

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

SIZE APPEAL OF:

BA Urban Solutions, LLC, *et al.*,

Appellants,

RE: Matt Martin Real Estate Management,  
LLC

Appealed From  
Size Determination Nos. 2-2013-103, -104,  
-105, -106, -107, -108, -109, -110, and -120

Solicitation No. R-ATL-02006

U.S. Department of Housing and Urban  
Development

SBA No. SIZ-5521

Decided: December 16, 2013

APPEARANCES

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Washington D.C., for Matt Martin Real Estate Management, LLC.

## DECISION<sup>1</sup>

### I. Introduction and Jurisdiction

These appeals arise from a size determination concluding that Matt Martin Real Estate Management, LLC (MMREM) is a small business under the \$7 million size standard associated with Request for Proposals (RFP) No. R-ATL-02006. The Appellants, which had previously protested MMREM's size, maintain that the size determination is flawed in various respects, and request that it be reversed or remanded. For the reasons discussed *infra*, the appeals are denied, and the size determination is affirmed.

The U.S. Small Business Administration (SBA) 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. Appellants filed the instant appeals within fifteen days of receiving the size determination, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

### II. Background

#### A. Procedural History

On November 2, 2011, the U.S. Department of Housing and Urban Development (HUD) issued RFP No. R-ATL-02006 for management and marketing of HUD-owned real estate properties throughout the United States. HUD divided the required services into six geographic areas, and stated that HUD planned to make a single contract award covering each area. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 531390, Other Activities Related to Real Estate, with a size standard of \$2 million. On November 29, 2011, the CO issued Amendment 0001 to the RFP, responding to questions and clarifying certain issues. As part of Amendment 0001, HUD changed the RFP's NAICS code to 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$7 million in average annual receipts.<sup>2</sup> Proposals were due December 9, 2011. There were no

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<sup>1</sup> This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. 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.

<sup>2</sup> Effective March 12, 2012, SBA increased the size standard for NAICS code 541611 to \$14 million. 77 Fed. Reg. 7,490, 7,514 (Feb. 10, 2012). However, SBA regulations provide that “the size standard in effect on the date the solicitation is issued” is controlling, unless the CO formally amends the solicitation to adopt the new size standard. 13 C.F.R. § 121.402(a). No such solicitation amendment occurred here, so the applicable size standard remained at \$7 million average annual receipts.

subsequent solicitation amendments.

HUD evaluated initial proposals and established a competitive range of the most highly rated offerors. By letter dated August 13, 2012, the CO distributed written discussion questions to offerors in the competitive range, and stated that “[o]fferors participating in discussions will have the opportunity to revise the initial proposal, including price, in order to make their evaluated proposal more competitive and correct any identified deficiencies.” (MMREM Protest Response, Tab M.) An offeror excluded from the competitive range filed a bid protest at the U.S. Government Accountability Office (GAO) challenging the competitive range determination. The bid protest was subsequently withdrawn, and by letter of December 11, 2012, the CO instructed that final proposal revisions be submitted by December 18, 2012. The CO's letter stated that the final proposal revision “shall be submitted as a full ‘red-lined’ copy of the original proposal, clearly delineating any changes or revisions made from the original proposal.” (*Id.*, Tab N.)

On May 21, 2013, HUD announced that MMREM was the apparent awardee for three geographic areas. Between May 21 and May 29, 2013, the CO received nine size protests from unsuccessful offerors disputing whether MMREM qualified as a small business. The protests were lodged by BA Urban Solutions, LLC (BA Urban); Wallin Residential Properties (Wallin); La Rosa Realty (La Rosa); Winn Realty & Appraisal, LLC (Winn Realty); Asset Management Real Estate, LLC (AMRE); Real Estate Resource Services, Inc. (RERS); OneSource REO, LLC (OneSource); and two other concerns that are not participating in this litigation. The protesters alleged that, based on publicly available data, MMREM's revenues substantially exceed the applicable size standard; that MMREM's size should be determined from the date of final proposal revisions, not the date of initial proposals; and that MMREM may be affiliated with concerns owned and controlled by [XXXX]. The CO forwarded the size protests to SBA's Office of Government Contracting, Area II (Area Office) for review.

On July 11, 2013, the Area Office issued Size Determination Nos. 2-2013-103, -104, -105, -106, -107, -108, -109, -110, and -120 denying the size protests.<sup>3</sup> Between July 26 and July 29, 2013, BA Urban, Wallin, La Rosa, Winn Realty, and AMRE (Appellants), filed appeals with the SBA Office of Hearings and Appeals (OHA). Because the appeals arose from the same size determination, and involved the same protested concern, OHA consolidated the appeals into the instant proceedings.

While the appeals were pending, HUD notified OHA that HUD would undertake corrective action on the procurement in response to additional bid protests filed at GAO. Because the corrective action had the potential to alter the outcome of the source selection, OHA temporarily stayed the proceedings and directed the parties to notify OHA once the corrective action was completed. On October 1, 2013, HUD advised OHA that MMREM was again selected as an apparent awardee. OHA lifted the stay and established a new close of record of October 29, 2013.

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<sup>3</sup> The Area Office issued a single document addressing all nine protests.

### B. Size Determination

On July 11, 2013, the Area Office issued Size Determination Nos. 2-2013-103, -104, -105, -106, -107, -108, -109, -110, and -120 concluding that MMREM is a small business under the \$7 million size standard applicable to the RFP.

The Area Office explained that Mr. Matt Martin is 75.5% owner of MMREM. (Size Determination at 3.) The remaining 24.5% interest is held by [XXXX], which in turn is owned by [XXXX]. Mr. Martin is MMREM's Chief Executive Officer and the [[XXXX] Manager. [XXXX]. (*Id.*) The Area Office noted that, at the time MMREM submitted its offer on the instant procurement, Mr. Martin owned only 51% of MMREM, with [XXXX] and [XXXX] each holding 24.5% ownership stakes. (*Id.* at 4.) In December 2012, Mr. Martin purchased [XXXX]'s interest.

In its response to the size protests, MMREM acknowledged affiliation with five other concerns controlled by Mr. Martin. (*Id.* at 5.) These acknowledged affiliates, however, had little or no revenues, and therefore did not materially affect whether MMREM exceeded the size standard.

The Area Office next examined the protest allegations that MMREM is affiliated with businesses owned or controlled by [XXXX]. The Area Office determined that [[XXXX], through [XXXX], owns 24.5% of MMREM. (*Id.* at 5-6.) However, Mr. Martin has always held at least 51% ownership of MMREM, and has also retained operational control of MMREM through his role as [XXXX]. (*Id.* at 6.) MMREM represented that “[XXXX] is a passive owner and has no active role in MMREM.” (*Id.* at 5.) The Area Office found “no evidence that [XXXX] or one of his entities provides assistance or contracts that create an identity of interest or the power to control.” (*Id.* at 6.) Further, Mr. Martin holds no ownership interest, and does not actively participate, in any concern owned by [XXXX]. (*Id.*) The Area Office concluded that there is no affiliation between MMREM and entities controlled by [XXXX].

The Area Office proceeded to explain that, according to 13 C.F.R. § 121.404(a), the date for determining size is the date of initial offers. (*Id.*) After consulting with the CO, the Area Office found that initial offers were submitted in December 2011. (*Id.*) MMREM was founded in March 2008, but generated revenue during 2008 and filed a 2008 tax return. (*Id.* at 3-4.) As a result, MMREM's three most recently completed fiscal years prior to its self-certification were 2008, 2009, and 2010. (*Id.* at 10.)

The Area Office observed that, although the protesters claimed that MMREM exceeded the size standard based on publicly available information, this data was “derived from the value of awarded contracts or accrual income and not actual revenue received and reported on an income tax return for a specific year.” (*Id.* at 7.) Furthermore, much of revenue referenced by the protesters was generated by MMREM after 2010, and therefore would not be included in the period to determine size. (*Id.*) The Area Office added that it must use income tax returns to calculate size, unless those returns are unavailable. (*Id.*)

Using MMREM's tax returns for the years 2008, 2009, and 2010, and applying the methodology set forth in 13 C.F.R. § 121.104(c)(3), the Area Office computed that MMREM's average annual receipts, combined with those of the five acknowledged affiliates, do not exceed \$7 million. As a result, MMREM is a small business.

### C. BA Urban and Wallin Appeal

On July 26, 2013, BA Urban and Wallin jointly filed an appeal of the size determination with OHA. BA Urban and Wallin argue that the size determination is clearly erroneous and should be reversed or remanded.

BA Urban and Wallin contend that the Area Office used an incorrect period of measurement to calculate MMREM's size. BA Urban and Wallin emphasize that MMREM was founded in 2008, and was in business only for a portion of that year. Thus, even accepting the Area Office's conclusion that MMREM self-certified on December 9, 2011, MMREM had not been in business for three complete fiscal years prior to December 9, 2011. BA Urban and Wallin state that, under these circumstances, “the correct regulation in calculating MMREM's size is 13 C.F.R. § 121.104(c)(2), which is the proper method for a concern in business for less than three completed fiscal years.” (BA Urban and Wallin Appeal, at 3.) Further, because 2008 was not a complete fiscal year for MMREM, the Area Office “should have reviewed MMREM's revenue for 2009, 2010, and 2011, which would have revealed that MMREM did not qualify as small under the solicitation's NAICS code.” (*Id.* at 6.) BA Urban and Wallin argue that the Area Office's findings that MMREM was in business for part of 2008, and generated some revenue during that year, do not support the decision to include 2008 in the period of measurement. (*Id.* at 5.)

Next, BA Urban and Wallin maintain that the Area Office should have found affiliation between MMREM and businesses owned or controlled by [XXXX]. (*Id.* at 7.) BA Urban and Wallin assert that the Area Office focused on the fact that Mr. Martin always maintained majority ownership of MMREM, and “failed to conduct any meaningful review of the relationship between MMREM and [XXXX] and his businesses.” (*Id.*) In addition, BA Urban and Wallin argue, the Area Office should have explored whether there was economic dependence or an identity of interest between Messrs. Martin and [XXXX] based on their lengthy and extensive association. (*Id.* at 8.)

BA Urban and Wallin also contend that the Area Office selected the wrong date to determine MMREM's size. BA Urban and Wallin assert that, after establishing a competitive range, the CO instructed the remaining offerors to resubmit their small business certifications as part of final proposal revisions. (*Id.* at 9.) BA Urban and Wallin contend that these proposal revisions “constituted a ‘formal response to the solicitation’ [within the meaning of 13 C.F.R. § 121.404(a)] thereby replacing the prior certification.” (*Id.*) According to BA Urban and Wallin, the Area Office should have assessed MMREM's size as of December 18, 2012, the deadline for receipt of final proposal revisions.

#### D. AMRE Appeal

On July 29, 2013, AMRE filed its appeal of the size determination.<sup>4</sup> 1 AMRE contends that “[t]he proper date for the size determination of MMREM was the date for submission of the final proposal revision, which was December 18, 2012.” (AMRE Appeal at 2.) AMRE observes that a prior version of 13 C.F.R. § 121.404(a) stated that that “[w]here an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation.” (*Id.*) Likewise, SBA remarked in *Federal Register* that a new certification is appropriate “if a change in a requirement is drastic enough that all offers are non-responsive.” (*Id.*, quoting 75 Fed. Reg. 9,129, 9,130 (Mar. 1, 2010).) In the instant case, AMRE asserts, “HUD changed significant requirements of the solicitation and re-opened the competition for all offerors to submit new, revised proposals.” (*Id.* at 3.) As a result, the initial offers submitted in December 2011 were no longer responsive, and the changes introduced by HUD effectively created a new solicitation. (*Id.*) AMRE concludes that MMREM should have been required to recertify as a small business concern when it resubmitted its final proposal revision, so December 18, 2012 is the proper date for determining size.

#### E. La Rosa and Winn Realty Appeal

On July 26, 2013, La Rosa and Winn Realty jointly filed an appeal of the size determination. La Rosa and Winn Realty maintain that the Area Office selected the incorrect date to determine size, calculated MMREM's average annual receipts for the wrong period, and inadequately analyzed MMREM's alleged affiliation with [XXXX] and his businesses.

La Rosa and Winn Realty first contend that the date utilized by the Area Office for determining size was incorrect. La Rosa and Winn Realty assert that, after the bid protest challenging the competitive range determination, HUD essentially “started over” and established a new competitive range. (La Rosa and Winn Realty Appeal, at 8-9.) As a result, the date for determining size should be December 18, 2012, “the due date for FPR submissions after the competition was re-opened, and was *begun anew*.” (*Id.* at 9 (emphasis in original).) Furthermore, La Rosa and Winn Realty argue, the final proposal revisions constitute a “formal response” to the RFP within the meaning of 13 C.F.R. § 121.404(a). (*Id.*) La Rosa and Winn quote SBA commentary in the *Federal Register* opining that a new small business certification may be appropriate when the structure of a procurement is drastically altered after the receipt of initial offers. La Rosa and Winn Realty conclude that the “re-submitted proposals were clearly both a ‘formal response’ to the Solicitation and the ‘initial offer’ of the re-opened procurement, under 13 C.F.R. § 121.404(a) as the SBA intended the regulation to be applied.” (*Id.* at 10.)

Next, La Rosa and Winn Realty maintain that the Area Office did not use the proper fiscal years for calculating MMREM's average annual receipts. La Rosa and Winn Realty assert that the Area Office treated MMREM as a concern which has been in business for three or more

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<sup>4</sup> By separate order of August 7, 2013, OHA determined that that AMRE's appeal was timely filed.

complete fiscal years, and thus calculated MMREM's receipts utilizing 13 C.F.R. § 121.104(c)(3). However, as of December 9, 2011, MMREM had not yet been in business for three complete years, so the correct regulation for calculating MMREM's average annual receipts would instead have been 13 C.F.R. § 121.104(c)(2). (*Id.* at 11-12.) La Rosa and Winn Realty argue that, if the Area Office had applied 13 C.F.R. § 121.104(c)(2), the Area Office would have taken into account at least a portion of MMREM's revenues for fiscal year 2011, which would have caused MMREM to exceed the size standard applicable to this solicitation. (*Id.* at 13.) In addition, the Area Office's decision to apply 13 C.F.R. § 121.104(c)(3) is contrary to OHA precedent established in *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306 (2011). (*Id.*)

Lastly, La Rosa and Winn Realty assert that the Area Office did not adequately analyze MMREM's alleged affiliation with [XXXX] and his businesses. In particular, La Rosa and Winn Realty argue that the Area Office did not address whether [XXXX] could exert negative control over MMREM, and did not consider the totality of the circumstances. (*Id.* at 14.) La Rosa and Winn Realty claim that [XXXX] conceivably could negatively control MMREM, notwithstanding that Mr. Martin owns the majority of the company. (*Id.* at 15.) La Rosa and Winn Realty add that the Area Office should have conducted a “detailed inquiry” as to whether affiliation existed under the totality of the circumstances. (*Id.* at 17.) La Rosa and Winn Realty maintain that, if the Area Office had more thoroughly investigated affiliation under the totality of the circumstances, the Area Office would have discovered that [XXXX] owns or controls businesses which are located at addresses previously associated with MMREM. (*Id.* at 18.) Furthermore, La Rosa and Winn Realty assert, a proper review could have shown additional ties suggestive of economic dependence. (*Id.* at 19-20.)

#### F. Motion to Supplement the Record

Accompanying their appeal petition, La Rosa and Winn Realty move to admit new evidence. Specifically, La Rosa and Winn Realty seek to introduce Dun & Bradstreet reports and other publicly available records concerning the business interests of [XXXX]. La Rosa and Winn Realty contend that these documents are relevant to the allegations that the Area Office inadequately analyzed the connections between MMREM and businesses owned and controlled by [XXXX]. (Motion at 3-4.)

MMREM opposes the motion. MMREM insists that the materials in question were publicly available at the time of the size protests. In MMREM's view, La Rosa and Winn Realty “had ample opportunity to submit this evidence during the course of their initial size protests”, so OHA should not entertain the new material at this late stage. (MMREM Opp., at 1.)

#### G. OneSource and RERS Response

On October 29, 2013, interveners OneSource and RERS filed a joint response to the appeals. OneSource and RERS maintain that the Area Office erred in using December 9, 2011 as the date for determining size, because the initial offers expired on or around February 9, 2012. OneSource and RERS cite to the solicitation's cover sheet, which indicates that if an offer is accepted within 60 days, the offeror must comply with its proposal. (OneSource and RERS Response, at 2.) Thus, the submission of December 18, 2012 “cannot be anything but a new offer

since the original proposal had expired.” (*Id.* at 3.) OneSource and RERS assert that “[b]y determining that an expired [proposal] must be used to determine the size of MMREM, the [Area Office] has caused substantial harm to this small business competition.” (*Id.*)

#### H. La Rosa and Winn Realty Response

On October 29, 2013, after reviewing the record under a protective order, La Rosa and Winn Realty filed a joint response to the appeals. La Rosa and Winn Realty reiterate their view that, because the final proposal revision was submitted after HUD re-established a competitive range, the final proposal revision represents an “initial offer” or “other formal response to” the RFP within the meaning of 13 C.F.R. § 121.404(a). (La Rosa and Winn Realty Response at 7.) In addition, La Rosa and Winn Realty assert that by submitting final proposal revisions on December 18, 2012, “MMREM is *deemed* to have made a new self-certification that it is a small business concern.” (*Id.* at 5 (emphasis in original).) La Rosa and Winn Realty point to recent amendments to the Small Business Act which state that, by submitting a bid or proposal for a set-aside procurement, an offeror is deemed to represent that it is a small business concern. (*Id.* at 5-6, citing 15 U.S.C. § 632(w)(2)(A).) In this case, La Rosa and Winn Realty contend, “MMREM’s submission of a proposal in December 2012 is deemed to be a certification that it was, at that time, a small business concern eligible for such a small business set-aside contract.” (*Id.* at 6.)

La Rosa and Winn Realty reiterate the arguments from their original appeal that the Area Office should have calculated MMREM’s receipts by using the approach dictated by 13 C.F.R. § 121.104(c)(2) instead of § 121.104(c)(3). (*Id.* at 8-9.)

Next, La Rosa and Winn Realty argue that MMREM’s response to the protests reveals that [XXXXXXXXXXXX] to MMREM during its inception. (*Id.* at 13.) La Rosa and Winn Realty maintain that this further suggests that MMREM may be economically dependent on [XXXX], thereby creating affiliation. La Rosa and Winn Realty cite to OHA cases in arguing that financial assistance between concerns can give rise to economic dependence and affiliation. (*Id.* at 14.)

Lastly, La Rosa and Winn Realty assert that MMREM failed to provide information about [XXXX] and his business interests on MMREM’s SBA Form 355. Although MMREM denied affiliation with [XXXX], La Rosa and Winn Realty contend that the form requires information about a protested concern’s alleged affiliates. La Rosa and Winn Realty argue that the omission of such information made it “impossible for the [Area Office] to reasonably analyze affiliation with [XXXX] or his businesses, as the Area Office did not ensure that MMREM furnished the information necessary for such analysis.” (*Id.* at 16.) La Rosa and Winn Realty cite to *Size Appeal of Step Construction, Inc.*, SBA No. SIZ-5483 (2013) for the proposition that failure to disclose information about alleged affiliates may lead an area office to apply an adverse inference. (*Id.* at 16-17.)

#### I. MMREM Response

On October 29, 2013, MMREM responded to the appeals. MMREM maintains that the size determination is correct and should be affirmed.



MMREM argues that the Area Office correctly used December 9, 2011 as the date to determine size. MMREM states that, according to 13 C.F.R. § 121.404(a) and OHA precedent, the date for determining size is the date of initial offers. (MMREM Response, at 11-12.) MMREM adds that, under current law, changes to a solicitation do not “require an offeror to recertify its size status.” (*Id.* at 14.) Further, the record does not support Appellants' contention that HUD made significant changes to the RFP. MMREM states that, here, HUD did not cancel or amend the RFP after receipt of initial offers, nor did HUD “change any of the requirements or scope of work within the Solicitation following its corrective action.” (*Id.* at 16.) The very fact that “no offeror was required to change the terms of its proposal to continue to be responsive to the Solicitation” is evidence that the RFP was fundamentally unchanged. (*Id.*)

Next, MMREM maintains that the Area Office correctly calculated MMREM's size under the methodology of 13 C.F.R. § 121.104(c)(3). MMREM states that “SBA regulations make clear that ‘a completed fiscal year means a taxable year including any short year.’” (*Id.* at 29, quoting 13 C.F.R. § 121.104(b).) MMREM adds that the IRS defines a taxable year to include not only a full calendar or 12-month fiscal year, but also “a period during which the taxed entity was in existence for less than a full year, and therefore only submits a return for that short period.” (*Id.* at 31.) MMREM contends that 2008 was a short year for which it filed a Federal income tax return, and thus was properly taken into account by the Area Office in calculating MMREM's receipts. MMREM asserts that, because the appropriate years for calculating its size are 2008, 2009, and 2010, even if its size were calculated under 13 C.F.R. § 121.104(c)(2), as Appellants urge, MMREM would still be found to be a small concern for the instant procurement. (*Id.* at 34-35.)

MMREM further argues that the Area Office properly found no affiliation between MMREM and [XXXX]'s business interests. MMREM asserts that [XXXX]'s minority interest in MMREM could not lead to negative control because Mr. Martin [XXXX] has the power to control MMREM. (*Id.* at 39.) According to MMREM's Operating Agreement, Mr. Martin is the [XXXX] Manager of MMREM and [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXX] in MMREM, which [XXXX] does not have. (*Id.* at 40.) Thus, [XXXX] cannot “‘block ordinary actions essential to operating’ MMREM”, a prerequisite for any finding of negative control. (*Id.* at 41 quoting *Size Appeal of Alares, LLC*, SBA No. SIZ-5471 (2013)). MMREM contends that the issue of negative control was considered, and rejected, by the Area Office in its review. MMREM adds that because Mr. Martin is the [XXXX] individual controlling MMREM, Appellants' suggestion that MMREM could be affiliated with other concerns through common management is meritless. (*Id.* at 43.)

MMREM goes on to dispute Appellants' allegations that an identity of interest, based on economic dependence, exists between Mr. Martin, [XXXX], and their respective companies. In MMREM's view, Appellants failed to allege any plausible basis to conclude that MMREM is economically dependent on [XXXX]. MMREM adds that its business relies on providing management services for Federal government clients, whereas [XXXX]'s business interests are traditional real estate brokerage firms. (*Id.* at 45.) MMREM's argues that OHA precedent has made it clear that the fact that two firms are in similar industries is not enough to show affiliation through identity of interest. (*Id.* at 46, citing *Size Appeal of HAL-PE Associates Engineering Services, Inc.*, SBA No. SIZ-5374 (2012)). MMREM states that it is not reliant on [XXXX] or

his businesses for 70% or more of its revenues, the threshold established by OHA in *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007). MMREM further disputes Appellants' allegations that affiliation could exist because MMREM shared the same addresses with concerns owned or controlled by [XXXX]. (*Id.* at 47.) MMREM contends OHA case law has established that “the fact that two concerns share facilities does not support a finding that they have an identity of interest.” (*Id.* citing *Size Appeal of David Boland, Inc.*, SBA No. SIZ-5189 (2011)).

Next, MMREM explains that, contrary to Appellants' arguments, MMREM and [XXXX]'s businesses are not affiliated under the totality of the circumstances. According to MMREM, the Area Office reviewed all the allegations and evidence presented to it, and failed to find affiliation under the totality of the circumstances. (*Id.* at 49.) MMREM maintains that because affiliation based on the totality of the circumstances still requires the power of control, the Area Office properly found no such affiliation when it determined that Mr. Martin [[XXXX] controls MMREM. (*Id.* at 51.) MMREM concludes that the Area Office reviewed the evidence and found that [XXXX] does not provide any assistance or contracts to MMREM that could lead to affiliation between the two. (*Id.* at 58-59.) MMREM reiterates that the Area Office's determination should be affirmed and the appeals denied.

### III. Discussion

#### A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of their appeals. Specifically, Appellants 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

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).

In this case, after reviewing the motion filed by La Rosa and Winn Realty, as well as the new evidence they seek to admit, I conclude that La Rosa and Winn Realty have not established

good cause for the admission of new evidence. As MMREM correctly observes, the materials in question were publicly available at the time La Rosa and Winn Realty filed their protests. Therefore, if La Rosa and Winn wished to have this information considered, they could and should have produced it to the Area Office with the protests or during the size review. *E.g.*, *Size Appeal of Jackson and Tull*, SBA No. SIZ-5492, at 7 (2013) (excluding new evidence presented on appeal that was publicly available at the time the protest was filed). Accordingly, the motion to supplement the record is DENIED.

### C. Analysis

In seeking to overturn the size determination, Appellants and interveners OneSource and RERS advance three principal arguments.<sup>5</sup> First, they allege that the Area Office incorrectly selected December 9, 2011 as the date to determine MMREM's size. Second, they assert that the Area Office improperly applied 13 C.F.R. § 121.104(c)(3), rather than § 121.104(c)(2), in calculating MMREM's average annual receipts. Third, they contend that the Area Office did not adequately investigate whether MMREM is affiliated with businesses owned and controlled by [XXXX]. As discussed *infra*, Appellants and interveners OneSource and RERS have not established clear error in the size determination with respect to any of these issues. As a result, the appeals are denied and the size determination is affirmed.

#### 1. Date to Determine Size

Pursuant to 13 C.F.R. § 121.404(a), “SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.” Applying this regulation, and after consulting with the CO, the Area Office found that MMREM's size should be determined as of December 9, 2011, the date of MMREM's initial proposal which included MMREM's proposed price and written self-certification that MMREM was a small business.

Appellants contend that the correct date to determine size is December 18, 2012, the date of final proposal revisions. Appellants reason that HUD made drastic changes to the procurement by reopening the competitive range, thereby rendering initial proposals (and size certifications) invalid. Further, Appellants argue, the final proposal revisions themselves constitute an “other formal response to a solicitation” within the meaning of 13 C.F.R. § 121.404(a), such that MMREM's size should be assessed as of December 18, 2012.

I find no merit to these arguments. With regard to the purported changes to the procurement, an older iteration of 13 C.F.R. § 121.404(a) stated that “[w] here an agency

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<sup>5</sup> In prior cases involving protester appeals, OHA has recognized that a protester “has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest.” *Size Appeal of Professional Performance Development Group, Inc.*, SBA No. SIZ-5398, at n.1 (2012); *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359, at 11 n.9 (2012). Accordingly, it is unnecessary to consider whether each protester raises substantively different arguments on appeal than were set forth in its protest.

modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation.” This older version of § 121.404(a), however, applies only to solicitations issued before March 4, 2011. *See* 76 Fed. Reg. 5,680 (Feb. 2, 2011). The instant RFP was issued November 2, 2011, so the older version of § 121.404(a) is not applicable here. Notably, SBA rescinded the older version of § 121.404(a) after concluding that “[d]isqualifying an offeror based on whether a procuring agency's requirement changes during the course of a protracted procurement unfairly punishes both the procuring agency and offerors that have expended time and resources pursuing the procurement.” 75 Fed. Reg. 9,129, 9,130 (Mar. 1, 2010). Under the current version of § 121.404(a), applicable to the instant case, changes to a procurement's requirements after the submission of initial proposals do not require offerors to recertify size.

Even if the older version of 13 C.F.R. § 121.404(a) were applicable here, the facts of this case do not support the notion that HUD “modifie[d] the solicitation” to the extent that initial offers were “no longer responsive”. Indeed, it appears that HUD made no changes at all to the RFP after initial proposals were submitted. *See* Section II.A, *supra*. Further, HUD did not alert offerors during discussions that previous proposals were nonresponsive, nor did HUD require offerors to address any new or modified requirements in their final proposal revisions. *Id.* Even HUD's decision to revisit the competitive range was modest in scope, as HUD merely expanded the competitive range to include additional firms which had already submitted proposals, but did not cancel the RFP or reopen the competition to new offerors. In short, then, HUD's actions did not significantly alter the competitive landscape of this procurement, let alone drastically change the underlying requirements such that initial offers became nonresponsive. *Size Appeal of The W.I.N.N. Group, Inc.*, SBA No. SIZ-5360, at 8 (2012) (recertification was not required because solicitation amendments “did not contain changes to the Statement of Work which would have rendered initial quotes nonresponsive”); *Size Appeal of Dynalantic Corp.*, SBA No. SIZ-5125 (2010) (request to extend proposal expiration date was not a fundamental change to the solicitation requiring recertification).

Appellants also maintain that offerors were required to recertify size in their final proposal revisions, because HUD requested a complete “red-lined” copy of the proposal, to include, *inter alia*, the size certification. Further, Appellants suggest, a final proposal revision may be considered a “formal response to a solicitation” within the meaning of 13 C.F.R. § 121.404(a). These arguments are similar to those advanced in *Size Appeal of Ramcor Services Group, Inc.*, SBA No. SIZ-5510 (2013). In *Ramcor*, OHA rejected a challenged firm's contention that its final proposal was a “formal response to a solicitation,” and that size therefore should be determined as of that date. OHA explained:

[The challenged firm's] argument would mean that any formal response to the solicitation should establish a date to determine size. The problem with [the challenged firm's] position is that it sets no definite date for determining size for a procurement. Every procurement has an initial offer, but many will have final proposal revisions and some will have several rounds of offers submitted. All of these are formal responses to the proposal. [The challenged firm's] argument provides no basis for determining which of these formal responses to the

solicitation should be used as the date for determining size. [[The challenged firm's] argument would leave area offices with no clear basis for selecting a date on which to determine size. By contrast, the rule that an initial offer including price must be used, except in certain definite cases enumerated in the regulation or where the initial response did not include price provides the area office with a clear rule to apply in selecting the date to determine size. [The challenged firm's] argument, if adopted would leave too much uncertainty in the size determination process.

*Ramcor*, SBA No. SIZ-5510, at 4. Likewise, in this case, HUD requested final proposal revisions, but did not ask offerors to recertify their small business status. The mere submission of final proposal revisions is not an “other formal response to a solicitation” under § 121.404(a). Accordingly, pursuant to 13 C.F.R. § 121.404(a), the Area Office correctly determined size from the date of initial proposals.

OneSource and RERS also argue that initial offers expired in February 2012, so HUD could not have unilaterally accepted those offers. While this may be true, SBA regulations require that size is determined from the date of initial proposals. 13 C.F.R. § 121.404(a). It is immaterial, and beyond the scope of a size review, to consider whether the initial proposals were capable of being unilaterally accepted by the procuring agency.

Lastly, La Rosa and Winn Realty point to recent amendments to the Small Business Act stating that, by submitting a bid or proposal for a set-aside procurement, an offeror is deemed to represent that it is a small business concern. *See* 15 U.S.C. § 632(w)(2)(A). This statutory language, however, does not specify whether such a representation is deemed to have occurred at the time of initial or final proposals, and therefore sheds no light on the issue presented here.

For these reasons, the Area Office properly concluded that MMREM's size should be determined as of December 9, 2011, the date of MMREM's initial proposal.

## 2. Period of Measurement

Appellants next assert that the Area Office improperly applied 13 C.F.R. § 121.104(c)(3), rather than § 121.104(c)(2), in calculating MMREM's average annual receipts. Ordinarily, SBA determines “average annual receipts” by adding the concern's receipts over its three most recently completed fiscal years preceding the date of self-certification, and dividing the resulting total by three. 13 C.F.R. § 121.104(c)(1). Special rules apply, however, if the concern has been in business for less than three complete fiscal years (§ 121.104(c)(2)), or has been business for three complete fiscal years but has a ““short year”” (*i.e.*, a period of less than 12 months for which the concern nevertheless filed an income tax return) within the period of measurement (§ 121.104(c)(3)). In the latter situation, SBA regulations instruct that:

Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by

the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

13 C.F.R. § 121.104(c)(3).

In the instant case, the Area Office determined that MMREM's size should be assessed under 13 C.F.R. § 121.104(c)(3). The Area Office reasoned that MMREM uses the calendar year as its fiscal year, and had been in business for three fiscal years (2008, 2009, and 2010) at time of its self-certification in December 2011. However, because MMREM was newly formed in March 2008, one of the three years under review was a short year. Specifically, 2008 was MMREM's short year because MMREM did not operate for all of calendar year 2008, although MMREM filed a 2008 Federal income tax return.

Appellants argue that the Area Office should have utilized 13 C.F.R. § 121.104(c)(2) rather than § 121.104(c)(3) because MMREM was not in business for three entire years before 2011. This argument might have merit if 2008 were not considered to be a “complete fiscal year” for MMREM. Under SBA regulations, though, a “completed fiscal year” is defined as “a taxable year, including any short year.” 13 C.F.R. § 121.104(b); *see also Size Appeal of Thomas Computer Solutions, LLC d/b/a TCS Translations*, SBA No. SIZ-4841 (2007). It is thus evident that a “short year” is still considered a “complete fiscal year” for purposes of SBA regulations. Because MMREM was in business for three complete fiscal years — 2008, 2009, and 2010 — prior to self-certification in December 2011, and one of the years under review was a short year, the Area Office appropriately utilized 13 C.F.R. § 121.104(c)(3) to determine MMREM's size.

Appellants further suggest that some or all of MMREM's 2011 revenues should have been considered in assessing MMREM's size. This argument fails because the Area Office was required to use MMREM's annual receipts from MMREM's Federal income tax returns from its three most recently completed fiscal years to determine size. 13 C.F.R. § 121.104(c)(3). The Area Office was not at liberty to substitute any different period of measurement merely because MMREM was not in business for all of calendar year 2008. *Cf., Size Appeal of ASRC Airfield and Range Servs., Inc.*, SBA No. SIZ-4835 (2007) (holding that the fact that a challenged firm earned no revenues during one of the three fiscal years under review does not justify disregarding that year); *Size Appeal of Williams Adley & Company-DC, LLP*, SBA No. SIZ-5341, at 5 (2012) (rejecting the notion that, if tax returns for a given year are unavailable, “an area office should determine size using [an] alternate period of measurement”).

Lastly, contrary to Appellants' arguments, OHA's decision in *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306 (2011) does not require a different result. In *TPG*, OHA remarked that the challenged firm had not been in business for three complete fiscal years preceding its self-certification, so an area office had properly applied 13 C.F.R. § 121.104(c)(2). *TPG*, SBA No. 5306, at n.8. Conversely, as discussed above, MMREM was in business for three complete fiscal years (including one “short year”) by December 2011, so the applicable regulation is 13 C.F.R. § 121.104(c)(3). Further, in *TPG*, OHA did not attempt to distinguish § 121.104(c)(2) from § 121.104(c)(3), and therefore did not decide the issue presented in the instant case.

### 3. Affiliation

Appellants also dispute the Area Office's conclusion that MMREM is not affiliated with businesses owned or controlled by [XXXX]. Specifically, Appellants assert that the Area Office focused superficially on Mr. Martin's majority ownership of MMREM, but failed to examine whether [XXXX] could exert negative control over the company. Further, according to Appellants, the Area Office did not adequately consider whether MMREM may be affiliated with [XXXX]'s businesses on other grounds, such as identity of interest or the totality of the circumstances.

I find no merit to these contentions. Under OHA precedent, an area office is expected to investigate issues specifically raised in a size protest, but need not explore other, unrelated theories or allegations. *E.g., Size Appeal of Perry Management, Inc.*, SBA No. SIZ-5100, at 3-4 (2009) (“Contrary to [the protester's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.”). Here, the underlying protests raised only a vague claim that MMREM may be affiliated with [XXXX]'s businesses, and the Area Office conducted a reasonable investigation of this issue. The Area Office found, upon reviewing the record, that Mr. Martin has always held at least 51% ownership of MMREM. Mr. Martin is also MMREM's CEO and [XXXX] Manager, and the firm has [[XXXXXXXXX]]. The Area Office found no evidence of any business relationships between MMREM and [XXXX]'s companies. Further, the Area Office determined, Mr. Martin holds no ownership interest in any concern controlled by [XXXX], nor does Mr. Martin actively participate in any such concern. The Area Office concluded that Mr. Martin [XXXX] has the power to control MMREM, and MMREM is not affiliated with any entity owned or controlled by [XXXX]. *See* Section II.B, *supra*.

Contrary to Appellants' arguments, the Area Office's findings are sufficient to establish that [XXXX] does not exert negative control over MMREM, and that MMREM is not affiliated with [XXXX]'s businesses through identity of interest or the totality of the circumstances. Under OHA precedent, “[n]egative control exists if a minority owner can block ordinary actions essential to operating the company.” *Size Appeal of Carntribe-Clement 8AJV #1, LLC*, SBA No. SIZ-5357, at 13 (2012). Here, [XXXX] is a minority shareholder of MMREM, but there is no indication that he has any ability to interfere with MMREM's operations. Similarly, the Area Office found no evidence suggestive of an identity of interest, such as economic ties, family relationships, or common investments (other the joint investment in MMREM itself). Although MMREM may operate in a similar line of business as [XXXX]'s companies, OHA has held that “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.” *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383, at 17-18 (2012). Lastly, in order to find affiliation through the totality of the circumstances, “an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.” *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 11 (2007). Again, the record contains no indication that [XXXX]'s businesses could control MMREM, or *vice versa*. I conclude, then, that the Area Office did not err in concluding that MMREM is not affiliated with [XXXX]'s businesses.

Lastly, La Rosa and Winn Realty argue that MMREM failed to disclose information about [XXXX] and his business interests on MMREM's SBA Form 355. As a result, La Rosa and Winn Realty assert, the Area Office could have imposed an adverse inference against MMREM as seen in *Size Appeal of Step Construction, Inc.*, SBA No. SIZ-5483 (2013). In *Step Construction*, however, the challenged firm refused to provide basic information about the alleged affiliates, either in its SBA Form 355 or in response to the area office's subsequent inquiries, even though the challenged firm acknowledged that the companies in question were linked by family relationships. *Step Construction*, SBA No. SIZ-5483, at 6-7. By contrast, MMREM cooperated with the Area Office's investigation and provided sufficient information to satisfy the Area Office that MMREM is not affiliated with [XXXX]'s businesses. As a result, *Step Construction* is readily distinguishable from the instant case, and the Area Office was not required to impose an adverse inference against MMREM.

#### IV. Conclusion

Appellants have not demonstrated that the size determination is clearly erroneous. Accordingly, the appeals are DENIED, the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge