United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Roundhouse PBN, LLC, Appellant, Appealed From Size Determination No. W912LC-11-R-0006	SBA No. SIZ-5383 Decided: August 17, 2012

APPEARANCES

Pamela J. Mazza, Esq., Isaias "Cy" Alba, IV, Esq., and Kelly A. DiGrado, Esq., PilieroMazza PLLC, Washington D.C., for Appellant

DECISION[1]

I. Introduction and Jurisdiction

This appeal involves the Paskenta Band of Nomlaki Indians (Tribe), a federally-recognized Indian tribe certified as economically disadvantaged by the U.S. Small Business Administration (SBA). The Tribe owns Tepa, LLC (Tepa), a holding company, which it uses to pursue federal contracts. Tepa owns 100% of Roundhouse PBN, LLC (Appellant). Tepa also owns 100% of Tepa EC, LLC (Tepa EC), Komada, LLC (Komada), and Torix General Contractors, LLC (Torix).

On April 20, 2012, the SBA Office of Government Contracting, Area V (Area Office) issued Size Determination No. 5-2012-034 finding that Appellant is not a small business under the size standard associated with Solicitation No. W912LC-11-R-0006. The Area Office determined Appellant was other than small due to affiliation with Appellant's parent company, Tepa, as well as Appellant's sister tribal companies, Tepa EC, Komada, and Torix. The Area Office based this affiliation finding on the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), the newly organized concern rule, 13 C.F.R. § 121.103(g), identity of interest, 13

[1] This decision was initially issued on July 20, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity 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 any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

C.F.R. § 121.103(f), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5).

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse, and determine that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

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. The record reflects that the size determination was issued April 20, 2012, but not received by Appellant until April 24, 2012. 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.

II. Background

A. Solicitation and Protests

On July 12, 2011, the U.S. Department of the Army and Air Force, National Guard Bureau (National Guard) issued Solicitation No. W912LC-11-R-0006 (RFP) for the construction of the North Colorado Springs Readiness Center. The Contracting Officer (CO) set aside the procurement exclusively for small businesses and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million average annual receipts. Proposals were due August 12, 2011. Appellant, Bosco Constructors, Inc. (Bosco), and nine other offerors submitted proposals.

The National Guard originally selected Smith Construction Management, LLC for award, but later revoked the award on January 19, 2012. The next day, the CO notified the remaining offerors that proposal revisions were due on February 7, 2012.

On March 9, 2012, the CO notified unsuccessful offerors that Appellant was the apparent awardee. On March 16, 2012, Bosco, a disappointed offeror, protested Appellant's size. The Area Office dismissed Bosco's protest on March 20, 2012, finding that Bosco had been eliminated for reasons other than size and therefore lacked standing to protest.[2] That same day, the Area Office initiated its own protest against Appellant pursuant to 13 C.F.R. § 121.1001(a).

B. Appellant's Proposal

Appellant stated in its proposal that it is "***," which are ***. Appellant explained that the "***" is "***." (*Id.*) Appellant represented that, """"***." (*Id.*)

The proposal indicated that Appellant "***." (*Id.* (emphasis in original).) It goes on to

[2] Bosco subsequently appealed the dismissal of its protest to OHA, but that appeal also was dismissed. *Size Appeal of Bosco Constructors, Inc.*, SBA No. SIZ-5345 (2012).

state, "***[3] ***." (*Id.*)

The proposal contained ***. (*Id.* at 2.) The *** shows ***. Appellant ***. (*Id.*)

According to the proposal, the corporate experience and past performance represent "***." (*Id.* at 2.) Appellant explains that one reason its clients benefit from the *** structure is because "***." (*Id.* (emphasis in original).)

The proposal states that Appellant may call upon ***. (*Id.* at 3.) Such support includes "***." (*Id.*)

For past performance references, Appellant listed ***. (*Id.* at 5-26.) Appellant ***. (*Id.*) The proposal identifies ***. (*Id.* at 4-15.)

The proposal was signed by ***.

C. Response to the Protest

On March 20, 2012, the Area Office asked Appellant to address (1) Appellant's own experience in the fields required by the procurement, (2) the tasks that Appellant and each of the alleged affiliates will perform, (3) who backed the bond for the contract, (4) whether any of Appellant's employees are shared employees of any of the alleged affiliates, and if so, whether they will be performing on the subject contract, (5) the lines of business Appellant and each alleged affiliate operate in, and (6) the management of each alleged affiliate.

On April 2, 2012, Appellant submitted its response. In Appellant's view, the Area Office's questions were relevant to an ostensible subcontractor inquiry. Appellant then emphasized that it "cannot be found to be affiliated with Tepa or any of [Appellant's] sister companies under an ostensible subcontractor analysis, because [Appellant] ***." (Protest Response at 2.)

Appellant argued that its reliance upon its sister companies' experience is not an independent ground for finding affiliation. According to Appellant, OHA precedent describes the exemption in 13 C.F.R. § 121.103(b)(2) as broad, and holds that it allows Appellant to rely on its sister companies' past performance without risking a finding of affiliation. *Size Appeal of Aluutiq Int'l Solutions, LLC*, SBA No. SIZ-5098 (2009) (finding that an arrangement whereby the tribal offeror relied upon its parent company's employees and experience to obtain the contract did not violate the broad exemption afforded to tribal entities.)

As for its own relevant experience, Appellant stated that it successfully completed multiple projects for the Army Corps of Engineers in 2010 and 2011 in underground design, construction, and research support. It has staff qualified in all aspects of construction including laborers, operators, superintendents, estimators, and managers with individual experience

[3] The Area Office believed that "***," and that the proposal intended to refer to ***. (Size Determination at 5, n.4.)

ranging from 12 to 30 years for key personnel. ***, Appellant's general manager, is a licensed geologist with 20 years of experience in construction. He has served as Program Manager for construction projects with contract values ranging from $10,000 to $52 million. Appellant's superintendent, ***, brings over 30 years of experience in the construction industry and holds numerous construction certificates. (Protest Response at 7.)

Appellant asserted that, as the prime contractor, it will retain control over all management functions (such as project management, program management, project superintendence, quality control, safety, procurement, and project administration). (*Id*) Apart from Tepa's performance of home office administrative support, Appellant represented that "***." (*Id* at 8.)

Appellant acknowledged that the Tribe backed the bond for the contract. But, argued Appellant, this financial assistance may be traced to the ownership benefits that a tribal entity can receive from its parent company. (*Id*)

Appellant stated it has *** employees, and that "***." (*Id.*)

Appellant asserted that it will directly perform at least XX% of the labor costs associated with the contract with its own employees, and that ""***." (*Id.*) Appellant assured the Area Office that Appellant will meet the minimum requirement found in FAR clause 52.219-14 that the prime contractor "perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees."

Appellant argued that each Tepa subsidiary operates under a different primary NAICS code and that Tepa does not perform federal contracts directly. Appellant reported that its primary NAICS code was 237110, Water and Sewer Line and Related Structures Construction.

Appellant also argued that, pursuant to 13 C.F.R. § 121.103(b)(2), it cannot be affiliated with its parent company, Tepa, or its sister companies. Appellant emphasized that it is wholly-owned by Tepa, which is wholly-owned by the Tribe. Appellant confirmed that it shares common officers with Tepa and the sister companies. (*Id.* at 4.) However, asserted Appellant, such common management cannot give rise to affiliation, as SBA regulations permit tribes to have common ownership, management, and administrative services. (*Id.* (citing 13 C.F.R. § 121.103(b)(2).))

Appellant contended that it does not share office space with Tepa's other subsidiaries. (*Id.* at 5.) Appellant stated its offices are in the same building as those of its sister companies, but argued that its own offices are separate and distinct. Appellant explained that the Tribe owns the building and leases it to Tepa, which in turn subleases to its subsidiaries for commercially reasonable rent.

D. Size Determination

On April 20, 2012, the Area Office issued its size determination finding that Appellant is affiliated with Tepa and Appellant's sister subsidiaries, Tepa EC, Komada, and Torix.

The Area Office found that Appellant is 100% owned by Tepa, and that Tepa is owned by the Tribe. In addition to Appellant, Tepa also owns seven other companies, including Tepa EC, Komada, and Torix. (Size Determination at 4.) Tepa and its subsidiaries share the same officers and board of directors but have different general managers. (*Id.*) Tepa provides administrative services for Appellant.

The Area Office recognized that there is an affiliation exception for Indian tribes and their subsidiaries. 13 C.F.R. § 121.103(b)(2). The Area Office reasoned, however, that "this exemption applies only to affiliation based on the common ownership by the tribe, common management by the tribe, and compensated administrative services (such as bookkeeping and payroll) between the entities." (Size Determination at 8.) Despite the exemption, affiliation can be found for other reasons. (*Id.*)

The Area Office found that Appellant violated the ostensible subcontractor rule due to its undue reliance on Tepa and the sister companies to perform the contract. The Area Office noted that the proposal referred to Tepa and the sister companies as the Tribe's "***," and determined that "the proposal clearly implies that all the Tepa subsidiaries are at [Appellant's] disposal to use for the contract's performance." (*Id.* at 9.) "Other than a statement in the proposal that [Appellant] was the prime contractor, one would not even be able to differentiate from the text which tribal entity was bidding on the contract." (*Id.* at 8.) The Area Office further noted that Tepa assisted Appellant in estimating the costs for the proposal, bonded the contract, and signed the proposal. (*Id.* at 9.) The Area Office found that Appellant has only *** employees and is a relatively new company, having been in business for only fifteen months at the time it bid on the contract. The Area Office also observed that all of the past performance references were for work performed by the sister tribal companies, Tepa EC, Komada and Torix. Further, the professionals Appellant listed for its *** team are all associated with the sister companies, not Appellant.

The Area Office remarked that Tepa apparently selected Appellant to bid on the subject contract because Appellant's more-experienced sister companies were ineligible under the applicable size standard. The Area Office stated:

> One has to ask oneself why one of the sister companies, with the relevant experience, did not bid the contract on its own. This contract is in Komada's primary NAICS code. Komada, Torix and Tepa EC had all the relevant contract experience. [Appellant] had no previous experience in this NAICS code or equivalent contract of this magnitude .... The newly created sister company, [[[Appellant], qualified as small for the procurement but had little management experience of its own, or infrastructure to perform. It had to draw upon the resources and experience of its sister tribal companies. The capabilities of the sister companies are simply being transferred over to [Appellant] because the sister companies are no longer small.

(*Id.* at 10-11.)

The Area Office explained that Appellant was unduly reliant upon Tepa and the sister tribal companies for "bonding, past performance, and experience which extends beyond the

scope of common ownership, common management, and administrative services." (*Id.* at 9.) The Area Office cited *Size Appeal of Alutiiq Education & Training, LLC*, SB A No. SIZ-5192 (2011) for the proposition that tribally-owned concerns may be affiliated with one another under the ostensible subcontractor rule, notwithstanding the exception at 13 C.F.R. § 121.103(b)(2). (*Id.*)

The Area Office next found Appellant generally affiliated with Tepa, Tepa EC, Komada, and Torix, as Appellant's ties to these companies extend beyond common management and common ownership. The Area Office found affiliation based on identity of interest, 13 C.F.R. § 121.103(f), the newly organized concern rule, § 121.103(g), and the totality of the circumstances, § 121.103(a)(5).

The Area Office determined that Appellant shared an identity of interest with Tepa EC, theorizing that Appellant was created to continue bidding on contracts for which the sister companies are no longer eligible to bid, because they now exceed the applicable size standards. In making this determination, the Area Office noted that both companies are performing in the same line of work, and the NAICS code for the instant RFP represents Komada's primary industry, not Appellant's.

The Area Office also considered the fact that Appellant referenced past contracts performed by Tepa EC, Torix, and Komada as its own past performance for the instant RFP. Because Appellant cited these companies' experience for the instant RFP, the Area Office reasoned that these sister companies all perform contracts in the same field. The Area Office remarked that such overlap is unusual in the context of tribally-owned sister companies because starting a new company in the same line of work as another sister company may render the new company ineligible for the 8(a) Business Development (BD) program.

The Area Office relied on four other factors in finding Appellant and Tepa EC have identical interests extending beyond common management and ownership. First, Tepa EC previously employed Appellant's general manager and four employees. Second, Appellant uses Tepa EC's and Torix's past performance to qualify for new contracts. Third, Appellant referred to Tepa EC and Torix as "predecessor" companies in its proposal. Fourth, Appellant and Tepa EC operate in the same office building and lease office space from their common parent company, Tepa. (Size Determination at 10.)

As indicated *supra*, the Area Office also found affiliation based on the newly organized concern rule, 13 C.F.R. § 121.103(g). In reaching this determination, the Area Office noted that Appellant was established in May 2010, fifteen months before it bid on the instant RFP, and that its general manager and four employees came from Tepa EC. The Area Office emphasized that Appellant employs these individuals, so they are not shared employees of Appellant and Tepa EC. (Size Determination at 11 (distinguishing *Size Appeal of Cherokee Nation Healthcare Servs., Inc.*, SBA No. SIZ-5343 (2012)).) The Area Office also considered that Tepa EC is furnishing Appellant with past performance references, the proposal refers to Tepa EC as Appellant's ""predecessor company," and the companies are located in the same office building.

Finally, the Area Office determined Appellant was generally affiliated with Tepa, Tepa

EC, Komada, and Torix based on the totality of the circumstances, a theory the Area Office reasoned was not included in the exception set forth at 13 C.F.R. § 121.103(b)(2). The Area Office determined there was affiliation based on the totality of the circumstances because Appellant, Tepa, and the sister tribal companies were conducting business as if they were interchangeable. The Area Office noted that Appellant used this factor as a selling point in its proposal, referring to the sister companies as part of the Tribe's "***" whereby "***." (*Id*) The Area Office interpreted this aspect of the proposal as to say "the lines between the sister companies are blurred— personnel and equipment are shared, and the companies operate as one unified, large concern." (*Id.*)

The Area Office concluded that Appellant is affiliated with Tepa, Tepa EC, Komada, and Torix. Appellant exceeds the applicable size standard once its receipts are aggregated with those of its affiliates. As a result, Appellant is not a small business. (*Id.* at 12.)

E. Appeal

On May 9, 2012, Appellant filed its appeal of the size determination with OHA.[4] Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant first argues it has no ostensible subcontractor relationship with Tepa EC, Komada, and Torix. According to Appellant, the Area Office's reliance on *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011) is misplaced because in that case, the alleged ostensible subcontractor was a publicly-traded company, not a sister Alaskan Native Corporation (ANC)-owned concern, as the Area Office believed. Therefore, argues Appellant, 13 C.F.R. § 121.103(b)(2)(ii) was not at issue in *Alutiiq Education*, and Appellant maintains that OHA's decision did not address whether there may be an ostensible subcontractor relationship between an ANC prime contractor and its sister ANC-owned concern. (Appeal at 7-8.)

Appellant insists that this appeal is actually more similar to *Size Appeal of Alutiiq Int l Solutions, LLC*, SBA No. SIZ-5098 (2009). In that case, states Appellant, the area office determined that an ANC subsidiary was "relying on the experience" of its parent company and that "both people named as key personnel on the proposal [were] employed by" the parent company. *Alutiiq Int'l*, SIZ-5098, at 3. OHA reversed the size determination, stating that "such

[4] By regulation, appeal petitions ordinarily are limited to 20 pages, excluding attachments. 13 C.F.R. § 134.203(d)(2). The appeal petition here is 33 pages. Appellant requests leave to exceed the standard page limitation, arguing that a lengthier appeal is warranted due to "the breadth and complexity of the issued raised by ... the size determination, particularly in light of the potentially-grave consequences that flow from the SBA's misconstruction of the rules governing tribally-owned concerns." (Motion at 1.) Appellant also emphasizes that the size determination "outlined numerous findings of affiliation based on unique sets of facts, and lending due consideration to each of those findings requires a greater number of pages than that which is typically assigned to Appeal Petitions." (*Id.* at 1-2.) For good cause shown, Appellant's request to exceed the page 20-page limit is GRANTED.

reliance does not violate the general principles of affiliation due to the ANC exemption set forth in the regulations." *Id.* at 7 (citing 13 C.F.R. § 121.103(b)(2)(ii)). OHA remarked further:

> In alleging that Appellant has relied upon its parent company's employees and experience to obtain this contract, the Area office has essentially alleged that Appellant should be considered affiliated with its parent due to common ownership/management. Thus, this arrangement does not appear to be a violation of the applicable affiliation regulations due to the broad ANC exemptions outlined above.

Id. Appellant argues *Alutiiq International* is controlling here because the Area Office found Appellant affiliated with Tepa EC, Komada, and Torix due to Appellant's reliance on those companies' experience and personnel to obtain the contract. As in *Alutiiq International*, argues Appellant, providing those resources is part of common ownership and management, and therefore not a valid basis for affiliation. (Appeal at 8-9.)

Appellant maintains this application of 13 C.F.R. § 121.103(b)(2)(ii) is consistent with SBA's intent in drafting the regulation. To support this argument, Appellant cites 13 C.F.R. § 124.109(c)(6)(iii), which exempts a tribally-owned concern from the "two years in business" rule for 8(a) BD eligibility, provided that "the [t]ribe has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so." Appellant argues it would make little sense to allow new, inexperienced companies to join the 8(a) BD program on the basis of tribal support, but then penalize the company by finding it affiliated with the tribal companies providing that support.

In Appellant's view, the Area Office's narrow reading of 13 C.F.R. § 121.103(b)(2)(ii) would limit an Indian tribe to a passive role in which the tribe could own subsidiaries but not help them succeed. Appellant argues the exception from affiliation has little benefit if it does not permit the common owner and manager to actually support its subsidiary. (*Id.* at 9.)

Appellant argues that the Area Office erred when it determined that, although there is an exception for common management and ownership, affiliation could be found for "other reasons" under 13 C.F.R. § 121.103(b)(2)(ii). While recognizing that the regulation specifically states that "[a]ffiliation can be found for other reasons," Appellant argues this regulation is contrary to the Small Business Act (Act). Appellant observes that the Act provides:

> In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantially unfair competitive advantage within an industry category.

15 U.S.C. § 636(j)(10)(J)(ii)(II). Thus, argues Appellant, the Act contemplates a broad exception from affiliation for concerns that are owned by "a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe)," subject only to the SBA Administrator's review of whether the arrangement creates "a substantially unfair competitive advantage." (Appeal at 10.)

Appellant argues further that 15 U.S.C. § 636(j)(10)(J)(ii)(II) applies here because Congress did not intend to limit the affiliation exception solely to the 8(a) BD program. To demonstrate congressional intent, Appellant contrasts the Act with its counterpart in Part 124 of SBA's regulations. The regulation provides:

> In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage with an industry category.

13 C.F.R. § 124.109(c)(2)(iii). Appellant attaches significance to the fact that "the words 'for either 8(a) BD program entry or contract award' appear only in the regulation, not in the Small Business Act." (Appeal at 11.) Appellant maintains that the absence of the words "for either 8(a) BD program entry or contract award" from the Act suggests that Congress did not intend to limit the affiliation exception to the 8(a) BD program.

Appellant goes on to argue the statute's use of the phrase "each firm's size" is also significant. According to Appellant, Congress could have used the phrase "the firm's size," as does 13 C.F.R. § 124.109(c)(2)(iii), if Congress had intended for the statute to apply only to 8(a) BD program eligibility and set-aside contracts. (*Id* at 12.) Appellant asserts that, "[b]y using the broader term 'each firm's size,' Congress instructed SBA to apply the exception to every qualifying tribally-owned concern, regardless of whether that concern was applying for 8(a) admission or seeking an 8(a) contract award." (*Id.*)

Appellant also points to the statute's legislative history. Appellant emphasizes that the statute came into being as part of Public Law 101-574, the SBA Reauthorization and Amendments Act of 1990, which provided for updates throughout the SBA's programs. Section 204, which created the exception from affiliation, came under the heading "Size Determinations Relating to Tribally Owned Business Concerns." Appellant argues that Congress's use of the term "size determinations" to describe the amendment further suggests that Congress intended for the exception to apply to all SBA size determinations, not just those pertaining to the 8(a) BD program. Appellant contends that where Congress intended its amendments to apply only to the 8(a) BD program, Congress used the headers to indicate as much, such as in sections 205 and 207.

Appellant argues the statutory interpretation it advances is in line with common sense and

sound public policy. Appellant argues that the Area Office's interpretation makes Appellant subject to two sizes: Appellant would be eligible for 8(a) BD set-aside contracts by virtue of the exception at 13 C.F.R. § 124.109(c)(2)(iii), but would not be eligible for ordinary small business set-asides if Appellant does not qualify under 13 C.F.R. § 121.103(b)(2)(ii). Appellant argues this construction is inconsistent with the basic purpose of the 8(a) BD program, "since the purpose of the 8(a) program is to develop successful businesses." *Matter of L.D.V. Inc.*, SBA No. BDP-252 (2007). Appellant argues that dependence on the 8(a) BD program for contract awards will prevent 8(a) BD participants from achieving their full potential. For that reason, Appellant argues the correct interpretation of 13 C.F.R. § 121.103(b)(2)(ii) should presume that Congress intended for every small business to have only one size for all federal procurement programs (under the same NAICS code), and that size be determined by applying the broad exception from affiliation found in 15 U.S.C. § 636(j)(10)(J)(ii)(II).

Appellant anticipates two possible counterarguments regarding its argument that Congress intended 15 U.S.C. § 636(j)(10)(J)(ii)(II) to apply to all SBA programs. The first counterargument is that Congress's decision to place this provision in subsection 636(j) of the Act demonstrates that Congress intended for it to apply only to the 8(a) BD program. The second counterargument is that Appellant's interpretation conflicts with the specific language of 13 C.F.R. § 121.103(b)(2).

As for the first potential counterargument, Appellant argues that the placement of the language is secondary to its plain meaning. Appellant cites *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 49 (2d Cir. 2010) for the proposition that "the plain language of [a] statute cannot be overcome by its placement in the statutory scheme."

Regarding the second potential counterargument, Appellant notes that 13 C.F.R. § 121.103(b)(2) does not stem directly from the Act. *See* 67 Fed. Reg. 70339, 70340 (2002) (stating that the exception from affiliation contained in 13 C.F.R. § 124.109(c)(2)(iii) is statutorily based, whereas the general exception contained in 13 C.F.R. § 121.103(b)(2) is not). Appellant argues further that the only place the Act discusses how tribal affiliates are to be treated for size purposes is in 15 U.S.C. § 636(j)(10)(J)(ii)(II). Insofar as the regulation conflicts with the Act, Appellant argues that the statute necessarily governs.

Next, Appellant argues that, even if the Area Office did not err in applying 13 C.F.R. § 121.103(b)(2) rather than 15 U.S.C. § 636(j)(10)(J)(ii)(II), Appellant nevertheless should not have been found affiliated with Tepa EC, Komada, and Torix. Appellant argues the Area Office erred in applying the newly organized concern rule and identity of interest, because these grounds for affiliation stem directly from the Tribe's common ownership and management of Appellant, Tepa EC, Komada, and Torix. (Appeal at 17.)

With regard to the newly organized concern rule, Appellant argues "the Area Office's conclusions are either based on incorrect factual information, or the bases for such conclusions are not relevant to the four factors under the newly organized concern rule." (*Id.* at 18.) Appellant recites the four elements of the newly organized concern rule, and argues that none of the elements have been met. Appellant argues that no "former" employees of Tepa EC went to work for Appellant, because Tepa, the tribal parent company, is the actual employer of all

employees working for the subsidiaries. Tepa assigns employees among the subsidiaries on an as-needed basis.

Appellant argues further that it is fallacious to assume, based on Appellant's use of a project performed by Tepa EC in the past performance portion of Appellant's proposal, that Appellant and Tepa EC are in the same line of work. Appellant maintains the past performance references were to show successful completion of projects, not that the Tepa EC contract was identical to the one arising from the instant RFP. Appellant emphasizes further that construction contracts, like the one at issue here, require multiple disciplines and skill sets, such that Tepa EC's experience could be relevant to only one aspect of the job. (Appeal at 21.)

Next, Appellant argues it does not share an identity of interest with Tepa EC, Komada, and Torix. According to Appellant, the factors the Area Office relied upon are not only the result of common management and ownership, but also irrelevant to an identity of interest inquiry.

Appellant argues that performing in the same field does not give rise to an identity of interest; otherwise, all companies in similar lines of work would be affiliated. Besides, "whether two tribally-owned companies operate in the same NAICS code is an issue of 8(a) eligibility, not size, and therefore beyond the scope of the Area Office's review." (*Id.* at 24.) *See Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312 (2012) (upholding the Area Office's determination that issues of 8(a) BD eligibility are outside the jurisdiction of a size determination). As for sharing employees, Appellant reiterates that these individuals were not former Tepa EC employees and argues that the Area Office confused the identity of interest concept with the newly organized concern rule.

Regarding Appellant's use of the past performance of Appellant's sister concerns, Appellant argues that the solicitation permitted this practice, so it should not lead to an affiliation finding. In a similar vein, Appellant argues that reference to the sister companies as "predecessors" is inconsequential. Appellant emphasizes that Tepa EC is still a functioning company, so the Area Office's suggestion that Appellant is the reincarnation of Tepa EC is a factual error.

Appellant also disputes the Area Office's finding that Appellant's proximity to Tepa EC as a basis for finding affiliation. Appellant explains that it leases office space from its parent, Tepa. Appellant argues that Tepa may provide Appellant with any type of assistance without a concern that a finding of affiliation might arise from that assistance. 13 C.F.R. § 121.103(b)(2)(i). Appellant contends that to find otherwise would unduly limit the scope of assistance a parent could provide its subsidiary, thereby frustrating the purpose of the tribal exemption. Appellant then emphasizes that it will soon apply for the 8(a) BD program, and there are requirements on where 8(a) BD construction contractors can perform work. Specifically, 8(a) BD firms must have a "bona fide office" in the general region served by the SBA area office where a contract will be performed. *See* 13 C.F.R. § 124.503(d)(1). Appellant argues these geographic limitations require Tepa to provide its subsidiaries with office space.

Next, Appellant argues that the Area Office erred because it relied on factors that result from common management and ownership. According to Appellant, factors such as common

facilities and reliance upon a sister company's past performance are within the common ownership/management exception and therefore cannot be used to find affiliation. *See Cherokee Nation Healthcare Servs., Inc.*, SBA No. SIZ-5343 (2012). Appellant contends that this mistake caused the Area Office to err in finding the firms affiliated based on identity of interest, as "[c]oncerns owned by the same Indian tribe will always share economic interests based on their common management and ownership." *See id.* Therefore, argues Appellant, the exception for common management/ownership includes identity of interest.

Finally, Appellant argues the Area Office erred in finding Appellant affiliated with Tepa EC, Komada, and Torix under the totality of the circumstances. The factors the Area Office relied on were that (1) the NAICS codes under which the sister companies perform overlap, (2) Appellant used the sister companies' past performance in the proposal, (3) Appellant personnel formerly worked at Tepa EC, (4) Appellant lacks experience to perform the contract arising from the RFP, (5) Tepa assisted Appellant in preparing the proposal, and (6) Appellant's offices are located closely to Tepa's. Appellant argues it discredited each of these factors above and reiterates its arguments. (Appeal at 30-31.)

F. Motion to Supplement the Record

On May 9, 2012, Appellant moved to supplement the record. Specifically, Appellant seeks to introduce employment letters and intercompany work agreements in support of its appeal. Appellant argues that the employment offers show that the personnel purportedly supplied to Appellant by Tepa EC are actually employees of Appellant's parent company, Tepa. "[W]hile certain individuals were assigned to Tepa EC prior to being assigned to [Appellant], all employees working for the Paskenta family companies area actual[ly] employees of Tepa, the wholly-owned holding company of the Tribe." (Appeal at 19.) Appellant further contends that the intercompany work agreements show that Appellant requisitioned employees directly from Tepa, rather than inheriting them from a sister company.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. New Evidence

Appellant seeks to introduce new evidence, specifically the employment offers for personnel involved in contract performance and intercompany work agreements. Appellant asserts that the evidence is relevant because "(1) the Letters clearly establish that the employees purportedly supplied by Tepa EC were, in fact, employees of [Tepa], the Tribe's holding

company; and (2) the Agreements unequivocally prove that [Appellant] requisitioned employees directly from [Tepa], rather than inherit[ing] employees from Tepa EC." (Motion at 3.) Appellant acknowledges that this evidence was not previously presented to the Area Office, but Appellant explains that it was unaware, until it received the size determination, that the information would be relevant. (*Id.*)

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

Here, I find that Appellant has shown good cause to admit the new evidence. This evidence is relevant to the issues on appeal, such as Tepa's role in the assignment of personnel and the factual question of which company actually employs these individuals. Further, Appellant has reasonably explained why it could not have offered this evidence to the Area Office during the size review. For these reasons, Appellant's motion to introduce new evidence is GRANTED.

C. Analysis

Appellant is a wholly-owned subsidiary of Tepa, which also wholly owns seven other companies. Further, the companies all share common officers and directors. Thus, under ordinary circumstances, Appellant plainly would be affiliated with its parent and sister companies by virtue of their common ownership and management. 13 C.F.R. § 121.103(c) and (e).

As the Area Office recognized, however, Tepa is owned by the Tribe, and SBA regulation authorizes an exception from affiliation for tribally-owned concerns. Specifically. the exception provides:

> (i) Business concerns owned and controlled by Indian Tribes ... or wholly-owned entities of Indian Tribes ... are not considered affiliates of such entities.
>
> (ii) Business concerns owned and controlled by Indian Tribes ... or wholly-owned entities of Indian Tribes ... are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

13 C.F.R. § 121.103(b)(2).

Applying this exception, the Area Office concluded that Appellant could not be found affiliated with Tepa and the other Tepa subsidiaries based upon common ownership, common management, or shared administrative services. (Size Determination at 8.) The Area Office went on, however, to find affiliation for four "other reasons": the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4); the newly organized concern rule, 13 C.F.R. § 121.103(g); identity of interest, 13 C.F.R. § 121.103(f); and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). As discussed *infra*, Appellant has successfully demonstrated that each of these theories is fundamentally flawed. Accordingly, the appeal must be granted. In light of this conclusion, it is unnecessary to resolve Appellant's arguments that the Area Office should have applied the broader exception language in 15 U.S.C. § 636(j)(10)(J)(ii)(II) instead of 13 C.F.R. § 121.103(b)(2).

1. Ostensible Subcontractor

The Area Office first determined that Appellant was affiliated with Tepa, Tepa EC, Komada, and Torix under the ostensible subcontractor rule. The Area Office recognized that Appellant had indicated that Appellant "will not be subcontracting any portion of the contract to Tepa or its sister tribal companies." (Size Determination at 8.) The Area Office nevertheless determined that the ostensible subcontractor rule could apply because "the proposal clearly implies that all the Tepa subsidiaries are at [Appellant's] disposal to use for the contract's performance." (*Id.* at 9.) In addition, the Area Office reasoned that Appellant was unduly reliant upon Tepa and the sister companies for "bonding, past performance, and experience which extends beyond the scope of common ownership, common management, and administrative services." (*Id.*)

The "ostensible subcontractor" rule provides that if a subcontractor is performing the primary and vital requirements of a contract, or the prime contractor is unusually reliant on a subcontractor, the prime contractor and subcontractor are deemed to have formed a joint venture for purposes of that contract. 13 C.F.R. § 121.103(h)(4). As the regulation makes clear, the rule applies to the relationship between a prime contractor and its subcontractor. Logically, then, if there is no subcontracting arrangement, the ostensible subcontractor rule will not apply. Indeed, OHA has repeatedly reached this conclusion in its prior cases. *Size Appeal of Active Deployment Sys. Inc.*, SBA No. SIZ-5230, at 8 (2011); *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098, at 7 (2009) ("[W]ith regard to the ... assertion that [the challenged firm] is unduly reliant upon its parent company ..., such reliance does not constitute a violation of the ostensible subcontractor rule because [[[the] parent is not a subcontractor.").

In this case, the ostensible subcontractor rule does not apply because there is no indication that Tepa or the sister companies are subcontractors to Appellant on this procurement. Appellant's response to the protest emphasized that none of these companies are Appellant's subcontractors. Nor are there any subcontracts included in the record. Appellant's proposal referred to these concerns not as subcontractors, but as "predecessor companies" or members of the Tribe's "***." Significantly, the proposal did not identify any portions of the contract that

would be performed by Tepa or any of the sister companies. Further, although the Area Office determined that Appellant was reliant upon Tepa and the sister companies for "bonding, past performance, and experience," the Area Office made no finding that Appellant would rely on Tepa or the sister companies for actual performance of the contract. Indeed, there is no indication that Tepa and the sister companies would even be involved in contract performance.[5] Tepa itself is a holding company that does not directly perform federal contracts. In addition, Appellant has convincingly explained that Tepa may shift personnel among its various subsidiaries, thereby providing a mechanism for Appellant to draw upon the resources and capabilities of its sister companies without necessarily engaging them as subcontractors. In short, there is no evidence that Tepa and the sister companies are Appellant's """"subcontractors" for this procurement, or that these concerns will be performing any of the contract work; the Area Office therefore clearly erred by invoking the ostensible subcontractor rule.[6]

I also agree with Appellant that *Size Appeal of Alutiiq International Solutions, LLC,* SBA No. SIZ-5098 (2009) is directly on point regarding the circumstances presented here. In *Alutiiq International*, an area office found the challenged firm to be affiliated with its parent company, an ANC, under the ostensible subcontractor rule. On appeal, OHA reversed, observing that the ostensible subcontractor rule was not applicable because the parent company was "not a subcontractor." *Alutiiq Int'l*, SBA No. SIZ-5098, at 7. OHA also held that the challenged firm's reliance on its parent company's employees and experience fell within the exception from affiliation found in 13 C.F.R. § 121.103(b)(2). OHA explained that "[i]n alleging that [challenged firm] has relied upon its parent company's employees and experience to obtain this contract, the Area Office has essentially alleged that [the challenged firm] should be considered affiliated with its parent due to common ownership/management." *Id.* Here, similar to *Alutiiq*

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[5] . In the bid protest context, the U.S. Government Accountability Office has recognized that an offeror may rely upon "the experience or past performance of an offeror's parent or affiliated companies where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror." *AMI-ACEPEX, Joint Venture*, B-401560, Sept. 30, 2009, 2009 CPD ¶ 197, at 7. Accordingly, the mere fact that Appellant's proposal cited the experience of its sister companies does not establish that the sister companies would participate in contract performance.

[6] It is worth noting that, even supposing that Tepa and the sister companies were Appellant's subcontractors, the Area Office should then have considered the fact that Appellant would be overseeing multiple subcontractors. OHA has recognized that "[w]here there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work." *Size Appeal of J.R. Conkey & Assocs., Inc., d/b/a Solar Power Integrators*, SBA No. SIZ-5326, at 8 (2012); *see also Size Appeal of Paragon TEC*, SBA No. SIZ-5290, at 14 (2011); *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 6 (2010). Here, Appellant has established that it will manage the contract and will self-perform at least 15% of the work with its own personnel in accordance with the requirements of FAR clause 52.219-14. Thus, even if Appellant had chosen to subcontract significant portions of the contract to the sister companies, it does not follow that Appellant would be unduly reliant upon any other single concern to perform the contract.

International, Tepa and the sister companies are not Appellant's subcontractors, and the fact that Appellant may have relied on Tepa's employees and the corporate experience of the sister companies to secure the award is not grounds for finding affiliation. Thus, there is no valid basis to find a violation of the ostensible subcontractor rule.

2. Newly Organized Concern

The Area Office next found affiliation between Appellant and Tepa EC under the "newly organized concern" rule, 13 C.F.R. § 121.103(g). The rule consists of four required elements:

> (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise.

Size Appeal of Rio Vista Mgmt., LLC, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010). In determining that Appellant and Tepa EC were affiliated under the newly organized concern rule, the Area Office found that Appellant was established only fifteen months before it bid on the instant RFP; that Appellant's general manager and four employees previously worked at Tepa EC; that Appellant cited projects performed by Tepa EC in the past performance portion of the proposal; that Appellant's proposal referred to Tepa EC as a "predecessor company;" and that the two companies are located in the same office building. (Size Determination at 11.)

The Area Office's findings are plainly insufficient to conclude that Appellant and Tepa EC are affiliated under the newly organized concern rule. As shown by the supplemental evidence introduced by Appellant, the personnel assigned to Appellant were never actually employed by either Tepa EC or Appellant. Rather, they were always employees of the parent company, Tepa, which assigned them "from company to company on an as-needed basis." (Appeal at 19.) Thus, the first and third elements of the newly organized concern rule are not satisfied, because Appellant cannot be said to have hired any former employees from its sister company; Appellant "merely accepted the reassignment of Tepa employees who were previously assigned to Tepa EC, not employed by Tepa EC." (Appeal at 25.) The second element of the test is not satisfied because Appellant and Tepa EC operate in fundamentally different primary industries. Appellant derives the bulk of its revenues from NAICS code 237110, Water and Sewer Line and Related Construction. Meanwhile, Tepa EC's primary industry is 562910, Remediation Services. Finally, the fourth element of the test is not met, as the Area Office made no finding that Tepa EC provided Appellant with financial or other assistance. It was the parent company, Tepa—not Tepa EC—which provided bonding assistance and facilities for Appellant.

Accordingly, I find the Area Office clearly erred in determining Appellant and Tepa EC are affiliated based on the newly organized concern rule. As discussed above, none of the four

elements of the test are met here. Furthermore, although the practice of reassigning employees from one Tepa subsidiary to another is perhaps somewhat unconventional, it is nevertheless directly attributable to the common management of the firms by Tepa. Appellant, though, is exempt from any finding of affiliation due to common management with other tribal concerns. 13 C.F.R. § 121.103(b)(2). Thus, the reassignment of personnel from Tepa EC to Appellant does not create affiliation between the firms, under the newly organized concern rule or otherwise.

3. Identity of Interest

The Area Office also found Appellant affiliated with Tepa EC, Komada and Torix on the theory of identity of interest. The applicable regulation provides:

> 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 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). In reaching its conclusion, the Area Office found that the firms have "substantially identical business and economic interests." (Size Determination at 9.) The Area Office observed that the firms operate in similar industries, that Appellant's personnel formerly worked at Tepa EC, that Appellant's proposal referred to the sister companies as "predecessor companies," and that the firms are located in close proximity to one another. (*Id.* at 9-10.)

OHA considered similar issues in *Size Appeal of Cherokee Nation Healthcare Services, Inc.*, SBA No. SIZ-5343 (2012). In that case, the area office determined that the challenged firm was affiliated with a sister company owned by the same Indian tribe through identity of interest. The area office noted that the two firms "have the same location, the same key employees, bid on medical services contracts, and operate under identical NAICS codes and nearly all of [the challenged firm's] revenue comes from [ ] subcontracts [with the sister company]." *Cherokee*, SBA No. SIZ-5343, at 5. On appeal, OHA reversed, explaining that many of the area office's findings were not relevant to showing identity of interest. OHA further stated that "The two concerns do have common management and common ownership, both of which grounds for affiliation cannot be considered here [by virtue of 13 C.F.R. § 121.103(b)(2)]. Concerns owned by the same Indian tribe will always share economic interests based on their common management and ownership." *Id.*

Likewise, in the instant case, the Area Office did not articulate any valid grounds to find affiliation through identity of interest. Indeed, the Area Office did not cite any of the ordinary reasons for finding affiliation on this basis, such as economic dependence, contractual relationships, or personal family relationships. *See* 13 C.F.R. § 121.103(f). As in*Cherokee*, many of the factors that the Area Office did reference are not relevant to showing identity of interest. The mere fact that companies operate in similar lines of work, or in close proximity to one

another, does not give rise to affiliation under 13 C.F.R. Part 121. Additionally, as discussed above, although it is true that Tepa may shift personnel among its subsidiaries, this stems from the common management of the subsidiaries by Tepa, and therefore falls squarely within the exception at 13 C.F.R. § 121.103(b)(2)(ii). In any event, the Area Office did not explain, and the record does not demonstrate, how identical business or economic interests would arise simply from the fact that Appellant's personnel formerly worked at Tepa EC. Accordingly, Area Office clearly erred in finding Appellant affiliated with Tepa EC, Komada and Torix under identity of interest.

4. Totality of the Circumstances

Lastly, in addition to the theories above, the Area Office found Appellant was affiliated with Tepa, Tepa EC, Komada, and Torix based on the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). The Area Office expressed particular concern that, based on language in Appellant's proposal, the companies were "conducting themselves as if they are interchangeable." (Size Determination at 11.)

Affiliation exists when "one [concern] 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); *see also Size Appeal of LGS Mgmt., Inc.*, SBA No. SIZ-5160, at 3 (2010) ("control 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."). Accordingly, OHA will reverse a finding of affiliation absent evidence of such "power to control." *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA No. SIZ-5132 (2010); *Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112, at 7 (2010) ("I conclude upon reviewing these ties, or rather, the absence of ties between the firms, that there is simply not enough here to give either Appellant or [its alleged affiliate] control or power to control the other.").

Here, Appellant and its sister companies share common ownership and management, but these are not valid grounds to find affiliation pursuant to 13 C.F.R. § 121.103(b)(2)(ii). The Area Office cited no other considerations, unrelated to common ownership and management, that demonstrate any such power to control. The fact that Appellant and its sister companies "conduct[] themselves as if they are interchangeable" has no bearing on the power to control. Accordingly, the Area Office erred in finding affiliation based on the totality of the circumstances.

V. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. I therefore GRANT this appeal and REVERSE 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