United States Small Business Administration
Office of Hearings and Appeals

FOR PUBLIC RELEASE

SIZE APPEAL OF: Martin Brothers Construction, Inc. Appellant, RE: Mahoney Construction, Inc. Appealed From Size Determination No. 06-2018-061	SBA No. SIZ-5945 Decided: July 31, 2018

APPEARANCES

P. Sean Milani-nia, Esq., Doug P. Hibshman, Esq., Fox Rothschild LLP, Washington, D.C., for Appellant

Stephan L. Skepneck, Esq., Shane J. McCall, Esq., Matthew P. Moriarty, Esq., Steven J. Koprince, Esq., Koprince Law LLC, Lawrence, KS, for Maloney Construction, Inc.

DECISION[1]

I. Procedural History and Jurisdiction

On May 4, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office), issued Size Determination No. 06-2018-061, finding Maloney Construction, Inc. (MCI), is an eligible small business for the procurement at issue.

Martin Brothers Construction, Inc. (Appellant) contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more requests for redactions and considered such requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

determination and find that MCI is not an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal and affirm the size determination.

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 February 15, 2018, the U.S. Department of the Army, Army Corps of Engineers (Army) issued Invitation for Bid (IFB) No. W91238-18-B-0001, seeking a contractor to provide removal of a pump building and trash rack and reconfiguring the pump station intake and installation of a new trash rack at The Natomas Basin. The Contracting Officer (CO) set the procurement aside for HUBZone small businesses and designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding $36.5 million annual receipts size standard as the appropriate code. The CO had notified potential offerors that it would award a firm-fixed price contract to the lowest bidder. Bids were due on March 29, 2018, and bids were opened the same day.

According to the solicitation, the contractor will be responsible for removing the existing Pumping Plant 4 building and trash rack, and reconfiguring the pump station intake and installing a new trash rack at the Natomas Basin. (Revised Specifications, Section 01 11 00, at 2.) The contractor will also raise the pump station pad and install new pumps; however, a new building will not be included. Construction of a new driveway to the new trash rack is required. The work further requires construction of a new electrical building located west of the existing Pumping Plant 4, where all of the new electrical controls will be housed. In addition, "a transformer and concrete pad will also be located adjacent to the Electrical Building, with power provided from the adjacent PG&E lines. Six-foot high chain-link fencing will enclose the Pumping Plant area, with gates installed as shown on the plans. Access ramps and landside toe roads will be reconfigured to accommodate the new pumping plant layout." (*Id.*)

The contractor will also remove the "pipes crossing through the levee at the abandoned Bennett and Northern Pumping Stations, in addition to removing the concrete structures on both the waterside and landside. The voids left by the removal of these facilities on the landside must be filled and compacted as shown on the plans. The waterside structures must be removed to the elevations shown on the plans, and stone protection placed as shown. The levee must be raised and enlarged to match the existing elevation of the raised and enlarged levee on either side of these pumping stations. The ramps and crown roads must be installed as shown on the plans, with an aggregate base surface." (*Id.*) Moreover, "a portion of the Vestal Drain between Pumping Plant 4 and where it crosses underneath the Sankey Canal must be relocated to the south side of Sankey Canal. The drain must cross under the irrigation ditch near Bennett, and connect into the existing concrete drainage ditch at Pumping Plant 4." (*Id.*)

On April 5, 2018, Appellant filed a size protest with the CO. Appellant alleged that under the ostensible subcontractor rule, MCI is affiliated with Teichert Construction (Teichert), and that together the two firms' annual receipts exceed the size standard. (Protest at 1.) Appellant alleged MCI is dependent on Teichert to perform the contract because MCI does not have any experience in the work sought by the IFB, and that at the bid opening, representatives from Teichert, not MCI, were present.

B. Protest Response

In its protest response, MCI stated that it proposed the following management positions: (i) Project Manager; (ii) Quality Control & Safety Manager; (iii) Project Superintendent; (iv) Project Engineer; and (v) Health and Safety Officer. MCI added that all proposed employees are either MCI employees or they will become MCI employees once the work commences. According to the resumes submitted, none of the proposed management is or was employed by Teichert. (Protest Response, Ex. A & F.) MCI added that it will self-perform 20% of the required work, while maintaining overall management control of the project. (*Id.*, Ex. A.) MCI's Quality Control Manager attended the Army's Site Visit. MCI used a Teichert employee to serve as a bid runner and attend bid opening for convenience. (*Id.*)

MCI also included with its protest response a declaration from XXX XX Maloney. Ms. XX Maloney is the wife of Mr. Sean Maloney, MCI's sole shareholder and officer. Ms. XX Maloney is employed by both MCI and XXXX (XX), a construction company owned by XXXX. She is the Director of Business Development at XX, but is not a shareholder, officer or director of the firm. Ms. XX Maloney asserts that her parents are divorced, and that XXXX. She has the lead in caring for her mother, who has Alzheimer's disease. Mr. XXXX informed XXXX in April 2017 that under his estate plan, his children XXXX. The children will not XXXX of XX; instead XX will be owned and controlled by XXXX. Mr. XXXX further informed his children that XX's Board, and that he would not XXXXX XX. Ms. XX Maloney further states that she began work at XX in 2012, and in that time, has had no promotions or raises. She makes no strategic decisions for XX and never attends board meetings. She believes her status as Mr. XXXX means she has no future with the company as communication XXXX, and they do not discuss XX strategy or personal matters. She does, however, have experience with levee construction, and is prepared to leave XX and work for MCI on this project. (Declaration of XXXX XX Maloney, April 30, 2018.)

C. The Size Determination

On May 4, 2018, the Area Office issued Size Determination No. 06-2018-061, finding Appellant is an eligible small business for this procurement.

The Area Office found that MCI is 100% owned by Mr. Sean Maloney, who also acts as MCI's sole director and officer. Mr. Maloney does not own any interest in any other business concern. (Size Determination at 3.) The Area Office found that Mr. Maloney's wife, Ms. XX Maloney, is employed by XX, a construction company owned by XXXX. Ms. XX Maloney is not a principal, shareholder, director, or officer of XX. (*Id.*) Further, MCI and XX do not have any economic relations, as no subcontracting agreement, loan agreement, resource sharing, nor

bonding assistance exists between the two. Ms. XX Maloney, who was the proposed Project Manager for the instant procurement, will cease to work for XX upon the commencement of work. (*Id.*) The Area Office concluded no affiliation exists between MCI and XX under the identity of interest rule.

The Area Office next noted that the Army confirmed the primary and vital requirements as 'earthwork, pump station construction and overall construction management of the project.' (*Id*; citing Email from A. Scyoc to J. Nietes, (May 2, 2018).) In analyzing MCI's proposals, the Area Office found that the positions of Project Manager and Quality Control Manager and Safety Manager will be filled by MCI personnel. Regarding the solicitation, the Area Office found that attendance at bid opening and past performance examples were not required. However, the Site Visit Attendee List, dated February 27, 2018, shows that MCI's Operations Manager was present. (*Id.* at 5.)

MCI proposes that it will perform 20% of the work, with the remainder performed by multiple subcontractors. Of these, Teichert will perform the largest percentage of work. The Area Office further states that the "Project Manager will be an MCI employee, as will the Site Manager/Project Superintendent and all key employees. No key employees are being hired from any of the subcontractors on this procurement." (*Id.*) Additionally, the Area Office found MCI will manage the contract, including providing the day-to-day on-site management. While the Project Manager and Quality Control Manager are MCI employees, MCI stated the Project Superintendent, Project Engineer/Alternate Quality Control Manager, and Health and Safety Officer will be hired from other companies, but none that are subcontractors for the instant contract. (*Id.* at 6.) The Area Office concluded that all key personnel for contract management will be MCI employees. The Area Office notes MCI asserted it was responsible for drafting the bid, providing the bid bond and only requested basic cost information from its subcontractors.

The Area Office noted that under a construction contract, the "subcontractors often perform a majority of the actual construction work, because the prime contractor frequently must engage multiple subcontractors specializing in a variety of trades and disciplines." (*Id.* at 7; citing *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503 (2013); *Size Appeal of J.R. Conkey & Associates, Inc.*, SBA No. SIZ-5326 (2012).)

Because MCI employees will be responsible for overall contract management, and MCI did not depend on a subcontractor for experience and bonding, the Area Office determined that MCI is not dependent upon any subcontractor in managing the instant solicitation. (*Id.* at 8.) After reviewing MCI's tax returns, the Area Office found MCI met the applicable size standard, and found them to be a small business concern for the instant procurement.

D. The Appeal

On May 18, 2018, Appellant filed the instant appeal. Appellant contends the Area Office clearly erred in finding MCI is a small business concern.

First, Appellant asserts the Area Office erred in failing to find that MCI and XX are affiliated under the identity of interest rule. Appellant argues that under *Size Appeal of Blue Cord*

Construction, Inc., SBA No. SIZ-5077 (2009), a familial identity of interest exists between in-laws. (Appeal at 7.) Here, Ms. XX Maloney continues to work for her father's company and her two sisters, and presumed brothers-in-law, also are employed at XX. Appellant contends that no clear fracture exists between MCI and XX because they share a key employee, Ms. XX Maloney, who is the proposed Project Manager for the instant solicitation. Further, as XX's Director of Business Development, Ms. XX Maloney is responsible for large, multi-million dollar projects, as well as publicly referred to as a key employee. (*Id.* at 9.) In addition, Appellant disputes the Area Office's finding that any potential identity of interest would be remedied when Ms. XX Maloney stopped working for XX when the work in question here commences. Because a concern's size is determined at the time it submitted its offer, "MCI cannot remedy its affiliation with XX after award of the Contract." (*Id.* at 10.)

Appellant also takes issue with the Area Office's finding that because Ms. XX Maloney and her father are estranged, a clear fracture exists. Appellant argues that the level of estrangement here does not create a clear line of fracture because Ms. XX Maloney continues to work for XX and MCI at the same time, while XX also performs the same type of levee construction sought here. Appellant claims that "[a]bsent an identity of interest, no business would allow its Director of Business Development to work for a competitor and be identified as a key team member of a competitor's proposal." (*Id.* at 11.) Appellant adds that the Area Office failed to consider whether Mr. Maloney was estranged from his father-in-law, as that relationship may also create an identity of interest. (*Id.*; citing *Size Appeal of Govern Service, Inc.*, SBA No. SIZ-3407 (1991); *Size Appeal of Midland O'Leary, Inc.*, SBA No. SIZ-2972 (1988).)

Second, Appellant asserts the Area Office erred in failing to find MCI affiliated with Teichert under the ostensible subcontractor rule. Appellant alleges the Area Office erred when it found that MCI will perform the primary and vital requirements despite Teichert's role in the bidding process. According to OHA case law, Appellant argues, "[a] subcontractor's involvement in submitting the bid and assisting with the selection of subcontractors is strong evidence that it is performing the primary and vital requirements of the contract." (*Id.*; citing *Size Appeal C.E. Garbutt Construction*, SBA No. SIZ-5083 (2009); *Size Appeal of B&M Construction, Inc.*, SBA No. SIZ-4805 (2006).) Here, Appellant states Teichert submitted the sealed bid and represented MCI at bid opening; that subcontractor Myers & Sons (Myers) submitted a bid to Teichert, not MCI; and that Teichert was on the Interested Vendors List. Appellant contends this is evidence that Teichert was chasing the contract and contacted MCI in order to serve as a pass through contractor. (*Id.* at 14-15.) Appellant claims that by Myers submitting a bid to Teichert, Myers understood that Teichert would be managing the contract.

Appellant next argues the Area Office did not properly evaluate bonding assistance. Appellant contends there is a difference between a bid bond and a performance and payment bond. Thus, "Appellant's ability to secure a bid bond does not guarantee that it will be able to secure payment and performance bonds" that amount to the bid price. (*Id.* at 16.) Appellant argues MCI is unlikely to secure this bond without assistance from Teichert or XX because MCI is a small company.

Lastly, Appellant contends the Area Office failed to consider the relative size and experience of both MCI and Teichert. Because the size of the prime contractor must be

considered as it relates to its subcontractor, the size determination should be reversed or remanded because there was no discussion of the relative size and experience of MCI and Teichert. (*Id.* at 17; citing *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011); *C.E. Garbutt Construction*, SBA No. SIZ-5083 (2009).) Appellant adds that MCI is unable to perform the required levee construction work because its experience is in residential construction. Thus, the Area Office's failure to consider the relative size and experience of MCI and Teichert is a clear error that requires reversal or remand of the size determination.

E. MCI's Response

On June 7, 2018, MCI responded to the appeal, arguing the Area Office correctly found MCI is a small business concern. MCI contends no affiliation exists between MCI and XX, and further argues Teichert is not MCI's ostensible subcontractor.

MCI contends no affiliation exists between MCI and XX because they do not do any business together, thus the presumption of an identity of interest affiliation does not exist. (MCI Response at 8; citing 13 C.F.R. § 121.103(f)(1).) SBA regulations updated in 2016 make clear, according to MCI, that in order for a familial identity of interest to exist, the business concerns must do business with each other. Thus, the new regulations dictate that the presumption exists when the concerns in question do business together and that the concerns must be controlled by close family members. (*Id.* at 9.) MCI states that there are no subcontracts, joint ventures, loans, and resource, equipment, location, nor employee sharing, between MCI and XX.

MCI also opposes Appellant's contention that MCI did not properly show a clear fracture when it stated that Ms. XX Maloney and her father were estranged. MCI points to Ms. XX Maloney's sworn declaration stating she and her father were estranged, and the fact that she still works for XX does not prevent a finding of a clear fracture "as the contract in question is her opportunity to extract herself from that position." (*Id.* at 12.) In addition, Ms. XX Maloney is not a high level employee of XX and she shares no common investments with her father, thus the evidence shows there is a clear fracture between her and her father.

MCI argues Appellant's arguments rely on outdated case law, because it claimed a familial identity of interest includes in-law relationships. MCI notes Appellant's reliance on *Blue Cord Construction* was erroneous because it was issued before the new familial identity of interest rules were promulgated, which state "[i]n-laws are not among the family members to whom the presumption applies." (*Id.* at 14.) MCI adds the Area Office properly investigated Ms. XX Maloney's role within XX, and thus, contrary to Appellant's claims, Ms. XX Maloney's relationship with XX was considered and adequately disposed of. MCI adds that in its proposal, Ms. XX Maloney's role as Project Manager shows her clear intent, at time of bid submission, to leave XX and join MCI full-time as the Project Manager for the instant procurement. (*Id.* at 15.)

Next, MCI disputes Appellant's allegations the Area Office erred in finding MCI and Teichert are not affiliated under the ostensible subcontractor rule. MCI contends that because it is managing and overseeing the contract, it is not affiliated with Teichert. (*Id.*, at 18-20)

MCI asserts despite Appellant's claims, Teichert attending the bid opening is not a violation of the ostensible subcontractor rule because the bid opening was not part of the contract's work requirement and the IFB did not require offerors to attend the bid opening. (*Id.* at 19.) MCI adds that it is overseeing and managing the contract and the Project Manager, Site Manager and key employees such as Quality Control Manager, Project Superintendent, Project Engineer/Alternate Quality Control Manager, and Health and Safety Officer will all be MCI employees. (*Id.* at 20, 22.) Thus, under OHA case law that dictates that under a construction contract the primary and vital requirement is to manage the work and not necessarily perform the majority of the actual construction work, MCI argues it is not affiliated with Teichert. (*Id.* at 21-22; citing *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503 (2013); *Size Appeal of J.R. Conkey & Associates, Inc.*, SBA No. SIZ-5326 (2012).)

Further, MCI contends that under the four factors OHA considers when determining whether unusual reliance on a subcontractor exists, none of the factors are found here. (*Id.* at 23; citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) Here, Teichert or any other subcontractor is not the incumbent; MCI is not planning on hiring any subcontractor employees; MCI's proposed management has no connection to its subcontractors; and MCI has the necessary experience to perform the contract.

In responding to Appellant's allegations Teichert reached out to Myers, MCI contends that it did not rely on Teichert to find subcontractors. Rather, it was MCI itself who contacted Myers seeking cost information. MCI argues that whether Myers understood that Teichert would be managing the project is irrelevant because Myers is not going to be a subcontractor to MCI. (*Id.* at 24-25.) Additionally, MCI states it secured the bid bond that was explicitly required by the IFB without any subcontractor assistance. Appellant's contention the Area Office erred by not finding that MCI could not secure performance and payment bonds without assistance is meritless. MCI maintains this argument is being made for the first time on appeal and thus must fail. Further, the solicitation required a performance and payment bond within a time period specified by the contract, not the IFB. Appellant claimed MCI did not have the ability to secure the performance and payment bond, yet MCI already provided the CO with this bond. (*Id.* at 25.)

MCI maintains it has experience to perform the work sought and it did not rely on the experience of its subcontractors because the solicitation did not require offerors to submit past performance. MCI alleges Appellant's contentions rely on marketing material MCI sent to residential homeowners, yet Appellant ignores the information on MCI's website. Specifically, the website, unlike the marketing material explicitly aimed at residential homeowners, discusses MCI's experience with levee work. (*Id.* at 26-27.) MCI concludes that it is not unusually reliant on its subcontractor because it will manage the contract with its own employees and was also responsible for chasing the bid, drafting the proposal, and securing the required bonds.

F. New Evidence

Accompanying its appeal, Appellant submitted a motion for new evidence. Appellant seeks to introduce into the record XX management profiles found in XX's website; an article about Ms. XX Maloney from the North Bay Business Journal website; an article about Ms. XX Maloney from the Associated General Contractors of California website; a printout from the XX

website concerning their experience; and a declaration from Mr. Felipe Martin, CEO and President of Appellant. Appellant argues the evidence should be admitted because the evidence relates to Ms. XX Maloney's dual employment at XX and MCI, of which Appellant became aware of at the time the size determination was issued. Appellant adds that the "information was not, and is still not reasonably accessible using publicly available resources." (Appeal, at 19.)

On June 7, 2018, MCI filed its opposition to the motion for new evidence. MCI argues the motion should be denied because the information about XX and Ms. XX Maloney Appellant seeks to introduce was available at the time of the size protest. (Opposition to New Evidence, at 2.) MCI contends Appellant's argument lacks merit because "[Appellant]'s protest hinged on the allegation that [MCI] was a large business because of affiliation. [Appellant] should have investigated any potential affiliation at the time." (*Id.* at 3; citing *Size Appeal of Perry Management, Inc.*, SBA No. SIZ-5100 (2009).) MCI also adds that the declaration by Mr. Martin was made *post hoc* and provides no value except to strengthen Appellant's arguments for admitting the new evidence.

On June 7, 2018, MCI filed a motion to introduce new evidence. MCI seeks to introduce a declaration by Ms. XX Maloney that addresses certain allegations made on appeal. MCI contends that if Appellant is allowed to introduce its evidence, MCI's evidence should also be allowed because MCI's "new evidence is a rebuttal of that evidence" and thus good cause would have been shown. (MCI Motion for New Evidence, at 1.)

On June 19, 2018, MCI filed another motion for new evidence. MCI attempts to introduce to the record a performance bond and payment bond MCI obtained in relation to the instant solicitation. MCI also seeks to introduce a declaration by Mr. Maloney, which gives context to the performance bond and payment bond. MCI argues the evidence should be admitted because "they directly respond to [Appellant]'s allegation that [MCI] has not and cannot obtain bonding without subcontractor assistance." (MCI Second Motion for New Evidence, at 2.)

G. Supplemental Appeal

On June 7, 2018, the date for the close of record, Appellant filed a supplemental appeal. In its supplemental appeal, Appellant once again contends the Area Office failed to properly analyze MCI's bonding capability. Appellant states that MCI's bid was roughly $24.2 million while having annual revenues of less than $3 million. (Supplemental Appeal, at 2.) Appellant adds that in its correspondence with the Area Office, MCI stated that Ms. XX Maloney will not be receiving pay from MCI until the project commences. Appellant reasons that "[MCI]'s inability to pay its employees demonstrates it is not financially able to perform an approximately $24 million project without the assistance of a large business." (*Id.* at 3.) Further, Appellant claims that despite the Area Office's request for evidence of bonding capability, MCI never provided it. Instead, MCI provided a General Agreement of Indemnity (GAI), which, according to Appellant, does not prove that MCI can meet the bonding requirements. Appellant adds that the record does not contain any other evidence that MCI can obtain the necessary bonding for this contract without assistance from a large business. Appellant argues that this failure by MCI should have led to a finding of adverse inference against MCI. (*Id.* at 4.)

Next, Appellant contends that significant family connections exist between MCI and XX. Appellant argues the Area Office never considered the fact that Ms. XX Maloney's two sisters and two brothers-in-law hold management positions at XX. Appellant claims that this misrepresentation rises to the level of "negative inference" under 13 C.F.R. § 121.1008. (*Id.* at 5-6.) Regarding the alleged estrangement between Ms. XX Maloney and her father, Appellant argues there is no explanation as to why XX allows Ms. XX Maloney to hold outside employment with MCI and why Ms. XX Maloney continues to work for XX despite her experience in the construction field. (*Id.* at 6.) Appellant maintains the record thus fails to establish that there is a clear line of fracture between MCI and XX due to Ms. XX Maloney's role as a key employee of both concerns.

H. MCI's Response to the Supplemental Appeal

On June 19, 2018, after being granted leave by OHA, MCI filed a response to Appellant's supplemental appeal.

MCI disputes Appellant's allegations that MCI failed to meet the bonding requirements, arguing that MCI has obtained the necessary bonding without the assistance of any subcontractor Additionally, MCI contends issues of bonding capability fall under a responsibility determination, an area under the discretion of a contracting officer. (Response to Supplemental Appeal, at 2.)

MCI states that on May 11, 2018, it obtained a performance bond for the amount of the total base contract, which it provided to the CO. Regarding Appellant's claims, MCI explains that the IFB incorporated FAR 52.228-15, in which it requires performance and payment bonds for the original contract price, described as 'the award price of the contract' but one that 'does not include the price of any options, except those exercised at the time of the contract award.' (*Id.* at 3; citing FAR 52.228-15(a).) Thus, according to MCI, its performance and payment bond for $10.3 million fulfills the FAR and IFB requirements and shows that MCI is not reliant on a subcontractor for bonding assistance.

Disputing Appellant's allegations that MCI and XX are affiliated based on a familial identity of interest; MCI contends they should be dismissed as the Area Office addressed these issues in its size determination. MCI argues that Appellant's contentions are a disagreement with the Area Office's findings "but disagreeing with a finding cannot be the basis for a finding of clear error of fact or law." (*Id.* at 4.) MCI adds that the allegation that the Area Office failed to consider Ms. XX Maloney's familial relationship should be dismissed or denied because it was a new issue on appeal and Appellant's size protest failed to allege Ms. XX Maloney was related to individuals at XX. This information was readily available at the time of the size protest and "the Area Office may not be faulted for failing to address issues that were never before it." (*Id.* at 5-6.) MCI adds that these claims are not based on information contained in the record before OHA, but instead on information it became aware of at the time of the size determination and thus should have been made at the time of its initial appeal.

MCI contends that no negative inference can be attributed to MCI in regards to its responses to the alleged familial relationship between MCI and XX. MCI argues a negative

inference under 13 C.F.R. § 121.1008 is for cases where an untimely or incomplete response was provided to the Area Office. Neither of those situations occurred here as MCI responded to all inquiries made by the Area Office. (*Id.* at 6.) MCI adds that the regulation does not allow OHA to 'take a negative inference'; instead it allows the Area Office, not OHA, to presume that a failure to submit requested information demonstrates that a concern is not a small business concern. (*Id.*) Furthermore, MCI argues that the familial relationships of Ms. XX Maloney are irrelevant as she has no ownership or control of MCI. Additionally, Ms. XX Maloney's two sisters and one brother-in-law have no ownership or control over XX. Thus, "[Mr. Maloney]'s relationship with his in-laws is especially irrelevant when his wife has no ownership or control in [MCI] and is not a principal, does not manage any employees, and does not have the ability to control [XX]." (*Id.* at 7.)

Given that identity of interest does not apply to in-laws, the Area Office properly limited its review to the relationship between Ms. XX Maloney and her father, while the presumption applies to those businesses that do business together, which the record shows MCI and XX do not. In response to Appellant's allegations that Ms. XX Maloney and her father are not estranged, MCI explains that the allegations in the supplemental appeal offer "no new arguments, legal authority, or evidence" beyond that which was argued in the initial appeal. (*Id.* at 8.)

III. Discussion

A. New Evidence and Standard of Review

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. 13 C.F.R. § 134.308 (a). Therefore, evidence 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). New evidence may be admitted on appeal at the discretion of the administrative judge if a motion is filed that establishes good cause for the admission of new evidence. 13 C.F.R. § 134.308(a). In its motion for admission of new evidence, the movant must demonstrate that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vazquez Commercial Contracting*, LLC, SBA No. SIZ-5803 (2017), quoting *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). Further, 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). The fact that evidence is publicly available does not eliminate the requirement to provide such information to the Area Office for its size determination. *See Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5041, at 10 (2017) (rejecting the appellant's argument that the information is not new evidence when it was available to Appellant, but not made a part of the record.)

Appellant seeks to introduce new evidence to the record with its initial appeal relating to Ms. XX Maloney's employment with XX. I find that this evidence was publicly available at the time Appellant filed its protest, and could have been submitted at that time. I further find it of little or no probative value. Accordingly, I DENY Appellant's motion to submit new evidence.

Furthermore, I also DENY MCI's motion to submit new evidence in response to Appellant's proffered new evidence.

However, I ADMIT into the record MCI's submission of June 19th relating to the bonds acquired by MCI. This evidence goes directly to arguments Appellant has made repeatedly, does not enlarge the issues, and clarifies the facts at issue in the appeal.

B. Analysis

1. Ostensible Subcontractor

Appellant's initial protest alleged MCI was in violation of the ostensible subcontractor rule. The "ostensible subcontractor" rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). 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).

Additionally, in cases involving construction work, OHA has repeatedly held that "[t]he primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors." *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503, at 6 (2013) (quoting *Size Appeal of C.E. Garbutt Constr. Co.*, SBA No. SIZ-5083, at 6 (2009).) Further, "a small business prime contractor on a construction contract may delegate a large portion of the construction work to its subcontractors without contravening the ostensible subcontractor rule, provided that the prime contractor retains management of the contract." *Size Appeal of Milani Construction, LLC*, SBA No. SIZ-5898 (2018) (quoting *Iron Sword*, SBA No. SIZ-5503, at 6.)

Here, MCI will be managing the contract, including the day-to-day site management. The Project Manager and Quality Control Manager positions will be filled by individuals who are currently MCI personnel. MCI will hire no key employees from any of the subcontractors, including Teichert, will perform 20% of the work, and oversee the performance by its subcontractors. MCI alone will thus be managing contract performance, and therefore performing the primary role of a prime contractor in a construction project, that of superintending, managing, and scheduling the work. MCI's role is therefore similar to that of other firms who have been found compliant with the ostensible subcontractor rule when they had firm control of the management of the subject contract. *Milani Construction*, at 6; *Size Appeal of J.R. Conkey Assoc., Inc.*, SBA No. SIZ-5326 (2012).

Further, Teichert is not the incumbent on this contract, and MCI did not hire the majority of its workforce from Teichert, nor its management. Accordingly, three important factors in determining whether the ostensible subcontractor has been violated are not present here. *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017).

The fourth factor is bonding. Appellant vigorously argues MCI does not have the capacity to obtain the bonding necessary to perform the contract, without the assistance of its subcontractors. Appellant's claims are mere assertions, and, even though it has had access to the record before the Area Office, Appellant has been unable to establish that it is Teichert, the alleged ostensible contractor, who is responsible for Appellant receiving bonding. Appellant's argument is based upon speculation as to MCI's ability to obtain bonding, and does not provide any basis for disturbing the finding of the Area Office that MCI has sufficient bonding capacity. *Milani Construction*, at 7. Further, the evidence Appellant submitted on June 19th establishes that Appellant has, in fact, obtained the necessary bonding for this procurement. I conclude Appellant's argument MCI is dependent upon Teichert for bonding is meritless, and based upon speculation unsupported by evidence.

Appellant further alleges MCI lacks the experience and capacity to perform the contract. However, its statements to that effect are mere allegations, and lack support in the record. This Solicitation did not require an evaluation of an offeror's past performance, so MCI could not have relied upon a subcontractor's experience to receive the award. (Solicitation, p. 11.) Where offers can be accepted without relevant past performance, the inclusion of a more experienced subcontractor is not a factor which could materially enhance an offeror's prospects for award. *Size Appeal of Emergent, Inc.*, SBA No. SIZ-5875, at 9 (2017). Accordingly, MCI was not reliant upon Teichert's experience to receive this award. Further, the resumes MCI submitted with its response to the protest confirm MCI's experience in levee construction.

Appellant also argues Teichert controlled the bidding process, because it delivered the bid and was present at bid opening, when MCI was not. Further, a quote submitted by Myers had originally been delivered to Teichert. The Area Office found, however, that MCI's Operations Manager was present when the Army held a Site Visit on February 27, 2018. In any event, the Solicitation did not require attendance at the bid opening. The fact that MCI relied on Teichert as a bid runner to perform the clerical acts of delivering the bid and attending the opening, and that they received the Myers quote, hardly establish control by Teichert of the bidding process. Appellant's contentions on this point are meritless.

I therefore conclude that MCI is performing the primary role of a prime contractor on this construction procurement by managing the contract through its own employees. MCI is not unusually reliant on Teichert or any other subcontractor; Appellant's arguments here are mere speculation, and are thus meritless. Appellant has failed to establish any error by the Area Office in its conclusion MCI was not in violation of the ostensible subcontractor rule.

2. Identity of Interest

Under SBA regulations, affiliation based on identity of interest:

> Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.

> Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.
>
> (1) Firms owned or controlled by married couples, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with each other, such as subcontracts or joint ventures or share or provide loans, resources, equipment, locations or employees with one another. This presumption may be overcome by showing a clear line of fracture between the concerns. Other types of familial relationships are not grounds for affiliation on family relationships.

13 C.F.R. § 121.103(f).

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

A challenged concern may rebut the presumption of identity of interest if it shows "a clear line of fracture among the family members." *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 17 (2006).) "A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged." (*Carwell* at 8, citing *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217, at 6 (2011).) "Factors that may be pertinent in examining clear line of fracture include whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and whether the family members participate in multiple businesses together." *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR).

Here, the issue is whether the fact that the wife of MCI's sole shareholder is the daughter of the principal of another construction firm, and is employed by that firm, creates an identity of interest between the two concerns. The Area Office concluded that it does not, and I agree.

First, Mr. Maloney is MCI's sole shareholder, officer and director, and therefore he controls MCI. Mr. XXXX, Mr. Maloney's father-in-law, is XX's principal, and controls that firm. Despite Appellant's erroneous allegations, the regulation does not provide for a finding of identity of interest between in-laws. While Appellant points to precedent that has relied on in-law relationships to find identity of interest (*Size Appeal of Blue Cord Construction, Inc.*, SBA No. SIZ-5077 (2009)), the regulation has since been revised to specifically enumerate those family relationships which lead to a finding of identity of interest due to a family relationship. 81 Fed. Reg. 34,243 (May 31, 2016); *Size Appeal of CTSI-FM, LLC*, SBA No. SIZ-5809, at 8 n.1 (2017). The regulation excludes in-law relationships from those that lead to an identity of interest finding. The Area Office was thus correct to find no identity of interest between Mr. Maloney and Mr. XXXX.

Further, even if the relationship between Ms. XX Maloney and XXXX is to be considered, and I find that it should not, Ms. XX Maloney's declaration clearly establishes that she is estranged from XXXX, XX's principal, and that this, in turn, demonstrates a clear fracture between them. Her parents are divorced, and she is caring for her mother. Mr. XXXX has made clear that she will have no XXXXX, that her XXXX, and that she will not XXXX in XX. Their personal interactions are limited. Ms. XXXX's descriptions of her duties do not show her to be someone with critical influence or substantive control over the operations or management of the concern, and thus not a key employee. 13 C.F.R. § 121.103(g). In addition, there are no business ties whatsoever between MCI and XX. There is no common ownership, common address or facilities, or contractual relationships between the concerns. The only common employee is Ms. XX Maloney, and the record shows Ms. XX Maloney does not have the power to control XX, nor is she a key employee of XX.

The fact that Ms. XX Maloney has other family members employed at XX does nothing to establish that there is an identity of interest between the two concerns. It is Mr. XXXX who is XX's principal, and the estrangement there is clear. The key factor in any finding of affiliation is control or power to control (13 C.F.R. § 121.103(a)(1)), and there is nothing here to show that XX controls MCI, or that MCI controls XX. The Area Office was therefore correct in not requesting further information on Ms. XX Maloney's other relatives. Because the Area Office requested no information, the adverse inference rule is not applicable. 13 C.F.R. § 121.1009(d).

I conclude that the Area Office correctly found no affiliation between MCI and XX based upon the identity of interest rule, and that Appellant has failed to meet its burden of establishing clear error in 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