Cite as: *Size Appeal of Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions*, SBA No. SIZ-5848 (2017)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Lost Creek Holdings, LLC d/b/a All-STAR Health Solutions, Appellant, RE: LifeHealth, LLC Appealed From Size Determination Nos. 05-2017-022 and -025	SBA No. SIZ-5848 Decided: August 28, 2017

APPEARANCES

Corey L. Tomlinson, Esq., Gressley, Kaplin & Parker, LLP, for Appellant Lost Creek Holdings, LLC

Edward J. Tolchin, Esq., Offit Kurman, for LifeHealth, LLC

Sam Q. Le, Esq., Office of General Counsel, Small Business Administration

DECISION

I. Procedural History and Jurisdiction

On June 1, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office), issued Size Determination Nos. 05-2017-022 and 05-2017-025, finding LifeHealth, LLC (LifeHealth), is an eligible small business for the procurements at issue.

Lost Creek Holdings, LLC, d/b/a All-STAR Health Solutions (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 that LifeHealth is not an eligible small business for the instant procurements. For the reasons discussed *infra*, I affirm the size determinations in part, and reverse in part, and remand the matter to the Area Office for new size determinations.

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 determinations, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Size Determination No. 05-2017-025

On March 3, 2017, the Florida Army National Guard (ANG) issued Request for Quotations (RFQ) No. W911YN-17-T-0024 for Dental Services during April and May, 2017 at outpatient care centers in Florida. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 621498, All Other Outpatient Care Centers, with a corresponding $20.5 million annual receipts size standard, as the applicable code. This acquisition is set-aside for Women-Owned Small Business Concerns (WOSB) eligible under the Women-Owned Small Business Program. On March 9, 2017, LifeHealth submitted its quote in response to the RFQ. On that same day, the CO notified unsuccessful offerors that LifeHealth was the apparent successful offeror.

On March 16, 2017, Appellant protested the award to LifeHealth. Appellant asserts LifeHealth is a "front" for, and thus affiliated with, Dentrust Dental International, Inc. (Dentrust), its subcontractor on this procurement, and Dentrust's affiliates, ACC Health, LLC and Onsite Health, LLC. (March 16, 2017 Protest at 1.) The protest alleged LifeHealth is affiliated with Dentrust under the ostensible subcontractor rule, because LifeHealth is unusually reliant upon Dentrust to perform the contract. (*Id.* at 2-7.) Appellant further alleged Dentrust is not a small business. (*Id.* at 7 and Exs. H & I.) Appellant alleged LifeHealth itself is not a small business, because it advertises that it performs contracts under 26 separate NAICS codes. (*Id.* at 7-8.) The CO referred the protest to the SBA Area Office.

On April 18, 2017, the Area Office issued Size Determination No. 05-2017-020, finding LifeHealth is an eligible small business for the procurement at issue. On May 1, 2017, Appellant appealed the size determination to OHA. On May 12, 2017, I remanded the matter to the Area Office on SBA's motion. *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5831 (2017).

On June 1, 2017, the Area Office issued, in response to the remand, Size Determination No. 05-2017-025, again finding LifeHealth to be an eligible small business. The Area Office found that Adam Langstaff, LLC, was formed in 2002, and changed its name to LifeHealth in 2006. LifeHealth is owned 51% by Margot Adam Langstaff and 49% by Elisa Jane Hamill, who are its only managers and directors. LifeHealth became a participant in SBA's 8(a) program in 2013. (Size Determination No. 05-2017-025, at 4.) The Area Office further found that Ms. Langstaff has the power to control LifeHealth, and that its 2014, 2015, and 2016 annual receipts do not exceed the $20.5 million size standard. (*Id.*)

In addressing the ostensible subcontractor rule allegation, the Area Office concluded that, because both LifeHealth and Dentrust are small businesses, there was no need to perform an ostensible subcontractor analysis. The Area Office noted that Dentrust was found to be a small business for the $20.5 million size standard in a size determination issued by Area Office II on March 31, 2017. That size determination used Dentrust's annual receipts for 2014, 2015, and

2016 to determine its size, the same years as are applicable here. (*Id.* at 3, 5, citing Size Determination No. 02-2017-062.) Thus, the Area Office reasoned, even if it finds LifeHealth and Dentrust affiliated as joint venturers under the ostensible subcontractor rule, because each concern is a small business, their joint venture also would be considered a small business under 13 C.F.R. § 121.103(h)(3)(i). (Size Determination No. 05-2017-025, at 5.)

The Area Office also considered whether LifeHealth and Dentrust are affiliated based on an identity of interest because LifeHealth has provided 25 subcontracts to Dentrust. The Area Office determined that identity of interest cannot be found on the basis of contracts provided by a challenged concern to an alleged affiliate unless it rises to the level of economic dependence. (*Id.* at 6, citing *Size Appeal of Logmet, LLC*, SBA No. SIZ-5155 (2010).) Here, LifeHealth is not a subcontractor for Dentrust on any contract, and has received no revenue from Dentrust. Thus, LifeHealth is not economically dependent upon, and therefore not affiliated with Dentrust under the identity of interest rule. (Size Determination No. 05-2017-025, at 6.)

B. Size Determination No. 05-2017-022

On April 9, 2017, the Florida ANG issued RFQ No. W911YN-17-T-0032 for Dental Services at four Florida locations. The CO designated NAICS code 621498, All Other Outpatient Care Centers, with a corresponding $20.5 million annual receipts size standard as the applicable code. This acquisition is set-aside for WOSBs eligible under the SBA's Women-Owned Small Business Program. On April 27, 2017, LifeHealth submitted its quote in response to the RFQ. On April 28, 2017, the CO notified unsuccessful offerors that LifeHealth was the apparent successful offeror at three of the locations.

On May 3, 2017, Appellant protested the award to LifeHealth. Appellant again alleged that LifeHealth is a "front" for Dentrust, and is unusually reliant upon Dentrust to perform the contract and is thus affiliated with Dentrust under the ostensible subcontractor rule. (May 3, 2017 Protest, at 1-8.) Appellant further alleged Dentrust and LifeHealth are not similarly situated entities, because Dentrust is not a women-owned small business. (*Id.* at 8-9.) Appellant alleged LifeHealth and Dentrust share an identity of interest, because LifeHealth could not perform its contracts without Dentrust's support. (*Id.* at 9-11.) Appellant also maintained LifeHealth and Dentrust are generally affiliated because they had participated in a large number of "implicit joint ventures". (*Id.* at 11.) The CO referred the protest to the SBA Area Office.

On June 1, 2017, the Area Office issued Size Determination No. 05-2017-022, finding LifeHealth to be an eligible small business. As in Size Determination No. 05-2017-025, the Area Office found Margot Adam Langstaff and Elisa Jane Hamill are its only owners, managers, and directors, and that LifeHealth is an 8(a) participant. (Size Determination No. 05-2017-022, at 3-4.) The Area Office also found Ms. Langstaff has the power to control LifeHealth, and that its 2014, 2015, and 2016 annual receipts do not exceed the $20.5 million size standard. (*Id.* at 4.)

Regarding the ostensible subcontractor rule allegation, the Area Office concluded, as it had in Size Determination No. 05-2017-025, that because both LifeHealth and Dentrust are small under the applicable size standard, even if found to be joint venturers under the ostensible subcontractor rule, their joint venture would be considered a small business under 13 C.F.R. §

121.103(h)(3)(i). Thus, ostensible subcontractor analysis is unnecessary. (*Id.* at 4-5.) As for Appellant's allegation that LifeHealth and Dentrust are affiliated under the identity of interest rule because LifeHealth provides Dentrust with subcontracts and is therefore economically dependent on Dentrust, the Area Office again found no affiliation because LifeHealth receives no revenue from Dentrust. (*Id.* at 5-6.)

Finally, regarding Appellant's allegation that the two concerns are affiliated because of "implicit joint ventures" in excess of the "3-in-2" rule, the Area Office determined that the "3-in-2" rule applies only to procurements where the offeror submits its offer as a joint venture, and there are none here. (*Id.* at n.9.)

C. The Appeal Petition

On June 15, 2017, Appellant filed the instant appeal of both size determinations. With its appeal, Appellant included an updated version of the spreadsheet of FPDS-NG data it had submitted with its protest (Exhibit 3), two papers from a civil lawsuit (Exhibits 4 and 5), a one-page document from FPDS-NG (Exhibit 6), and a March 7, 2016 email (Exhibit 7). Exhibits 4, 5, 6, 7, and part of Exhibit 3 are evidence presented for the first time on appeal.

Appellant first argues that the Area Office erred in determining that Dentrust could not be an ostensible subcontractor for LifeHealth, because the two concerns operate as a *de facto* joint venture. Appellant maintains SBA's regulations explicitly prohibit unidentified and unregistered *de facto* joint venture arrangements to benefit from the joint venture exceptions to affiliation and to avoid the ostensible subcontractor rule. To qualify for the general affiliation and ostensible subcontractor rule exceptions, LifeHealth and Dentrust must meet at least three conditions. First, they must execute a written joint venture agreement; second, the joint venture must do business under its own name; and third, it must be identified as a joint venture in the System for Award Management (SAM). (Appeal at 4-6, citing 13 C.F.R. § 121.103(h).) LifeHealth and Dentrust meet none of these conditions, and the Area Office erred in disregarding them and in its finding that the exception to affiliation applies. (Appeal at 6.) Because LifeHealth and Dentrust do not meet these conditions, the Area Office should have found them affiliated. Further, the regulation provides that in the case of unregistered and unidentified *de facto* joint ventures, SBA may determine that the relationship between the prime and its subcontractor is a joint venture, and that affiliation exists between the two concerns. (*Id.* at 6, citing 13 C.F.R. § 121.103(h).)

Appellant argues the Area Office ignored the provision in the regulation that no joint venture may be awarded more than three contracts over a two year period; that the same concerns may create additional joint ventures, but that at some point "a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them." (Appeal at 6, quoting 13 C.F.R. § 121.103(h).) Appellant argues that such a relationship exists between LifeHealth and Dentrust, where Dentrust has performed 34 of LifeHealth's contracts, representing nearly 82% of LifeHealth's revenues, since March 25, 2016. (Appeal at 6, citing FPDS-NG data at Ex. 3.) Appellant further asserts that the Area Office erred in finding the "3-in-2" rule applies only where an offeror has submitted an offer as a joint venture. (Appeal at 7.)

Appellant characterizes the Area Office's determinations as creating an unregulated "doughnut hole" between the joint venture identification and registration requirements and the ostensible subcontractor rule, essentially nullifying these provisions. (*Id.* at 7-8.). Conceivably, LifeHealth and Dentrust could perform an unlimited number of contracts as *de facto* joint venturers, in violation of the purpose and language of 13 C.F.R. § 121.103. (*Id.* at 8.)

Appellant also argues a concern is affiliated with its subcontractor when it relies upon the subcontractor for essentially its entire workforce. (*Id.* at 11, citing *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011).) Appellant points to emails it submitted with its protest which, it argues, establish Dentrust is performing almost entirely contracts awarded to LifeHealth in Florida. (*Id.* at 11-12.) Appellant maintains LifeHealth and Dentrust are affiliated under the "seven factors test". (Appeal at 12.)

Second, Appellant asserts the Area Office erred in finding LifeHealth and Dentrust do not share an identity of interest due to economic dependence. Appellant argues that Dentrust has performed nearly 74% of LifeHealth's military readiness contracts, constituting nearly 82% of LifeHealth's revenues. Appellant maintains this level of contracting violates the "70% rule" establishing economic dependence by one firm upon another. (*Id.* at 8-10, citing Ex. 3 and 13 C.F.R. § 121.103(f)(2).)

Appellant disputes the Area Office's conclusion, following *Logmet*, that LifeHealth is not economically dependent upon Dentrust because it does not receive any revenue from Dentrust. The fact that LifeHealth relies upon Dentrust to perform work as a subcontractor, and thus that LifeHealth is only entitled to payment because of the work Dentrust performs, means LifeHealth is economically dependent upon Dentrust. (*Id.* at 12.) In support, Appellant cites to *Size Appeal of Core Recoveries, LLC*, SBA No. SIZ-5723 (2016), *Size Appeal of Dorado Services, Inc.*, SBA No. SIZ-5515 (2013), and others. (Appeal at 8-11.)

Appellant goes on to argue that Dentrust itself is not a small business, despite the Area Office's findings in Size Determination Nos. 02-2017-022 and -025. Appellant maintains Dentrust is affiliated with ACC Health, LLC, and Onsite Health, Inc. Appellant alleges Dentrust has purchased the assets of Onsite Health, Inc., and that concern's size must be considered in establishing Dentrust's size. (*Id.* at 13-16.)

As relief, Appellant requests OHA to conclude the Area Office clearly erred in finding LifeHealth an eligible small business, and to reverse or remand both size determinations. Appellant further demands that OHA refer this matter to an SBA debarment and suspension official. (*Id.* at 16.)

D. Comments of SBA's Office of General Counsel

On July 7, 2017, in response to my Order requesting Agency comments, SBA's Office of General Counsel (OGC) filed comments in support of the size determinations. SBA confirms the Area Office's determinations that, under SBA's affiliation rules, a prime-subcontractor

relationship that is treated as a joint venture under the ostensible subcontractor rule may still be an eligible small business, provided both concerns are small. (OGC Comments at 1.)

SBA's regulations provide that a joint venture of two or more concerns may offer as a small business "so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract." (*Id.*, quoting 13 C.F.R. § 121.103(h)(3)(i).) Thus, the Area Office properly determined that under this regulation a small prime contractor whose small subcontractor might be found to be an ostensible subcontractor, would still qualify as a small business, whatever their aggregate receipts might be. (OGC Comments at 1.)

SBA maintains this interpretation is further supported by the fact the joint venture regulation does not require that a joint venture between two or more small businesses be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business. (*Id.* at 2, citing 13 C.F.R. § 125.8(b)(1).) SBA argues the regulation should be read also to apply to a prime-sub relationship which would be treated as a joint venture under the ostensible subcontractor rule. (OGC Comments at 2.)

SBA asserts that under the most recent revision of 13 C.F.R. § 121.103(h), SBA no longer aggregates the size of joint venture participants. There, the preamble states SBA proposed to remove the restriction on the type of contract for which small businesses may joint venture without being affiliated for size determination purposes. SBA did this for several reasons: to encourage more small business joint venturing; to be consistent with the results of the Small Business Teaming Pilot Program indicating a need for more small business opportunities; and to better align the regulation with the new provisions of the National Defense Authorization Act (NDAA) governing the limitations on subcontracting. These provisions allow a small business prime contractor to subcontract to as many similarly situated subcontractors as desired. If a small business prime contractor can subcontract significant portions of the contract to one or more other small businesses without being affiliated, SBA believes similar treatment should be accorded to joint ventures. (*Id.*, citing 81 Fed. Reg. 34243, 34252 (May 31, 2016).)

SBA concedes that, in revising the regulations, SBA "also should have changed" 13 C.F.R. § 121.103(h)(2), which affiliates joint venturers for that contract, and 13 C.F.R. § 121.103(h)(4) which affiliates a contractor with its ostensible subcontractor for that contract. (OGC Comments at 2-3.) SBA maintains that retaining these provisions "was merely an oversight," and these provisions of the regulation should be disregarded as "vestiges" of SBA's prior regulatory scheme. (*Id.* at 3.) SBA asserts it will delete these provisions in the near future. SBA intends that joint ventures be treated as a small business for any small business procurement provided all the venturers are small. (*Id.* at 3.)

Here, SBA asserts the aggregate receipts of LifeHealth and Dentrust do not exceed the size standard, based upon the record here and that in *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5839 (2017), where OHA affirmed two recent size determinations that Dentrust is a small business. (*Id.* at 3.)

SBA disputes Appellant's contention that this interpretation creates a "doughnut hole" by allowing a joint venture to qualify as small without a written agreement and without satisfying

the "3-in-2 rule." The joint venture agreement need not be in any specific form or contain any specific conditions to qualify as small. Further, the "3-in-2 rule" is not applicable here because the parties deemed to be in a joint venture under the ostensible subcontractor rule are affiliated only for the specific contract. (OGC Comments at 3, citing 13 C.F.R. § 121.1010(b).)

Further, SBA notes the relationship between LifeHealth and Dentrust is documented in a teaming agreement which provides LifeHealth will perform 51% of the work. (OGC Comments at 3-4.) While SBA does not explicitly state so, it appears to assert there is no ostensible subcontractor rule violation here; despite the fact the Area Office performed no analysis under the rule.

E. LifeHealth's Response

On July 17, 2017, LifeHealth responded to the appeal. First, LifeHealth asserts it can be affiliated with Dentrust in a joint venture and still be eligible for this procurements, because Dentrust is a small business. (Response at 1.) Appellant's ostensible subcontractor contention is meritless. Appellant invents the concept of a *de facto* joint venture. (*Id.* at 2.) LifeHealth argues that Appellant's contention a joint venture must be in writing, do business in its own name, and be registered in SAM is erroneous, because these requirements are not exclusive. SBA may also determine that the relationship between a prime and a subcontractor is a joint venture, and that affiliation exists. (*Id.* at 3.) The regulations provide for an exception to affiliation for joint ventures as long as each firm is small. (*Id.* at 3-4.)

LifeHealth further argues Appellant's contention the Area Office's interpretation would allow firms to avoid the "3-in-2 rule" is meritless, and there is no evidence of any such avoidance here. (*Id.* at 4.) Appellant's argument creates a logical inconsistency. The Small Business Act, as amended by the 2013 NDAA, provides that contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted for the purposes of determining compliance with the limitation on subcontracting. (*Id.* at 5, citing 15 U.S.C. § 657s.) Similarly, two small businesses may joint venture and be exempt from the affiliation rules even if one small business performs 99% of the work. (*Id.*, citing 13 C.F.R. § 121.103.) Yet Appellant would find such an arrangement improper as a "*de facto joint* venture". (Response at 5.)

LifeHealth maintains the Area Office's interpretation created no "doughnut hole" which would permit evasion of the ostensible subcontractor rule. If LifeHealth and Dentrust actually joint venture, they cannot be deemed large so long as each is small. (*Id.* at 6.) LifeHealth argues the only issue is whether Dentrust is small. (*Id.* at 7.)

Second, LifeHealth asserts that it has no identity of interest with Dentrust. Appellant's figures on LifeHealth's contracts consider only its government contracts, and not its commercial contracts and subcontracts with government prime contractors. LifeHealth points to its submission to the Area Office to document that Dentrust is not performing the majority of work under LifeHealth's contracts. (*Id.* at 7-9, citing LifeHealth May 10, 2017 letter, Attachment G.) LifeHealth is not dependent on Dentrust's workforce, as LifeHealth performs the majority of work on its contracts, and has substantial business unrelated to Dentrust. (Response at 9.)

LifeHealth further argues Appellant's allegations of Dentrust's affiliation with other concerns is a new argument raised on appeal, and thus not properly before OHA. (*Id.* at 10-12.) Finally, LifeHealth requests that Appellant be sanctioned for its repetitive and inaccurate protests, and that it not be permitted to file protests against LifeHealth for three years.

F. Appellant's Response to OGC Comments

On July 17, 2017, Appellant responded to SBA's comments. Appellant concedes that if both LifeHealth and Dentrust were eligible to serve as prime contractors on these procurements, their *de facto* joint venture would not run afoul of the regulations. (Appellant's Response at 4.) However, these contracts are WOSB set-asides, and Dentrust is not a WOSB. Therefore, the concerns are not similarly situated and must be found affiliated. Thus, LifeHealth is other than small. (*Id.* at 3-4.)

Appellant reiterates its contention that the Area Office's interpretation of the regulation would permit a "doughnut hole" which would allow evasion of the "3-in-2" rule at 13 C.F.R. § 121.103(h). Appellant further reiterates its argument that Dentrust is performing most of the work on LifeHealth's contracts and, therefore, even if there is a joint venture compliant with the regulation, LifeHealth is in violation of the ostensible subcontractor rule. (*Id.* at 5-7.)

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 determinations are 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).

Appellant submits Exhibits 4, 5, 6, 7, and the part of Exhibit 3 not included with its protest as new evidence on appeal. OHA generally will 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."). Further, 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). No such motion has been filed here.

Therefore, because it cannot be the basis for a finding of clear error by the Area Office, I EXCLUDE all of the proffered new evidence.

B. Analysis

Appellant's protest alleged that LifeHealth and Dentrust are affiliated for these procurements under the identity of interest rule and the ostensible subcontractor rule.

Appellant's claim that LifeHealth is affiliated with Dentrust because of identity of interest due to economic dependence completely misunderstands the regulation. Appellant argues that because LifeHealth uses Dentrust as a subcontractor on a number of its contracts, it is economically dependent upon Dentrust. The 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.

13 C.F.R. § 121.103(f). Further,

> SBA may presume an identity of interest based upon economic dependence if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years.

13 C.F.R. § 121.103(f)(2).

Under this regulation, SBA may presume that the concern whose size status is "in question" (here the protested concern LifeHealth), is economically dependent upon "another concern" (here the alleged affiliate Dentrust), if 70% or more of its (LifeHealth's) receipts derive from that other concern (Dentrust). This regulation clearly requires the revenue stream between these two concerns to flow from Dentrust to LifeHealth. Appellant's attempt to characterize LifeHealth's subcontracting to Dentrust, in which the revenue stream between the two concerns flows the opposite way, as showing economic dependence under this regulation is unavailing. In *Size Appeal of Logmet, LLC*, SBA No. SIZ-5155 (2010), the Area Office took the same position Appellant advocates for here, that an identity of interest based on economic dependence exists between a protested concern and its alleged affiliate who is a frequent subcontractor. OHA disagreed with the Area Office there, and reversed the size determination after determining the protested concern's receipts do not come from the subcontractor. *Logmet* at 7-8. Appellant attempts to distinguish *Logmet* from the instant case based on the number of subcontracts which, Appellant claims, is much higher here than in *Logmet*. Appeal at 8. In doing so, Appellant completely misses the point that the regulation focuses on the protested concern's receipts, not its expenditures.

Because the facts here parallel those in *Logmet*, I conclude that the Area Office properly relied upon *Logmet* for its determination that LifeHealth cannot be presumed economically dependent on Dentrust due to the frequent subcontracting. This result is also consistent with the overall regulatory scheme, which bases a finding of affiliation on whether one concern controls

or has the power to control another, and which has special rules covering the issue of subcontracting. *See* 13 C.F.R. § 121.103(a)(1), (h). Further, when a concern may subcontract with whichever firm it chooses, it is not economically dependent upon, and is therefore not controlled by, its subcontractor. *Size Appeal of Dorado Svcs., Inc.*, SBA No. SIZ-5515, at 7 (2013). *See also Size Appeal of Harbor Services, Inc.*, SBA No. SIZ-5576 (2014); *Size Appeal of Accent Service Co., Inc.*, SBA No. SIZ-5237 (2011) ("That a challenged concern grants subcontracts to another concern is not evidence of dependence upon the second concern.") Here, there is no evidence in the record suggesting that LifeHealth is not free to choose to whom it subcontracts work.

Appellant also looks for support to *Size Appeal of Core Recoveries, LLC*, SBA No. SIZ-5723 (2016), and *Size Appeal of Dorado Services, Inc.*, SBA No. SIZ-5515 (2013), but these OHA decisions, too, are unavailing. In *Core*, OHA upheld the Area Office's finding of economic dependence where the protested concern was a regular subcontractor to the alleged affiliate, a different set of facts than exists here. *Core* at 5-6. In *Dorado*, OHA again rejected the argument that a protested concern is economically dependent on a subcontractor, citing *Logmet. Dorado* at 6-7. Finally, Appellant argues that LifeHealth is economically dependent on Dentrust because LifeHealth is paid only because of the work Dentrust performs as its subcontractor. Appeal at 12. This argument, too, is flawed because it ignores the regulatory requirement that to show presumptive economic dependence under the identity of interest rule, the receipts must flow to LifeHealth from Dentrust, and not the other way around.

Accordingly, I conclude that the Area Office was correct in finding that LifeHealth is not presumed economically dependent on Dentrust, and thus that the two concerns are not affiliated under the economic dependence prong of the identity of interest rule.

The Area Office did not consider Appellant's contention LifeHealth and Dentrust are affiliated under the ostensible subcontractor rule because it had found both firms are small businesses, relying upon 13 C.F.R. § 121.103(h)(3)(i):

> A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract.

However, the ostensible subcontractor rule provides:

> A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in § 125.1 of this chapter, and performs the primary and vital requirements of a contract, or of an order, or is a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work) agreements between the prime and

> subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4).

The ostensible subcontractor rule thus explicitly requires that if a prime and its subcontractor are found to be in an ostensible subcontractor relationship, they are deemed to be joint venturers, and are affiliated for size determination purposes. This regulation admits of no exceptions, save for those concerns found to be similarly situated entities; if the analysis determines that the concerns are in an ostensible subcontractor relationship, they are affiliated. Here, however, the Area Office did not perform the analysis, and SBA maintains here that there was no need to perform the analysis because § 121.103(h)(3)(i) applies, while the current text of the ostensible subcontractor rule is a "vestige" of an earlier regulatory scheme.[1] The problem with this argument is that a regulation remains in full force and effect until amended, and SBA can point to no authority which permits an agency to waive a regulation on the ground that it is a "vestige" of an earlier regulatory scheme. The Administrative Procedure Act (5 U.S.C. § 500 *et seq.*) governs the issuance and amendment of regulations, and nothing in it permits an agency to ignore a properly issued regulation by declaring it a "vestige" in a pleading filed in an administrative proceeding. "[I]t is a basic tenet of administrative law that an agency is bound to follow its own regulations." *Matter of KRW, Inc.*, SBA No. MSB-379, at 22 & n.16 (1991) (citing *Service v. Dulles*, 354 U.S. 363, 372 (1957) ("[R]egulations validly prescribed by a Government administrator are binding upon him as well as the citizen.")). OHA has found arbitrary and capricious "the Agency's use of an analysis different from that mandated by the regulations." *Matter of Joanna T. Lau and Lau Acquisition Corp.*, SBA No. MSB-407, at 5 & n.7 (1992) (also citing *Service v. Dulles*.).

Further, the ostensible subcontractor rule and § 121.103(h)(3)(i) in their current form were issued in the same rulemaking, indeed, on the same page. 81 Fed. Reg. 34243, 34258 (May 31, 2016). SBA cannot now argue that one rule negates the other when they were written together as part of the same rulemaking. In addition, the rule's recent revision does exclude from its reach subcontractors which are similarly situated entities to the prime contractor. Similarly situated entities are defined as subcontractors having the same small business program status as the prime contractor. 13 C.F.R. § 125.1. SBA thus was able to be very clear about excluding one class of small business concerns from the reach of the ostensible subcontractor rule, those concerns in the same small business program as the prime contractor. I must conclude that the fact that SBA did not take the opportunity to exclude all small business subcontractors from the rule's operation means that it did not intend to do so. The SBA's changes to the ostensible subcontractor rule excluded similarly situated entities from its operation. If SBA had intended to exclude all small concerns, as Agency Counsel states, it easily could have done so in the rulemaking, but did not. I therefore further conclude that the ostensible subcontractor rule

[1] While SBA maintains that 13 C.F.R. § 121.103(h)(2) is another "vestige," this provision does not conflict with § 121.103(h)(3)(i), because it explicitly provides for the exceptions from a finding of affiliation in paragraph (h)(3).

remains in full force and effect, with its explicit requirement that firms deemed to be joint venturers under it are affiliated, whether or not they are both small.

Further, the ostensible subcontractor rule is a specific provision, requiring a finding of affiliation only in those cases where a prime contractor is unusually reliant upon its subcontractor, or the subcontractor is performing the contract's primary and vital requirements. The rule targets only those situations when a small concern may be relying upon another concern for performance of the contract. The purpose of the rule is to "prevent other than small firms from forming relationships with small firms to evade SBA's size requirements." *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). Therefore, it controls over the general provision at § 121.103(h)(3)(i), which simply says a joint venture of two or more small businesses may submit an offer for "a Federal procurement" as long as each firm is small.[2] This is because when there is a conflict between a provision of law that specifically applies to the case at hand and a general provision, the specific provision prevails. *Size Appeal of Hummingbird Data Systems, LLC*, SBA No. SIZ-5311 (2011); *Size Appeal of SIGA Technologies, Inc.*, SBA No. SIZ-5201, at 9 (2011); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 183-188 (2012).

Accordingly, I find that the ostensible subcontractor rule remains in full force and effect and the Area Office clearly erred as a matter of law when it failed to perform an ostensible subcontractor analysis on LifeHealth. I cannot entertain SBA's argument on appeal that there is no violation of the ostensible subcontractor rule here, because the Area Office undertook no analysis which I may review. The Area Office, in determining whether there is a violation of the ostensible subcontractor rule, must examine all aspects of the relationship, including the terms of the proposal and any agreements, between the prime contractor and its subcontractor. *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799 (2016). Ostensible subcontractor inquiries are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).[3]

Accordingly, because the Area Office erred as a matter of law in not performing an ostensible subcontractor analysis on LifeHealth, I must remand the proceeding to the Area Office for two new size determinations, to determine whether LifeHealth has complied with the ostensible subcontractor rule and, if it has not, whether LifeHealth and Dentrust are, when aggregated, still small for the two procurements at issue here.[4] The Area Office must perform

---

[2] SBA's position might be stronger if § 121.103(h)(3)(i) had read "any Federal procurement" rather than "a Federal procurement". But while that language was used in the preamble to the final rule (81 Fed. Reg. 34243, 34252 (May 31, 2016)), it is not the language of the regulation.

[3] What the Area Office must not do, of course, is to oblige Appellant and apply the seven factors test, which SBA no longer uses in ostensible subcontractor analysis. *Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082 (2009).

[4] If the Area Office has to determine Dentrust's size, it will have to determine it for these procurements as of the self-certification dates for these RFQs, and not merely rely on *Size*

this determination for each procurement, considering each proposal separately and considering all aspects of each proposal in making the new determinations.

The Area Office also must consider Appellant's contention that LifeHealth and Dentrust are generally affiliated under 13 C.F.R. § 121.103(h), which provides that two firms which engage in a number of joint ventures together may be in a longstanding inter-relationship or develop contractual dependence which may lead to finding of general affiliation. Appellant raised this contention in its May protest, but the Area Office failed to address it.

IV. Conclusion

Appellant has demonstrated that the subject size determinations are, in part, clearly erroneous. The instant appeal is DENIED and the size determinations are AFFIRMED IN PART as to the Appeal's challenge to the determination that LifeHealth is not affiliated with Dentrust under the identity of interest rule. Nevertheless, the appeal is GRANTED, and the size determinations are REMANDED to the Area Office for new size determinations which will examine whether LifeHealth and Dentrust are affiliated for these procurements under the ostensible subcontractor rule.[5]

CHRISTOPHER HOLLEMAN
Administrative Judge

Appeal of Lost Creek Holdings, SBA No. SIZ-5839 (2017), which used a different date for self-certification. 13 C.F.R. § 121.404(a).

[5] I must deny LifeHealth's request for sanctions in this matter. I do not find Appellant's pleadings to be filed in such bad faith as to warrant sanctions.