

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

SIZE APPEAL OF:

SysCom, Inc.,

Appellant,

RE: SNI United , LLC

Appealed From
Size Determination No. 04-2022-00

SBA No. SIZ-6171

Decided: September 8, 2022

APPEARANCES

Douglas P. Hibshman, Esq., P. Sean Milani-nia, Esq., Dana Molinari, Esq., Fox Rothschild LLP, Washington, D.C., for Appellant

Terry L. Elling, Esq., Amy L. Fuentes, Esq., Danielle R. Rich, Esq., Holland & Knight, LLP, Tysons, Virginia, for SNI United, LLC

DECISION¹

I. Introduction and Jurisdiction

On March 2, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2022-008, concluding that SNI United, LLC (SNI) is a small business for the subject procurement. On appeal, SysCom, Inc. (Appellant), which had previously protested SNI's size, contends 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 granted, Size Determination No. 04-2022-008 is vacated, and the matter is remanded to the Area Office for further review.

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 15 days after 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.

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.

II. Background

A. Solicitation

On December 9, 2021, the U.S. Department of the Air Force (Air Force) issued Request for Quotations (RFQ) No. FA700021Q0037 for refuse and recycling services. The RFQ's Performance Work Statement (PWS) explained that the contractor will “provide all personnel, equipment, tools, materials, vehicles, supervision, and other items and services necessary to perform Integrated Solid Waste Management at the United States Air Force Academy” in Colorado Springs, Colorado. (PWS at 2.) The Contracting Officer (CO) set aside the procurement entirely for participants in SBA's 8(a) Business Development (BD) program, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of \$41.5 million average annual receipts. Quotations were due January 3, 2022. On January 18, 2022, the CO informed Appellant, an unsuccessful offeror, that SNI was the apparent awardee.

B. Protest

On January 25, 2022, Appellant filed a protest with the CO challenging SNI's size. The protest observed that SNI purports to be a joint venture between an 8(a) participant, 1-855-US-TRASH, LLC (US Trash), and a small business, Six Nations, Inc. (Six Nations). (Protest at 1.) However, Appellant alleged, SNI does not meet SBA requirements to qualify as a joint venture, and therefore is ineligible for award of the instant procurement. (*Id.* at 1-2.)

Appellant contended that US Trash, the 8(a) participant in the joint venture, does not control day-to-day management and administration of SNI, in contravention of 13 C.F.R. § 124.513(c)(2). According to Appellant, SNI's joint venture agreement (JVA) likely does not designate US Trash as the Managing Venturer and an employee of US Trash as the “Responsible Manager.” (*Id.* at 4.) Rather, Six Nations apparently controls SNI. Ms. Linda McMahan, President of Six Nations, signed SNI's application to transact business as a limited liability company (LLC) in Florida, where she identified herself and Messrs. Paul Davis, Steve Foutch, and Ashraf “Alex” Hamad, President of US Trash, as the managers of SNI. (*Id.* at 5-6, citing Exh. B.) Mr. Davis is the Vice President of Operations of Six Nations, and Mr. Foutch is the Vice President of Business & Finance of Six Nations. (*Id.* at 5-6, citing Exh. C) It is “evident” that SNI's JVA and operating agreement identify Ms. McMahan and Messrs. Davis and Foutch as managers of SNI. (*Id.* at 6.) Because “managers” control the day-to-day administration of and entity, and Ms. McMahan and Messrs. Davis and Foutch are officers or managers of Six Nations, they are “deemed to control” SNI. (*Id.* at 6, citing *Matter of XOtech, LLC*, SBA No. VET-277 (2018).) An annual statement from the Michigan Department of licensing and Regulatory Affairs reflects Ms. Tracy Latarski, a manager of Six Nations, as a manager of SNI. (*Id.* at 5 n.3, citing Exh. B.) A Statement of Foreign Entity Authority filed with the Colorado Secretary of State lists Six Nations' office address as SNI's physical office. (*Id.* at 6, citing Exhs. B, E.) A shared address is a strong indication that Six Nations controls SNI. Further, various state filings show that Ms. McMahan organized and formed SNI. (*Id.* at 7.) Appellant asserted that Six Nations “took all the steps required to form, register, and control [SNI] to continue to benefit from the 8(a) set-aside

work at the [Air Force Academy], where [Six Nations] serves as the incumbent contractor.” (*Id.* at 7.)

Next, Appellant predicted that SNI's JVA does not include itemization of major equipment, facilities, and other resources, as required by 13 C.F.R. § 124.513(c)(6), and fails to specify the respective responsibilities of the joint venturers, in contravention of § 124.513(c)(7). (*Id.* at 6-7.)

Lastly, Appellant contended that US Trash, the 8(a) participant in SNI, “cannot and will not perform at least 40% of the work performed by the joint venture” and “is highly unlikely” to satisfy the performance of work requirement at 13 C.F.R. § 124.513(d) because US Trash's operations do not extend outside of the Detroit, Michigan area. (*Id.* at 9-10, citing Exhs. G, H.) Six Nations, on the other hand, “operates a national business ‘all over the map’” and “has been performing the incumbent work at the [Air Force Academy] for approximately the prior ten years.” (*Id.*)

Because SNI is controlled by Six Nations, and because SNI's JVA likely is not compliant with the joint venture regulations at 13 C.F.R. § 124.513, SNI is ineligible for award of the instant 8(a) contract. (*Id.* at 11.)

C. Protest Response and Supplements

The CO forwarded Appellant's protest to the Area Office for review. On February 11, 2022, SNI responded to the protest, and submitted copies of its JVA and JVA Addendum; its Articles of Organization; its Bylaws; completed SBA Form 355s for US Trash and Six Nations; sworn declarations from Ms. McMahan and Mr. Hamad; and other documents. SNI indicated that it is an LLC based in the state of Michigan. (Protest Response, Exh. J-4 at 2.) SNI informed the Area Office that “SNI does not have an operating agreement.” (Protest Response, at 7.)

SNI asserted that US Trash controls SNI, and is its majority owner. (*Id.* at 5.) The publicly-available information relied upon by Appellant is “not dispositive” on the issue of control because SNI's JVA reflects that: (1) US Trash is the majority (51%) owner of SNI; (2) US Trash is the Managing Venturer of SNI; (3) Mr. Hamad, an employee of US Trash, is the Project Manager for all contracts performed by SNI; and (4) US Trash “will perform ‘more than 50% of the work on the [instant] contract’”. (*Id.* at 5-6.) SNI stated that Mr. Hamad is the President and Treasurer of SNI. (*Id.* at 6.) Further, although Mr. Hamad and Ms. McMahan “are the only two Directors of SNI,” SNI maintained that this should not give rise to any finding of “negative control” by Ms. McMahan or Six Nations. (*Id.*) Ms. McMahan's name appears on multiple state filings associated with SNI, but Ms. McMahan completed these filings in order to teach Mr. Hamad “how to start up a federal contract in a new state.” (*Id.*) In addition, as SNI's Secretary, Ms. McMahan is responsible for making various state filings. (*Id.* at 7.) As such, the use of Ms. McMahan's name on SNI's state filings “do not themselves” suggest that she controls SNI. (*Id.*)

SNI next argued that Appellant's allegation that “managers ‘are defined to control day-to-day administration on the entity’” is premised on inapposite OHA precedent and a flawed

interpretation of regulations pertaining to the Service-Disabled Veteran-Owned Small Business (SDVOSB) program. (*Id.* at 7.) “SNI does not have an operating agreement,” and its “corporate governance documents here do not give managers any type of power or control of decisions for SNI.” (*Id.*) “In fact, the term ‘manager’ does not appear in any of SNI’s corporate documents.” (*Id.*) Rather, these records show that “power is held by the directors of the joint venture and voting power is distributed by ownership interest.” (*Id.* at 8.) SNI reiterated that its JVA identifies US Trash as the Managing Venturer and Mr. Hamad, President of US Trash, as the Project Manager for the instant contract. (*Id.*)

With regard to Appellant’s allegation of affiliation based on a shared address, SNI asserted that SNI uses Six Nations’ address as a matter of convenience because US Trash operates from the personal residence of Mr. Hamad, until he is able to set up a separate office space. However, a shared address “does not mean” that Six Nations controls SNI. (*Id.* at 8.)

SNI further asserted that Appellant’s contention that Ms. McMahan “essentially created SNI with the fraudulent intent to profit ‘from the 8(a) set-aside work at the [Air Force Academy]’ is both offensive and meritless.” (*Id.* at 8.) Contrary to Appellant’s insinuations, SNI was created in 2020 “at the recommendation of the SBA” for Six Nations to “mentor” US Trash to “help US Trash expand its footprint beyond the Detroit area.” (*Id.* at 8-9, emphasis SNI’s.)

Next, SNI argued that Appellant’s allegations that SNI’s JVA “likely” violates 13 C.F.R. §§ 124.513(c)(6) and (c)(7) should be rejected as mere speculation. (*Id.* at 9-10.) Even if considered on the merits, though, the JVA, supplemented by the JVA Addendum, itemizes all major equipment, facilities and other resources to be furnished by US Trash and Six Nations in accordance with § 124.513(c)(6), and specifies responsibilities of the joint venturers in accordance with § 124.513(c)(7). (*Id.* at 10-12.)

SNI proceeded to argue that Appellant’s allegation that US Trash will not perform at least 40% of the work under the contract due to its location and service area is “nonsensical.” (*Id.* at 12-13.) US Trash and Mr. Hamad are able to manage and perform a contract in Colorado, for instance, by hiring employees needed to perform the work requirements. (*Id.*) SNI further emphasized that US Trash performs at least 40% of three other federal contracts outside of the Detroit area as the Managing Venturer of SNI. (*Id.* at 14.)

Lastly, SNI acknowledged that “SNI is affiliated with Six Nations and US Trash.” (*Id.* at 14.) However, Six Nations and US Trash are not affiliated with one another. SNI claimed that the combined receipts of Six Nations and US Trash over the three fiscal years preceding SNI’s self-certification (2018 — 2020) do not exceed the \$41.5 million size standard. (*Id.* at 14-17.)

On February 16, 2022, SNI submitted a Supplemental Response to the protest, wherein it corrected the three-year period of measurement to 2019 — 2021, as SNI self-certified on January 3, 2022. (First Supp. Protest Response, at 1-2.) Additionally, SNI responded to questions from the Area Office regarding “SBA Approval of SNI’s [JVA] and [JVA Addendum].” (*Id.* at 4.) SNI stated that the JVA was signed by Mr. Hamad and Ms. McMahan on October 28, 2020; the JVA Addendum was signed by Mr. Hamad and Ms. McMahan on December 10, 2021; and SBA’s

Detroit District Office approved the JVA Addendum on December 13, 2021. (*Id.* at 4-5.) In support, SNI offered a supplemental declaration from Mr. Hamad.

On February 22, 2022, SNI submitted a second Supplemental Response, wherein it addressed the Area Office's request that SNI "provid[e] in more detail precisely what functions or duties US Trash will perform and what functions or duties Six Nations will perform," so as to substantiate that US Trash will perform at least 40% of the work on the instant contract. (E-mail from D. Gordon (Feb. 19, 2022).) SNI asserted that US Trash will perform at least 40% of the work under the contract, and that such work "exceeds mere 'administrative or ministerial functions.'" (Second Supp. Protest Response, at 2.) Specifically, SNI claimed that in addition to Mr. Hamad serving as the Project Manager, US Trash will provide [XXXXXXX] employees, and will lease [XXXXXXXXXXXXXXXXXX] from Six Nations to perform work under the contract, which "equates to at least 40% of the total work done by the two partners combined." (*Id.* at 4-5.)

On February 24, 2022, SNI submitted a final Supplemental Response, wherein it responded to the Area Office's request to identify numbers, duties, responsibilities, salaries and hours of the US Trash employees hired to perform work for the instant contract, as well as supporting detail regarding the leased equipment. (Third Supp. Protest Response, at 2-5.) In particular, SNI explained that, including Mr. Hamad in addition to direct labor, a total of [XXXXXXX] personnel will be performing work under the contract, [XXXXXXX] of which are US Trash employees (Mr. Hamad and [XXXXXXX] direct labor). (*Id.* at 2-4.) However, Mr. Hamad is devoted to the contract only part-time. (*Id.*) SNI clarified that SNI, rather than US Trash, will lease vehicles and equipment from Six Nations to perform the work under the contract. (*Id.* at 5.)

D. SNI's Articles of Organization

According to SNI's Articles of Organization, SNI is an LLC based in the state of Michigan. (Protest Response, Exh. J-4 at 2.) SNI's Articles of Organization do not designate a manager or Managing Member.

E. SBA Forms 355

Accompanying its protest response, SNI submitted completed SBA Form 355s for US Trash and Six Nations, signed by Mr. Hamad and Ms. McMahan, respectively. In response to Questions 9(b) and 13(a), Mr. Hamad stated that he personally owns 51% of SNI. (Protest Response, Exh. A-5, at 10-11.) Ms. McMahan stated that she personally owns 49% of SNI. (Protest Response, Exh. A-3, at 10-11.)

F. Declarations

SNI provided the Area Office sworn declarations, each of which is dated February 10, 2022, from Mr. Hamad and Ms. McMahan. (Protest Response, Exhs. L and M.)

In his declaration, Mr. Hamad attests that he is the CEO, President, and sole owner of US Trash. (Hamad Decl. ¶ 3.) Mr. Hamad operates US Trash from his personal residence until he is able to build the business “to the point where I can open a separate office space.” (*Id.* ¶ 5.)

Mr. Hamad states that, sometime in late 2019 or early 2020, SBA's Michigan District Office connected him with Six Nations, a graduate from the 8(a) program, and recommended that US Trash form a joint venture with Six Nations so that US Trash may gain experience, “learn how to do federal contracting,” and expand beyond the state of Michigan. (*Id.* ¶ 7.) In 2020, US Trash and Six Nations formed SNI. (*Id.* ¶ 8.) US Trash is the Managing Venturer SNI. (*Id.* ¶ 9.) Mr. Hamad owns 51% of SNI, is President and Treasurer of SNI, and also “serve[s] as the Project Manager for all 8(a) contracts awarded to SNI.” (*Id.* ¶¶ 2, 10-11.) US Trash performs at least 40% of contracts awarded to SNI through local hiring for each contract. (*Id.* ¶ 13.) For the instant contract, US Trash provides [XXXXXXX] employees, thereby confirming that at least 40% of the services will be performed by US Trash. (*Id.* ¶ 14.)

In her declaration, Ms. McMahan avers that she is the President and sole owner of Six Nations. (McMahan Decl. ¶ 3.) SBA's Michigan District Office introduced Six Nations to US Trash and urged that they form a joint venture so that “Six Nations could assist US Trash achieve its goal of expanding beyond the Detroit Metropolitan area.” (*Id.* ¶ 4.) SNI was formed as an 8(a) unpopulated joint venture in 2020. (*Id.* ¶ 5.) US Trash is the Managing Venturer of SNI, and Mr. Hamad owns 51% of SNI. (*Id.*) Mr. Hamad also is President, Treasurer, and Project Manager of SNI. (*Id.*) Six Nations is the “Non-Managing Venturer” of SNI, and Ms. McMahan owns 49% of SNI. (*Id.* ¶¶ 2, 5.) Ms. McMahan's name appears on “various corporate documents” associated with SNI because she “helped facilitate the formation of SNI,” including completing state filings to “show Mr. Hamad how to begin a federal contract in a new state.” (*Id.* ¶ 6.) Ms. McMahan “merely assisted” with the formation of SNI, and does not control SNI. (*Id.*) SNI and Six Nations share an address not for purposes of control but for convenience, as US Trash temporarily operates from Mr. Hamad's personal residence. (*Id.* ¶ 7.)

G. Joint Venture Agreement and Addendum

The Area Office file contains an undated Joint Venture Agreement (JVA) for SNI, signed by Mr. Hamad and Ms. McMahan. (Protest Response, Exh. J-1.) The JVA states that SNI is “an unpopulated Joint Venture” organized as a limited liability company (LLC) in order to bid on a procurement conducted by the U.S. Department of the Army. (JVA § 1.) US Trash, an 8(a) participant, owns 51% of SNI, and Six Nations owns the remaining 49%. (*Id.* § 3.) The JVA identifies US Trash as the Managing Venturer and Six Nations as the Partner Venturer, and designates Mr. Hamad, an employee of US Trash, as “the Project Manager responsible for performance of the contract.” (*Id.* § 2.)

The JVA indicates that the joint venturers will contribute the following “Major Equipment, Facilities, and Other Resources” upon award of the 8(a) contract:

[XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]
[XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]

[XXX]
[XXX]
[XXX]
[XXX]

(Id. § 6.)

The JVA also specified that:

[US Trash] as Managing Venturer and [Mr.] Hamad as Employee of the Managing Venturer is solely responsible with regard to negotiation of the contract[,] source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the 8(a) partner [US Trash] will perform at least 40% of the work performed by the joint venture [and] will meet the performance of work requirements. The percentage of work performed will not be limited to administrative, but the 8(a) [participant, US Trash,] will hire employees, manage and operate the day to day duties of the contract so that the 8(a) [participant] will gain substantial experience moving forward.

(Id. § 7.)

The Area Office file also includes a copy of an undated Addendum (the “JVA Addendum”), signed by Mr. Hamad and Ms. McMahan. (Protest Response, Exh. J-2.) The JVA Addendum states that SNI intends to bid on the instant procurement. (JVA Addendum § 1.) The JVA Addendum provides the following list of “Major Equipment, Facilities, and Other Resources” that will be contributed by each joint venturer:

[XXX]
[XXX]
[XXX]
[XXX]
[XXX]
[XXX]
[XXX]
[XXX]
[XXX]

(Id. § 6.) Furthermore, “[o]n this contract the 8(a) [participant], [US Trash], will perform 50% of the work on the contract.” (Id. § 12.)

The JVA Addendum otherwise contains provisions substantively identical to the original JVA.

H. SNI's Bylaws

SNI provided the Area Office a copy of its Bylaws, executed on February 28, 2020 by Mr. Hamad and Ms. McMahan. (Protest Response, Exh. J-3.) The Bylaws indicate that SNI is a

corporation based in the state of Michigan, subject to the Michigan Business Corporations Act. (Bylaws, Art. I.) Mr. Hamad is President/Treasurer of SNI as well as a Director. (*Id.*, Art. XI.) Ms. McMahan is SNI's Vice President/Secretary and also a Director. (*Id.*)

The Bylaws stipulate that “[t]he business, property and affairs of the corporation shall be managed by its Board of Directors.” (*Id.*, Art. III § 1.) The Board consists of “at least one (1) but no more than three (3)” Directors, who are elected by the shareholders. (*Id.*, Art. III § 2.) “A majority of the members of the Board” is needed to establish a quorum. (*Id.*, Art. III § 10.) With regard to decisions of the Board, “[t]he act of the majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.” (*Id.*, Art. III § 11.) The Bylaws also contain the following provisions pertinent to these proceedings:

ARTICLE II

SHAREHOLDERS

...

Section 7. Quorum. A majority of the outstanding shares of the corporation entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. . . .

...

Section 9. Voting of Shares. (Subject to the provisions of Section 11 of this Article II,) Each outstanding share of capital stock of the corporation shall be entitled to one vote upon each matter submitted to a vote at a meeting of shareholders except as the Articles of Incorporation otherwise provide.

...

Section 11. Cumulative Voting. At each election of Directors every shareholder entitled to vote at such election shall have the right to vote in person or by proxy, the number of shares owned by him for as many persons as there are Directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such Directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of candidates. The entire number of Directors to be elected shall be balloted for at one and the same time and not separately.

...

ARTICLE III

BOARD OF DIRECTORS

...

Section 4. Removal. At a special meeting of the shareholders of this corporation called for the purpose of removing any Director, such Director may be removed from office by a vote of a majority of all the shares of stock outstanding and entitled to vote, (provided, however, that the shareholders shall have the right to vote cumulatively on such removal and no Director shall be removed if the number of votes recorded against his removal would be sufficient, if cumulatively voted at an election of the entire Board of Directors to elect one or more Directors. All such shares voted cumulatively against the removal of a Director shall not be voted against the removal of any other Director during the term of which the Board of Directors shall have been elected.) No more than one meeting of shareholders of this corporation shall be called for the purpose of removing any individual Director during the term for which he is elected. When any director is removed, a new Director may be elected at the same meeting of the shareholders for the unexpired term of such Director removed. If the shareholders fail to elect a person to fill the unexpired term of the Director removed, such unexpired term shall be considered a vacancy on the Board of Directors to be filled by the remaining Directors.

(*Id.*, Art. II-III.)

I. Size Determination

On March 2, 2022, the Area Office issued Size Determination No. 04-2022-008, concluding that SNI is small for the instant procurement. (Size Determination at 10.) The Area Office identified January 3, 2022 as the date to determine SNI's size. (*Id.* at 9.) That was the date SNI self-certified as a small business for the instant procurement. (*Id.*) SNI “responded to the protest by submitting completed SBA Forms 355 and corporate documents, as well as subsequent queries from [the Area Office].” (*Id.* at 1.)

The Area Office determined that SNI was formed on October 28, 2020, as an unpopulated joint venture between US Trash and Six Nations. (*Id.* at 2.) SNI is structured as a limited liability company (LLC) in the state of Michigan. (*Id.* at 6.) SBA approved SNI's JVA on November 2, 2020, and the joint venturers executed the JVA Addendum on December 10, 2021. (*Id.* at 2.) The Area Office determined that Mr. Hamad, as majority owner of US Trash, and Ms. McMahan, as majority owner of Six Nations, have the power to control those companies, respectively. (*Id.*) There is no evidence that either US Trash or Six Nations have other affiliates. (*Id.*)

The Area Office first examined Appellant's allegations of the JVA's non-compliance with the regulations at 13 C.F.R. § 124.513(c) and found them to be “not specific.” (*Id.* at 3.) Even if specific, Appellant's allegations are “incorrect” because the JVA as supplemented by the JVA Addendum designates US Trash as the Managing Venturer, § 124.513(c)(3), itemizes all major equipment, facilities, and other resources to be furnished by each party, § 124.513(c)(6), and specifies the responsibilities of the parties to the joint venture, § 124.513(c)(7). (*Id.* at 3-4.)

The Area Office found that Appellant's allegation under § 124.513(d)(2) is “implicitly premised on the assumption that small businesses have no interest in or ability to expand their expertise, their business, or their markets” and “fails to apprehend why the 8(a) program exists or how it works.” (*Id.* at 4.) Mr. Hamad's declaration, an e-mail from the Michigan District Office, and SNI's formal proposal are consistent with the mission of the 8(a) program—SNI was formed for US Trash to gain experience with federal contracting and expand its business and markets. (*Id.* at 5.) In addition, US Trash “easily satisfies” the 40% work requirement. (*Id.* at 6.) SNI provided “substantial information” for “each employee who will perform the instant contract, including labor hours and wage rates (as well as additional information),” which show that US Trash's employees “account for more than 40% of the total labor hours and dollars.” (*Id.*)

Next, the Area Office addressed Appellant's allegation that Six Nations controls SNI. Appellant's control allegation is based on SNI's application to transact business as an LLC in Florida, which identified three Six Nations' officers and managers as “managers” of SNI, as well as two irrelevant SDVOSB cases. (*Id.* at 6.) However, the Area Office found, “neither [SNI's] By-Laws nor its [JVA] confer control on managers because [SNI] has no managers.” (*Id.*) In addition, Michigan's Limited Liability Company Act does not “require that organizers even create such a title or position.” (*Id.*) Although SNI's application to transact business in Florida was signed by Ms. McMahan, “the clerical act of preparing and filing a corporate form hardly confers control of the entity that is the subject of the filing upon the filer.” (*Id.*) Ms. McMahan's declaration explains that she completed such filings on behalf of SNI because she was “teaching Mr. Hamad through SNI's registrations.” (*Id.* at 7.) In fact, Ms. McMahan is SNI's Secretary, and thus tasked with administrative duties. (*Id.*)

Further, Appellant's contention that a shared address between SNI and Six Nations “*in and of itself* is evidence of control is untethered to fact.” (*Id.*, emphasis Area Office's.) The evidence of record, including sworn declarations from Ms. McMahan and Mr. Hamad, shows that Mr. Hamad currently works from home and SNI elected to use Six Nations' address “as one of convenience” until Mr. Hamad “is able to build [his] business up enough to open a separate office space.” (*Id.*) Appellant's allegation of control based on the fact that Ms. McMahan organized and formed SNI is also “illogical” and based on the false assumption that “a firm's organizer necessarily controls” the firm. (*Id.*) In so finding, the Area Office acknowledged that SNI's joint venturers drafted its corporate documents “without the benefit of legal advice or counsel,” resulting in various errors such as “[i]mproperly identifying individuals as ‘managers’ when no such position exists.” (*Id.* at 8.) Though such mistakes are “misleading,” they “do not create (or terminate) actual control of an entity.” (*Id.*)

With regard to Appellant's control allegation based on Six Nations' incumbency, the Area Office found that while it is correct that Six Nation has graduated from the 8(a) program, “[i]ncumbency may only be a reason to examine circumstances closely but it is not a basis for a finding of control.” (*Id.* at 8.) SBA typically addresses incumbency in the context of ostensible subcontracting, but Appellant “does not allege ostensible subcontracting because the parties have created a joint venture and are not prime and subcontractor.” (*Id.*) “[E]ven when an incumbent serves as a new subcontractor, the mere fact of incumbency ‘is not by itself sufficient to show unusual reliance.’” (*Id.*, quoting *Size Appeal of Telesis Corp.*, SBA No. SIZ-6113, at 16 (2021).)

SNI's "fundamental organizing documents" that create and confer control are its JVA, JVA Addendum, and Bylaws. (*Id.* at 9.) These documents reflect that US Trash controls SNI: US Trash is "the majority owner and Managing Venturer," and Mr. Hamad is the Project Manager for all contracts performed by SNI. (*Id.*) Appellant has not adduced any evidence to show that Six Nations' incumbent status demonstrates its control over SNI. (*Id.* at 8-9.) Rather, Appellant "confuses conclusion with argument" in suggesting that, because Six Nations serves as the incumbent contractor, it controls or exerts negative control over SNI, without elaborating on its theory of "negative control." (*Id.*) Nor does Six Nations' graduation from the 8(a) program prove that it controls SNI. (*Id.* at 8.)

The Area Office reviewed SNI's Bylaws and found its Board is comprised of two Directors, Mr. Hamad and Ms. McMahan. (*Id.* at 9, n.19.) Mr. Hamad nevertheless "controls the Board" because, "as the majority shareholder" he could unilaterally remove Ms. McMahan as a Director pursuant to Article III, § 4. (*Id.*)

Lastly, Appellant's allegation that SNI's size, combined with Six Nations and US Trash, will "likely" render SNI not small is "speculative." (*Id.* at 9.) Although SNI did not provide federal income tax returns for 2021 for any of these concerns, the available financial records indicate that "neither firm's average annual receipts—nor their total combined receipts—exceed the applicable size standard." (*Id.*)

J. Appeal

On March 17, 2022, Appellant filed the instant appeal. Appellant argues that the Area Office committed multiple errors of fact and law, and its determination is based on "conclusory, unsupported statements purported to be facts" and SNI's "self-serving affidavits, statements, or arguments." (Appeal at 6.) Appellant also takes an issue with the "overall tone" of the size determination, claiming that it is "patently dismissive of the substantive evidence submitted by [Appellant]" and merely "parrot[s] the responses submitted by SNI . . . without substantiating or adequately investigating those positions." (*Id.* at 7.)

Appellant first claims that the Area Office's determination that SNI "has no managers" listed in the JVA is a *per se* violation of 13 C.F.R. § 124.513(c)(2), and thus renders the JVA "defective." (*Id.*)

Next, Appellant maintains that multiple state filings, accompanying the protest, show that "at least four" of Six Nations' employees—Ms. McMahan, Mr. Davis, Mr. Foutch, and Ms. Latarski—are identified as "managers" of SNI. (*Id.* at 8.) The Area Office disregarded this evidence and erroneously found, based on erroneous interpretation of state law, that "the clerical act of preparing and filing a corporate form hardly confers control of the entity." (*Id.*) Specifically, SNI's corporate filings in Florida list Ms. McMahan and Messrs. Davis and Foutch as three of the four managers of SNI. (*Id.* at 9.) Florida law defines a manager as "'a person who, under the operating agreement of a manger-managed limited liability company, is responsible, alone or in concert with others, for performing the management functions' of the entity." (*Id.* at 9-10.) Similarly, Michigan law defines a manager as "'a person or persons designated to manage

the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers”D’. (*Id.* at 10.) Ms. Latarski is identified as the manager of SNI in various filings in Michigan. (*Id.*) Because “[t]he joint venture is viewed as a business entity” in determining who has the power to control, the individuals listed as managers of SNI in state filings have the power to control SNI. (*Id.* at 10-11, citing 13 C.F.R. § 121.103(h) and *Matter of Seventh Dimension, LLC*, SBA No. VET-6057 (2020).) “[A]greements and documents that indicate that Six Nations controls four managers versus one for US Trash indicates that the 8(a) does not control the joint venture.” (*Id.* at 11.) Six Nations’ “substantial level of control” over SNI is also evidenced in its name— SNI is an acronym for “Six Nations, Inc.” (*Id.* at 12.)

Appellant maintains that the shared office space between Six Nations and SNI reflects control over SNI by Six Nations, and argues that the Area Office erroneously rejected this claim “as one of mere ‘convenience’D’ without legal support. (*Id.* at 12-13.) Specifically, SBA regulations and OHA precedent make clear that “one of the many factors showing control of one entity over the other is ‘whether the firms share officers, employees, facilities, or equipment.’” (*Id.* at 13, citing *Size Appeal of ProSol Assocs., LLC*, SBA No. SIZ-5813 (2017) and *Size Appeal of Nat’l Sec. Assocs., Inc.*, SBA No. SIZ-5907 (2018).) Ms. McMahan’s assistance to SNI and Mr. Hamad constitutes “technical assistance,” which supports a finding of affiliation and control. (*Id.* at 13-14, citing 13 C.F.R. §§ 121.103(g) and 124.702(g).) Yet, the Area Office failed to find control based on SNI’s “dependence on Six Nations for technical assistance.” (*Id.* at 14.)

Lastly, the Area Office erred in finding that Six Nations’ incumbency on the predecessor contract does not demonstrate its control over SNI. (*Id.* at 15.) Relying on *Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103 (2021) and *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), Appellant argues that Six Nations’ incumbent status is “significantly relevant” to finding of affiliation and control. (*Id.* at 15.) The Area Office should have found that Six Nations controlled or had the ability to control SNI because Six Nations is the incumbent contractor and is no longer able to compete for an 8(a) set-aside, and SNI, the new prime contractor, lacks the requisite experience to perform the work due to US Trash’s lack of federal contract experience beyond the Michigan area. (*Id.*)

K. SNI’s Response

On April 4, 2022, SNI responded to the appeal. SNI argues that Appellant’s allegations are based on “a fundamental misunderstanding and misapplication of SBA regulations” as well as Appellant’s “mere disagreement” with the size determination. (Response at 1.)

SNI first contends that Appellant’s allegation of *per se* violation of 13 C.F.R. § 124.513(c)(2) is “misplaced.” (*Id.* at 7.) The Area Office correctly found that the JVA names US Trash as the Managing Venturer of SNI, and an employee of US Trash, Mr. Hamad, as its “Responsible Manager.” (*Id.* at 7-8.) Contrary to Appellant’s suggestions, the Area Office “did not find that there is no named Responsible Manager, as required in SBA regulations.” (*Id.*) Appellant also mischaracterizes the Area Office’s analysis regarding Six Nations’ four employees listed as “managers” in SNI’s state filings. (*Id.* at 8.) In the size determination, the Area Office explained that the four named employees of Six Nations reflected in SNI’s state filings are

“irrelevant to the actual corporate documents of the joint venture” because the employees do not hold positions as managers in SNI, and thus have no control over SNI. (*Id.*)

Next, SNI insists that the Area Office correctly determined that SNI remains an eligible small business notwithstanding its affiliation with Six Nations. (*Id.* at 9.) Appellant's allegation that Six Nations controls SNI is largely premised on affiliation between Six Nations and SNI through (1) Six Nations holding four “manager” positions in SNI; (2) a shared office space between Six Nations and SNI; (3) Ms. McMahan's “technical assistance” to SNI; and (4) Six Nations' incumbency on the predecessor contract. (*Id.*) In response to the protest, though, “SNI specifically acknowledged its affiliation with Six Nations,” and argued that despite the affiliation, both Six Nations and SNI remain small. (*Id.* at 9-10.)

The Area Office also correctly determined that US Trash is the majority owner and Managing Venturer and it controls SNI. (*Id.* at 10, 14-15.) Appellant's references to the state law definitions of “manager” are not only “illogical” but also “inapplicable” to the instant appeal. (*Id.* at 12.) The JVA, JVA Addendum, and Bylaws are the relevant corporate documents, and these documents reflect that US Trash is the Managing Venturer and Mr. Hamad is the Project Manager. (*Id.* at 12, 14.) The SBA regulation at 13 C.F.R. § 124.513(c)(2) “solely addresses the requirements of a joint venture agreement,” whereas state laws referenced by Appellant require a manager, if any, to be named in the operating agreement. (*Id.* at 11-12.) Indeed, the Area Office “explicitly found” that SNI mistakenly listed Six Nations' four employees as managers in state filings, but the governing corporate documents “confer no such title or control” to these individuals. (*Id.* at 11.) “SNI elected not to include managers within its Articles of Organization, and similarly excluded managers from its Bylaws” because the state of Michigan does not require LLCs to list managers within its Articles of Organizations. (*Id.* at 13.) Not doing so does not violate § 124.513(c)(2). (*Id.*) Appellant's reliance on § 121.103(h) and OHA's decision in *Seventh Dimension* in support of its position that individuals listed as managers of SNI in state filings have the power to control SNI is also misplaced. (*Id.* at 13-14.)

Likewise, Appellant's reliance on 13 C.F.R. § 121.103(g) is misplaced as the regulation “concerns affiliation based on the newly organized [concern] rule— an issue not raised in its size protest.” (*Id.* at 15.) Not only did SNI already acknowledge affiliation with Six Nations, but Appellant's reliance on § 121.103(g) is untimely. (*Id.*) In addition, the Area Office properly relied upon sworn declarations in the record. (*Id.* at 15-16.)

SNI then argues that the Area Office did not err in concluding that a shared office space between SNI and Six Nations does not reflect control. (*Id.* at 17, 21.) SNI maintains that Six Nations and US Trash “chose” to use Six Nations' business address “in the interim” until SNI is able to open its own office space. (*Id.* at 18.) Highlighting 13 C.F.R. § 124.513 and SBA's website pertaining to unpopulated 8(a) joint ventures, SNI claims that sharing an office space “is not impermissible” under the regulations. (*Id.* at 19.) In addition, the OHA precedent relied upon by Appellant—*ProSol Assocs.* and *Nat'l Sec. Assocs.*—in support of its claim that a shared office is one of many factors showing control do not address affiliation or control in the context of an unpopulated 8(a) joint venture, and thus are inapplicable here. (*Id.* at 19-20.)

SNI continues to assert that the Area Office “reasonably” relied on SNI's explanation, substantiated by two sworn declarations, in concluding that Ms. McMahan's assistance and guidance to SNI do not reflect control, and that Ms. McMahan merely performs administrative duties as SNI's Secretary. (*Id.* at 21-22.) SNI maintains that Ms. McMahan assisted SNI through state filings so that Mr. Hamad can become familiar with “how to start up a federal contract in a new state.” (*Id.* at 22.) Besides its reliance on “inapplicable or misconstrued regulations” at 13 C.F.R. §§ 121.103(g) (newly-organized concern rule) and 124.702 (technical assistance program), Appellant has provided no evidence to support its claim that Ms. McMahan's assistance to SNI is either “improper” or “disallowed.” (*Id.* at 23.)

Lastly, SNI urges that “OHA should not disturb the Area Office's finding that “Six Nations' incumbency *does not in any way demonstrate or even tend to demonstrate* that Six Nations controls SNI.” (*Id.* at 28, emphasis SNI's.) Contrary to Appellant's suggestions, Six Nations' incumbency is “irrelevant” to SNI's award of the instant contract and does not evidence control. (*Id.* at 24.) Appellant's contentions are premised on inapplicable precedent concerning the ostensible subcontractor rule. (*Id.* at 26.) Here, as correctly explained by the Area Office, Appellant did not allege any violation of the ostensible subcontractor rule in the underlying size protest and the relationship at issue in the instant appeal is “not one of a prime contractor/subcontractor.” (*Id.*) Likewise, US Trash's lack of experience in performing the type of work contemplated under the instant contract does not reflect control in the 8(a) program. (*Id.* at 27.) SBA's 8(a) program is intended to support small businesses with limited experience. (*Id.* at 27.) In fact, the regulations governing 8(a) joint ventures explicitly provide that entering into a joint venture is permitted only where an 8(a) concern “*lacks the necessary capacity to perform the contract on its own.*” (*Id.*, emphasis SNI's.)

L. Supplemental Appeal

On April 4, 2022, after its counsel reviewed the Area Office file under the terms of an OHA protective order, Appellant moved to supplement its appeal. Appellant observes that OHA routinely grants litigants leave to supplement their appeals under such circumstances. (Motion at 2.) Accordingly, for good cause shown, Appellant's motion is GRANTED and the Supplemental Appeal is ADMITTED. *E.g.*, *Size Appeal of Crew Training Int'l, Inc.*, SBA No. SIZ-6128, at 16 (2021).

In the Supplemental Appeal, Appellant contends that the Area Office clearly erred by “disregarding” evidence of Ms. McMahan's “unequivocal ability to control” SNI, reflected in SNI's Bylaws. (Suppl. Appeal at 3.) The Bylaws identify Ms. McMahan as the Vice President, Secretary, and one of the two directors of SNI. (*Id.*) This establishes both “affirmative and negative control” over SNI. (*Id.* at 4, citing 13 C.F.R. § 121.103(a)(3).)

Specifically, the Bylaws provide the Board of Directors “express authority” over “[t]he business, property, and affairs” of SNI and to “designate management duties” and control “salaries, loans, declarations, and dividends” of the officers of SNI. (*Id.* at 4-5.) The Bylaws also authorize Ms. McMahan to “perform duties of President, or such other duties that may be assigned by the “Board of Directors' if the President is absent or refuses to act.” (*Id.* at 6.) According to Appellant, “[t]his is a clear sign of control,” as it reflects Ms. McMahan's ability to

have “**influence or control over**” SNI's day-to-day operations “if Mr. Hamad refuses to take certain actions.” (*Id.*, citing *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769 (2016), emphasis Appellant's.) Ms. McMahan's role as the Secretary of SNI also “empowers” her as an officer and manager of SNI, thus provides her control over SNI. (*Id.* at 7.)

With regard to negative control, SNI's Bylaws provide that “[t]he act of the majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.” (*Id.* at 7.) The Bylaws also require “a majority of the members of the Board to be present to establish a quorum.” (*Id.* at 8.) Because there are only two directors, the Board cannot take any action without Ms. McMahan's consent or participation. (*Id.* at 7-8.) As such, Ms. McMahan “at minimum” has negative control over SNI. (*Id.* at 8-9, citing *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125 (2021) and *Size Appeal of Southern Contracting Solutions III, LLC*, SBA No. SIZ-5956 (2018).)

Appellant also contends that the Area Office improperly failed to obtain or request an SBA Form 355 from SNI. (*Id.* at 9-10.) US Trash and Six Nations each provided completed Form 355s, but none was provided from SNI. (*Id.* at 9.) “The key issues the Area Office was charged with determining was the control, ownership, management, and other key aspects of [SNI], not of Six Nations or US Trash.” (*Id.*) Failure to develop a complete record constitutes a clear and reversible error. (*Id.* at 10.)

Finally, Appellant asserts that the Area Office erred in finding that the JVA, even as supplemented by the JVA Addendum, complies with 13 C.F.R. § 124.513(c)(6). (*Id.*) The JVA Addendum lists equipment without “a detailed schedule of cost or value of such equipment” as required by the regulations. (*Id.* at 10-11.) Merely repeating “currently owned” next to each item of equipment does not suffice to satisfy the regulation. (*Id.* at 11.)

M. Supplemental Response

On April 19, 2022, SNI opposed Appellant's motion to supplement the appeal, or in the alternative, moved to supplement its response. Because OHA has granted Appellant's motion to supplement the appeal, SNI's request to supplement its response also is GRANTED.

SNI argues, first, that Appellant's contention that the Area Office did not address Ms. McMahan's control over SNI pursuant to SNI's Bylaws is “meritless and reflects inaccurate, intentional misrepresentation” of SNI's Bylaws, evidence of record, and the size determination. (Supp. Response at 3.) SNI points out that the size determination “clearly” identifies Ms. McMahan's position as the Vice President, Secretary, and one of Board of Directors of SNI. (*Id.* at 4.) Notably, the Area Office found that SNI's Bylaws “explicitly provide that **Mr. Hamad controls the Board** because, as the majority shareholder, **he has the power to remove Ms. McMahan as director.**” (*Id.* at 4, citing Size Determination at 9, n.19, emphasis SNI's.) The size determination likewise acknowledges Ms. McMahan's position as the Secretary of SNI, and specifically found that “***[h]er duties are conferred upon her by her office and are administrative.***” (*Id.*, emphasis SNI's.) Ms. McMahan's role as the Vice President was also in the record before the Area Office. (*Id.*)

Appellant “merely quotes language (out of context)” from the Bylaws to argue that Ms. McMahan controls SNI. (*Id.* at 5.) However, Appellant fails to explain how the “shared responsibilities” of SNI between Mr. Hamad and Ms. McMahan confer Ms. McMahan affirmative control over SNI. (*Id.*) Nor does Appellant refute the Area Office's determination that Mr. Hamad, as the majority shareholder, could unilaterally remove Ms. McMahan as a Director. (*Id.* at 6.) Although the Bylaws provide that the “Vice President shall perform the duties of President” in the event that the President is absent or refuses to act, this does not suggest control. (*Id.*) Instead, the Bylaws establish that the President “**shall in general supervise and control all of the business and affairs of the corporation.**” (*Id.* at 7, emphasis SNI's.) Appellant's reliance on *Human Learning* is also misplaced as the case discusses affiliation in the context of the newly-organized concern rule. (*Id.* at 6-7.)

The Area Office identified the JVA, JVA Addendum, and Bylaws as SNI's “fundamental organizing documents” and found that they clearly indicate that “US Trash is the majority owner and Managing Venturer and it controls SNI.” (*Id.* at 9.) While “selectively ignore[ing] the power conferred to US Trash in SNI's JVA,” Appellant “unreasonably focus[es] on the number of directors as indicative of control **when in fact control of SNI is based on the majority vote and shareholder power**[.]” (*Id.* at 10, emphasis SNI's.)

Appellant further misinterprets the Bylaws quorum provision in claiming that Ms. McMahan can exert negative control over SNI. (*Id.* at 9.) Contrary to Appellant's allegation, “the Bylaws require majority of shareholders to be present for a quorum to voice, and the power to take action lies with the shareholders, and not the directors.” (*Id.* at 13.) “[W]hile SNI's Bylaws may require the Board to pass resolutions to act upon certain matters, this does not evidence that Ms. McMahan has negative control over SNI as voting power is maintained by the majority owner.” (*Id.*)

Next, Appellant's allegation that the Area Office improperly failed to obtain or request an SBA Form 355 from SNI is “unfounded, refuted by the record.” (*Id.* at 13.) In the Area Office's initial letter to SNI, the Area Office “instructed SNI to provide ‘an original signed and completed SBA Form 355 **for each party to the joint venture.**” (*Id.* at 14, emphasis SNI's.) Both US Trash and Six Nations submitted required SBA Form 355. (*Id.*) The size determination itself acknowledges that “‘**SNI [] responded to the protest by submitting completed SBA Forms 355 and corporate documents.**’” (*Id.*, emphasis SNI's.) Appellant, also, provides no authority or support for the notion that SNI should have submitted a separate SBA Form 355. (*Id.*) Even if SNI had submitted its own SBA Form 355, “it would not have affected outcome of the joint venture's ‘size’” because SBA requires that all joint ventures be “unpopulated” and thus have no employees performing any contract work. (*Id.* at n. 3, citing 13 C.F.R. § 121.103(h).)

Lastly, the Area Office did not err in finding that SNI's JVA complies with 13 C.F.R. § 124.513(c)(6). (*Id.* at 18.) Appellant did not challenge this aspect of the size determination in its first appeal, and should not be permitted to “revive an untimely argument.” (*Id.* at 16-17.)

Even if considered on the merits, the Area Office reasonably concluded that the JVA sufficiently lists the equipment. (*Id.* at 18.) The JVA provides a description and costs for each equipment. (*Id.*) The JVA Addendum later “omitted” the cost of the equipment because “at that

point, the equipment was already owned by entities.” (*Id.*) OHA has found that when an entity is leasing resources from another, listing those resources in detail is sufficient to satisfy the 13 C.F.R. § 124.513(c)(6). (*Id.*, citing *Size Appeals of Kentucky Bldg. Maint., Inc. and NMI Alaska, Inc.*, SBA No. SIZ-6001 (2019).)

III. Discussion

A. Standard of Review

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

B. Analysis

I find it appropriate to remand this case for further review. In response to Appellant's protest, SNI argued, and the Area Office agreed, that SNI is a joint venture and an LLC, majority-owned by US Trash, which also serves as the Managing Venturer of SNI. Sections II.C and II.I, *supra*. As Appellant observes in its appeal, however, SNI's assertions appear inconsistent with other evidence in the record, much of which was submitted by SNI itself. As a result, additional review is warranted.

Beginning with the question of whether US Trash serves as the Managing Member of SNI, the Area Office correctly recognized that, as an LLC based in the state of Michigan, SNI is not necessarily required to designate any Managing Member. Section II.I, *supra*. Under Michigan law, however, management of an LLC is vested in its members, unless a particular Manager or Managing Member is stated in the LLC's operating agreement or articles of organization. The pertinent provision of the Michigan Limited Liability Company Act thus provides:

450.4401 Management vested in members.

Sec. 401.

Unless the articles of organization state that the business of the limited liability company is to be managed by 1 or more managers, the business of the limited liability company shall be managed by the members, subject to any provision in an operating agreement restricting or enlarging the management rights and duties of any member or group of members. If management is vested in the members, both of the following apply:

- (a) The members are considered managers for purposes of applying this act, including section 406 regarding the agency authority of managers, unless the context clearly requires otherwise.
- (b) The members have, and are subject to, all duties and liabilities of managers and to all limitations on liability and indemnification rights of managers.

Mich. Comp. Laws § 450.4401.

Here, SNI submitted Articles of Organization reflecting that SNI is an LLC based in the state of Michigan. Section II.D, *supra*. Nothing in those articles, however, designated US Trash as the Manager or Managing Member of SNI. *Id.* SNI further informed the Area Office that “SNI does not have an operating agreement.” Section II.C, *supra*. The Area Office also independently reviewed SNI's organizational documents and found that they made no reference to any Managers or Managing Members because “[SNI] has no managers.” Section II.I, *supra*. Given this record, then, the conclusion that US Trash is the Managing Venturer of SNI appears questionable and inconsistent with Michigan law, which statutorily vests management of an LLC in all of its members.

The Area Office also did not perform a complete review of whether SNI's business and ownership structure is sufficient to meet SBA requirements pertaining to joint ventures. As discussed above, in response to Appellant's protest, SNI represented to the Area Office that it is a joint venture between two business concerns, US Trash and Six Nations. Section II.C, *supra*. SNI, however, also submitted Bylaws to the Area Office, which appear to indicate that, in actuality, SNI is not a joint venture but rather is structured as a stand-alone corporation of indefinite (perpetual) duration. Section II.H, *supra*. SNI asserted that “SNI is affiliated with Six Nations and US Trash.” Section II.C, *supra*. Under OHA precedent, though, a participant in a joint venture is not affiliated with its joint venture. *E.g., Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011). Accordingly, SNI's statement that it is affiliated with US Trash and Six Nations may be understood as suggesting that SNI is not a joint venture. Moreover, SNI repeatedly stated, including in sworn declarations and in SBA Form 355s, that it is not in fact owned by the purported joint venturers themselves, but instead is owned by two individuals (Mr. Hamad and Ms. McMahan). Sections II.E and II.F, *supra*. Again, these statements appear to contradict SNI's claim that it is a joint venture between two business concerns. Given this record, additional review is needed to determine whether, and how, SNI's business and organizational structure meets SBA joint venture requirements, for example the requirement that, when a joint venture is competing for an 8(a) procurement, “the 8(a) Participant(s) must own at least 51% of the joint venture entity.” 13 C.F.R. §§ 121.103(h)(1)(i) and 124.513(c)(3).

Apart from the above issues, SBA regulations also require that, if a joint venture is competing for an 8(a) procurement, an 8(a) participant must have control over the day-to-day management and administration of the contractual performance of the joint venture. 13 C.F.R. §§ 121.103(h)(1)(i) and 124.513(c)(2)(i). Here, as Appellant highlights in its appeal and supplemental appeal, SNI's corporate Bylaws indicate that SNI is governed by a Board of Directors, which was comprised of two individuals (Mr. Hamad and Ms. McMahan) as of the date to determine size. The Bylaws further stipulate that a “majority” of the Board is needed to

establish a quorum or to take action. Section II.H, *supra*. Based on this structure, then, it appears that Ms. McMahan could exert negative control over SNI by, for example, declining to attend Board meetings, thereby blocking a quorum. *See generally* 13 C.F.R. § 121.103(a)(3) (negative control includes situations where a minority shareholder can “prevent a quorum or otherwise block action by the board of directors”). In response to the appeal, SNI suggests that any negative control exerted by Ms. McMahan would be illusory because Mr. Hamad, as SNI's majority shareholder, could remove Ms. McMahan from her position as Director. The relevant provision of SNI's Bylaws, however, indicates that “no Director shall be removed if the number of votes recorded against his removal would be sufficient, if cumulatively voted at an election of the entire Board of Directors to elect one or more Directors.” Section II.H, *supra*. In light of this cumulative voting restriction, it is not evident that Mr. Hamad, as 51% owner of SNI, holds a sufficiently large ownership interest to unilaterally remove Ms. McMahan from SNI's Board. Under such circumstances, negative control would not be illusory; additional review is thus appropriate.

C. Remand

OHA has held that “an area office's failure to further develop and address clear contradictions in the record constitutes clear error.” *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5895, at 16 (2018) (citing *Size Appeal of Precision Standard, Inc.*, SBA No. SIZ-4858 (2007)); *see also Size Appeal of DNT Solutions, LLC*, SBA No. SIZ-5900 (2018); *Size Appeal of The Frontline Group*, SBA No. SIZ-5835 (2017). Such is the case here, because although SNI represented that it is a joint venture between two business concerns, majority-owned and controlled by US Trash, its Managing Venturer, these assertions appear inconsistent with Michigan law as well as with other evidence in the record, which SNI itself submitted to the Area Office. Accordingly, additional review and clarification is needed.

On remand, the Area Office should assess whether SNI's business and ownership structures meet SBA joint venture requirements, and should obtain a separate SBA Form 355 from SNI itself. The Area Office also should review and obtain clarification, as necessary, to determine whether Ms. McMahan could indeed prevent a quorum or block action by SNI's Board of Directors, and whether Mr. Hamad could unilaterally remove her from the Board in light of the cumulative voting restrictions.

IV. Conclusion

For the above reasons, the appeal is GRANTED, Size Determination No. 04-2022-008 is VACATED, and the matter is REMANDED to the Area Office for a new size determination.

KENNETH M. HYDE
Administrative Judge