

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

**REDACTED DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

MEGEN-AWA 2, LLC

Appellant,

Appealed From  
Size Determination No 04-2017-021

SBA No. SIZ-5845

Decided: August 1, 2017

APPEARANCES

Craig S. King, Esq., Kevin R. Pinkney, Esq., Patrick R. Quigley, Esq., Arent Fox LLP, Washington, D.C., for Megen-AWA 2, LLC

Jonathan Hollingsworth, Esq., Hollingsworth & Washington, LLC, Centerville, Ohio, for Megen-AWA 2, LLC

Pamela J. Mazza, Esq., Antonio R. Franco, Esq., Patrick T. Rothwell, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Veterans Construction Coalition, LLC.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On May 9, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2017-021, concluding that Megen-AWA 2, LLC (Appellant), is not an eligible small business for the subject procurement. On appeal, Appellant contends that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is DENIED.

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<sup>1</sup> I originally issued this Decision under a Protective Order. After receiving and considering one or more timely requests for redactions, I now issue this redacted Decision.

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 timely filed the instant appeal on May 24, 2017. Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The RFP, Protest, and Prior SBA Proceedings

On June 9, 2016, the Department of the Air Force, Air Force Materiel Command (Air Force) issued Request for Proposals (RFP) No. FA8601-16-R-0010 for design-build and design-bid-build construction projects at Wright-Patterson AFB. The Contracting Officer (CO) set aside the contract for 8(a) concerns and assigned to it North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$36.5 million annual receipts size standard. Initial offers were due July 18, 2016.

On December 7, 2016, the CO awarded Contract No. FA8601-17-D-0001 to Appellant and notified Veterans Construction Coalition, LLC (VCC), an unsuccessful offeror, of the award. On December 14, 2016, VCC filed a size protest with the CO alleging that Appellant is not a small business concern. Specifically, VCC alleged the joint venturers making up Appellant are affiliated with each other “on the basis of identity of interest due to familial relationship and the totality of the circumstances”. (Protest at 2.) VCC also alleged common management affiliation. (*Id.* at 6.) Finally, in light of the \$76.5 million value of the contract, VCC alleged Appellant “must have unduly relied upon a large subcontractor to prepare its proposal and will rely upon the same subcontractor to perform this contract.” (*Id.* at 7.) The CO referred the protest to the SBA Office of Government Contracting, Area IV (Area Office), for a size determination.

On January 25, 2017, the Area Office issued Size Determination No. 04-2017-011, the first of an eventual three size determinations on Appellant. There, the Area Office concluded that Appellant is an eligible small business under the size standard for the instant procurement. On January 31, 2017, VCC appealed this size determination to OHA, and on February 9, 2017, OHA remanded it to the Area Office to resolve a question of whether the Area Office file was complete. *Size Appeal of Veterans Construction Coalition, LLC*, SBA No. SIZ-5812 (2017).

On February 14, 2017, the Area Office issued Size Determination No. 04-2017-15 (Second Size Determination), again concluding Appellant is an eligible small business. The Area Office found Appellant is a two-member joint venture consisting of AWA Business Corporation (AWA), an 8(a) concern, and Megen Construction Company, Inc. (Megen). (Second Size Determination at 2.) Megen is affiliated with two other concerns, CLEN, LLC and Sure Mechanical, LLC. (*Id.*) The Area Office stated it was unnecessary to determine whether AWA and Megen are affiliated with each other, citing to 13 C.F.R. § 121.103(h)(3)(ii), which provided an exception to affiliation for certain 8(a) joint ventures. (*Id.* at 2.) After aggregating both AWA and Megen with their respective affiliates and finding each joint venturer a small business, and applying the 8(a) joint venture exception, the Area Office concluded Appellant is an eligible small business for the instant procurement. (*Id.* at 3.)

On February 17, 2017, VCC appealed the Second Size Determination to OHA. On April 18, 2017, OHA issued its decision holding that the exception from affiliation cited in 13 C.F.R. § 121.103(h)(3)(ii) applied only to contract-specific affiliation issues and remanding the case back to the Area Office for further investigation. *Size Appeal of Veterans Construction Coalition, LLC*, SBA No. SIZ-5824, at 10 (2017).<sup>2</sup>

#### B. Size Determination No. 04-2017-021

On May 9, 2017, the Area Office issued Size Determination No. 04-2017-021 (Size Determination), this time concluding that Appellant is not an eligible small business for this procurement. The Area Office found there was no showing of clear fracture to rebut the presumption of affiliation based on family identity of interest between the owners, and the combined annual receipts of both joint venturers exceed the size standard.

The Area Office found Benjamin Nwankwo owns a majority interest in AWA. AWA owns a controlling interest in two affiliates: AWA-Megen Joint Venture (AWA-M), and AWA-Wilson Joint Venture (AWA-W). (Size Determination at 2.) Benjamin's brother Evans Nwankwo owns a majority interest in Megen. Although Benjamin once worked at Megen, he left there in 2009. Neither brother has any ownership or position in the other's firm. (*Id.* at 4.)

The Area Office found that Megen awarded a subcontract to AWA in 2016 valued at \$[xxx], representing nearly [xxx]% of AWA's 2015 receipts. (Size Determination at 4.) AWA and Megen entered into their first joint venture in 2012. AWA's share of the joint venture receipts amounted to [xxx]% of its 2015 income. (*Id.*) Even though the joint venture produced no income in 2013 or 2104, the 2015 income represented [xxx]% of AWA's receipts over the three years. (*Id.*)

AWA and Megen have created a second joint venture, the Appellant in the instant case. Both attribute all of their income to NAICS code 236220. The two brothers are both involved in the same charitable foundation, which the Area Office found to be another shared business interest. (*Id.*) The Area Office found that all of these factors demonstrated that Appellant had failed to establish that there is clear line of fracture between the two brothers. Accordingly, AWA and Megen are affiliated due to an identity of interest between them. (*Id.*)<sup>3</sup>

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<sup>2</sup> SBA eliminated the exception effective August 24, 2016. 81 Fed. Reg. 48558, 48578 (July 25, 2016). Citations to the exception — codified at 13 C.F.R. §§ 121.103(h)(3)(ii) and 124.513(b)(1) — refer to the version in effect on June 9, 2016, the date the Air Force issued the RFP. *See Size Appeal of Olgoonik Diversified Services, LLC*, SBA No. SIZ-5825, at 8, n.3 (2017); *Size Appeal of GASL, Inc.*, SBA No. SIZ-4191 (1996).

<sup>3</sup> The Area Office stated that VCC did not allege common management affiliation in its protest, and therefore did not consider this issue. In fact, AWA did make such an allegation on page six of its protest. However, because I am affirming the finding of affiliation under identity of interest, there is no need to further consider this issue.

The Area Office found no ostensible subcontractor rule violation because there is no subcontractor involved in the contract, and found no affiliation based on the totality of the circumstances because the only facts beyond the family relationship were insufficient. (Size Determination at 5.)

The Area Office found that because the combined annual receipts of Appellant's two venturers and Megen's affiliates exceed the applicable size standard, Appellant does not qualify as a small concern for the instant procurement. The Area Office did consider whether Appellant qualified under an exception from affiliation for joint venturers submitting offers in a competitive 8(a) procurement in which at least one member is an 8(a) firm. 13 C.F.R. § 124.513(b). (*Id.* at 6.) The Area Office concluded the exception did not apply because AWA, the only 8(a) participant in the joint venture, exceeds one-half of the size standard applicable to the instant procurement. Accordingly, Appellant is other than small for this procurement.

### C. Appeal

On May 24, 2017, Appellant filed the instant appeal. Appellant asserts there is a clear line of fracture between AWA and Megen, and therefore the Area Office erred in finding them affiliated based on family identity of interest between them. (Appeal at 6-7.) Appellant argues the factors to be considered in determining whether there is a clear line of fracture between concerns are whether the concerns have common ownership, common management, shared officers, directors, employees, facilities or equipment; whether the concerns have different customers or lines of business, whether there is financial assistance, loans or significant subcontracting between the concerns, and whether the family member participate in multiple businesses together. (Appeal at 6, citing *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5442 (2013); *Size Appeal of GPA Technologies*, SBA No. SIZ-5307 (2011).)

Appellant asserts AWA and Megen do not share officers, employees, facilities, or equipment. The two concerns have different customers and lines of business. (Appeal at 7-8.) While they both operate within NAICS code 236220, Megen has a much broader customer base, and services multiple industries in which AWA does not participate, including schools and universities, hospitals, private business, and state and local governments, while AWA's customer base is mainly Federal government. (*Id.* at 8-9.) There is no financial assistance and no loans between AWA and Megen. There is not, and never has been, any common ownership of the two concerns. (*Id.* at 9.)

Appellant further argues that the subcontracting between Megen and AWA is not sufficient to support a finding of no clear fracture. The Area Office erred in considering the 2016 subcontract from Megen to AWA. The 2016 contract produced no receipts within the applicable three-year measuring period. (*Id.* at 9-10.) Thus, Appellant argues the Area Office should not have considered this subcontract. (*Id.* at 10, citing *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013).) Further, the 2016 subcontract, which AWA won through a competitive bidding procedure, produced only \$[xxx] in receipts, a figure equal to [xxx]% of AWA's receipts, and [xxx]% of Megen's. This level of subcontracting is too small to base affiliation on. (*Id.* at 11, *Size Appeal of GPA Technologies*, SBA No. SIZ-5307 (2011).)

Appellant discloses there was a 2014 subcontract from Megan that had been inadvertently omitted from Appellant's response to the protest. This subcontract generated \$[xxx] in receipts for AWA in 2014, [xxx]% of its receipts for the year, and [xxx]% of Megan's receipts. In 2015, AWA received \$[xxx] from the subcontract, [xxx]% of AWA's receipts and [xxx]% of Megan's receipts. Over the course of three-year period used to determine size, this subcontract accounted for [xxx]% of AWA's receipts, and [xxx]% of Megan's. (*Id.* at 12-13.)

Appellant maintains the 2014 and 2016 subcontracts represent only a small portion of the receipts of both AWA and Megan, and thus do not support a finding of no clear fracture. (*Id.* at 13-14.)

AWA's Administrative Assistant states that in 2015, AWA's receipts from its 2012 joint venture with Megan represented [xxx]% of its receipts, and [xxx]% in 2016, for a total of [xxx]% for the period used to determine size. She further discloses that AWA had two subcontracts from Megan in the 2012-2016 period. These represented [xxx]% of receipts in 2014, [xxx]% in 2015, and [xxx]% in 2016, for an average of [xxx]% for the period used to determine size. (Exhibit 13, at 1-3.)

Appellant also argues the Area Office further erred as a matter of law by disregarding the three contracts over two years rule in 13 C.F.R. § 121.103(h). (Appeal at 15-20.) In Appellant's view, where there are no more than three joint venture contracts over a two-year period, none should be counted for purposes of determining affiliation. (*Id.*)

Appellant argues the Area Office used an erroneous legal standard for identifying an identity of interest. The Area Office found that any joint efforts between AWA and Megan, or Evans and Benjamin, warranted a finding of affiliation based upon identity of interest. Appellant maintains that some level of economic activity between two concerns is consistent with a finding of clear fracture that rebuts the presumption of identity of interest. Here, Appellant maintains that the minor amount of economic activity between AWA and Megan established a clear fracture between the brothers and their economic interests. (*Id.* at 20-21.)

Appellant concludes that the Area Office's treatment of Evans's and Benjamin's involvement in the same charitable organization as an indicator of identity of interest is also error. (*Id.* at 22-23.)

Appellant submits with its appeal eight exhibits as new evidence. Exhibits 2 and 3 are declarations from Evans and Benjamin Nwamkwo stating that Appellant inadvertently failed to include in its submissions in response to the protest the 2014 subcontract awarded by Megan to AWA. These statements include proposed revisions to the SBA Form 355s to correct that oversight. Exhibits 7, 8, and 11 are letters from business associates to the effect that Megan and AWA operate separately. Exhibit 9 is Megan's customer list. Exhibits 12 and 13 are declarations from Megan's and AWA's financial staff showing the impact of the 2014 subcontract on both companies' receipts.

#### D. Response to the Appeal

On June 9, 2017, VCC responded to the appeal. VCC argues that AWA and Megan are presumed affiliated based on their owners' family relationship, and that there is no clear fracture between them because they continue to work together. Although Benjamin established AWA in 1997, he continued to work for Megan for over 10 years and was its vice president in 2009. (Response at 8.) Their 2012 joint venture, AWA-M, accounted for an average of [xxx]% of annual receipts in the 2013-2015 period, with [xxx]% of AWA's 2015 receipts. (*Id.* at 8-9.) AWA and Megan worked together as a joint venture to bid on the instant procurement. (Response at 6-7.) Additionally, the 2014 and 2016 subcontracts show a continuing business relationship between them. (*Id.* at 8-9.)

VCC also maintains that AWA and Megan are in the same line of business because both attribute all of their receipts to the same NAICS code. (*Id.* at 9-10.) While they do not share facilities, they do share AWA's office for their joint venture. (*Id.* at 10.) VCC also contends that both brothers' involvement in the same charity is “another shared business interest” between them. (*Id.* at 10-11 and n.12 (emphasis in original), citing *Size Appeal of CHT, Inc.*, SBA No. SIZ-2383 (1986).)

VCC asserts the Area Office properly considered the 2016 subcontract because it was signed prior to Appellant's self-certification. (*Id.* at 12.) VCC also asserts the Area Office properly considered the joint ventures between Megan and AWA, and that Appellant's reading of the “3-in-2 rule” ignores the fact the regulation states that a long standing relationship between joint venture partners will lead to a finding of affiliation between them. (*Id.* at 13.)

The Area Office did identify the factors it considered in determining there was no clear fracture between the brothers' interests, and they are sufficient to sustain the size determination. (*Id.* at 16-18.) VCC concludes by noting that a memorandum in the file states that there were errors in previous size determinations which found AWA was a small business. VCC maintains that AWA is other than small, and that this appeal amounts to mere disagreement with the Area Office's conclusion. (*Id.* at 16-19.)

Also on June 9, 2017, VCC moved to strike pages 21-24 of the appeal petition for overlength and to exclude Exhibits 7, 8, 9, 11, 12, and 13 from the record. VCC notes Appellant failed to file a motion to admit new evidence, as required by the regulation. VCC does not object to the admission of the information Appellant submits to correct its earlier oversight in failing to include the 2014 subcontract.

#### E. Subsequent Pleadings

On June 23, 2017, Appellant submitted a revised appeal petition of 20 pages, together with an Opposition to the Motion to Strike. Appellant formally moves for the admission of its new evidence.

On June 30, 2017, VCC opposed Appellant's Motion to Admit Evidence. VCC asserts the Motion is untimely, being filed after the close of record, and Appellant has not established good cause for its submission, or for the failure to submit the new evidence to the Area Office.

### III. Discussion

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

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).

OHA will generally not consider evidence not previously presented to the Area Office. 13 C.F.R. § 134.308(a). 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).

Here, the evidence Appellant submits with its initial appeal is meant to correct inadvertent errors Appellant made in submitting in response to the protest and SBA Form 355. Appellant's coming forward to correct these errors is commendable, and puts into the record information that should have been there initially. VCC is not objecting to the submission of such evidence. Accordingly, I ADMIT Exhibits 2 and 3, which are the declarations of Evans and Benjamin Nwankwo, and Exhibits 12 and 13, which provide the data on which Exhibits 2 and 3 are based. I EXCLUDE the remaining new evidence, Exhibits 7, 8, 9, and 11, because this evidence was not initially accompanied by a motion to admit it, and because it is information which could have been submitted to the Area Office.

I DENY VCC's motion to strike pages 21-24 of the Appeal.

#### B. Analysis

The issue here is whether the Area Office correctly found AWA and Negan generally affiliated under the identity of interest rule because the owners of the two firms are brothers. SBA's regulation provides:

Affiliation may arise among two or more persons with an identity of interest. 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).<sup>4</sup>

OHA has extensive case precedent interpreting this regulation as creating a rebuttable presumption that close family members have identical interests and must be treated as one person. *See, e.g., Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014). OHA has explained that “[t]he regulation creates a rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions.” *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 12 (2015) (quoting *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984).) “The presumption arises, not from the degree of family members' involvement in each other's business affairs but, rather, from the family relationship itself.” *Id.* (quoting *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295 (1998).) The underlying rationale for the rule is that persons will, because of their common interests, act in concert as one. *Size Appeal of RBG Group, Inc.*, SBA No. SIZ-5351, at 7 (2012). When one concern is owned and controlled by one brother, and the other owned and controlled by another brother, the two concerns are presumed to be affiliated by an identity of interest. *Size Appeal of Gregory Landscape Services, Inc.*, SBA No. SIZ-5817 (2017); *Size Appeal of Quigg Bros., Inc.*, SBA No. SIZ-5786 (2016).

It is not necessary to conclude that one concern exercises near-total control over another in order to find affiliation through family relationships. Rather, the fact of the family relationship creates a presumption that the family members have identical interests and so SBA must treat them as one person. The burden then shifts to the challenged concern to rebut that presumption. *Size Appeal of CTSI-FM, LLC*, SBA No. SIZ-5809, at 9 (2017).

A challenged concern may rebut the presumption of identity of interest if it shows “a clear line of fracture among the family members.” *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 17 (2006).) “A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged.” *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217, at 6 (2011). “Factors that may be pertinent in examining clear line of fracture include whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and

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<sup>4</sup> SBA recently has revised this regulation to include more specific language defining which family relationships give rise to an identity of interest. The revised regulation became effective June 30, 2016. 81 Fed. Reg. 34243 (May 31, 2016). However, because the RFP was issued before June 30, 2016, the prior version of the regulation governs this case. *Size Appeal of GASL, Inc.*, SBA No. SIZ-4191 (1996).



whether the family members participate in multiple businesses together.” *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR). A minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture. *Size Appeal of RBG Group, Inc.*, SBA No. SIZ-5351, at 7 (2012); *accord Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307, at 6 (2011).

Here, AWA is owned and controlled by Benjamin Nwankwo, and Megan is owned and controlled by his brother, Evans Nwankwo. Therefore, the two concerns are presumed affiliated under the identity of interest rule. The issue before me is, whether Appellant has met its burden of rebutting the presumption by showing there is a clear line of fracture between the two concerns. The Area Office pointed to the fact that both concerns are in the same line of business under NAICS code 236220; the 2012 joint venture (AWA-M), which provided AWA with [xxx]% of its 2015 receipts; the instant joint venture (Appellant); the 2016 subcontract; and the involvement of the two brothers in the same charity. The Area Office thus concluded that there was no clear fracture between the two concerns. Appellant has commendably added the 2014 subcontract, which it had inadvertently failed to disclose to the Area Office.

Appellant argues that the small amount of receipts attributable to the subcontracts between the firms establish the clear fracture, largely relying on *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013) and *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011). In *Carwell*, clear fracture was found when two firms owned by a mother and daughter had only a few contracts between them, amounting to a small percentage of each concern's receipts. Specifically, the protested concern subcontracted less than 10% of its receipts in one year to the alleged affiliate, and contracts going the other way decreased from less than 5% of the protested concern's receipts to less than 1% over three years. *Carwell* at 2, 8. In *GPA Technologies* clear fracture was found between two concerns owned by a brother and sister where the concerns operated in different NAICS codes and the subcontracting between the firms amounted to a small percentage of each concern's receipts. Specifically, the protested concern subcontracted 4.5% of its receipts one year and 4.0% of its receipts the next to the alleged affiliate, and they had a consulting agreement covering smaller amounts. *GPA Technologies* at 2, 8.

Here, however, AWA and Megan are in the same line of business, operating under the same NAICS code. They have worked together as joint venturers in AWA-M since 2012, and in 2015, AWA's share of joint venture income represented [xxx]% of its 2015 receipts. The separate 2016 subcontract from Megan was [xxx]% of AWA's 2015 receipts, and the separate 2014 subcontract was for [xxx]% of AWA's 2014 receipts. This amount and frequency of business between the two concerns is not minimal, and does exceed the amounts OHA had found acceptable in *Carwell* and *GPA Technologies*. There has been continuing business between AWA and Megan over time, demonstrating there is no clear fracture between them. Further, Appellant is the second joint venture between the two concerns, and the fact that they propose to continue to work together on the contract at issue here almost mandates the finding of no clear fracture between the Nwankwo brothers. *See Size Appeal of ProSol Associates, LLC*, SBA No. SIZ-5813 (2017) (no clear fracture where protested concern was using alleged affiliate as subcontractor on the subject procurement); *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351

(2012) (one factor in finding no clear fracture was protested concern using alleged affiliate as subcontractor on the subject procurement).

Appellant's argument that the 2016 subcontract should not be considered because it is outside the three-year measuring period for determining annual receipts is meritless. SBA calculates a concern's annual receipts by taking an average of its receipts over its three most recently completed fiscal years. 13 C.F.R. § 121.104(c)(1). SBA's regulation on affiliation, at 13 C.F.R. § 121.103 contains no such time limitation. Appellant's citation to *Carwell* is likewise unavailing, because there the subcontracting that would take place after the three-year measuring was only speculative while in the instant case the subcontracting actually occurred.

Further, Appellant's reliance on the three-in-two rule (13 C.F.R. § 121.103(h)) is entirely misplaced. The three-in-two rule deals with the issue of affiliation between concerns based on their participation in joint ventures together. That is not the issue here. Here the issue is whether AWA and Megen are affiliated under the identity of interest rule (13 C.F.R. § 121.103(f)) because their principals are brothers. AWA and Megen were not found affiliated because of their participation in joint ventures with each other. AWA and Megen were presumed affiliated based on their principals' family relationship. 13 C.F.R. § 121.103(f). The fact that they participate in joint ventures together, including the joint venture to perform the instant procurement, is fatal to Appellant's attempt to rebut that presumption. However, the joint ventures were not the basis for finding affiliation, and so § 121.103(h) is not applicable.<sup>5</sup>

Accordingly, I conclude Appellant has failed to establish that the Area Office's determination that AWA and Megen are affiliated was based on any clear error of law or fact, and thus I must deny the instant appeal and affirm the size determination.

#### IV. Conclusion

For the above reasons, the appeal is DENIED. Appellant Megen-AWA 2, LLC, is not an eligible small business for the subject procurement.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge

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<sup>5</sup> The Nwankwo brothers' involvement in a charity is irrelevant to the issue of clear fracture. See *Size Appeal of Lajas Industries, Inc.*, SBA No. SIA-4285 (1998).