Cite as: *Size Appeal of Randy Kinder Excavating, Inc. d/b/a RKE Contractors*, SBA No. SIZ-6120 (2021)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Randy Kinder Excavating, Inc. d/b/a RKE Contractors, Appellant, Re: E&L Construction Group, LLC Appealed From Size Determination No. 05-2021-024	SBA No. SIZ-6120 Decided: August 25, 2021

APPEARANCES

John B. Dunlap III, Esq., Erin G. Fonacier, Esq., Dunlap Fiore LLC, Baton Rouge, Louisiana, for E & L Construction Group, LLC

Peter B. Ford, Esq., Samuel S. Finnerty, Esq., Anna R. Wright, Esq., Meghan F. Leemon, Esq., PilieroMazza, PLLC, for Randy Kinder Excavating, Inc. d/b/a RKE Contractors

DECISION[1]

I. Introduction and Jurisdiction

On June 9, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2021-024 concerning the U.S. Department of Veterans Affairs (VA), National Cemetery Administration, Solicitation No. 36C78621B0004. The Area Office found that E & L Construction Group, LLC (E&L) was a small business concern for the subject solicitation. Randy Kinder Excavating, Inc. d/b/a RKE Contractors (Appellant), the original protestor, appealed that determination maintaining that the Size Determination is clearly erroneous.

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 timely 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. Solicitation and Protest

On March 10, 2021, the VA issued IFB No. 36C78621B0004 (Solicitation) for a construction project at Fort Sill National Cemetery in Elgin, Oklahoma. The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding $39.5 million annual receipts size standard as the appropriate code.[2]

On April 22, 2021, bids were opened, and the CO announced that E&L was the lowest bidder and apparent awardee. On April 28, 2021, Appellant, an unsuccessful bidder, filed a timely size protest against E&L with the CO.

Appellant's protest alleged that E&L is affiliated with its minority owner, Ben LeBlanc and the companies he owns and controls, including a large business, Patriot Construction and Industrial, LLC (Patriot), through identity of interest, economic dependence, and under the "newly organized concern" rule. Additionally, Appellant alleged E&L is unduly reliant upon one or more ostensible subcontractors, likely Patriot. (Protest, at 1.) In support, Appellant claimed Patriot rents space from E&L and E&L remains significantly indebted to Mr. LeBlanc and his company, Le Blanc Lease, LLC, (LeBlanc Lease). Particularly, E&L's debt to Mr. LeBlanc and LeBlanc Lease is substantial and SBA should analyze whether the loan exceeds E&L's assets, not simply its revenues, and whether the loan still gives Mr. LeBlanc the power to control E&L. (*Id.*, at 6-7.) Further, Mr. LeBlanc provides additional financial assistance to E&L through personal indemnification, reported on the SBA Form 355, question 22, which was noted in a footnote of the Area Office's Adverse Size Determination No. 05-2020-019. (Adverse Size Determination, at 9.) However, the Area Office's Recertification Size Determination No. 05-2020-027 (Recertification) made no mention of any change regarding this indemnification. Thus, because this indemnification is presumably still in place, it continues to support a finding of affiliation between E&L and Mr. LeBlanc. (Protest, at 7.)

Appellant further maintained that E&L is dependent upon Mr. LeBlanc and LeBlanc Lease's financing for survival, which is a strong indicium of control; there are continuing contractual relationships because of the loans, lease, and likely subcontracting; Mr. LeBlanc has a great interest in the success of E&L and vice versa; and Mr. LeBlanc holds a substantial minority interest in E&L. (*Id.*) Additionally, E&L and Patriot presumably share resources and office space. Thus, the removal of Mr. LeBlanc as a Vice President of E&L and the documentation of its lease to Patriot and loans from Mr. LeBlanc and LeBlanc Lease do not

[2] The description under the Solicitation No. 36C78621B0004 incorrectly identified a $36.5 million annual receipts size standard for the NAICS code 237990. (Solicitation, at 1.) The parties do not dispute the size standard in question. As the error is harmless, further discussion is unnecessary.

change the fact that E&L and Mr. LeBlanc continue to share an identity of interest and should, therefore, be deemed affiliated. (*Id.*)

Appellant maintained that E&L and Patriot are affiliated based on the "newly organized concern" rule, noting that Patriot was formed in 2005, Patriot's CEO, Ben LeBlanc, presumably formed E&L with Christopher Esponge just a few years ago, Ben LeBlanc was (and still is) an officer, director, owner, managing member, and/or key employee of Patriot and/or LeBlanc Marine, LLC (LeBlanc Marine) and is an owner and key employee of E&L. (*Id.*, at 8.) E&L and Patriot are in the same or related industry, as both provide construction services. There is subcontracting work between E&L and Patriot, and E&L will rely on Patriot for assistance to perform the contract contemplated under the IFB. (*Id.*) Mr. LeBlanc provides substantial financial assistance to E&L. Thus, E&L and Patriot should be deemed affiliated under the "newly organized concern" rule.

Appellant also claimed that Patriot is E&L's ostensible subcontractor. To support this, Appellant noted that E&L has minimal employees and lacks experience with contracts similar to that contemplated under the IFB. (*Id.*, at 9.) Thus, E&L is unduly reliant on a subcontractor to fill the key personnel positions required by the IFB. (*Id.*)

Finally, Appellant argued that E&L is affiliated with Mr. LeBlanc and the companies he owns or controls based on the totality of the circumstances. (*Id.*, at 10.) In addition to the loans, lease, and Mr. LeBlanc's substantial minority ownership of E&L, the shared resources and partnership on the contract for the instant IFB between E&L and the companies owned or controlled by Mr. LeBlanc strongly support a finding of affiliation based on the totality of the circumstances. (*Id.*)

The CO forwarded Appellant's protest to the Area Office for review.

B. Size Determination

On June 9, 2021, the Area Office issued Size Determination No. 05-2021-024 (Size Determination), concluding that E&L is a small business under the $39.5 million size standard.

E&L submitted its bid, including price, on April 22, 2021, so the Area Office reviewed E&L's tax returns for the years 2018, 2019, and 2020. (Size Determination, at 3-5.) The Area Office found that the average annual receipts of E&L did not exceed $39.5 million. (*Id.*, at 5.)

In considering Appellant's protest allegations, the Area Office found E&L is not economically dependent on Mr. LeBlanc or LeBlanc Lease. E&L is the building owner of 134 E. Main Street, New Iberia, Louisiana and has written leases with three tenants, including LeBlanc Marine, Patriot's Marine Division, and no tenant shares office space. (*Id.*, at 6.) Mr. LeBlanc, both personally and through LeBlanc Lease, lent money for the remodeling of E&L's office building from 2017 to 2019, in the form of personal loans. In May 2020, E&L formalized the repayment loan terms to Mr. LeBlanc and LeBlanc Lease in separate Promissory Notes, which identified the unpaid principal, interest rate, and payment terms. Prior to the date size is being

determined for the instant procurement, E&L paid off the loan to Mr. LeBlanc and significantly paid down its loan with LeBlanc Lease. The Area Office found the remaining amount owed to LeBlanc Lease does not allow LeBlanc Lease to have the power to control E&L.

The Area Office thus rejected Appellant's allegation that E&L is economically dependent on Mr. LeBlanc and LeBlanc Lease based on these loans. (*Id.*) Unlike *Size Appeal of Heritage of America, LLC*, SBA No. SIZ-5017 (2008), where OHA found economic dependance based on lack of evidence regarding the terms of the loan and loan repayment, unless the borrower could afford to do so, and the lender's inability to demand payment without obtaining a judgement, here, the Area Office found that E&L is repaying LeBlanc Lease under a Promissory Note with clear terms. The Area Office also noted that in *Heritage*, the loans created a liability twice the size of the concern's assets and twenty times greater than its income, while LeBlanc Lease's loan is less than ten percent of E&L's assets and less than 5% of its 2020 revenue. (*Id.*) Thus, the Area Office found the amount of money E&L owes LeBlanc Lease is not significant enough to cause E&L to be economically dependent upon LeBlanc Lease and the loan does not provide LeBlanc Lease with the power to control E&L.

Additionally, the Area Office determined that E&L is not dependent upon any business Mr. LeBlanc is associated with for contract revenue. (*Id.*) E&L had given two subcontracts to Patriot in the past, and to no other business with which Mr. LeBlanc is affiliated. As the Area Office saw no evidence that E&L is economically dependent upon Patriot, or any other business Mr. LeBlanc is associated with, it also found no evidence that E&L relies upon any of these companies for its revenue. (*Id.*, at 6-7.)

In analyzing whether the "newly organized concern" rule was applicable, the Area Office found that it was not. E&L is not newly organized, being established in 2016, and from its size being determined as of April 2021, the business concern had been operating for over five years. (*Id.*, at 7.) While Appellant asserted that E&L had only performed six contracts, E&L provided a list of twenty-one contract awards, thirteen of which were Federal contracts. For each project, E&L provided documentation of Project Managers/Superintendents, Quality Control Managers, and Safety Managers. It had 5 to 6 employees over the past three years, on a project-by-project basis, while retaining two current full-time employees and one part-time employee that fills in as needed. None of these employee positions are filled by Mr. LeBlanc. The Area Office further noted that E&L did not receive any contracts from Patriot, nor any other business associated with Mr. LeBlanc. Thus, E&L demonstrated that it is a viable business with sustainability that should no longer be considered "new." (*Id.*, at 7-8.)

Applying the "newly organized concern" rule to Patriot, the Area Office found that while Mr. LeBlanc is a principal stockholder in E&L, and Patriot and E&L are both in the construction business, the rest of the conditions are not met. (*Id.*, at 8.) E&L was established in 2016, two years prior to Mr. LeBlanc's ownership or office position at Patriot. Neither Mr. LeBlanc nor Mr. Esponge had any connection with Patriot when E&L was formed. Patriot never provided E&L with a contract, loan, indemnification, bonds, or financial/technical assistance. While Patriot's Marine Division leases office space from E&L, they do not share offices, receptionist, furniture, phones, or equipment. Thus, the Area Office determined that E&L is not affiliated with Patriot under the "newly organized concern" rule.

Similarly, in applying the "newly organized concern" rule to LeBlanc Lease, the Area Office found that the regulatory test is not met. (*Id.*, at 9.) While Mr. LeBlanc is a principal stockholder in E&L, the two firms are not in the same business. E&L is in the construction business and LeBlanc Lease was created in 2009 for liability purposes to hold assets, i.e., equipment, for LeBlanc Marine, which LeBlanc Marine would rent from it. When LeBlanc Marine merged with Patriot, Patriot bought the equipment from LeBlanc Lease. This left LeBlanc Lease with no assets. (*Id.*)

In reviewing the ostensible subcontracting rule, the Area Office rejected Appellant's allegations that E&L has an ostensible subcontractor. Appellant alleged E&L has limited federal prime contracting experience, has no experience performing work that is contemplated under the instant IFB, and has only been awarded six contracts in the past five-year with its largest award being $2.4 million, which is $2 million less than the value of the instant award. (*Id.*) The Area Office, however, found that E&L was awarded 21 contracts, 13 of which are federal contracts; E&L is a general contractor and the subject procurement has a general construction NAICS code; there are no subcontracts or teaming agreements in place for the instant IFB; E&L has secured bids from over a dozen subcontractors and suppliers since the work entails multiple types of construction trades; E&L has not selected the subcontractors due to the Suspension of Work notice; and one of the many subcontractors that submitted a bid is Patriot, but its bid does not contain a quote for management or administrative duties. (*Id.*).

The Area Office took note of Mr. Esponge's role as the full-time Project Manager on site and his experience in general construction management with licenses and certifications. (*Id.*, at 9-10.) Additionally, E&L did not rely upon the past performance or expertise of Patriot or any other entity when submitting its bid for the subject procurement. (*Id.*, at 10.)

Further, the Area Office applied OHA precedent and limitations of subcontracting clause in the context of general construction contracts, to find that E&L employees will be superintending, managing, and scheduling the work, including coordinating the work of various subcontractors, and subcontracting out the specialty construction work, which it is not in violation of the ostensible subcontractor rule. (*Id.*, citing to *Size Appeal of C&C Contractors, LLC*, SBA No. SIZ-5990 (2019); *Size Appeal of C.E. Garbutt Construction Company*, SBA No. SIZ-5083 (2009); *Size Appeal of J.R. Conkey & Associates, Inc. d/b/a Solar Power Integrators*, SBA No. SIZ-5326 (2012); *Size Appeal of Roundhouse PBN, LLC*, SBA No., SIZ-5383 (2012).)

When reviewing the totality of circumstances under OHA precedent and the six other compounding factors, the Area Office did not find affiliation. (*Id.*, at 10-11; 13 C.F.R. § 121.103(a)(5); *Size Appeal of Engineering Logistics, Inc.*, SBA No. SIZ-5587 (2014*); Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999).) The Area Office revisited the prior findings and noted that as of April 2021, Mr. LeBlanc is 49% owner of E&L but he is not an employee, officer, or Manager; Patriot's Marine Division leases office space in a building owned by E&L under a written lease agreement and the businesses do not share space; E&L has a loan with LeBlanc Lease under a Promissory Note but the remaining amount is not significant enough to allow LeBlanc Lease the power to control E&L; and E&L is not economically dependent upon LeBlanc Lease. The Area Office further noted that even when considered all together, Patriot,

LeBlanc Lease or Mr. LeBlanc does not have the ability to control E&L. (*Id.*, at 11.) To support this, the Area Office found that E&L is not "heavily indebted" to LeBlanc Lease, is not "sharing" a business location with Patriot, does not claim to have a strategic relationship with Patriot or LeBlanc Lease, is not and has not received any subcontracts from Patriot or LeBlanc lease, is not entering contracts with exclusive dealings, and is not sharing resources or materials. (*Id.*, emphasis Area Office's). Thus, the Area Office determined that E&L is not affiliated with Mr. LeBlanc, Patriot, LeBlanc Lease, or any of the other entities associated with Mr. LeBlanc.

C. Appeal

On June 24, 2021, Appellant filed the instant appeal. Appellant contends that the Area Office made clear errors of fact and law when analyzing whether E&L and Patriot are affiliated under the "newly organized concern" rule, which contributed to a flawed evaluation of affiliation under the totality of the circumstances.[3] (Appeal, at 1, 3.)

Appellant contends that under the "newly organized concern" rule, the Area Office failed to determine when E&L began to generate revenues, thus, erroneously finding that E&L was an active concern because it was organized in 2016. (*Id.*, at 4-5.) Appellant identifies OHA precedents to argue the Area Office committed clear errors of law when publicly available information showed that E&L did not generate revenues until sometime in 2018, two or three years leading up to its bid under the instant IFB. (*Id.*, citing *Size Appeal of Coastal Management Solutions*, SBA No. SIZ-5281 (2011); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006); *Size Appeal of Vortec Development, Inc.*, SBA No. SIZ-4866 (2007).) Thus, the Area Office concluded that the mere passage of time bars application of the "newly organized concern" rule.

Appellant then reasons the Area Office's failure to analyze when E&L became an active concern renders erroneous its conclusion that E&L was not formed by former or current officers, directors, principal stockholders, or key employees of Patriot. (*Id.*, at 6.) When the Area Office found that E&L was established in 2016, two years prior to Mr. LeBlanc having any ownership or position at Patriot, it also found that Mr. LeBlanc could not have organized E&L as a stockholder of Patriot because he was not a stockholder of Patriot until after E&L was established as a legal entity. (*Id.*) Relying on *Vortec* and *Taylor*, Appellant highlights that E&L was a newly organized concern because it was not until after Mr. LeBlanc joined Patriot that E&L became an active concern, and thus, E&L was organized by a current stockholder of Patriot. (*Id.*, at 6-7.) This conclusion would support a finding of affiliation. Thus, failure to determine "became an active concern had a spillover effect on its other conclusions when analyzing affiliation under the 'newly organized concern' rule." (*Id.*, at 7.)

[3] On appeal, Appellant does not challenge the Area Office's determination that E&L is not affiliated with Patriot under the identity of interest and the ostensible subcontractor rule. Thus, that portion of the Area Office's decision is now final. *Size Appeal of Envt'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 also argues the Area Office erred when it concluded that E&L does not meet the fourth and final prong of the "newly organized concern" rule, when the two subcontracts from Patriot to E&L should have been considered assistance. The Area Office also erred when it ignored Mr. LeBlanc and LeBlanc Lease's loans to E&L, which support a finding of affiliation. (*Id.*, at 7-8, citing *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. 1899 (1984).) In this case, Mr. LeBlanc is a creditor of E&L, and the Area Office did not factor that into its analysis.

Finally, Appellant alleges had the Area Office properly evaluated whether E&L and Patriot are affiliated under the "newly organized concern" rule, it may have uncovered additional facts that support a finding of affiliation under the totality of the circumstances. (*Id.*, at 8.)

D. Supplemental Appeal

On July 13, 2021, Appellant filed a motion seeking leave to supplement its appeal. (Supp. Appeal).[4] Appellant argues that there is good cause to submit a supplemental appeal, because the appeal file revealed circumstances and documents not previously known to Appellant or discussed in its Appeal that support its contentions in this proceeding. (Appellant's Motion, at 1-2.)

Appellant maintains, the Appeal File confirms the Area Office had sufficient information to analyze when E&L became an active concern and erred in concluding that it had been operating for over five years. (Supp. Appeal, at 1-2.) First, Appellant identifies discrepancies between the two SBA Form 355's completed by Mr. Esponge. Whereas the 2020 Form 355 lists E&L's receipts as - $163.999.79 in 2018 and $311,570.35 in 2019, the 2021 Form 355, completed by E&L in response to the instant protest, lists E&L's receipts for those years as - $211,294.69 and $212,843.31, respectively. Appellant argues that these discrepancies alone should have led the Area Office to take a closer look at E&L's finances to determine when E&L began to generate revenue and became an active concern. (*Id.*, at 2.)

Appellant further claims that E&L's list of contract awards should have prompted questions from the Area Office, when E&L was not awarded any contracts in 2016, but only generated revenue from its leases in that particular year. (*Id.*) Because the first awarded contract in September 2017 had a period of performance through August 2018 and only required a one-day of site work, Appellant questions whether E&L actually performed any work under such contract in 2017 and whether E&L's generated nominal receipts in 2017 are from contract awards or from lease revenues. (*Id.*, at 2-3.) Appellant then argues that even if E&L generated rental revenues in 2016 and 2017, E&L did not become a revenue-generating contractor until more than one year and half after its formation. As such, E&L was a dormant concern until at least that time.

Appellant then revisits the arguments raised in its appeal petition, claiming the Area Office opted to credit E&L with over five years of active operations in spite of the Appeal File

[4] On July 12, 2021, E&L indicated that it opposes Appellant's motion because Appellant has already filed multiple protests, appeals and supplemental protests related to the award at issue, and thus, it should not be allowed to file another supplemental appeal in this matter.

confirming that it was dormant; E&L did not become a revenue-generating contractor until late 2017 when Mr. LeBlanc joined Patriot; and the Area Office did not analyze Mr. LeBlanc and LeBlanc Lease loans to E&L under the fourth element of the "newly organized concern" rule. (*Id.*, at 3-5.)

Finally, Appellant maintains, had the Area Office conducted the analysis required under the first two prongs of the "newly organized concern" rule, it may have discovered additional facts that support a finding that Patriot "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." (*Id.*, at 5.) Rather, the Area Office took E&L's statement—that it does not share employees, office space, equipment, or bonding/financing with or receive any technical assistance from any of the entities affiliated with Mr. LeBlanc, including Patriot and LeBlanc Lease— at face value when E&L receives financial assistance from LeBlanc Lease in the form of a $132,682.20 loan. Under these circumstances, Appellant insists that a closer inquiry of the fourth prong of the "newly organized concern" rule was warranted. (*Id.*)

E. E&L's Response

On the same day, E&L responded to the appeal. E&L maintains that it cannot be affiliated with Patriot based on the "newly organized concern" rule under 13 C.F.R. § 121.103(g) because it is not newly organized. (Response, at 2, citing *Size Appeal of Clark Mechanical Contractors, Inc.*, No. 1907 (1984).)

As a background information, E&L explains that it was founded on February 24, 2016, by Mr. Esponge, a Service-Disabled Veteran who served the country and suffered a spinal cord injury requiring complete dependency on a wheelchair for mobility. (*Id.*, at 2-3.) Mr. Esponge is the founder, manager, and majority owner of E&L. Mr. LeBlanc is a minority owner of E&L and is not an officer or manager.

Patriot was created on February 15, 2017. (*Id.*, at 3.) Prior to this, Patriot had structural and name changes from Cody Fortier Farms, LLC in 2005, Superior Construction and Equipment, LLC, in 2009, and Patriot Construction and Equipment, LLC in 2010. Mr. LeBlanc owned X of LeBlanc Marine, a company that he founded on September 8, 2004. On July 1, 2018, LeBlanc Marine merged with Patriot to provide the company with a marine division. This was accomplished by creating a holding company called XXX, which LeBlanc Marine is the sole member. Mr. LeBlanc owns a X share in XX, which diluted to almost X once the companies were merged together. Now, XXXXXXX is the holding company for Patriot and XX. In turn, LeBlanc Lease, owned 100% by Mr. LeBlanc, currently holds a X share in U.S. Industrial Holdings.[5] (*Id.*, at 3-4.)

In response to Appellant's allegations, E&L asserts that the four elements of the "newly organized concern" rule are not met in this case. Particularly, Mr. LeBlanc is still an owner and

[5] OHA has redacted Mr. LeBlanc's affiliated business concerns and its ownership percentage at E&L's request, but for purposes of clarity it is noted that Mr. LeBlanc's ownership share of its affiliated concerns did not rise to the level of control as a minority shareholder.

officer of Patriot and obtained that interest two years after the creation of E&L. Mr. LeBlanc is not a *former* officer or owner of Patriot, rather he holds a minority interest in and officer position at Patriot. (*Id.*, at 4-5, emphasis E&L's.) Thus, the "newly organized concern" rule does not apply to a person such as Mr. LeBlanc who remains involved with Patriot. (*Id.*, at 5, citing *Size Appeal of Hal-Pe Associates Engineering Services, Inc.*, SBA no. SIZ-5374 (2012).) Instead, E&L maintains, the proper analysis is one of affiliation through common ownership or common management. The Area Office analyzed this when it determined that Patriot was not affiliated based on those factors finding that Mr. LeBlanc does not have any management or control over E&L, he holds no positions at E&L, and he is given no power in the operating agreement to control E&L. (*Id.*)

E&L alleges that it has always been an active company, organized under the laws of Louisiana in 2016, over five years ago. (*Id.*, at 5.) E&L was formed over two years prior to Mr. LeBlanc owning any interest in Patriot or being an officer of Patriot. Patriot did not create E&L and the founders of E&L had no connections to Patriot at the time E&L was formed. (*Id.*)

As for allegations that E&L was dormant until 2018 and its revenues are only due to Mr. LeBlanc's association with Patriot in 2018, E&L states that Appellant failed to raise these allegations during its original size protest. (*Id.*, at 5-6.) Therefore, E&L submits that Appellant cannot raise such issues for the first time during its appeal and are not properly before OHA. (*Id.*, at 6, *citing Size Appeal of Backick Graul LLC*, SBA No. SIZ-6071 (2020).)

Nevertheless, E&L finds Appellant's new arguments to be incorrect. E&L maintains that it was not dormant, as evidenced that immediately after its formation in 2016, E&L bought and renovated a new office building and submitted proposals and bids for contracts. In August 2016, E&L was awarded a $78,493.00 federal contract for the Draft Tube Gate project, which was terminated for government convenience due to incomplete design specifications and at no fault of E&L's. (*Id.*, at 7.) In August 2017, E&L was re-awarded the Draft Tube Gate project after the new designs were completed. Thereafter, in 2018, E&L was also awarded the Lake Darling Stop Log Project. From that point forward, E&L continued to be awarded even larger projects. (*Id.*)

E&L clarifies that its reduced profit and slower startup from October 2016 through May 2018, was because of Mr. Esponge's continuous medical treatments due to serious health issues, including multiple surgical interventions and recovery period. (*Id.*, at 6-7.) E&L reiterates that Mr. Esponge is the Manager of the company and has complete control of the concern as required by the regulation.

Moreover, E&L asserts that this case distinguishes from *Taylor* because the concern in that matter did not earn its first revenue until five years after it was created, did not file tax returns, and had no other activity during that time. Therefore, OHA determined it had only been an "active" concern for a year. However, E&L has been active for the entirety of its existence, buying, renovating, and leasing out a building, as well as being awarded a federal contract within the first year of its existence. (*Id.*, at 8.)

E&L also refutes Appellant's reliance on *Taylor* and argument that E&L did not generate sufficient revenue until after Mr. LeBlanc became an owner of Patriot. In *Taylor*, the concern

was created in April 2000, the founder became the Senior Consultant/Director of a different large concern, and the concern did not have any revenue or any other activity until five years later, which is not the case of E&L. Moreover, E&L states that it is not aware of any regulation that deems that a small business can be "too" small in its revenues. (*Id.*, emphasis E&L's.) Unlike *Taylor*, E&L adds that when it was created in February 2016, Mr. LeBlanc was not associated or affiliated in any way with Patriot until July 2018. (*Id.*, at 8.) Patriot's subcontract with E&L was not until August of 2019, three years after its existence. E&L did not sit dormant for five years after Mr. LeBlanc became a minority owner of Patriot.

Similarly, Appellant's reliance on *Vortec* to assert that E&L should be considered dormant for a lengthy period is not applicable. In *Vortec*, a family of siblings and other relations owned and controlled a series of businesses, including large businesses. The parties bought a "failed concern" who had no income, assets or contracts prior to their ownership. OHA then found the concern was newly organized due to lack of activity prior to being purchased by the family. (*Id.*, at 8-9). This case distinguishes from *Vortec*, because E&L was created as a new business, Mr. Esponge and Mr. Leblanc are not related and have no other business relationships, and E&L was awarded a contract in 2016 and 2017. (*Id.*, at 9.)

E&L further rejects Appellant's assertion that any amount from E&L's 2016 and 2017 contract would be negligible so it should be disregarded. (*Id.*) Most new concerns are not awarded large contracts upon their creation and if they were to be, protestors like Appellant would immediately protest the awarded concern for lacking the requisite past performance. After being awarded its first contract in 2016, E&L continued to be awarded larger contracts for five years. E&L maintains the increase in revenues can be attributed to the hard work of Mr. Esponge as his health improved, and not because of any affiliation with Patriot. (*Id.*)

While Appellant alleges that E&L received financial or technical assistance, E&L states that it has not received any financial or technical assistance, indemnification, or bonds from Patriot. (*Id.*) According to a declaration from Conrad Bourg, Vice President of Patriot, the largest of the two subcontracts that E&L gave to Patriot, only accounted for 1% of Patriot's revenues in 2019. Patriot has never awarded a subcontract to E&L. (*Id.*, at 9-10.) Appellant's assertion that E&L received financial assistance from Mr. LeBlanc through loans does not claim that E&L received it directly from Patriot, as required by the fourth factor of the "newly organized concern" rule. (*Id.*, at 10.) Here, Mr. LeBlanc and Mr. Esponge provided personal investments to E&L related to the 2016 purchase and renovation of its office building and other necessary expenses to start the business. Mr. LeBlanc funded some of this investment with Leblanc Lease and these payments were not capital contributions to E&L under E&L's operating agreement, but personal loans.

E&L executed promissory notes with Mr. LeBlanc, which contain standard commercial terms and provisions found in at arm's length transaction, while the amount due is subject to an interest rate of X per annum, consistent with the current interest rates by third party lenders. (*Id.*) The terms include E&L making twelve monthly payments each year, over a ten-year period. E&L defaults on such loans when it fails to make timely payments, files for bankruptcy, admits in writing its inability to pay its debts or is subject to a conservatorship or writ attachment. After

a period to cure such default, failure to pay would result in interest, penalties, and demands for collateral. (*Id.*)

In the past year, E&L explains that it paid off a substantial amount of these loans. Specifically, E&L paid off the promissory note to Mr. LeBlanc, while the rest of the money that E&L owes to LeBlanc Lease and Mr. Esponge reflect the member's proportionate 51-49% ownership in the concern. (*Id.*) At the time of the protest, the outstanding debt amounted from XXX to Mr. Esponge and XXX to Mr. LeBlanc through LeBlanc Lease. These debts were paid down to eliminate any alleged economic dependence or financial assistance. (*Id.*, at 10-11.)

E&L reiterates that it did not receive financial assistance from Patriot, and Mr. LeBlanc does not have the power to control E&L through his personal investments. Relying on OHA precedent that promissory notes are generally not vehicles to control a concern and do not by themselves justify a finding of control, E&L argues that these notes did not grant Mr. LeBlanc or any other entity control over E&L or the ability to block or interfere with ordinary business actions essential to running the company. (*Id.*, at 11, citing *Size Appeal of Lukas, LLC*, SBA No. SIZ-6047 (2020).) The Area Office reviewed the promissory notes when considering and finding that E&L was not a newly organized concern.

Finally, E&L contends that it does not meet SBA's standard of affiliation as a newly organized concern. Even if E&L was found to be a newly organized concern, there is a clear line of fracture because there is a minimal amount of economic or business activity between the two concerns. (*Id.*) E&L subcontracted with Patriot on only two occasions and there is no other business activity between the concerns. Thus, a minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture. (*Id.*, citing *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307(2011).

F. E&L's Supplemental Response and Motion

With its response, E&L also filed a motion seeking leave to submit new evidence, including Mr. Esponge's sworn declaration.[6] E&L states that Appellant has now advanced new arguments with its supplemental appeal. (E&L's Motion, at 2.) First, Appellant now alleges that even though E&L has been in business for over five years, that it should be considered "dormant" until it generated what Appellant considered sufficient revenues. Second, Appellant now asserts that E&L should be considered a newly organized concern because it did not generate sufficient revenue until after Mr. LeBlanc gained his interest in Patriot. Since these are new issues raised on appeal, E&L should have the opportunity to respond to such allegations. (*Id.*)

E&L submits as evidence Mr. Esponge's extensive medical records from 2016 through 2018. In 2016, Mr. Esponge suffered from serious health issues related to his service-related disability, requiring complete dependency on a wheelchair for mobility and bed rest for almost two years. (*Id.*, at 2-3.) E&L contends, the early years of delay in revenues was caused by Mr.

[6] Appellant indicated that it opposes to E&L's motion seeking leave to submit new evidence.

Esponge's health condition shown in the medical records and the increased revenues in 2018 was due to Mr. Esponge's recovery, not because of Mr. LeBlanc's interest in Patriot. (*Id.*, at 3.) Additionally, E&L submits contract documents that show E&L was awarded a federal contract in 2016, the same contract being terminated due to government convenience, and the same contract being re-awarded in 2017. With this evidence, E&L states that it was not dormant as alleged by Appellant. (*Id.*)

E&L argues that it has established that good cause exists for the submission of such evidence, i.e., Mr. Esponge's sworn declaration, Mr. Esponge's medical records and contract documents, which they are new evidence relevant to the issues on appeal, they do not unduly enlarge the issues, and they clarify the facts on the issues on appeal. (*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. Threshold Issues

New Evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). It is well-settled that 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 find that both Appellant and E&L have established good cause. First, Appellant did not have access to the Area Office's file at the time of the protest or the subsequent appeal, and thus, Appellant could not have previously summitted arguments pertaining to E&L's revenues and operation from 2016 through 2018. Similarly, E&L must be afforded an opportunity to respond to arguments raised in the Supplemental Appeal. Sections II.D and II.F., *supra*. I therefore GRANT Appellant's motion and ADMIT E&L's proffered new evidence into the record.

C. Analysis

There are two main issues in this appeal. First, the adequacy of the Area Office's investigation of E&L's revenue and affiliation, and second, the "newly organized concern" rule.

Appellant's principal contention is that the Area Office failed to assess when E&L generated revenues and made no effort to determine when it became an active business by concluding that E&L was not new because it had operated for over five years. Had the Area Office properly evaluated whether E&L and Patriot are affiliated, it may have uncovered additional facts to support a finding of affiliation under the totality of the circumstances. On its Supplemental Appeal, Appellant claims that E&L submitted two SBA Form 355's, which showed discrepancies on its yearly receipts between the two forms, and these discrepancies alone should have led the Area Office to take a closer look at E&L's finances to determine when it actually began to generate revenue and when it became an active concern. Similarly, E&L's list of contract awards should have prompted questions about its operation because Appellant claims E&L was not awarded any contract in 2016 and the only revenue came from its commercial property leases. Sections II.C and II.D, *supra*.

I find Appellant's contentions without any legal support. Appellant's arguments are plainly suggesting that the Area Office must only review E&L's revenues or lack of them in order to determine whether E&L was new or active and disregard the evidence showing the 21 awarded contracts since inception, the hiring of several employees over the past three years, and the lack of any contracts from Patriot. Section II.B, *supra*. Moreover, Appellant did not raise allegations concerning E&L's revenue in its protest and the Area Office was not required to, and did not expand the scope of its review beyond the issues raised by Appellant. 13 C.F.R. § 121.1009(d); *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012). Because Appellant has not demonstrated clear error in the size determination, this portion of the appeal is meritless.

Similarly, Appellant's supplemental allegations that E&L became a revenue generator when Mr. LeBlanc joined Patriot in 2018 and E&L was not awarded any contract in 2016 are refuted by E&L's new evidence showing federal contract awards in 2016 and 2017, and Mr. Esponge's serious health condition and recovery records likely affecting E&L's revenue. Sections II.D and II.F, *supra*. The Area Office properly relied upon specific information provided by E&L, and reasonably chose to confine its review to the issues raised in the protest. Appellant has not demonstrated that the Area Office committed any error with this approach.

Moreover, the discrepancies in E&L's SBA Forms 355 are irrelevant to the main issues at hand. They do not address the issue of affiliation, the basis of this decision. Certainly, Appellant did not protest or appeal E&L's eligibility for the $39.5 million annual receipts size standard.

In addressing the remaining issue, the “newly organized concern” rule provides that:

> Except as provided in 13 C.F.R. § 124.109(c)(4)(iii) affiliation may arise where former or current officer, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members or key employees, and the one concern 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. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee 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 has distilled the rule into four required elements: (1) the former [or current] officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members or key employees; and (4) the one concern 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.[7] *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 10 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 6-7 (2010).

In this case, the Area Office found that Patriot and E&L are both in the construction business, while the rest of the conditions are not met. Section II.B, *supra*. In light of the record, I find Appellant's application of *Taylor* and *Vortec* to be inapposite and mere speculations that had the Area Office conducted the analysis required under the first two prongs of the "newly organized concern" rule, it may have discovered additional facts that support a finding that Patriot "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." Sections II.C and II.D, *supra*.

Particularly, while it is undisputed that Mr. LeBlanc is an officer of Patriot and the minority owner of E&L, the record clearly shows that Mr. Esponge and Mr. LeBlanc founded E&L in 2016 and they did not have any connection with Patriot before Mr. LeBlanc held an ownership and office position at Patriot in 2018. Thus, the Area Office reasonably concluded that Mr. LeBlanc did not organize a new concern and it did not meet the first element. If the first element of the test is not met, there is no violation of the "newly organized concern" rule. *Size Appeal of Telaforce, LLC*, SBA No. SIZ-5970, at 13 (2018). E&L is clearly not a "spin-off" of Patriot. Similarly, Patriot did not provide E&L with any contracts, rather E&L indicated that it had given two subcontracts to Patriot, the largest subcontract which only accounted for 1% of Patriot's revenue. It was not Patriot which assisted E&L, but rather the other way around. Section II.E, *supra*. Therefore, the "newly organized concern" rule does not apply here because not all of

[7] The regulatory text of 13 C.F.R. § 121.103(g) was changed to the add phrase "or current" to the describe the officials whose formation of a new concern would trigger application of the rule. 85 Fed. Reg. 66146, 66179 (Oct. 16, 2020). The changed rule ensures that affiliation may arise where the key individuals are still associated with the first company. OHA now notes the change and adopts it in its description of the four required elements.

the mandatory elements of that rule are met. *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477 (2013).

Further, Appellant incorrectly relies on the assumption that E&L was dormant until 2018 when the record supports E&L filed its tax returns, purchased and remodeled a building office since inception, leased out offices, made biddings, and was awarded 21 contracts. Appellant's claim that Mr. LeBlanc and LeBlanc Lease provided financial assistance meeting the fourth element is also flawed. The Area Office correctly analyzed any affiliations between E&L and Mr. LeBlanc or LeBlanc Lease under the identity of interests because these were personal loans, and the remaining loans are just proportionate to the member's ownership in E&L as of the date to determine E&L's size. The fact that E&L owed money to Mr. LeBlanc prior to Mr. LeBlanc joining Patriot, sufficiently shows that Patriot did not provide the financial assistance.

Lasty, Appellant's allegation of affiliation under the totality of the circumstances also fails because it is based upon mere speculation. E&L's response, Mr. Esponge's sworn declaration, and the contract awards since 2016, altogether support the concern was not dormant and the Area Office's finding that E&L was not new. While Mr. LeBlanc is 49% owner of E&L, he is not an employee, officer, or Manager. While Patriot's Marine division leases space under a written lease from E&L, the concerns do not share office space. While E&L has a loan with LeBlanc Lease, it is not large enough to grant LeBlanc Lease control of the company. E&L is simply not dependent upon LeBlanc Lease. None of these factors would grant Mr. LeBlanc Patriot control or power to control over E&L. Appellant fails to cite a regulation or precedent with a comparable situation, and thus, it has not met its burden to prove that affiliation can be found based on the totality of the circumstances.

Therefore, I find Appellant has not met its burden of proving that the size determination is clearly erroneous. For the reasons discussed *infra*, the appeal is denied.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is denied, and the size determination is affirmed. This is the final decision of the U. S. Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge