




CERTIFICATE OF SERVICE

I hereby certify that, on May 7, 2014, I served the foregoing by email upon the following:

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