

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

SIZE APPEAL OF:

Alutiiq Education & Training, LLC,

Appellant,

RE: Serrato Corporation

Appealed From

Size Determination No. 6-2012-050

SBA No. SIZ-5371

Decided: June 27, 2012

APPEARANCES

S. Lane Tucker, Esq., Stoel Rives LLP, Anchorage, Alaska, for Alutiiq Education & Training, LLC

Ramon Serrato, President/CEO, for Serrato Corporation

DECISION<sup>1</sup>

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office clearly erred in concluding that the protested concern is not affiliated with its proposed subcontractor under the identity of interest rule, the ostensible subcontractor rule, or the totality of the circumstances rule. *See* 13 C.F.R. § 134.314.

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<sup>1</sup> I originally issued this Decision under a Protective Order. *See* 13 C.F.R. § 134.205. After reviewing the original Decision, the parties informed OHA they had no requested redactions. Therefore, I now issue the entire Decision for public release.

### III. Background

#### A. The Solicitation and Protest

On September 23, 2011, the Department of Labor, Employment and Training Administration, in Washington, DC (DOL), issued Solicitation No. DOL111RP20403 (the RFP) for a contractor to operate the Job Corps Center in Cleveland, Ohio. The Contracting Officer (CO) set the procurement aside for small business, and designated North American Industry Classification System (NAICS) code 611519, Job Corps Centers, with a corresponding \$35.5 million annual receipts size standard, for this procurement.

On February 17, 2012, the CO notified unsuccessful offerors that Serrato Corporation (Serrato) was the apparent successful offeror. On February 24, 2012, Alutiiq Education and Training, LLC (Appellant), an unsuccessful offeror, filed a size protest alleging that Serrato is not an eligible small business concern because it is affiliated with Horizon Youth Services, L.C. (HYS), a subsidiary of Endless Horizons, Inc., a large business. On March 2, 2012, the CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting - Area VI, in Seattle, Washington (Area Office). On March 6, 2012, the Area Office notified Serrato of the protest, and requested that it provide a response, together with a completed SBA Form 355 and certain other information. On March 10, 2012, Serrato responded to the protest.

#### B. The Statement of Work<sup>2</sup>

The Contractor will provide material, services, and all necessary personnel to operate the Cleveland Job Corps Center, which serves 396 residential and 44 nonresidential students. The contractor is to provide disadvantaged youth ages 16 to 24 with a comprehensive range of career development services leading to employment and long-term attachment to the workforce. The Contractor shall:

Provide academic, career technical, social, employability and independent living skills training.

Provide health care, counseling, and other support services on an individualized needs basis.

Conduct program operations in a setting that is clean, well maintained, and safe.

Assist youth in obtaining employment, additional education or training, or entry into the Armed Forces.

Provide support that prepares graduates to maintain long-term attachment to the labor market or educational opportunities.

Integrate center operations with the local workforce development systems, employers, the business community, and community-based organizations.

The Contractor will perform Outreach to ensure the Job Corps maintains a positive public image and works in partnership with communities, employers, and

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<sup>2</sup> RFP at 4-15.

state and local workforce development systems.

The Career Preparation Period (CPP) is an approximately six-week period in which the Contractor will provide activities designed to assist each new student in Center life and to acquire basic job readiness and job search skills. The introduction to Center life includes Center expectations, behavioral standards, and career success standards as well as training in personal development skills, to ensure the student is ready for the Career Development Period. The contractor will develop a comprehensive Career Preparation Plan, assess each student's needs, and provide counseling, career planning, training, and assistance in navigating the labor market.

The Career Development Period (CDP) is an integrated program of center-based, work-based, and independent living skills training. The Contractor will provide career technical training for entry-level skills in three career areas: Office Administration, Computer Service Technician, and Health Occupations. The Contractor will ensure that students acquire the foundation skills, knowledge, and competencies needed to achieve their career goals; understand how to progress in the workplace; move successfully from learning to work; experience personal growth; and learn self-management, personal responsibility and community and independent living skills. The Contractor will provide academic instruction in reading, mathematics, English as a second language, and high school diploma/GED. The Contractor also will provide personal and career counseling, evaluation of progress, information technology training, driver education, and career transition readiness. The Statement of Work includes the Residential Living and Recreation programs as part of the CDP.

The Contractor will provide direction, management, and administrative support of all Center activities. The Contractor will provide systems to ensure effective program organization and management, program integrity and accountability, and staff professionalism and development. This will include recruitment of qualified staff, training, procedures to ensure security and personal safety for staff and students, property management, financial management and facilities maintenance. The Contractor will also provide student support and benefits, such as monitoring student attendance; issuing student allowances, managing student records; and providing clothing, transportation, food, healthcare, and childcare services.

Under Section M, Evaluation of Proposals, the basis for award is Best Value. RFP at 120. The Technical Proposal is weighted significantly more than Past Performance, and together they are more important than cost/price. *Id.* The Technical Proposal is evaluated in the following order of importance: (1) Career Development Period, (2) Career Preparation Period, (3) Outreach, and (4) Administrative & Management Support Services. RFP at 116. In considering Past Performance, only that of the offeror/prime contractor is considered. RFP at 117.

The Key Personnel for the contract are the Center Director, Deputy Center Director,

Administration Director/Manager, Programs Director, Training Managers (Academic and Career Technical Training), and Career Success Manager (Social Development Manager). RFP at 121.

#### C. The Serrato/HYS Subcontract

The subcontracting agreement between Serrato and HYS provides that HYS staff will take direction from the Center Director and Serrato's President, both Serrato employees. HYS staff will have no approval authority for Center transactions not delegated by Serrato. The Center Director, a Serrato employee, has the right to request removal or replacement of an HYS employee for cause. HYS will comply with any such request that seems reasonable.

#### D. Serrato's Proposal

Under the Proposal, Serrato will provide 90 employees including the highest position of Center Director, while HYS will provide 68 employees including the second-highest position of Deputy Center Director. Serrato will provide four of the seven other key employees: the three Career Technical Training (CTT) cluster managers (Health, Business and Construction) and the Social Development Director. HYS will provide the Academic Manager, the Finance & Administration Director, and the Career Services Manager.

Serrato will oversee CTT and all its staff will be Serrato employees except for four National Training Contractors (NTC) trades instructors. Proposal at 44, 51. Serrato will oversee the residential living and recreation portions of the contract, and will employ all 50 residential living and recreation staff. *Id.* at 79. The Proposal emphasizes this staff is vital to student success, as the residential students will spend most of their time there, and the non-residential students will be affected by their relationship with these counselors as they participate in evening and weekend activities. *Id.*

Another Serrato employee will be the Business Community Liaison, who will collaborate with local groups serving the populations targeted for enrollment and will establish relationships with employers and educational institutions to provide learning and job opportunities for graduates. *Id.* at 64-65, 87. Serrato will also provide the HR/Staff Training Manager, the Safety/Security Manager, and staff for safety/security, transportation, and food services.

HYS will staff and oversee the Career Development Period and academic instruction. *Id.* at 18, 34. HYS also will staff and oversee much administrative staff including finance, facility maintenance, and wellness except for the medical subcontractors.

For Past Performance, Serrato submits seven projects, all performed by Serrato, none by HYS. Serrato presents its consulting contract and subcontract with HYS, and also presents five other training contracts it has performed for Federal, state and local governments.

#### E. The Size Determination

On March 27, 2012, the Area Office issued Size Determination No. 6-2012-050 (Size Determination), concluding that Serrato is small for this procurement.

Serrato was incorporated on September 25, 2001. Ramon Serrato, President/CEO, is sole shareholder, officer and director. By itself, Serrato is below the size standard. There is no common ownership between Serrato and HYS, nor are there shareholders with common investments, or affiliation between the concerns due to the common involvement of family members.

The Area Office considered Appellant's first contention that Serrato was affiliated with HYS under the identity of interest rule due to economic dependence. Appellant had alleged there were subcontracting agreements between the concerns at a number of Job Corps Centers. The Area Office found that there was only one such contract, at the Charleston, West Virginia, Job Corps Center. Serrato also had a consulting contract with HYS. According to the financial information Serrato submitted, 2.8% of Serrato's 2009 receipts, 22.3% of its 2010 receipts, and 0.1% of its 2011 receipts came from its consulting contract with HYS. The Charleston Job Corps Center subcontract with HYS accounted for 20% of Serrato's 2011 receipts. The Area Office concluded that Serrato's subcontracts with HYS were a small portion of its receipts, and that Serrato is not affiliated with HYS based upon identity of interest.

The Area Office then considered whether Serrato was affiliated HYS for the instant procurement under the ostensible subcontractor rule. Serrato's past performance submission listed seven projects, five with Serrato as prime and two from work Serrato did as subcontractor or consultant for HYS. The Area Office concluded Serrato was not dependent upon HYS for its past performance submission.

The Area Office noted that Serrato's submission stated that no current or former Serrato employee had ever been employed by HYS. Serrato asserted it will have the majority of staffing and costs associated with the contract. Serrato further asserted it will provide 53.65% of the personnel, and the majority of key management positions. HYS will perform 40.54% of the total work. Academics, Career Services and Finance/Administration are subcontracted to HYS. HYS will provide only 68 employees to perform the contract, while Serrato will provide 90.

The Area Office considered Serrato's Technical Proposal. The Area Office found the responsibilities are carefully defined. The Area Office concluded Serrato was performing the primary and vital functions of the contract and was not unusually reliant on HYS.

The Area Office further found the Center Director is to be Serrato's employee, and he has not been employed by HYS. The Area Office found only two key employees would be HYS employees. Serrato's Director of Training and Education will oversee the whole Center and HYS's Director of Operations will oversee only the areas subcontracted to HYS.

The Area Office found that there is scant evidence that HYS had "chased the contract." Further, Serrato's Director of Training was the lead proposal writer. The Area Office found Serrato was not reliant upon HYS for financing. Serrato informed the Area Office that HYS provides it with no facilities and is and never has been entitled to any Serrato profits.

The Area Office found that Serrato is performing some of the more complex and costly

contract functions. The Center Director has the highest salary, and the Social Development Director is one of the more highly compensated positions. Both positions will be held by Serrato employees.

The Area Office reviewed the Serrato/HYS "Teaming Agreement." This provides that the Center Director is to be a Serrato employee, and that the Director has the right to request removal or replacement of any HYS employee for reason or cause. HYS is under the direction of Serrato as prime contractor.

The Area Office thus concluded Serrato was not dependent upon Serrato's qualifications, the responsibilities of the two concerns were clearly defined, and Serrato would manage the contract. The Area Office determined Serrato was not unusually reliant upon HYS for the performance of this contract, and was therefore not affiliated under the ostensible subcontractor rule.

Finally, the Area Office considered Appellant's contention Serrato was affiliated with HYS under the totality of the circumstances rule. The Area Office found no indicia of affiliation between Serrato and HYS, and thus no affiliation under the totality of the circumstances rule.

Thus, the Area Office concluded that Serrato is an eligible small business for this contract.

#### F. The Appeal

On March 29, 2012, Appellant received the Size Determination. On April 13, 2012, Appellant filed the instant appeal. Appellant also seeks to submit new evidence, affidavits which seek to discuss events which occurred after issuance of the Size Determination, and clarification as to what the primary and vital functions of the contract are. Appellant renews on appeal each of its three protest allegations.

First, Appellant asserts the Serrato and HYS are affiliated under the identity of interest rule. Appellant argues the two concerns are economically dependent through contractual relationships. Appellant asserts it is undisputed that both concerns are in the same line of business, under the same NAICS code. Appellant reasserts the claims made in its protest that all of Appellant's Job Corps Center contracts involve a prime-sub relationship with HYS. Appellant relies upon information allegedly available on Serrato's website, and asserts that the Area Office did not explain why it relied upon Serrato's response rather than Appellant's allegations.

Second, Appellant asserts the Area Office erred in finding Serrato and HYS are not affiliated under the ostensible subcontractor rule. Appellant alleges that HYS will perform the primary and vital functions of the contract. Appellant asserts the Area Office erred in not comparing how primary and vital the functions Serrato would perform are versus those performed by HYS. Appellant argues that HYS will perform the Academic and Career Services which are the primary and vital functions of the contract. Further, HYS will perform in those fields more heavily weighted by the RFP. These include Outreach, Career Preparation Period, Career Development Period, Administrative and Management Support Services and Career

Transition Period. Appellant relies upon *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011) ( *Alutiiq*) to support its claim that Serrato is unusually reliant upon HYS because HYS will be performing the core functions of the contract. Appellant asserts the social and administrative functions of the contract which Serrato is performing are not the primary and vital functions of the contract.

Appellant asserts HYS will perform a substantial percentage of the work, a substantial portion of the staffing here and this also supports a finding of unusual reliance, citing *Alutiiq*. Appellant further asserts this Size Determination is inconsistent with an earlier size determination issued by the same Area Office.

Finally, Appellant argues that the Area Office erred in not finding Serrato and HYS affiliated under the totality of the circumstances. Appellant bases most of its argument on this point on Serrato and HYS's relationship on this contract. Appellant also argues Serrato has made representations about its relationships with HYS contrary to what has been published on the Serrato and HYS websites. Appellant further attempts to introduce evidence concerning the transition of the contract from Appellant to Serrato.

#### G. Serrato's Response to the Appeal

On May 1, 2012, Serrato responded to the appeal. Serrato opposes Appellant's Motion to Admit New Evidence. Serrato asserts it is a small business with no affiliates.

Serrato denies it is affiliated with HYS based upon identity of interest. Serrato asserts its representations to the contrary are certified as part of its SBA Form 355. Serrato further denies it is affiliated with HYS under the ostensible subcontractor rule. Serrato asserts it will perform all the Career Technical Training and key management functions for the Center.

Serrato distinguishes *Alutiiq*, first, because it is a small concern without a parent company or multiple subsidiaries. Second, because the challenged concern in *Alutiiq* relied upon other entities for its past performance, and Serrato did not do so here.

Serrato further asserts that it provided the Area Office with a complete staffing chart, demonstrating that it would be providing most key personnel. Serrato asserts the Size Determination is based upon the staffing chart it submitted to the Area Office. Serrato asserts it will be providing most key employees. The Center Director will be a Serrato employee, and as leader of all the other positions is the most important. Serrato argues that it is indeed performing the primary and vital functions of the contract.

Serrato further asserts the Area Office did not err in finding it was not affiliated with HYS under the totality of the circumstances. Serrato asserts the size determination Appellant relies upon is inapposite.

#### IV. Discussion

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

Appellant filed its appeal within fifteen days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

I DENY Appellant's motion to admit new evidence. Evidence not considered by the Area Office is not to be admitted absent a motion establishing good cause. 13 C.F.R. § 134.308(a)(2). Appellant seeks to admit evidence the Area Office never saw, and which concerns events which took place after the date for determining size. This evidence has no bearing on whether the Area Office based the Size Determination on a clear error of fact or law. *See infra*. Appellant also seeks to submit new evidence concerning which services comprise the Career Services function. Appellant could have and should have submitted this information with its protest, and it is too late to do so now.

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 on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction 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. The Identity of Interest Issue

Appellant seeks to argue, based upon its protest allegations and information gleaned from Serrato's and HYS's websites, that Serrato and HYS are affiliated based upon identity of interest. Concerns are affiliated based upon an identity of interest if the concerns are economically dependent through contractual or other relationships. 13 C.F.R. § 121.103(f). However, here Serrato's response to the protest detailed its prior relationship with HYS. Serrato has only worked on one subcontract for HYS prior to this, and had one consulting contract. HYS has not provided a large percentage of Serrato's revenues, such that Serrato could be said to be dependent upon it. *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 10 (2007) (a concern's dependence upon another concern for 70% of its revenues establishes economic dependence.) Further, Serrato has had only one subcontract with HYS, not four as Appellant alleges.

Serrato's response is attached to its SBA Form 355, and thus Serrato had certified that it is true and correct. The signed and certified written statements by Serrato, providing detailed financial information, are of more weight than Appellant's allegations based upon information gleaned from websites. *Size Appeal of Rebmar, Inc.*, SBA No. SIZ-4173 (1996). The Area Office made no error in finding Serrato was not affiliated with HYS under the identity of interest rule.

##### C. The Ostensible Subcontractor Issue

Under SBA's "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4), a prime



contractor and its subcontractor may be treated as joint venturers, and thus affiliates, if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. To apply the ostensible subcontractor rule, the Area Office must consider all aspects of the relationship between the prime and subcontractor, including the terms of the Proposal, agreements between the concerns (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006).<sup>3</sup> The purpose of the rule is to “prevent other than small firms from forming relationships with small firms to evade SBA’s size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). An ostensible subcontractor case must be analyzed on the basis of the RFP and proposal at hand. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011).

Under the regulation the Area Office must consider whether the subcontractor in question is the incumbent on the contract. Here, that is not the case. OHA has consistently held that among the main considerations in ostensible subcontractor analysis are which concern is managing the contract, and will be providing the key employees. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290 (2011). Serrato is managing the contract, and is providing most of the key employees.

Serrato will also provide the Social Development Director, who will oversee the important residential program. It is clear that the purpose of the Center is not merely academic training, but, in effect, the operation of large educational institution providing support services in a safe setting and training the students in life skills and well as technical skills. The Social Development Director is clearly a key position. Serrato will also be providing the Health Cluster Manager, the Construction Cluster Manager, and Business Technology Cluster Manager, all overseeing the Career Technical Training which will be provided by Serrato employees. HYS is providing the Deputy Director, and the Academic Manager. Further, it is clear that the Center Director has the overall management of the entire Center. It is therefore clear that Serrato will be providing most of the key employees, and managing the contract.

Further, the largest part of this contract is the Career Development Program (CDP), which includes the Career Technical Training and the Academic Training as well as the residential and recreational programs. It is also the most heavily weighted of the evaluation criteria. Serrato will performing all but the Academic Training portion of the CDP, and thus will clearly be performing this primary and vital function of the contract.

Serrato's past performance submission also evidences extensive experience in the training sector, and is reliant only upon contracts performed by Serrato itself, and on none by HYS. (Under the RFP criteria, Serrato's subcontracting work was not to be considered, even if submitted.) This demonstrates Serrato has the relevant experience in performing this type of

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<sup>3</sup> The seven factors test is no longer applicable. *C&C Int'l Computers and Consultants, Inc.*, at 12-13.

contract. OHA has consistently held that where a concern has the ability to manage a contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 13 (2011).

Appellant argues that because HYS will perform the Academic and Career Services portion of the contract, it is performing the primary and vital functions of the contract. Appellant relies upon *Alutiiq* to support its case. However, *Alutiiq* is not dispositive here. As noted above, an ostensible subcontractor analysis is based upon all aspects of the case in question. *Alutiiq* found affiliation under the ostensible subcontractor rule based upon three factors. First, the challenged concern in that case was wholly reliant for its past performance rating upon other concerns, which OHA held to be probative evidence that the challenged concern would be unusually reliant upon its large subcontractor. *Alutiiq*, at 9. Here, Serrato's past performance submission is entirely its own, and so evidences no dependence upon HYS.

Second, the challenged concern in *Alutiiq* was reliant upon its subcontractor for four of its eight key employees, and further, two of the remaining four were to be hired from the subcontractor. This heavy reliance upon the subcontractor for key employees was found an indicia of unusual reliance. *Alutiiq*, at 10-12. Here, Serrato will provide most of the key employees, including the highest post of Center Director. Accordingly, Serrato's key employee submission does not evidence unusual reliance upon HYS.<sup>4</sup>

Third, the challenged concern in *Alutiiq* was not performing the academic training and career technical training tasks required by the contract. The proposal in *Alutiiq* called for 81 personnel to perform academic and career technical training for that contract. The challenged concern was to provide 1 employee, the ostensible subcontractor 72. OHA found that these tasks were the heart of the contract, and that the primary function of the contract was to provide career and technical training. Thus, the challenged concern in *Alutiiq* was thus found to be unusually reliant upon its subcontractor for the performance of the primary and vital functions of the contract. *Alutiiq*, at 12-13.

Here, however, while HYS is performing the Academic training, Serrato will perform the Career Technical Training, and so Serrato has not subcontracted out all of the training portion of the contract, as the challenged concern in *Alutiiq* did, but retained most of it for itself. Further, Serrato will be performing entirely the Social Development portion of the contract, not merely providing a clean and safe facility, but teaching students to become stable, contributing and productive employees. Technical Proposal at 79. Most of the students will be residential students and receive, while residents, comprehensive training to learn self-management, personal responsibility, and community and independent living skills. The counseling from the Resident Advisors, and the recreational activities are all designed to assist the students in their career and personal development. This is an important part of the contract, and Serrato will provide 50 employees to perform it. Accordingly, it is not true that HYS's performing the academic training means that Serrato is not performing the primary and vital functions of the contract.

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<sup>4</sup> While Serrato's designations of key employees do not precisely track those of the RFP, they appear to have been close enough to satisfy the DOL, and I cannot dispute that judgment.

The holding in *Alutiiq* was based upon all three factors, taken together, not merely upon the fact that the challenged concern was subcontracting the training function. *Alutiiq*, at 13. All three factors are not present in this case; accordingly, I find that *Alutiiq* is inapposite here. Serrato is not reliant upon HYS for past performance, or for most of the contract's key employees. While Serrato has subcontracted out the academic training to HYS, it has retained for itself the larger portion of the training, the Career Technical Training, and the important Social Development portion of the contract. Thus, I find Serrato is not unusually reliant upon HYS for the primary and vital tasks of the contract.

Appellant's attempt to rely upon another size determination is meritless. Size determinations not appealed to OHA are not binding precedent, and are not controlling in any other case. *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 7 (2009). I need not consider a size determination not appealed here, but whether the instant Size Determination appealed to OHA is based upon any clear error of fact or law.

Appellant's argument that the fact HYS is providing a substantial number of employees is indicative of unusual reliance is also meritless. There has been no finding of unusual reliance where a subcontractor has been providing a minority of the employees and there are no other indicia of unusual reliance. Appellant relies upon *Alutiiq* to support its argument here, and I have already explained why that case is inapposite.

Here, it clear that Serrato will be performing the majority of the work under the contract, is not reliant upon any other concern for its past performance rating, will manage the contract and will provide most of the key employees. Serrato's subcontract with HYS provides that Serrato's Center Director will have direction of the contract. While Serrato is subcontracting the Academic Training to HYS, Serrato is maintaining the Career Technical Training and Social Development portion of the contract. Accordingly, I conclude that Serrato is not unusually reliant upon HYS, nor is HYS performing the primary and vital functions of this contract, and Serrato is not in violation of the ostensible subcontractor rule.

#### D. The Totality of the Circumstances Issue

In determining affiliation, SBA will consider the totality of the circumstances, and may find affiliation even if no one factor is sufficient to constitute affiliation. 13 C.F.R. § 121.103(a)(5). Appellant alleges Serrato and HYS are affiliated under the totality of the circumstances. However, Appellant's argument here is based upon (1) evidence which it offered to establish affiliation under the identity of interest rule, and which was contradicted by Serrato's more reliable evidence (2) the new evidence which I have excluded here, and (3) Appellant's affiliation of under the ostensible subcontractor rule on the instant contract, an allegation which I have concluded is meritless. Even if Serrato had been found affiliated with HYS under the ostensible subcontractor rule, affiliation under the ostensible subcontractor rule is applicable only to the contract on which the two concerns have teamed. 13 C.F.R. § 121.103(h)(2). It is not the basis for a finding of general affiliation. Accordingly, Appellant's argument Serrato and HYS are affiliated under the totality of the circumstances rule is meritless.

V. Conclusion

The record on appeal supports the Area Office's conclusion that Serrato Corporation is not affiliated with Horizon Youth Services, L.C. under the identity of interest, the ostensible subcontractor, or the totality of the circumstances rules. The Size Determination is AFFIRMED and the Appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge