Cite as: *Size Appeal of National Security Assocs., Inc*, SBA No. SIZ-5907 (2018)

United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: National Security Associates, Inc., Appellant, Appealed From Size Determination No. 03-2018-026	SBA No. SIZ-5907 Decided: May 11, 2018

APPEARANCES

H. Todd Whay, Esq., The Whay Law Firm, McLean, Virginia, for Appellant National Security Associates, Inc.

Terry L. Elling, Esq., Mitchell A. Bashur, Esq., Holland & Knight LLP, Tysons, Virginia, for Man in the Arena Consulting, LLC

DECISION[1]

I. Procedural History and Jurisdiction

On February 14, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office), issued Size Determination No. 03-2018-026, finding National Security Associates, Inc. (Appellant), is not an eligible small business for U. S. Department of the Army Solicitation No. H92239-18-R-0002, the procurement at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal and affirm the size determination.

[1] 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 filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation, Award, and Protest

On November 21, 2017, the U.S. Department of the Army (Army) issued Solicitation No. H92239-18-R-0002 (RFQ) for Regimental Master Breacher Course Range Support. The Contracting Officer (CO) set the procurement aside for service-disabled veteran-owned small businesses and designated North American Industry Classification System (NAICS) code 238910, Site Preparation Contractors, with a corresponding $15 million annual receipts size standard as the appropriate code. Proposals were due on December 7, 2017, with Final Proposal Revisions due on December 22, 2017.

On January 16, 2018, the Army notified unsuccessful offerors that it had awarded the contract to Appellant. On January 23, 2018, Man in the Arena Consulting, LLC (MITAC) filed a size protest with the CO. MITAC alleged that Appellant is affiliated with Pezold Management Associates, Inc. (Pezold), and that together the two firms' annual receipts exceed the size standard. (Protest at 2.) MITAC asserted Appellant's President, CEO, and CFO, Tracy Sayers, also serves as Pezold's Chief Operating Officer (COO), and Registered Agent, and has been with Pezold since at least 1996. Mr. Pezold is 70 years old. Mr. Sayers, therefore, must be responsible for Pezold's day-to-day management. (*Id.* at 3-4.) Further, Appellant and Pezold share a business address at 600 Brookstone Parkway, Columbus, GA, and so apparently share common office and administrative resources. (*Id.*)

B. Response to Protest

On January 31, 2018, Appellant responded to the protest. Included with the Response are sworn declarations from Tracy Sayers, John D. Pezold, Sr., and Jerry B. Latta. Appellant was established in 1996, and operates a 700-acre firearms range and training facility at 960 River Bend Road, Cusseta, GA, near Fort Benning. Appellant has provided Regimental Master Breacher Course range support to the 75th Ranger Regiment since 2008. (Response at 2.) Tracy Sayers owns a 70% interest in Appellant. He is also Appellant's President, CEO, CFO, Secretary, and sole director. (Response at 2, Sayers Declaration at 1.) Family Holdings Sub, LLC (FHS), owns 30% of Appellant. Mr. Pezold owns 100% of FHS. (Response at 2.)

Appellant's corporate offices are located at 1222 Broadway, Columbus, GA. Mr. Sayers also maintains an office at 600 Brookstone Centre Parkway, Columbus, GA. Mr. Sayers is unable to drive due to a vision impairment, and the Brookstone office is within walking distance of his home. (Response at 2, Sayers Declaration at 2.) The landlord for Brookstone is Four JS Family, LLP (Four JS), a concern controlled by the Pezold family. The lease charges $12.00 a day rental for a 10 foot by 10 foot space. The term of the lease is month to month. (Lease, March

1, 2016.) A number of other, unrelated concerns have offices there. Neither Pezold nor any concern has offices co-located with Mr. Sayers' Brookstone office space. (*Id.*)

Pezold owns and operates 21 McDonald's restaurants and its annual revenues exceed $15 million. Mr. Pezold is Pezold's majority owner, sole officer, and Director. In order to own and manage a McDonald's, McDonald's requires an individual to graduate from its Hamburger University. Mr. Pezold and his son, John Pezold, Jr., have graduated from that august institution; Mr. Sayers has not. (Response at 3, Sayers Declaration at 2-3.)

Mr. Pezold oversees Pezold's daily operations. Mr. Pezold enumerated his extensive duties, typical for a CEO. Mr. Pezold declares he is supported in his management duties by his son and by Mr. Latta, Pezold's Director of Operations. Mr. Sayers and Mr. Pezold both declare that Mr. Sayers' duties are not those normally associated with a COO. Mr. Sayers' work is part-time (less than 15 hours a week) and limited in scope. His duties include review of contracts, tax assessments, and other documents, and providing his input on them. Mr. Sayers does not have signature authority for the contracts he reviews. He is not involved in Pezold's decision-making, and has no supervisory authority over any Pezold personnel. He has no ownership interest in Pezold and is not on its Board of Directors. (Sayers Declaration at 2-3, Pezold Declaration at 1-2.) Mr. Sayers also states Pezold "provides no resources, financial assistance, or other support" to Appellant. (Sayers Declaration at 3.)

Appellant also submitted a Declaration from Jerry Latta, Pezold's Director of Operations. Mr. Latta's duties include recruiting, training, and supervising all Pezold employees. He reports directly to Mr. Pezold and he meets regularly with Mr. Pezold, Mr. Pezold's son, and Pezold's CFO. Mr. Sayers has never been involved in any of these meetings. Mr. Latta has no reporting relationship with Mr. Sayers, and takes no direction from him. (Latta Declaration.)

Mr. Sayers states Pezold has no control or influence over Appellant's operations. Appellant has never subcontracted any work to or from Pezold. Mr. Pezold declares Mr. Sayers has no role in decision making for Pezold, and has no authority to do so. (Sayers Declaration at 3, Pezold Declaration at 2.)

Appellant argued that there is no common management between itself and Pezold because Mr. Sayers has no meaningful management role at Pezold, and Mr. Pezold has no role whatever at Appellant. (Response at 5-6.) Appellant argues there is no identity of interest between the concerns. The concerns do not have common office space. Appellant owns and operates a firearms range and training facility, Pezold owns and operates McDonald's restaurants. Neither company subcontracts work to or from the other company. Neither company is involved in bonding or financing the other company. The only common investment is FHS's ownership stake in Appellant, and there is no family relationship. (Response at 6-7, Sayers Declaration at 2-3, Pezold Declaration at 2.) Appellant maintained there is no affiliation between itself and Pezold.

Appellant also submitted, as required, Federal income tax returns for 2014-2016 for itself and for its two acknowledged affiliates: ECLA Family Partnership, LLLP (ECLA), and OSDA

Dinginela, LLLP (OSDA). These tax returns show the annual receipts for Appellant, ECLA, and OSDA combined are below $15 million.

Appellant's tax returns show that Mr. Sayers devotes 25% of his time to Appellant and that his salary from Appellant was $[XXX] in 2014, $[XXX] in 2015, and $[XXX] in 2016. (Response at Ex. 10, NSA Federal Income Tax Returns.) The returns also show a note payable by Appellant to Pezold. In 2014, the amount due went from $[XXX] to $[XXX]. In 2015, the amount due went from $[XXX] to $[XXX]. In 2016, the amount due went from $[XXX] to $[XXX]. (*Id.*) Appellant's tax returns also show a note receivable from Four JS to Appellant for $[XXX], an amount that does not change over the three years. (*Id.*)

Appellant's Proposal includes the July 25, 2017 resolution of "all of the directors of [Appellant]" authorizing Mr. Sayers to submit an offer on the instant RFQ. The resolution is signed by Mr. Sayers and Mr. Pezold. (Proposal at 8.)

In response to the Area Office's questions, on February 7, 2018, Appellant stated Mr. Pezold owns FHS, which is Appellant's 30% shareholder and also the landlord at 960 River Bend Road where Appellant's firing range is located. (email, T. Whay to I. Bascumbe, Feb. 7, 2018.) Mr. Pezold owns 67% of Pezold, with the rest owned by his family. (*Id.*) Asked about Appellant's December 31, 2010 shareholder resolution appointing Mr. Sayers as Director, and which Mr. Pezold had also signed, Appellant explained that Mr. Pezold had signed it in his capacity as owner of FHS, and that he himself owns no shares of Appellant. (email, T. Whay to I. Bascumbe, Feb. 8, 2018.)

On February 12, 2108, in response to further questions, Appellant stated that it has four employees at the firing range and four at its headquarters (1222 Broadway); that Appellant's headquarters landlord is not related to the Pezold family; and that before 2008 Appellant did not use 960 River Bend Road as a firing range but rented other ranges for firearms training. (email, T. Whay to I. Bascumbe, Feb. 12, 2018.) Appellant also stated its headquarters is about 20 miles from the firing range and five miles from 600 Brookstone. (*Id.*) Appellant provided a copy of the lease for 600 Brookstone, photos showing its access and parking lot are separate from Pezold's, and check stubs and bank statements showing rent paid, stating Mr. Sayers pays $12 per day of use. (*Id.*)

Asked for salary information, Appellant stated Mr. Sayers' full-time salary at Pezold was $[XXX] in 2013. In 2016, his total income was $[XXX], of which $[XXX] was from part-time work at Pezold. (*Id.*) In 2017, he earned $[XXX] working part-time at Pezold. (*Id.*)

C. The Size Determination

On February 14, 2018, the Area Office issued Size Determination No. 03-2018-026, finding Appellant is not an eligible small business for this procurement.

The Area Office noted Mr. Sayers controls ECLA, which owns and operates restaurants and hotels. Mr. Sayers owns 50% of OSDA, while another individual owns the rest. The Area

Office concluded that both Mr. Sayers and the other individual have the power to control OSDA. Accordingly, Appellant is affiliated with ECLA and OSDA. (Size Determination at 3-4.)

The Area Office next found common management affiliation between Appellant and Pezold because Mr. Sayers controls both concerns. It reasoned that common management affiliation does not require total control of a concern, just critical influence or ability to exercise substantive control over a concern's operations. The Area Office further reasoned that it may assume that a COO is commonly understood to be a senior leadership position and the person holding that position exercises substantial control and critical influence over the business. (*Id.* at 4-5.) The Area Office found that the statements downplaying Mr. Sayers' role at Pezold are contradicted by other evidence in the record, specifically his title as COO and his salary. Mr. Sayers has been employed by Pezold for many years and though he is a part-time employee his salary is a substantial six figures. (*Id.*) According to Appellant's tax returns he devotes 25% of his time to Appellant and his salary as a part-time employee at Pezold is more than double that of his salary from Appellant. The Area Office concluded that Mr. Sayers has the power to control both firms, and therefore, Appellant is affiliated with Pezold due to common management. (Size Determination at 4-5, citing *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477 (2013).)

The Area Office further noted Appellant began operations in 1996. Mr. Sayers provided firearms training by travelling to different venues and renting ranges prior to leasing the current facility. Appellant, ECLA, and Pezold all share the 600 Brookstone address. ECLA is in the same line of business as Pezold, restaurants and lodging. The lease at 600 Brookstone is not an arm's-length relationship because Mr. Sayers pays a daily rate for his space. The Pezold logo is on the building. Mr. Sayers has an ongoing relationship with Mr. Pezold by leasing the space where his firing range is located. The rent paid for the facility and the notes payable to Pezold noted in Appellant's tax returns demonstrate business ties. The Area Office concluded Appellant's lease of its main facility from Pezold, Pezold's 30% ownership interest in Appellant, Mr. Sayers' long-term management position in Pezold, Appellant's sharing office space with Pezold, Appellant's long-term liability to Pezold, and the ongoing long-term relationships and contractual relationships between Appellant and Pezold, taken together, mean that Appellant is affiliated with Pezold under the totality of the circumstances. (Size Determination, at 5-6, citing *Size Appeal of A.M. Kinney Assoc.*, SBA No. SIZ-4401 (2000).)

The Area Office then examined the tax returns of Appellant and its affiliates ECLA, OSDA, and Pezold (Appellant stipulated that Pezold's annual receipts exceed $15 million) and concluded Appellant exceeded the applicable size standard, and thus is an other than small business. (Size Determination at 6-7)

D. The Appeal

On March 1, 2018, Appellant filed the instant appeal. Appellant contends the Area Office clearly erred in finding it affiliated with Pezold.

First, Appellant asserts the Area Office erred in finding it affiliated with Pezold through common management. (Appeal at 7-9.) Appellant faults the Area Office for essentially finding all of Appellant's declarations false, undertaking no substantive analysis, and relying upon Mr.

Sayers' officer title as Pezold's COO and his Pezold salary. Appellant asserts the Area Office misapplied OHA's precedents, arguing that, by submitting the declarations, Appellant had met the standard for rebutting the presumption that, as COO, Mr. Sayers has substantive control or critical management over Pezold's operations. (Appeal at 8-9, citing *Size Appeal of AudioEye*, SBA No. SIZ-5477 (2013), *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ- 5403 (2012).)

Appellant also takes issue with the Area Office's reliance on Mr. Sayers' salary at Pezold as an indicator of his control over that concern. Appellant points out the Area Office had failed to note this salary has decreased over the years, and undertook no analysis to support its conclusion $[XXX] was too much to pay Mr. Sayers for the work described in his declaration. Appellant seeks to submit a supplemental declaration from Mr. Sayers on this point. (Appeal at 9, citing Exh. 3.)

Second, Appellant asserts the Area Office erred in finding it affiliated with Pezold under the totality of the circumstances. (Appeal at 9-12.) Appellant argues that the touchstone issue here is control, and that a connection between two concerns does not necessarily lead to a finding of affiliation. There must be an element of control present. The Area Office failed to explain how the factors it discussed led to it finding that one has the power to control the other. (*Id.* at 9- 10 citing *Size Appeal of Global, A 1st Flagship Co.*, SBA No. SIZ-5462 (2013) and *Size Appeals of Medical Comfort Systems, Inc., et al.*, SBA No. SIZ-5640 (2015).)

Appellant asserts the Area Office erred when it referred to Mr. Sayers traveling to perform firearms training. (Appeal at 10.) Appellant's prior owners did this, not Mr. Sayers. (*Id.*) Mr. Sayers has been Appellant's majority shareholder for only nine years. The Area Office inaccurately said Pezold owns 30% of Appellant, when it is FHS that is the 30% shareholder. Mr. Pezold has no ownership interest in Appellant. (Mr. Pezold wholly owns FHS.) The Area Office said that Pezold owns and leases the range facility to Appellant, when it is FHS that is the owner and lessor of the range. According to corporate filings, ECLA's headquarters is 871 Graystone Drive, Columbus, GA, not the same address as Pezold. (*Id.* at 10.)

Appellant argues neither Pezold nor Appellant has the power to control the other. The one common investment by FHS is insufficient to support a finding of affiliation. (*Id.* at 10-11, citing *Global*.) The mere fact that companies operate in similar lines of work, or in close proximity to each other, does not support a finding of affiliation. Neither does simply leasing space from another company (*Id.* at 11, citing *Size Appeal of Rio Vista Management*, SBA No. SIZ-5316 (2012).) The lease between Appellant and FHS for the range facility is an arm's- length transaction with no unusual lease provisions. (*Id.*) Appellant maintains it receives no resources or financial assistance from Pezold. (*Id.* at 4.)

Appellant further maintains Mr. Sayers' personal office at 600 Brookstone does not support a finding of affiliation. (*Id.* at 11.) Appellant's main office is at another location, and other firms are also located at the 600 Brookstone address. The Area Office erred when it found that Mr. Sayers' paying a daily rate for office space is indicative of an unusual business relationship. Appellant points to other examples of daily office rental, and further asserts this is not indicative of control. Finally, Appellant asserts Mr. Sayers' limited role in Pezold does not

involve management of the company, and the Area Office does not explain how this role results in Pezold controlling Appellant. (*Id.* at 11.)

E. Man in the Arena Consulting's Response to the Appeal

On March 19, 2018, MITAC responded to the appeal, arguing the Area Office correctly found Appellant affiliated with Pezold. MITAC emphasizes the factors in the Area Office's analysis: 1) Appellant is 30% owned by FHS, which is controlled by Mr. Pezold; 2) FHS owns the property necessary for contract performance — the firing range — and leases it to Appellant; 3) Mr. Sayers is both Appellant's President and a long-time Pezold employee, currently its COO; 4) Appellant and Pezold share office space; 5) Mr. Sayers has a greater salary from Pezold than from Appellant; 6) Mr. Sayers devotes only 25% of his time to Appellant; and 7) Appellant has long-term notes payable to Pezold. (MITAC Response at 2.)

MITAC also opposes Appellant's Motion to Admit New Evidence. MITAC asserts the motion is untimely, the evidence presented could have been presented to the Area Office, and Appellant was aware of the issues its new evidence seeks to address. (*Id.* at 3-5.) Conversely, MITAC submits over 100 pages of documents as exhibits to its response to the appeal, many of them not in the record, with no separate motion for their admission.

MITAC asserts the evidence demonstrates that Mr. Sayers and Appellant are economically dependent upon Pezold because Appellant is financially unstable. MITAC argues the declarations Appellant submitted are contradicted by the evidence in the record. (*Id.* at 7.)

MITAC argues the Area Office properly relied upon *AudioEye*, where firms with common officers were found affiliated, because these positions are commonly understood to be senior management positions within the company. The challenged concern there failed to come forward with evidence to support its claim of no common management. Similarly, Appellant has failed to provide sufficient evidence that, despite his job title, Mr. Sayers has no substantive authority at Pezold. (*Id.* at 9-10.) MITAC also argues *Global* is inapposite, because there the connection between the two concerns was historic, while here Mr. Sayers is still COO of Pezold. (*Id.* at 10-11.)

MITAC maintains Appellant and Pezold are affiliated through common management because Mr. Sayers is an officer and key employee of both concerns. (*Id.* at 11.) Further, according to Appellant's Proposal, Mr. Pezold is a director of Appellant, and gave his consent to permit Mr. Sayers to execute the contract. Therefore, Mr. Pezold has the power to control both concerns. (*Id.* at 12.) MITAC also asserts Mr. Sayers' role at Pezold is broader than admitted. MITAC points to the new evidence it seeks to admit in support of this contention. (*Id.* at 12-13.) Against all the evidence in support of affiliation, Appellant offers only self-serving declarations, and this is not sufficient to overturn the Area Office. (*Id.* at 14.)

Finally, MITAC disputes Appellant's contention that the Area Office erred in considering the co-location of Appellant's office at Pezold's headquarters. The fact that Mr. Sayers is unable to commute to Appellant's alleged headquarters is sufficient in itself to find that he does not

control the company. Further the change in registration Appellant proffers took place after the date for determining size and, therefore, is not relevant here. (*Id.* at 15.)

On March 27, Appellant moved to strike MITAC's exhibits as new evidence which MITAC did not formally move to admit. On March 28, MITAC responded to the motion to strike, arguing it was untimely, that most of its exhibits were already in the record, and that there is good cause to admit the new evidence to rebut Appellant's false declarations.

III. Discussion

A. New Evidence and Standard of Review

Both Appellant and MITAC attempt to submit new evidence with their pleadings. 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).

Appellant offers a Supplemental Declaration and an unsworn letter from its accountant attempting to vary the content of its tax returns. MITAC offers copies of public records and news articles to show Mr. Sayers' authority at Pezold is greater than Appellant maintains. All of this evidence was available, and could have been submitted, at the protest stage. 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 4 (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).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The Area Office found Appellant affiliated with Pezold on two grounds, common management and totality of the circumstances. Under the common management rule, concerns are affiliated where:

> [O]ne or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

13 C.F.R. § 121.103(e).

A finding of affiliation through common management does not require that the person exercising the common management have "total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations." *Size Appeal of DMI Educational Training LLC*, SBA No. SIZ-5275, at 6 (2011). The influence in question must be wielded by someone in the overall management of both concerns. *Size Appeal of Optivision, Inc.* SBA No. SIZ-5740, at 13-14 (2016).

As the Area Office noted, OHA has held that positions such as COO are commonly understood to be senior leadership positions within a company, so that an area office could reasonably infer that the holder of such a position has the ability to exercise critical influence or substantive control over the company. *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9 (2013). Nevertheless, in *AudioEye*, OHA held this inference is rebuttable, and a concern could come forward with evidence to show that, despite, a position's title, the individual officer does not actually have critical influence or substantive control. *Id.* OHA has relied upon sworn declarations to establish the limited nature of an officer's actual responsibilities, despite his or her title. *Id.*, citing *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403, at 5-6 (2012).

Here, Appellant submitted three sworn declarations that support its contention that Mr. Sayers' duties at Pezold are limited to document review, that he does not have signature authority for the contracts he reviews, and that he does not exercise critical influence or substantive control over Pezold. OHA will give greater weight to signed specific, factual evidence than to unsupported allegations. *Size Appeal of Stellar Innovations and Solutions, Inc.*, SBA No. SIZ-5851, at 10 (2017). In contrast, all the Area Office relied upon was Mr. Sayers' salary, which has been declining over the years, and his title. The Area Office chose to judge a book by its cover. I conclude that the signed, sworn, specific evidence Appellant submitted establishes that Mr. Sayers does not have critical influence or substantive control over Pezold, and that the Area Office therefore erred in finding Appellant and Pezold affiliated under common management.

The second ground for the Area Office's finding of affiliation between Appellant and Pezold is the totality of the circumstances.

> In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

13 C.F.R. § 121.103(a)(5).

Concerns may be found affiliated under the totality of the circumstances if "the interactions between the businesses are so suggestive of reliance as to render the firms affiliates. . . . Although the evidence in the record may not establish affiliation under one of the specific factors enumerated in the regulation, a review of all the factors may lead to the conclusion one business has power to control the other and, thus, both are affiliated." *Size Appeal of Diverse Construction Group, LLC*, SBA No. SIZ-5112, at 5 (2010). The fact that there are ties between the concerns is not sufficient to support a finding of affiliation, the ties must establish that one concern controls or has the power to control the other. "Nevertheless, as with any case, affiliation may be found only when 'one [concern] controls or has the power to control the other, or a third party or parties has the power to control both.'" *Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462 (2013) (quoting 13 C.F.R. § 121.103(a)). "As in all affiliation analysis under the size regulations, the touchstone issue is control. A connection between two concerns does not necessarily cause affiliation. There must be an element of control present." *Size Appeal of Native Energy and Technology, Inc.*, SBA No. SIZ-5249, at 9 (2011).

Here, Mr. Sayers is Appellant's President and 70% shareholder. He is also a long-time employee of Pezold, which provides a significant portion, even if not a majority, of his income. Mr. Pezold is Pezold's majority shareholder, sole officer and Director. Mr. Pezold also is sole shareholder of FHS, which is Appellant's 30% shareholder and its landlord at the facility where contract performance will take place. Mr. Sayers maintains a satellite office at a building where Pezold's main office is located, where the landlord is Four JS, a Pezold affiliate. Mr. Sayers pays a daily rate for this office on a month-to-month basis, and so Pezold could terminate it at relatively short notice. It is worth noting that Appellant owes Pezold a significant sum on a long-term note payable, which Appellant failed to discuss in its submissions. There is at least one other financial or business tie between Appellant and Pezold affiliate Four JS, as evidenced by a note receivable from Four JS, disclosed in Appellant's tax returns. Appellant maintains in its appeal that Pezold provides it with no financial assistance or other support (Appeal at 4), but this assertion is contradicted by Appellant's tax returns, which record the note payable to Pezold. Mr. Pezold also signed as one of Appellant's two directors the July 25, 2017 consent resolution authorizing Mr. Sayers to submit the offer on the instant RFQ.

All of these factors lead me to conclude the Area Office was correct to find affiliation under the totality of the circumstances between Appellant and Pezold, because of the numerous ties between the concerns which give Pezold's principal, Mr. Pezold, the ability to control Appellant. A significant portion of Mr. Sayers' income is dependent upon Pezold. Appellant, despite its protestations to the contrary, receives significant financial assistance from Pezold. This latter fact calls into question all the assertions Appellant makes in its pleadings. (The terms of the notes are not in the record, and the Area Office should have obtained copies.) Mr. Pezold may not be on Appellant's Board, but he signs important documents on behalf of minority shareholder FHS, of which he is sole shareholder. Further, Mr. Sayers' daily lease for his satellite office means he occupies it essentially at the pleasure of the Pezold affiliate which is the landlord. All of these factors lead to Pezold having control over Appellant.

OHA has held that financial assistance in the form of loans can afford a lending concern the power to control the borrower concern. *Size Appeal of Heritage of America, LLC*, SBA No. SIZ-5017, at 5 (2008). OHA has also held that there is affiliation under the totality of the circumstances where a concern is heavily indebted to another concern which additionally holds substantial ownership interest in the borrower concern. *Size Appeal of Engineering Logistics, Inc.*, SBA No. SIZ-5587 (2014); *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999). In addition to the loans and Mr. Pezold's partial ownership of Appellant through FHS, Appellant is dependent upon Pezold affiliate landlords for Mr. Sayers' satellite office, and its main facility for contract performance. Mr. Sayers also is dependent upon Pezold for a significant portion of his income. All of these factors support the Area Office's conclusion that Pezold has the power to control Appellant under the totality of the circumstances.

Accordingly, I conclude that while the Area Office erred in finding Appellant and Pezold affiliated under common management by Mr. Sayers, the Area Office correctly found Appellant and Pezold affiliated under the totality of the circumstances, due to the number of ties between the concerns which give Pezold the power to control Appellant. Therefore, Appellant has failed to establish clear error in the size determination, and therefore I must deny the appeal and affirm the size determination.

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge