United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: VMD-MT Security LLC, Appellant, Appealed From Size Determination Nos. 2-2012-86 & 87	SBA No. SIZ-5380 Decided: July 19, 2012

APPEARANCES

David S. Cohen, Esq., Laurel A. Hockey, Esq., Gabriel E. Kennon, Esq., & Amy Y. Spencer, Esq., Cohen Mohr LLP, Washington, DC, for Appellant

Ryan Klein, Esq., Sherman & Howard LLC, Colorado, Springs, CO, ror the Excalibur Associates

William K. Walker, Esq., Walker Reausaw, Washington, DC, for Chenega Management, LLC

DECISION [1]

I. Introduction and Jurisdiction

On May 23, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 3-2012-086 & 87 finding VMD-MT Security, LLC (Appellant) to be an ineligible small business for the procurement at issue and accompanying size standard. Appellant now appeals the decision. For the reasons discussed *infra*, the appeal is GRANTED.

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.

[1] This Decision was issued under a Protective Order to prevent the disclosure of confidential or proprietary information. On July 19, 2012, I issued an Order for Redactions directing each party to file a request for redactions by July 31, 2012, if that party desired to have any information redacted from the published Decision. OHA has received affirmative responses from all parties requesting that the original Decision not be redacted in any way. Thus, OHA now publishes the Decision in its entirety.

Appellant timely filed the instant appeal on April 13, 2012. Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the size determination finding Appellant to be an ineligible small business for this procurement because a joint venture between an 8(a) protégé concern and its mentor was majority owned by the mentor was based on clear error of fact or law.

II. Background

A. Solicitation and Protest

On June 17, 2010, the Contracting Officer (CO) for the Transportation Security Administration (TSA) issued Solicitation No. HSTS03-10-R-SPP021, seeking to procure Airport Security Screening Services. The CO set the procurement aside for small business and designated North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services, with a corresponding $18.5 million annual receipts size standard as the appropriate code for this procurement. All initial offers were due July 27, 2010.

On February 24, 2012, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror. On March 1, 2012, Excalibur Associates, Inc. (Excalibur) protested Appellant's small business status, claiming Appellant's affiliation with McNeil Security, Inc. (McNeil) and AECOM National Security Programs, Inc. (AECOM), based on common management between Appellant, McNeil and AECOM. Excalibur further claimed affiliation based on the newly organized concern rule, claiming former officers of McNeil and AECOM formed Appellant. Excalibur also stated Appellant, McNeil and AECOM are in the same line of business and that Appellant is receiving assistance from McNeil and AECOM. Excalibur added Appellant operates out of the same location as McNeil and AECOM, and all three firms share the same phone number. Lastly, Excalibur claimed affiliation existed under the totality of the circumstances.

On March 1, 2012, Chenega Management, LLC (Chenega) an unsuccessful offeror, filed a protest with the CO. Chenega's protest was similar to Excalibur's yet also raised new issues. Chenega claimed Appellant was a joint venture under the SBA's mentor-protégé program. In its protest, Chenega argued a violation of the joint venture regulations that went into effect on February 2011.

B. Size Determination

On May 23, 2012, the Area Office consolidated the protests, and issued Size Determination No. 2-2012-086 - 87, concluding that Appellant is other than a small business concern for the procurement at issue. The Area Office determined size based on the date of Appellant's self-certification, July 27, 2010.

The Area Office undertook an affiliation analysis regarding Appellant and McNeil. The

Area Office found Appellant to be a joint venture established by VMD Systems Integrators, Inc. (VMD Systems) and MT Holdings, Inc. (MT). VMD Systems owns 33% and MT owns the remaining 67% of the joint venture.

The Area Office found VMD Systems to be an SBA 8(a) Business Development (BD) program participant. VMD Systems is 100% owned by Deepti Malhotra, its Chief Executive Officer (CEO), and has no other affiliates. The Area Office found Ron Thomas is Appellant's President and McNeil's CEO and Vivek Malhotra as a Member of the Executive Office of Appellant, both individuals with zero ownership interest in Appellant. MT is a large business concern which owns the stock of McNeil and its subsidiaries. The Area Office found MT and VMD Systems to have an SBA-approved mentor-protégé agreement dating to September 2008. VMD Systems is the protégé firm. SBA renewed its approval on July 18, 2011.

On May 25, 2010, VMD Systems and MT formed a joint venture, organizing Appellant as a Limited Liability Company. Appellant's Operating Agreement recites it was formed with the purpose of pursuing contracts as a small business concern based on VMD System's status as a small business. Operating Agreement, § 2.11. The purpose of the company "is to pursue the Business, and otherwise to engage in any business activity permitted" under Delaware's Limited Liability Company Act. *Id.*, § 2.3. The company may engage in any kind of activity and perform and carry out contracts of any kind necessary to, or in connection with or convenient or incidental to the accomplishment of such purpose, so long as they are legal. *Id* The Operating Agreement defines the Business to be pursued as contracting opportunities under the Department of Homeland Security (DHS)/TSA Screening and Partnership program that Appellant may pursue as a prime contractor or subcontractor. *Id.*, § 11. MT will provide Appellant with the cash financing required. *Id.*, § 4.1. The Area Office found the Operating Agreement indicating Appellant was formed to pursue any business venture, and thus Appellant is more than a mere joint venture.

The Area Office then considered whether Appellant was affiliated with MT under the newly organized concern rule. The Area Office determined Appellant met the elements of the rule because Mr. Thomas is the CEO of McNeil and current President of Appellant; Appellant is in the same line of business as McNeil and VMD Systems; and MT provides financing to Appellant. The Area Office noted affiliation may not be found based upon assistance provided under a mentor-protégé agreement. Nevertheless, the Area Office concludes this exemption from finding affiliation does not apply in the case of the newly organized concern rule.

The Area Office acknowledges protection from affiliation between a protégé and mentor is granted to an SBA-approved mentor-protégé agreement. Further, the Area Office states that a mentor and protégé are immune from affiliation where the protégé is a small business concern. However, the Area Office found the situation here warranted a finding of affiliation. The Area Office's major concern was that MT's 67% interest in Appellant gave it the power to control Appellant.

The Area Office noted that under SBA's recently revised regulations, a protégé concern must be small and maintain at least 51% ownership interest in the joint venture. The Area Office asserted this has always been SBA's intention, even before the revised regulations took effect in

2011. The Area Office cited to the preamble to the proposed regulations published in the Federal Register (74 Fed. Reg. 55694, 55696 (Oct. 28, 2009)) in support of its determination that excess of 51% ownership in a joint venture by a large business is considered a form of assistance that would cause a finding of affiliation. The Area Office argued the mentor-protégé program was not formed in order to allow large businesses to have over 51% ownership in a concern formed under the SBA's mentor-protégé program. Further, the Area Office asserted OHA has never enforced the exemption from affiliation for joint ventures between an SBA-approved mentor and protégé where the mentor owns more than 51% of the joint venture.

The Area Office stated its finding of affiliation is not based on the level of assistance provided by MT to VMD Systems or whether the mentor-protégé agreement and joint venture is in compliance with SBA regulations. The Area Office based its finding of affiliation on MT's 67% ownership of Appellant. The Area Office concluded Appellant was attempting to utilize a loop hole in the regulations allowing a large business that owns the majority of a joint venture to bid and receive contract awards set aside for small businesses. The Area Office determined the level of ownership over the joint venture exercised by MT was not contemplated by the SBA mentor-protégé agreement. Thus, because 13 C.F.R. 121.103(b)(6) allows for a finding of affiliation based on findings other than the level of assistance provided by a mentor to a protégé, the Area Office concluded affiliation exists between MT and VMD systems.[2]

D. Appeal Petition

On June 1, 2012, Appellant filed the instant appeal. Appellant asserts the Area Office's decision is based upon clear errors of law. Appellate asserts the Area Office misapplied its own size regulations and improperly relied on the preamble to the current size regulations in finding affiliation. Appellant further states the Area Office incorrectly applied the rules governing 8(a) procurement to a small business set-aside contract, in clear contravention of OHA precedent. In addition, Appellant asserts the Area Office erred in applying the current size regulations retroactively without any authority to do so. Lastly, Appellant states the Area Office erred in discussing the newly organized concern rule notwithstanding the SBA-approved mentor-protégé agreement between VMD Systems and MT.

Appellant argues the Area Office committed a clear error of law because 13 C.F.R. § 121.103(h)(3)(iii)(2010) exempts a mentor-protégé joint venture from affiliation if the protégé is a small business. Appellant states that at the time initial proposals were due, the regulations in place did not require a protégé firm to have at least 51% ownership or earn 51% of the profits in a mentor-protégé joint venture, Appellant goes on to cite numerous OHA decisions upholding the view that under the pre-2011 size regulations, a mentor firm and its protégé are not affiliated so long as the protégé is small. Appellant states it submitted its proposal on July 27, 2010, whereas the current regulations limiting joint ventures to require a protégé firm to have at least 51 % ownership or earn 51% of the profits in a mentor-protégé joint venture apply to size

[2] The Area Office did not analyze any potential affiliation between Appellant and AECOM because AECOM purchased MT in the fourth quarter of 2010. Thus, AECOM was not affiliated with MT as of the date for determining size, and MT is a large concern even without AECOM. Accordingly. Appellant is not affiliated with AECOM for the purposes of this case.

certifications made after March 14, 2011.

Appellant asserts the Area Office erroneously relied on statements in the preamble to the current regulations in order to expand the scope of the applicable size regulations. Appellant argues the Area Office had no authority to rely on the preamble to the current regulations in order to justify the intent behind publishing the prior, governing regulations. Appellant cites to numerous OHA decisions establishing the rule that the preamble to a regulation cannot vary the plain text of the regulation. Further, Appellant argues OHA's own precedent does not give OHA the authority to consult the regulatory history when the regulation itself is clear. Lastly, Appellant argues the preamble provides insight only into the regulations that were made effective in 2011, and not as to what the SBA was thinking at the time it published the regulations that were in effect at the time Appellant submitted its proposal.

Appellant further argues the Area Office erred in applying the requirements of 13 C.F.R. §§ 124.513(c) and (d). Appellant argues these regulations apply to contractors pursuing 8(a) set aside contracts, which is not the case here. Appellant cites to a number of OHA cases that have rejected SBA attempts to enforce the requirements of 13 C.F.R. §§ 124.513(c) and (d) to joint ventures that pursue small business set aside contracts.

Appellant asserts the Area Office should not have relied upon the newly organized concern rule. Appellant argues the rule has no application in situations involving joint ventures under SBA-approved mentor-protégé agreements. Appellant further argues joint venture regulations afford the mentor firms the ability to provide assistance in numerous ways to their protégé firms. Appellant argues any assistance received pursuant to a mentor-protégé agreement does not support a finding of affiliation between the firms. Appellant argues the Area Office erred, even though it did not use it as a basis for affiliation, in suggesting the newly organized concern rule has any applicability to this particular situation.

Appellant asserts the only question applicable here to an affiliation determination was whether the protégé firm was small at the time initial proposals were submitted. VMD Systems was a small business at that time, and thus the size determination is based upon a clear error of law.

E. Excalibur's Response

On June 19, 2012, Excalibur filed its response to the instant appeal. Excalibur argues OHA should defer to SBA's interpretation of 13 C.F.R. § 121.103(h)(3)(iii) based on past OHA decisions. Excalibur asserts SBA's interpretation in this case is appropriate because Appellant is being used as a vehicle by MT to obtain access to the small business set aside procurement at issue.

Excalibur argues Appellant is in violation of the requirements of 13 C.F.R. § 124.520. These regulations permit SBA to reject mentor-protégé agreements that are used to allow mentor firms access to 8(a) contracts. Excalibur argues § 124.520 requires mentor-protégé agreements to provide detailed description of any joint venture the firms may form. Excalibur asserts SBA would not approve a joint venture where the mentor firm has over 50% ownership interest.

Excalibur concedes 13 C.F.R. § 121.103(h)(3)(iii) is silent or ambiguous as to the requirements regarding ownership or profits of a mentor-protégé joint venture. Excalibur argues that in lieu of the regulation's omission of ownership and profit requirements, OHA should validate the size determination's use of the preamble to the proposed rule in support of the affiliation finding.

F. Chenega's Response

Chenega argues affiliation exists under the newly organized concern rule. Chenega asserts the four elements of the rule are present here. Mr. Thomas is the president of Appellant and McNeil, Appellant is in the same line of business as MT and VMD Systems, and MT provides financing to VMD. According to Chenega, these undisputed facts meet the four part test of the rule. Chenega further argues the Operating Agreement shows the joint venture was formed to pursue any business opportunity, thus supporting the allegation that Appellant is more than a joint venture.

Lastly, Chenega argues the mentor-protégé joint venture exemption is not a limitless provision afforded to large businesses who seek small business set aside procurements. Chenega asserts the SBA correctly interpreted its regulations in finding Appellant affiliated with MT.

H. Appellant's Reply to Excalibur & Chenega's Response

On June 19, 2012, Appellant moved to reply to the response of Excalibur and Chenega. Appellant contends the responses make statements that are contrary to regulation and well-established precedent, to which it should be allowed to reply.

Appellant asserts Excalibur's argument that OHA case law requires it to defer to the SBA's interpretation of its regulations is meritless. Appellant argues OHA case law expressly states that when regulation language is clear, SBA cannot use the preamble to change the understanding, scope or effect of the regulation. Appellant further argues OHA case law prohibits the enforcement of requirements not included in the regulation by using the preamble. Appellant asserts that in numerous OHA cases, ambiguity regarding 13 C.F.R. § 121.103(h)(3)(iii) has never been found.

Appellant further argues the requirements of 13 C.F.R. § 124.513 are not applicable here because they are applicable to joint ventures seeking 8(a) contracts. Appellant argues the SBA had no authority to apply these requirements to non-8(a) contracts. If the SBA had wanted to apply these requirements, Appellant argues, it would have done so just as it did in the regulations regarding joint venture 8(a) contracts.

Lastly, Appellant asserts Excalibur's allegations Appellant is being used as a vehicle for MT to obtain small business set aside contracts is without basis. Appellant argues it will receive numerous benefits from award of the procurement at issue. Appellant argues its benefits from the joint venture will allow VMD Systems to pursue future contracts on its own and will allow it to grow financially. Appellant further argues Excalibur's assertions SBA would not approve of a

joint venture where the mentor firm owns more than 51% of the joint venture is speculative because under SBA regulations joint ventures based out of mentor-protégé agreements do not require SBA approval to procure non-8(a) contracts.

Regarding Chenega's response, Appellant argues its operating agreement makes it clear that it was formed to pursue contracting opportunities under the DHS/TSA Screening and Partnership Program. Thus, according to Appellant, Chenega's allegations Appellant was formed to pursue any business opportunity is factually incorrect.

Appellant asserts Chenega misread the size determination by interpreting the Area Office's determination as finding affiliation based on the newly organized concern rule. Appellant argues the Area Office never formally found affiliation based on the newly organized concern rule, instead finding affiliation based on MT's excessive ownership of the joint venture. Accordingly, Appellant argues Chenega's assertion of affiliation based on the newly organized concern rule should be rejected. Appellant states SBA regulations indeed find joint venturers affiliated with each other but that exceptions to affiliation exists for joint ventures under 13 § C.F.R. 121.103(h)(3)(iii). In the situation here, according to Appellant, the exception to affiliation based on a mentor-protégé joint venture is applicable.

III. Discussion

A. Timeliness, Standard of Review, and Motion to Reply

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

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).

Appellant's Motion to Permit its Reply to Excalibur and Chenega's Responses alleges it is responding to misstatements of fact and law, and does not unduly enlarge the issues. Accordingly, good cause having been shown, the motion to reply is GRANTED. 13 C.F.R. § 134.309(d).

B. Merits

There is no question here that VMD Systems is a small business, without any affiliates. Appellant is a joint venture between VMD Systems and MT, a large business. As a general rule, the concerns in a joint venture seeking a procurement under any of SBA's programs (including, as here, the small business set-aside program) are affiliated for the purposes of that contract. 13 C.F.R. § 121.103(h)(1). If Appellant and MT are affiliated, Appellant is not a small business. The question here is whether any of the exemptions to affiliation for certain joint ventures apply.

Appellant claims that the exemption from affiliation for a joint venture between 8(a) mentor and protégé firms applies. 13 C.F.R. § 121.103(h)(3)(iii). The Area Office concluded the exemption was not available to Appellant.

The dispositive issue here is the date as of which Appellant's size is determined. A concern's size is determined as of the date the concern submits its initial offer, including price. 13 C.F.R. § 121.404(a). Here, Appellant submitted its offer on July 27, 2010, in response to a solicitation issued June 17, 2010. Both the Area Office and Appellant agree the date of Appellant's self-certification is the date as of which Appellant's size must be determined. It is therefore undisputed, indeed, it is indisputable, that Appellant's size must be determined as of that date.

In this case, the Area Office did not use the size regulations that were in effect on that date. Rather, the Area Office applied the recent revision to the size and 8(a) regulations, published on February 11, 2011, and effective March 14, 2011. 76 Fed. Reg. 8222 (Feb. 11, 2011). With respect to size determinations, these regulations apply to solicitations issued and certifications made after March 14, 2011. *Id.* Further, the Area Office relied upon the preamble to the proposed version of these regulations, published in October, 2009. 74 Fed. Reg. 55694, 55696 (Oct. 28, 2009).

Under the new regulations, it is clear that two firms approved by SBA to be a mentor and protégé may joint venture as a small business for any Federal prime contract or subcontract, provided the protégé qualifies as small for the procurement's size standard, *and* if the procurement is not an 8(a) procurement, the provisions of 13 C.F.R. §§ 124.513(c) and (d) will apply. 13 C.F.R. § 121.103(h)(3)(iii) (2011). The joint venture may be in the form of a separate legal entity. 13 C.F.R. § 121.103(h). The new provisions require that if the joint venture is a separate legal entity, the 8(a) firm must own at least 51% of the joint venture entity. 13 C.F.R. § 124.513(c)(3) (2011). It is clear that under the new regulations. Appellant would not be entitled to the exemption from affiliation for joint ventures between 8(a) mentor and protégé firms, and thus would not be small. This is the regulation the Area Office applied.

Nevertheless, under the regulations in place at time of Appellant's self-certification, two firms approved by SBA as a mentor and protégé may joint venture as a small business for any Federal procurement, provided the protégé qualifies as small for the procurement's size standard. 13 C.F.R. § 121.103(h)(iii) (2010). The joint venture may be in the form of a separate legal entity. 13 C.F.R. § 121.103(h). This is consistent with the regulatory provision that assistance rendered by a mentor to a protégé under an approved mentor-protégé agreement may not be the basis for a finding of affiliation, although affiliation may be found for other reasons. 13 C.F.R. § 121.103(b)(6) (This provision remains essentially unchanged.). This exemption to affiliation contains no other qualifications for procurements outside the 8(a) program, no referral to Part 124, and no requirement that the 8(a) concern have a majority interest in the joint venture.

OHA case law holds the previous regulations require only the protégé firm to be small in order to hold a mentor and its protégé not affiliated based on their joint venture. *Size Appeal of*

SES-Tech Global Solutions, SBA No. SIZ-4951 (2008). Under the previous regulations, any two firms engaged in an SBA-approved mentor-protégé agreement are allowed to form a joint venture for any federal procurement. *Id.* Hence, the resulting joint venture is exempt from affiliation "as long as the protégé concern qualifies as small for the size standard applicable to the contract." *Id; See also Size Appeal of Technical Support Services*, SBA No. SIZ-4794, at 16 (2006). The previous regulation at no point requires protégé firms to own 51% or earn 51% of the profits of the joint venture, the basis for which the Area Office found affiliation. These requirements simply did not exist for mentor-protégé joint ventures seeking small business set-aside contracts at the time of Appellant's self-certification.

Here, the applicable provisions of § 121.103 are those in effect before March 14, 2011. 76 Fed. Reg. 8222 (Feb. 11, 2011) ("The amendments to 13 CFR part 121 apply with respect to all solicitations issued and all certifications as to size made after March 14, 2011."). Appellant certified on July 27, 2010, well before the March 14, 2011 date set by the regulations, thus the new provisions of § 121.103 were not in effect when Appellant certified as a small business for the procurement at issue. The regulations in place before March 14, 2011 are the only applicable regulations in determining Appellant's size. Because the regulations in place at time of Appellant's self-certification on July 27, 2010 required only VMD Systems to be small, the Area Office's reliance on regulations that took effect on March 14, 2011 is erroneous and constitutes clear error of law.

The Area Office, in justifying its finding of affiliation, erroneously relied on the preamble to the proposed rule changes to § 121.103. First, this was a preamble to rules not applicable to this case. Second, OHA has clearly held the use of a regulation's preamble is not acceptable to vary the plain text of the regulation. *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4854 (2007). Here, the regulation is direct and specific regarding the size of mentor-protégé joint ventures seeking non-8(a) procurements. Allowing the use of the preamble to be determinative would only help to create ambiguity on the otherwise clear text of the regulation. The regulation in place at the time Appellant self-certified as a small business clearly and unequivocally states the only requirement for a joint venture under an SBA-approved mentor-protégé agreement to seek small business set-aside contracts is for the protégé firm to qualify as small for the procurement at issue. There is no question, and the Area Office affirms, that VMD Systems was and is a small business for the procurement at issue here. Consequently, given the specificity and clarity of the regulations in place at time of Appellant's self-certification, the Area Office erred in relying on the preamble to proposed rules that were not effective until March 14, 2011, well after Appellant self-certified as a small business. I therefore conclude that because Appellant was a joint venture between an 8(a) firm and its mentor (which firms were in an SBA-approved 8(a) mentor-protégé relationship at the time of submission of its offer here) Appellant was exempt from a finding of affiliation, and is an eligible small business for this procurement.

The Area Office's conclusion the Operating Agreement establishes Appellant is more than a mere joint venture is meritless and based upon a misreading of the Operating Agreement. The purpose clause of the Operating Agreement specifically states the purpose of the company is to pursue the Business, defined as contracting opportunities under the DHS/TSA Screening and Partnership program. This is Appellant's main purpose The following language about Appellant having the power to take any necessary action is standard language in setting up a corporation or

LLC, to ensure that the company has the legal ability to take any action necessary to pursue the business it seeks. Because the regulation provides that 8(a) mentor-protégé joint ventures may organize as separate legal entities, they must contemplate that language creating the new entity will include the standard provisions giving the company all power to perform any necessary act, and so the inclusion of this language does not strip Appellant of its joint venture status. The Operating Agreement is simply not the open-ended charter the Area Office concluded it was, because it emphasizes seeking the DHS/TSA contracting opportunities.

The Area Office stated Appellant met the elements of the newly organized concern rule. The size determination is not clear as to whether this conclusion is one of the grounds finding Appellant is not a small business. In its response to the appeal, Chenega argues Appellant violates this rule and implores OHA to find affiliation based on the newly organized concern rule. I will thus consider whether the Area Office's conclusion Appellant violates the newly organized concern rule is based on an error of fact or law. As discussed below, I find the Area Office's decision erroneous and lacking in its incomplete analysis of the rule. Moreover, I find Chenega's argument meritless.

The newly organized concern rule provides that when former officers, directors, shareholders or key employees of one concern organize a new concern in the same or related industry, and serve as the new concern's officers, directors, shareholders or key employees, and the first concern is furnishing the second with contracts, financial or other technical assistance, the concerns are affiliated. 13 C.F.R. § 121.103(g). Nonetheless, a key word under this rule is the reference to *former* key employees. *Size Appeal of Cherokee Nation Healthcare Services, Inc.* SB A No. SIZ-5343 (2012)(*Cherokee Nation*). Further, OHA has stated there are four required elements for the newly organized concern rule: (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. *Size Appeal of Sabre88. LLC*, SB A No. SIZ-5161, at 7 (2010).

The Area Office and Chenega rest their arguments on the fact that Mr. Thomas is CEO of McNeil and President of Appellant; Appellant is in the same line of business as that of MT and VMD Systems; and MT provides financing to Appellant. However, the newly organized concern rule is inapposite to the issues here. Mr. Thomas is not *a former* officer of McNeil, thus the first element of the rule is not met. *Cherokee Nation*, at 5. Because Appellant is a joint venture between MT, a parent company to McNeil, and VMD Systems, it would be expected that Appellant would have personnel from both members of the joint venture. In addition, the fact that Appellant is in the same line of business as VMD Systems and MT is a result of the companies joining together to form the joint venture. Lastly, MT providing financing to Appellant is the direct result of the SBA-approved mentor-protégé agreement between VMD Systems and MT.

The type of assistance found here is contemplated by SBA regulations governing mentor-

protégé agreements. 13 C.F.R. 124.520(a) ("This assistance may include technical and/or management assistance; financial assistance in the form of equity investment and/or loans; subcontracts; and/or assistance in performing prime contracts with the government in the form of joint venture arrangements."). It is clear that assistance between concerns that enter into a mentor-protégé agreement is contemplated and expected. Affiliation cannot be found due to assistance received during the existence of a mentor-protégé relationship. 13 C.F.R. § 121.103(b)(6); *Size Appeal of Technical Support Services*, SBA No. SIZ-4794 (2006) ("[T]here is no doubt that once a mentor and protégé have entered into an approved relationship that events occurring during their relationship cannot be used to find affiliation."). Thus, the Area Office erroneously found Appellant met the elements of the newly organized concern rule in this case.

Accordingly, I conclude the Area Office clearly erred in applying regulations not in place at the time Appellant self-certified as small. The regulations in place at the time Appellant self-certified as small required the protégé firm in a mentor-protégé joint venture to be small for the procurement at issue. Here, there is no doubt VMD Systems, the protégé firm, is small under the size standard. As a result, Appellant has met its burden of finding clear error in the size determination. I must therefore reverse the size determination, and grant the instant appeal.

IV. Conclusion

Appellant has met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is GRANTED, and the Size Determination is REVERSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge