

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

SIZE APPEAL OF:

Tactical Micro, Inc.,

Appellant,

RE: Mistral, Inc.

Appealed From  
Size Determination Nos. 02-2014-127-128-  
129

SBA No. SIZ-5646

Decided: March 11, 2015

APPEARANCES

Theodore P. Watson, Esq., Nicole L. Carter, Esq., Watson & Associates, LLC, Aurora, CO, for Appellant

David W. Lease, Esq., Smith, Lease & Goldstein, LLC, Rockville, MD, for Mistral, Inc.

DECISION

I. Procedural History and Jurisdiction

On November 14, 2014, the Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determinations Nos. 02-2014-127-128-129. The Area Office concluded Mistral, Inc. (Mistral) is a small business concern for the procurement at issue. On November 26, 2014, Tactical Micro, Inc. (Appellant) filed an appeal challenging the Area Office's size determinations. Docket No. SIZ-2014-11-26-25.

On December 9, 2014, SBA moved to remand the matter back to the Area Office for a new size determination. SBA assigned as its reason that Size Determinations Nos. 02-2014-127-128-129 failed to address an issue raised in the protest, namely, whether Mistral was in violation of the non-manufacturer rule. On December 11, I granted the SBA's motion, vacated Size Determinations Nos. 02-2014-127-128-129, and remanded them back to the Area Office to conduct a new size determination.

Appellant contends the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determinations and find Mistral to be an ineligible small business for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation and Protest

On April 30, 2014, the U.S. Customs and Border Patrol Protection issued Solicitation No. HSBP10112-R-0054 for Mobile Video Surveillance Systems (MVSS), including system maintenance and logistics support. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 334511, Search, Detection, Navigation, Guidance, Aeronautical and Nautical System and Instrumentation Manufacturing, with a 750 employee size standard, as the appropriate code for this procurement.

On July 31, 2014, the CO notified Mistral that it was the apparent awardee. On August 4, 2014, Appellant filed a size protest challenging Mistral's size as a small business concern. The protest claimed Mistral was affiliated with ESC BAZ, Ltd. (ESC BAZ) and other entities.

### B. Size Determinations

On January 20, 2015, the Area Office issued its size determinations finding Mistral is a small business concern for the procurement at issue.

The Area Office found Mistral is 100% owned by Eyal Banai. Mr. Banai also serves on Mistral's Board of Directors. In its response, Mistral acknowledged affiliation through common management, or personal investment by Mr. Banai, with: Mistral Security, Inc. (MSI); Survivability Systems LLC (SS); Karil International Marketing Ltd. (KIM); Mistral Detection Ltd. (MD); Karil Protective Systems, Ltd. (KPS); BKS Development LLC (BKS); Water Gen Ltd. (WG); Banai Family LLC (Banai Family); and ESB Development Inc. (ESB). Mistral further provided the Area Office with a list of all persons employed by all affiliates in the 12 months preceding Mistral's offer. Size Determination at 3. The Area Office concluded that the number of employees for Mistral and its affiliates is below the 750 employee size standard. *Id.*

The Area Office next analyzed whether the acquisition of ODF Optronics (ODF) by MD resulted in affiliation between Mistral and ODF. The Area Office explains that at the time of the acquisition ODF was a foreign entity, and under SBA regulations, would not be considered a small business concern. *Id.*; citing 13 C.F.R. § 121.105(a)(1). In its response, Mistral stated to the Area Office that it only acquired ODF's assets and not the corporation itself, even though ODF has never had more than 30 employees. Similarly, MD did not merge with, but merely acquired the assets of, Oceana Technologies, therefore it does not affect Mistral's overall number of employees and size standard calculation.

Mistral further stated it has no interest, ownership, control, or management positions in ESC BAZ and other entities cited by Appellant and other protestors. Mistral provided the Area Office with information proving Mistral has the manufacturing capabilities to perform the contract and not be unduly reliant upon ESC BAZ, who has no involvement in the contract at issue. *Id.* at 4.

The Area Office addresses whether Mistral and Plasan Sasa, an affiliate of Plasan North America, are affiliated based on Mr. Banai's involvement with Plasan North America. Plasan Sasa, a large multinational corporation, and Mistral have had a Marketing Service Agreement for years, with Mistral receiving less than 5% of its income as a result of this agreement. However, Mr. Banai aided Plasan Sasa in developing a new entity in Vermont, with Mr. Banai receiving the “ceremonial title of President” in order to assist Plasan Sasa in dealing with U.S. industry and the U.S. government. According to Mistral, Mr. Banai never received any compensation, authority, or control over Plasan Sasa in exchange for his services as he only served as an advisor. Mr. Banai's association with Plasan Sasa ended in March 2010 and the only relationship that remains between the two concerns is the marketing agreement. *Id.* Further, the Area Office determined the relationship between Mistral and Plasan Sasa does not render the concerns affiliated under the totality of the circumstances.

The Area Office found the MVSS is a tactical system providing short and medium range mobile surveillance. It consists of a suite of camera sensors mounted on U.S. Border Patrol vehicles. The system is mounted in a truck bed which houses an extendable mast on which the camera sensors are mounted. Mistral will purchase various components and subsystems, and manufacture some components. Mistral will directly manufacture the observation pod, the USB Serial communication interface box, the interconnecting cable and wiring harness that connects the Control Display unit (CDU), joystick, the interface box and power supply and distribution box. Elbit Land Systems (Elbit) will provide the night thermal camera, the laser illuminator and the laser range finder. Mistral will then assemble all the components into the MVSS end product, integrating the various components under the direct supervision of its engineering, management and quality control personnel.

In analyzing the protestor's nonmanufacturer rule claim, the Area Office found Mistral will obtain some hardware components from other manufacturers and suppliers. However, Mistral will maintain fabrication and integration, and electro-optical lab and component integration facilities in Maryland in order to perform the contract. Based on Mistral's record for performing similar work, including manufacturing and delivering similar systems to other agencies, the Area Office determined Mistral qualifies as a manufacturer, as there would be no end-product without Mistral's involvement. *Id.* at 6-7.

After reviewing Mistral's proposal, the Area Office found that the contract's primary and vital requirements will be performed by Mistral, while Elbit will provide equipment for integration into the initial system, as well as software, cabling and wiring. This represents 31% of the contract's value, with two other concerns providing additional support. Mistral will provide all system engineering, program management, quality management, contract management, and contract administration. Mistral will provide the user interface portion of the

system, and perform integration and testing of all subsystems and components The Area Office thus concluded that no violation of the ostensible subcontractor rule is present. *Id.*

The Area Office concluded that even adding Mistral's employees to its affiliates' employees, Mistral is still under the 750 employee size standard and as such, it is a small business concern for the procurement at issue.

### C. Appeal Petition

On January 28, 2015, Appellant filed its appeal of the size determinations. Appellant argues the Area Office committed errors of fact and law, and thus the size determinations should be reversed.

Appellant argues the Area Office erroneously relied on Mistral's statements regarding Mr. Banai's role as President of Plasan Sasa. Appellant contends the Area Office's analysis lacks any discussion of Mr. Banai's ability to control Plasan Sasa, thus rendering them affiliated with Mistral under common management. Appeal at 4-5. According to Appellant, Mr. Banai's role as President of Plasan Sasa clearly shows he had the ability to control Plasan Sasa, which together with Mistral and Plasan Sasa's ongoing marketing agreement, renders the concerns affiliated under common management. Appellant disputes Mr. Banai's "ceremonial" presidency did not allow him some measure of control or influence over Plasan Sasa. *Id.* at 5. Appellant goes on to cite 13 C.F.R. § 121.702(c)(3) to explain the importance of the President's role managing a concern for affiliation purposes, which the Area Office accepted as an "illusory role" performed by Mr. Banai for Plasan Sasa. *Id.* at 6. Appellant maintains the Area Office failed to consider whether Mr. Banai had the power to control Plasan Sasa. Appellant argues that affiliation through common management does not require total control of a concern, just critical influence to exercise substantive control over operations. The Area Office should have applied a presumption that a president exercises substantive control over a company.

Appellant argues Mistral has an identity of interest with Plasan entities. Mistral has years of subcontracting and other activities with Plasan which support a finding of identity of interest. Furthermore, Appellant maintains the Area Office failed to consider proclamations contained in Mistral's website regarding its mission statement. These statements, together with Mistral's long list of affiliates, were "sidestepped" by the Area Office in its failure to conclude Mistral's attempts to mask its goals of obtaining U.S. contracts. Together with the Area Office's failure to determine who Mistral Group and Mistral Water were helping with branding, Appellant suggests the evidence of Mistral's affiliation with other concerns is clear. *Id.* at 7.

Appellant further contends the Area Office "simply looked to the single facts that less than 5% of Mistral's overall income is derived from sales services" in concluding no control existed between Plasan Sasa and Mistral. *Id.* at 8. Mr. Banai's involvement with Plasan Sasa, the marketing agreement between the two, along with Mistral's use of Mistral Group and Mistral Water for marketing purposes, is indicative of affiliation under identity of interest and totality of the circumstances. *Id.* at 8-9.

Appellant raises the question that if Mr. Banai, as president, did not control Plasan, what voting block did. If not, then Mr. Banai and Plasan's board must be deemed to have control, and that would result in a finding of affiliation.

Appellant further asserts that the Area Office erred in its totality of the circumstances analysis, by not considering an ongoing marketing agreement between Mistral and Plasan Sasa that established a common interest in acquiring contracts.

Next, Appellant explains the Area Office erred in focusing its analysis on ODF when Mistral's size is at issue here. Appellant contends it is not clear whether Mistral's acquisition of ODF occurred before or after the solicitation was issued. Additionally, the lack of inquiry into ODF's number of employees, along with its status as a large business, is sufficient to find affiliation between ODF and Mistral. Again, Appellant challenges the Area Office's determination as it only relied on statements by Mr. Banai that Mistral only purchased ODF's assets and it lacks an inquiry into whether Mistral has the power to control ODF. Appellant asserts the same deficiencies are found in the Area Office's analysis of Mistral's purchase of Oceana Technologies. *Id.* at 11.

Appellant maintains Mistral and Elbit are affiliated under the ostensible subcontractor rule as Mistral cannot perform the contract without Elbit. The Area Office's flawed analysis stems from its reliance on the total contract value when determining affiliation. Appellant argues Mistral "lacks the ability and lacks the requisite expertise to independently provide equipment for integration into the initial system, as well as software, cabling and wiring." *Id.* at 13. Without these abilities, Mistral's experience in other aspects of the contract is meaningless. Thus, Mistral is unduly reliant upon Elbit.

Appellant explains that Elbit cannot be performing 31% of the contract's value if it will provide the 71 required thermal camera system units. According to Appellant, that would put the cost of the camera at \$133,000, which Appellant argues is an unreasonable amount in the marketplace. Appellant asserts the camera system units required by the solicitation, and provided by Elbit, must cost at least \$260,000, thus Appellant disputes the Area Office's conclusion that Elbit will perform 31% of the contract's total value. *Id.* at 14-15. Elbit's percentage of the work must be much higher. In addition, for Mistral to maintain 5 Contractor Maintenance Logistics Support (CMLS) facilities, it would require at least 10% of the contract performance. Appellant asserts Mistral is not performing the CMLS work. Thus, Mistral is not performing any meaningful work on this contract. *Id.* at 15. Appellant speculates Elbit is also supplying a number of components that would need to then be integrated and tested, which Mistral has no expertise in performing, further showing Mistral "is performing an insignificant amount to integrate any of the constituent parts." *Id.* at 16. Appellant theorizes Elbit's 31% contribution to the total contract value excludes its hardware contribution. Given this possibility, Appellant suggests that in addition to supplying hardware, Elbit is also performing 31% of the labor, while Mistral lacks the past performance and experience to perform the contract at issue. Appellant further speculates it is likely Elbit prepared the proposal and the Area Office failed to investigate so. *Id.* at 17. Appellant concludes the facts show Elbit is Mistral's ostensible subcontractor.

Lastly, Appellant argues the Area Office failed to properly analyze the protest's allegations concerning Mistral's relationship with ESC BAZ. Appellant's allegations rely on Mistral's public statements regarding its partnership with ESC BAZ, making it apparent it cannot perform the contract without the assistance of ESC BAZ, which can be concluded by reviewing ESC BAZ's website. *Id.* at 18-19. Appellant argues the Area Office erred by relying on Mistral's proposal in concluding ESC BAZ has no connection to the procurement at issue and not performing a proper ostensible subcontractor analysis. *Id.* at 19.

#### D. Mistral's Response

On December 2, 2014, Mistral filed its response to the appeal. Mistral requests OHA affirm the size determination and deny Appellant's appeal because it has not shown any clear error of fact or law by the Area Office.

Mistral argues that by the date to determine size, June 13, 2013, Mr. Banai was no longer an officer or director of Plasan North America, and no other Mistral employee was under the management of any Plasan entity. Mistral states Appellant fails to understand that Mr. Banai's relationship with Plasan North America ended in 2010, as the Area Office points out, and that Appellant fails to show any evidence that Mr. Banai is in any way still involved in the management of any Plasan entity. Response at 4. Accordingly, no affiliation under common management existed between Mistral and any Plasan entity.

Mistral and Plasan Sasa entered into a marketing agreement in 1998, which calls for Mistral "to provide marketing services to Plasan in promoting Plasan's armor capabilities only to the Department of Defense which included identifying potential opportunities, assisting Plasan in submitting its bids, assisting in scheduling meetings, preparation of presentations and coordinating activities for shows." *Id.* at 5. This arms-length agreement between the two concerns, by which Mistral is compensated by an agreed-upon fee, is not indicative of affiliation between Mistral and Plasan Sasa. Additionally, less than 5% of Mistral's income derives from the marketing agreement.

Next, Mistral challenges Appellant's allegations that Mistral has control, or the power to control, over any of the Plasan entities. Mistral's only relationship with the Plasan entities is through a marketing agreement and Mr. Banai's role as President of Plasan North America, which ended in 2010, a full 3 years before the date to determine size. Given the small percentage the marketing agreement accounts in Mistral's income, and Mr. Banai's long-expired involvement with Plasan North America, Mistral contends Appellant's allegations that Mistral has control over any of the Plasan entities are unfounded. *Id.* at 6.

Mistral further purports that Appellant's allegations of affiliation under an identity of interest is badly misplaced. According to Mistral, Appellant cites to OHA cases discussing identity of interest as it relates to affiliation between family owned businesses. Here, a showing of clear facture between Mistral and the Plasan entities is not needed as there is no presumption of affiliation based on familial identity of interest. Instead, evidence of economic dependence between the concerns would be necessary, which Appellant fails to show. In order to find affiliation based on economic dependence, a concern must depend on another for a large

proportion of its revenues, and where the relationship amounts to a small percentage of revenues, no evidence of control exists. *Id.* at 7; citing *Size Appeal of Rockwell Medical, Inc.*, SBA No. SIZ-5559 (2014); *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007); *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244 (2011). Given that no subcontracting relationship exists between Mistral and the Plasan entities, as well as no purchase orders have been issued between the concerns, Mistral argues that the marketing agreement between them cannot lead to a finding of affiliation based on economic dependence. *Id.* at 8. Similarly, Appellant states the marketing agreement and Mr. Banai's previous role with Plasan North America are insufficient to find affiliation based on common ownership and the totality of the circumstances, as the Area Office found.

Mistral maintains that, contrary to Appellant's misstatements, ODF was an other than small business because of its status as a foreign company, and not based on the number of its employees. Mistral states that, as it showed to the Area Office, it engaged in an asset purchase from ODF and Oceana Technologies, not the acquisition of stock or ownership. Given that the employee count included those for MD, which accounted for any additional employees as a result of the asset purchase, Mistral argues Appellant once again fails to show the Area Office committed any error in finding Mistral was a small business concern. *Id.* at 10.

In rebuffing Appellant's claims that Mistral is affiliated with Elbit under the ostensible subcontractor rule, Mistral contends it has the manufacturing capabilities and past performance experience to perform the contract. Appellant makes certain contentions regarding Mistral's technical capabilities that fall under the purview of the CO and are related to Appellant's own proposal. Mistral maintains it will be performing the overall management, integration, systems engineering, and supervision required by the solicitation. In addition, Appellant cites to OHA cases to establish that when a number of subcontractors are utilized, no violation of the ostensible subcontractor rule exists if no subcontractor performs the majority of the work and the challenged concern maintains control over the contract management. *Id.* at 13; citing *Size Appeal of Hx5, LLC*, SBA No. SIZ-5331 (2012).

Mistral denies Appellant's "bald assertions" that Elbit will provide all system hardware, software, cabling and wiring. Rather, Mistral will source certain non-developmental items from Elbit for the MVSS, while still responsible for integrating the items into the observation pod and performing sub-system verification tests to meet contract requirements. The integration and testing are all performed at Mistral's integration facility. Mistral will manufacture some components, perform all system integration testing and will validate that all MVSS functions and requirements are met. *Id.* at 13. Thus, Mistral maintains it has the proper capabilities to perform the prime contractor duties of the contract, which include fabrication and integration facilities, and relevant past performance experience, as well as maintaining complete management supervision of the contract.

Finally, Mistral argues the Area Office was correct in finding no affiliation between Mistral and ESC BAZ. Appellant claims ESC BAZ will assist Mistral in performing the contract, yet ESC BAZ is not a subcontractor on this contract, nor was it involved in assisting Mistral with its proposal. Appellant's allegations stem from an article in 2011 regarding a possible agreement between the two concerns regarding electro-optical products. However, an agreement was

unsuccessful at the end of 2011 and no further activity between the concerns has taken place since.

#### E. Motion for New Evidence

On January 28, 2015, Appellant moved to supplement the record with new evidence. Specifically, Appellant seeks to introduce a web sourced printout of Mistral Group employees and LinkedIn profiles for Mistral and Plasan Sasa employees. Appellant argues that there is good cause to admit this evidence because it demonstrates ties between Mistral and Plasan Sasa, does not unduly enlarge the issues, and clarifies the facts and issues on appeal. Motion at 2.

Mistral opposes the motion. Mistral argues the information submitted by Appellant was available at the time of Appellant's protest. Further, Appellant could have submitted the new evidence to the Area Office after the initial size appeal was remanded back to the Area Office. Moreover, the new evidence is irrelevant as it contains errors and fails to establish any affiliation between Plasan Sasa and Mistral. Opposition at 2. The employee directory provided by Appellant is also out of date and contains a smaller number of employees than currently employed at Mistral.

### 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

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. 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 Appellant has not shown good cause to admit the new evidence. Appellant has not persuasively shown that it could not have submitted the new evidence to the Area Office with the protest or after the remand, and OHA has previously stated that it “will not accept new

evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). For these reasons, Appellant’s motion to supplement the record is DENIED, and the proffered evidence is EXCLUDED.

### C. Analysis

Appellant’s assignments of error fall into two categories. First, those raising allegations that Mistral is generally affiliated with other firms, and second, those alleging Mistral is affiliated with its subcontractors for the MVSS procurement under the ostensible subcontractor rule.

First, Appellant argues Mistral is affiliated with Plasan Sasa. In considering this issue, we must remember that Mistral’s size is determined as of the date of its submission of its initial offer, including price, June 13, 2013. 13 C.F.R. § 121.404(a). At that time, Mr. Banai no longer held the “ceremonial presidency” which Plasan Sasa had bestowed upon him to facilitate marketing in the U.S. This role ended in 2010. Therefore, there was no reason for the Area Office to investigate whether this position actually had some measure of control or influence over Plasan Sasa. (I note that Appellant’s citation to 13 C.F.R. § 121.702(c)(3) is inapposite, because this regulation applies only to the Small Business Innovation Research and Small Business Technology Transfer programs.)

There is no evidence of common ownership or common management between Mistral and Plasan Sasa. While there is a history of subcontracting between the concerns, there is no evidence that could support a finding of an identity of interest between them. There is a marketing agreement between the concerns, alluded to by the Area Office, and contained in the record, establishing that only 5% of Mistral’s sales are the result of the agreement between Plasan Sasa and Mistral. This is far less than the threshold required to find an identity of interest between two concerns. *Size Appeal of Phoenix Environmental Design, Inc.*, SBA No. SIZ-5595 (2014) (“In the past, OHA has held, as a matter of law, that one firm is economically dependent upon another if it derives 70% or more of its revenue from that firm.”); *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 8 (2013) (recognizing that “a minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture.”). The Area Office properly concluded that the ties between Mistral and Plasan Sasa did not support a finding that one concern could control or have the power to control the other, and thus found they were not affiliated. 13 C.F.R. § 121.103(a)(1). The fact that two concerns have agreements and subcontract between them is not sufficient to support a finding of affiliation, unless the amount of revenue generated is substantial enough to create an economic dependence by one concern upon the other. Identity of interest only arises when the parties have identical or substantially identical economic interests. 13 C.F.R. § 121.103(f). That is not the case here.

Appellant argues the Area Office erroneously relied on statements made by Mistral in response to the protest, which contained a signed SBA Form 355, instead of considering proclamations found in Mistral’s website. Thus, Appellant suggests the Area Office should have discarded statements made in Form 355, a sworn statement, including all the information the submitter incorporates by reference, signed under penalties of perjury, when determining

Mistral's size. However, in the past OHA has clearly stated that “more weight is given to the signed and sworn statements made by the challenged firm on its SBA Form 355” than to any unsupported statements. *Size Appeal of Silver Enterprises Associates, Inc.*, SBA No. SIZ-5124, at 6 (2010).

Appellant's reliance on *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011) for the proposition that “while a minimal amount of economic activity does not prevent a finding of clear fracture, the analysis does not stop there” is misplaced. That case involved concerns which were owned by members of the same family, and so affiliation was presumed unless a clear fracture was found between the concerns. *GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011) (finding no affiliation between two sibling-owned firms when the only ties between them were a handful of non-managerial employees, and subcontracts representing less than 5% of each firm's business). There is no such relationship between Mistral and Plasan Sasa.

Appellant also focuses on Mistral's acquisition of the assets of ODF and Oceana Technologies, arguing that this creates further affiliations. However, these firms were not acquired by Mistral, only their assets. There is no evidence that the either the ODF or Oceana assets are a substantial portion of Mistral's assets, and therefore the asset purchases are not a basis for taking into account the predecessor entities for determining size. 13 C.F.R. § 121.105(c); *Size Appeal of AIS Engineering, Inc.*, SBA No. SIZ-5348 (2012) (finding that § 121.105(c) applies only when a substantial portion of a challenged firm's assets are those of the predecessor entity.) Similarly, the asset purchase here did not create a situation where an entity ceased to exist and a new entity emerged with the new assets as the previous entity. *Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462, at 16 (2013); citing 61 Fed. Reg. 3280, 3282 (Jan. 31, 1996). Further, the fact that ODF was not an eligible small business is irrelevant to Appellant's size. ODF was not eligible because it was a foreign-owned firm. 13 C.F.R. § 121.105(a)(1). Nothing about Mistral's mere purchase of the assets of these concerns supports a finding that it is affiliated with them.

Second, Appellant alleges that Mistral is in violation of the ostensible subcontractor rule for this procurement. Under the ostensible subcontractor rule, a prime contractor and its subcontractor may be treated as affiliates if the subcontractor performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. 13 C.F.R. § 121.103(h)(4).

To determine whether firms have violated the ostensible subcontractor rule, all aspects of the relationship between the firms must be considered. *Id.* When determining whether affiliation exists under the ostensible subcontractor rule, SBA determines the size status of a concern as of the date of the final proposal revision submitted by the concern for the procurement. 13 C.F.R. § 121.404(d). Mistral submitted its final proposal including price on February 3, 2014. Any events occurring after that date are irrelevant. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010).

An ostensible subcontractor analysis is extremely fact-specific and is undertaken on the basis of the solicitation and the proposal at issue. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010). The Area Office must base its ostensible subcontractor determination

solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal and anything submitted therewith. Any assertions not in accord with the proposal are, therefore, immaterial.

The Area Office reviewed the solicitation and Mistral's proposal and found Mistral was performing the primary and requirements of the contract, and was not unusually reliant upon any subcontractor. After reviewing the record, I conclude that the Area Office was correct, and Appellant's arguments to the contrary are meritless.

Appellant asserts Mistral is unduly reliant upon ESC BAZ, but this assertion is pure speculation. Appellant's argument that the Area Office erred in relying upon Mistral's proposal is utterly wrongheaded. As noted above, it is precisely upon an analysis of the proposal in question that SBA bases an ostensible subcontractor determination. ESC BAZ has no role in Mistral's proposal, and therefore there is no basis whatsoever for finding it is an ostensible subcontractor in this case. I note here that Appellant has made no effort to obtain access to Mistral's proposal under a protective order in accordance with 13 C.F.R. § 134.205(e). Appellant's ostensible subcontractor arguments are therefore based upon speculation rather than analysis of the actual proposal in question.

This also applies to Appellant's arguments regarding Elbit, a firm which is one of Mistral's subcontractors on this procurement. Appellant's arguments are based upon nothing more than speculation, not upon Mistral's actual proposal. Elbit will provide some of the equipment and systems for the MVSS, but Mistral will provide more of the parts, assemble the system, and manage the entire project. It is clear from the record that Elbit's role here is that of a subcontractor. Appellant's speculations as to Elbit's role are entirely unsupported by the record. Elbit is performing only a portion of the work. Mistral is performing the major share, will be assembling the final product, and is overseeing the entire project. Under these circumstances, it is clear that Mistral is not in violation of the ostensible subcontractor rule. *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5609 (2014) (finding no violation of the ostensible subcontractor when the prime contractor is performing the majority of the work, manage the contract, and perform the primary and vital contract requirements.) Appellant has utterly failed to establish any factual or legal error in the size determination.

#### IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge