

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

SIZE APPEAL OF:

Crash Research & Analysis, Inc.

Appellant,

RE: American Automotive Safety  
Research, LLC

Appealed From  
Size Determination No. 04-2021-013

SBA No. SIZ-6106

Decided: June 28, 2021

APPEARANCES

Adam K. Lasky, Esq., Bret C. Marfut, Esq., Seyfarth Shaw LLP, Seattle, Washington, for Appellant

Keith R. Szeliga, Esq., Sheppard, Mullin, Richter & Hampton LLP, Washington, D.C., for American Automotive Safety Research, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On January 27, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2021-013, concluding that American Automotive Safety Research, LLC (AASR) is a small business under the size standard associated with the subject procurement. The Area Office rejected allegations that AASR is affiliated with Calspan Corporation (Calspan), AASR's SBA-approved mentor under the All-Small Mentor-Protégé Program (ASMPP). On appeal, Crash Research & Analysis, Inc. (Appellant), which had originally protested AASR'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.

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<sup>1</sup> This decision was originally issued under a protective order. After reviewing the decision, the parties informed OHA that they had no requested redactions. Therefore, OHA now issues the entire decision for public release.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The Solicitation

On April 23, 2020, the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA) issued Request for Proposals (RFP) No. 693JJ920R000001, seeking a contractor to perform Crash Investigation Sampling System (CISS) Injury Coding. (RFP at 1, 5.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and originally assigned North American Industry Classification System (NAICS) code 541715, Research and Development in the Physical, Engineering and Life Sciences (except Nanotechnology and Biotechnology), with a corresponding size standard of 1,000 employees. (*Id.* at 47.)

The RFP explained that the contractor will code injuries and injury causation from medical documents and records collected at 32 sampling unit sites. (RFP, Amendment 0007, at 6-7.) The contractor will have four main areas of responsibility: medical record collection; injury interpretation and code assignment; injury causation; and medical record storage. (*Id.* at 7.) The contractor shall cooperate with local medical facilities to obtain the necessary records. (*Id.* at 11.) The contractor will review medical documentation, including images and other documents, to assign injury codes based on the most recent version of the Association for the Advancement of Automotive Medicine (AAAM) Abbreviated Injury Scale (AIS). (*Id.* at 7.) Based on its evaluation of this documentation, the contractor will select an “involved physical component (IPC) and injury causation scenario (ICS) for each injury.” (*Id.*) The contractor “shall enter injury causation information such as body region injured, source of energy, contributing factors, and comorbidities” into the CISS system. (*Id.*)

On April 30, 2020, Appellant filed a NAICS appeal with OHA, arguing that the correct NAICS code for the RFP is 541990, All Other Professional, Scientific, and Technical Services, with a corresponding size standard of \$16.5 million annual receipts. *NAICS Appeal of Crash Research & Analysis, Inc.*, SBA No. NAICS-6056 (2020). On May 20, 2020, the CO issued Amendment 0003, changing the assigned NAICS code to 541990. Appellant then moved to withdraw its appeal, and on May 22, 2020, OHA dismissed the case as moot, without prejudice to a new NAICS appeal being filed as a result of the new NAICS code assignment. *Id.*

On May 29, 2020, Calspan filed its own NAICS appeal with OHA, arguing that the CO's decision to change the NAICS code to 541990 was improper because the original NAICS code, 541715, best described the principal purpose of the RFP. *NAICS Appeal of Calspan Corp.*, SBA No. NAICS-6062 (2020). OHA denied Calspan's appeal and concluded that “[s]ince NAICS code 541990 covers a wide range of technical and scientific services, the CO's designation was not clearly erroneous.” *Id.* at 10.

Proposals were due July 16, 2020. (RFP, Amendment 0006 at 1.) AASR and Appellant submitted timely offers.

### B. Protest

On December 17, 2020, the CO notified Appellant that AASR had been awarded the contract. On December 24, 2020, Appellant filed a telephonic size protest with the CO, and subsequently confirmed the protest in a letter dated December 28, 2020. (Protest at 2-3.) The protest alleged that AASR is affiliated with Calspan, a large business, through common ownership, the newly-organized concern rule, the ostensible subcontractor rule, and the totality of the circumstances. (*Id.* at 2.) Appellant observed that Calspan is the incumbent prime contractor on the predecessor CISS Injury Coding contract. (*Id.*)

With regard to the newly-organized concern rule, 13 C.F.R. § 121.103(g), Appellant alleged that AASR's founder, Ms. Roberta Hamilton, is a former “key employee” of Calspan. (*Id.* at 10.) More specifically, according to Appellant, Ms. Hamilton managed Calspan's Crash Data Research Center (CDRC), “a division of Calspan that performed various government contracts for NHTSA.” (*Id.* at 12.) Appellant contended that Ms. Hamilton “managed a substantial number of employees,” including all employees working on the incumbent CISS Injury Coding contract, and that AASR is “effectively a spin-off” of the Calspan CDRC. (*Id.*) Appellant asserted that the second and third elements of the newly-organized concern rule are satisfied, because AASR and Calspan operate in the “same or related industry,” and Ms. Hamilton is the founder and President of AASR. (*Id.* at 12-13.)

Appellant alleged that Calspan has provided assistance to AASR, as required for affiliation under the newly-organized concern rule, because Calspan provided technical assistance with AASR's proposal for the instant procurement. (*Id.* at 13.) Appellant claimed that Ms. Hamilton was a full-time employee of Calspan while she drafted the proposal and that “it is almost certain” that Ms. Hamilton would have utilized “Calspan's own equipment and resources” to prepare the proposal. (*Id.*) Further, AASR hired Calspan employees *en masse* after contract award, which AASR “could not [] realistically have done” without Calspan's approval and assistance. (*Id.*) Appellant contended that Calspan also may have provided other forms of assistance to AASR, specifically “Calspan may have agreed to share employees with AASR,” may have committed to provide “facilities/equipment/financial resources” to assist AASR in performing the instant contract, may have provided corporate formation assistance to AASR, and may be serving as an AASR subcontractor for the procurement. (*Id.* at 13-14.)

Appellant acknowledged that Calspan and AASR are, now, an SBA-approved mentor and protégé. However, SBA did not approve the Mentor-Protégé Agreement (MPA) until August 13, 2020, well after the date AASR self-certified as small for the instant procurement, July 16, 2020. (*Id.* at 8, 15.) As a result, assistance that Calspan provided to AASR prior to SBA's approval the MPA could still be grounds to find affiliation. (*Id.* at 21-22.)

Turning to the next allegation, Appellant alleged that AASR will be unusually reliant upon Calspan to perform the contract, in contravention of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(2). (*Id.* at 15-16.) OHA case law has outlined “four key factors” that may be

suggestive of unusual reliance, and all four factors are present here. (*Id.* at 16.) Appellant highlighted that Calspan is the incumbent prime contractor and was unable to compete for the instant award in its own name. (*Id.*) AASR plans to hire, and already has hired, the large majority of its workforce from Calspan. AASR's management previously worked for Calspan on the incumbent contract. (*Id.*) AASR, “a brand new entity,” lacks relevant experience and must have relied on the proposed subcontractor, Calspan, to win the award. (*Id.*)

Next, as AASR was formed just 38 days before proposals were due, Appellant “reasonably suspects that Calspan has an ownership interest in AASR and is likely affiliated with AASR based on common ownership.” (*Id.* at 16.) Appellant further contended that Calspan and AASR are affiliated under the totality of the circumstances. (*Id.* at 17.) Appellant pointed to *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010), where OHA found affiliation under the totality of the circumstances because three of the four elements of the newly-organized concern rule, as well as other indicia of affiliation, were met. (*Id.* at 17-18.) Accordingly, even assuming that one element of the newly-organized concern rule were to fail in the instant case, there could still be affiliation under the totality of the circumstances. (*Id.* at 18.)

### C. Protest Response

The CO forwarded Appellant's protest to the Area Office for review. On January 8, 2021, AASR responded to the protest and provided its sworn SBA Form 355 and other supporting documents. AASR denied that it is affiliated with Calspan, and maintained that it received no assistance from Calspan to compete for the instant procurement. (Protest Response at 1.)

AASR argued, first, that it is not affiliated with Calspan under the newly-organized concern rule because the first and fourth elements of the test are not met. (*Id.* at 5.) The first element fails because AASR's founder, Ms. Hamilton, was never an “officer, director, principal stockholder, managing member, or key employee of Calspan.” (*Id.*) Despite Appellant's allegations to the contrary, Ms. Hamilton could not have been a “key employee” of Calspan because she did not have a senior role at the firm. While at Calspan, Ms. Hamilton served as Program Manager of the Quality Control Center (QCC) contract. (*Id.* at 6.) There were “at least 5 tiers of employees at Calspan who outranked” her. (*Id.*) Further, Ms. Hamilton managed only 14 of Calspan's hundreds of employees, and the QCC contract she managed represented less than 2% of Calspan's total revenues. (*Id.*) Ms. Hamilton did not have authority to hire or fire personnel at Calspan, nor did she have authority to enter into contracts on behalf of Calspan. (*Id.*) As a result, Ms. Hamilton did not possess the level of “influence or authority” necessary to be considered a “key employee.” (*Id.* at 5-6, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5769 (2016), *Size Appeal of Native Energy & Tech., Inc.*, SBA No. SIZ-5858 (2017), and *Size Appeal of Willow Envntl., Inc.*, SBA No. SIZ-5403 (2012).)

AASR contended that the fourth element of the newly-organized concern rule test also is not satisfied because, as of July 16, 2020, the date to determine size, Calspan had not furnished AASR with any contracts, financial or technical assistance, indemnification, or facilities. (*Id.*) Ms. Hamilton and Ms. Connie Zingg, another then-employee of Calspan, wrote the proposal on nights and weekends without any assistance from Calspan. (*Id.* at 7.) AASR hired some former Calspan employees in December 2020, but Calspan did not aid AASR in recruiting former

Calspan personnel nor was there an agreement between the firms to share employees. (*Id.*) AASR denied Appellant's allegations that Calspan provided "corporate formation assistance," or that Calspan will be a subcontractor to AASR for the instant procurement. (*Id.*) Moreover, in accordance with 13 C.F.R. § 121.103(g), AASR averred that there is a "clear line of fracture" between itself and Calspan. (*Id.* at 8.) As of the date for determining size, the two firms did not share any common management, common ownership, subcontracts, other business relationships, or assistance of any type. (*Id.*) Further, "Calspan did not provide any assistance at all to AASR prior to" August 13, 2020, when SBA formally approved the MPA. (*Id.* at 3.)

AASR disputed Appellant's characterization of AASR as a "spin off" from Calspan. (*Id.* at 2.) Ms. Hamilton "created and funded AASR personally," without "any administrative, financial, legal, or other assistance" from Calspan. (*Id.*) Ms. Hamilton founded both AASR and a second company, American Safety Research Corporation, LLC (ASRC), on July 8, 2020. (*Id.* at 2-3.) ASRC was created with the possibility of it becoming part of a future mentor-protégé joint venture, but, as of the date to determine size, it remained wholly-owned by Ms. Hamilton. (*Id.* at 2.) ASRC later did become a mentor-protégé joint venture between Calspan and AASR on November 20, 2020. (*Id.* at 3.)

Turning to the next allegation, AASR denied that it is affiliated with Calspan through the ostensible subcontractor rule, because AASR did not propose to subcontract any work to Calspan for the instant procurement. (*Id.* at 8.) Ms. Hamilton owns 100% of AASR and no ownership interest in Calspan, so AASR and Calspan cannot be affiliated through common ownership. (*Id.* at 9.) AASR and Calspan are also not affiliated under the totality of the circumstances, and Appellant's reliance on *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010) is misplaced. (*Id.* at 10.) Contrary to Appellant's suggestions, OHA did not find that, when three out of the four elements of the newly-organized concern rule are met, this will, by itself, be sufficient to give rise to affiliation. Instead, *Specialized Veterans* also involved various other facts indicative of affiliation, for example, the president of the large business held a 40% ownership interest in the small business. (*Id.* at 9.)

According to its sworn SBA Form 355, AASR is 100% owned by Ms. Hamilton, who is also AASR's President and Managing Member. (SBA Form 355 at 3-4.) Calspan holds no ownership interest in AASR, nor will Calspan perform any work as a subcontractor for the instant procurement. (*Id.* at 6, 8.) Further, Calspan provided no assistance in preparing AASR's proposal. (*Id.* at 8.) On January 12, 2021, in response to the Area Office's request for additional information, AASR sent the Area Office a letter providing further explanation of Ms. Hamilton's career in the field of crash research. (Letter from R. Hamilton to D. Gordon (Jan. 12, 2021).) AASR stated that Ms. Hamilton worked for Calspan from 2010 to 2020, eventually rising to the position of "Manager/Project Manager of the CISS Quality Control Center (QCC) contract" in August 2018. (*Id.* at 1-3.)

The record includes correspondence between the Area Office and Mr. Gregory Campbell, President of Calspan. Mr. Campbell informed the Area Office that Calspan did not provide any assistance in the creation of AASR; that Calspan and AASR do not share employees; that Ms. Hamilton does not hold, and has never held, any ownership interest in Calspan; that there were 85 managers above Ms. Hamilton's level when she served as Calspan's QCC Manager; that there

were 14 individuals in the QCC group, out of Calspan's total workforce of approximately 520 employees; that the QCC team represented “significantly less than 10% of Calspan's revenues”; that Ms. Hamilton never served as manager of the entire Calspan CDRC; and that Calspan did not provide any assistance to AASR prior to approval of the MPA. (E-mails from G. Campbell to D. Gordon (Jan. 15-22, 2021).)

#### D. AASR's Proposal

According to its letter responding to the protest, AASR transmitted a copy of its proposal for the instant procurement to the Area Office. (Protest Response at 1.) The Area Office file, however, contains only “Section K: Representations, Certifications, and Other Statements of Offerors and Respondents” from AASR's proposal, signed by Ms. Hamilton on July 16, 2020. (Section K at 1.) Part III of Section K, entitled “Special Studies Subcontractors/Consultants,” stated that, for special studies that may benefit from the use of highly-experienced consultants or subcontractors, “AASR has secured the services of subject matter expert Dr. John H. Bolte IV, of the Ohio State University” as well as “subject matter experts from Daemen College.” (*Id.* at 11.) There was no mention of Calspan anywhere in Section K.

#### E. Size Determination

On January 27, 2021, the Area Office issued Size Determination No. 04-2021-013, concluding that AASR is a small business. The Area Office evaluated Appellant's four principal protest allegations — affiliation based on common ownership, the newly-established concern rule, ostensible subcontracting, and the totality of the circumstances — and determined that AASR is not affiliated with Calspan on any of these grounds. (Size Determination at 10.)

The Area Office first explained that AASR is wholly-owned by Ms. Hamilton, who has the power to control AASR pursuant to 13 C.F.R. § 121.103(c)(1). (*Id.* at 2.) Ms. Hamilton also owns ASRC, so AASR and ASRC are affiliated through common ownership. (*Id.*) The Area Office noted that, apart from ASRC, “no other entities are affiliated with AASR through Ms. Hamilton; further, AASR does not have any parent, subsidiary, or sister companies that would be considered its affiliates under SBA size regulations.” (*Id.*)

Turning to Appellant's first protest allegation, the Area Office found that AASR and Calspan do not share common ownership. (*Id.*) According to AASR's sworn SBA Form 355, Ms. Hamilton is the sole owner of AASR, as well as its sole officer and Managing Member. (*Id.*) Calspan holds no ownership or managerial interest in AASR, and does not control, or have the power to control, AASR. (*Id.*)

Next, the Area Office found no affiliation under the newly-established concern rule. (*Id.* at 2-7.) OHA applies a four-factor test to examine affiliation under this rule, and the first factor of the test — whether “former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern” — is not present here, because Ms. Hamilton is not a current or former officer, director, principal stockholder, managing member, or key employee of Calspan. (*Id.* at 3-4.) Appellant did not allege, nor attempt to argue, that Ms. Hamilton was ever an officer, director, principal stockholder, or

managing member of Calspan. The first element would only be met, then, if Ms. Hamilton were a former “key employee” of Calspan. (*Id.* at 3.)

The Area Office found that Appellant incorrectly alleged that Ms. Hamilton is the former “Manager of Calspan's Crash Data Research Center”; in actuality, Ms. Hamilton merely served as Program Manager for Calspan's QCC contract. (*Id.*) In this capacity, Ms. Hamilton oversaw a group of 14 employees, of whom only five (less than 1% of Calspan's total workforce) directly reported to her. (*Id.*) Because Ms. Hamilton “occupied the fifth tier of authority at Calspan,” “supervised a miniscule number of individuals,” and “had no authority to hire or fire personnel, no power to sign contracts, and no voice in [Calspan's] operations or management,” the Area Office concluded that she was never a “key employee” of Calspan. (*Id.* at 4-5, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5769 (2016).)

OHA has held that, if the first element of the newly-organized concern rule fails, there can be no violation of the rule, “irrespective of whether the remaining conditions of the rule are met.” (*Id.* at 6, quoting *Size Appeal of Avar Consulting, Inc.*, SBA No. SIZ-6017, at 13 (2019).) Nevertheless, the Area Office also addressed the other elements of the test. The Area Office questioned whether AASR and Calspan operate in the “same or related” industries, the second element of the test. (*Id.*) Although Calspan is the incumbent on the predecessor contract for similar work, the Area Office did not find this dispositive of whether AASR, “a tiny new firm able to provide limited services,” is in the same line of business as Calspan. (*Id.*) The Area Office further observed that “lines of business change over time,” Calspan's business might be different than it had been at the time Calspan was awarded the incumbent contract in 2016. (*Id.*) The Area Office assumed, however, “for the sake of argument,” that both the second and third elements of the test are met. (*Id.*)

The Area Office found that the fourth element of the test — whether the alleged affiliate “is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise” — is not met. (*Id.* at 3.) Based on Ms. Hamilton's signed, sworn statement, and other information submitted by AASR and Calspan, the Area Office found that Calspan did not provide AASR with any contracts, financial assistance, indemnification on bonds, or facilities prior to July 16, 2020, the date for determining size. (*Id.* at 8-9.) AASR acknowledged that Calspan did provide “a small value subcontracting opportunity” to AASR in December 2020, as well as “a small value, short term business loan” in early 2021. (*Id.* at 7.) Such assistance, though, is *de minimis* in nature, and occurred only “after the date of [AASR's] self-certification” as a small business for the instant procurement. (*Id.*, emphasis Area Office's.) Further, at the time such assistance was made, AASR and Calspan were an SBA-approved mentor and protégé, so assistance from Calspan to AASR would be improper only if such assistance exceeded the scope of the MPA. (*Id.* at 7-8.) Calspan confirmed that it did not authorize, or permit, Ms. Hamilton to devote any of her work time with Calspan to developing AASR. (*Id.* at 7.) Further, “Calspan provided AASR no assistance with its creation and no assistance with its offer on the instant procurement.” (*Id.*) The Area Office rejected Appellant's allegation that AASR's proposal to hire incumbent Calspan employees working on the predecessor contract required approval or assistance from Calspan. (*Id.* at 8.) The Area Office also found no merit to the allegation that ASRC is a joint venture between AASR and Calspan. The Area Office reiterated that, as of the

date to determine size, ASRC was not a joint venture, but rather a stand-alone company wholly-owned by Ms. Hamilton. (*Id.*)

The Area Office found no evidence to support Appellant's claims that Calspan provided assistance to AASR prior to approval of the MPA. SBA formally approved the MPA on August 13, 2020, and Calspan provided no assistance to AASR prior to approval of the MPA. (*Id.* at 8-9.)

Turning to the third protest allegation, the Area Office found that AASR is not affiliated with Calspan under the ostensible subcontractor rule, as Calspan will not be a subcontractor for the instant procurement. (*Id.* at 9.) According to AASR's signed and sworn response to the protest, AASR will not subcontract any of the work under the instant contract to Calspan, and Calspan will have no "role in the instant procurement." (*Id.*) Finally, the Area Office rejected Appellant's claim that AASR and Calspan are affiliated under the totality of the circumstances. (*Id.*) Unlike *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010), cited by Appellant, in the instant case there are "no other indicia of affiliation" between Calspan and AASR. (*Id.*) The mere fact that AASR is a relatively "new firm" does not prove that it lacks experience or that it had to rely on Calspan's experience to win the contract. (*Id.*) The Area Office noted that AASR's President, Ms. Hamilton, has "several decades of experience in the field and has hired other experienced individuals as well." (*Id.*) The Area Office determined that Appellant's "repetitive allegations of fraudulent and intentional criminal conduct are baseless." (*Id.* at 10.)

The Area Office found that the combined receipts of AASR and ASRC do not exceed the size standard. (*Id.* at 10-11.) Therefore, AASR is a small business.

#### F. Appeal

On February 11, 2021, Appellant appealed Size Determination No. 04-2021-013 to OHA. Appellant asserts that Ms. Hamilton, "a key employee of Calspan, spun off a new company in NAICS code 541990, [AASR]" on June 8, 2020. (Appeal at 4.) AASR was founded shortly after OHA issued its decision in *NAICS Appeal of Calspan Corp.*, SBA No. NAICS-6062 (2020), under which Calspan would have been ineligible to compete for the instant procurement in its own name. (*Id.*) Appellant renews its contentions that AASR is affiliated with Calspan under the newly-organized concern rule, the ostensible subcontractor rule, the totality of the circumstances, and common ownership. (*Id.* at 7.) Appellant maintains that the Area Office clearly erred in its review, and failed to adequately investigate Appellant's allegations. Therefore, OHA should reverse or remand. (*Id.* at 20.)

Appellant argues, first, that the Area Office's application of the newly-organized concern rule was deficient. (*Id.* at 7-14.) The Area Office clearly erred in not finding that Ms. Hamilton is a former key employee of Calspan. (*Id.* at 8.) A "key employee" is defined as a person:

who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(*Id.* at 9, quoting 13 C.F.R. § 121.103(g).) Further, under OHA precedent, "a manager who has



substantial control over a portion of a large firm's operations and management is a key employee.” (*Id.* at 9-10 quoting *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466, at 9 (2001).) Where a new concern is effectively “spun-off” from a particular division/team of a large company, OHA has focused on whether the founder of the new company had “substantive control over the operations of that division/team before it was spun-off.” (*Id.* at 10-11.)

Here, Appellant argues, due to Ms. Hamilton's significant role as the Program Manager for Calspan's division managing the incumbent contract, the Area Office should have found that she is a former Calspan key employee. (*Id.* at 11.) Although the Area Office apparently accepted AASR's claim that neither Ms. Hamilton nor the employees she managed performed work on the incumbent contract, Ms. Hamilton's own LinkedIn profile “held herself out as Calspan's Manager of the [CDRC].” (*Id.* at 5, 12.) The Area Office failed to address or investigate this discrepancy in the size determination. (*Id.* at 12.)

Next, Appellant argues that the Area Office appropriately assumed that the second and third elements of the newly-organized concern rule test are met. AASR and Calspan do operate in the same industry or field of operations. (*Id.* at 12.) This conclusion is supported by the fact that “Calspan was the incumbent on the contract awarded to AASR and is apparently teaming with AASR to pursue future projects as a mentor/protégé joint venture.” (*Id.*) The third element is also clearly satisfied as Ms. Hamilton is the owner and an officer of AASR. (*Id.*)

Appellant disputes the Area Office's finding that the fourth element of the rule is not satisfied. (*Id.*) By relying solely on Ms. Hamilton's sworn statement, the Area Office disregarded evidence that Calspan did provide support to AASR. (*Id.*) For example, AASR, located in Novi, Michigan, hired six incumbent employees who will “continue to work in Buffalo, New York — Calspan's principal place of business” which, in Appellant's view, “strongly suggests that those employees are using the same facilities and equipment they used at Calspan.” (*Id.* at 13-14.) Further, Calspan employees may have been subject to non-compete agreements, which would have prevented them from being proposed on contracts with other firms absent Calspan's permission and assistance. (*Id.* at 13.) The RFP required letters of commitment for certain positions, so AASR may have had “to procure letters of commitment from Calspan employees while they were still working at Calspan.” (*Id.*) In addition, the fact that incumbent employees transferred to AASR “apparently on the date of the contract award and with zero transmission time, suggests a degree of advanced coordination with (or at least permission from) Calspan that the Area Office simply did not appreciate.” (*Id.*) It also is implausible that Calspan was in no way involved with the establishment of ASRC. (*Id.* at 14.) Given these facts, the Area Office did not adequately explore whether Calspan provided assistance to AASR. (*Id.*)

Appellant argues that the Area Office erred in finding no affiliation between AASR and Calspan under the totality of the circumstances. (*Id.* at 14.) The Area Office incorrectly viewed the instant case as distinguishable from *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010), where OHA overturned a finding of newly-organized concern affiliation but sustained affiliation based on the totality of circumstances. (*Id.* at 15.) In the instant case, the Area Office should have found that all four elements of the newly-organized concern rule were satisfied. (*Id.*) In addition, like the challenged concern in *Specialized Veterans*, AASR lacks any corporate experience and therefore must have relied on prior experience of other firms, such as

Calspan, to meet the RFP's past performance criteria. (*Id.* at 16.) AASR existed for only 38 days before submitting its offer for the instant procurement, similar to the 63 days which OHA found suggestive of affiliation in *Specialized Veterans*. (*Id.*) If anything, the instant case presents more compelling grounds for affiliation than *Specialized Veterans*, because “Calspan was the incumbent, and [] AASR was formed — using Calspan's employees and under the direction of Calspan's self-described Manager of the [CDRC] — only after a change in NAICS codes rendered Calspan ineligible to bid.” (*Id.* at 17.)

Appellant asserts that the Area Office clearly erred by failing to “investigate the protest allegations and establish a record.” (*Id.*, quoting *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5895, at 16 (2018).) Without obtaining and reviewing pertinent documents, the Area Office could not properly investigate Appellant's allegations under the newly-organized concern rule, the totality of the circumstances, common ownership, and ostensible subcontracting. (*Id.* at 18-19.) In a size protest, the challenged firm's proposal is “foundational to a size determination and 'controlling' over other information.” (*Id.* at 18.) It therefore was clear error that the Area Office failed to obtain, and review, AASR's proposal. (*Id.* at 19.) The Area Office instead relied solely on AASR's self-serving statements provided in response to the protest. (*Id.* at 19-20.)

Because the Area Office did not request or consider AASR's proposal, the size determination did not fully address whether AASR proposed to use Calspan as a subcontractor or whether “AASR was proposing to use Calspan equipment/facilities/resources in performance of the contract, as would be relevant to the newly-organized concern rule.” (*Id.* at 19.) The proposal also may have shed light on which entities were involved in the drafting of the proposal. (*Id.* at 19-20.) The Area Office further failed to obtain other pertinent documentation, such as the Operating Agreements for AASR and ASRC, without which the Area Office could not determine whether “Calspan had any options or other negative control interest in [the companies].” (*Id.* at 19.)

#### G. AASR's Response

On March 3, 2021, AASR responded to the appeal. AASR argues that the Area Office conducted a “reasonable investigation” and properly determined that AASR is not affiliated with Calspan. (Response at 2.) The appeal therefore should be denied.

AASR asserts, first, that the Area Office properly applied the newly-organized concern rule to find that AASR and Calspan are not affiliated. (*Id.* at 8.) Despite Appellant's contentions to the contrary, the Area Office appropriately determined that the first element of the newly-organized concern rule test was not satisfied, because Ms. Hamilton is not a current or former “key employee” of Calspan. (*Id.* at 9.) OHA's recent precedent instructs that to be considered a “key employee,” an “individual must have influence or control over a concern as a whole — not merely a small portion of a concern.” (*Id.* at 10, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5769, at 9 (2016).) In *Human Learning*, OHA found that a vice president was not a “key employee” because “only 8% of the concern's revenue was associated with the line of business for which he was responsible.” (*Id.* at 11, citing *Human Learning*, SBA No. SIZ-5769, at 9.)

AASR maintains that the Area Office properly determined that Ms. Hamilton is not a former “key employee” under this test “because her group accounted for less than 3% of Calspan's 520 employees and significantly less than 10% of Calspan's revenues.” (*Id.*) The Area Office also explained that Calspan had 85 managers above Ms. Hamilton's level and “that she lacked the authority to hire or fire, to sign contracts, and to make financial commitments, and did not participate in strategic decision making.” (*Id.* at 12.) Moreover, the Area Office delved well beyond Ms. Hamilton's title to examine the substance of her role at Calspan. (*Id.*) Among other evidence, the Area Office obtained an e-mail from Calspan's President, Mr. Campbell, clarifying that Ms. Hamilton was never the manager of the entire Calspan CRDC, but rather, her “manager role pertained to QCC only.” (*Id.*)

Next, AASR argues Area Office properly determined the fourth element of the newly-organized concern rule was not satisfied, because Calspan did not furnish AASR with any assistance, such as “contracts, financial or technical assistance, indemnification, and/or other facilities.” (*Id.*, referencing 13 C.F.R. § 121.103(g).) While Appellant alleges that the Area Office overlooked other assistance that Calspan may have provided, Appellant's arguments are speculative and based on unwarranted inferences. In AASR's view, even if the Area Office had addressed other “evidence” referenced by Appellant, there would have been no change in the Area Office's reasoning. (*Id.* at 14.) The mere fact that some former Calspan employees will continue to reside in Buffalo, New York is not suggestive of support. (*Id.*) The Area Office properly relied on sworn statements from both Calspan and AASR that the two companies would not be sharing facilities or employees. (*Id.* at 14-15.) Instead, the employees in question decided to stay in Buffalo “because that is their home.” (*Id.* at 15.)

AASR also rejects Appellant's contention that the migration of six Calspan employees to AASR on the date of the award of the instant procurement is indicative of assistance. (*Id.*) The Area Office properly found that the former Calspan employees did not perform work for AASR on Calspan time, nor did Calspan aid in recruiting the personnel. (*Id.*) In its response to the protest, AASR explained that Calspan released its former employees from their non-compete obligations, but this is not evidence of assistance as “Calspan had no use for the employees after the expiration of the incumbent [contract].” (*Id.*) AASR next disputes Appellant's allegation that the Area Office failed to address the simultaneous creation of AASR and ASRC as evidence of assistance. (*Id.*) The Area Office explained that, as of the date to determine size, ASRC was a stand-alone company without any connection to Calspan. Further, Calspan specifically provided the Area Office with assurance that it did not assist with the formation of either AASR or ASRC. (*Id.* at 15-16.)

Next, AASR argues that the Area Office properly interpreted *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010) to find that AASR and Calspan are not affiliated under the totality of the circumstances. (*Id.* at 16.) AASR disputes Appellant's assertion that *Specialized Veterans* is analogous to the facts in the instant case. (*Id.* at 18.) Unlike the situation in *Specialized Veterans*, Calspan does not hold any ownership interest in AASR; made no capital contribution or other investment in AASR; has not agreed to finance bonding requirements or indemnification for AASR; and is not providing any technical assistance or subcontracted labor to AASR. (*Id.* at 18.) The facts in the instant case also are distinguishable because Ms. Hamilton has more than 23 years of relevant experience in crash research whereas

the majority owner of the small business in *Specialized Veterans* lacked relevant industry experience. (*Id.*) Furthermore, the Area Office directly addressed the allegations of “indicia of affiliation” raised in the protest and appropriately determined they were baseless. (*Id.* at 19.)

AASR denies Appellant's allegation of affiliation based on common ownership. (*Id.*) Contrary to Appellant's assertions, the Area Office did obtain the Operating Agreements of AASR and ASRC, and these documents reflect that Calspan holds no options or other negative control interests. (*Id.* at 19-20.) AASR also rejects Appellant's argument that it was necessary for the Area Office to review AASR's complete proposal to address the ostensible subcontractor allegation. (*Id.* at 20.) In both its response to the protest and its sworn SBA Form 355, AASR attested that it did not propose to subcontract any work to Calspan for the instant contract. (*Id.*) As Calspan is not a subcontractor to AASR on this procurement, the Area Office properly concluded that AASR and Calspan could not possibly be affiliated through ostensible subcontracting. (*Id.*)

A review of AASR's proposal also was unnecessary to evaluate Appellant's newly-organized concern allegations. (*Id.* at 21.) Because the proposal would not have addressed whether Ms. Hamilton is a former key employee of Calspan, it would not have shed light on the first element of the test. Likewise, as “there was no role at all for Calspan” on this procurement, the proposal would not have assisted the Area Office in considering whether Calspan has provided more than *de minimis* assistance to AASR, the fourth element of the test. AASR also argues that it was not necessary for the Area Office to conduct further investigation of whether Calspan would provide “equipment, facilities, or other resources to AASR,” because AASR's response to the protest unequivocally represented that this was not the case. (*Id.*, citing Protest Response at 7.)

#### H. Supplemental Appeal

On March 3, 2021, after reviewing the Area Office file under the terms of an OHA protective order, Appellant moved to supplement its appeal. Appellant withdraws its argument that AASR and Calspan are affiliated through common ownership, but argues that new facts in the Area Office file bolster the remaining arguments raised in its appeal. (Supp. Appeal at 2.)

Appellant argues, first, that another former Calspan employee, Ms. Zingg, assisted in the preparation of AASR's proposal. (*Id.*) The issue is significant because AASR's response to the protest admitted that Ms. Zingg is Calspan's former manager for the incumbent contract, and that Ms. Zingg subsequently became an employee of AASR. Ms. Zingg had management authority over the incumbent contract, and as such is a former “key employee” of Calspan. (*Id.* at 4.) Appellant asserts that, even if OHA agrees with the Area Office and AASR that Ms. Hamilton is not a former key employee of Calspan, OHA may still find that Ms. Zingg's role satisfies the first and third elements of the newly-organized concern rule. (*Id.*) Because the Area Office failed to review AASR's proposal, or to otherwise investigate Ms. Zingg's roles at Calspan and AASR, the size determination did not discuss Ms. Zingg's contribution to drafting the proposal and whether her help to AASR while still an employee of Calspan constituted assistance on behalf of Calspan. (*Id.* at 5.)

Appellant renews its argument that Calspan released some employees from non-compete agreements, which in Appellant's view “indicates a level of coordination between AASR and Calspan that the Area Office failed to appreciate or investigate.” (*Id.* at 6.) Appellant contends that AASR and Calspan likely coordinated about the employees' non-compete obligations “before AASR submitted its proposal.” (*Id.* at 5.) The Area Office's failure to explore this “indicia of assistance” was clear error. (*Id.* at 6.) Moreover, AASR offered only “vague” explanations as to when the employees were moved into a “dedicated lease space.” (*Id.*) Appellant asserts that AASR probably was using Calspan's facilities, and maybe its equipment, “at least at some point.” (*Id.*)

Appellant contends that the Area Office's failure to review AASR's full proposal, as well as documents related to the MPA, requires remand. (*Id.* at 7.) By failing to review the proposal, the Area Office could not determine whether Calspan wrote any portions of the proposal, is a proposed subcontractor for the instant procurement, or would otherwise provide support to AASR. (*Id.* at 7-8.) Similarly, the Area Office did not obtain the MPA between AASR and Calspan. (*Id.* at 8.) The details regarding the coordination between Calspan and AASR leading up to the formation of the MPA remain unclear. (*Id.*) Appellant notes that although AASR stated in its protest response that the “Business Plan for the [ASMPP]” was attached to its response, this document is not in the Area Office file and the Area Office evidently did not follow-up concerning its absence. (*Id.*) Finally, Appellant argues that the Area Office also failed to investigate the level of coordination necessary for Ms. Hamilton to create ASRC, an entity to serve as a joint venture between AASR and Calspan, on the same day AASR itself was established. (*Id.*)

### I. Supplemental Response

On March 19, 2021, AASR responded to the Supplemental Appeal. AASR contends that Appellant's new allegations have no merit and are premised on “unsubstantiated speculation.” (Supp. Response at 2.) “[Appellant] identifies innocuous or irrelevant facts, draws from them unwarranted inferences regarding purported affiliation between AASR and Calspan, and then faults the Area Office for declining to investigate [Appellant's] speculative allegations in [Appellant's] preferred manner.” (*Id.*)

AASR argues that Appellant has failed to show any error that would warrant disturbing the Area Office's conclusion that the first and fourth elements of the newly-organized concern rule are not met. (*Id.* at 4.) In its Supplemental Appeal, Appellant essentially abandons its original contention that Ms. Hamilton is a former key employee of Calspan; instead, Appellant now “switches to a different AASR employee,” Ms. Zingg. (*Id.* at 4-5.) Appellant, though, made no allegations concerning Ms. Zingg in its protest, so the Area Office was not required to consider whether Ms. Zingg is a former key employee of Calspan. (*Id.* at 5.) Nor may OHA decide this issue for the first time on appeal. (*Id.*) In any event, Ms. Zingg, like Ms. Hamilton, was a Project Manager who reported to the Director of Calspan's CDRC. (*Id.* at 6.) Ms. Zingg was thus “at the same level within Calspan as Ms. Hamilton, who the Area Office determined not to be a key employee.” (*Id.*) AASR also observes that Appellant does not even allege that Ms. Zingg “organized” AASR, as would be necessary to meet the first element of the newly-organized concern rule. (*Id.*) On the contrary, AASR explained in its response to the protest that

Ms. Hamilton personally created and funded AASR. (*Id.* at 7.) Further, the record establishes that Ms. Hamilton — not Ms. Zingg — is the sole owner, sole officer, and sole member of AASR. (*Id.*) As a result, “there is no sense in which Ms. Zingg can be said to have ‘organized’ AASR.” (*Id.*)

AASR rejects Appellant's argument in the Supplemental Appeal that the Area Office did not adequately investigate facts pertinent to the fourth element of the newly-organized concern rule, particularly purported assistance provided by Ms. Zingg in preparing AASR's proposal. (*Id.* at 7-8.) The “Size Determination quotes at length Ms. Hamilton's sworn statement that she and Ms. Zingg wrote the proposal on their own time, *i.e.*, nights and weekends, not as part of their responsibilities as Calspan employees,” and that Calspan did not provide any resources nor compensation to assist in preparing the proposal. (*Id.* at 8.) Because Ms. Zingg “worked on AASR's proposal in her personal capacity, not as a Calspan employee,” no further investigation of the issue was warranted. (*Id.*)

Next, AASR argues that, pursuant to 13 C.F.R. § 121.103(g), an agreement to release employees from non-compete agreements is not “assistance” or “support” within the meaning of the newly-organized concern rule. (*Id.* at 9.) The newly-organized concern rule specifically identifies the types of assistance that may be problematic, and does not include releasing employees from non-compete agreements. At best, this circumstance could be characterized “assistance” to the released employee, not the employee's future employer. (*Id.*) AASR also disputes Appellant's argument that the Area Office should have further investigated assistance that Calspan may have provided. The Area Office reviewed the signed, sworn statements from both AASR and Calspan attesting that no such assistance was provided. (*Id.* at 9-10.)

AASR asserts that the Area Office properly investigated each of Appellant's protest allegations and determined that they were without merit. (*Id.* at 10.) Given the record before it, the Area Office did not need to review AASR's complete proposal because “AASR unequivocally represented that it had not proposed to subcontract any work to Calspan.” (*Id.*) It was therefore unnecessary for the Area Office to consider the full proposal to investigate the ostensible subcontracting allegations. (*Id.*) Further, AASR made clear in its protest response that Ms. Hamilton and Ms. Zingg jointly prepared the proposal, in their individual capacities, without any assistance from Calspan. (*Id.* at 10-11.) The extent of Ms. Zingg's involvement in proposal preparation is thus irrelevant, and could not have impacted the Area Office's decision. (*Id.* at 11.)

AASR also argues that the Area Office was not required to review the MPA or other documents pertaining to participation in the ASMPP. (*Id.*) Even if the Area Office had found evidence of “coordination” in reviewing such documents, this would not support a finding of affiliation. Indeed, “SBA regulations exempt assistance provided under a MPA from the affiliation analysis.” (*Id.*, citing 13 C.F.R. § 125.9(d)(4).) As for ASRC, the Area Office found that, as of the date to determine size, ASRC was a stand-alone company solely owned by Ms. Hamilton. Although Ms. Hamilton envisioned that ASRC might eventually transition to become a joint venture between Calspan and AASR, if, and only if, the MPA were approved by SBA, Appellant has not explained how such “prudent business planning” might give rise to affiliation between Calspan and AASR. (*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 findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Analysis

The Area Office determined that AASR is not affiliated with Calspan under any of the four theories advanced in Appellant's protest: common ownership, the ostensible subcontractor rule, the newly-organized concern rule, and the totality of the circumstances. Section II.E, *supra*. On appeal, Appellant has withdrawn its allegations pertaining to common ownership, so that portion of the Area Office's decision is now final. *Size Appeal of Invisio Commc'ns, Inc.*, SBA No. SIZ-6084, at 11 (2020). Appellant maintains, however, that the Area Office's consideration of the three remaining issues was flawed. Because Appellant does not show clear error in the size determination, this appeal must be denied.

##### 1. Ostensible Subcontracting

Appellant's protest alleged that AASR will be unduly reliant upon Calspan to perform the contract, in contravention of the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(2). Section II.B, *supra*. The record, however, is devoid of any evidence that AASR will utilize Calspan as a subcontractor for the instant procurement. On the contrary, AASR's response to the protest, as well as its sworn SBA Form 355, stated that Appellant did not propose to subcontract any work to Calspan, nor will Calspan have any role in performing this contract. Section II.C, *supra*. Further, although it is true, as Appellant emphasizes, that the Area Office did not obtain, or have access to, AASR's complete proposal, Section K of the proposal is in the record, and that document similarly made no mention of Calspan. Section II.D, *supra*. Section K instead indicated that AASR may engage subject matter experts from The Ohio State University and Daemen College as consultants or subcontractors. *Id.* No other proposed consultants or subcontractors were identified. *Id.*

It is well-settled law that the ostensible subcontractor rule can be violated only when the alleged affiliate is, in fact, a proposed subcontractor on the particular procurement in question. *E.g., Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5432, at 6-8 (2013) ("the ostensible subcontractor rule does not apply because there is no indication that [the alleged affiliate] is a subcontractor to [the challenged firm] on this procurement"); *Size Appeal of Assessment and Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 4 (2012). Accordingly, the Area Office appropriately determined that AASR and Calspan cannot be affiliated through the ostensible subcontractor rule. While Appellant complains that a review of AASR's entire proposal might have altered the Area Office's analysis, Appellant offers no

support for this claim beyond mere conjecture, and the Area Office properly gave greater evidentiary weight to AASR's sworn statements and records than to Appellant's unsupported allegations. 13 C.F.R. § 121.1009(d); *see also Size Appeal of AeroSage LLC*, SBA No. SIZ-6075, at 7 (2020). Accordingly, Appellant has not carried its burden of proving that the Area Office erred in its analysis of the ostensible subcontractor rule.

## 2. Newly-Organized Concern Rule

Appellant also maintains that the Area Office incorrectly determined that AASR and Calspan are not affiliated under the newly-organized concern rule, 13 C.F.R. § 121.103(g). OHA utilizes a four-factor test to examine affiliation under the newly-organized concern rule, and the Area Office found that two of the elements (the first and the fourth) are not satisfied in the instant case. Section II.E, *supra*. On appeal, Appellant contends that the Area Office should have considered Ms. Hamilton and/or Ms. Zingg to be former “key employees” of Calspan. Sections II.F and II.H, *supra*. Furthermore, Appellant argues, the Area Office mistakenly concluded that Calspan did not provide assistance to AASR prior to July 16, 2020, the date for determining size. *Id.* Because Appellant again has not demonstrated clear error in the size determination, this portion of the appeal is meritless.

Beginning first with Appellant's arguments pertaining to Ms. Zingg, Appellant's underlying protest alleged only that Ms. Hamilton is a former “key employee” of Calspan, making no mention of Ms. Zingg. Section II.B, *supra*. As Appellant did not raise allegations pertaining to Ms. Zingg in its protest, the Area Office was under no obligation to have investigated such matters. *E.g.*, *Size Appeal of Global Native Servs., Inc.*, SBA No. SIZ-5865, at 5 (2017). Moreover, as AASR observes in its Response to the Supplemental Appeal, the newly-organized concern rule applies only when key employees or other high-ranking officials of one concern “organize a new concern.” 13 C.F.R. § 121.103(g). There is no indication here that Ms. Zingg participated in any way in “organizing” AASR. Rather, according to AASR's signed, sworn statements to the Area Office, AASR was independently conceived, created, and funded by Ms. Hamilton alone. Section II.C, *supra*. I therefore see no basis to conclude that the Area Office erred by failing to address whether Ms. Zingg is a former key employee of Calspan.

The Area Office did address Appellant's allegations that Ms. Hamilton is a former “key employee” of Calspan, and reasonably determined that she is not. By regulation, a “key employee” is one who, “because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.” 13 C.F.R. § 121.103(g). OHA case law has recognized that a key employee will have “influence or control over the operations of a concern as a whole.” *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5769, at 9 (2016). Further, an employee who does not have authority to hire or fire employees, or to enter into contracts on behalf of the concern, is unlikely to be a key employee. *Id.* (citing *Size Appeal of Willow Env'tl., Inc.*, SBA No. SIZ-5403 (2012).) In *Human Learning*, OHA held that, notwithstanding his title, a former Vice President who was outranked by at least 19 other managers, and who served in no higher than “the fifth tier of authority,” was not a “key employee.” *Id.* at 9-10.



In the instant case, similar to OHA's decision in *Human Learning*, the Area Office appropriately concluded that Ms. Hamilton is not a former “key employee” of Calspan. Based on information provided by both AASR and Calspan, the Area Office determined that there were 85 managers above Ms. Hamilton's level during the time when she served as Calspan QCC Manager; that Ms. Hamilton was on Calspan's fifth tier of authority; that she supervised only a small portion of Calspan's overall workforce; and that she lacked authority to “hire or fire, to sign contracts, [or] to make financial commitments, and did not participate in strategic decision making.” Section II.E, *supra*. These facts amply support the Area Office's conclusion that Ms. Hamilton is not a former “key employee” of Calspan.

Having determined that the first element of the newly-organized rule was not satisfied, the Area Office need not have explored whether the remaining elements of the test were met. *E.g.*, *Size Appeal of Avar Consulting, Inc.*, SBA No. SIZ-6017, at 13 (2019); *Willow Envtl.*, SBA No. SIZ-5403, at 6. The Area Office nevertheless did do so, however, and found that the fourth element of the test also is not present here, because AASR received no contracts, financial or technical assistance, indemnification, or facilities from Calspan prior to July 16, 2020, the date for determining size. Section II.E, *supra*. Appellant challenges the Area Office's conclusion, contending that Calspan may have assisted with AASR's proposal or with AASR's creation. Again, though, Appellant's allegations are purely speculative and are not corroborated by any tangible evidence. The Area Office appropriately gave greater weight to the signed, sworn statements, from both AASR and Calspan, attesting that no such assistance ever was provided. Section II.C, *supra*. Appellant also argues that Calspan may have assisted AASR by releasing certain Calspan personnel from their employment agreements under the predecessor contract. The predecessor contract, though, was expiring in any event, and the Area Office found no evidence that AASR's proposal to utilize incumbent Calspan employees required approval or assistance from Calspan. Section II.E, *supra*. Moreover, Appellant has not persuasively explained how any such releases would have constituted “contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise,” the types of assistance that may be problematic under the newly-organized concern rule. 13 C.F.R. § 121.103(g). Appellant thus has not demonstrated that the Area Office erred in its consideration of the fourth element of the newly-organized concern rule.

### 3. Totality of the Circumstances

Lastly, Appellant's allegation of affiliation under the totality of the circumstances also fails. Relying on *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010), Appellant contends that AASR and Calspan may be affiliated under the totality of the circumstances if at least three of the four elements of the newly-organized concern rule are met. Sections II.F and II.H, *supra*. As explained above, though, the Area Office here appropriately found that no more than two of the four elements are met, because the record establishes that Ms. Hamilton is not a former “key employee” of Calspan and that Calspan did not provide contracts, financial or technical assistance, indemnification, or facilities to AASR prior to the date to determine size. Moreover, as the Area Office correctly observed, in *Specialized Veterans* there were numerous other indicia of affiliation between the challenged firm and the alleged affiliate, which are not present here. For instance, the owner of the alleged affiliate in *Specialized Veterans* provided nearly all of the challenged firm's initial capital, and held a 40% ownership

interest in the challenged firm, facts which OHA deemed highly relevant in finding affiliation under the totality of the circumstances. *Specialized Veterans*, SBA No. SIZ-5138, at 2, 8. No comparable situation exists in the instant case, and Appellant has not met its burden to prove that affiliation can be found based on the totality of the circumstances.

IV. Conclusion

Appellant has not shown reversible error in the size determination. Accordingly, the appeal 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