

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

SIZE APPEAL OF:

Atlantic Diving Supply, Inc.,

Appellant,

Appealed From  
Size Determination No. 02-2018-309

SBA No. SIZ-6005

Decided: May 23, 2019

APPEARANCES

Paul F. Khoury, Esq., John R. Prairie, Esq., Kendra P. Norwood, Esq., Wiley Rein LLP, Washington, D.C., for the Appellant

Steven J. Koprince, Esq., John Mattox, Esq., Koprince Law LLC, Lawrence, Kansas, for the Appellant

Meghan E. Michalski, Defense Logistics Agency Troop Support, Construction & Equipment Directorate, Philadelphia, Pennsylvania

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AMENDED DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On March 12, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determination No. 02-2018-309, concluding that Atlantic Diving Supply, Inc. (Appellant) is not eligible for award of the subject procurement, because it found that Appellant was affiliated with Mythics, Inc. (Mythics) arising from ongoing relationships between its owners and management Luke Hillier, R. Scott LaRose, and Michael Hillier. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons

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<sup>1</sup> This decision was originally issued without limitations on its use. On May 29, 2019, Appellant filed a motion seeking confidential treatment for the decision. I GRANTED the Motion, and gave confidential treatment to the original, unredacted decision. I now issue this redacted decision, for public release.

discussed *infra*, the appeal is GRANTED IN PART, the size determination is VACATED, and the matter is REMANDED to the Area Office for further review consistent with this 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 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

On August 10, 2017, Defense Logistics Agency Troop Support (DLA) issued Request for Proposals (RFP) No. SPM8EH-16-R001 for various types of fire and emergency services equipment. Specifically, the solicitation stated that the scope of work was for

The scope of work under the Fire & Emergency Services Equipment (F&ESE) Tailored Logistics Support (TLS) Program includes the total logistics support for the fire and emergency services equipment requirements of DLA customers to include military installations and federal activities worldwide. The primary purpose of the proposed TLS Program is to provide support to authorized customers for all fire and emergency services equipment, supplies, and related incidental services necessary to perform their missions.

(RFP at 42.) The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industrial Classification System (NAICS) code 339999, All Other Miscellaneous Manufacturing, with a corresponding 500 employee size standard. (RFP at 1.)

### B. Proposal

Appellant submitted its initial proposal on June 27, 2016. (Proposal at 1.) Appellant submitted its final proposal revision on April 4, 2018. (ADS Size Protest Response at 2.)

### C. Protest

On September 12, 2018, the CO informed Appellant that it was challenging the small business representation of Appellant. (Size Protest at 1.) The CO stated that Appellant may be affiliated with Mythics Inc. (Mythics), London Bridge Trading Co. Ltd., SEK Solutions LLC (SEK), Karda Systems LLC (Karda), and MJL Enterprises LLC (MJL) due to the then-recently settled civilian *qui tarn* lawsuits with the U.S. Department of Justice (DOJ) regarding allegations of set-aside procurement misrepresentation. (*Id.* at 3.) Additionally, the CO argued that Appellant's purchase of an "other than small" foreign entity Theodor Wille International (TWI) made Appellant other than small. (*Id.*) The CO also raised concerns about the formation of TWI USA, LLC, a new entity formed by TWI that has become a separate wholly-owned subsidiary of Appellant. (*Id.*)

Regarding the DOJ litigation and settlement, the CO specifically noted that of concern was a 2017 settlement agreement (ADS Settlement) between Appellant and the DOJ Civil Division “whereby the former agreed to pay \$16 million to the U.S. Government to settle allegations that it knowingly conspired with and caused other purported affiliated small businesses to submit false claims for payment in connection with fraudulently obtained small business contracts.” (*Id.* at 1.) The settlement agreement addressed alleged wrongdoing between January 1, 2006 and August 1, 2016 and did not include an admission of liability by Appellant. (*Id.* at 2.) Karda, SEK, and MJL also reached settlement agreements with DOJ. (*Id.*) Additionally, the former CEO and co-founder of SEK, Khalil Nairn, pleaded guilty to obtaining 8(a) program contracts through aiding and abetting a false statement to SBA. (*Id.*) The president of Karda, Samuel Caragan, pleaded guilty to making false statements to the SBA for the purpose of obtaining 8(a) contracts. (*Id.* at 2-3.)

#### D. Protest Response

On September 27, 2018, Appellant responded to the protest, and provided its completed SBA Form 355, payroll documentation, corporate documents, and other documents requested by the SBA. (ADS Size Protest Response.) Appellant stated it only had XXX employees, under the 500-employee size standard. (*Id.* at 1.) Appellant stated the CO's protest contained no specific allegations regarding Appellant's alleged affiliation with the allegedly affiliated companies and should therefore be dismissed. (*Id.*) Appellant additionally argues that the CO's allegations are meritless because the settlement involved no finding of wrongdoing or affiliation and because the settlement's covered conduct allegedly occurred between 2006 and 2016, while the relevant size determination date is April 4, 2018. (*Id.*) Appellant stated it was not affiliated with any of the entities discussed in the DOJ investigation. (*Id.* at 11.)

Appellant is 100% owned by ADS Tactical, Inc. [Shareholder 1] owns XXX of ADS Tactical, Inc., and is XXX of Appellant. (Ex. G to Protest Response, Appellant's SBA Form 355.) Other shareholders of ADS Tactical, Inc. include [Shareholder 2], [Shareholder 3], and [Shareholder 4].

Appellant asserted it owns 100% of TWI USA, LLC, which in turn owns 100% of Theodor Wille Intertrade GmbH (Swiss), which in turn owns 100% of Theodor Wille Intertrade GmbH (German) and Theodor Wille Intertrade FZE. While these entities are “other than small,” this is due to their status as foreign corporations. Appellant maintains that including their employees in its count does not cause it to exceed the size standard. (*Id.*, at 3-4.) Appellant also identified a number of affiliates which had no employees. Appellant then identified its affiliates which did have employees: [Affiliate 1]; [Affiliate 2]; [Affiliate 3]; [Affiliate 4]; TWI USA, LLC; Theodor Wille Intertrade GmbH (Swiss); Theodor Wille Intertrade GmbH (German); Theodor Wille Intertrade FZE. (*Id.* at 6.) Appellant then calculated the number of employees for itself and its affiliates at XXX. (*Id.* at 6-10.)

Appellant stated that it is not affiliated with Mythics. (*Id.* at 12.) Any affiliation between the companies ended, at the latest, in 2011. (*Id.*) In 2009, Mythics was owned in equal parts by Luke Hillier, Michael Hillier (Luke's brother) and R. Scott LaRose. Luke Hillier resigned as

Mythics CEO, effective January 1, 2010. (*Id.*) On March 15, 2010, Luke Hillier sold 90 of his 100 Mythics shares. (*Id.*) On November 1, 2011, he sold the remaining 10 shares. (*Id.*) Meanwhile, Michael Hillier sold his interest in Appellant on January 1, 2009. (*Id.*) Further, the two concerns are in different businesses, share no facilities, employees, management or resources. (*Id.*) They have never worked together, except on one small contract in 2010. (*Id.*) Further, they have no teaming agreement, joint venture agreements, or subcontracting agreements. (*Id.*) Appellant thus maintained that there were no grounds to find it affiliated with Mythics. (*Id.*)

Appellant also denied affiliation with London Bridge, SEK solutions, Karda Systems, and MJL Enterprises. (*Id.* at 13-16.)

#### E. Size Determination

On March 12, 2019, the Area Office issued Size Determination No. 02-2018-309, concluding that Appellant is ineligible for the subject procurement. The Area Office found that Appellant is not a small business concern and is not eligible for the instant procurement due to its affiliation with other concerns. (Size Determination at 4.)

##### 1. Affiliation

The Area Office first addressed Appellant's request to dismiss the Co's allegations due to a lack of specificity. (*Id.* at 2.) The Area Office stated that the lack of admission of guilt cannot be used to prevent an Area Office from issuing a size determination because the size determination process is an administrative tool rather than a criminal proceeding. (*Id.*) Additionally, the CO's concerns arose from all of Appellant's activity rather than just the actions during the period covered by the DOJ settlement. (*Id.*)

The Area Office noted Appellant had failed to account for XXX% of the ownership of its parent, ADS Tactical, Inc., but noted that Scott LaRose appeared to have been removed as a director in 2015, based on information in the Virginia state records.

The Area Office noted that business concerns are considered affiliates when one has the power to control the other, or a third party or parties have the power to control both, regardless of whether control is exercised. (*Id.* at 5, *citing* 13 C.F.R. § 121.103(a)(1).) The Area Office further noted the affiliates Appellant identified in its Response. (*Id.*, at 3-4.)

The Area Office examined the relationships between Appellant, Mythics, Luke Hillier, his brother Michael Hillier, and Scott LaRose. (Size Determination at 5-6.) The Area Office noted Appellant answered “Yes” to question 21 on its Form 355, inquiring whether any family member of one of its owners have an ownership interest in any alleged affiliate. Appellant's note said that Michael Hillier may have a minority interest in Mythics. The Area Office concluded this appears to contradict Appellant's assertions in its narrative Response to the Protest. (*Id.* at 6.) The Area Office notes that there may be identity of interest based upon other factors than a family relationship. The Area Office “considered that the whole scope of relationships of the individuals involved in Appellant and Mythics includes undisclosed ties.” (*Id.*)

The Area Office continued its investigation by examining publicly available information on website of the Commonwealth of Virginia's State Corporation Commission (VA SCC). (*Id.* at 6-7.) In this examination, the Area Office found that Appellant failed to disclose the extent of the relationship between Luke Hillier, Michael Hillier, Robert Scott LaRose, and Daniel J. Clarkson. (*Id.*) The Area Office compared Appellant's submitted information on ownership with information found on the VA SCC. (*Id.* at 7.) Appellant's submission included the following statement on ownership of these two entities:

- [Company 1]
- [Company 2]

(*Id.*) The Area Office noted that according to the VA SCC, “2013 was the last year Robert S. LaRose was a listed as Director of ADS in its annual SCC filing and 2011 is the last year Luke Hillier is listed as a Director of Mythics.” (*Id.*) ADS Tactical Inc.'s 2011 SEC filing shows that Daniel Clarkson, Luke Hillier, Michael Hillier, Jr. and R. Scott LaRose had a business called Tactical Exporters, Inc. (*Id.*) Tactical Exporters, Inc. was owned by “Daniel Clarkson, Luke Hillier, Michael Hillier, Jr. and R. Scott LaRose in the amounts of 16.64%, 50.08%, 16.64% and 16.64%, respectively” in 2008. (*Id.*) From 2009 to 2011, “Tactical Exporters was owned by Daniel Clarkson, Luke Hillier, and R. Scott LaRose in the amounts of 16.63%, 58.42% and 24.95%, respectively.” (*Id.*)

The four co-owners of Tactical Exporters, Inc. also co-owned a business called Tactical Properties, LLC. (*Id.*) “Each of Daniel Clarkson, Luke Hillier, Michael Hillier, Sr., Michael Hillier, Jr., R. Scott LaRose and Charles Salle own 16.67% of Tactical Properties.” (*Id.* at 7-8.) In addition to Tactical Exporters, Inc. and Tactical Properties, LLC, the Area Office also found other for-profit ventures co-owned by the Daniel Clarkson, Luke Hillier, Michael Hillier, Jr. and R. Scott LaRose:

Based on VA SCC filing, in 2009 and 2010 Luke M. Hillier, and Robert LaRose are among the Directors for Mythics; from 2011 to the most recent available filing in 2018 R. Scott LaRose is still among the Directors of Mythics. From its date of formation in 2011 through its 2015 annual filing Luke M. Hillier, and Daniel J. Clarkson are among the Directors for ADS Tactical; Robert S. LaRose was a Director on the initial filing in 2011, then again in 2013, 2014 and 2015. Luke Hillier still remains as Director in 2017 and 2018. From its date of formation in 2010 through its 2015 annual filing Luke M. Hillier, and Daniel J. Clarkson are among the Directors for Mar-Vel International, Inc. From its date of formation in 2007 through its 2010 annual filing Michael A. Hillier, Jr., and Robert S. LaRose are among the Directors for Iron Brick Ltd. Robert LaRose remained as Director through 2012.

The Area Office did not request a Form 355 for Mythics as it has a current DSBS profile indicating an average of 388 employees. Consequently, the Area Office made the calculation that of affiliation is found ADS [Appellant] would not be under 500 employees. (*Id.* at 8.) Finally, the

Area Office also found evidence of non-profits that were co-owned by Daniel Clarkson, Luke Hillier, Michael Hillier, Jr. and R. Scott LaRose but undisclosed by Appellant. (*Id.*) This includes the Hillier LaRose Foundation, Lynnhaven Dive Center, and the Hillier Foundation. (*Id.* at 8-9.) Lynnhaven Dive Center was founded by Michael Hillier Sr. (Luke Hillier's father) in 1978 and was ADS' original parent firm; it is currently owned by Luke Hillier's sister and husband. (*Id.* at 8.) It is still run by Luke Hillier's sister and serves as a location for events for the other non-profits. Appellant and Mythics participated in one such event in 2016. The Area Office found Appellant affiliated with Lynnhaven. (*Id.* at 8-9.)

The Area Office concluded that the non-disclosure of the full extent of the business relationships between Daniel Clarkson, Luke Hillier, Michael Hillier, Jr., and R. Scott LaRose, Appellant's insistence that there was no affiliation between itself and Mythics, R. Scott LaRose's and possibly Michael Hillier Jr.'s continuing ownership and control over Mythics, Appellant's failure to submit information regarding the alleged affiliate Mythics' employees, and Appellant's non-inclusion of Lynnhaven Dive Center supported it drawing an adverse inference against Appellant. (*Id.* at 9.)

The Area Office thus found that Appellant “is affiliated with Mythics due to the totality of the circumstances indicating clear identity of interest arising from the long-term and ongoing business relationship between its owners and management Luke Hillier, R. Scott LaRose, and Michael Hillier.” (*Id.* at 9.) The Area Office also found Appellant “is affiliated with Mythics, Lynnhaven, and potentially other firms sharing the same owners and/or management or other firms due to contractual or other agreements.” (*Id.*, at 11.) The Area Office stated that it would conclude the missing information would demonstrate the concern was other than small. (*Id.* at 9.)

## 2. Number of Employees

The Area Office then went on to examine Appellant's employee records. (*Id.*) It agreed with Appellant that the correct date to determine size status April 4, 2018 and examined records starting from April 2017 through March 2018. (*Id.* at 10.) Appellant indicated that it paid its employees on a biweekly basis and had XXX employees for the 26 relevant pay periods. (*Id.* at 11.) It had additional employees in acknowledged affiliates, totaling to XXX employees for the relevant period. (*Id.*) However, based on the adverse inference which supported the finding of affiliation with Mythics, Lynnhaven Dive Center, and potentially other firms, the Area Office concluded Appellant had more than 500 employees, exceeded the applicable size standard and thus was not eligible for the instant procurement. (*Id.*)

## F. Appeal

On March 22, 2019, Appellant filed the instant appeal, arguing that the Area Office clearly erred in determining that Appellant is ineligible for award. (Appeal at 1-2.) Appellant objects to the evidence upon which the Area Office based the Size Determination, claiming that the cited historical connections between Luke Hillier and the various individuals existed many years ago. (*Id.* at 2-3.) Appellant also objects to the “six-month long ‘investigation’”D’ conducted by the Area Office using searches through the U.S. Securities and Exchange Commission and

VA SCC websites and claims it did not have notice of the scope and focus of the Area Office's investigations. (*Id.* at 2.)

Appellant alleges five clear errors of fact and law. (*Id.* at 3.) First, Appellant claims that the Size Determination was based upon evidence concerning historical ties that no longer exist. (*Id.*) Appellant states that only two of the alleged connections were within the last three years, and many are over seven years old. (*Id.*) Appellant argues OHA precedent holds that past affiliation through investments or other historical ties cannot support a current finding of affiliation. (*Id.* at 12, citing *Size Appeal of Medical Comfort Sys., Inc.*, SBA No. SIZ-5640 (2015); *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316 (2012).) Therefore, Appellant argues the evidence of historical ties the Area Office relied upon do not support a current finding of affiliation. (*Id.*)

Second, Appellant claims the record does not support a finding of current affiliation based upon an identity of interest between Luke Hillier, Michael Hillier, and Mr. LaRose. There is no ongoing business relationship between these individuals. (*Id.* at 16.) Absent evidence of current business ties between these individual, the Size Determination's finding of affiliation is unsupported. (*Id.* at 17, citing *Size Appeal of A&H Contractors, Inc.*, SBA No. SIZ-5459 (2013).) In terms of identity of interest, there are only two common investments between Luke Hillier and Mr. LaRose, and those are of non-substantial value. (*Id.*) Appellant argues that common investments must be substantial in number or value to give raise to an identity of interest affiliation. (*Id.* at 18, citing *Size Appeal of W. Harris Gov't Svcs. Contractor, Inc.* SBA No. SIZ-5717 (2016); *Size Appeal of Solar City Corp.*, SBA No. SIZ-5257 (2011).) Here, the Area Office did not address whether the common investments were substantial in number or in value. (*Id.*) Additionally, Appellant argues that evidence of identity of interest gives rise to a rebuttable presumption of affiliation, the Area Office did not give Appellant the opportunity to rebut the presumption and show that the two common investments were of low value. (*Id.* at 19.)

Appellant argues the record does not support a finding of affiliation between itself and Mythics under the totality of the circumstances. (*Id.* at 20.) Virtually all the interactions the Area Office identified between the Hillier brothers and Mr. LaRose are historical in nature and cannot establish any power to control Appellant as of the date to determine size. (*Id.* at 21, citing *Size Appeal of Global A 1<sup>st</sup> Flagship Co.*, SBA No. SIZ-5462 (2013).) Appellant asserts there is no evidence in the record that Luke Hillier, Michael Hillier, or Mr. LaRose currently control Mythics. (*Id.* at 22.) Appellant claims that the historical evidence the Area Office relied upon regarding the ownership and management of Mythics does not establish the firm's current ownership or management. (*Id.*) The record is devoid of any evidence of who currently controls Mythics. (*Id.*)

Third, Appellant argues the Area Office erred in finding Appellant affiliated with Lynnhaven Dive Center. (*Id.* at 4.) Appellant claims that the finding is “based on inaccurate and irrelevant facts and fails to even identify a basis for finding affiliation.” (*Id.*) First, Appellant claims that although Luke Hillier's father founded Lynnhaven Dive Center, this is a historical tie and does not establish current affiliation. (*Id.* at 24-25.) Second, although Luke Hillier's sister and husband currently own Lynnhaven Dive Center, there is no evidence of common ownership, contracts, loans, employee connections, or other ties. (*Id.* at 25.) Lynnhaven was not Appellant's

original parent firm. (*Id.*) Finally, Lynnhaven Dive Center's hosting of non-profit events in which Luke Hillier was involved does not establish affiliation. (*Id.*)

Fourth, Appellant objects to the Area Office's decision to draw an adverse inference due to lack of disclosure. (*Id.* at 4.) Appellant argues that the historical information is not relevant to the Area Office's decision, that the Area Office never asked Appellant to disclose these historical ties, and that Appellant had no reason to know it would become an issue. (*Id.*) Appellant raises the three-part test for assessing whether an adverse inference was appropriate. (*Id.* at 26.) Here, Appellant challenges whether the first prong of the test, which requires the information requested by the Area Office be relevant to the size determination, has been met. (*Id.* at 26-27.) Appellant argues that the information requested was not relevant, and furthermore, that the request for information was not clearly communicated to or received by Appellant. (*Id.* at 27, citing *Size Appeal of W&K Container, Inc.*, SBA No.SIZ-5758 (2016); *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540(2014).)

Appellant further asserts the Area Office never requested the information Appellant allegedly failed to disclose. The size protest was based on alleged affiliation with several specifically named firms. Appellant addressed those allegations in its response and offered to provide more information upon request. The Area Office never informed Appellant it was also examining potential ties between various individuals. Nor did the Area Office request information on other entities it cited as evidence of affiliation. (*Id.* at 28.)

Finally, Appellant argues that the Area Office did not provide Appellant with adequate due process. (*Id.* at 5.) Appellant states that it was not given notice of the Area Office's investigation into historical ties and potential identity of interest affiliation and was not given an opportunity to address or respond to the Area Office's concerns. (*Id.*)

#### G. Motion to Supplement the Record

Accompanying the appeal, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit a “Declaration of [Shareholder 3]” addressing issues raised in the Size Determination. (Motion to Supplement at 1.) The declaration would explain how the two common investments among Luke Hillier and R. Scott LaRose ([Company 1] and [Company 2]) are not substantial in number or value, and that the facts upon which the Area Office found Lynnhaven Dive Center affiliated with Appellant are inaccurate. (*Id.* at 3.)

Appellant argues that OHA may supplement the record where there is “good cause.” (*Id.*) This requires 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.” (*Id.* at 4.) Appellant argues that the evidence is relevant to rebut facts cited in the Size Determination. (*Id.*) Additionally, Appellant argues that it had no reason to submit the materials before now as it did not know that the Area Office was examining the common investments or Lynnhaven Dive Center. (*Id.*)



#### H. CO's Response

On April 11, 2019, the CO responded to the appeal. The CO argues that the DOJ settlements that Appellant and suspected affiliates have entered to resolve allegations of misrepresenting size status, along with Appellant's acquisition of an "other than small" foreign business gave the CO good reason to challenge Appellant's size representation. (CO's Response at 2.) Additionally, the former and current principals of Appellant's alleged affiliates SEK and Karda recently pleaded guilty to allegations of making false statements to the SBA regarding their size status. (*Id.*) Although the CO acknowledges that the information from the civil investigations and criminal pleas cover historical behavior and do not involve Appellant's admittance of guilt, the CO states that the nature of the allegations constitute sufficient reasons to question Appellant's size representation. (*Id.* at 5.)

#### I. SBA's Response

On April 11, 2019, SBA responded to the appeal. SBA argues that the Area Office correctly found that Appellant is ineligible for award. (SBA's Response at 1.) Therefore, the determination should be affirmed. (*Id.*) Additionally, SBA challenges Appellant's motion to supplement the record on appeal. (*Id.* at 3.)

SBA challenges Appellant's motion to supplement the record on appeal by adding the "Declaration of [Shareholder 3]." (*Id.*) SBA argues Appellant has failed to show good cause for the introduction of the declaration because the SBA has taken "multiple steps to inform a protested concern of the potential to find affiliation in multiple areas." (*Id.*) SBA points to Form 355's multiple instructions regarding the various grounds for affiliation. (*Id.* at 3, 4.) SBA argues that the form, cover page, and included links gave Appellant notice that any possible affiliation would be up for review and consideration during the size determination process. (*Id.*) SBA also argues that Appellant is "constructively asking for an opportunity to rebut the presumption of affiliation based on identity of interest." (*Id.* at 4.) However, the size determination decision was reached based on the totality of circumstances and a negative inference from the lack of information Appellant provided, and therefore there was no requirement to provide Appellant an opportunity to rebut conclusions made about identity of interest. (*Id.*)

In support for the Area Office's decision, SBA emphasizes that a challenged concern has the burden of establishing its small business size. (*Id.* at 5, citing 13 C.F.R. § 121.1009(c).) SBA argues the Area Office correctly determined that Appellant had not met its burden. (*Id.*) SBA argues that the Area Office's decision to draw an adverse inference was correct under the three-part adverse inference test. (*Id.* at 5, 6.) The three-part test asks whether: 1) the requested information was relevant to an issue in the size determination, 2) there is a level of connection between the challenged concern and the information requested, and 3) the request was specific. (*Id.*, citing *Size Appeal of Perry Johnson & Assocs., Inc.*, SBA No. SIZ-5943, at 12 (2018).) In the instant case, SBA argues that 1) the information was regarding the relationship of Luke Hillier, Mike Hillier Jr., R. Scott LaRose, Daniel Clarkson, and Mythics was relevant to affiliation based on identity of interest, 2) the four individuals had prior and current investments together that would be relevant to affiliation considerations, and 3) the protest specifically

mentions potential affiliation between Mythics and Appellant and SBA Form 355 requires disclosure of all potential affiliates. (*Id.* at 6.)

Furthermore, SBA argues that the Area Office correctly determined Appellant was other than small based on the totality of circumstances. (*Id.*) SBA concedes the Area Office's stated ground for finding affiliation between Appellant and Mythics "are slightly confusing." (*Id.* at 7.) SBA states that the Area Office found that Appellant was affiliated with R. Scott LaRose and Mythics not through identity of interest but through a totality of circumstances, which requires that no single factor is sufficient to support a finding of affiliation. (*Id.*) SBA states "the logical conclusion is that the Area Office intended to find Appellant other than small based on the totality of the circumstances." SBA contends the Area Office has shown that there is an element of control between Luke Hillier and Appellant on one hand, and R. Scott LaRose, and Mythics on the other, not through a clear identity of interest, because it does not rise to the level of substantial interest required by SBA regulations, but, because of the totality of the circumstances. (*Id.*)

SBA asserts it may find affiliation where the interaction between businesses are so suggestive of reliance as to render them affiliated. (*Id.*, citing *Size Appeal of Lance Bailey & Assoc, Inc.*, SBA No. SIZ-4817 (2006).) A connection between concerns is not enough to create affiliation, there must be an element of control present. (*Id.* citing *Size Appeal of Native Energy and Technology, Inc.*, SBA No. SIZ-5249, at 11 (2011).) SBA concedes the Area Office's requirement to establish an element of control is complicated by the lack of disclosure. SBA asserts that, despite Appellant's arguments that Luke Hillier severed all affiliation with Mythics, there is an indication that Appellant exerted some control over Mythics. This is evidenced by the allegations described in the DOJ investigations along with the lack of proof that the investment connections between Luke Hillier and R. Scott LaRose have "ceased completely." (*Id.* at 8.)

SBA also argues that the Area Office's use of historical affiliation between the alleged affiliates to show affiliation was not clear error. (*Id.*) SBA argues that there is no clear distinction between the historical affiliation the Area Office relied on and current affiliation because R. Scott LaRose and Luke Hillier continue to have mutual investments and connections. (*Id.* at 8, 9.) SBA argues that there is no indication that Luke Hillier has severed all business ties with Mythics' director R. Scott LaRose. (*Id.* at 9.) SBA also contends that it is reasonable to assume based on Department of Justice allegations on conduct spanning from 2006-2016 that there is continued connection. (*Id.*) Additionally, SBA points to Appellant's concession that both R. Scott LaRose and Luke Hillier have current investments in [Company 1] and [Company 2]. (*Id.*)

Finally, SBA argues that the Area Office provided adequate due process to Appellant during the Size Determination. (*Id.*) A size determination may be based on grounds not raised in the protest. (*Id.* citing 13 C.F.R. § 121.1009(b).) SBA distinguishes instant case from *Alutiiq Int'l Sols., LLC* SBA No. SIZ-5069 (2009) on the basis that in *Alutiiq*, the final size determination changed the focus of the protest from allegations of receipts in excess of the size standard to a finding of affiliation based on the ostensible subcontractor rule. (*Id.* at 10.) In the current case, there was no such change in the focus of the size determination. (*Id.*) SBA distinguished the current case from *Magnum Opus Techs., Inc.* SBA No. SIZ-5372 (2012) because in *Magnum Opus*, the protest was based on affiliation due to common management and the newly organized

concern rule, but the final determination was based on the 3-in-2 joint venture rule. (*Id.*) This represents a shift in the grounds of affiliation that was not addressed in the protest or SBA notification letter. (*Id.*) SBA argues that in the instant case, the CO's protest letter to Appellant specifically stated that the SBA would review all past and current affiliates of the Appellant. (*Id.* at 11.)

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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. New Evidence

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 previously presented to the Area Office is generally not admissible and OHA will not consider it. (*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 the issues on appeal.” (*Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (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).)

Here, Appellant had failed to submit this evidence, which was available at the time of the protest, to the Area Office, and thus it is not admissible here. This evidence is also irrelevant to the main issue in this case, whether the Area Office properly drew an adverse inference against Appellant. If the adverse inference was proper, the size determination must be sustained. If the inference was improper, then the appropriate remedy would be to remand the case to the Area Office for a new size determination, not for OHA to attempt to conduct its own size determination. (*Size Appeal of OxyHeal Medical Systems, Inc.*, SBA No. SIZ-5707, at 8-9 (2016).)

#### C. Analysis

I find that the Area Office failed to give Appellant an opportunity to respond to the Area Office's concern prior to drawing an adverse inference against the Appellant, and thus fails the specificity prong of the three-part adverse inference test. OHA has established a three-part test to

assess when an adverse inference is appropriate. *See Size Appeal of W&K Container, Inc.*, SBA No. SIZ-5758 at 8 (2016). First, the requested information must be relevant to an issue in the size determination. *Id.* Second, there must be a level of connection between the protested concern and the concern about which the information is requested. *Id.* Finally, the request must be specific. *Id.* If all three factors are met, then the challenged concern must produce the requested information or suffer the consequences of an adverse inference. *Id.*

Although 13 C.F.R. § 121.1009(b) permits area offices to issue size determinations on grounds not raised by the protestor, “it is axiomatic that before finding a concern other than small on grounds not found in a protest, an area office must provide notice to the protested concern of any change in focus and request a response.” *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009). This precaution is necessary to ensure that the protested concern “may craft a response [to new issue's] that protects their interests and, thus, to afford protested concerns due process.” *Id.*

Here, Appellant provided what it clearly considered to be a complete discussion of its relationship with Mythics, and its explanation of why it considered the firms to no longer be affiliated. *See* Protest Response, at 12. The Area Office did not respond with any request for further information on this issue, and Appellant could reasonably have concluded it had addressed the matter. Yet, the record demonstrates that the Area Office drew an adverse inference because Appellant did not produce information about Appellant's and Luke Hillier's possible affiliates. The record reveals very little of the communications back and forth between a challenged concern and the Area Office that is typical in a size determination proceeding. Additionally, the emails sent on September 28, 2018 between Steven Koprince (Counsel of Appellant) to Helen Goza (Area Office Size Specialist) involve the only request for clarification from the Area Office to Appellant. Emails between John Mattox and Helen Goza, September 28, 2018. These emails clarified the term “business” to include charity and show that Appellant attempted to clarify its response to the Area Office when requested. Appellant did not refuse to cooperate with the Area Office. Rather, Appellant appears to have been unaware based on its interactions with the Area Office that the Area Office expected further information regarding the alleged affiliates. The Area Office's request for information clarifying Mythics's relationship with Appellant not clearly communicated, and thus it was not proper for the Area Office to draw an adverse inference on this issue. *See Size Appeal of Deftec Corporation*, SBA No. SIZ-5540, at 8 (2014).

The SBA and CO argue that because Appellant has not produced evidence that it is not currently affiliated with the alleged affiliates, it is appropriate for the Area Office to draw an adverse inference and assume the alleged connections have continued until this point. *See* SBA's Response at 9. The SBA and CO further argue that the generic instructions found in Form 355 are specific enough to provide notice to Appellant that the Area Office would be investigating the ties between Daniel Clarkson, Luke Hillier, Michael Hillier, Jr., R. Scott LaRose, and the various alleged affiliate firms.

However, I find that the instructions and information within Form 355 do not provide Appellant with enough notice or specificity as to the scope of the investigation. Allowing generic language regarding “any potential current affiliation” to permit an area office to say it had

specifically requested information would allow an area office to “effectively avoid the notice requirements found in 13 C.F.R. § 121.1007(b) and (c).” *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 3 (2009). Accordingly, I find that the Area Office erred in drawing an adverse inference against Appellant, and this matter should be remanded.

Further, I also find a remand is in order for the Area Office to clarify on just what basis it is finding affiliation between Appellant and Mythics, the Lynnhaven Dive Center, and other firms. Affiliation may be found based upon identity of interest, based upon either family relationship or contractual relationships. 13 C.F.R. § 121.103(f)(1). Affiliation may also be based on the totality of the circumstances. 13 C.F.R. § 121.103(a)(5). These are different grounds, and as SBA admits, the size determination is confusing.<sup>2</sup> The conclusion of a size determination should not be unclear, and there should be no doubt as to the grounds for finding affiliation. However, the Area Office's grounds for finding affiliation seem to vary from page to page, between these three grounds.

The Area Office states that there is affiliation “due to contractual or other agreements” but fails to identify just what those contractual agreements are, and how they constitute control by Appellant of other firms, or control by those firms of Appellant. Size Determination at 11. The Area Office mentions “identity of interest” presumably based upon family relationships but fails to clearly state that it is finding affiliation based upon those grounds. *Id.* Were it to do so, the Area Office would have to consider the evidence of a clear line of fracture between Appellant and the alleged affiliates Mythics and Lynnhaven Dive Center that Appellant has submitted. *See Size Appeal of Martin Brothers Construction, Inc.* SBA No. SIZ-5945 (2018). Factors which may be pertinent in examining whether a clear line of fracture exists include whether the firms share officers, employees, facilities, or equipment, whether the firms have different customers or different line 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 Prosol Assoc, LLC*, SBA No. SIZ-5813 (2017). Appellant argues it has established a clear line of fracture between itself and Luke Hillier, and Mythics, Mike Hillier and Mr. LaRose. The Area Office failed to consider this issue of decisional significance, which supports a decision to remand. *Size Appeal of Client Network Svcs., Inc.*, SBA No. SIZ-4686, at 5 (2005).

OHA has repeatedly held that in order to find affiliation through the totality of the circumstances an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other. *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 10 (2007). Merely listing connections between concerns does not suffice to show they are affiliated under the totality of the circumstances. *Size Appeal of Telaforce, LLC*, SBA No. SIZ-5970, at 15 (2018). As SBA admits in its Response, a connection between the alleged affiliates does not support a finding of affiliation without an element of control being present. *Size Appeal of Native Energy and Technology, Inc.*, SBA No. SIZ-5249, at 11 (2011).

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<sup>2</sup> While SBA's Response argues “the logical conclusion” is the Area Office intended a totality of the circumstances finding, this is a *post hoc* rationalization and cannot be considered here. *Size Appeal of Ceres Environmental Services, Inc.*, SBA No. SIZ-5342, at fn. 4 (2012).

However, the Area Office failed to establish control between the Hillier brothers, Appellant, Mr. LaRose, and Mythics.

SBA refers to Appellant exerting control in the behavior described in the Department of Justice's allegations. However, these actions are alleged, and Appellant did not admit to them in the Settlement Agreement. Further, these actions took place in the period 2006-2016. Appellant's size must be determined as of April 4, 2018, the date of its submission of final proposal revisions. 13 C.F.R. § 121.404(d). Historic ties between a challenged concern and an alleged affiliate do not establish current affiliation when the historic ties no longer exist as of the date to determine size. *Size Appeal of Medical Comfort Systems, Inc.* SBA No. SIZ-5640, at 14 (2015) (firms previously affiliated are no longer affiliated when evidence shows ties were terminated prior to the date for determining size); *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 6 (2012) (revenues, contractual relationships, and work experience of principals prior to the period to determine size not relevant to size determination); *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291, at 4-5 (2011) (no identity of interest based on common investments when investments previously held had been divested, and only one common investment remained). The Area Office erred in relying so heavily upon prior ties between Appellant, the Hillier brothers and Mr. LaRose, without clearly establishing affiliation between Appellant, the Hillier brothers and Mr. LaRose, as of the date to determine size.

Thus, I find that the Area Office failed to provide Appellant an opportunity to respond to the Area Office's concern prior to drawing an adverse inference against the Appellant, and thus fails the specificity prong of the three-part adverse inference test. Further, the Area Office in failing to address the issue of whether a clear line of fracture had been established between the interests of Appellant and Luke Hillier on the one hand, and Michael Hillier and Mythics on the other. The Area Office also erred in relying upon past connections between Appellant and its alleged affiliates. Finally, the Area Office erred most of all in failing to clearly articulate on just which basis it was finding Appellant affiliated with Mythics, identity of interest based on family relationships, contractual relationships, or totality of the circumstances. A remand is thus appropriate in order for the Area Office to clearly articulate its rationale. *Size Appeal of Alon U.S.A., LP*, SBA No. SIZ-4453 (2001).

I therefore vacate this Size Determination, and remand it to the Area Office, for a new size determination consistent with this decision.

#### IV. Conclusion

Appellant has shown clear error in the size determination. The appeal therefore is GRANTED IN PART, the size determination is VACATED, and the matter is REMANDED to the Area Office for further review consistent with this decision. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge