

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

SIZE APPEAL OF:

Global Dynamics, LLC

Appellant,

RE: GiaCare and MedTrust JV, LLC

Appealed From
Size Determination No. 3-2019-038

SBA No. SIZ-6012

Decided: June 18, 2019

APPEARANCES

Craig A. Holman, Esq., Alexandra L. Barbee-Garrett, Esq., Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Appellant

Antonio R. Franco, Esq., Michelle E. Litteken, Esq., Patrick T. Rothwell, Esq., Jacqueline K. Unger, Esq., Samuel S. Finnerty, Esq., PilieroMazza PLLC, Washington, D.C. for GiaCare and MedTrust JV, LLC

DECISION¹

I. Introduction and Jurisdiction

On February 25, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2019-038 finding that GiaCare and MedTrust JV, LLC (GiaMed) is a small business for the subject procurement. Global Dynamics, LLC (Appellant), which had previously protested GiaMed's size, 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 discussed *infra*, the appeal is denied and the size determination is affirmed.

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

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 any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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. Procedural History

On September 14, 2012, the U.S. Army Medical Command (Army) issued Request for Proposals (RFP) No. W81K04-12-R-0025 for registered nursing services in the San Antonio Military Health System (SAMHS). According to the RFP's Performance Work Statement (PWS), work would be performed at military treatment facilities in and around San Antonio, Texas, with the Brooke Army Medical Center being the primary performance location. (PWS § 1.3.) The required nursing services include “Critical Care, Medical/Surgical, Ambulatory, Peri-Operative, Burn Unit, Mother/Baby Units, Psychiatric Units, and In and Out Patient areas of the [military treatment facilities].” (*Id.* § 1.3.2.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of \$7 million in average annual receipts.² The RFP stated that the Army planned to award a single indefinite delivery / indefinite quantity (ID/IQ) contract with a five-year ordering period. Proposals initially were due October 16, 2012. Appellant and GiaMed submitted timely offers.

On December 12, 2012, the CO informed Appellant that its proposal was excluded from the competitive range. The Army thereafter completed the evaluation of proposals, and on January 24, 2013, notified Appellant that GiaMed was the apparent successful offeror. Appellant filed a bid protest with the U.S. Government Accountability Office (GAO) challenging its exclusion from the competitive range. On May 6, 2013, GAO sustained the protest and recommended that the Army re-evaluate proposals and make a new competitive range determination. *Global Dynamics, LLC*, B-407966, May 6, 2013, 2013 CPD ¶ 118. The Army made a new competitive range determination, which included both Appellant and GiaMed, and obtained revised proposals.

On January 29, 2015, the CO informed GiaMed that Appellant was now the apparent successful offeror. GiaMed filed a size protest challenging Appellant's size. The size protest was denied and GiaMed appealed that decision to OHA. On October 29, 2015, OHA denied GiaMed's appeal. *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690 (2015).

While the size litigation was ongoing, GiaMed also challenged the Army's award decision through a bid protest at GAO. The Army undertook corrective action, and GAO dismissed the bid protest as moot. In June 2016, after concluding corrective action, the Army reaffirmed the award to Appellant. GiaMed filed another bid protest, and GAO partially sustained that protest. *GiaCare and MedTrust JV, LLC*, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321.

² Effective July 14, 2014, SBA increased the size standard for NAICS code 621399 to \$7.5 million. 79 Fed. Reg. 33,647 (June 12, 2014).

In November 2017, the Army announced that it would cancel the RFP and award a sole source extension to the incumbent contractor, MedTrust, LLC (MedTrust). Appellant filed a bid protest at the U.S. Court of Federal Claims challenging these decisions. The Army then rescinded the cancellation, amended the RFP, reopened discussions, and requested revised proposals. On August 23, 2018, the CO notified Appellant that GiaMed was the apparent successful offeror.

B. The Instant Size Protest

On August 29, 2018, Appellant filed a size protest with the CO alleging that GiaMed is not a small business. (Size Protest at 1.) Among other allegations, Appellant observed that GiaMed is a joint venture between GiaCare, Inc. (GiaCare) and MedTrust, a large business, and that, in addition to GiaMed, GiaCare and MedTrust have formed several other joint ventures, including GiaMed Resources JV, LLC, GiaMed Alliance LLC and GiaMedTrust JV, LLC. (*Id.* at 5-7.) Appellant further contended that GiaCare is unusually reliant upon MedTrust to perform the instant contract, in contravention of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (*Id.* at 7-8.) The CO forwarded Appellant's protest to the Area Office for review.

GiaMed responded to the merits of the size protest, but by separate e-mail to the Area Office, urged that the protest be dismissed as untimely because Appellant first received notice that GiaMed was the apparent awardee in January 2013. With regard to Appellant's allegations concerning other joint ventures, GiaMed noted that the other joint ventures identified by Appellant did not exist as of the date of GiaMed's self-certification. Rather, GiaMedTrust JV, LLC was formed on April 26, 2013; GiaMed Resources JV, LLC was formed on September 3, 2013; and GiaMed Alliance LLC was formed on November 1, 2016. (Protest Response at 19.) On October 2, 2018, the Area Office issued Size Determination No. 3-2018-073, dismissing Appellant's protest as untimely. Appellant appealed the dismissal to OHA, and on December 17, 2018, OHA granted the appeal and remanded the matter to the Area Office for a new size determination. *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-5979 (2018).

C. Mentor-Protégé Agreement

On August 7, 2012, GiaCare and MedTrust entered into a mentor-protégé agreement (MPA) under the 8(a) Business Development (BD) program. The MPA described MedTrust as a veteran-owned, small disadvantaged business, which offers healthcare professionals on permanent and temporary bases. (MPA at 1.) GiaCare is an 8(a) BD program participant providing staffing and healthcare IT solutions. (*Id.*) According to the MPA, “establishing a mentor-protégé relationship will enhance the capabilities of [GiaCare] and improve its ability to successfully compete for contracts consistent with the goals of SBA's Mentor/Protégé Program” and “this relationship will result in ‘material benefits’ and ‘developmental gains’ to foster [GiaCare's] growth and development.” (*Id.* at 2.) “[GiaCare] can significantly benefit from the business development assistance that [MedTrust] proposes to offer, and [MedTrust] is qualified to provide the ‘material benefits,’ ‘developmental gains,’ and assistance within the context of the SBA Mentor/Protégé Program.” (*Id.*)

On August 15, 2012, SBA formally approved the MPA, stipulating that the MPA would expire after one year unless SBA approved an extension. On May 7, 2013, SBA granted a one-year extension of the MPA.

D. Joint Venture Operating Agreement

On September 25, 2012, GiaCare and MedTrust executed the “Joint Venture Operating Agreement of [GiaMed]” (OA) for the purpose of competing for and performing the instant procurement. (Joint Venture Operating Agreement, Article II § 2.3.) An attachment to the OA, labeled “Exhibit A,” explained that GiaCare owns a 51% interest in GiaMed, while MedTrust owns 49%. The OA stated that GiaMed is a populated joint venture, and that it would self-perform 75% of the work under the contract. (*Id.*, Article II § 2.8.) Further, “because [GiaMed] is populated (with more than just administrative personnel), neither MedTrust nor any of MedTrust's affiliates may act as a subcontractor to [GiaMed] or to any other subcontractor of [GiaMed], unless the SBA determines that other potential subcontractors are not available.” (*Id.*) To ensure compliance with these requirements, “any and all subcontracts executed between [GiaMed] and each of its subcontractors shall contain provisions that obligate the subcontractor and entitle [GiaMed] to reduce the subcontractor's scope of work and reallocate such work to [GiaMed].” (*Id.*)

The business and affairs of GiaMed will be managed by, and under the direction and control of, a Management Committee. (*Id.*, Article V § 5.1.1.) The Management Committee would be comprised of two managers appointed by GiaCare and one manager appointed by MedTrust, with each manager is entitled to cast one vote. (*Id.*) The Management Committee may delegate its authority to the Project Manager. (*Id.*, Article V § 5.1.2.) The Project Manager shall serve at the pleasure of the Management Committee and may be removed at any time. (*Id.*, Article V § 5.2.1.) “In order to ensure GiaCare's control of Contract performance, the Project Manager will report to the Management Committee.” (*Id.*)

E. Joint Venture Agreement

On September 25, 2012, GiaCare and MedTrust executed a Joint Venture Agreement (JVA) for GiaMed, the purpose of which was to compete for and to perform the instant contract. The JVA stated that GiaMed is a populated joint venture. (JVA § 1.0.)

The JVA indicated that GiaCare and MedTrust “will not bring any major equipment or facilities into the Joint Venture; the Joint Venture will utilize Army equipment and facilities.” (*Id.* § 8.0.) However, GiaCare will contribute \$[XXX] and MedTrust will contribute \$[XXX] as initial capitalization. (*Id.*)

With respect to contract performance, pursuant to Article V of the OA, GiaCare “will control performance of the Contract through its power to control the Management Committee.” (*Id.* at § 9.0.) GiaMed's Management Committee, controlled by GiaCare, “will be responsible for negotiating the original Contract, and any subsequent negotiations.” (*Id.*)

Regarding the performance of work for the instant procurement, GiaMed will perform at least 60% of the work. (*Id.* at § 14.0.) The JVA added that “[d]espite GiaCare's experience in managing healthcare staffing contracts, GiaCare lacks the corporate experience and capacity to effectively compete against more established firms for the Solicitation.” (*Id.*) “MedTrust has the additional experience and capacity to round out GiaCare's experience and capacity, and [will] allow [GiaMed] to submit a competitive bid for the Solicitation.” (*Id.*) Participation in the joint venture is of “substantial benefit to GiaCare because the experience and past performance GiaCare will gain in the successful performance of the Contract will enhance GiaCare's standing and experience with federal procurements and will open doors for GiaCare to expand its services, increase its visibility and credibility, and enable GiaCare to more readily access markets and win larger contracts.” (*Id.*)

The JVA included an “Attachment A: Subcontractor Scope of Work” which indicated that the subcontract between GiaMed and GiaCare will entitle GiaCare to perform no more than 50% and no less than 40% of the total direct labor costs for the contract. (*Id.*, Attach. A.) GiaCare will recruit and source candidates to fill allocated task orders; credential candidates for task orders; and onboard and staff employees for task orders. (*Id.*)

F. Teaming Agreements

On June 25, 2018, GiaMed executed a Teaming Agreement with GiaCare (Teaming Agreement A) and a separate Teaming Agreement with MedTrust (Teaming Agreement B). In the respective Teaming Agreements, GiaMed agreed to name GiaCare and MedTrust as subcontractors for the instant procurement. (Teaming Agreements A and B, at 1.) GiaCare and MedTrust each agreed to forego submitting a proposal in response to the RFP and will serve as subcontractors for the contract, where GiaMed will be the prime contractor. (*Id.*) The Teaming Agreements required that “the terms and conditions [of the subcontracts] will not conflict with Government rules, regulations and applicable law.” (*Id.* at 2.) The Teaming Agreement with MedTrust stated that the subcontract between GiaMed and MedTrust will entitle MedTrust to perform no more than 60% and no less than 50% of the total direct labor costs for the contract. (Teaming Agreement B, Attach. A.)

G. Proposal

GiaMed's proposal, submitted October 16, 2012, stated that, in order to ensure an adequate supply of qualified nurses, GiaMed will employ “a recruiting staff dedicated to SAMHS's needs.” (Tech. Proposal at 3.4.2.) GiaMed recruiters will “[XXXXXXXXXXXX],” and also “will have access to [XXXXXXXXXXXX] (of which approximately [XXXX] of whom are in the [XXXXXXXXXXXX]) that is constantly replenished.” (*Id.* at 3.4.3.) To assist GiaMed in performing personnel and financial management tasks, GiaMed will utilize [XXXXXXXXXXXXXXXX]. (*Id.* at 4.4.1.2.)

H. Size Determination

On February 25, 2019, the Area Office issued Size Determination No. 3-2019-038 concluding that GiaMed is a small business.

The Area Office explained that GiaCare holds 51% interest in GiaMed and is the Managing Partner. (Size Determination at 6.) MedTrust holds the remaining 49% interest. GiaCare has the power to control GiaMed by virtue of its majority ownership. (*Id.* at 6.) The Area Office found that GiaMed was registered as an LLC in the state of Florida on September 25, 2012. The MPA between GiaCare and MedTrust was in effect from August 15, 2012 through May 6, 2014. (*Id.*)

The Area Office determined that GiaCare is wholly-owned by Ms. Marina Giannini, who has the power to control GiaCare. GiaCare operated under the name GiaSpace, Inc. until January 31, 2017. Ms. Giannini subsequently permitted her ex-husband to establish a company using that name. The Area Office found that, in its current form, GiaSpace has no connections with Ms. Giannini, GiaCare, or GiaMed, and no business relationship with GiaCare or MedTrust. (*Id.* at 6-7.)

GiaMed acknowledged that MedTrust is a large business. (*Id.* at 7.) MedTrust also is the incumbent contractor on the predecessor contract. (*Id.*)

The Area Office then conducted an analysis of GiaMed as a joint venture and the exceptions to joint venture affiliation. The Area Office found that GiaMed is a populated joint venture created to submit a proposal on the instant procurement, and that GiaMed is compliant with the rule under 13 C.F.R. § 121.103(h) that a joint venture may receive no more than three contracts in a two-year period. (*Id.* at 9.) The Area Office also determined that GiaMed is a joint venture between an SBA-approved mentor and protégé, and that GiaMed qualifies for the mentor-protégé exception to joint venture affiliation. (*Id.* at 9-10.) Further, GiaMed's JVA meets the requirements of 13 C.F.R. § 124.513(c) and (d). (*Id.* at 10.) Also, “the documents provided and the [JVA] show no undue reliance by [GiaCare] on [MedTrust] for the above referenced procurement.” (*Id.*) The Area Office concluded that GiaCare and MedTrust are not affiliated for the instant procurement, as the exception to joint venture affiliation at 13 C.F.R. 121.103(h)(3)(iii) applies. (*Id.*)

The Area Office used October 16, 2012, the date of GiaMed's proposal including price, as the date to determine GiaMed's size. (*Id.* at 1, 10.) GiaCare's average annual receipts for the years 2009-2011 do not exceed the size standard, so GiaMed is a small business.

I. Appeal

On March 12, 2019, Appellant filed the instant appeal. Appellant argues that the Area Office erred in determining GiaMed is a small business because (1) GiaMed is affiliated with MedTrust and other entities; (2) GiaMed is not an eligible mentor-protégé joint venture; (3) GiaMed's JVA lacks specificity such that the exception to joint venture affiliation does not apply; and (4) GiaMed is affiliated with GiaSpace. (Appeal at 1.)

Appellant considers the size determination to be “largely conclusory.” (*Id.* at 2.) The Area Office provided only a summary explanation for rejecting Appellant's arguments that GiaMed did not meet the specificity requirements under 13 C.F.R. §§ 121.103, 124.513(c), and 124.513(d). (*Id.*) The Area Office failed to address the “numerous relationships” between GiaCare and MedTrust that suggest general affiliation. (*Id.*) Further, the Area Office did not elaborate on the notion that there was no undue reliance. (*Id.* at 2-3.) Appellant also notes that the MPA between GiaCare and MedTrust likely lapsed and therefore “did not exist for much of the competition.” (*Id.* at 3.) Area Office only reviewed the status of the MPA at the time of initial proposal submission, “ignoring that the Army had changed the award numerous times, cancelled and reopened the procurement, changed the size standard, added new certification requirements, and called for entirely updated price proposals all at periods after which GiaMed apparently had allowed the [MPA] to lapse.” (*Id.*)

Appellant highlights that SBA's approval of an MPA does not by itself mean that the joint venture satisfies the SBA's regulations for small business set-asides. (*Id.* at 10.) Further, SBA narrowly construes the exceptions to joint venture affiliation. (*Id.*) In the case of an 8(a) mentor-protégé joint venture, SBA regulations require the joint venture to comply with 13 C.F.R. §§ 124.513(c) and (d) in order to enjoy the exception to joint venture affiliation. (*Id.*, citing *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016).) The regulations in effect in 2012 also imposed requirements on populated joint ventures, such as GiaMed. (*Id.* at 11.) Appellant urges that “OHA should find the Area Office's decision inadequate and test the GiaMed [JVA] against the regulatory requirements or remand the matter for the Area Office to do so.” (*Id.* at 13.)

Appellant contends the Area Office failed to explore the relationships between GiaCare and MedTrust in its analysis. (*Id.*) For example, the Area Office did not mention other joint ventures between GiaCare and MedTrust, as were discussed in Appellant's protest. (*Id.*) Appellant finds the “web of relationships” between the two concerns to “reveal a pattern of reliance and involvement establishing affiliation between the large business joint venture partner, the small business joint venture partner, and the numerous other joint ventures.” (*Id.* at 13-14.) The exception to affiliation for an SBA-approved mentor and protégé “does not shield mentor-protégé joint venture partners from findings of affiliation.” (*Id.* at 14.) Appellant argues the longstanding relationship between GiaCare and MedTrust should give rise to “general affiliation.” (*Id.*)

Appellant highlights that GiaCare and MedTrust have entered into numerous joint ventures in addition to GiaMed, including: Gia MedTrust JV, LLC; GiaMed Resources, JV, LLC; and GiaMed Alliance JV, LLC. (*Id.* at 14-15.) “These joint ventures demonstrate a continued, extended contractual relationship between GiaCare and MedTrust, and interdependence between the two organizations.” (*Id.* at 15.) Thus, the joint ventures should be considered affiliated with GiaMed, GiaCare, and MedTrust, and SBA should aggregate their receipts in calculating GiaMed's size. (*Id.*)

Appellant asserts that GiaCare and MedTrust “have worked together on three other joint ventures, over five completed contracts, and have recently received two substantial multiple

award IDIQ contracts,” which further establishes that the two concerns are affiliated. (*Id.*) In addition, MedTrust has earned hundreds of millions of dollars as the incumbent contractor for the instant procurement, and was not a small business even in 2012 under a \$7.5 million size standard, according to MedTrust's 2012 SAM profile. When MedTrust's receipts are aggregated with those of GiaMed, GiaMed is not small for this procurement. (*Id.* at 16.)

Appellant contends that GiaMed and GiaCare are unduly reliant upon MedTrust, emphasizing that MedTrust is the large business incumbent contractor, whereas “GiaMed has never held a substantial federal contract on its own, and GiaCare's contracting experience is limited to significantly smaller contracts.” (*Id.* at 16-17.) Further, Appellant continues, the majority of GiaCare's work stems from its relationship with MedTrust. (*Id.* at 17.) Appellant argues that GiaMed does not meet the requirement for GiaCare to complete at least 40% of the work where GiaCare will only perform administrative and ministerial tasks. (*Id.*)

Appellant maintains that GiaMed is a “legal nullity” ineligible to receive awards as a mentor-protégé joint venture, because GiaCare and MedTrust allowed the MPA to expire, and because “the SBA no longer permits populated joint ventures.” (*Id.*) The Area Office failed to address either of these issues in detail. (*Id.*) Appellant posits that, although size is usually determined at the date of initial proposal submission, “a mentor-protégé cannot continue to receive the benefits of such a designation where the parties fail to make the most basic steps of compliance or where SBA fails to approve the continuation of the relationship.” (*Id.* at 18, citing *Straughan Environmental, Inc. v. United States*, 135 Fed. Cl. 360 (2017).) Further, GiaMed's JVA contemplated a populated joint venture, a type of arrangement which SBA no longer allows. In Appellant's view, “[i]f an offeror fails to renew its [MPA] or SBA elects to discontinue its approval of [a] joint venture, that joint venture may not continue to compete as if it is an approved joint venture.” (*Id.*)

J. GiaMed's Response

On March 29, 2019, GiaMed responded to the appeal. GiaMed argues that the Area Office correctly determined that GiaMed is a small business, and that GiaCare and MedTrust are not affiliated. (Response at 1.) According to GiaMed, the appeal “is premised on a combination of unsupported speculative assertions and events that transpired long after the dates relevant to this matter — the date the [s]olicitation was issued and the date initial proposals were submitted.” (*Id.*)

GiaMed argues that the validity of the MPA must be examined as of the date GiaMed submitted its initial offer including price, and should be analyzed under the regulations in effect at the time the solicitation was issued. (*Id.* at 8.) The instant solicitation was issued on September 14, 2012, so the applicable regulations are those in effect at that time. (*Id.* at 9.) “Under those regulations, for a concern (including a joint venture) to be small, it must be small as of the date it submits a written self-certification that it is small as part of its initial offer including price.” (*Id.*, citing 13 C.F.R. § 121.404(a) (2013).)

GiaMed argues that nothing in SBA regulations requires that an MPA remain effective throughout the competition and up to time of the award. (*Id.*) Instead, GiaMed contends, OHA

has recognized that issues of affiliation, including whether a joint venture is eligible for the mentor-protégé exception to affiliation, are determined as of the date of initial offer including price. (*Id.* at 10, citing *Size Appeal of Quadrant Training Sols., LLC*, SBA No. SIZ-5811 (2017); *Size Appeal of SGS, LLC*, SBA No. SIZ-5859 (2017); and *Size Appeal of HBC Mgmt. Servs.*, SBA No. SIZ-5686 (2015).) OHA has held that an MPA that was not approved prior to initial offer submission including price is not entitled to the joint venture affiliation exception. (*Id.*, citing to *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532 (2014).) Similarly, the joint venture affiliation exception does not apply when the MPA expired prior to the initial offer. (*Id.*, citing *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715 (2016).) Here, though, the MPA was approved and was in effect from August 15, 2012 to May 6, 2014, and therefore was valid on the date of GiaMed's initial offer, October 16, 2012. (*Id.* at 11.)

GiaMed argues that *Straughan Environmental*, referenced by Appellant, does not support Appellant's contention that a mentor-protégé joint venture must maintain SBA's approval throughout the procurement process and until award, because the challenged firm in *Straughan Environmental* submitted its initial offer after SBA's approval of the MPA had lapsed. (*Id.* at 12.) In contrast, there is no question that GiaMed had an SBA-approved MPA on the date GiaMed submitted its proposal with price, and the fact that the MPA later expired “is entirely irrelevant.” (*Id.*) The Area Office properly found that GiaMed had a valid MPA at the time of proposal submission. (*Id.* at 13.)

GiaMed contends that Appellant's protest “presented no more than vague, unsupported allegations that GiaMed's [JVA] did not meet SBA's regulations.” (*Id.*) The Area Office's investigation was reasonable in light of Appellant's “speculative challenge” to the JVA, and the Area Office correctly found that the JVA meets the requirements of 13 C.F.R. § 124.513(c) and (d). (*Id.* at 14.) Further, SBA regulations in effect at the time the solicitation was issued, September 14, 2012, permitted populated joint ventures. (*Id.*, citing 13 C.F.R. § 121.103(h) (2013).)

With respect to the performance of work requirement, GiaMed argues that:

only an unpopulated joint venture had to demonstrate how the 8(a) partner would perform at least 40% of the work performed by the joint venture (in line with the current requirement). Critically, no such requirement applied to populated joint ventures under the regulations governing the size determination.

(*Id.* at 15, citing 13 C.F.R. § 124.513(c)(7), (d)(1) (2013) (emphasis GiaMed's).) The regulatory scheme “makes sense” in light of the nature of a populated joint venture, where GiaCare and MedTrust would not perform tasks on the contract in their individual capacities, and thus would not be performing separate percentages of the work. (*Id.*) GiaMed adds that it demonstrated that contract performance would be controlled by the 8(a) managing venturer by including language to that effect in its OA and JVA. (*Id.* at 15-16.) Thus, GiaMed contends, the Area Office had a reasonable basis to conclude that GiaMed met the requirements under 13 C.F.R. § 124.513(c) and (d) and that the mentor-protégé exception to joint venture affiliation applied. (*Id.* at 16.)

In response to Appellant's contention that GiaMed is generally affiliated with MedTrust and other concerns, GiaMed emphasizes that it is an eligible small business between an SBA-approved mentor and protégé, with a valid JVA. (*Id.* at 17.) Appellant's argument "is completely irrelevant to the issue of GiaMed's size, because it is premised on events that occurred after October 16, 2012 — the date on which GiaMed's size must be determined." (*Id.*) Appellant maintains the other joint ventures referenced by Appellant did not exist in 2012 and, as a result, there was not any longstanding interrelationship or evidence of general affiliation for the Area Office to consider. (*Id.* at 17-18.) While the Area Office did not specifically reject Appellant's arguments concerning the other joint ventures, GiaMed maintains that "[i]t is well-established that 'an Area Office is under no duty to examine every allegation made in a protest, especially those that are unfounded and irrelevant.'" (*Id.* at 18, quoting *Size Appeal of IPKeys Techs., LLC*, SBA No. SIZ-5353, at 7 (2012) (emphasis added by GiaMed).)

Lastly, with regard to the question of undue reliance, GiaMed contends that Appellant ignores the fact that GiaMed is a populated joint venture acting under an SBA-approved MPA. Unusual reliance may be found in connection with the ostensible subcontractor rule, which is not applicable here as it applies only between a prime contractor and a subcontractor. (*Id.* at 19-20.) Even if the ostensible subcontractor rule were applicable, GiaMed insists that, contrary to Appellant's suggestions, GiaCare has provided similar services to the Government. Appellant's contention that GiaCare will only perform ministerial and administrative work on this contract is contradicted by the JVA and by GiaMed's proposal for the instant procurement. (*Id.* at 21.) The Area Office reviewed this information and correctly found no violation of the ostensible subcontractor rule. (*Id.*)

K. Supplemental Appeal

On March 28, 2019, after reviewing the record under the terms of an OHA protective order, Appellant supplemented its appeal.³ Appellant maintains that the Area Office "failed to meaningfully address several of [Appellant's] arguments and erred as to others." (Supp. Appeal at 1.)

Appellant highlights that SBA rules no longer allow populated joint ventures, the type of arrangement utilized by GiaMed. (*Id.* at 10.) Further, even at the time of proposal submission, SBA did not permit a populated joint venture to subcontract to the mentor. (*Id.*, citing 13 C.F.R. 124.513(d)(2)(ii) (2012).) GiaMed's Teaming Agreement with MedTrust states that GiaMed impermissibly intends to subcontract up to 60% of the contract to MedTrust, and thus is inconsistent with the JVA and SBA regulations. According to Appellant, "given that this arrangement does not reflect an SBA-approved populated joint venture, GiaMed's proposal to subcontract up to sixty percent of the work to large business MedTrust plainly renders GiaMed ineligible for award under the [s]olicitation." (*Id.* at 11, emphasis Appellant's.)

Appellant renews its contention that GiaMed's JVA did not meet the specificity requirements of 13 C.F.R. §§ 121.103, 124.513(c), and 124.513(d). The JVA failed to itemize

³ In an Order issued March 28, 2019, OHA granted Appellant's request to file a supplemental appeal up to 30 pages in length.

major equipment, facilities, and other resources to be furnished by each party to the joint venture, including a detailed schedule of the value of each. (*Id.* at 13, citing 13 C.F.R. § 124.513(c)(6) (2012).) Although the JVA stated that neither GiaCare nor MedTrust will supply such items, GiaMed's proposal “identifies extensive equipment facilities, and resources brought to the competition by large business MedTrust,” including “a database of [XXXXXX]” and the [XXXXXXXXXX]. (*Id.*, emphasis Appellant's.) Thus, GiaMed's JVA is contradicted by its own proposal. (*Id.*) In Appellant's view, “[h]ad the Area Office properly reviewed GiaMed's [JVA] to determine compliance with SBA's regulations, [it] would have realized the joint venture merely constituted a front for MedTrust.” (*Id.*)

Appellant maintains that GiaMed's JVA also did not specify GiaCare and MedTrust's responsibilities regarding source of labor and contract performance as required by 13 C.F.R. § 124.513(c)(7) (2012). (*Id.*) The JVA's statement that GiaMed will “ensure that [GiaCare and GiaMed] will meet the performance of work requirements. . .” is far too vague to satisfy SBA requirements. (*Id.* at 13-14, quoting JVA § 2.0.) Likewise, the JVA's statement that “[GiaCare] will control performance of the Contract through its power to control the Management Committee, which manages [GiaMed's] operations and affairs” does not address the parties' respective roles and responsibilities. (*Id.* at 14, citing *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014).) Merely stating that GiaMed will self-perform 75% of contract work does not identify the source of labor. (*Id.*)

Appellant notes that SBA regulations at the time of self-certification required the JVA to specify how the joint venture partners will meet the performance of work requirements set forth in 13 C.F.R. § 124.513(d) (2012). (*Id.* at 15.) Paragraph (d), Appellant continues, prohibited a non-8(a) joint venture partner or any of its affiliates from being a subcontractor of the joint venture, absent certain exceptions. (*Id.* at 16, citing 13 C.F.R. § 124.513(d)(2) (2012).) GiaMed's Teaming Agreement with MedTrust commits GiaMed to subcontract up to 60% of the contract work to MedTrust. (*Id.*) Had the Area Office conducted a more thorough review, it could only conclude that GiaMed's JVA did not comply with SBA's specificity requirements and violates SBA's rules. (*Id.*)

Next, Appellant argues that the Area Office failed to address the numerous relationships between GiaCare and MedTrust indicating general affiliation, and the record establishes “the long and targeted nature of this MedTrust-directed relationship, plainly designed to secure MedTrust's ability to continue performing this substantial contract, regardless of ineligibility.” (*Id.* at 3.) According to Appellant, “the web of relationships between GiaCare and MedTrust, including prior relationships and numerous other joint ventures, reveal a pattern of reliance and involvement establishing affiliation between the large business joint venture partner, the small business joint venture partner, and the numerous other joint ventures.” (*Id.* at 16-17.) The longstanding relationship between GiaCare and MedTrust is of the type that SBA regulations indicate will give rise to “general affiliation.” (*Id.* at 18.) Appellant asserts that GiaMed's status as an SBA-approved 8(a) mentor-protégé joint venture “cannot insulate GiaMed from affiliation when GiaCare and MedTrust have a history of working together prior to the joint venture. . . and [have] entered into numerous joint ventures subsequent to [GiaMed] including Gia MedTrust JV, LLC, GiaMed Resources, JV, LLC, and GiaMed Alliance JV LLC.” (*Id.*, emphasis Appellant's.) Appellant also contends that GiaMed's proposal, and the other joint ventures between GiaCare

and MedTrust, demonstrate a “continued, extended contractual relationship between GiaCare and MedTrust, and interdependence between the two organizations.” (*Id.* at 19.) The Area Office clearly erred by finding no affiliation between GiaCare, MedTrust, and the other joint ventures. (*Id.*)

Appellant maintains that GiaMed and GiaCare are unduly reliant on MedTrust because the record shows GiaMed will subcontract up to 60% of the work for the procurement to MedTrust. (*Id.* at 20.) GiaMed's proposal stated that GiaCare has [XXXX] relevant past experience under the solicitation, and healthcare services account for only [XX]% of GiaCare's revenues. (*Id.* at 21.) Appellant asserts that GiaCare lacks the personnel required to perform substantive work and therefore must be relegated to administrative or ministerial task. (*Id.*) Similarly, GiaMed's proposal indicated that MedTrust will provide nearly all the project personnel and resources. (*Id.* at 21-22.) Appellant contends, “[n]ot only does a populated joint venture subcontracting to its large business mentor violate SBA populated joint venture regulations. . . , it also demonstrates an unduly reliant, ostensible subcontractor relationship.” (*Id.* at 24.)

Lastly, Appellant reiterates its view that GiaMed is a “legal nullity” because GiaMed allowed the MPA to expire, and because “the SBA no longer permits populated joint ventures.” (*Id.*) Appellant asserts that GiaMed does not dispute that it no longer has an SBA-approved MPA. Further, if GiaMed were a true populated joint venture, GiaMed would not need to subcontract all of the work to MedTrust and GiaCare. (*Id.* at 25.) Appellant again notes that a populated joint venture cannot subcontract with a non-8(a) joint venture partner. (*Id.*)

L. Supplemental Response

On April 15, 2019, GiaMed responded to the supplemental appeal. GiaMed maintains that the supplemental appeal focuses on events and circumstances that are “irrelevant to the matter at hand.” (Supp. Response at 2.) In particular, much of the supplemental appeal pertains to the Teaming Agreements, which were signed more than five years after the date to determine size. (*Id.*) GiaMed argues its JVA has not changed, and that GiaCare and MedTrust are exempt from affiliation as participants in an SBA-approved mentor-protégé joint venture. (*Id.*)

GiaMed argues that OHA should look to the JVA, rather than any teaming agreements, to determine whether the protested firm qualifies for the affiliation exception. (*Id.* at 3.) Further, “teaming agreements are rarely, if ever, legally enforceable.” (*Id.* at 5.) Appellant “has not cited any authority for the proposition that OHA should consider teaming agreements prepared more than five years after the [JVA] is signed.” (*Id.* at 3.) In addition, GiaMed argues that its final proposal revision submitted on June 25, 2018 establishes that GiaMed did not intend to subcontract work to MedTrust or any other firms and intended to perform the contract as a populated joint venture. (*Id.* at 4.)

GiaMed finds Appellant's argument that GiaMed is a legal nullity due to the expiration of the MPA to be meritless, because the Area Office determined that the MPA was valid “as of the date GiaMed submitted its initial proposal including price.” (*Id.* at 6.) Appellant offers no authority to support the notion that the MPA cannot have expired before award, “and in fact,

OHA's case law shows the contrary to be true.” (*Id.* at 7.) There is no requirement that the MPA remain in effect through the date of award and numerous OHA cases support this point. (*Id.*) GiaMed highlights that Appellant has not alleged that GiaMed lacked a valid SBA-approved MPA on the date of GiaMed's initial proposal submission. (*Id.* at 7-8.)

With respect to Appellant's argument that the SBA no longer permits populated joint ventures, the SBA regulations in effect on September 14, 2012, the date of solicitation issuance, allowed for populated joint ventures, and the subsequent rule change allowing only unpopulated joint ventures has no retroactive impact on GiaMed for this procurement. (*Id.* at 8.)

GiaMed argues that Appellant relies on Teaming Agreements that were executed “nearly six years after GiaMed was created as a populated joint venture, was approved by SBA as a mentor-protégé joint venture, and submitted its initial offer including price (the relevant date for determining the eligibility of the joint venture).” (*Id.* at 8-9.) OHA should find that the Teaming Agreements have no bearing on GiaMed's status as a valid mentor-protégé joint venture. (*Id.* at 9.)

GiaMed contends that its JVA met SBA's specificity requirements and that the Area Office's “investigation and conclusions were reasonable and supported by the record. . . .” (*Id.*) Section 8.0 of the JVA stated that GiaCare and MedTrust will not bring any major equipment or facilities into the joint venture. (*Id.* at 10.) While the proposal indicated that MedTrust will provide some additional resources, these cannot be considered “major” facilities, equipment, or resources, because “they are ancillary to the core requirement of the contract — the provision of registered nurses.” (*Id.* at 10-11.) Thus, GiaMed concludes, the description of the major facilities, equipment, and resources in the JVA was sufficiently specific. (*Id.* at 11.)

With respect to Appellant's contention that GiaMed did not specify the respective responsibilities of GiaCare and MedTrust in its JVA, GiaMed maintains that, as a populated joint venture, GiaMed itself will hire the personnel who will perform the labor. (*Id.*) The JVA made clear that GiaCare will control performance through its control of the Management Committee. (*Id.* at 11-12.) For a populated joint venture, SBA regulations required that the JVA “needed only to explain what [GiaCare] would ‘gain from the performance of the contract and how such performance will assist in its business development.’” (*Id.* at 12, quoting 13 C.F.R. § 124.513(d)(1) (2013).) GiaMed's JVA addressed this requirement. (*Id.*, citing JVA § 14.0). GiaMed reiterates that the Teaming Agreement between GiaMed and MedTrust is irrelevant in considering GiaMed's eligibility for the mentor-protégé joint venture exception from affiliation, because GiaMed submitted its offer nearly six years before the Teaming Agreement was executed, nor was the JVA revised since the time of its initial execution. (*Id.*)

Appellant's arguments concerning relationships between GiaCare and MedTrust that predate GiaMed's formation are untimely and must be dismissed, because these arguments were not raised in Appellant's protest or in the initial appeal. (*Id.* at 13.) Rather, Appellant's protest alleged general affiliation between GiaCare and MedTrust based on relationships subsequent to GiaMed's formation. (*Id.* at 13-14.) Such arguments also are beyond OHA's subject matter jurisdiction because Appellant “is essentially asking OHA to examine whether SBA should have approved GiaCare's and MedTrust's [MPA].” (*Id.* at 14.) Moreover, the mere fact that GiaCare

and MedTrust worked together before entering into an MPA is not suggestive of affiliation. (*Id.* at 15.) Appellant's arguments about events that occurred after the date GiaMed submitted its offer for the procurement are equally meritless, as such events have no bearing on whether GiaMed was a valid mentor-protégé joint venture at the time of its self-certification. (*Id.* at 15-17.)

GiaMed argues that OHA should reject Appellant's allegations regarding the circumstances that led to the formation of GiaMed, as well as Appellant's allegations that GiaCare had done minimal business before partnering with MedTrust. (*Id.* at 17.) Such contentions, GiaMed maintains, “are not valid grounds for a size protest.” (*Id.*, citing *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888 (2018).) GiaMed asserts that it was not formed for any improper purpose but acknowledges that it was formed, in part, to allow MedTrust “to perform as GiaCare's SBA-approved mentor under a contract that [MedTrust] was no longer eligible to perform.” (*Id.* at 17-18.) The parties' intentions are “within the spirit of the regulations” and have “no bearing” on the issue of affiliation. (*Id.* at 18.) Appellant's allegations fail to demonstrate GiaCare is controlled by MedTrust or *vice versa*. (*Id.*)

Finally, GiaMed argues that Appellant's characterization of the GiaMed mentor-protégé joint venture as a prime contractor-subcontractor relationship “does not withstand scrutiny.” (*Id.*) As a populated joint venture, GiaMed will complete the work and “neither GiaCare nor GiaMed is unduly reliant on MedTrust.” (*Id.* at 19.) GiaMed reiterates its view that the Teaming Agreements are irrelevant to this case because GiaMed did not propose to utilize MedTrust as a subcontractor for the procurement. (*Id.* at 19-20.)

M. New Evidence

Accompanying its Supplemental Response, GiaMed moved to introduce new evidence. Specifically, GiaMed seeks to introduce portions of its final proposal revisions, and evidence pertaining to the MPA between GiaCare and MedTrust. GiaMed offers the final proposal revisions to show that “contrary to [Appellant's] assertion, GiaMed will be operating as a populated joint venture and MedTrust will not be acting as a subcontractor to GiaMed.” (Motion at 3.) The MPA documents, according to GiaMed, demonstrate that “the GiaCare and MedTrust [MPA] did not expire at the time GiaMed submitted its final proposal revision and, in fact, has not expired to date.” (*Id.* at 4.)

Appellant opposes the motion. The final proposal revisions are not admissible because they could have been, but were not, provided to the Area Office during the size review. (Opp. at 2.) If, however, OHA nevertheless accepts the new evidence, Appellant should be afforded an opportunity to comment on the documents. (*Id.*) Appellant objects to the introduction of the MPA materials because this evidence too was not provided to the Area Office. (*Id.* at 4-5.) Further, much of the information pertains to GiaCare's 8(a) status, which is not at issue in this case. (*Id.* at 5.)

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Equity Mortgage Sols., LLC*, SBA No. SIZ-5867, at 16 (2017). As a result, evidence that was not previously presented to the Area Office is generally not

admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). 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 6 (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).

In the instant case, I agree with Appellant that the new evidence GiaMed seeks to introduce was available to GiaMed during the size review, and GiaMed has not persuasively explained why this information could not have been provided to the Area Office. OHA has consistently held that it will not accept new evidence when the material in question was available during the course of the size investigation but not submitted to the Area Office. *E.g.*, *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 10 (2015). Further, as GiaMed itself emphasizes in its response to the appeal, the Area Office found that GiaMed's size is determined as of October 16, 2012, the date of GiaMed's initial proposal including price. Section II.H, *supra*. The new evidence, though, pertains to events and circumstances after October 16, 2012, and therefore has limited, if any, relevance to these proceedings. Accordingly, the new evidence is EXCLUDED from the record and has not been considered for purposes of this decision.

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 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

SBA regulations provide that SBA will determine “the size status of a concern, including its affiliates” as of the date the concern self-certifies as small with its initial offer including price. 13 C.F.R. § 121.404(a). Applying this rule, OHA has repeatedly held that events occurring after the date to determine size are not relevant in a size determination. *E.g.*, *Size Appeal of Precision Asset Mgmt. Corp., et al.*, SBA No. SIZ-5781, at 7 (2016), *recons. denied*, SBA No. SIZ-5801 (2017) (PFR); *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646, at 11 (2015); *Size Appeal of Brown & Pipkins LLC*, SBA No. SIZ-5621, at 6 (2014); *Size Appeal of Alterity Mgmt. & Tech. Solutions, Inc.*, SBA No. SIZ-5514, at 7 (2013); *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192, at 7 (2011); *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010) (an area office “may not consider evidence or events that transpired after” the

date to determine size). Similarly, OHA has recognized on numerous occasions that issues of affiliation, including whether a joint venture is eligible for the mentor-protégé exception to affiliation, are examined as of the date of initial offer including price. *E.g.*, *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715, at 8-9 (2016) (joint venturers were affiliated because mentor-protégé agreement had lapsed as of the date of self-certification); *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532 (2014); *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 10-11 (2013) (“because size is determined as of the self-certification date, a size determination must determine affiliation—in this case, economic dependence—as of that date.”).

In the instant case, the Area Office twice stated in the size determination — and Appellant does not dispute — that GiaMed's size must be determined as of October 16, 2012, the date of GiaMed's initial proposal including price. Section II.H, *supra*. This key fact disposes of several of Appellant's arguments on appeal. First, Appellant maintains that GiaMed is a “legal nullity” because GiaMed is structured as a populated joint venture, a type of arrangement no longer permitted under SBA regulations. While it is true that SBA essentially abolished populated joint ventures in 2016, populated joint ventures were allowed at the time of GiaMed's self-certification. *See, e.g.*, 13 C.F.R. § 121.103(h) (2012) (a joint venture “may (but need not) be populated (*i.e.*, have its own separate employees)”). Further, in promulgating the rule that eliminated populated joint ventures, SBA made clear that the rule would have no retroactive effect. 81 Fed. Reg. 48,558, 48,575 (July 25, 2016). Contrary to Appellant's contentions, then, GiaMed did have a valid legal structure as of October 16, 2012, the date to determine size, and therefore is not a “legal nullity.”

Similarly, Appellant complains that GiaCare and MedTrust, the participants in GiaMed, have engaged in other joint ventures, which, in Appellant's view, are so extensive in nature that GiaCare and MedTrust should be deemed generally affiliated. GiaMed counters, however, that the other joint ventures did not exist as of October 16, 2012, but rather were formed in subsequent years. Section II.B, *supra*. I agree with GiaMed that, under OHA precedent, events occurring after the date to determine size are not relevant in a size determination. Accordingly, the other joint ventures cannot establish general affiliation between GiaCare and MedTrust as of October 16, 2012.

Appellant also argues that the MPA between GiaCare and MedTrust expired in 2014, such that GiaCare and MedTrust are no longer an SBA-approved mentor and protégé. Again, the crucial flaw in Appellant's argument involves the date to determine size. GiaMed denies that the MPA has now expired, but even assuming Appellant is correct that the MPA did expire in 2014, there is no dispute that GiaCare and MedTrust were an SBA-approved mentor and protégé on October 16, 2012, the date to determine size. Section II.C, *supra*. As a result, any subsequent expiration of the MPA would not affect GiaMed's eligibility for award. Indeed, in *Size Appeals of Kentucky Building Maintenance, Inc., et al.*, SBA No. SIZ-6001 (2019), OHA affirmed a determination that a mentor-protégé joint venture remained eligible for award, even though the mentor had withdrawn from the MPA after the date for determining size but prior to award. After explaining that size is determined as of the date of self-certification with the initial offer including price, OHA reasoned that the joint venture had a proper MPA and JVA as of the date to determine size. *Kentucky Building*, SBA No. SIZ-6001, at 15-17.

Appellant's strongest arguments on appeal are that GiaMed did not meet SBA requirements applicable to joint ventures in effect on October 16, 2012, the date of GiaMed's self-certification. SBA regulations at that time provided that joint venturers normally would be affiliated with one another for any contract performed by the joint venture. 13 C.F.R. § 121.103(h)(2) (2012). An exception existed for joint ventures between an SBA-approved mentor and protégé, but SBA regulations stipulated that, to qualify for that exception, "the joint venture must meet the requirements of §§ 124.513(c) and (d)." 13 C.F.R. § 121.103(h)(3)(iii) (2012); *see also* 13 C.F.R. § 124.520(d)(1)(ii) (2012).

Sections 124.513(c) and (d), in turn, set forth requirements applicable to joint ventures. As is pertinent here, the regulations stated:

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.520, must contain a provision:

...

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each; [and]

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section.

...

(d) *Performance of work.* (1) . . . For an unpopulated joint venture or a joint venture populated only with one or more administrative personnel, the 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture. . . . For a joint venture populated with individuals intended to perform contracts awarded to the joint venture, each 8(a) Participant to the joint venture must demonstrate what it will gain from performance of the contract and how such performance will assist in its business development.

(2) . . . (ii) In a populated joint venture, a non-8(a) joint venture partner, or any of its affiliates, may not act as a subcontractor to the joint venture awardee, or to any other subcontractor of the joint venture, unless [SBA] determines that other potential subcontractors are not available, or the joint venture is populated only with administrative personnel.

13 C.F.R. § 124.513 (2012).

The Area Office determined that GiaMed's JVA met each of the above requirements, and as discussed below, Appellant has not shown that the Area Office's determination is clearly erroneous. Appellant maintains that the Area Office incorrectly found that GiaMed's JVA itemized major equipment, facilities and other resources, as required by 13 C.F.R. § 124.513(c)(6) (2012). Instead, Appellant observes, the JVA merely stated that GiaCare and MedTrust “will not bring any major equipment or facilities into the Joint Venture” because “the Joint Venture will utilize Army equipment and facilities.” Section II.E, *supra*. The instant procurement, though, is for services (specifically, nursing services), and the RFP stated that work would be performed at military treatment facilities in and around San Antonio, Texas. Section II.A, *supra*. It therefore is reasonable that there would have been no major equipment, facilities or other resources for GiaMed to have detailed in the JVA. *Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5822, at 11 (2017) (in a procurement of professional services, using information technology provided by the procuring agency, “[b]ecause the contract does not require major equipment, facilities, or other resources, [the joint venture] was not required to list them in its JVA.”). Appellant also highlights that GiaMed's proposal made reference to additional resources that are not mentioned in the JVA, including a database of [XXXXXXXXXX] and the [XXXXXXXXXX]. Section II.G, *supra*. I agree with GiaMed that these items do not rise to the level of “major” resources, and thus need not have been itemized in the JVA. According to the proposal, the [XXXXXXXXXX] would be only part of GiaMed's multi-faceted recruitment strategy, not the exclusive or even the primary method of obtaining new candidates. *Id.* The [XXXXXXXXXX], meanwhile, is a personnel and financial management system, and thus is ancillary to the nursing services called for in the instant procurement. *Id.*

Appellant also argues that the Area Office erroneously found GiaMed's JVA compliant with 13 C.F.R. § 124.513(c)(7) (2012), because the JVA did not describe the respective responsibilities of GiaCare and MedTrust, and because the JVA did not explain how GiaMed would ensure that GiaCare, the 8(a) member of GiaMed, will perform at least 40% of the work. Appellant's arguments conflate the requirements applicable to populated joint ventures, such as GiaMed, with the requirements applicable to unpopulated joint ventures. Under the regulations in effect on the date of self-certification, a populated joint venture was one with its own employees. 13 C.F.R. § 121.103(h) (2012). GiaMed's JVA and the accompanying OA explained that the joint venture itself, rather than the joint venturers in their individual capacities, would perform the large majority of the contract. Sections II.D and II.E, *supra*. Through its control of the Management Committee and the Project Manager, GiaCare would control the management of GiaMed as well as performance of the instant contract. *Id.* The JVA also outlined the ways in which GiaCare, the 8(a) participant, would benefit from involvement in the joint venture. *Id.* Thus, the Area Office properly found that GiaMed met the requirements applicable to populated joint ventures as were set forth at 13 C.F.R. § 124.513(c)(7) (2012). While it is true, as Appellant alleges, that the JVA did not commit that GiaCare would perform at least 40% of the work, that requirement pertained only to unpopulated joint ventures, not to a populated joint venture as seen here. 13 C.F.R. § 124.513(d)(1) (2012).

Appellant also contends that the Area Office overlooked that GiaMed intends to subcontract up to 60% of the procurement to MedTrust, in contravention of 13 C.F.R. § 124.513(d)(2)(ii) (2012). This argument fails for two reasons. First, GiaMed's size is determined

as of October 16, 2012, and GiaMed's OA, in effect on that date, stated that “because [GiaMed] is populated (with more than just administrative personnel), neither MedTrust nor any of MedTrust's affiliates may act as a subcontractor to [GiaMed] or to any other subcontractor of [GiaMed], unless the SBA determines that other potential subcontractors are not available.” Section II.D, *supra*. Conversely, the only evidence that GiaMed plans to engage MedTrust as a subcontractor is the Teaming Agreement, signed several years after the date to determine size on June 25, 2018. Section II.F, *supra*. As of the date to determine size, then, there was no basis for the Area Office to find that GiaMed would subcontract any portion of this contract to MedTrust. Second, while Appellant maintains that the Teaming Agreement establishes that GiaMed will subcontract to MedTrust, Appellant offers no rationale for concluding that the terms of the Teaming Agreement take precedence over the OA. Notably, the Teaming Agreement stipulated that any resulting subcontract must be consistent with “Government rules, regulations and applicable law,” and the OA indicated that, to ensure compliance with the OA, “any and all subcontracts executed between [GiaMed] and each of its subcontractors shall contain provisions that obligate the subcontractor and entitle [GiaMed] to reduce the subcontractor's scope of work and reallocate such work to [GiaMed].” Sections II.D and II.F, *supra*. In light of these terms, it is not evident that language in the Teaming Agreement expressing intent to utilize MedTrust as a subcontractor would supersede contrary statements in the OA.

Lastly, I find no merit to Appellant's contention that the Area Office should have found GiaCare unusually reliant upon MedTrust, such that the firms are affiliated under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). GiaCare and MedTrust are not prime contractor and subcontractor, but rather are participants in a joint venture, GiaMed. It is well-settled law that the ostensible subcontractor rule does not apply when there is no subcontracting relationship between the challenged concerns. *Size Appeal of Assessment and Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 4 (2012); *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383, at 15 (2012) (“Logically, then, if there is no subcontracting arrangement, the ostensible subcontractor rule will not apply.”); *Size Appeal of Active Deployment Sys. Inc.*, SBA No. SIZ-5230, at 8 (2011); *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098, at 7 (2009). The ostensible subcontractor rule therefore is not applicable in the instant case. The fact that GiaCare and MedTrust were, on the date of self-certification, an SBA-approved mentor and protégé further undermines any basis to find GiaCare unusually reliant upon MedTrust. SBA regulations stated that “[n]o determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to that agreement.” 13 C.F.R. § 124.520(d)(4) (2012).

IV. Conclusion

Appellant has failed to establish that the size determination is clearly erroneous. Accordingly, I DENY the instant appeal, and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge