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

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| SIZE APPEAL OF:<br><br>C2 Alaska, LLC,<br><br>Appellant,<br><br>Appealed From<br>Size Determination No. 05-2021-038 | SBA No. SIZ-6149<br><br>Decided: April 19, 2022 |

APPEARANCES

Mark G. Jackson, Esq., Stowell B. Holcomb, Esq., Jackson Holcomb LLP, Seattle, Washington, William K. Walker, Esq., Walker Reausaw, Washington, D.C.. for Appellant

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., Schoonover & Moriarty, LLC, Olathe, Kansas, for CBF Partners JV, LLC

D'Jaris Gladden, Contracting Officer, U.S. Securities and Exchange Commission, Washington, D.C.

## DECISION[1]

### I. Introduction and Jurisdiction

On September 29, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 05-2021-038, concluding that C2 Alaska, LLC (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant, a wholly-owned subsidiary of an Alaskan Native Corporation (ANC), is affiliated with a sister company under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). On appeal, Appellant maintains that the Area Office did not adequately inform Appellant of the issues that were the focus of the size investigation, and requests that SBA's Office of Hearings and Appeals (OHA) remand or reverse. For the reasons discussed *infra*, the appeal is granted, Size Determination No. 05-2021-038 is vacated, and the matter is remanded to the Area Office for further review.

[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 Solicitation

On April 16, 2021, the U.S. Securities and Exchange Commission (SEC) issued Request for Proposals (RFP) No. 50310221R0008 for the Integrated Professional Acquisition Support Services 2.0 ("iPASS 2.0") acquisition. The RFP explained that SEC seeks a contractor to "provide all the resources, management, and oversight to appropriately acquire and retain professional contractor personnel with skills essential to provide support services in the SEC's mission accomplishment." (RFP at 4.) The iPASS 2.0 contractor will support SEC in the following subject areas: Accounting; Administration/Office Automation; Auditing; Communications and Media; Business and Financial Analytics; Document/Records Management; Forensics; Fraud; Legal; Program/Project Management; and Technical Writing/Editing. (*Id.* at 9.)

The RFP contemplated the award of a single indefinite-delivery indefinite-quantity (ID/IQ) contract with a maximum ceiling value of $2.5 billion. (*Id.* at 3-4, 24.) Specific services will be set forth in task orders issued after award of the base contract. (*Id.* at 20.) The contract will have a total period of performance of up to 10 years, consisting of a 5-year base period and 5-year option. (*Id.* at 4.)

The iPASS 2.0 procurement is the successor to a procurement for similar services known as the iPASS Pilot contract. (Contracting Officer's (CO's) Statement at 2-3.) Chenega Healthcare Services, LLC (CHS) is the incumbent iPASS Pilot prime contractor. (*Id.* at 2.) The iPASS Pilot contract was awarded in August 2019 and expires in 2024. (*Id.*)

The CO set aside the iPASS 2.0 procurement entirely for participants in SBA's 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of $16.5 million average annual receipts. (RFP, at 3.) Offers were due June 21, 2021.

On August 17, 2021, SEC awarded the iPASS 2.0 contract to Appellant. (CO's Statement at 2.) SEC subsequently issued five task orders under the iPASS 2.0 contract. (*Id.* at 3.) Under the five orders, Appellant ultimately will provide a total of 58 contractor personnel. (*Id.* at 3-4 and Exh. B.) However, because some of the task orders are not yet in performance, only 18 personnel are required at the present time. (*Id.* at 3-4.)

B. Protest and Area Office Proceedings

On August 17, 2021, the CO informed unsuccessful offerors, including CBF Partners JV, LLC (CBF), that Appellant was selected for award of the iPASS 2.0 contract. On August 24, 2021, CBF filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant is affiliated with a subcontractor, probably CHS, under SBA's ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(2). (Protest at 4-5.)

In the protest, CBF acknowledged that Appellant is a wholly-owned subsidiary of Chenega Corporation, an ANC. (*Id.* at 4.) The alleged ostensible subcontractor, CHS, also is a subsidiary of the same ANC. (*Id.*) Although SBA regulations stipulate that sister companies owned and controlled by the same ANC cannot be affiliated with one another through common ownership or common management, such concerns still may be affiliated on alternate grounds. (*Id.* at 5, citing 13 C.F.R. § 121.103(b)(2).) In particular, subsidiaries of an ANC may be affiliated with each other under the ostensible subcontractor rule. (*Id.*, citing *Size Appeal of Olgoonik Diversified Servs., LLC*, SBA No. SIZ-5825 (2017).)

CBF proceeded to allege that "[Appellant] does not qualify as a small business under the iPASS 2.0 RFP because it is affiliated with its ostensible subcontractor, [CHS]." (*Id.* at 11.) According to CBF, "the primary and vital requirement of the iPASS 2.0 RFP is the recruitment, retention and administration of geographically dispersed professional staff to support SEC operations." (*Id.* at 6.) Appellant lacks the capability and expertise to self-perform such work, and instead must rely upon CHS, which has "ample experience supporting iPASS staffing" as the incumbent prime contractor on the iPASS Pilot acquisition. (*Id.*) CBF asserted that CHS is "actively recruiting new iPASS employees" whereas Appellant itself is not. (*Id.* at 7.)

CBF contended that Appellant also will be unusually reliant upon CHS to perform the contract, in contravention of the ostensible subcontractor rule. OHA has identified "four key factors" suggestive of unusual reliance, and in CBF's view, all four factors are present here. (*Id.* at 8-10.) With regard to corporate experience, the RFP included a "go/no-go" factor which required each offeror to submit a recent example of a contract under which the offeror, as the prime contractor, had provided at least 150 personnel. (*Id.* at 10.) Appellant is a small and relatively new business, though, and would not have had the experience to meet this requirement. "Because [Appellant] does not actually have any relevant experience, it could not pass this go/no-go factor without [CHS's] experience—meaning that [CHS] must be acting as [Appellant's] ostensible subcontractor." (*Id.* at 7.)

The CO forwarded the protest to the Area Office for review. The Area Office then directed Appellant to provide:

> A response to each of the allegations in the protest, including what experience [Appellant] has in performing this type of work, what tasks will be performed by [Appellant] and what tasks will be performed by subcontractor(s), whether [Appellant's] workforce for the contract (including the contract's management) is being hired from another contractor, the identi[t]y of any subcontractor and their size status for the $16.5 million size standard; what equipment/facilities will be

> provided by each party, who will be supplying any required licenses, and what percentage of work each party will perform[.]

(Letter from S. Lewis to [XXXX] (Sept. 1, 2021), at 1-2.) The Area Office further requested that Appellant produce copies of its organizational documents and tax returns; a copy of its proposal for the iPASS 2.0 procurement; and copies of any applicable subcontracts or teaming agreements. (*Id.* at 2.) On September 16, 2021, the Area Office requested additional information from Appellant concerning its proposed staffing for the iPASS 2.0 contract, and its prior business dealings with CHS on the iPASS Pilot contract. (Letter from S. Liu to [XXXX] (Sept. 16, 2021), at 1-2.)

C. Size Determination

On September 29, 2021, the Area Office issued Size Determination No. 05-SD-2021-38. The Area Office rejected CBF's allegation that Appellant is affiliated with CHS under the ostensible subcontractor rule. (Size Determination at 4-9.) However, the Area Office concluded, Appellant is not a small business for the iPASS 2.0 procurement due to affiliation with CHS under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). (*Id.* at 9-12.)

The Area Office noted that there is no dispute that Appellant itself is small. (*Id.* at 4.) Instead, "[t]he crux of this size protest is whether CHS should be considered as the ostensible subcontractor of [Appellant] for this solicitation." (*Id.*) According to information Appellant provided in response to the protest, Appellant will self-perform "at least 51% of the iPASS 2.0 effort" while subcontracting 25% to CHS. (*Id.* at 9.) The Area Office made no finding that CHS, rather than Appellant, will perform the primary and vital contract requirements. (*Id.* at 4.)

Even if the prime contractor will self-perform a majority of the primary and vital contract work, however, the ostensible subcontractor rule may be violated if the prime contractor is unusually reliant upon a subcontractor. (*Id.*) OHA case law has identified "four key factors" that may be suggestive of unusual reliance. (*Id.* at 4-5.) Those four factors are:

> (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement;
>
> (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor;
>
> (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and
>
> (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.

(*Id.* at 5.) The Area Office found that only two of the four factors — the first and the third — are present in the instant case.

The Area Office explained that the first factor is met because CHS, one of Appellant's eight proposed subcontractors, is the incumbent on the iPASS Pilot contract. (*Id.* at 5-6.) CHS is not small under the $16.5 million size standard applicable to the iPASS 2.0 procurement, and thus would not have been eligible to submit its own proposal for the contract. (*Id.* at 5.)

The Area Office found that the second key factor is not met. Appellant will not hire the bulk of its workforce from CHS because: (1) CHS's incumbent personnel will still be working on task orders under the iPASS Pilot contract, which continues until August 18, 2024; and (2) although Appellant may hire qualified incumbent employees upon completion of iPASS Pilot task orders, it is "unlikely" that Appellant could rely predominantly on such staff to fulfill the iPASS 2.0 contract, as the iPASS 2.0 contract is "significantly larger in scope than the iPASS Pilot." (*Id.* at 6.)

The Area Office determined that the third key factor is met. The instant case is distinguishable from *Size Appeal of Olgoonik Diversified Servs., LLC*, SBA No. SIZ-5825 (2017), where OHA concluded that "an ANC subsidiary's reliance upon a sister company's employees or experience is an aspect of common ownership and management and is thus exempt from finding of affiliation." (*Id.* at 7). In *Olgoonik*, the alleged ostensible subcontractor was not proposed as a subcontractor, whereas Appellant did identify CHS as a subcontractor that "will play a *substantial* role" in the iPASS 2.0 contract. (*Id.*, emphasis Area Office's.) Further, the iPASS Pilot and iPASS 2.0 procurements have "overlapping contract performance periods" with "several key employees identified as part of [Appellant's] management team for iPASS 2.0 that continue to work on the iPASS Pilot contract as CHS employees." (*Id.* at 7-8.)

Lastly, the fourth key factor is not met. Although Appellant did rely on the past performance and experience of CHS and another of its proposed subcontractors, [XXXX], such reliance was permitted under the RFP and is consistent with OHA precedent that "ANC sister companies' contract experiences are part of common ownership and management." (*Id.* at 8, citing *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098 (2009) and *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843 (2017).) Moreover, Appellant "appears to be capable" of performing the iPASS 2.0 contract, as Appellant will "self-perform 100% of the first four task orders issued to date." (*Id.* at 9.)

The Area Office concluded that Appellant and CHS are not affiliated under the ostensible subcontractor rule. (*Id.*) The Area Office proceeded to find, however, that Appellant and CHS are affiliated, for the iPASS 2.0 procurement only, under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). (*Id.*)

The Area Office determined that Appellant's relationship with CHS violated the "common administrative services" exception to affiliation found at 13 C.F.R. § 121.103(b)(2)(ii)(B) and (C). (*Id.* at 10-11.) Specifically, Appellant and CHS share key employees, including [Employee 1], the General Manager of CHS, who will serve as Appellant's Director of Business Services for iPASS 2.0. (*Id.* at 11.) [Employee 1's] work on the iPASS Pilot contract cannot qualify as "common administrative services" as defined at 13 C.F.R. § 121.103(b)(2)(ii)(A). (*Id.*) Further, the regulations prohibit transferring of employees between two wholly-owned subsidiaries of an ANC after contract award, but incumbent employees on the

iPASS Pilot contract will be "transferred" to iPASS 2.0 post-award. (*Id.*) Lastly, the Area Office found that Appellant and CHS share common facilities and jointly utilize a computer system. (*Id.*) "With the same management team co-located with the original incumbent from the iPASS Pilot, the Area Office is not convinced that [Appellant] and CHS are not affiliated." (*Id.*)

Because Appellant is affiliated with CHS for the iPASS 2.0 procurement under the totality of the circumstances, the Area Office aggregated Appellant's average annual receipts with those of CHS. (*Id.*) The combined total exceeds the size standard applicable to the instant procurement, so Appellant is not small. (*Id.* at 12.)

D. Appeal

On October 14, 2021, Appellant appealed Size Determination No. 05-SD-2021-38 to OHA. Appellant contends that the size determination is "replete with clear errors, both legal and factual." (Appeal at 1-2.)

Appellant argues, first, that the Area Office clearly erred by finding affiliation under the totality of the circumstances based on non-compliance with 13 C.F.R. § 121.103(b)(2)(ii) without notifying Appellant of the change in focus in the investigation, thereby denying Appellant due process as required by 13 C.F.R. § 121.1007(b) and (c). (*Id.* at 2-3, citing *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 3 (2009) ("an Area Office must provide notice to the protested concern of any change in focus and request a response.").) CBF's protest alleged affiliation under the ostensible subcontractor rule, and the Area Office determined that Appellant is not affiliated with CHS on this basis. (*Id.* at 5.) The Area Office found Appellant affiliated with CHS on different grounds, however, "without ever providing notice to [Appellant] of 'any change in focus,' let alone affording [Appellant] the opportunity to craft a meaningful response to the new issues raised in the size determination." (*Id.*) Nor could Appellant reasonably have anticipated that the Area Office would concentrate on the exception to affiliation at 13 C.F.R. § 121.103(b)(2)(ii)(B) and (C) and allegations of shared facilities and technology. (*Id.* at 7.) After the size determination was issued, Appellant requested that the Area Office reopen the matter to provide Appellant due process, but the Area Office refused, claiming that "the totality of circumstances is an extension examination of the ostensible subcontractor rule analysis." (*Id.* at 6, quoting Letter from J. Fasano to [XXXX] (Oct. 7, 2021), at 2.) As a result, Appellant was left with no choice but to appeal to OHA. (*Id.* at 6-7.)

Next, Appellant argues that the Area Office clearly erred by finding affiliation based on three connections between Appellant and CHS without explaining — much less establishing — how those connections could enable CHS to control Appellant, or *vice versa*. (*Id.* at 7-8, citing *Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103, at 22 (2021).) The Area Office's decision is contrary to a long line of OHA cases which have held that, in order to find affiliation under the totality of the circumstances, an area office cannot merely list connections between concerns, but must explain how those connections would permit one concern to control another. (*Id.*, citing *Size Appeals of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015).)

Appellant argues that the three connections the Area Office identified between Appellant and CHS also are themselves marred by significant errors. (*Id.* at 9-16.) The Area Office's finding that Appellant and CHS share key employees is directly contradicted by the record. (*Id.* at 10-11.) The Area Office "never" inquired as to whether Appellant and CHS will share employees. (*Id.* at 10.) Rather, the Area Office apparently misinterpreted Appellant's responses to questions about whether Appellant's key personnel had "resigned from their respective companies and are currently [Appellant's] employees" and whether those who were part of CHS's management team for the iPASS Pilot will "continue to have the same roles and responsibilities in the iPASS Pilot." (*Id.*) In response to these questions, Appellant explained that (1) two individuals had resigned from CHS and the Chenega Corporation, respectively, and are currently Appellant's own employees; (2) the remaining key personnel, including [Employee 1], are "not yet needed to manage the small number of task orders awarded" to date under the iPASS 2.0 contract; and (3) once transitioned to Appellant, managerial personnel "will work exclusively on iPASS 2.0" and will no longer have any roles or responsibilities under the iPASS Pilot contract. (*Id.* at 10-11.) Given these responses, the Area Office's conclusion that [Employee 1] would simultaneously manage both of the iPASS contracts is "mindboggling." (*Id.* at 11.)

Appellant argues that the Area Office clearly erred in concluding that 13 C.F.R. § 121.103(b)(2)(ii)(C) prohibits transfer of employees between two wholly-owned subsidiaries of an ANC after contract award. Contrary to the Area Office's interpretation, the regulation (1) "concerns the assignment of existing 'employees' to tasks 'for contract performance', not to transfer between sister companies"; and (2) "does not dictate the timing of 'employee assignments', only the timing of *control* over employee assignments." (*Id.* at 12-13, emphasis Appellant's.) The Area Office further incorrectly assumed that Appellant itself would not control hiring decisions. (*Id.*)

Appellant maintains that the Area Office also clearly erred in finding that Appellant and CHS will share common facilities and a contract-specific computer system. (*Id.* at 14.) The Area Office noted that Appellant and CHS have the same address in San Antonio, Texas, and thus assumed that they share facilities. (*Id.*) The Area Office, though, failed to inquire about lease agreements or other office arrangements, and therefore could not properly draw this inference. Additionally, even if the Area Office were correct that Appellant and CHS do share common facilities, this would not demonstrate control and thus "cannot support a finding of affiliation." (*Id.* at 14-15, citing *Size Appeal of Morris-Clark Contracting, LLC*, SBA No. SIZ-5044, at 4 (2009).) The Area Office's finding of shared contract-specific technology is contradicted by Appellant's proposal, which "plainly states" that Appellant will use [XXXXX], a different tool than used by CHS, [XXXXX]. (*Id.* at 15-16, emphasis Appellant's.) And again, even supposing that Appellant and CHS did utilize the same system for both iPASS procurements, the Area Office did not explain how this might enable one firm to control the other. (*Id.*)

Lastly, Appellant contends that the Area Office clearly erred by basing the size determination on events that purportedly will transpire after contract award, rather than assessing size as of the date Appellant submitted its offer, June 17, 2021. (*Id.* at 16-17.) Furthermore, because Appellant is an 8(a) participant and a wholly-owned subsidiary of an ANC, Appellant should have been entitled to the broader exemption to affiliation set forth at 15 U.S.C. § 636(j)(1)(J)(ii)(II) and 13 C.F.R. § 124.109(c)(2)(iii). (*Id.* at 18-19.)

Accompanying its appeal, Appellant submitted several exhibits, including supplemental declarations from [XXXX] (Exhibit 8) and [Employee 1] (Exhibit 9), and a declaration from [XXXX] (Exhibit 10). Appellant argues that, although Exhibits 8-10 were not previously provided to the Area Office, there is good cause for OHA to consider them because Appellant "was not given the opportunity to respond or provide evidence regarding the three findings upon which the Size Determination is based." (Motion at 4.) Appellant further highlights that the Area Office posed no questions to Appellant pertaining to these three findings. (*Id.* at 4-5.)

E. CBF's Response

On November 2, 2021, CBF responded to the appeal. CBF first argues that OHA should not permit Appellant to supplement the record, and should exclude Appellant's three new declarations which, in CBF's view, merely set forth what Appellant "wishes it told the Area Office during the size protest." (Response at 2-3.) CBF argues that Appellant could have submitted such information to the Area Office during the size review. (*Id.*) Because Appellant failed to do so, the new evidence may not now be considered.

Next, CBF argues that Appellant had sufficient notice of the allegations against it. Although CBF's protest repeatedly referenced the ostensible subcontractor rule, the protest in essence alleged that Appellant "is simply too close to — and thus affiliated with" CHS. (*Id.* at 4.) The protest twice cited to the exception to affiliation at 13 C.F.R. § 121.103(b)(2)(ii), a regulation which played a central role in the size determination. (*Id.* at 5.) Further, as part of an ostensible subcontractor review, an area office must consider "[a]ll aspects of the relationship between the prime and subcontractor." (*Id.* at 6, quoting 13 C.F.R. § 121.103(h)(2).) Appellant thus "could not have reasonably been surprised by an affiliation analysis considering the 'totality of' [Appellant's] relationship" with CHS. (*Id.*, citing 13 C.F.R. § 121.103(a)(5).) Upon investigating that relationship, the Area Office appropriately concluded that Appellant's "utter reliance on its ANC corporate family for contract management violated 13 C.F.R. § 121.103(b)(2)(ii)(B)." (*Id.* at 1, 9-15.) Appellant's argument that it is entitled to the broader exemption to affiliation set forth at 15 U.S.C. § 636(j)(1)(J)(ii)(II) and 13 C.F.R. § 124.109(c)(2)(iii) was never raised to the Area Office, and should not be considered by OHA for the first time on appeal. (*Id.* at 8-9.)

Lastly, CBF argues that, insofar as the Area Office committed any errors, the Area Office "should have found" Appellant affiliated with CHS under the ostensible subcontractor rule. (*Id.* at 16.) CBF urges OHA to reverse this aspect of the size determination and affirm Appellant's ineligibility for the instant procurement. Specifically, according to CBF, CHS will perform the primary and vital contract requirements, and Appellant will be usually reliant upon CHS. (*Id.* at 16-22.)

F. Motion to Reply, Motion to Strike, and Opposition

On November 5, 2021, Appellant requested leave to reply to CBF's Response, in order to address purported inaccuracies. In addition, Appellant moved to strike the portions of CBF's

Response pertaining to the ostensible subcontractor rule. Appellant highlights that the Area Office found no violation of the ostensible subcontractor rule, and that CBF that did not file its own appeal challenging the Area Office's decision. (Motion at 2-3.) Therefore, Appellant maintains, CBF's arguments regarding the ostensible subcontractor rule are untimely. (*Id.* at 3-4.) Appellant further contends that CBF did not timely respond to Appellant's motion to introduce new evidence. (*Id.* at 1-2.)

CBF opposes Appellant's motions. CBF argues that it did timely oppose Appellant's motion to supplement the record, by filing a timely response to the appeal as a whole. (Opp. at 1-3.) CBF's ostensible subcontractor arguments likewise are timely. Because that the Area Office found Appellant not small, CBF was not adversely affected by Size Determination No. 05-2021-038 and would have lacked standing to bring its own appeal. (*Id.* at 3-5.)

## III. Discussion

### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

The "ostensible subcontractor" rule provides that when a non-similarly-situated subcontractor is performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon a non-similarly-situated subcontractor, the firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(2). The rule "asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor." *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). Generally, "[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule." *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011).

### B. Analysis

I agree with Appellant that the Area Office did not provide Appellant sufficient notice of the change in focus in the size investigation. As a result, it is appropriate to remand this matter for further review.

CBF's protest alleged violation of the ostensible subcontractor rule, and the Area Office itself recognized that "[t]he crux of this size protest is whether CHS should be considered as the ostensible subcontractor of [Appellant] for this solicitation." Sections II.B and II.C, *supra*. The Area Office investigated the ostensible subcontractor allegations but found that Appellant is not affiliated with CHS on this basis. *Id.* The Area Office nevertheless determined, however, that

Appellant is affiliated with CHS on alternate grounds, specifically the totality of the circumstances due to Appellant's inability to qualify for the exception to affiliation at 13 C.F.R. § 121.103(b)(2)(ii). Section II.C, *supra*. This conclusion, in turn, stemmed from three particular factual findings: (1) that Appellant and CHS apparently share at least one key employee, [Employee 1]; (2) that Appellant, the iPASS 2.0 prime contractor, may not control employee assignments for that procurement; and (3) that Appellant and CHS are situated at the same address and may jointly utilize a computer system. *Id.*

The record reflects that the Area Office did not inform Appellant that it would be examining affiliation through the totality of the circumstances based on the applicability of the exception at § 121.103(b)(2)(ii), nor did the Area Office clearly raise any of the three associated factual issues. Section II.B, *supra*. OHA has long held that, although SBA area offices are empowered to explore new issues beyond those set forth in a size protest, due process requires that the challenged concern must be given notice of the new issues and an opportunity to respond. *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 3 (2009) ("it is axiomatic that before finding a concern other than small on grounds not found in a protest, an area office must provide notice to the protested concern of any change in focus and request a response."); *see also Size Appeal of Magnum Opus Techs., Inc.*, SBA No. SIZ-5372, at 5-6 (2012). Here, because Appellant was not provided notice of the change in focus of the size investigation, remand of this case is warranted.

In response to the appeal, CBF maintains that the Area Office was not required to have provided additional notice to Appellant, because CBF's protest twice referenced § 121.103(b)(2)(ii), and because the totality of the circumstances is a theory of affiliation related to, or encompassed within, an ostensible subcontractor allegation. Section II.E, *supra*. These arguments are unpersuasive for several reasons.

First, while it is true that CBF's protest made references to § 121.103(b)(2)(ii), this regulation is not an independent ground for affiliation but rather an exception to affiliation for concerns owned and controlled by Indian Tribes or ANCs. Thus, in its protest, CBF did not attempt to argue that Appellant and CHS could be affiliated due to noncompliance with § 121.103(b)(2)(ii). Section II.B, *supra*. Rather, CBF cited to § 121.103(b)(2)(ii) in contending that the exception to affiliation is not absolute, such that Appellant and CHS may be affiliated with one another under the ostensible subcontractor rule, notwithstanding that they are both wholly-owned subsidiaries of the same ANC. *Id.* The references to § 121.103(b)(2)(ii) in CBF's protest, then, were not sufficient to give Appellant notice that it might be found affiliated with CHS on grounds other than the ostensible subcontractor rule.

Second, although SBA regulations at 13 C.F.R. § 121.103(h)(2) indicate that an area office will consider "[a]ll aspects of the relationship between the prime and subcontractor" in conducting an ostensible subcontractor analysis, OHA has made clear that the ostensible subcontractor rule and the totality of the circumstances are fundamentally different theories of affiliation:

> [The] totality of the circumstances is not an applicable ground of affiliation under an ostensible subcontractor analysis. A totality of the circumstances analysis rests

> on whether numerous factors taken together establish that a business concern has the power to control another, not whether it can control a particular contract. Conversely, an ostensible subcontractor analysis is contract specific and is a completely different form of determining affiliation.

*Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692, at 10 (2015). Accordingly, because CBF's protest here was premised exclusively on the ostensible subcontractor rule, Appellant would not reasonably have understood that the Area Office also would be reviewing the totality of the circumstances.

Third, even if Appellant had been aware that Appellant could be found affiliated with CHS under the totality of the circumstances due to noncompliance with § 121.103(b)(2)(ii), it is not clear that Appellant could have prepared a meaningful response to this issue, without more detailed information as to the Area Office's particular concerns. The Area Office, though, did not notify Appellant of the three specific factual issues that ultimately formed the basis for the size determination. Sections II.B and II.C, *supra*. Further, although Appellant did provide the Area Office some information about, for example, key personnel as part of Appellant's response to the ostensible subcontractor allegations, Appellant would not have known that such information might be repurposed to find Appellant affiliated with CHS on other, unrelated grounds. I therefore cannot conclude that Appellant had proper notice of, and a fair opportunity to address, the Area Office's concerns. *E.g., Alutiiq Int'l Solutions*, SBA No. SIZ-5069, at 4 (area office erred by "request[ing] information from [the challenged firm] without explaining why *[*the area office] wanted this information.").

It is worth noting that, apart from the issue of due process, remand also is warranted here because the size determination did not articulate valid grounds for affiliation under the totality of the circumstances. OHA has repeatedly held 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)). An area office thus "cannot merely list connections between the firms, it must explain how those connections could lead one firm to control the other." *Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103, at 22 (2021); *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 10 (2018). Stated differently, the fact that "there are ties between [two] concerns is not sufficient to support a finding of affiliation, the ties must establish that one concern controls or has the power to control the other." *Size Appeal of SC&A, Inc.*, SBA No. SIZ-6059, at 12 (2020); *Size Appeal of TelaForce, LLC*, SBA No. SIZ-5970, at 15-16 (2018).

In the instant case, the Area Office identified three connections between Appellant and CHS to support the conclusion of affiliation under the totality of the circumstances. Section II.C, *supra*. The Area Office did not, however, explain how the three connections would enable CHS to control Appellant, or *vice versa. Id.* As a result, additional review is necessary.

Lastly, I see no merit to CBF's contention that OHA should affirm the Area Office's ultimate conclusion (*i.e.*, that Appellant is not small) by determining that the Area Office clearly erred in its examination of the ostensible subcontractor rule. Section II.E, *supra*. As Appellant

observes, such an outcome would be procedurally irregular because the portion of the size determination pertaining to the ostensible subcontractor rule was not appealed, either by Appellant or by CBF. Sections II.D, II.E, and II.F, *supra*. More fundamentally, though, and assuming that OHA could, theoretically, reach the result CBF advocates, the record does not establish that the Area Office clearly was mistaken in finding no violation of the ostensible subcontractor rule. Among other issues, the Area Office found that Appellant will self-perform at least 51% of the iPASS 2.0 contract while subcontracting no more than 25% to CHS, and that CHS will be one of eight subcontractors to Appellant on the procurement. Section II.C, *supra*. The parties debate whether CHS actually will perform far less than 25% of the contract, but in any event, OHA seldom has found violation of the ostensible subcontractor rule under circumstances where a prime contractor will utilize multiple subcontractors, and none of those subcontractors will perform a majority of the work. *E.g., Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011) ("Where there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work.").

## IV. Conclusion

The Area Office did not provide Appellant adequate notice of the change of focus of the size investigation, and the size determination does not articulate a valid basis for affiliation under the totality of the circumstances. Accordingly, the appeal is GRANTED, Size Determination No. 05-2021-038 is VACATED, and the matter is REMANDED to the Area Office for further review. In light of this outcome, it is unnecessary to rule on Appellant's motion to supplement the record, motion to reply, and motion to strike, and CBF's objections thereto. *E.g., Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 16 (2016); *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 9 (2014).

KENNETH M. HYDE
Administrative Judge