United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Crew Training International, Inc., Appellant, RE: Saguaro Business Solutions LLC Appealed From Size Determination No. . 06-2021-038	SBA No. SIZ-6128 Decided: November 10, 2021

APPEARANCES

J. Bradley Reaves, Esq., Beth V. McMahon, Esq., Paul Hawkins, Esq., ReavesColey PLLC, Chesapeake, Virginia, for Appellant

Michelle F. Kantor, Esq., McDonald Hopkins LLC, Chicago, Illinois, for Saguaro Business Solutions LLC.

DECISION[1]

I. Introduction and Jurisdiction

On April 20, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2021-038, concluding that Saguaro Business Solutions LLC (Saguaro) is a small business under the size standard associated with the subject procurement. Saguaro is a joint venture between Metro Accounting and Professional Services, LLC (Metro) and its SBA-approved mentor, Sonoran Technology and Professional Services, LLC (Sonoran). The Area Office rejected protest allegations filed by Crew Training International, Inc. (Appellant) that the joint venturers are affiliated with one another. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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

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 RFP

On April 1, 2019, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA489019RA020, seeking a contractor to perform E-3 aircrew training and courseware development.[2] The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 611512, Flight Training, with a corresponding size standard of $30 million average annual receipts. Saguaro submitted its initial proposal, including price, for the procurement on November 15, 2019, self-certifying as a small business.

According to the RFP's Performance Work Statement (PWS), the Air Force will provide facilities for the performance of the contract. (PWS at 19.) In addition, the Air Force will provide: (1) training devices, aircraft, and other associated equipment required by the E-3 course syllabi; (2) computers and audiovisual equipment in the training classrooms; (3) electronic flight bags (EFBs); (4) secure containers for classified materials; (5) office furniture and telephones; (6) classified work area computers for both instruction and courseware development; and (7) other office equipment as agreed between the contractor and the Air Force. (*Id.*)

B. Mentor-Protégé Agreement and Joint Venture Agreement

On October 26, 2016, the Director of SBA's All-Small Mentor-Protégé Program (ASMPP) approved a Mentor-Protégé Agreement (MPA) between Metro and Sonoran. (Letter from H. Schick to V. Saldivar, at 1.) The Director stated that the MPA would be "effective for three (3) years ending October 26, 2019," and thereafter was renewable for an additional three years. (*Id.*) The Director further noted that:

> The purpose of the ASMPP is to enhance the development of the protégé and encourage approved mentors to provide various forms of assistance to eligible ASMPP participants to ensure contracting opportunity, experience and overall financial viability.

(*Id.*) According to the Director's letter, the approved goals and objectives for the MPA were "Management and Technical Assistance, Business Development Assistance, [and] General and/or Administrative Assistance and Contracting Assistance." (*Id.*)

[2] The Air Force subsequently re-designated the solicitation as RFP No. FA4890-20-R-0004. (RFP, Amendment 6 at 1.)

On March 6, 2017, Metro and Sonoran formed Saguaro as an Arizona limited liability company. (Protest Response at 4-5.) Saguaro is 51% owned by Metro, the Managing Member, and 49% owned by Sonoran. (*Id.*) On June 8, 2017, Metro and Sonoran entered into a Joint Venture Agreement (JVA). Metro and Sonoran subsequently amended the JVA, on October 23, 2019, and November 7, 2019, to address the proposed distribution of work and other matters related to the instant procurement. (JVA Addendum-6 and Addendum-7.)

The JVA provides that Metro is the Managing Venturer and will receive profits commensurate with the work it performs for the joint venture. (JVA at 2.) The operating account will be held in the name of the joint venture at the Bank of Oklahoma. (JVA Addendum-6 and Addendum-7, at 2.) Metro will contribute 51% of working capital while Sonoran will contribute the remaining 49%. (JVA at *2*.) The JVA, as modified by the addendums, included an itemized list of equipment that would be furnished by each joint venture partner, but noted that the Air Force would be providing the necessary facilities as well as most equipment. (JVA Addendum-6, at 2.) In addition, the addendums included charts describing the respective responsibilities of Metro and Sonoran during contract performance. (*Id.* at 2-5.) The addendums highlighted that Metro will be responsible for performing at least 40% of the required work. (*Id.* at 5-6.) Metro's owner and President, Ms. Virginia A. Saldivar, will serve as the project manager. (JVA at 2-3.) All accounting and administrative records, as well as contractual records, will be maintained at Metro's offices. (*Id.* at 3.)

C. Protest

On February 19, 2021, the CO notified Appellant, an unsuccessful offeror, that Saguaro was the apparent awardee. On February 26, 2021, Appellant filed a size protest with the CO challenging Saguaro's size. In its protest, Appellant acknowledged that Saguaro is a joint venture between an SBA-approved mentor and protégé. (Protest at 1-2.) Appellant maintained, however, that the protégé, Metro, is not a small business due to affiliation with Sonoran under the "newly-organized concern" rule, 13 C.F.R. § 121.103(g), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). (*Id.* at 4-6.) Because Metro is not small, Saguaro also is not small. Appellant alleged that Metro and Sonoran became affiliated prior to SBA's approval of the MPA. (*Id.* at 6.)

Appellant highlighted that an SBA-approved mentor and protégé still may be affiliated for "other reasons" under 13 C.F.R. § 121.103(b)(6). (*Id.* at 4.) In the instant case, Metro and Sonoran are affiliated because all four elements of the newly-organized concern rule are met:

> 1) A former officer, director, principal stockholder, managing member, or key employee of one concern organizes a new concern;
>
> 2) In the same or related industry or field of operation;
>
> 3) That former principal serves as an officer, director, principal stockholder, managing member, or key employee of the new concern; 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.

(*Id.* at 4-5, citing 13 C.F.R. § 121.103(g).) The first element is met because Metro's owner and President, Ms. Saldivar, was Sonoran's Chief Financial Officer from October 2010 to September 2016, and continues to have "critical influence in or substantive control over the operations or management of Sonoran." (*Id.* at 5.) Ms. Saldivar organized Metro as a "new concern" in 2016. (*Id.*) The second and third elements are met because Metro and Sonoran operate in the same or related industries, and because Ms. Saldivar is the owner and President of Metro. (*Id.* at 5-6.)

Appellant alleged that, in satisfaction of the fourth element, Sonoran has "furnished contracts, assistance, and facility support" to Metro, and such assistance pre-dates the MPA between the two firms. (*Id.*) Appellant maintained that, although characterized as a Sonoran "consultant," Ms. Saldivar has "essentially continued" in her role as CFO of Sonoran since 2016, and consequently, Sonoran has "carried forward a contractual relationship with Metro." (*Id.*) Publicly-available information reveals that Ms. Saldivar continues to administer Sonoran's 401(k) program in her role as Sonoran's "undercover CFO." (*Id.* at 3.) In addition, Appellant continued, there is further evidence of support from Sonoran to Metro, including the co-location of both businesses in the same building and the use of Sonoran servers and e-mail addresses by Metro employees, including Ms. Saldivar. (*Id.*) Appellant asserted that Metro essentially "spun-off" from Sonoran as a newly-organized concern in order for Sonoran to continue to access small business opportunities. (*Id.* at 6.)

Appellant also claimed that the Area Office should find affiliation between Metro and Sonoran based on the "totality of the circumstances" under 13 C.F.R. § 121.103(a)(5). (*Id.*) According to Appellant, SBA administers a "sniff" test to determine if the record "smells" of affiliation, and if so, "affiliation may be found based on all the specific facts and circumstances even if affiliation cannot be found under any of the other specific avenues for an affiliation finding." (*Id.* at 6-7.) In the instant case, the pre-existing relationship between Metro and Sonoran, as well as their shared employees, facilities, and contractual relationships, are all evidence that the two firms are affiliated based on the totality of the circumstances. (*Id.* at 7.) Appellant contended that "***[t]here is no question that Sonoran controls or has the power to control Metro*** (the touchstone of affiliation)." (*Id.* (emphasis Appellant's).) Without the mentor-protégé relationship, Saguaro would not have been eligible to bid on the RFP. (*Id.*)

Accompanying the protest, Appellant also submitted a copy of the RFP; Ms. Saldivar's resume; Metro's Certificate of Good Standing with the State of Arizona; an Armed Services Board of Contract Appeals opinion based on an appeal by Sonoran; the SBA profiles for Metro and Sonoran; Sonoran's GovTribe profile and Brightscope profiles; a list of contracts performed by Metro and Sonoran; and printouts of Sonoran's and Metro's contact information and leadership pages on their websites. (*Id.*, Exhs. A-E, G-I, and K-N.) The printout of the leadership page on Sonoran's website identified Ms. Saldivar as Chief Financial Officer. (*Id.*, Exh. F.) Appellant also provided an e-mail, dated November 3, 2016, sent by Ms. Saldivar from a Sonoran e-mail account. (*Id.*, Exh. J.)

D. Protest Response

The CO forwarded Appellant's protest to the Area Office for review. On March 17, 2021, Saguaro responded to the protest and provided its sworn SBA Form 355, business records, and other supporting documents. Saguaro denied that Metro is affiliated with Sonoran and maintained that Metro is not a "spin off" of Sonoran. (Protest Response at 8, 18.)

As a preliminary matter, Saguaro provided background information about Metro's formation. While working for Sonoran full-time, Ms. Saldivar formed Metro, a member-managed Arizona limited liability company, in February 2016. (*Id.* at 2.) She worked for Metro on nights and weekends until she resigned from Sonoran on October 31, 2016, and began working for Metro full-time. (*Id.*) On October 26, 2016, SBA formally approved the MPA. (*Id.*) In November 2016, Metro entered into a consulting agreement with Sonoran "to provide accounting, CFO related services and other services to Sonoran, as Sonoran had grown to trust Ms. Saldivar in her financial acumen and Ms. Saldivar was already familiar with the tasks at hand." (*Id.* at 7.) On February 17, 2017, Metro was admitted to SBA's 8(a) program, and on March 6, 2017, Saguaro was formed as an Arizona limited liability company with Metro as its Managing Member. (*Id.* at 2, 4-5.) Saguaro is owned 51% by Metro and 49% by Sonoran. (*Id.* at 5.) On June 17, 2017, SBA's Arizona District Office approved Saguaro's JVA. (*Id.*)

Saguaro argued, first, that Metro is not affiliated with Sonoran under the newly-organized concern rule. (*Id.* at 10.) The rule is not even applicable here since Metro, established in 2016, is not "new." (*Id.*) Contrary to Appellant's suggestions, OHA has found that a concern "organized a mere two (2) years, six (6) months, and seventeen (17) days before OHA issued its decision was not a newly-organized concern." (*Id.* at 11, citing *Size Appeals of Ferguson-Williams, Inc. and R&D Maintenance Serv., Inc.*, SBA No. 2060 (1984).) Nor can Metro be characterized as having been "dormant" for an extended period after its establishment, since Metro has been an "active, revenue generating concern since its inception in 2016." (*Id.*, citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006).)

Turning to the four elements of the newly-organized concern rule, Saguaro argued that the first element fails because Metro's founder, Ms. Saldivar, was never an "officer, director, principal stockholder, managing member, or key employee" of Sonoran. (*Id.* at 3, 16.) Ms. Saldivar could not have been a "key employee" of Sonoran because she never had a senior role at the firm. (*Id.* at 3.) After Ms. Saldivar had worked for Sonoran approximately three years, Sonoran's majority owner and managing member, Mr. Paul A. Smiley, awarded her the "honorary title of CFO" so that "she would have more respect in dealing with third parties." (*Id.*) Sonoran's Operating Agreement "does not even mention the [position] of CFO," and thus the title was honorary, as Ms. Saldivar was not empowered "to have any decision making authority or any other legal authority over Sonoran." (*Id.*) Saguaro emphasizes that, notwithstanding her title, Ms. Saldivar was not authorized to sign checks, to approve price proposals, to make hiring or firing decisions, or to obligate Sonoran in any way. (*Id.* at 14.)

Appellant's characterization of Ms. Saldivar's role as a "key employee" also fails, because she did not have actual "influence or control over the operations of the concern as a whole." (*Id.* at 13-14, citing *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 9 (2016).)

Saguaro offers a sworn declaration from Mr. Smiley, who asserts that he is, and always has been, "the sole and final authority on all operational, leadership, HR, and managerial decisions involving Sonoran." (*Id.* at 14.) Sonoran's Operating Agreement specifically states that Mr. Smiley alone "is responsible for day-to-day operations. No Person other than Mr. Smiley shall have the authority to act for or bind [Sonoran], except pursuant to his express delegation in writing." (*Id.* at 15, quoting Sonoran's Amended and Restated Operating Agreement, § 3.1.) Despite Appellant's assertions to the contrary, the fact that Metro currently provides financial consulting services to Sonoran is not evidence that Ms. Saldivar is a former "key employee" of Sonoran. (*Id.*) The MPA permits and encourages contracting between mentor and protégé, so Metro's consultancy with Sonoran has "no probative value and certainly cannot amount to affiliation." (*Id.* at 14.) Similarly, the inclusion of Ms. Saldivar, in her role as a consultant, in a 2018 e-mail with Sonoran's managerial personnel does not establish that she was ever a "key employee" of Sonoran. (*Id.* at 15.) The fact that a different employee, [XXXXXXXXX], worked on a part-time basis for both Sonoran and Metro is also irrelevant to the newly-organized concern rule inquiry, as Appellant does not even allege that [XXXXXXX] was ever an officer or key employee of Sonoran. (*Id.* at 15-16.)

Saguaro did not dispute Appellant's contention that Metro and Sonoran work in the "same or related industry" in satisfaction of the second element of the newly-organized concern rule. (*Id.* at 16.) Saguaro reiterated, however, that Ms. Saldivar was never an officer or key employee of Sonoran. (*Id.*) Finally, Appellant's allegations relating to the fourth element are flawed, since any assistance from Sonoran to Metro was allowable under their MPA and the ASMPP. (*Id.*) The applicable SBA regulation states:

> (a) *General*. The [ASMPP] is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. **This assistance may include technical and/or management assistance**; financial assistance in the form of equity investments and/or loans; **subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education**; and/or **assistance in performing prime contracts with the Government through joint venture arrangements**. **Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities**.

(*Id.* at 17, quoting 13 C.F.R. § 125.9(a) (emphasis added by Saguaro).) As such, Saguaro asserts, "Sonoran as the mentor was allowed and encouraged to furnish Metro with subcontracts" and other assistance. (*Id.*)

Appellant's allegation that Sonoran is providing Metro with assistance in the form of facilities also fails. (*Id.*) Although both Metro and Sonoran have suites in the same multi-tenant building, each firm has its own separate lease with the building's landlord, Estrella Professional Center #15, LLC. (*Id.*) Sonoran subleases one office from Metro, while Metro does not sublease any space from Sonoran. (*Id.* at 17-18.) In addition, Metro has its "own company server, e-mail, and computer network" and thus, is not reliant on Sonoran for these resources. (*Id.* at 18.) Ms.

Saldivar uses her Sonoran e-mail address only while performing consulting services for Sonoran. As such, Appellant has failed to make any plausible showing that the fourth element is satisfied. If any single element of the newly-organized concern rule is not met, the test cannot be satisfied, and the protest must fail. (*Id.*)

Turning to Appellant's final allegation, Saguaro insisted that there is no affiliation based on the totality of the circumstances. (*Id.* at 18.) Appellant's allegations are premised on "pure conjecture," or on "actions that are permitted by a[n] SBA-approved MPA." (*Id.* at 19.) Appellant cannot show that "one concern controls or has the power to control the other," a prerequisite for affiliation. (*Id.* at 18, citing *Size Appeal of SC&A, Inc.*, SBA No. SIZ-6059, at 12 (2020).) The sworn declarations of Mr. Smiley and Ms. Saldivar affirm that Sonoran and Metro are independent entities and that "Sonoran has no power to control Metro." (*Id.* at 20 (emphasis Saguaro's).)

Accompanying its response to the protest, Saguaro submitted sworn declarations from Ms. Saldivar and Mr. Smiley; a letter from Ms. Saldivar resigning from her position at Sonoran, effective October 31, 2016; a copy of the ASMPP approval letter, dated October 26, 2016; excerpts of Metro's and Sonoran's leases; a copy of Saguaro's JVA, with various addendums; copies of the Operating Agreements of Saguaro, Metro, and Sonoran; and other tax and business records. (Protest Response, Exhs. A-K.) According to Metro's SBA Form 355, Ms. Saldivar currently is a "non-voting member" and [minority] owner of Sonoran, as well as President and 100% owner of Metro. (SBA Form 355, responses to questions 4, 5, and 9b.) Sonoran's Operating Agreement likewise reflects that Ms. Saldivar was a non-voting member of Sonoran, with a [minority] ownership interest, as of January 1, 2019. (Sonoran Operating Agreement at Exh. A.) Mr. Smiley is Sonoran's only voting member, and holds [a majority] ownership interest. (*Id.*)

In her declaration, Ms. Saldivar avers that she was never an officer of Sonoran, and never held any substantive control over Sonoran's decision-making, including its financial decisions. (Saldivar Decl. ¶ 17.) After her resignation from Sonoran, Metro and Sonoran entered into a consulting agreement whereby Metro performs "accounting [and] CFO related services" for Sonoran. (*Id.* ¶¶ 14-15.) Metro also performs similar work for several other companies. (*Id.*) Ms. Saldivar states that Sonoran "did not provide any technical, management, financial, marketing or any other type of assistance to Metro" prior to approval of the MPA on October 26, 2016. (*Id.* ¶ 16.)

In his declaration, Mr. Smiley attests that Ms. Saldivar is a former employee of Sonoran who held the "honorary title of CFO." (Smiley Decl. ¶¶ 6, 12.) However, Ms. Saldivar was never an actual officer of Sonoran, nor did she control any aspect of Sonoran's operations. (*Id.* ¶¶ 6, 14.) Instead, Sonoran is, and always has been, controlled solely by Mr. Smiley. (*Id.* ¶¶ 12-13.) Ms. Saldivar resigned from Sonoran by letter dated October 7, 2016, and her resignation became effective October 31, 2016. (*Id.* ¶ 8.) On October 26, 2016, SBA approved the MPA between Sonoran and Metro. (*Id.* ¶ 9.) On November 1, 2016, Sonoran entered into a consulting agreement with Metro to obtain CFO-related services. (*Id.* ¶ 10.) Mr. Smiley states that Sonoran "did not provide any technical, management, financial, marketing or any other type of assistance to Metro" prior to approval of the MPA. (*Id.* at ¶ 11.)

E. Size Determination

On April 6, 2021, the Area Office issued Size Determination No. 06-2021-038, concluding that Saguaro is a small business. The Area Office evaluated Appellant's allegations that Saguaro's joint venture partners, Metro and Sonoran, are affiliated with one another and determined that the firms are not affiliated on any of the protested grounds. (Size Determination at 1-2.)

The Area Office first explained that it "does not have the jurisdiction to question the motives behind entering the existing MPA or to explore attempts at invalidating an existing MPA." (*Id.* at 9, citing *Size Appeal of Sevenson Envtl. Servs., Inc.*, SBA No. SIZ-6087 (2021).) As such, the Area Office did not investigate Appellant's complaints that Sonoran "provided support and assistance" to Metro prior to the date that the MPA was formed. (*Id.* at 8-9.)

Turning to the next protest allegation, the Area Office found that Metro and Sonoran, as joint venture partners, normally would be affiliated under 13 C.F.R. § 121.103(h)(2). (*Id.* at 10.) Based on a review of Metro's tax returns for the three years preceding the date to determine size, November 15, 2019, the Area Office found that Metro is small under the applicable $30 million size standard. Sonoran, though, is not small. (*Id.*) However, SBA regulations recognize certain exceptions to joint venture affiliation, including:

> (ii) Two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of §§ 124.513 (c) and (d), §§ 125.8(b) and (c), §§ 125.18(b)(2) and (3), §§ 126.616(c) and (d), or §§ 127.506(c) and (d) of this chapter, as appropriate.

(*Id.* at 11, quoting 13 C.F.R. § 121.103(h)(3).)

The Area Office noted that, pursuant to 13 C.F.R. § 121.404(d), Saguaro's compliance with §§ 125.8(b) and (c) is assessed as of the date of the final proposal revisions for negotiated acquisitions. (*Id.* at 12.) Here, the Area Office found that final proposals were submitted April 27, 2020, so the Area Office analyzed Saguaro's JVA as of that date. (*Id.* at 12, 20.)

The Area Office found that the JVA met the requirement of 13 C.F.R. § 125.8(b)(2)(i), because the JVA set forth the purpose of the joint venture and specifically identified the instant RFP. (*Id.* at 15.) The JVA stated that, the protégé, Metro, would be the Managing Venturer and that Ms. Saldivar, an employee of Metro, would be the Project Manager, in compliance with § 125.8(b)(2)(ii). (*Id.*) Metro owns 51% of Saguaro, satisfying § 125.8(b)(2)(iii). (*Id.*) The profits from the joint venture are distributed commensurate with the work that Metro performs, as required by § 125.8(b)(2)(iv). (*Id.* at 16.) Saguaro's JVA satisfies the requirements of § 125.8(b)(2)(v) since it provides for the establishment and administration of a special bank account in the name of the joint venture, and Saguaro provided substantiating documentation in

the form of a bank signature card for Saguaro. (*Id.*) Because the instant procurement is predominantly for services, and major equipment, facilities, and other resources are provided by the Air Force, the Area Office found that that Saguaro's JVA adequately described the resources that will be contributed by each joint venture partner, as required by § 125.8(b)(2)(vi). (*Id.* at 16-17.)

The JVA met the requirements of § 125.8(b)(2)(vii) since it indicated that Ms. Saldivar will be responsible for contract negotiations, explained how Metro and Sonoran will provide contract labor, and described the planned distribution of work. (*Id.* at 17.) The JVA met the requirements of § 125.8(b)(2)(viii) because it obligated Metro and Sonoran to ensure performance of the contract in the event of withdrawal of the other joint venturer. (*Id.*) In accordance with § 125.8(b)(2)(ix), the JVA specified that accounting and other administrative records relating to the joint venture will be kept at Metro's offices. (*Id.*) The JVA also met the requirements of § 125.8(b)(2)(x) because it requires that original records be retained by Metro upon completion of any contract set aside or reserved for small businesses that was performed by the joint venture. (*Id.* at 17-18.) In accordance with § 125.8(b)(2)(xi) and (xii), the JVA stated that quarterly financial statements must be submitted to SBA not later than 45 days after each operating quarter, and that a project-end profit and loss statement must be submitted to SBA no later than 90 days after completion of the contract. (*Id.* at 18.)

The Area Office also found that Saguaro's JVA satisfied the requirements of 13 C.F.R. § 125.8(c)(3), because Saguaro will perform at least 51% of the work; the JVA made clear that Metro, the protégé, will perform at least 40% of the contract; and Metro's work does not consist of mere administrative or ministerial functions. (*Id.* at 19-20.) Because Saguaro's JVA satisfied all requirements under §§ 125.8(b) and (c), the Area Office found that Saguaro is eligible for the exception to affiliation under 13 C.F.R. § 121.103(h)(3)(ii). (*Id.*)

Turning to the next allegation, the Area Office found that Metro and Sonoran are not affiliated based on the newly-organized concern rule, 13 C.F.R. § 121.103(g). (*Id.* at 21.) Although Ms. Saldivar previously worked at Sonoran before founding Metro, her role as CFO was "symbolic and [she] lacked the power to bind Sonoran or make decisions on behalf of Sonoran." (*Id.* at 21.) Moreover, as both CFO and a non-voting minority member, Ms. Saldivar "lacked critical influence or substantive control over the operations or management of Sonoran." (*Id.*) Mr. Smiley, the sole officer and controlling member of Sonoran, holds no interest in Metro and thus cannot control Metro. (*Id.*) The Area Office further noted that even if Ms. Saldivar were a former key employee of Sonoran, she has not been employed with that company since 2016. (*Id.*)

Finally, the Area Office found no basis to conclude that Metro and Sonoran are affiliated through identity of interest under 13 C.F.R. § 121.103(f). (*Id.* at 21-22.) In the instant case, apart from their joint association with Sonoran, Mr. Smiley and Ms. Saldivar do not share any familial relationship or common ownership in any other concern, nor does Metro derive 70% or more of its receipts from Sonoran. (*Id.* at 22.) Absent any finding of affiliation between Metro and Sonoran, the Area Office determined that Saguaro is small under the size standard associated with the instant procurement. (*Id.*)

F. Appeal

On April 20, 2021, Appellant filed the instant appeal. Appellant asserts that the Area Office clearly erred in its review, and failed to adequately investigate Appellant's protest allegations. Appellant renews its contentions that Saguaro's joint venture partners, Sonoran and Metro, are affiliated under the newly-organized concern rule and the totality of the circumstances. (Appeal at 2.) In addition, the Area Office overlooked that the MPA between Sonoran and Metro had lapsed as of the date of self-certification. Therefore, OHA should reverse or remand the size determination. (*Id.*)

Appellant argues, first, that the Area Office's application of the newly-organized concern rule was deficient. (*Id.* at 5-11.) In particular, the Area Office clearly erred in finding that Ms. Saldivar is not a former "officer" of Sonoran. (*Id.* at 8.) Despite Saguaro's claim that Ms. Saldivar's title of Chief Financial Officer was merely "honorary," Ms. Saldivar held this position for several years and still includes her role as Sonoran's Chief Financial Officer on her Linked-In profile. (*Id.*) SBA policy guidance suggests that "C-suite title[s] (such as Chief Executive Officer or Chief Financial Officer)" should be classified as "officers" for purposes of the newly-organized concern rule. (*Id.*, citing "Small Business Compliance Guide: A Guide to the SBA's Size Program and Affiliation Rules" (July 2020), at 15.) Further, the regulatory text does not recognize "honorary titles." (*Id.* at 9). Under the Area Office's approach, any protested concern could construe officer positions as merely "honorary" to evade a finding of affiliation under the newly-organized concern rule. (*Id.*)

Appellant claims that the Area Office erred by determining that an individual must be both a former officer and former a key employee to trigger the presumption under the newly-organized concern rule. (*Id.*) Rather, the language of the rule is disjunctive. (*Id.*) The presumption is triggered "where former officers, directors, principal stockholders, managing members, ***or*** key employees of one concern . . ." start a new business. (*Id.* (quoting 13 C.F.R. § 121.103(g) (emphasis added by Appellant).) The Area Office also erred by suggesting that a former officer must have "controlled" the concern. (*Id.*) The fact that Mr. Smiley alone may have controlled Sonoran due to his majority ownership interest has no bearing on whether Ms. Saldivar is a former officer of Sonoran. (*Id.*)

Next, Appellant highlights that the Area Office failed to consider whether a "clear line of fracture" exists between Metro and Sonoran. (*Id.* at 10.) Since 2016, in her role as a Sonoran consultant, Ms. Saldivar still has been performing CFO duties for Sonoran and continues to exert "critical influence in Sonoran's business operations." (*Id.*) In support, Appellant points to a 2018 e-mail between Ms. Saldivar and "Sonoran's highest ranking management personnel on a meeting invite to 'discuss the current status of the four contracts Sonoran [and another firm] share and to discuss future opportunities."' (*Id.*) The use of Sonoran e-mail addresses by Metro personnel, like Ms. Saldivar, illustrates Sonoran's support of Metro in the form of operational resources. (*Id.*) In addition, Ms. Saldivar still holds an ownership interest in Sonoran. (*Id.*) According to Appellant, OHA has not previously found a clear line of fracture in the situation "where a departing officer/owner/key employee remains an owner in the Company from which they departed." (*Id.*) The numerous connections between Sonoran and Metro serve to "completely and totally disprove a clear line of fracture." (*Id.* at 11.)

Appellant asserts that the Area Office erred in finding that Metro and Sonoran qualify for the exception to affiliation for an SBA-approved mentor and protégé. (*Id.*) As of the relevant date to determine size, November 15, 2019, the original three-year term of the MPA had lapsed and had not been renewed. (*Id.*) The Area Office itself found that the MPA was approved "**for a period of three (3) years beginning on October 26, 2016 and ending October 26, 2019**." (*Id.* quoting Size Determination at 8 (emphasis added by Appellant).) Not until six months later, in an e-mail dated March 12, 2020, did SBA notify Ms. Saldivar that the MPA had been extended. (*Id.* at 11.) While the current version of 13 C.F.R. § 125.9(e)(5) provides that "[u]nless rescinded in writing as a result of an SBA review, the mentor protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm," the version of the rule in effect on November 15, 2019 enabled the MPA to lapse after its three-year initial term. (*Id.* at 12.) Accordingly, without a valid MPA, Metro and Sonoran do not qualify as mentor-protégé joint venturers. (*Id.*) Appellant reiterates its view that, even if the MPA were in effect, Metro and Sonoran still would be affiliated under both the newly-organized concern rule and the totality of the circumstances. (*Id.*)

Appellant lastly avers that the Area Office failed to properly analyze affiliation under the totality of the circumstances. (*Id.*) According to 13 C.F.R. § 121.103(a)(5), "SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation." (*Id.*) The Area Office therefore should have "take[n] an overall look at the facts in the record" and determined whether one concern had the power to control another concern. (*Id.*) The Area Office failed to adequately review the record and ignored the multiple connections between Metro and Sonoran, including but not limited to:

> 1) overlapping ownership; 2) sharing of employees (Ms. Saldivar was admittedly an employee of ***both*** Metro ***and*** Sonoran at the same time in October 2016 as was at least one other individual); 3) sharing of resources through e-mail servers and networks; 4) locations in the same building; 5) using Ms. Saldivar to continue to provide financial consulting services essentially as an undercover CFO (Exhibit G); 6) using Ms. Saldivar to continue to administer and manage Sonoran's 401(k) (Exhibit K); and 7) even after "leaving" Sonoran (i.e., after October 31, 2016, the date that Ms. Saldivar swears was her last date working for Sonoran as an employee), Ms. Saldivar continuing to act on behalf of Sonoran's management in routine contract administration matters and even coordinating company social events from a Sonoran employee e-mail address.

(*Id.* at 13 (emphasis Appellant's).)

G. Saguaro's Response

On May 6, 2021, Saguaro responded to the appeal. Saguaro argues that the Area Office "thoroughly analyzed" the protest allegations and correctly determined that Metro is not affiliated with Sonoran. (Response at 1.) The appeal therefore should be denied.

Saguaro asserts, first, that the Area Office properly applied the newly-organized concern rule to find that Metro and Sonoran are not affiliated. (*Id.* at 7.) Notwithstanding Appellant's contentions to the contrary, the Area Office appropriately determined that the first element of the newly-organized concern rule test is not satisfied, because Ms. Saldivar is neither a current or former "officer," nor a current or former "key employee," of Sonoran. (*Id.*) OHA precedent instructs that if the first element fails, "there can be no violation of the newly-organized concern rule, irrespective of whether the remaining conditions of the rule are met." (*Id.* at 7-8, citing *Size Appeal of Metis Tech. Solutions, Inc.*, SBA No. SIZ-5538 (2014) and *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769 (2016).) In response to the protest, Saguaro explained, and the Area Office agreed, that Ms. Saldivar's CFO title was "honorary" and does not indicate that she is, or was, an "officer of Sonoran, which is a legal position that simply does not exist for Sonoran under Sonoran's Operating Agreement." (*Id.*)

Saguaro observes that, to be considered a "key employee," an individual "must have influence or control over a concern as a whole" and a role that is critical to the "control of day-to-day operations." (*Id.*, citing *Size Appeal of Alterity Mgmt. & Tech. Solutions, Inc.*, SBA No. SIZ-5514, at 6 (2013).) OHA precedent instructs that a key employee "is not merely an employee with a responsible position or a particular title. A key employee is one who actually has influence or control over the operations of the concern as a whole." (*Id.* at 9, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5769, at 9 (2016).)

In the instant case, Saguaro maintains, the Area Office properly determined that Ms. Saldivar is not a former "key employee" under this test because she "lacked critical influence or substantive control over the operations or management at Sonoran." (*Id.* at 10, citing Size Determination at 22.) Ms. Saldivar did not have contract signature authority, bank signature authority, or any other type of authority necessary to bind Sonoran. (*Id.* at 9.) Further, she lacked authority to hire or fire Sonoran employees. (*Id.*) Mr. Smiley alone is "the only person in Sonoran that has a critical influence or substantive control over Sonoran's operations and management." (*Id.*)

Appellant's arguments are premised on misleading references to "C-suite titles" in SBA's "Small Business Compliance Guide." (*Id.* at 10.) The example cited by Appellant only references Chief Executive Officers, not Chief Financial Officers, and therefore does not support the conclusion that a "C-suite title automatically renders an individual a legal officer of a company." (*Id.*) Saguaro also contests Appellant's claim that Ms. Saldivar had "apparent authority" and should consequently be considered an "officer" under 13 C.F.R. § 121.103(g). (*Id.* at 12.) This allegation was not raised in the protest and is not supported by any legal basis. (*Id.* at 12-13.) OHA lacks authority to adjudicate "new issues presented for the first time on appeal" and thus, "any newly raised issues must be dismissed." (*Id.* at 13, citing 13 C.F.R. § 134.316(c).)

Furthermore, Sonoran is organized under Arizona law which does not contemplate "apparent authority" as "[o]fficer authority for a limited liability company is derived from the operating agreement of the entity." (*Id.*) The relevant documents, including Sonoran's Operating Agreement, provided in response to the protest clearly demonstrate that Sonoran's Managing Member, Mr. Smiley, "had sole authority over all decision-making" for Sonoran and that Ms. Saldivar was not an officer. (*Id.*) In addition, courts have applied the doctrine of apparent

authority only in circumstances where a third party relied upon the apparent authority of an individual on behalf of the principal, a fact pattern that is not present in the instant case, as Appellant has no standing to assert that it relied on the apparent authority of Ms. Saldivar. (*Id.* at 15, citing *Smith v. Gimli M.D.*, No. C20182677, 2020 WL 5499238 (Ariz.Super. May 21, 2020) and *Great Am. Ins. Co. v. United States*, 481 F.2d 1298, 1312 (Ct. Cl. 1973).)

Next, Saguaro argues that the Area Office properly determined that the fourth element of the newly-organized concern rule was not satisfied, because any contracts and assistance provided by Sonoran to Metro were allowable under the ASMPP program. (*Id.* at 10-11, citing 13 C.F.R. § 125.9(a).) Furthermore, application of the newly-organized concern rule is not appropriate since Metro is not actually a "new" business. (*Id.* at 11.) Metro has been in existence since 2016 and thus had more than three and a half years of revenue-generating business as of the relevant dates to determine size. (*Id.*) OHA precedent instructs that firms in existence for more than three years are not considered "new" for the purposes of applying the newly-organized concern rule. (*Id.* at 12, citing *Size Appeals of Ferguson-Williams, Inc. and R&D Maintenance Serv., Inc.*, No. 2060, 1984 WL 42004 (October 18, 1984) and *Size Appeal of W. B. & A., Inc.*, SBA No. 1835 (1983).)

Saguaro asserts that Appellant's "clear line of fracture" argument is raised for the first time on appeal, and in any event is rendered moot by the Area Office's conclusion that there was no affiliation. (*Id.* at 16-17.) In accordance with 13 C.F.R. § 121.103(g), a "concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns." (*Id.* at 17 (emphasis added by Saguaro.).) Because the Area Office did not find Metro and Sonoran affiliated in the first instance, it would have been unnecessary and inappropriate for the Area Office to reach this issue. (*Id.*) Further, even if the Area Office had engaged in this inquiry, it still would not have found affiliation since an SBA-approved MPA "provides an exception to affiliation for contractual and other assistance." (*Id.*)

Appellant's argument that the MPA had lapsed, another issue raised for the first time on appeal, lacks merit. (*Id.*) Appellant attempts distinguish between an earlier version of 13 C.F.R. § 125.9(e)(5) and a newer version of this regulation. (*Id.* at 17-18.) While the newer version no longer contains language stating that "SBA will review the mentor-protégé relationship annually to determine whether to approve its continuation for another year," both versions of the regulation state:

> Unless rescinded in writing as a result of an SBA review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm.

(*Id.* at 18, citing 13 C.F.R. § 125.9(e)(5).) Applying either version of the regulation, then, "the only manner by which a mentor-protégé relationship does not automatically renew is if the SBA rescinds the relationship in writing." (*Id.*) In the instant case, the MPA automatically renewed since SBA did not rescind its approval in writing. (*Id.*) In fact, on October 10, 2019, SBA sent Ms. Saldivar an e-mail explaining:

> We [*i.e.*, SBA] are currently reviewing all ASMPP 3 Year Extension Agreements you will receive a decision letter at the completion of our review. You can continue to operate your MPA until a decision is made.

(Response, Exhibits A-B.) Because the MPA did not lapse, Appellant's allegations of "assistance" arising to affiliation under the fourth element of the newly-organized concern rule lack merit. (*Id.* at 18.)

Finally, Saguaro maintains that the Area Office properly analyzed, and rejected, Appellant's allegation of affiliation under the totality of the circumstances based on shared employees, shared facilities, and contractual relationships. (*Id.* at 19-20.) While the Area Office did not use the exact phrase "totality of the circumstances" in the size determination, it did provide an "in depth, 10-page analysis of Saguaro's eligibility," and addressed whether there were indications that Sonoran could control Metro, or *vice versa*. (*Id.*) The Area Office thoroughly examined the claim of "shared facilities" by reviewing the lease arrangements of Metro and Sonoran. (*Id.*) Saguaro observes that OHA has held that the mere "fact that one firm leases office space from another provides no basis to find power to control."DD' (*Id.* at 19, citing *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316 (2012).) Appellant's allegation that Ms. Saldivar "manages" Sonoran's 401(k) plan also does not suggest affiliation under the totality of the circumstances. There is no factual evidence to support this contention, and the allegation also is raised on appeal for the first time, and thus should be dismissed. (*Id.*)

Saguaro also asserts that the Area Office had no obligation to "even address or consider shared employees, facilities, or contractual relationships in a totality of circumstances analysis." (*Id.* at 20.) Instead, the pertinent issue is whether one concern controls another concern, not whether there are miscellaneous connections between the concerns. (*Id.*, citing *Size Appeal of SC&A, Inc.*, SBA No. SIZ-6059 (2020).) Saguaro insists that Appellant relies entirely on "speculation" or allegations of assistance that are not improper between an SBA-approved mentor and protégé. (*Id.* at 20-21.) After reviewing the record, the Area Office determined that Mr. Smiley, the majority owner of Sonoran, "is not an owner, officer, principal, or key employee at Metro; thus, Mr. Smiley cannot control Metro." (*Id.* at 21, citing Size Determination at 21.) As such, the Area Office performed sufficient analysis to determine that there was no affiliation under the totality of the circumstances. (*Id.* at 21.) It is immaterial that the size determination did not use the precise phrase "totality of the circumstances" since the Area Office clearly performed the requisite analysis for affiliation under this test. (*Id.* at 22, citing *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009).) Saguaro urges that, even if OHA were to find that the Area Office should have commented directly on the totality of the circumstances, any such error was harmless. (*Id.* at 22.)

Accompanying its Response, Saguaro attached e-mails between Ms. Saldivar and SBA officials concerning the renewal of the MPA; a supplemental declaration from Ms. Saldivar; and a supplemental declaration from Mr. Smiley. (Response, Exhs. A-C.) Saguaro also filed a motion to introduce the new evidence into the record under 13 C.F.R. § 134.308. (Motion at 1.) There is good cause to admit the new evidence, Saguaro maintains, because it rebuts allegations raised for the first time on appeal, specifically Appellant's assertions that the MPA lapsed, and that Ms.

Saldivar had "apparent authority" and therefore should be considered an officer of Sonoran. (*Id.* at 2.)

H. Supplemental Appeal

On May 6, 2021, after its counsel reviewed the record under the terms of an OHA protective order, Appellant moved to supplement its appeal. Appellant observes that OHA has routinely grants litigants leave to supplement their appeals under such circumstances. (*Id.*, citing *Size Appeals of Maywood Closure Co., LLC and TPMC-EnergySolutions Envtl. Servs. 2009, LLC*, SBA No. SIZ-5499, at 5 (2013).) Accordingly, for good cause shown, Appellant's motion is GRANTED and the Supplemental Appeal is ADMITTED.

The Supplemental Appeal focuses on the declarations of Mr. Smiley and Ms. Saldivar that Saguaro provided to the Area Office in response to the protest. (Supp. Appeal at 2.) First, Mr. Smiley's declaration concedes that he "appointed Ms. Saldivar as Sonoran's 401(k) plan administrator with signature authority consistent with that role." (*Id.*, citing Smiley Decl. ¶ 14.) Appellant argues that Mr. Smiley's statement "undermines the Area Office's conclusion that Ms. Saldivar's role was merely 'symbolic"' since the role of 401(k) administrator "necessarily requires legal and administrative duties that affect the entire company." (*Id.* at 2-3.) Moreover, Mr. Smiley acknowledges that Ms. Saldivar had signature authority for purposes of plan administration. (*Id.* at 3, citing Smiley Decl. ¶ 14.) Accordingly, Mr. Smiley's declaration contradicts the Area Office's conclusion that Ms. Saldivar's role as Sonoran's CFO does not rise to the level of an "officer" for purposes of the newly-organized concern rule. (*Id.*)

Second, Appellant contends that Ms. Saldivar's declaration should have been disregarded by the Area Office due to clear inconsistencies. (*Id.*) In Appellant's view, these statements include Ms. Saldivar's description of her "alleged non-vital role in Sonoran's operations despite being a named officer of the company, conclusions regarding the nature of Metro and Sonoran's business relationship, and responses to specific exhibits submitted by [Appellant] in its Size Protest." (*Id.* at 3-4.) Further, Appellant argues, Ms. Saldivar offers an inconsistent timeline of events in her declaration by stating that Metro was admitted into the 8(a) program on February 17, 2017, and that the Metro-Sonoran MPA was approved on October 26, 2016. (*Id.* at 2.) Elsewhere in her declaration, though, Ms. Saldivar comments that "[s]oon after Metro became certified in the SBA 8(a) Business Development program, [Ms. Saldivar] approached Mr. Smiley about mentoring Metro. . . ." (*Id.*, quoting Saldivar Decl. ¶ 9).)

I. Supplemental Response

On May 18, 2021, Saguaro opposed Appellant's motion to supplement the appeal. Saguaro maintains that Appellant has not shown valid reason to supplement the appeal. Alternatively, Saguaro requests leave to supplement its response. (Motion at 1.) In Saguaro's view, the arguments raised in the supplemental appeal are irrelevant and cannot possibly justify overturning the size determination. (*Id.* at 2.) Because OHA has granted Appellant leave to supplement the appeal, Saguaro's request to supplement its response also is GRANTED.

Saguaro argues, first, that the mere fact that Ms. Saldivar was Sonoran's 401(k) administrator does not demonstrate that she was ever an "officer" of the firm, because an officer is "a legal position that exists with a company's operating agreement and corporate structure." (*Id.*) As 401(k) plan administrator, Ms. Saldivar had only limited autonomy and signature authority "**so long as she obtained [Mr. Smiley's] review and approval before anything was signed**." (*Id.* (emphasis Saguaro's).)

Saguaro asserts that Appellant's other principal argument is premised on an "entirely immaterial and obviously innocent mistake" in Ms. Saldivar's first declaration. (*Id.* at 2.) The exact dates of Metro's entrance into the 8(a) program and approval of the MPA are set forth in the declaration. (*Id.*) Saguaro also provided the Area Office with the SBA letter approving the MPA, so the Area Office would not have had doubt as to the timeline for the establishment of the MPA. (*Id.* at 2-3.) The instant procurement is for a "**small business set-aside, not an SBA 8(a) set-aside"** and thus, any inconsistencies relating to the exact date of Metro's entry into the 8(a) program were irrelevant to the size determination. (*Id.* at 3, emphasis Saguaro's.)

J. Appellant's Opposition to Motion to Introduce New Evidence

On May 20, 2021, Appellant opposed Saguaro's motion to introduce new evidence. According to Appellant, the new evidence should be excluded because it is "irrelevant, redundant, and was available at the time of Saguaro's response" to the protest. (Motion at 2.) Further, contrary to Saguaro's contentions, the issues in the appeal "**are not new grounds or additional issues raised for the first time**." (*Id.* at 3 (emphasis Appellant's).) It therefore would be improper for OHA to consider new evidence on those points.

Appellant disputes Saguaro's characterization of the "apparent authority" claim as having been voiced for the first time on appeal. (*Id.* at 4.) Rather, the appeal addressed the Area Office's conclusion that Ms. Saldivar was given her CFO title by Mr. Smiley so that "***she would have more respect dealing with third parties***." (*Id.* (emphasis Appellant's).) Thus, Saguaro initially raised the issue of apparent authority by admitting the reason why Ms. Saldivar was given her CFO title. (*Id.* at 4.)

Appellant also maintains that the e-mails pertaining to renewal of the MPA should also not be admitted into the record because Appellant did not raise any "new issue." (*Id.* at 5.) Instead, the appeal explained that the Area Office incorrectly relied on a newer version of the ASMPP regulations to determine dates for MPA renewals. (*Id.*) The e-mails do not assist OHA in finding whether the Area Office erred in its analysis of this question. (*Id.*) Further, even if the MPA did automatically renew, as Saguaro asserts, this still would not "paper over" the existing affiliation between Sonoran and Metro. (*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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In the instant case, I find that Saguaro has shown good cause to introduce new evidence. Section II.G, *supra*. The evidence in question is limited in scope, consistent with the information Saguaro previously provided to the Area Office, and responds and expounds specifically on issues presented in the appeal. For these reasons, Saguaro's motion is GRANTED and the new evidence is ADMITTED into the record.

C. Analysis

In its protest, Appellant alleged that Saguaro is affiliated with Sonoran under the newly-organized concern rule and the totality of the circumstances. Section II.C, *supra*. The Area Office investigated these allegations and found them to be meritless. Sections II.D and II.E, *supra*. On appeal, Appellant maintains that the Area Office erred in its analysis of these questions. Sections II.F and II.H, *supra*. In addition, according to Appellant, the Area Office improperly analyzed the mentor-protégé relationship between Sonoran and Metro. *Id.* Because Appellant has not shown that the Area Office clearly erred with regard to any of these issues, the appeal must be denied.

1. Newly-Organized Concern Rule

Appellant first maintains that the Area Office incorrectly found that Sonoran and Metro are not affiliated under the newly-organized concern rule, 13 C.F.R. § 121.103(g). OHA utilizes a four-part test to examine affiliation under this rule, and the Area Office found that two of the elements (the first and the fourth) were not satisfied in the instant case. Section II.E, *supra*. On appeal, Appellant contends that the Area Office should have found that Metro's founder, Ms. Saldivar, is a former "officer" of Sonoran, because she held the title of Sonoran's "Chief Financial Officer." Section II.F, *supra*. According to Appellant, SBA policy guidance instructs

that a concern's "C-suite" employees are "officers" for purposes of the newly-organized concern rule. *Id.* In addition, Appellant maintains, the Area Office erred by conflating the determination of a former "officer" and a "key employee" into one single inquiry. Because Ms. Saldivar is a former "officer" of Sonoran, the first element of the newly-organized concern rule is met, irrespective of whether she also is a former "key employee" of Sonoran. *Id.*

I find no merit to Appellant's arguments. In response to the protest, the Area Office obtained and considered sworn declarations from Mr. Smiley and Ms. Saldivar. Section II.D, *supra*. In their declarations, both Mr. Smiley and Ms. Saldivar attested that Mr. Smiley alone has, and always has had, sole decision-making authority for Sonoran; that Ms. Saldivar is not, and never was, an officer of Sonoran; that Ms. Saldivar's title of Chief Financial Officer was merely "honorary" in nature and did not connote that she was an actual officer of Sonoran or that she had any substantive control over Sonoran's operations; and that Ms. Saldivar has not been employed by Sonoran since October 31, 2016, although she did thereafter continue to perform certain financial-related services for Sonoran as a consultant. *Id.* The Area Office appropriately attached significant probative value to these signed, sworn statements. 13 C.F.R. § 121.1009(d) (an area office must "give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.").

Further, Sonoran is a limited liability company based in the state of Arizona, and there is no indication that such an entity is required to have a "Chief Financial Officer" under Arizona law. Nor is the role of "Chief Financial Officer" a position contemplated by Sonoran's organizational documents, such as its Operating Agreement. In addition, there is no evidence that Sonoran or Mr. Smiley ever formally appointed Ms. Saldivar to an "officer" position. Given these facts, the Area Office reasonably concluded that Ms. Saldivar is not a current or former "officer" of Sonoran.

Although SBA regulations at 13 C.F.R. § 121.103(g) do not define the term "officer," the regulations do define a "key employee" as 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." Interpreting this provision, OHA has long recognized that the mere fact that an individual held "a responsible position or particular title" does not suffice to show that the individual was a "key employee." *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 9 (2016); *Size Appeal of Willow Envtl., Inc.*, SBA No. SIZ-5403, at 6 (2012). Rather, the relevant inquiry is whether the individual actually had "influence or control over operations of the concern as a whole." *Size Appeal of Crash Research & Analysis, Inc.*, SBA No. SIZ-6106, at 17 (2021). Accordingly, OHA case law supports the conclusion that an individual's title is not controlling in determining whether the first element of the newly-organized concern rule is met.

On appeal, Appellant maintains that the Area Office ignored SBA policy guidance suggesting that a "C-suite" employee is an officer of that concern. Again, though, because Ms. Saldivar's title as Sonoran's CFO was merely "honorary," there is no indication here that Ms. Saldivar actually did hold a "C-suite" leadership position within Sonoran. Further, as Saguaro observes, the policy guidance in question indicates that a "former chief executive officer" is an officer of the company, but does not discuss "C-suite" employees in general. *See* Small Business Compliance Guide: A Guide to the SBA's Size Program and Affiliation Rules (July 2020), at 15.

Contrary to Appellant's claims, then, the policy guidance does not establish that all "C-suite" employees are necessarily officers.

Having concluded that Ms. Saldivar is not a former "officer" of Sonoran, the Area Office also considered whether she is a former "key employee" of Sonoran. Section II.E, *supra*. Appellant has not shown that this portion of the Area Office's analysis was erroneous. In *Size Appeal of CJW Construction, Inc.*, SBA No. SIZ-5254 (2011), OHA rejected the argument that an "Accounting Manager," whose primary responsibility was performing accounting duties, was a key employee. OHA found that "largely administrative support positions, or positions subordinate to the concern's management" do not rise to the level of a key employee. *CJW Constr.*, SBA No. SIZ-5254, at 7. Similarly, OHA has explained that "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." *Crash Research*, SBA No. SIZ-6106, at 17. Here, like the situation presented in *CJW Construction*, Ms. Saldivar's role at Sonoran was to perform accounting and financial services. According to the signed, sworn declarations provided by Ms. Saldivar and Mr. Smiley, Ms. Saldivar did not have the authority to hire or fire employees, nor did she have bank signature or contract signature authority. Although Ms. Saldivar did serve as Sonoran's 401(k) plan administrator, this was a ministerial function subject to Mr. Smiley's review and approval. Accordingly, the Area Office properly found that Ms. Saldivar is not a former "key employee" of Sonoran, and also is not a former officer of Sonoran. Section II.E, *supra*. The first element of the newly-organized concern rule therefore fails.

Because the first element of the newly-organized concern rule is not present, the Area Office was not required to examine 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 6-7. The Area Office nevertheless did note, however, that Sonoran and Metro are an SBA-approved mentor and protégé. Under the ASMPP, a mentor is encouraged, and expected, to provide assistance to the protégé. 13 C.F.R. § 125.9(a). It therefore is unlikely that the fourth element of the test — contracts or other assistance provided to the newly-organized concern — could be present here, unless Sonoran provided assistance to Metro prior to SBA's approval of the MPA in October 2016, or unless assistance from Sonoran to Metro was beyond the scope of the approved MPA. There is no indication in the record that either of these scenarios existed here, and on appeal, Appellant has not shown any error in the Area Office's analysis.

2. Mentor-Protégé

In the size determination, the Area Office found Saguaro is a joint venture between an SBA-approved mentor and protégé, and that Metro and Sonoran had a valid MPA at the time of Saguaro's proposal, as required by 13 C.F.R. § 125.9(d)(1). Section II.E, *supra*. Further, the Area Office reviewed the contents of Saguaro's JVA, and found that the JVA meets all the requirements of 13 C.F.R. § 125.8(b)(2) and (c). *Id.*

On appeal, Appellant does not dispute that Saguaro's JVA is compliant with SBA regulations. Appellant contends, however, that the Area Office erred in concluding that the MPA was still in effect as of the date of Saguaro's proposal. Section II.F, *supra*. In Appellant's view, the MPA lapsed on October 26, 2019, and therefore was not in effect when Saguaro submitted its

proposal for the instant procurement on November 15, 2019. *Id.* Appellant observes that, in her letter approving the MPA, the Director of the ASMPP stated that the MPA "will be effective for three (3) years ending October 26, 2019, and [thereafter] potentially renewable for another three (3) years." Section II.B, *supra*. SBA did, ultimately, renew the MPA, but this renewal did not occur until March 12, 2020. Appellant urges that, because the MPA between Metro and Sonoran lapsed from October 26, 2019 until March 12, 2020, the Area Office should have considered whether assistance from Sonoran to Metro during this interval may have given rise to affiliation. Section II.F, *supra*.

I agree with Saguaro that the MPA did not lapse, because the MPA was extended by operation of law. Specifically, effective August 24, 2016, SBA amended the ASMPP regulations to state that:

> SBA will review the mentor-protégé relationship annually during the protégé firm's annual review to determine whether to approve its continuation for another year. Unless rescinded in writing at that time, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm. The term of a mentor-protégé agreement may not exceed three years, but may be extended for a second three years.

81 Fed. Reg. 48,558, 48,588 (July 25, 2016) (subsequently codified at 13 C.F.R. § 125.9(e)(5) (2016)). This same regulatory language remained in effect as of November 15, 2019.

Accordingly, at the time SBA originally approved the MPA, and at the time the initial three-year term of the MPA would otherwise have expired, the applicable SBA regulations provided for automatic renewal of the MPA, unless SBA affirmatively intervened to rescind the MPA. As the MPA here was not "rescinded in writing" by SBA, the Area Office correctly concluded that the MPA was still in effect as of the date of Saguaro's proposal.

3. Totality of the Circumstances

Lastly, Appellant's allegations of affiliation under the "totality of the circumstances" under 13 C.F.R. § 121.103(a)(5) also fail. Appellant contends that the record "smells of affiliation" due to various connections between Metro and Sonoran. Section II.F, *supra*. Appellant highlights, for example, that the two firms are located in the same office building; that Metro performs accounting work for Sonoran through a consulting agreement; and that the firms share, or previously shared, one or more employees. Further, although Metro's principal, Ms. Saldivar, resigned from Sonoran in 2016, Appellant alleges that she continues to operate as *de facto* CFO for Sonoran, and occasionally utilizes a Sonoran e-mail address. *Id.* Ms. Saldivar also holds a [minority] non-voting ownership interest in Sonoran and, according to Appellant, OHA has never found a "clear line of fracture" in circumstances where a departing officer remains a partial owner of the concern. *Id.*

I find no merit to Appellant's contentions. OHA has repeatedly explained that "in order to find affiliation through the totality of the circumstances, 'an area office must find facts and explain why those facts caused it to determine one concern had the power to control the

other."' *Size Appeals of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015) (quoting *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007)); *see also Size Appeal of Nat'l Sec. Assocs., Inc.*, SBA No. SIZ-5907, at 10 (2018); *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807, at 9 (2017). It follows, therefore, that merely identifying "connections between concerns does not suffice to show that they are affiliated under the totality of the circumstances." *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 10 (2018). Further, when, as here, the alleged affiliates are an SBA-approved mentor and protégé, it is highly likely that there may be connections between the two concerns. Given, however, that SBA regulations permit, and encourage, a mentor to provide assistance to its protégé, such connections are not improper, except when they exceed the scope of the approved MPA. 13 C.F.R. §§ 121.103(b)(6) and 125.9(d)(4).

Here, as discussed above, the Area Office reasonably concluded that Metro is not affiliated with Sonoran under the newly-organized concern rule or through the mentor-protégé relationship. While Appellant points to various other connections between Sonoran and Metro, Appellant has not shown how such facts or circumstances might enable Sonoran to control Metro or *vice versa*, and has not demonstrated that such connections are improper in the context of an SBA-approved mentor-protégé relationship. The Area Office thus would have had no basis to conclude that Metro is affiliated with Sonoran under 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