

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

SIZE APPEAL OF:

Melton Sales & Service, Inc.,

Appellant,

RE: MTP Drivetrain Services, LLC

Appealed From
Size Determination No. 05-2018-014

SBA No. SIZ-5893

Decided: March 29, 2018

APPEARANCES

Doug P. Hibshman, Esq., P. Sean Milani-Nia, Esq., Ronni Two, Esq., Fox Rothschild LLP, Washington, D.C., for Melton Sales & Service, Inc.

Lori Ann Lange, Esq., Nick R. Hoogstraten, Esq., Peckar & Abramson, P.C., Washington, D.C., for MTP Drivetrain Services, LLC

DECISION

I. Introduction and Jurisdiction

On January 16, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2018-014, finding MTP Drivetrain Service, LLC (MTP) is small for the subject procurement. The Area Office found MTP is affiliated with several entities based on common ownership, common management, and identity of interest, but determined that, nevertheless, MTP satisfied the applicable size standard.

On January 30, 2018, the SBA Office of Hearings and Appeals (OHA) received the above-captioned appeal from Melton Sales & Service, Inc. (Appellant), the original protestor. On appeal, Appellant asserts the Area Office clearly erred, in-part, when finding MTP is not affiliated with VIPAR Heavy Duty, Inc. and with the international affiliates of Aksa Power Generation USA.

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 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

On October 31, 2017, the U.S. Department of the Army, Army Contracting Command — Redstone (ACC) issued Solicitation No. W911N2-18-R-0003 (Solicitation), a firm-fixed price contract seeking remanufacture of Route Clearance Vehicle engines. The Contracting Officer (CO) set aside the entire procurement for small business and assigned North American Industry Classification System (NAICS) code 333618, Other Engine Equipment Manufacturing, with a corresponding 1,500 employee size standard. Proposals were due on November 17, 2017, and MTP submitted a timely proposal.

On November 30, 2017, the CO notified unsuccessful offerors that MTP was the apparent successful awardee.

B. Protest

On December 7, 2017, Appellant protested ACC's award of the subject procurement to MTP, asserting MTP is affiliated with numerous entities in the United States and abroad based on common ownership, common management, identity of interest, and the totality of the circumstances. Based on these affiliations, Appellant asserted MTP far exceeds the applicable employee-based size standard.

Appellant asserted MTP is affiliated with Joe Gear Holdings, LLC (Joe Gear),¹ a network of entities “engage[d] in distributing, manufacturing, servicing, and refurbishing machinery parts and equipment,” based on common ownership and management. (Appeal, at 1, 3-4). These entities, comprising approximately 500 employees, include: MTP; Consolidated Truck Parts & Service of Many, LLC (formerly Many Gear and Axle); Consolidated Truck Parts & Service, LLC; Consolidated Truck Sales, LLC; Aksa Power Generation USA (Aksa USA); and JAT Power, LLC. (*Id.*, at 5-6, 14.)

According to Appellant, Joe Niswanger is MTP's principal and managing partner as well as President and owner of Joe Gear and its numerous subsidiaries. (*Id.*, at 4, 8.) Appellant also stated Rudy Niswanger, Joe's son, is the Chief Executive Officer of Joe Gear and manages several Joe Gear subsidiaries as well as MTP. (*Id.*, at 4, 6.) Appellant argued MTP and the Joe Gear entities are also affiliated based on the familial identity of interest between Joe and Rudy Niswanger (*i.e.*, father and son). (*Id.* at 4, 8.) Appellant noted, “[t]hese entities have substantial economic identity of interest as many operate in the same or overlapping industries,” and these

¹ The Area Office correctly noted Appellant's protest mistakenly references “Joe Gear” and “Joe Gear Companies” when the legal entity is actually “Joe Gear Holdings, LLC” and “Joe Gear” is a brand name for its family of companies. (Size Determination, n. 3.)

entities “conduct business with each other and share or provide resources — including, for example, expertise, management services, and employees.” (*Id.*, at 8.)

Appellant argued MTP is also affiliated with VIPAR Heavy Duty Inc. (VIPAR) based on Joe Gear's stock ownership in VIPAR and VIPAR's own advertisements. (*Id.*) According to Appellant, VIPAR “operates in the same truck and machinery parts distribution and services fields, and acknowledge[d] affiliation with MTP and other Joe Gear companies” when publicly stating “[f]our of the Joe Gear Companies will be affiliated with VIPAR,” including MTP. (*Id.*, at 8.)

Appellant also asserted MTP is affiliated with Aksa Power Generation USA (Aksa USA) based on common ownership by Joe Niswanger, common management with Rudy Niswanger, the Niswanger's familial identity of interest, and the totality of the circumstances. (*Id.*, at 9.) According to Appellant, Aksa USA is a subsidiary of Joe Gear and is managed by Rudy Niswanger as its “Officer and Manager.” (*Id.*)

Appellant continued, asserting MTP is affiliated with Kazanci Holdings Anonim Sirketi A.S. (Kazanci) and its eight subsidiaries: Aksa Power Generation (Aksa Power), Aksa Natural Gas, Aksa Electricity, Aksa Energy, Aksa Agriculture, Aksa Tourism, Aksa Service and Rental, and Aksa Sales and Marketing. (*Id.*, at 10.) According to Appellant, Kazanci owns Aksa Power which owns Aksa USA, “the newest subsidiary of Aksa Power.” (*Id.*, at 10.) Appellant also suggested Kazanci and Aksa USA share common resources, including management and personnel, and operate in the same or similar lines of business. (*Id.*, at 12.) Appellant argued MTP is affiliated with Aksa USA based on, at minimum, common ownership and management and is thereby affiliated with Kazanci and its other international subsidiaries, which comprise 7,000 to 9,000 employees. (*Id.*, at 10-12, 13.)

C. Size Determination

The Area Office determined Joe Niswanger holds a 70% ownership interest in MTP and his son, Rudy, serves as MTP's Chief Executive Officer (CEO). (Size Determination, at 2.) The Area Office found William Rogers, MTP's General Manager, and Richard Johnson hold the remaining minority interests. (*Id.*) The Area Office concluded Joe Niswanger, therefore, controls MTP as a majority shareholder. (*Id.*, at 2-3, citing 13 C.F.R. § 121.103(c)(1).)

The Area Office also concluded there is no evidence of a clear fracture between Joe and Rudy Niswanger, and therefore the two are treated as one party with “identical or substantially identical business or economic interests.” (*Id.*, at 3, citing 13 C.F.R. § 121.103(a)(1).)

Based on this, the Area Office concluded any business controlled by MTP, Joe Niswanger, or Rudy Niswanger is affiliated with MTP. (*Id.*) The Area Office identified the following 24 companies as under the control of MTP, Joe Niswanger, or Rudy Niswanger:

1. Consolidated Truck Parts & Services of Many, LLC
2. Consolidated Truck Parts & Services, LLC
3. JAT Power, LLC (**JAT Power**)

4. Consolidated Truck Sales — Monroe, Louisiana
5. Joe Gear Holdings, LLC (**Joe Gear**)
6. Joe Gear Properties, LLC
7. Joe Gear Equipment, LLC
8. PowerTrain of Shreveport Holding, LLC
9. PowerTrain of Shreveport, LLC
10. JAT Power Merger Sub, LLC
11. JAT Power Holdings, LLC
12. JAT Holdings, LLC (**JAT Holdings**)
13. JAT Wholesale, LLC
14. Niswanger Property Holdings, LLC
15. Niswanger Operating Holding, LLC
16. RPN Properties, LLC
17. RPN, LLC
18. Consolidated Truck Parts & Services of Alexandria, LLC
19. Toro, LLC
20. Progear, LLC
21. Yellow Wood Ranch & Timber, LLC
22. Yellow Wood, LLC
23. TBC Products, LLC
24. Rusty Recordings Enterprises, LLC

(*Id.*, at 3-4.) Therefore, the Area Office concluded, the listed companies are affiliated with MTP. (*Id.*) However, the Area Office determined, even when aggregated with its affiliates' employees, MTP satisfies the applicable size standard of 1,500 employees because 19 of the 24 affiliates have no employees. (*Id.*, at 4.)

The Area Office turned its focus to MTP's affiliations through affiliates Joe Gear and JAT Holdings. First, the Area Office concluded MTP is not affiliated with VIPAR through Joe Gear's stock ownership. (*Id.*, at 4.) The Area Office found Joe Gear owns a single share of VIPAR, which “has 120 stockholders, each entitled to one vote.” (*Id.*) The Area Office reasoned “[Joe Gear's 1/120th] share ratio does not provide Joe Gear with the power to control VIPAR.” (*Id.*) In addition, the Area Office found there is no identity of interest between MTP and VIPAR because there is no familial relationship between MTP's and VIPAR's ownership, there are no common investments, and there is no economic dependence on VIPAR. (*Id.*, at 5.) Further, the Area Office concluded VIPAR's use of “affiliate” in press release when mentioning Joe Gear companies does not itself establish affiliation under SBA regulations. (*Id.*, at 4-5.) Even so, the Area Office also noted MTP still would not exceed the applicable size standard if it was affiliated with VIPAR. (*Id.*, at n. 6.)

Second, the Area Office concluded MTP is affiliated with Aksa USA through JAT Holdings, but refrained from extending affiliation to Aksa USA's international ownership. (*Id.*, at 5.) The Area Office determined JAT Holdings has a 40% ownership interest in Aksa USA, while Aksa Power Generation (China) Co., Ltd. (Aksa China) holds the remaining 60% ownership interest. (*Id.*; *see id.*, n. 8 (noting Aksa USA is not a subsidiary of Kazanci, as Appellant suggested in its protest).) Based on the Operating Agreement, the Area Office determined JAT

Holdings will appoint two out of five directors at Aksa USA, while Aksa China will appoint the remaining three directors and the Chairman of the Board. (*Id.*) The Area Office concluded JAT Holdings has the power to control Aksa USA because the three-director quorum requirement requires at least one of JAT Holdings' directors to be present, permits JAT Holdings' two directors to constitute a voting majority, and permits JAT Holdings' directors to block a quorum by refusing to attend a meeting. (*Id.*) Based on JAT Holdings' potential control, the Area Office concluded Aksa USA is affiliate with JAT Holdings and MTP. (*Id.*) However, even with Aksa USA's employees, the Area Office found MTP does not exceed the applicable size standard. (*Id.*) In addition, the Area Office noted MTP and Aksa USA are not affiliated based on common management through Rudy Niswanger, who serves as a manager at Aksa USA, because “he reports to ... Aksa USA's General Manager [and] his lower level management position does not have the level of influence required.” (*Id.*, at n. 7.)

The Area Office also concluded MTP is not affiliated with Aksa USA's international affiliates. The Area Office determined Aksa USA's majority-owner Aksa China is wholly-owned by Aksa Jenerator Sanayi A.S. of the Republic of Turkey (Aksa Turkey) and potentially affiliated with several international entities sharing the “Aksa” name. (*Id.*, at 5, 6.) The Area Office could not clearly determine the ownership of Aksa Turkey and its place in the Aksa/Kazanci family of companies. (*Id.*, at 6.) However, the Area Office concluded that, even if Aksa USA is affiliated with the Aksa/Kazanci companies, there is no evidence that MTP or JAT Holdings has the power to control these companies through Aksa USA, or vice versa. (*Id.*) The Area Office also concluded Aksa USA does not have control over any other company, nor does any other third-party have control over MTP, JAT Holdings, and the Aksa/Kazanci companies. (*Id.*)

The Area Office was unpersuaded by Appellant's reliance on *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006) and *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-4603 (2004). (*Id.*) The Area Office stated *ETI Professionals* involved more substantial ties based on common investments and franchise relationships, and the instant matter does not involve either. (*Id.*) The Area Office similarly found *Mission Solutions* unpersuasive because the challenged concern in that case had an affiliate that controlled three other businesses through majority stock ownership. (*Id.*, at 7.) The Area Office stressed, “[t]he flow of affiliation [is] downward to anything else that that affiliate owns and controls” and Aksa USA does not have any ownership or control of another entity. (*Id.*) The Area Office further stated recent OHA case law supports a finding of no affiliation with the affiliates of an affiliate, absent “any common ownership or control between the protested company and the affiliate of the affiliate.” (*Id.*, citing *Size Appeal of BryMak & Associates, Inc.*, SBA No. SIZ-5789 (2016).)

D. Appeal

In its appeal, Appellant asserts the Area Office erred in its analysis of MTP's affiliations based on identity of interest, common management through Rudy Niswanger, and the totality of the circumstances. In particular, Appellant disputes the Area Office's conclusions that MTP is not affiliated with VIPAR and with Aksa China and Aksa Turkey. (Appeal, at 1-2.)

Appellant maintains the Area Office erred in finding MTP is not affiliated with VIPAR. (*Id.*, at 15-16.) According to Appellant, there is a presumption of control that arises when multiple shareholders hold the same or substantially similar numbers of shares, and the Area Office failed to adequately address this presumption. (*Id.*) Appellant stresses “the mere fact that a minority shareholder cannot individually control a concern is not sufficient to overcome the presumption” that minority shareholders with equal minority interests can control the concern. (*Id.*, at 16, citing *Size Appeal of Government Contracting Resources, Inc.*, SBA No. SIZ-5706, at 8 (2016) and *Size Appeal of ADVENT Environmental, Inc.*, SBA No. SIZ-5325, at 7 (2012).) Appellant suggests Joe Gear has equal ownership shares and equal voting powers in VIPAR, and has failed to rebut the presumption. (*Id.*, at 16, 17.) Appellant also suggests the Area Office failed to “fully investigate the control structure of VIPAR and the role played by owner-members in its day-to-day management,” improperly relying solely on VIPAR's President's declaration and MTP's statements. (*Id.*, at 17.)

Appellant contends the Area Office erred in not finding or even investigating JAT Power shared identity of interest with Aksa China and Aksa Turkey based on JAT Power's economic dependence on the two international entities for generators. (*Id.*, at 7.) According to Appellant, JAT Power “is completely dependent upon Aksa China and Aksa Turkey's supply of generators to conduct business, and [JAT Power] would cease to exist as an entity but for its affiliation and financial dependence on Aksa China and Aksa Turkey.” (*Id.*, at 7.) Appellant suggests JAT Power “was created for the sole purpose of distributing Aksa power generators to Latin America” and relies exclusively on Aksa China and Aksa Turkey for its supply. (*Id.*, at 6-7.) Appellant suggests “there are surely agreements . . . providing [JAT Power] a license, franchise, or sale distributorship to market and distribute the Aksa products in Latin America,” and asserts the Area Office failed to investigate or consider these connections. (*Id.*, at 7.) In Appellant's view, “Aksa China and Aksa Turkey have the power to control any entity that JAT [Power] has the power to control,” namely MTP. (*Id.*)

Appellant asserts the Area Office failed to adequately consider affiliation between MTP, Aksa China, and Aksa Turkey based on the totality of the circumstances. (*Id.*, at 9.) According to Appellant, the “numerous and significant web of connections between [MTP, Aksa China, Aksa Turkey,] and their multiple affiliates” is so suggestive of reliance to suffice for affiliation. (*Id.*) Appellant suggests MTP, the Niswangers, and its alleged affiliates comprise “a large web, or consortium, of entities tied together by significant financial, management, and ownership connections” that warrants affiliation. (*Id.*, at 10.)

Appellant maintains the Area Office's determination that MTP is not affiliated with Aksa China and Aksa Turkey is contrary to OHA's precedent. (*Id.*, at 11.) Appellant disputes the Area Office's view of affiliation as “flowing downward to anything else that affiliate owns and controls.” (*Id.*, at 11.) Appellant posits that control can occur in either direction, citing the “vice versa” language in 13 C.F.R. § 121.103. (*Id.*) According to Appellant, OHA has long held that a protested concern is affiliated with the affiliates of an affiliate. (*Id.*, at 12, citing *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006).) Appellant suggests, contrary to the Area Office's characterization, *ETI Professionals* involved a protested concern with no common investments, franchise agreements, nor any direct connections with the ultimate affiliate, other than that affiliate's connection to another affiliate. (*Id.*, at 12, citing *ETI Professionals*, SBA No.

SIZ-4603 (2004).) Appellant distinguishes the OHA cases cited by the Area Office, arguing OHA did not reach the chain affiliation arguments in *Veterans Construction Coalition*. (*Id.*, at 14, citing *Veterans Construction Coalition, LLC*, SBA No. SIZ-5824 (2017).) Appellant also argues *BryMak* is inapplicable because OHA merely held the petitioner had failed to establish a “challenged firm is always affiliated with the affiliates of its affiliates, even in the absence of common ownership and control” — not that “affiliates of affiliates are not or can never be affiliates.” (*Id.*, at 14-15, citing *BryMak*, SBA No. 5789 (2016).) Appellant asserts the connections between MTP, Aksa China, Aksa Turkey, and the Niswangers are far more substantial than those in *ETI Professionals* and in *BryMak*. (*Id.*, at 14.)

Appellant also contends the Area Office erred in calculating MTP's aggregated number of employees based on MTP's affiliation with Aksa USA. (*Id.*, at 8.) According to Appellant, the Area Office should have included “the average number of employees of each of Aksa USA's affiliates,” specifically Aksa China and Aksa Turkey, when calculating Aksa USA's employees for its analysis of MTP. (*Id.*) In Appellant's estimation, when aggregated with Aksa China and Aksa Turkey, Aksa USA alone exceeds the applicable 1,500-employee size standard. (*Id.*) Therefore, Appellant posits, MTP must exceed the size standard when aggregated with Aksa USA. (*Id.*)

E. Response

On February 15, 2018, MTP responded to the appeal, asserting Appellant fails to show the Area Office erred in concluding MTP is not affiliated with Aksa China, Aksa Turkey, and VIPAR. (Response, at 1.)

MTP asserts there is no evidence suggesting JAT Power is economically dependent on Aksa China and Aksa Turkey, and MTP stresses Appellant merely speculates that a license, franchise, or sales distributor agreement exists. (*Id.*, at 2.) MTP also asserts, even if a franchise agreement exists, it “does not automatically result in a finding that the franchisor and the franchisee are affiliated.” (*Id.*, citing 13 C.F.R. § 121.103(i).) MTP suggests such affiliation requires excessive restrictions on the franchisee or unequal distribution of profits and risks, for which Appellant has not provided any evidentiary support. (*Id.*, at 2-3.) Further, MTP contends Appellant failed to raise its speculative allegations of economic dependence between JAT Power and Aksa China or Aksa Turkey in its original protest, leaving the Area Office with no obligation to investigate these claims. (*Id.*, at 3.)

MTP maintains that JAT Power does not have the power to control MTP through common ownership and management. (*Id.*, at 3.) According to MTP, Joe and Rudy Niswanger control JAT Power through their ownership interests of [xxx] and [xxx] in JAT Power, respectively, but those interests do not give JAT Power control over the Niswangers. (*Id.*, at 4, n. 1.) Therefore, even if Aksa China and Aksa Turkey had control over JAT Power, neither company would have the power to control the Niswangers and, thereby, MTP. (*Id.*) Similarly, MTP asserts, while JAT Holdings and Aksa China have the power to control Aksa USA, neither has the power to control the other through Aksa USA. (*Id.*, at 5.) MTP continues, stating “no one on the Niswanger side and no one on the Aksa side has any ownership interest in any entity on

the other side — they each have an ownership interest only in Aksa USA” and, therefore, are not be affiliated. (*Id.*, at 5.)

MTP also maintains it is not affiliated with Aksa/Kazanci companies under the totality of the circumstances, asserting the Area Office properly considered and dismissed this contention. (*Id.*, at 5-6, citing *Size Determination*, at 1.) According to MTP, “[t]here is not a separate totality of the circumstances rule; rather[,] for each independent test of affiliation the Area Office reviews whether the totality of the circumstances supports such a finding of affiliation.” (*Id.*, at 6, citing *Size Appeal of TKC Tech. Sols., LLC*, SBA No. SIZ-4758 (2006).) MTP disputes Appellant's depiction of a “significant web of connections between the Aksa companies and MTP,” asserting the only connections between MTP and the Aksa companies are JAT Power's distribution of Aksa generators, JAT Holdings joint ownership of Aksa USA alongside Aksa China. (*Id.*, at 6.) MTP argues these circumstances do not suffice for affiliation, and Appellant fails to highlight any other circumstances otherwise ignored by the Area Office that show Aksa/Kazanci companies have the power to control the Niswangers or MTP. (*Id.*, at 6, 7.)

MTP disputes Appellant's assertion that MTP is necessarily affiliated with the affiliates of its affiliates (*e.g.*, Aksa China, Aksa Turkey). In MTP's view, Appellant's reliance on *Mission Solutions* and *ETI Professionals* is misplaced. (*Id.*, at 8.) MTP suggests the court in *Mission Solutions* did not hold that a firm is automatically affiliated with secondary affiliates, but concluded the challenged firm was affiliated with the secondary affiliates because of the majority shareholder of the firm also owned the secondary affiliates. (*Id.*, at 8, citing *Mission Solutions*, SBA No. SIZ-4828, at 6-7 (2006).) MTP similarly suggests the court in *ETI Professionals* concluded the challenged firm was affiliated with a large franchisor because the franchise agreement was unusually restrictive, requiring the franchisee to use the franchisor's employees as temporary employees, to adhere to strict business practices set by the franchisor, and to only accept customers who met the franchisor's standards. (*Id.*, at 8, n. 2, citing *ETI Professionals*, SBA No. 4603 (2004).) MTP argues that *ETI Professionals* found the challenged firm was affiliated with the franchisor and its other franchisee because of the level of direct influence over the challenged firm and the other franchisee. (*Id.*, at 8-9.) MTP maintains that level of direct influence does not exist between Aksa China and JAT Power, and stressed there is no evidence of a restrictive license, franchise, or distributor agreement. (*Id.*, at 9.)

MTP also asserts OHA has recently recognized such affiliation is not automatic, particularly if there is no common ownership or control between the challenged firm and the secondary or tertiary affiliates. (*Id.*, at 7, citing *BryMak*, SBA No. SIZ-5789, at 4 (2016) and *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5839 (2017).) MTP reiterates that there is no common ownership, interests, or investments between MTP, the Niswangers, and the other Aksa/Kazanci companies. (*Id.*, at 9.) MTP reasserts there is also no common management, as Rudy Niswanger is not responsible for the day-to-day operations of Aksa USA and reports to its general manager. (*Id.*, at 4, 9, 10.) In MTP's view, “Aksa China and Aksa Turkey simply have no control of power to control MTP and vice versa.” (*Id.*, at 10.)

Last, MTP maintains Joe Gear is not affiliated with VIPAR based on minority stock ownership. (*Id.*, at 11.) According to MTP, VIPAR authorized 500 shares of Class 7199 stock and 120 members, including Joe Gear, each own one share. (*Id.*, at 11.) MTP argues the Area

Office correctly concluded Joe Gear does not have control of VIPAR under the minority shareholder rule because a single share does not give Joe Gear the power to control VIPAR. (*Id.*, at 11.) MTP stresses the Area Office reviewed VIPAR's Articles of Amendment and Restatement, Articles Supplementary, and Stockholders' Agreement, contrary to Appellant's characterization of the Area Office's analysis. (*Id.*) MTP also stresses Joe Gear has no other ownership or management interest in VIPAR. (*Id.*) Even so, MTP contends, affiliation between VIPAR and MTP through Joe Gear would not change MTP's status, as VIPAR's approximately [xxx] employees would not push MTP beyond the applicable size standard. (*Id.*, at 11-12.)

F. New Evidence

On January 30, 2018, with its appeal, Appellant moved to supplement to the administrative record with “new evidence concerning Aksa China's and Aksa Turkey's connections with the Niswanger family, MTP, and MTP's affiliates. (Appeal, at 18.) Appellant asserts there is good cause to admit this evidence because “its relevance only became apparent after the receipt of the Size Determination” describing the connections between Aksa China, the Niswangers, and MTP's affiliates. (*Id.*, at 18-19.) Appellant requests admission of “a page from JAT Power's website indicating JAT Power obtains its power generators from China and Turkey” because it suggests JAT Power receives its generators from Aksa China and Aksa Turkey. (*Id.*, at 2.) Alternatively, Appellant suggests the webpage supports remanding this matter to the Area Office for further investigation of the contractual arrangements between JAT Power, Aksa China, and Aksa Turkey. (*Id.*)

On February 14, 2018, MTP objected to the motion, arguing Appellant “was certainly aware enough of JAT Power's relationships with Aksa [China, Aksa Turkey,] and MTP to look on the JAT Power website.” (Opposition to Motion, at 2.) MTP asserts Appellant's protest included references to JAT Power's relationship with the Niswangers, Aksa China, and Aksa Turkey and even stated “JAT Power, LLC distributes the Aksa Power Generation diesel industrial generator sets.” (*Id.*, at 2, citing Protest, at 6.) MTP contends OHA should exclude Appellant's proffered evidence because it “will not accept new evidence when the proponent unjustifiably fails to submit the materials to the Area Office during the size review.” (*Id.*, citing *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).) In addition, MTP asserts the webpage was electronically available during the size investigation, and states OHA has previously excluded information electronically available on the Internet at the time of the size investigation. (*Id.*, at 3, citing *Size Appeal of Global Submit, Inc.*, SBA No. SIZ-5804 (2017).)

III. Discussion

A. Threshold Matters

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 first 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 appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 5 (2009). OHA “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).

I am also unpersuaded by Appellant's assertion that the relevance of JAT Power's webpage only became relevant after the size determination. *See* Section II.F, *supra*. In its protest, Appellant specifically referenced JAT Power and, citing MTP's website, stated “JAT Power, LLC distributes the [Aksa] Power Generation diesel industrial generator sets ... to all of Latin America.” (Protest, at 6.) Appellant similarly referenced Aksa China and Aksa Turkey, and asserted identities of interest between these firms and MTP based on possible business connections. *See* Section II.B, *supra*; Protest, at 12. In fact, Appellant provided webpages for several alleged affiliates, including Aksa USA, but merely provided JAT Power's business filings in the State of Louisiana. *See* Section II.B, *supra*; Protest, at Exhs. 3, 12. Appellant does not assert that JAT Power's webpage now offered as new evidence was not available at the time of the Area Office's investigation. For these reasons, this new evidence is EXCLUDED from the record and has not been considered for the purposes of this decision. *See Size Appeal of Elliott Aviation, Inc.*, SBA No. SIZ-5890, at 3 (2018) (declining to admit new evidence when such evidence was available at the time of the Area Office investigation and Appellant failed to demonstrate such evidence was then-unavailable); *Size Appeal of First Financial Associates, Inc.*, SBA No. SIZ-5869, at 4 (2017).

B. 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).

C. Analysis

I find the Area Office erred, albeit harmlessly, when improperly analyzing the Appellant's potential affiliation with VIPAR under the minority shareholder rule. SBA regulations state, in the pertinent part:

(c) Affiliation based on stock ownership

...

- (2) If two or more persons (including any person, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's

voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

13 C.F.R. § 121.103(c)(2-3). As described above, a concern whose size is at issue may encounter one of two rebuttable presumptions under the minority shareholder rule: (1) each person with equal or approximately equal shares controls the corporation; or (2) the widely-held corporation is controlled by the Board of Directors and the CEO or President. OHA has held the latter takes precedence over the former. *See Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806, at 13-14 (2006). Based on the Area Office file and the issued size determination, it appears the Area Office did not consider whether VIPAR is a widely-held corporation entitled to the latter presumption. However, as discussed *infra*, this error is harmless.

OHA has defined a “widely-held corporation” as a corporation with voting stock that is freely traded and is held by more than a few shareholders. *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721, at 16-17 (2016). Here, according to VIPAR's Articles of Incorporation and its president's Declaration, VIPAR issued 500 shares of 7199 stock, each being the equivalent of 7,500 shares of the corporation's common stock. (VIPAR's Articles of Incorporation, Article IV, § 1-3.) Each stockholder having at least one share of 7199 stock or at least 7,500 shares of common stock has one vote. (VIPAR's Articles of Incorporation, Article IV, § 2.) It is undisputed that MTP holds one share of 7199 stock and only 120 shares total are currently held, each individually. *See* Section II.E, *supra*. From this, it is clear that VIPAR's voting stock is held by more than a few shareholders. However, these shares are not freely traded. According to the Stockholder's Agreement, several limitations are placed on the transfer or sale of one's shares, including a [xxx], VIPAR. (Stockholders' Agreement, at 1 (stating [xxx])); *see id.*, at § 4 (stating [xxx]); *see id.*, § 5.1, 5.1.1 (stating [xxx]). Therefore, VIPAR's voting stock is not freely traded, and VIPAR is not a widely-held corporation. *See Size Appeal of Novalar Pharm., Inc.*, SBA No. SIZ-4977, at 16 (2006) (finding the subject stock was widely-held when it was publicly traded and owned by at least size shareholders); *MPC Computers*, SBA No. SIZ-4806 (2006) (finding a corporation's voting stock was freely traded because it was offered and traded on the American Stock Exchange). After concluding VIPAR is not a widely-held corporation, the Area Office should have then proceeded to examine the other presumption under the multiple minority shareholder rule.

Unfortunately, the Area Office also erred when examining VIPAR under the multiple minority shareholder rule by failing to properly rebut the first presumption. In short, if two or more entities hold equal or approximately equal minority shares in a given concern and the aggregate of these shares would constitute a majority, then SBA presumes that each minority shareholder has control or the power to control the given concern. *See* 13 C.F.R. 121.103(c)(2).

SBA regulations provide this presumption may be rebutted with evidence to the contrary, such as evidence demonstrating another party such as the Board of Directors and CEO or President controls the concern. *See Size Appeal of Gov't Contracting Resources, Inc.*, SBA No. SIZ-5706 (2016); *see* 13 C.F.R. 121.103(c)(2). OHA has held that, even if a minority shareholder cannot individually control the subject concern, multiple minority shareholders may have control or the power to control the subject concern. *Gov't Contracting Resources*, SBA No. SIZ-5706. OHA has stressed “[a]ll concerns must be controlled by someone or some group at all times. . . . [T]o consider none of the minority shareholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved.” *Id.*, at 8.

Here, it is undisputed that MTP is affiliated with Joe Gear through common ownership, and Joe Gear holds one of VIPAR's 120 shares of 7199 stock. When considering MTP's affiliation with VIPAR under the minority shareholder rule, the Area Office erred in concluding Joe Gear's 1/120th interest does not provide Joe Gear with control or the power to control VIPAR. *See* Section II.C, *supra*. On appeal, MTP echoes this rationale, arguing Joe Gear's single share of 7199 stock does not provide control over VIPAR. *See* Section II.E, *supra*. However, individual control is immaterial, as multiple minority shareholders may control a subject concern even if they individually cannot. *Gov't Contracting Resources*, SBA No. SIZ- 5706 (2016). Rather, in the absence of clear evidence demonstrating control or the power to control by another party, it is presumed that each minority shareholder has equal control over the subject concern, regardless of the size of the shareholder's interests. The Area Office failed to establish MTP and Joe Gear had rebutted this presumption with evidence demonstrating another party controls or has the power to control VIPAR. Unsurprisingly, the administrative record lacks evidence demonstrating another party than the 120 known shareholders controls VIPAR. Therefore, Joe Gear must be presumed to control or have the power to control VIPAR under the multiple minority shareholder rule, and accordingly, MTP is affiliated with VIPAR.

I, like the Area Office, am unconvinced by Appellant's arguments directing SBA to link MTP, Aksa China, and Aksa Turkey through MTP's affiliation with Aksa USA based on common ownership. Appellant asserts the chain of affiliation extends from MTP, through Joe Niswanger (*i.e.*, owner of MTP), Joe Gear (*i.e.*, owned by Joe Niswanger), JAT Holdings (*i.e.*, owned by Joe Gear), and Aksa USA (*i.e.*, 40% owned by JAT Holdings) to Aksa China (*i.e.*, owns 60% of Aksa USA) and Aksa Turkey (*i.e.*, owner of Aksa China). *See* Section II.C, *supra*. SBA regulations dictate “[c]oncerns and entities are affiliates of each other when one controls or has power to control the other, or a third party or parties controls or has the power to control both . . . [and] SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.” 13 C.F.R. § 121.103(a)(1-2). OHA has held a challenged firm is not automatically affiliated with the affiliates of its affiliates, “particularly in the absence of any common ownership or control between the challenged firm and the affiliates of the affiliate.” *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5839 (2017); *Size Appeal of BryMak & Associates, Inc.*, SBA No. SIZ-5789, at 4 (2016) (PFR).

Appellant is correct that OHA's holding in *BryMak* does not prohibit a challenged firm from being affiliated with the affiliates of an affiliate. *See* Section II.D, *supra*. To the contrary, OHA has often found a challenged firm is affiliated with the affiliate of an affiliate — but only in

instances where there was common ownership and control or “substantial ties between the challenged firm and its affiliates” establishing affirmative control.² See *BryMak*, SBA No. SIZ-5789, at 4 (2016) (citing *Size Appeal of RX Tech.*, SBA No. SIZ-4998 (2008), *Size Appeal of Baldt, Inc.*, SBA No. SIZ-4987 (2008), *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006), and *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-4603 (2004)). Here, Appellant can point to no such common ownership or control establishing ties between MTP, Aksa China and Aksa Turkey.

Indeed, Appellant does not suggest that Aksa China affirmatively controls or has the power to affirmatively control MTP, or any of MTP's affiliates except for Aksa USA. See Section II.D, *supra*. Appellant merely argues that Aksa China, its affiliates, and JAT Holdings, and its affiliates (*e.g.*, MTP), are affiliated because both Aksa China and JAT Holdings have ownership interest in Aksa USA. See Section II.C, *supra*. However, OHA dismissed similar arguments in *W&T Travel Services* and *BryMak*, refraining from affiliating two concerns “based on a joint connection.” *BryMak*, SBA No. SIZ-5789, at 3 (2016). Instead, the proponent of affiliation must demonstrate that the two firms can control one another, affirmatively or negatively, through common management or other substantial ties such as both being franchisees subject to the same restrictive franchisor. But, Aksa China and JAT Holdings have no other connection than their joint ownership of Aksa USA. See Section II.C, *supra*.

Nothing in the record suggests that Aksa China has the power to exert affirmative or negative control directly over JAT Holdings, Joe Gear, Joe Niswanger, or MTP. Similarly, nothing in the record suggests that Aksa USA can exert affirmative or negative control over its partial parent company, JAT Holdings. Therefore, JAT Holdings and its affiliates are not affiliated with Aksa China, and its affiliates, based on their joint connection to Aksa USA.

Appellant's argument that MTP is affiliated with Aksa China and Aksa Turkey because JAT Power is affiliated with those firms because of identity of interest based upon economic dependence is raised for the first time on appeal, and therefore I cannot consider it here. 13 C.F.R. § 134.316(c); *Size Appeal of Elliott Aviation, Inc.*, SBA No. SIZ-5890 (2018).

Notably, even though the Area Office erred when analyzing VIPAR under the minority shareholder rule, this is harmless error. OHA has consistently held an area office's error is harmless when rectifying the error would not have changed the result. See *Size Appeal of Automation Precision Technology, LLC*, SBA No. SIZ-5850, at 17 (2017); *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843 (2017). Here, VIPAR's employees alone would not

² SBA regulations do provide that control may be affirmative or negative. Negative control includes a minority shareholder's ability to prevent a quorum or otherwise block action. See 13 C.F.R. § 121.103(a)(3). A minority shareholder's ability to obstruct the ordinary actions fundamental to daily operations will support a finding of negative control. However, a minority shareholder's ability to protect its interests by blocking extraordinary actions would not result in a finding of negative control. See *Size Appeal of Team Waste Gulf Coast, LLC*, SBA No. SIZ-5864, at 6-7 (2017) (citing *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023, at 10 (2009) and *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977, at 14 (2008) as examples of negative control).

have altered the Area Office's determination, as the aggregate of MTP and its affiliates, including VIPAR, would have satisfied the applicable employee-based size standard. Therefore, the Area Office's error is harmless.

III. Conclusion

Appellant has not demonstrated that the Area Office clearly and patently erred in finding MTP is small for the subject procurement. Accordingly, the instant appeal is DENIED, and the size determination AFFIRMED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 124.210(a).

CHRISTOPHER HOLLEMAN
Administrative Judge