United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: TPG Consulting, LLC, Appellant, Appealed From Size Determination No. 6-2011-115	SBA No. SIZ-5306 Decided: December 13, 2011

APPEARANCES

Richard B. Oliver, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for Appellant

Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, Vienna, Virginia, for eTouch Federal Systems, LLC

DECISION[1]

I. Introduction

On September 16, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2011-115 finding TPG Consulting, LLC (Appellant) other than small because of the firm's relationship with the Information Systems Division of Toyota Motor Sales, USA, Inc. (Toyota). Appellant maintains that the size determination contains numerous clear errors. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958,15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within fifteen days 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.

[1] This decision was initially issued on December 2, 2011, under a protective order to prevent the disclosure of confidential or proprietary information. At that time, I issued an order for redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered those requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Protests

On December 4, 2009, the National Aeronautics and Space Administration (NASA) issued Solicitation No. NNH09274133R (RFP) seeking a contractor to create, manage, and maintain NASA's public websites. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 541519, Other Computer Related Services, with a corresponding size standard of $25 million in average annual receipts.[2]

On February 5, 2010, Appellant submitted its initial offer and certified as a small business for this procurement. On June 13, 2011, the CO notified offerors that eTouch Federal Systems, LLC (eTouch) was the apparent successful offeror. On July 12, 2011, after NASA protested eTouch's size, the Area Office determined that eTouch is other than a small business concern. Subsequently, on August 8, 2011, offerors were notified that Appellant was the apparently successful offeror for the procurement. On August 11, 2011, eTouch protested Appellant's size. eTouch alleged that Appellant is affiliated with Toyota and other entities.

B. Size Determination

On September 16, 2011, the Area Office issued its size determination. The Area Office noted that Appellant has several acknowledged affiliates. The Area Office determined that the combined average annual receipts of Appellant and its acknowledged affiliates for the years under review (2007, 2008, and 2009) fall below the size standard applicable to this procurement. The Area Office rejected eTouch's allegations with regard to the other entities named in the protest but credited the allegation that Appellant is affiliated with Toyota.

The Area Office explained that when one firm relies on a second firm for 70% or more of its revenue, the first firm is economically dependent upon the second firm. 13 C.F.R. § 121.103(f); *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007). The Area Office noted that even in the absence of other ties between the companies, the dependence by one firm upon another for the large majority of its revenue is sufficient to uphold a finding of affiliation between the firms. *Size Appeal of Incisive Techs., Inc.*, SBA No. SIZ-5122 (2010). Finally, the Area Office stated that there must be a longstanding relationship between the firms

[2] On October 12, 2011, the CO issued Amendment 7 to the RFP, which cancelled the solicitation "[d]ue to substantial changes in NASA's requirements." OHA will still decide the appeal because the size determination has future applicability for Appellant. The issues in the size determination are not contract-specific, so Appellant remains ineligible to compete for small business set-aside procurements conducted under this size standard as long as the size determination is in effect. It is well-settled that "a size appeal is not moot even if a procurement is canceled, if the issues are not contract-specific and the size determination at issue has future applicability." *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 5 (1998).

to justify such a finding of affiliation; economic dependence cannot be based upon one contract of short duration. *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011).

Under this line of cases, the Area Office analyzed Appellant's relationship with Toyota. The Area Office acknowledged that Appellant was organized on January 5, 2007, and that Appellant received no revenue from Toyota in 2007. Appellant derived an average of [XX]% of its receipts from its contract with Toyota during 2008 and 2009. However, the Area Office noted that over 70% of Appellant's receipts were derived from its contract with Toyota in 2009 and that strong economic ties between Appellant and Toyota continued through 2010 and into 2011. The Area Office acknowledged that Appellant had been in business for less than three fiscal years prior to the date of self-certification and had minimal revenues in 2007. Nonetheless, the Area Office emphasized that Appellant had a relationship with Toyota for two years prior to self-certification and continues to have a relationship with Toyota now. The Area Office also noted that, at the time of self-certification, [XX]% of Appellant's staff worked at a Toyota facility. The Area Office concluded that Appellant depends upon Toyota for its economic viability, and Appellant therefore is affiliated with Toyota under 13 C.F.R. § 121.103(f). Consequently, when Appellant's receipts are combined with those of Toyota, Appellant is other than a small business concern. The Area Office did not address eTouch's allegation that Appellant is affiliated with Toyota based on the totality of the circumstances because it found affiliation based upon a specific regulatory ground.[3]

C. Appeal Petition

On October 3, 2011, Appellant filed the instant appeal. Appellant provides a lengthy recitation of the facts underlying this matter in an attempt to illustrate that although Toyota is a customer of Appellant's, Appellant has no other ties with Toyota. Appellant explains that it provides web services for Toyota, as well as various other customers, and that it is standard industry practice for website service employees to work at client facilities. Appellant insists that its owners were never employed by Toyota, the firms do not share ownership or employees, the firms are in different lines of business, the firms have no teaming agreements, and Appellant would be economically viable without the Toyota contract because it has other customers. Appellant stresses that Toyota is simply Appellant's largest customer, not its affiliate.

Appellant goes on to allege that the Area Office committed seven different clear errors. First, Appellant contends the Area Office improperly considered Appellant's 2010 and 2011 revenues in the size determination. Appellant verifies that it self-certified as a small business on February 5, 2010, and asserts that its size must be determined based on its receipts from 2007, 2008, and 2009. Appellant contends any information regarding revenues beyond February 5, 2010, is irrelevant to the size determination and notes that it repeatedly objected to the Area Office's requests for the information. Appellant claims the Area Office reviewed its 2010 and 2011 revenues to demonstrate Appellant's ongoing relationship with Toyota and to distinguish this case from *Argus and Black*, SBA No. SIZ-5204, where OHA determined that one contract of short duration could not alone support a finding of economic dependence. Appellant argues that

[3] The Area Office made a number of other findings that are not relevant to this appeal and will not be discussed here.

size must be determined "based on documents in existence and available as of the date of self-certification." *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5234, at 6 (2011) (quoting 67 Fed. Reg. 70,339, 70,342 (Nov. 22, 2002)). Appellant concludes the Area Office's consideration of its 2010 and 2011 revenues constitutes a clear error of law.

Appellant next asserts the Area Office erred by mechanically applying the 70% rule articulated in *Faison*, SBA No. SIZ-4834, to conclude that Appellant is economically dependent upon Toyota. Appellant argues that neither *Faison* nor *Incisive Technology*, SBA No. SIZ-5122, which applies the same rule, compels the conclusion that Appellant is dependent upon Toyota. Appellant points out that in *Faison*, there were significant other indicia of affiliation between the firms, whereas here Appellant has no other business connection to Toyota. In *Incisive Technology*, the challenged firm relied upon a subcontract from a large firm for nearly 100% of its revenues, so its success was dependent upon the success of the large firm. Here, Appellant emphasizes that its revenues from Toyota constituted [XX]%[4] of its total revenue for only one of the years used to determined size. Appellant also indicates it has never been Toyota's subcontractor; Toyota is only Appellant's customer. Appellant concludes:

> By converting the 70 percent threshold (even for one year) into an automatic and unqualified basis for affiliation, and by neglecting the complete differences in relationships between the parties deemed to be affiliates in *Faison* and *Incisive* and this case, the Area Office has unreasonably extended *Faison* and *Incisive* well beyond their circumstances.

(Appeal Petition 13.) Appellant again emphasizes that there are no loans or other financial arrangements between Appellant and Toyota, that the firms do not submit proposals together, that Toyota plays no role in the performance of Appellant's contracts, that the firms are not in the same line of business, that the firms do not share common locations, and that Appellant would still be profitable without Toyota. Appellant specifically highlights that it is not Toyota's subcontractor, so Toyota cannot control Appellant's flow of business, and it is not heavily dependent upon Toyota for its revenue stream. Appellant asserts OHA has never found economic dependence based upon a customer relationship, and the Area Office erroneously expanded OHA's case law by finding that Appellant is economically dependent upon Toyota. According to Appellant, if the size determination is affirmed, "[i]t would be the first case finding that a concern is economically dependent upon a company that is a pure customer and has no prime contractor/subcontractor relationship, with no other indicia of affiliation, where the concern did not essentially receive all of its revenues from its customer over at least a four year period." (Appeal Petition 18.)

The third error alleged by Appellant is that the Area Office assumed that affiliation exists where there is some evidence of economic dependence. Specifically, Appellant asserts that the size determination contains no discussion of whether Appellant's ties to Toyota are sufficient to constitute affiliation. Appellant points out that the language of 13 C.F.R. § 121.103(f) provides that affiliation "may arise" from economic dependence, but it does not require a finding of

[4] The specific percentage has been redacted at Appellant's request, but I note that Appellant derived more than 70% of its revenues from Toyota in 2009.

affiliation upon finding economic dependence. Appellant also argues that OHA interpreted the regulation as discretionary in *Faison*, where OHA looked to other indicia of affiliation to bolster the finding of economic dependence before concluding there was affiliation, and in other cases as well. *Faison*, SBA No. SIZ-4834, at 9-10; *see also Size Appeal of Kansas City LLC d/b/a Best Harvest Bakeries*, SBA No. SIZ-4574 (2003); *Size Appeal of PCCI, Inc.*, SBA No. SIZ-4531 (2003); *Size Appeal of Wireless Tech. Equip. Co., Inc.*, SBA No. SIZ-4204 (1996).

Fourth, Appellant asserts the Area Office failed to consider whether Appellant successfully rebutted a finding of affiliation by showing that its interests are separate from those of Toyota. Appellant again points to 13 C.F.R. § 121.103(f), which provides that a "firm may rebut [the determination that its interest should be aggregated with those of another firm] with evidence showing that the interests deemed to be one are in fact separate." Appellant argues it presented sufficient evidence to demonstrate that its interests are separate from Toyota's interests. Appellant explains that Toyota could terminate Appellant's contract at any time, so the firms' interests are not aligned, and the Area Office erred in failing to consider this information.

The fifth error alleged by Appellant is that the Area Office assumed Appellant's viability depends upon Toyota's business. Appellant asserts the Area Office cited no evidence from the record to demonstrate that Appellant depends upon Toyota to remain in existence. Instead, Appellant contends that the record demonstrates that Appellant could remain economically viable without Toyota. Appellant lists other customers from which it received substantial revenue during the period of measurement used to determine Appellant's size. Appellant concedes that "Toyota could obtain these website services from many other companies" and that Appellant "would probably have to lay-off some employees" if the Toyota contract were terminated, but Appellant maintains that it could remain profitable even without the business from Toyota. (Appeal Petition 21-22.)

Sixth, Appellant contends the fact that [XX]% of Appellant's employees work on-site at Toyota is not an indicia of economic dependence. Instead, Appellant maintains that it is standard industry practice for website service providers to work at the client's facility because those services require close collaboration with the client. Appellant emphasizes that it does have its own facility where its employees could work but explains that all of its major customers host Appellant's employees at the client's location, consistent with industry practice. In fact, as of the date to determine size, only [XX]% of Appellant's employees worked at Appellant's own facility. Appellant asserts its compliance with industry practice is not an indication of economic reliance upon Toyota.

Finally, Appellant asserts the Area Office should have concluded that Appellant could not be affiliated with Toyota based upon the "totality of the circumstances," 13 C.F.R. § 121.103(a)(5). Appellant notes that the Area Office rejected most of eTouch's protest allegations and found affiliation based on very specific and limited factors that only apply to economic dependence. Accordingly, Appellant contends the Area Office should have determined that, both factually and as a matter of law, there could be no finding of affiliation between Appellant and Toyota based upon the totality of the circumstances. Appellant concludes the size determination is based upon clear errors of fact and law and requests that OHA grant its appeal and reverse the size determination.

D. eTouch Response

On October 19, 2011, eTouch filed its opposition to the appeal. eTouch contends Appellant failed to meet its burden of proving clear error and urges OHA to affirm the size determination, which eTouch asserts is consistent with the facts and OHA precedent. eTouch asserts that at the time Appellant self-certified, the firm admittedly relied upon Toyota for [XX]% of its revenue, and [XX]% of its employees were located at a Toyota facility. Based on the *Faison* 70% rule, and numerous OHA decisions applying *Faison*, eTouch asserts those facts alone are sufficient to deny the appeal and affirm the finding of economic dependence. Alternatively, eTouch requests that OHA find that Appellant is affiliated with Toyota under the totality of the circumstances or remand the matter to the Area Office for consideration of that theory of affiliation.

eTouch addresses Appellant's argument that the Area Office erred in considering its 2010 and 2011 revenue by claiming the Area Office properly found economic dependence because Appellant's Toyota revenue constituted [XX]% of Appellant's total 2009 revenues. eTouch contends the Area Office only examined Appellant's 2010 and 2011 revenues to determine whether Appellant has a continuing relationship with Toyota. eTouch claims the 2010 and 2011 revenues demonstrate Appellant's continued reliance on Toyota, so Appellant is unable to establish that its interests are separate from those of Toyota.

eTouch next argues that the Area Office properly applied *Faison* and *Incisive Technology* to the facts of this case. eTouch asserts the relevant language in 13 C.F.R. § 121.103(f) is "economically dependent through contractual or other relationships" and quotes from *Faison* and *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR), to demonstrate its point. eTouch also emphasizes that OHA has previously determined that affiliation may be based on economic dependence alone without any other indicia of affiliation. *See Eagle Consulting*, SBA No. SIZ-5267, at 5; *Incisive Tech.*, SBA No. SIZ-5122, at 4; *Faison*, SBA No. SIZ-4834, at 10. Nevertheless, eTouch also argues there are other indicia of affiliation between Appellant and Toyota. eTouch contends the fact that [XX]% of Appellant's workforce is located at Toyota's facility does demonstrate economic dependence.

eTouch also alleges that both of Appellant's principals have longstanding relationships with Toyota. eTouch claims one of Appellant's owners has been a consultant for Toyota since 2002. eTouch maintains the other owner has been employed by Toyota since 2002 and still lists Toyota as his employer on his Linkedin.com profile.[5] (Protest Ex. 8.) eTouch also indicates that both owners list Toyota Alumni Networks as a professional networking group on their Linkedin.com profiles. (Protest Ex. 7-8.) eTouch concludes that as in *Faison*, *Incisive Technology*, and *Eagle Consulting*, Appellant is heavily dependent upon its contract with Toyota for its revenues and, therefore, is affiliated with Toyota. eTouch submits that granting

[5] eTouch cites the size determination for this proposition. The size determination provides that "neither [of the owners] were/are owners, officers, directors, or key employees of Toyota; [both owners] were consultants to Toyota prior to forming [Appellant]." (Size Determination 6.)

Appellant's appeal would require OHA to overturn those decisions.

eTouch supports the Area Office's conclusion that Appellant's economic viability depends on Toyota's business. eTouch contends Appellant's own figures buttress this conclusion: by Appellant's own admission, [XX]% of its employees work at a Toyota facility, and Appellant derives 70% of its revenue from Toyota. Again, eTouch points to *Eagle Consulting* for support, where OHA held that heavy economic dependence during the time period under review was sufficient to uphold a finding of affiliation.

eTouch again insists that the fact that [XX]% of Appellant's employees work at a Toyota facility is indicative of economic dependence. eTouch contends Appellant's argument that it is standard industry practice for web services employees to work from a client's location is unsupported by the record because Appellant has not offered any evidence to support that claim. eTouch disputes Appellant's claim that it has a physical office, instead reasserting its protest allegation that Appellant's address is a rented UPS store mailbox. eTouch also argues that Appellant's business model is similar to the staff augmentation model used by large businesses, whereby Appellant would provide lower cost employees with particular skills to Toyota. eTouch posits that because the employees technically work for Appellant and not Toyota, it is easier for Toyota to terminate those employees during times of economic downturn. However, eTouch emphasizes that those employees are "actually effectively employees of Toyota." (eTouch Response 9.) eTouch believes Appellant is utilizing this business model and has, for practical purposes, become part of Toyota: "Under this approach, the putative consulting firm is a captured arm of the large business." *Id.*

Lastly, eTouch asserts that the Area Office did not need to consider affiliation under the totality of the circumstances because the Area Office found affiliation based on economic dependence, and OHA has determined that the totality of the circumstances should only be the basis for affiliation when no other specific affiliation rule applies. *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 10 (2010). eTouch contends that even if the Area Office had considered the totality of the circumstances, it would have found affiliation based upon all the indicia of affiliation discussed above.

E. Appellant's Reply

On October 21, 2011, after the close of record, Appellant filed a reply. Appellant requests leave to file the reply to address the decision in *Eagle Consulting*, on which eTouch relied and which was not publicly available until after Appellant filed its appeal petition. Appellant also wishes to correct alleged factual inaccuracies in eTouch's response to the appeal petition. I find this is a sufficient basis to permit the brief reply. 13 C.F.R. §§ 134.207(b), 134.309(d).

Appellant asserts that the *Eagle Consulting* decision does not alter the analysis set forth in its appeal petition because that case, like *Incisive Technology*, involved long-term, heavy economic dependence by a subcontractor upon a prime contractor. Appellant argues that in those cases, the small subcontractor was effectively an extension of the large prime contractor, so the prime contractor could control the subcontractor. Appellant maintains that no such relationship exists here because Toyota is only Appellant's customer.

Appellant disputes eTouch's contentions that its owners previously worked for Toyota.[6] Appellant explains that the sworn declarations submitted to the Area Office confirm that neither owner was ever employed by Toyota or had any contractual relationship with Toyota. Appellant asserts that the owners' Linkedin.com profiles, which indicate that the owners list the Toyota Alumni Group as a professional association, are not sufficient to contradict the sworn testimony of the owners themselves. *See Size Appeal of Native Energy and Tech., Inc.*, SBA No. SIZ-5249 (2011). Appellant also claims the record does not indicate the membership criteria of this group, so membership does not constitute evidence that the owners were ever employed by Toyota.

Appellant next explains that it did offer support for its contention that it is standard industry practice for web service employees to work at the client's location. In particular, the sworn declaration of its one of its owners indicates that this practice is customary. Appellant also explains that the fact that it has a physical location (not just a mailbox) is supported by the record, which contains the lease for its office premises. Lastly, Appellant challenges eTouch's claim that Appellant merely augments Toyota's staff as new, untimely, and unsupported.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its 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 the 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

The Area Office determined that Appellant is affiliated with Toyota based upon Appellant's economic dependence upon, and identity of interest with, Toyota. The applicable regulation provides:

> Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or

[6] Appellant, too, points to the size determination for support: "None of the key employees proposed for the instant procurement were ever employed by ... Toyota." (Size Determination 5.)

> firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). Based upon this regulation and OHA case precedent, the Area Office reasoned that because Appellant derived over 70% of its revenue from Toyota in 2009, Appellant is economically dependent upon Toyota. In support of its finding, the Area Office also observed that, in 2009, [XX]% of Appellant's staff worked at a Toyota facility. In addition, although outside of the years under review, the Area Office noted that Appellant continued to derive a large majority of its revenue from Toyota in 2010 and 2011.

In analyzing questions of affiliation, the ultimate question is always whether one concern can control the other: "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. § 121.103(a)(1); *see also Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244, at 5 (2011) (finding no identity of interest and noting "there is simply no evidence that [the challenged firm and its alleged affiliate] can control one another or that a third party can control both entities") (citing *Size Appeal of LGS Mgmt., Inc.*, SBA No. SIZ-5160, at 3 (2010) ("[C]ontrol is always the principal question when addressing affiliation."); *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128, at 5 (2010) ("The ultimate inquiry in any type of affiliation case ... is the power to control."")). In this case, the record supports the conclusion that Appellant is economically dependent upon Toyota as its predominant source of revenue and that Toyota therefore could control Appellant. Thus, for the reasons discussed below, I find the Area Office did not err in concluding that Appellant is affiliated with Toyota.

1. Period of Measurement

Appellant's first challenge to the size determination is that the Area Office erroneously considered its revenues from 2010 and 2011 in determining that Appellant is economically dependent upon Toyota. eTouch counters that the Area Office's examination of the 2010 and 2011 revenues was proper because the Area Office only used those revenues to determine whether Appellant has a continuing relationship with Toyota, not to find economic dependence or to calculate Appellant's size.

Appellant submitted its initial offer on February 5, 2010, so the Area Office determined Appellant's size as of that date.[7] When the solicitation at issue employs a receipts-based size

[7] 13 C.F.R. § 121.404(a). eTouch observes that, although proposals originally were due in February 2010, the solicitation subsequently was amended and required submission of revised proposals. (eTouch Response 4.) The version of 13 C.F.R. § 121.404(a) in effect at that time provided that "[w]here an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation." SBA eliminated this provision in February 2011, but the amended regulation applies only to solicitations issued on or after March 4, 2011. 76 Fed. Reg. 5680 (Feb. 2, 2011). Arguably, then, solicitation amendments after February 2010 might have required Appellant to recertify as small [*cont*]

standard, as did the RFP here, SBA regulations specifically articulate how to calculate a firm's receipts. 13 C.F.R. § 121.404. The regulation governing the period of measurement used to determine a firm's size is clear: "Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52." 13 C.F.R. § 121.104(c)(2).[8] The size determination specifies that the Area Office used "fiscal years 2009, 2008, and 2007" to calculate Appellant's average annual receipts. (Size Determination 2.) The size calculation worksheet in the record further reflects that the Area Office actually did use those years to calculate Appellant's size. Therefore, the Area Office properly calculated Appellant's size using only data from 2007, 2008, and 2009.

Nevertheless, as Appellant points out, it is clear that the Area Office did give some consideration to Appellant's 2010 and 2011 revenues. Specifically, the Area Office stated that: "[Appellant's] receipts from its contract with Toyota jumped significantly from 2008 to 2009, representing over 70% of the Company's receipts for 2009, as well as 2010. In 2011, Toyota accounts for over [XX]% of the Company's receipts year-to-date." (Size Determination 4.) The Area Office later commented that Appellant "continues to have an ongoing contractual relationship with Toyota which has resulted in its increased dependence on Toyota for its economic viability." (Size Determination 5.) It therefore appears the Area Office analyzed Appellant's 2010 and 2011 revenues in finding that Appellant's relationship with Toyota is longstanding and continuing.

Although the Area Office's calculation of Appellant's size was proper, I agree with Appellant that, because Appellant's size was being determined as of February 2010, Appellant's 2010 and 2011 revenues were beyond the scope of the Area Office's review, and therefore largely irrelevant to the analysis. In the context of economic dependence, OHA has indicated that only information existing before the date of self-certification should be used to determine size. In *Size Appeal of Norris Prof'l Servs., Inc.*, SBA No. SIZ-5289, (2011), for example, OHA found that procurements for which the challenged firm reportedly competed in 2010 could not alter the determination that the firm was economically dependent upon another business in prior years.

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when it submitted its revised proposals, which might in turn affect the date for determining size. *Size Appeal of Continental Staffing, Inc.*, SBA No. SIZ-4808, at 9 (2006) (finding SBA is responsible for determining whether solicitation amendments required recertification, even when procuring agency did not request recertification). Nevertheless, the record clearly indicates that consideration of data from 2010 and 2011 would only have strengthened the Area Office's conclusion that Appellant is economically dependent upon Toyota. Because I find that the Area Office reasonably determined that Appellant is economically dependent upon Toyota as of February 2010, it is unnecessary to decide whether the Area Office should instead have assessed Appellant's size as of a later date.

[8] Appellant uses the calendar year as its fiscal year. Because Appellant was established on January 5, 2007, it had not technically been in business for three *completed* fiscal years before it certified as a small business on February 5, 2010. Accordingly, the Area Office properly applied 13 C.F.R. § 121.104(c)(2) in lieu of § 121.104(c)(1).

Even so, I find that the Area Office's consideration of Appellant's 2010-2011 revenues was, at most, harmless error, because it would not have affected the outcome of the size determination. Using the February 2010 date of certification, the Area Office based its calculation of Appellant's size upon the appropriate years (2007-2009) and determined Appellant to be economically dependent upon Toyota based on the data from 2009. The Area Office further established—apart from Appellant's activities in 2010 and 2011—that Appellant had a longstanding relationship with Toyota before the date to determine size. Specifically, the Area Office observed that Appellant "had an ongoing relationship for almost 2 years prior to its self-certification." (Size Determination 5.) Accordingly, it appears that the Area Office considered Appellant's 2010 and 2011 revenues merely to note that the trend of economic dependence identified in 2009 continued unabated in subsequent years. Although any comments with regard to 2010 and 2011 were perhaps irrelevant, they were not prejudicial to Appellant. Stated differently, supposing that the Area Office had remained silent with regard to 2010 and 2011, a finding of economic dependence would still have been proper based on the data for 2009. The Area Office's observations about Appellant's 2010 and 2011 revenues did not change these facts or add anything that would significantly alter the Area Office's discussion of the matter. Accordingly, the Area Office's consideration of Appellant's 2010 and 2011 revenues does not warrant reversal of the size determination. *See Size Appeal of A1 Procurement, LLC*, SBA No. SIZ-5121, at 8 n.3 (2010) (finding the Area Office's possible reliance upon one fact to be harmless error because the record demonstrated affiliation even absent that fact).

2. OHA Case Precedent and the 70% Rule

Appellant next contends that the Area Office mechanically applied the 70% economic dependence rule articulated in*Faison*, thereby extending OHA case precedent beyond its intended reach. Appellant contends that OHA has applied the *Faison* rule in situations where a subcontractor is economically dependent upon a prime contractor, but OHA has not previously found economic dependence based upon a vendor/customer relationship. eTouch argues the 70% rule is a bright line standard to establish economic dependence and emphasizes that OHA has repeatedly opined that no additional evidence of affiliation is necessary once the 70% threshold is exceeded. eTouch submits that granting Appellant's appeal would require OHA to overturn an entire line of prior decisions.

Appellant's suggestion that OHA has not previously found economic dependence in the context of a vendor/customer relationship is simply incorrect. In *Size Appeal of J.R. Logging*, SBA No. SIZ-4426 (2001), OHA determined that the challenged logging firm was economically dependent upon the sawmill to which it sold its logs because the sawmill accounted for over 98% of the challenged firm's receipts. OHA emphasized that—even though there were other factors supporting a finding of affiliation in that case—the percentage of receipts alone was enough to establish that the logging firm was economically dependent upon, and therefore affiliated with, the sawmill. In *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466 (2001), the challenged firm derived 88%, 86%, and 86% of its receipts in 1998, 1999, and 2000, respectively, from a customer to which the challenged firm sold manufactured parts. OHA found that the Area Office

properly considered this as evidence of affiliation.[9] When the challenged firm argued that it could not be dependent upon a customer with whom it had only arm's length transactions, OHA explained: "[A] firm may be found economically dependent on one customer for business, even absent evidence that their dealings are not at arm's length." *Pointe Precision*, SBA No. SIZ-4466, at 10. In *Size Appeal of Kansas City LLC d/b/a Best Harvest Bakeries*, SBA No. SIZ-4574 (2003), OHA found the challenged bakery affiliated with the McDonald's restaurant chain in part because approximately 95% of the bakery's sales were to McDonald's. As recently as last year, OHA stated that affiliation based upon economic dependence is commonly based upon a challenged firm's reliance on "subcontracts or other receipts" from its alleged affiliate. *Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112, at 6 (2010). Accordingly, although several OHA cases have involved a relationship between a subcontractor and a prime contractor, it is clear that economic dependence may also be based upon a vendor/customer relationship.

Furthermore, Appellant has shown no convincing policy rationale to distinguish dependence on a customer from dependence on a prime contractor. Appellant argues that treating these situations similarly applies *Faison* and *Incisive* too "mechanically." Appellant does not explain why applying those precedents to a vendor/customer relationship is unfair or unreasonable, especially in light of the OHA decisions indicating that affiliation may be based upon such a relationship. Indeed, whether a firm is economically dependent upon a prime contractor or a customer, the result is the same: another entity effectively controls the challenged firm's revenue stream. Such control is a sufficient basis upon which to determine that the concerns share an identity of interest.

Having determined that economic dependence may be found in the context of a vendor/customer relationship, the remaining question is whether the revenue Appellant derives from Toyota is sufficient to support a finding of economic dependence in this case. The record reflects that Appellant's revenues from Toyota constituted 0% of its total revenues in 2007, [XX]%[10] of its total revenues in 2008, and [XX]% of its total revenues in 2009. In *Faison*, OHA

[9] OHA found the information appropriate to consider under the totality of the circumstances because the identity of interest rule was not in effect at that time. OHA explained: "Contractual relationships existed as a separate basis for affiliation before 1996. Under this rule, affiliation generally arises where one firm is dependent upon another for contracts and business to such a degree that its economic viability would be in jeopardy without such contracts or business. 13 C.F.R. Section 121.401(k) (1995);*Size Appeal of Defense Logistics Agency*, SBA No. SIZ-3974, at 7 (1995). In eliminating contractual relationships as a separate basis for affiliation, the SBA noted it still would be 'referenced as a factor that may cause affiliation under the totality of circumstances.' 60 Fed. Reg. 57982, 57985 (Nov. 24, 1995)(preamble to proposed 13 C.F.R. Section 121.103)." *Pointe Precision*, SBA No. SIZ-4466, at 10. Additionally, the customer was the challenged firm's minority owner, and OHA also considered the newly organized concern rule in its totality of the circumstances affiliation analysis. *Id.* at 10-16. The current identity of interest rule, 13 C.F.R. § 121.103(f), was promulgated in 2004. 69 Fed. Reg. 29,192 (May 21, 2004).

[10] The specific percentage has been redacted at Appellant's request, but I note that Appellant derived less than 70% of its revenues from Toyota in 2008.

held, as a matter of law, that "when one concern depends on another for 70% or more of its revenue ... the concern is economically dependent on the other." *Faison*, SBA No. SIZ-4834, at 10. OHA continued: "Given the high probative value of this kind of evidence, 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." *Id.*

Appellant advances several arguments in an attempt to distance itself from *Faison*. Appellant maintains that its receipts do not meet the *Faison* standard because it derived more than 70% of its revenue from Toyota in only one of the three years under review. Appellant further contends that the 70% rule applies only where there are other indicia of affiliation, as in *Faison*, or where nearly 100% of a firm's revenues are derived from another company, as in *Incisive*. Appellant also argues the Area Office ignored factual differences in the relationships between itself and Toyota and the firms at issue in those cases. Appellant claims "[m]aking the 70 percent threshold the only basis for a holding of affiliation completely unmoors *Faison* and *Incisive* from their underlying justifications." (Appeal Petition 14.)

I find Appellant's arguments unpersuasive to distinguish the instant case from *Faison* and other OHA precedent. First, OHA has repeatedly and clearly held that when a high portion of a firm's receipts are attributable to one other firm, that fact alone is a sufficient basis to warrant a finding of economic dependence. "[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." *Incisive Tech.*, SBA No. SIZ-5122, at 4 (citing *J&R Logging*, SBA No. SIZ-4426; *Size Appeal of Metropolitan Area Contractors*, SBA No. SIZ-4229 (1996)). The holding in *Incisive* was not limited to instances where the challenged firm relied upon its alleged affiliate for nearly all of its revenues. Accordingly, Appellant's insistence that it has no other ties to Toyota is unavailing. A high percentage of revenue derived from a single source is enough to constitute economic dependence and, therefore, affiliation.

Appellant contends that it is not heavily dependent upon Toyota for its revenues. Under *Faison*, however, any percentage greater than 70% equates to economic dependence "as a matter of law." *Faison*, SBA No. SIZ-4834, at 10. With this precedent in place, Appellant cannot escape the conclusion that it is heavily dependent upon the revenues from Toyota.

Appellant also contends that *Faison* should be limited to situations where a firm derives 70% or more of its revenues from another over multiple years. However, Appellant offers no authority for this proposition. *Faison* itself did not set forth such a requirement. It is true that several of OHA's cases have noted activity over multiple years in finding economic dependence. *Eagle Consulting*, SBA No. SIZ-5267, at 2; *Incisive Tech.*, SBA No. SIZ-5122, at 2. However, other OHA cases have focused on a particular year. In *Size Appeal of Supreme-Technology, Inc.*, SBA No. SIZ-4092 (1995), OHA specifically stated that "affiliation through contractual relationships may be based on findings from a single fiscal year." *Supreme-Tech*, SBA No. SIZ-4092, at 5; *see also J&R Logging*, SBA No. SIZ-4426, at 2, 4 (determining the Area Office properly found economic dependence when more than 98% of the challenged firm's receipts in the year 2000 were from contracts with the alleged affiliate). In *Argus and Black*,

OHA reviewed less than a year of revenues because the challenged firm had only one contract of short duration. *Argus and Black*, SBA No. SIZ-5204, at 2, 6. OHA did not conclude, however, that economic dependence must be based upon revenues from more than one year. Rather, OHA based its decision on alternate grounds: that one contract of short duration and modest dollar value was insufficient to warrant a finding of economic dependence. *Id.* at 6-7. Accordingly, I find that Appellant in the instant case has not successfully articulated why revenues from one year should be insufficient to serve as a basis for a finding of economic dependence.

Essentially, Appellant argues the facts of this case are too dissimilar from those in *Faison, Incisive*, and *Eagle Consulting* to apply the rules set forth in those cases. However, Appellant has not identified any meaningful differences between the cases. OHA case law plainly indicates that economic dependence can be based upon a vendor/customer relationship and that a concern which relies upon another for 70% or more of its receipts is economically dependent upon the source of its revenues. OHA case law does not require that a challenged firm receive more than 70% of its revenues from an alleged affiliate over multiple years to warrant a finding of economic dependence. Furthermore, OHA has repeatedly ruled that other indicia of affiliation are not necessary to find economic dependence once the 70% threshold is exceeded. Given these precedents, I conclude that the Area Office did not err in finding that Appellant is economically dependent upon Toyota.

3. Application of 13 C.F.R. § 121.103(f)

Appellant alleges the Area Office erroneously assumed that affiliation exists where there is some evidence of economic dependence. Appellant emphasizes that the language of 13 C.F.R. § 121.103(f) is discretionary, not mandatory. Appellant complains that the Area Office failed to exercise its discretion and that the Area Office failed to fully analyze Appellant's ties to Toyota. I find this argument meritless. The Area Office set forth the legal basis for its determination, discussed the factors it found to be most relevant, and concluded that Appellant is economically dependent upon Toyota. Appellant presents no evidence that the Area Office failed to properly exercise its discretion. Even if, as Appellant argues, the regulation does not require a finding of economic dependence, it certainly authorizes the finding the Area Office made.

Appellant also asserts that the Area Office failed to consider whether Appellant successfully rebutted a finding of affiliation, as contemplated by 13 C.F.R. § 121.103(f). Appellant maintains that it submitted sufficient evidence to demonstrate that its and Toyota's business interests separate, as required by the regulation. Appellant emphasizes that the two are unrelated companies with no other ties and that Toyota could cancel Appellant's contract at any time.

Many of the factors that Appellant identifies as rebutting the presumption of affiliation—such as the absence of common ownership or management, or the fact that Appellant operates in a different primary industry than the alleged affiliate—have been found insufficient to overcome the presumption of affiliation in cases such as *Incisive* and *Eagle Consulting*. Indeed, once heavy economic dependence is shown, OHA has seldom, if ever, found the presumption to be rebutted. *Cf., Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011) (determining that although the challenged firm derived all of its revenue from the alleged affiliate, it was improper

to find affiliation based on one contract of modest dollar value and short duration).

Furthermore, there is simply no evidence that the Area Office failed to consider the evidence and arguments put forth by Appellant. All the mitigating factors to which Appellant refers in its appeal petition are also referenced in the record before the Area Office. For instance, Appellant's response to the size protest stated:

> [Appellant] and Toyota are not in the same line of business. Toyota does not own any [of Appellant's] shares, and there are no loans or other financial arrangements between Toyota and [Appellant]. [Appellant] has its own office and equipment, and its principals are not former employees of Toyota. [Appellant] has other substantial clients. Toyota will have no role in performing the NASA contract, and Toyota has no role in performing any of the other non-Toyota contracts that [Appellant] performs. Toyota is simply a customer of [Appellant] and has no other rule in [Appellant]'s business.

(Protest Response at 7.) Appellant also attached a declaration from its Chief Executive Officer, which further elaborated on Appellant's contentions and explained Appellant's business operations and structure. (Protest Response Ex. B.) These documents demonstrate that, on appeal, Appellant largely restates arguments previously made to the Area Office.

Neither Appellant nor the record presents any reason to believe that the Area Office did not fully consider Appellant's submissions. In fact, the size determination repeatedly refers to and summarizes Appellant's arguments. The Area Office chose, consistent with applicable law, to weigh certain factors more heavily than others. Although Appellant disagrees with the result of the Area Office's consideration of its evidence, I see no basis to conclude that the Area Office ignored the evidence and arguments presented. The fact that Appellant disagrees with the Area Office's conclusion does not establish that the Area Office failed to consider Appellant's arguments. *See Faison*, SBA No. SIZ-4834, at 10 (recognizing a "presumption that SBA [officials] acted in good faith in issuing a size determination [which] can only be overcome by clear and convincing evidence of personal animus, prejudice, or other irregular conduct").

I also find no merit to Appellant's argument that its interests are not aligned with those of Toyota. The applicable SBA regulation includes "firms that are economically dependent through contractual or other relationships" as an example of firms "that have identical or substantially identical business or economic interests." 13 C.F.R. § 121.103(f). Thus, the plain language of the regulation indicates that a firm that is economically dependent upon a second firm shares substantially identical interests with that second firm, by definition. Similarly, OHA case decisions indicate 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." *Size Appeal of Metropolitan Area Contractors*, SBA No. SIZ-4229, at 6 (1996)*; see also Size Appeal of Norris Prof'l Servs., Inc.*, SBA No. SIZ-5289, at 6-7 (2011) ("Control need not be exercised through direct ownership or management. Rather, a finding of economic dependence indicates that [the challenged firm] and [its affiliate] share an identity of interest — *i.e.*, that the 'two concerns have identical or nearly identical business or economic interests."'); *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 [its affiliate] can, in effect, control [the challenged firm].”). Thus, a finding of economic dependence equates to a finding of substantially identical interests, such that the concerns must be treated as one.

4. Location of Appellant's Employees

Appellant claims the fact that [XX]% of its employees worked on-site at a Toyota facility is not significant because it is standard industry practice for web service employees to work at their client's location. eTouch argues the fact that the majority of Appellant's workforce was located at Toyota's facility is indicative of economic dependence.

The size determination is unclear in its treatment of this issue. The Area Office noted that “[XX]% of [Appellant's] employees worked at the Toyota facility” and that “[t]his provides further evidence of [Appellant's] economic dependency on Toyota for its viability.” (Size Determination 5.) On the next page of the size determination, however, the Area Office stated that:

> The fact that [Appellant] has employees located at its client's facility is not indicative of affiliation; however, due to [Appellant's] economic dependence and high number of employees that work on the Toyota contract, the SBA does find that [Appellant] is unduly reliant on Toyota for its economic viability as a business concern.

Id. at 6. Thus, it is unclear whether the Area Office found the fact that Appellant's employees work at a Toyota facility to be supporting evidence of economic dependence, or whether the Area Office was concerned that a large percentage of Appellant's workforce was devoted to the Toyota contract.

In any event, the size determination makes clear that the finding of economic dependence was based primarily (if not entirely) upon the percentage of revenue Appellant derived from Toyota in 2009. The Area Office emphasized that “even if there are no other ties between two firms, the contractual ties between the two firms where one is heavily dependent on another for its revenues is alone sufficient to support a finding of affiliation.” (Size Determination 4.) Further, OHA recognized in *Faison* that “co-location” of employees is among the “other facts that strengthen a determination of economic dependence and bear on whether there is an affiliation based upon an identity of interest.” *Faison*, SBA No. SIZ-4834, at 10. Accordingly, insofar as the Area Office did base its determination on the co-location of employees, I see no basis to conclude that such treatment was clearly erroneous.

5. Appellant's Economic Viability

Appellant contends the record demonstrates that it is economically viable without Toyota because Appellant can identify other customers from which it received substantial revenue during the period of measurement used to determine Appellant's size. Appellant allows that it may be forced downsize absent business from Toyota, but Appellant maintains that it would

remain profitable without Toyota.

OHA has previously rejected similar arguments. In *Best Harvest Bakeries*, OHA rejected the challenged firm's argument that it could continue its business without the sales to its alleged affiliate because the challenged firm "fail [ed] to show ... that it has other customers as important to its business" as the alleged affiliate." *Best Harvest Bakeries*, SBA No. SIZ-4574, at 8. Similarly, here Appellant cannot demonstrate that it has any customers as important as Toyota. In its appeal petition, Appellant names several other customers, but none of those customers constitute a large portion of Appellant's receipts. In 2008, Appellant had five customers aside from Toyota. Two of those customers accounted for [XX]% of Appellant's revenue combined, one accounted for [XX]%, another for [XX]%, and the largest non-Toyota customer represented [XX]% of Appellant's revenues. In 2009, Appellant had only [XX] customers besides Toyota. One customer represented [XX]% of Appellant's revenues and the other accounted for [XX]%. (Appeal Petition 8.) These percentages are dwarfed when compared with the business Appellant conducts with Toyota. It is also significant that Appellant decreased its customer base from 2008 to 2009 and increased its dependence upon Toyota.

In any case, in order to find affiliation, it is not necessary to conclude that Appellant would cease to be a viable business entity without Toyota. Rather, the appropriate question is whether Appellant "economically dependent through contractual or other relationships" upon Toyota. 13 C.F.R. § 121.103(f). The Area Office properly addressed that legal standard. Whether or not Appellant's economic viability depends upon Toyota may be helpful to consider, but it is not the precise legal standard at issue.

6. Totality of the Circumstances

Appellant lastly argues that the Area Office should have concluded that Appellant is not affiliated with Toyota under the "totality of the circumstances." 13 C.F.R. § 121.103(a)(5). I find, as discussed above, that the Area Office properly determined that Appellant is affiliated with Toyota through economic dependence. As a result, the Area Office did not reach the issue affiliation through the totality of the circumstances.

The totality of the circumstances may serve as a basis for affiliation where "no single factor is sufficient to constitute affiliation." *Id.* Here, the Area Office found a specific basis for affiliation: economic dependence. That the Area Office did not consider whether totality of the circumstances was a separate basis for affiliation was not erroneous. *See Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 10 (2010) ("It is true that the Area Office must consider the totality of the circumstances surrounding the relationship between the firms in examining the issue of affiliation. However, the totality of the circumstances should only be the basis for a finding of affiliation if no other specific ground is sufficient. In other words, the Area Office should find affiliation based upon the totality of the circumstances only when it is unable establish affiliation under any of the other specific affiliation rules, yet the relationship between the parties taken as a whole is indicative of affiliation."). Similarly, because I am upholding the Area Office's determination that Appellant is economically dependent upon, and therefore affiliated with, Toyota, I need not consider whether the firms are affiliated based upon the totality of the circumstances. I do, however, agree with eTouch that, if this appeal were to be

granted, the case would likely require remand to the Area Office for consideration of this theory of affiliation. eTouch points to various potential connections between Appellant and Toyota which may be appropriate for consideration under such an inquiry, but because I have already determined that Appellant is affiliated with Toyota through economic dependence, I need not address them here.

IV. Conclusion

As the challenged firm, Appellant was responsible for persuading the Area Office that it is a small business. 13 C.F.R. § 121.1009(c). Based upon the record, Appellant failed to do so. On appeal, it was Appellant's burden to prove that the size determination is clearly erroneous. 13 C.F.R. § 134.314. Again, Appellant has not done so. Therefore, I DENY this appeal and AFFIRM the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge