

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

SIZE APPEAL OF:

Invisio Communications, Inc.,

Appellant,

RE: Atlantic Signal, LLC

Appealed From  
Size Determination No. 04-2020-040

SBA No. SIZ-6084

Decided: December 9, 2020

APPEARANCES

Kristen E. Ittig, Esq., Nathaniel E. Castellano, Esq., Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Appellant.

John R. Prairie, Esq., George E. Petel, Esq., Wiley Rein LLP, Washington D.C., for Atlantic Signal, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On September 18, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2020-040, denying a size protest filed by Invisio Communications, Inc. (Appellant) against Atlantic Signal, LLC (Atlantic Signal). The Area Office determined that Atlantic Signal is a small business for the subject procurement. On appeal, 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 discussed *infra*, the appeal is denied and the size determination is affirmed. *\*I* 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 received the size determination on September 18, 2020, and filed the instant appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

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<sup>1</sup> This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

## II. Background

### A. The Solicitation

On April 22, 2020, the U.S. Marine Corps (USMC) issued Request for Proposals (RFP) No. M67854-20-R-1701 for Hearing Enhancement Devices (HEDs). The RFP contemplated the award of an indefinite-delivery indefinite-quantity (ID/IQ) contract. The RFP consisted of ten Contract Line Item Numbers (CLINs), nine of which were for various types of equipment, along with estimated quantities for each item:

#### 1. SCHEDULE OF SUPPLIES

CLIN	Description	Quantity	Unit of Issue
0001	Headset, Dual Communication, Coyote-498/499	17,979 max	Each
0002	Headset, Non-Communication, Coyote-498/499	35,961 max	Each
0003	Push-to-Talk, Dual, Coyote-498/499/Black	17,979 max	Each
0004	Cable, Dual	17,979 max	Each
0005	Cable, Single	17,979 max	Each
0006	Cable, Motorola 5000 XTS	17,979 max	Each
0007	Hygiene Kit, Headset Non-Communication	35,961 max	Each
0008	Hygiene Kit, Headset Dual Communication	17,979 max	Each
0009	Helmet Adapter-ARC Rail	53,940 max	Each
0010	[Contract Data Requirements Lists (CDRLs)]	Not Separately Priced	

(RFP, Attach. 01, at 1.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 334220, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, with a corresponding size standard of 1,250 employees. Proposals were due May 19, 2020. Appellant and Atlantic Signal submitted timely offers.

### B. Size Protest

On August 17, 2020, the CO informed Appellant that Atlantic Signal was the apparent awardee. On August 21, 2020, Appellant filed a protest challenging Atlantic Signal's size. Appellant alleged that Atlantic Signal is not a small business for the instant procurement. More specifically, Appellant contended that Atlantic Signal is affiliated with 3M Peltor, a division of a large business, through the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and based on their frequent business dealings. (Protest at 3-4.) Additionally, Appellant claimed, Atlantic Signal cannot meet the requirements of the nonmanufacturer rule, 13 C.F.R. § 121.406. (*Id.* at 5.)

With regard to affiliation under the ostensible subcontractor rule, Appellant alleged that: 1) 3M Peltor, not Atlantic Signal, will manufacture the headsets, which according to Appellant account for approximately 85% of contract value are therefore the “primary and vital” contract requirement; and 2) Atlantic Signal will be unusually reliant upon 3M Peltor due to a teaming

agreement between the two firms. (*Id.* at 3-4.) Appellant contended that Atlantic Signal is affiliated with 3M Peltor through economic dependence and contractual relationships, based on a “long-standing and deeply ingrained” history of working and teaming together. (*Id.* at 4.) Lastly, with regard to the nonmanufacturer rule, Appellant reiterated its position that “Atlantic Signal is not the manufacturer of the headsets to be provided under the procurement, 3M Peltor is.” (*Id.* at 5.) Atlantic Signal would not be eligible to provide the equipment as a nonmanufacturer because 3M Peltor is not small. (*Id.* at 6.)

### C. Response to Size Protest

The CO forwarded Appellant's protest to the Area Office for review. On September 1, 2020, Atlantic Signal responded to the size protest. Atlantic Signal argued that, contrary to Appellant's allegations, Atlantic Signal will be the manufacturer of the HEDs. (Protest Response at 2.) According to Atlantic Signal:

[T]he headsets manufactured by 3M Peltor are *not* the foundational component of the [HEDs] being procured by the [USMC]; they are just one of several end items being procured and which Atlantic Signal will combine—along with the push-to-talk (“PTT”) adapter assemblies and interface cables [XXXXXXX]—to connect to the [USMC's] radios and other communication devices.

(*Id.*, emphasis Atlantic Signal's.)

Atlantic Signal claimed that it will manufacture end items comprising at least 51% of the total value of the procurement. (*Id.* at 4.) Specifically, CLINs [XXXXXXX] equate to [a majority] of the total proposed contract value and will be manufactured by Atlantic Signal. (*Id.* at 4-5.) Additionally, [XXXXXXX], another small business, will manufacture CLINs [XXXXXXX]. (*Id.* at 5.) Only CLINs [XXXXXXX] will be manufactured by 3M Peltor, and the value of CLIN [XXXXXXXXXX]. (*Id.*) Since Atlantic Signal will manufacture more than 50% of the contract value, it qualifies as the manufacturer for the procurement. (*Id.*)

Atlantic Signal next argued that it will be manufacturing the most important aspects of the HEDs, which “transform the base hearing protection headsets into a communication-enabled [HED].” (*Id.*) Atlantic Signal asserted that the RFP calls for three principal end items that together make up the HEDs: the radio Push-to-Talk (PTT) adapter, the radio interface cables, and the headsets. (*Id.* at 5-6.) [XXXXXXXXXX] 3M Peltor will manufacture the headsets. (*Id.* at 6.) Further, the communication headsets [XXXXXXXXXXXX], without which “3M Peltor's headset would not work for this procurement.” (*Id.*)

Atlantic Signal highlighted that it has the technical capabilities to manufacture the items at issue in the procurement. (*Id.* at 6-7.) Atlantic Signal's [XXXXXXX] are produced in its own plant in Topeka, Kansas.

Atlantic Signal next argued that it is not affiliated with 3M Peltor under the ostensible subcontractor rule. (*Id.* at 7.) Atlantic Signal is the manufacturer of the primary and vital

requirements of the solicitation, [XXXXXXXX], and is not unusually reliant upon 3M Peltor. (*Id.* at 7-8.) Atlantic Signal argued that even if Appellant were correct in claiming that the headsets represent 85% of the total value of the contract, the purpose of the procurement is to obtain a communication systems solution, not merely headsets. (*Id.* at 8.) Atlantic Signal is the manufacturer of that system, and so is not unduly reliant upon 3M Peltor. (*Id.*, citing *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718 (2016).)

Lastly, Atlantic Signal argued that it is not economically dependent on 3M Peltor. (*Id.*) Atlantic Signal denied that it has “exclusive rights” to 3M Peltor’s ComTac V headset. (*Id.*) Rather, the ComTac V headset is a widely-available commercial item with multiple authorized distributors. (*Id.*) Allied Signal possesses exclusive rights only to certain variants of the ComTac V platform [XXXXXXXX]. (*Id.*) Atlantic Signal also claimed that there is no teaming agreement between Atlantic Signal and 3M Peltor. (*Id.*) Instead, they have only a non-exclusive distributor agreement. (*Id.*) Finally, Atlantic Signal argued that its sales are not centered on 3M Peltor subcontracts. (*Id.* at 9.)

On September 11, 2020, in response to inquiries from the Area Office, Atlantic Signal further detailed its manufacturing capabilities and processes. (Supp. Protest Response at 2-5.) Additionally, Atlantic Signal provided information about the approximate value of subcontracts between Atlantic Signal and 3M Peltor during 2017-19:

	<b>Subcontracts to Atlantic Signal</b>	<b>Subcontracts to 3M Peltor</b>
2019	[\$[XX] ([XX]%)	[\$[XX]
2018	[\$[XX] ([XX]%)	[\$[XX]
2017	[\$[XX] ([XX]%)	[\$[XX]

(*Id.* at 5.)

#### D. Size Determination

On September 18, 2020, the Area Office issued Size Determination No. 04-2020-040, concluding that Atlantic Signal is a small business for the instant procurement. The Area Office explained that [XXXX] and [XXXX] own equal interests in Atlantic Signal, and therefore both control or have the power to control Atlantic Signal. (Size Determination at 2.) [XXXX] holds no ownership or managerial interest in any other entity. (*Id.*) [XXXX] is owned and controlled by [XXXX], which is owned and controlled by [XXXX], which is in turn owned and controlled by [XXXX]. (*Id.*) Atlantic Signal is affiliated with [XXXXXXXXXXXX], but the combined employees of Atlantic Signal and these affiliates do not exceed the size standard. (*Id.* at 2, 8.)

The Area Office next examined Appellant’s allegations concerning the nonmanufacturer rule. The RFP consists of ten CLINs, nine of which are for equipment. (*Id.*) Only two of the nine CLINs are for headsets, and those two CLINs are for different types of headsets (one for communication, the other for hearing protection). (*Id.* at 2-3.) Although Appellant alleged that headsets account for approximately 85% of the value of the procurement, Appellant did not explain how it reached the 85% figure. (*Id.* at 3.) The Area Office found that in a procurement for multiple types of items, the small business prime contractor need not be the manufacturer of

every item. (*Id.*, citing 13 C.F.R. § 121.406(d)(1).) Rather, at least 50% of the value of the items being procured must be manufactured by small businesses. (*Id.*) Atlantic Signal will be the manufacturer for CLINs [XXXXXXX], which together represent [a majority] of the total proposed contract value. (*Id.*) [XXXX], another small business, will be the manufacturer for CLINs [XXXXXXXX]. (*Id.*) 3M Peltor, a large business, will be the manufacturer for CLINs [XXXXXX], but these [XX] CLINs comprise [less than 50]% of contract value. (*Id.*) Because small businesses together will manufacture items that constitute [a majority] of the value of the instant contract, Atlantic Signal is compliant with the nonmanufacturer rule. (*Id.*)

The Area Office next considered the ostensible subcontractor rule. (*Id.* at 4-5.) OHA has repeatedly explained that the ostensible subcontractor rule is not applicable to procurements for goods or manufactured products. (*Id.* at 5.) The instant procurement was assigned a manufacturing NAICS code, and nine of the ten CLINs are for equipment. (*Id.*) Therefore, “the core of this procurement is equipment,” and the ostensible subcontractor rule is inapplicable. (*Id.*)

The Area Office then determined that Atlantic Signal and 3M Peltor are not affiliated based on their business dealings. (*Id.*) Although Appellant alleged that Atlantic Signal and 3M Peltor have frequently done business with one another, Appellant provided no evidence that 3M Peltor has the power to control Atlantic Signal, or *vice versa*. (*Id.*) Simply doing business with another firm is not, by itself, grounds for affiliation. The Area Office found that Appellant did not demonstrate that the business relationship between 3M Peltor and Atlantic Signal rose to a level of economic dependence or that there were any other indicia of affiliation, such as common management. (*Id.*) The Area Office rejected Appellant's allegations that Atlantic Signal's website contained references to 3M Peltor as a “teaming partner.” (*Id.*) Commercial websites and/or publications are intended for marketing purposes, and are not a valid basis to find affiliation. (*Id.* at 5-6.) Rather, the Area Office must give greater weight to specific and sworn information. Moreover, Atlantic Signal is an authorized distributor of 3M Peltor products, and such arrangements are common and not improper. (*Id.* at 6.) Appellant did not offer any factual basis that would support the conclusion that Atlantic Signal is economically dependent on 3M Peltor. According to Atlantic Signal's submissions to the Area Office, Atlantic Signal has derived “virtually none” of its revenues over the last three years from 3M Peltor subcontracts. (*Id.* at 7.)

The Area Office concluded that the combined employees of Atlantic Signal and its affiliates do not exceed the size standard for the instant procurement. (*Id.* at 8.) Atlantic Signal is therefore an eligible small business.

#### E. Appeal

On October 1, 2020, Appellant filed the instant appeal. Appellant argues, first, that Atlantic Signal is not the manufacturer of the headsets to be provided under the procurement. (Appeal at 5.) According to Appellant, the ComTac V headsets comprises of the majority of the procurement, and the labeling on that headset reveals that it is manufactured by 3M Peltor. (*Id.*) Appellant argues that Atlantic Signal cannot qualify as a nonmanufacturer because the headsets are manufactured by a large business and the value of the procurement is well above the simplified acquisition threshold. (*Id.*)

Appellant acknowledges that, for multi-item acquisitions, the prime contractor can satisfy the nonmanufacturer rule if 50% of the estimated contract value is manufactured by small businesses. (*Id.*, citing 13 C.F.R. § 121.406(d).) The Area Office determined that Atlantic Signal is manufacturing over 50% “of the value of the items being acquired.” (*Id.*, citing *Size Determination* at 3.) Appellant alleges that the Area Office erred because the nonmanufacturer rule requires that the small business manufacture 50% “of the estimated contract value.” (*Id.* at 6.) It is not evident that the Area Office properly calculated the total estimated contract value, or what percentage would be produced by small businesses. (*Id.*) Therefore, the Area Office's size determination was unreasonable. (*Id.*)

Next, Appellant argues that Atlantic Signal is affiliated with 3M Peltor under the ostensible subcontractor rule. (*Id.*) Appellant alleges that Atlantic Signal is unusually reliant on 3M Peltor because of the teaming arrangement between the two firms and because Atlantic Signal's business model relies on its work with 3M Peltor. (*Id.* at 6-7.) Appellant also contends that 3M Peltor will perform the “primary and vital” contract requirements, the manufacturing of the headsets. (*Id.* at 7.)

Appellant disputes the notion that the ostensible subcontractor rule does not apply to procurements assigned a manufacturing NAICS code. (*Id.*) “Nothing in the plain language of the regulation provides that it applies only to procurements that are classified as services procurements, as the Area Office asserts.” (*Id.* at 8.) Nor does the Area Office, or OHA, have the authority to re-write published regulations. (*Id.*) OHA's recent discussion of the question in *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6068 (2020) should be considered “nonbinding dicta,” because the challenged firm in *Superior Optical* had already acquired the alleged ostensible subcontractor, so there was no longer any separate subcontractor with which the challenged firm could have been affiliated. (*Id.* at 9.)

Similarly, Appellant claims, another case cited by the Area Office, *Size Appeal of Marwais Steel Co.*, SBA No. SIZ-3884 (1994), did not establish a bright-line rule that the ostensible subcontractor rule cannot apply to solicitations with a manufacturing NAICS code. (*Id.* at 11.) Rather *Marwais* stands for the proposition that “a determination that a firm is the manufacturer of the end item to be procured precludes its being found unduly reliant upon its subcontractor.” (*Id.*) Here, 3M Peltor manufactures the headsets, not Atlantic Signal, so *Marwais* is not controlling.

Finally, Appellant renews its contentions that Atlantic Signal and 3M Peltor are affiliated based on frequent business dealings. (*Id.* at 12.) The two firms have a long history of working together. (*Id.* at 13.) As evidence, Appellant points to Atlantic Signal's website, which repeatedly refers to 3M Peltor as its teaming partner. (*Id.*) Appellant asserts that Atlantic Signal depends on 3M Peltor for a significant portion of its revenue. (*Id.*) Appellant argues that Atlantic Signal's representation to the Area Office that it has no “contractual commitment” with 3M Peltor is inconsistent with the acknowledged distribution agreement, as well as the fact that Appellant has derived revenue from 3M Peltor subcontracts. (*Id.*)

Appellant argues that the Area Office improperly analyzed Atlantic Signal's revenue data. (*Id.* at 14.) In Appellant's view, the key question is whether a significant portion of Atlantic

Signal's revenue stems from its relationship with 3M Peltor. (*Id.*) Appellant claims that if a significant portion of Atlantic Signal's sales are possible only because of its distribution agreement with 3M Peltor, that is enough to establish economic dependency. (*Id.*) At a minimum, the Area Office's analysis of this issue was inadequate and should be remanded for a more thorough investigation. (*Id.* at 14-15.)

#### F. Supplemental Appeal

On October 19, 2020, after reviewing the Area Office file under an OHA protective order, Appellant moved to supplement its appeal. Appellant first withdraws its allegations that Atlantic Signal violated the nonmanufacturer rule. (Supp. Appeal at 3.) Appellant no longer contends that the Area Office made a clear error of fact or law on this issue. (*Id.*)

With regard to the ostensible subcontractor rule, Appellant argues that the Area Office file shows that 3M Peltor will manufacture the primary and vital aspects of the procurement. (*Id.* at 5.) Specifically, Appellant claims that the procurement is primarily concerned with the acquisition of headsets, both communication and non-communication. (*Id.* at 5-6.) The non-headset items covered by the procurement are accessories which accompany the headsets. (*Id.* at 6.) Appellant alleges that 3M Peltor will manufacture the headsets and Atlantic Signal will manufacture only ancillary components. (*Id.* at 6-7.)

Appellant reiterates its view that the ostensible subcontractor rule applies to this procurement, notwithstanding that the RFP was assigned a manufacturing NAICS code. (*Id.* at 8-9.) Appellant repeats the arguments set forth in its initial appeal. (*Id.* at 8-13.)

Appellant argues that the Area Office did not properly analyze whether Atlantic Signal is economically dependent on 3M Peltor. (*Id.* at 13.) According to Appellant, the Area Office ignored inconsistencies in Atlantic Signal's response. In particular, Atlantic Signal acknowledged that it has had subcontracts that were awarded both to and from 3M Peltor, yet also claimed that its only contractual arrangement with 3M Peltor was a standard distribution agreement. (*Id.* at 13-14.)

Additionally, Appellant contends that the Area Office focused narrowly on subcontracting, but failed to consider how much of Atlantic Signal's total revenue is based on its relationship with 3M Peltor. (*Id.* at 16.) In fact, Appellant alleges, Atlantic Signal may depend upon 3M Peltor for [a large majority] of its revenues. (*Id.*) Appellant observes that Atlantic Signal's total annual 2019 revenue was \$[XXXX]. (*Id.* at 17.) Atlantic Signal made \$[XXXX] in payments to 3M Peltor that year. (*Id.* at 16.) Appellant supposes that these payments presumably represent products purchased from 3M Peltor to be sold with markup. (*Id.* at 17.) Assuming that Atlantic Signal places a 25% markup, 3M Peltor products would represent \$[XXXX] in sales, or [XX]% of Atlantic Signal's revenue. (*Id.*) Next, Appellant argues that all of Atlantic Signal's accessories to 3M Peltor headsets are likewise dependent on 3M Peltor. (*Id.*) When such sales also are considered, Atlantic Signal relies on the 3M Peltor relationship for [XX]% of its revenue. (*Id.*)

Finally, Appellant argues that the distribution agreement between Atlantic Signal and 3M Peltor may give 3M Peltor control over Atlantic Signal, as it gives 3M Peltor the right to change various pricing and certain aspects of the agreement. (*Id.* at 19.)

#### G. Atlantic Signal's Response

On October 30, 2020, Atlantic Signal responded to the appeal and supplemental appeal. Atlantic Signal argues that it is the manufacturer for the procurement, that the ostensible subcontractor rule does not apply, and that it is not unduly reliant upon 3M Peltor. In Atlantic Signal's view, Appellant is “desperately grasping at straws that simply find no support in the record or precedent.” (Atlantic Signal Response at 2.)

First, although Appellant withdrew its allegations pertaining to the nonmanufacturer rule, Atlantic Signal highlights that it is the manufacturer for this procurement and so is not in violation of the nonmanufacturer rule. (*Id.* at 3-4.) As the Area Office correctly recognized, the instant procurement is for HEDs, not just headsets. (*Id.* at 4.) Appellant's claim that headsets represent 85% of the value of the procurement is inaccurate and unsupported. (*Id.*)

Turning to the ostensible subcontractor rule, Atlantic Signal contends that the ostensible subcontractor rule does not apply to procurements for manufactured products, such as found here. (*Id.* at 5.) Indeed, OHA has held that applying the ostensible subcontractor rule to procurements for manufactured products would “swallow the nonmanufacturer rule.” (*Id.* at 6.) Atlantic Signal points to OHA precedent as support for its argument. (*Id.* at 5-6, citing *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020) and *Size Appeal of Controlled Sys.*, SBA No. SIZ-5039 (2009).) Appellant, conversely, is unable to “cite a single case where OHA has held that a concern subject to 13 C.F.R. § 121.406 violated the ostensible subcontractor rule.” (*Id.* at 6.)

Atlantic Signal argues that the primary and vital requirements of the instant procurement are not headsets. (*Id.*) Rather, the purpose of the procurement is to obtain a communication system solution, which must be compatible with USMC's existing communication equipment. (*Id.* at 7.) The headsets are one aspect in the procurement. (*Id.*) Atlantic Signal is manufacturing end items that comprise more than 50% of the total value of the entire communications system, and so cannot be unduly reliant on 3M Peltor or any other supplier. (*Id.*) Appellant no longer disputes that Atlantic Signal is the manufacturer of the HEDs, and thus has “effectively conceded that Atlantic Signal is performing the primary and vital requirements of this contract for manufactured products.” (*Id.* at 10.)

Atlantic Signal argues that it is not economically dependent upon 3M Peltor, and that Appellant has not articulated any plausible grounds to conclude that Atlantic Signal could be controlled by 3M Peltor. (*Id.* at 10-12.) The three OHA cases cited by Appellant all involve situations where the challenged firm received revenues from its alleged affiliate, not where the challenged firm was paying money to the alleged affiliate. (*Id.* at 12-13.) According to Atlantic Signal, “[t]here is simply no legal or logical support for [Appellant's] claim that a concern is economically dependent on a supplier that it uses frequently.” (*Id.* at 13.)



Atlantic Signal denies that it made any false or inconsistent statements to the Area Office. (*Id.* at 13-14.) The statement that the only current contractual commitment between Atlantic Signal and 3M Peltor is a standard, non-exclusive distribution agreement was perfectly correct, and Atlantic Signal did not claim that it had no business dealings with 3M Peltor in the past. (*Id.* at 14.) Atlantic Signal further refutes Appellant's claim that it is relevant to consider whether the challenged firm's revenues from other customers stem from its relationship with the alleged affiliate. (*Id.*) There is no support in regulation or case law for such an analysis. (*Id.*) Moreover, even if this were the rule, Atlantic Signal manufactures and sells numerous products unrelated to 3M Peltor. (*Id.* at 14-15.)

Atlantic Signal disputes Appellant's allegations that more than [XX]% of its revenues are connected with 3M Peltor. (*Id.* at 15.) Appellant's calculations are “complete and utter nonsense,” premised on speculation and erroneous assumptions. (*Id.* at 16.) Rather than undertake such an analysis, “the Area Office correctly looked at the percentage of revenues Atlantic Signal *receives from* 3M Peltor, and determined that Atlantic Signal is not economically dependent on 3M Peltor in any way.” (*Id.*, emphasis Atlantic Signal's.)

Finally, Atlantic Signal claims that, contrary to Appellant's contentions, its non-exclusive commercial distribution agreement with 3M Peltor is not evidence of control. (*Id.* at 17.) Construing such agreements as evidence of control would undermine the nonmanufacturer rule, as the rule permits, and indeed requires, that firms agree to standard distribution terms with suppliers. (*Id.*) Appellant “offers no case law—because none exists—to support its theory that affiliation should result from an arms' length commercial distribution agreement with standard terms that most suppliers use and which apply to all distributors.” (*Id.*)

### 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Analysis

I agree with the Area Office and Atlantic Signal that the ostensible subcontractor rule is not applicable in the instant case. As the Area Office correctly observed, OHA has repeatedly held that the ostensible subcontractor rule does not apply to procurements for manufactured products. *See, e.g., Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072, at 11 (2020); *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6068, at 9 (2020); *Size Appeals of ProActive Techs., Inc. et al.*, SBA No. SIZ-5772, at 26 (2016); *Size Appeal of Marwais Steel Co.*, SBA No. SIZ-3884, at 7 (1994). Similarly, SBA has explained in the *Federal Register* that a determination that

the prime contractor meets the requirements of the nonmanufacturer rule resolves the question of whether the prime contractor is compliant with the ostensible subcontractor rule:

In classifying the procurement as a manufacturing/supply procurement, the procuring agency must have determined that the “principal nature” of the procurement was supplies. As a result, any work done by a subcontractor on the services portion of the contract cannot rise to the level of being “primary and vital” requirements of the procurement, and therefore cannot be the basis of [f] affiliation as an ostensible subcontractor.

76 Fed. Reg. 8,222, 8225 (Feb. 11, 2011). Appellant's suggestion that both the ostensible subcontractor and nonmanufacturer rules may apply to the same procurement for manufactured goods also is problematic because, if the “primary and vital” contract requirements are defined as producing the manufactured products, it would become essentially impossible for a small business prime contractor to be eligible for award as a nonmanufacturer. Utilizing the ostensible subcontractor rule in situations ordinarily governed by the nonmanufacturer rule is thus logically untenable, as such an approach “would eviscerate the nonmanufacturer rule.” *Size Appeal of Controlled Sys.*, SBA No. SIZ-5039, at 3 (2009).

Here, the instant procurement was assigned a manufacturing NAICS code, and nine of the ten CLINs were for equipment. Section II.A, *supra*. Thus, the procurement plainly is for manufactured products, and the ostensible subcontractor rule is not applicable. Although Atlantic Signal still must comply with the nonmanufacturer rule, the Area Office determined that Atlantic Signal is the manufacturer of the end items being produced, and Appellant has withdrawn its appeal pertaining to that aspect of the size determination. Sections II.D and II.F, *supra*. Accordingly, no basis exists to disturb the Area Office's findings on that question. *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”).

Appellant's remaining arguments are that Atlantic Signal is economically dependent upon 3M Peltor. Appellant posits that more than [XX]% of Atlantic Signal's revenue stems from its relationship with 3M Peltor, but this argument is largely speculative and unsupported by the record. Section II.F, *supra*. The Area Office properly did not engage in similar conjecture in the size determination. Moreover, Appellant offers no legal support, either in regulation or case law, for the notion that revenues that a challenged firm derives from other customers may be grounds to find affiliation with an alleged affiliate.

Lastly, a standard non-exclusive commercial distribution agreement is not by itself evidence of affiliation. Appellant has not pointed to unusual provisions in that agreement that might enable Atlantic Signal to control 3M Peltor, or *vice versa*.

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge