

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

SIZE APPEALS OF:

Aldevra, LLC,

Appellant,

RE: Government Sales, LLC

Appealed From
Size Determination Nos. 3-2022-032
and 3-2022-038

SBA No. SIZ-6240

Decided: August 29, 2023

APPEARANCES

Jason A. Blindauer, Esq., Blindauer Law PLLC, Washington, D.C., for Appellant

Aron C. Beezley, Esq., Patrick R. Quigley, Esq., Nathaniel J. Greeson, Esq., Gabrielle A. Sprio, Esq., Bradley Arant Boult Cummings LLP, Washington, D.C., for Government Sales, LLC

DECISION¹

I. Introduction and Jurisdiction

On October 21, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2022-032, concluding that Government Sales, LLC (GSL) is a small business. Aldevra, LLC (Appellant), which had previously protested GSL's size, appealed that decision to SBA's Office of Hearings and Appeals (OHA). While that appeal was pending, the Area Office issued Size Determination No. 3-2022-038 on April 4, 2023, again concluding that GSL is small, and Appellant again appealed to OHA. Because the two appeals involve the same issues and the same parties, OHA consolidated them into a single proceeding for adjudication. For the reasons discussed *infra*, the appeals are denied and the size determinations are affirmed.

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 appeals within

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.

15 days of receiving the respective size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Procurements

On July 20, 2022, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. 36C25222Q0753 for meal tray delivery carts. (RFQ No. 36C25222Q0753 at 1.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 333241, Food Product Machinery Manufacturing, with a corresponding size standard of 500 employees. (*Id.* at 1.) According to the RFQ, VA planned to award the contract on a lowest-price technically-acceptable basis. (*Id.* at 3, 30.) Quotations were due July 30, 2022. (*Id.* at 1.) GSL and Appellant submitted timely quotes. On September 5, 2022, the CO announced that GSL had been selected for award.

On September 9, 2022, VA issued RFQ No. 36C24922Q0678 for “ten (10) refrigerator/freezers.” (RFQ No. 36C24922Q0678 at 1.) The procurement was set aside entirely for small business under the NAICS code 333415, Air Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing, with a corresponding size standard of 1,250 employees. (*Id.*) Quotations were due September 15, 2022. (*Id.* at 6.) GSL and Appellant submitted timely responses. On September 17, 2022, the CO announced that GSL had been selected for award.

B. Protests and Responses²

1. The Protests

Appellant filed timely size protests challenging GSL's size on September 6, 2022 and September 19, 2022, respectively. The COs forwarded the protests to the Area Office for review.

In its protests, Appellant alleged that GSL is affiliated with TriMark USA, LLC (TriMark), which describes itself as “the country's largest restaurant supply company and provider of food service supplies.” GSL therefore is not small. (Protest at 1-2.) Appellant maintained that “GSL was a subject in a False Claims Act suit and Department of Justice (‘DOJ’) fraud investigation for serving as a pass-through company in the small business contracting fraud scheme of [TriMark] and its subsidiaries.” (*Id.* at 2.) Although the case ultimately was settled, TriMark “accepted responsibility for engaging in a scheme to circumvent . . . small business requirements to secure set-aside contracts,” and agreed to pay \$48.5 million. (*Id.* at 2-3.) Appellant highlighted that a Settlement Agreement between DOJ and TriMark indicates that “for a period of time, TriMark held a 49% ownership stake in GSL,” and that

² Appellant's size protests, and GSL's responses thereto, are substantively identical. Citations within this decision are to the size protest and response filed in conjunction with RFQ No. 36C25222Q0753.

TriMark previously employed, or concurrently employed, “seven (7) out of sixteen (16) of GSL's *current* employees.” (*Id.* at 3, emphasis Appellant's.) As a result, GSL and TriMark may have continuing connections, which may give rise to affiliation through identity of interest, common ownership or management, and/or the totality of the circumstances. (*Id.*)

Appellant elaborated as to “GSL's role in TriMark's small business fraud scheme” as set forth in the *qui tam* complaint against TriMark:

- [The predecessor to GSL, Government Sales, Inc. (GSI),] was incorporated in 2000 and operated as a corporation until 2013, when it converted into [a limited liability company (LLC)] and became GSL. GSI initially focused on furniture sales. Until its conversion, the number and value of GSI's federal contracts was modest — from 2005 through 2012, was awarded thirty-five contracts worth approximately \$1.7 million.

- . . . TriMark became involved with GSL before GSI's LLC conversion, since at least 2013. GSL's contracting activity proliferated greatly — the [*qui tam* complaint] alleges that from March 2014 through March 2019, GSL generated over \$40 million in revenue via more than 2,000 awards. Most of these sales were in foodservice equipment, which aligns with TriMark's line of business. TriMark's involvement in the management and operations of GSL is reflected in GSL's first three annual reports. . . .

- [At least four] key principals for GSL [including its President, Mr. Charles P. Robinson, III] formerly held significant positions at TriMark. For some time, Mr. [Gil] McClurg, who rose to the level of Vice President of Sales and Marketing, worked concurrently for both GSL and TriMark. In fact, all four worked concurrently for both companies. . . . [A] number of TriMark employees performed work on behalf of GSL, which included preparing and helping submit quotes on behalf of GSL for small business set-aside opportunities.

(*Id.* at 3-4, internal citations omitted.) The Settlement Agreement also “shed[s] light” on the relationship between TriMark and “Company 2,” which Appellant asserts is GSL. (*Id.* at 5.) In Appellant's view, TriMark treated GSL as an affiliate “by permitting [GSL] to participate in TriMark's ‘buying groups’ and benefit from discounted pricing.” (*Id.*) Additionally, through the Settlement Agreement, TriMark “admit[ted], acknowledge[d], and accept[ed] responsibility” for engaging in a small business scheme with Company 2 and others. (*Id.* at 6.) TriMark's “admissions” are indicative of its affiliation with small businesses, including GSL. (*Id.*)

Appellant alleged “ongoing entanglement” between GSL and TriMark. (*Id.* at 6-7.) First, Appellant contended that GSL “may be” affiliated with TriMark based on common ownership and control. (*Id.* at 7, citing 13 C.F.R. § 121.103(a)(3) and (c).) GSL's annual reports from 2014 to 2016 evidence that TriMark held an ownership interest in GSL, and the 2016 annual report was signed by Ms. Phyllis Leon, who at that time was a TriMark employee and now is employed by GSL. (*Id.*) Although public records do not clearly show that “TriMark retains its direct

ownership interest in GSL,” nor do such records demonstrate that TriMark has relinquished its ownership interest. (*Id.*)

Appellant argued that GSL is affiliated with TriMark based on ownership, management, previous relationships, and/or the totality of the circumstances. Public information shows that at least seven of GSL's 16 employees “were previously employed by TriMark,” including GSL's President, Mr. Robinson. (*Id.*) This suggests a “longstanding and significant” “interrelationship” between GSL and TriMark. (*Id.* at 9.)

Lastly, given “the longstanding and extensive connections” between GSL and TriMark, “it is likely” that GSL and TriMark are affiliated through identity of interest and economic dependence. (*Id.*, citing 13 C.F.R. § 121.103(f).) Appellant claimed that “GSL received a total of \$17,397,389.94 in prime federal contract awards” from 2019 to 2021, of which “approximately \$12,334,777.51” came from acquisitions related to food or kitchen supplies, “categories that align with TriMark's line of business.” (*Id.*) “Because a high percentage of GSL's sales and receipts are made through its relationship with TriMark, it is plausible, if not likely, that GSL is economically dependent on TriMark.” (*Id.*)

2. GSL's Responses

On September 14, 2022, GSL responded to Appellant's first size protest, and submitted copies of its tax returns and financial records, Operating Agreement, a “Member Withdrawal Agreement” (MWA), annual reports, a sworn SBA Form 355, and other supporting documents. On October 27, 2022, GSL responded to the second size protest. GSL denied affiliation with TriMark, asserting that Appellant's allegations are “riddled with factual inaccuracies and mistaken assumptions,” and premised on outdated information. (Protest Response at 3.)

GSL insisted that it is not affiliated with TriMark based on identity of interest, common ownership or management, or the totality of the circumstances. (*Id.*) First, GSL denied that TriMark holds any ownership interest in, or control over, GSL. (*Id.*) The historical relationships discussed in the *qui tam* complaint, the Settlement Agreement, and GSL's annual business filings from 2014 to 2016 do not “accurately depict the current state of facts.” (*Id.*) Upon laying out in detail what it claims to be accurate facts, GSL concluded:

Although TriMark was [previously, in a 2018 size determination,] found to be affiliated with GSL on the basis of negative control resulting from the ownership interest it held in GSL, such affiliation ceased following the corporate reorganization of GSL in early 2018 when TriMark relinquished its interest in GSL. Since that time, GSL has sought, and received, recertification of its small business status from the SBA. Further, as part of that reorganization and recertification process, GSL's previous affiliation with TriMark was found to be eradicated. Notably, too, [Appellant] cites to GSL's annual reports from 2014, 2015, and 2016 as support for its allegations while blatantly (and conveniently) disregarding the more recent annual reports, from 2017 and 2018 to the present, which plainly reflect the change in ownership of GSL and the disaffiliation of TriMark.

(*Id.* at 5.) As such, TriMark has not held any ownership interest in GSL since early 2018, and thus has no control, nor any power to exercise control, over GSL. (*Id.* at 5-6.)

Next, GSL denied affiliation with TriMark through common management or “close connections.” (*Id.* at 6.) Appellant's protests relied on “unverified websites,” and “outdated information” from 2016 — 2018 in asserting that seven out of 16 current GSL employees were recently or concurrently employed by TriMark. (*Id.*) In actuality, GSL has only nine employees, and “does not share any employees or managers with TriMark.” (*Id.* at 6-8.) GSL addressed each of the seven individuals named in Appellant's protests, and claimed that none of them work concurrently for TriMark. (*Id.* at 6-7.) GSL then argued that “[w]hile certain of GSL's current employees *formerly* worked at TriMark, previous employment at another company in the same industry does not evidence ‘close connections’ between those companies or necessitate a finding of affiliation.” (*Id.* at 7-8, emphasis GSL's.) GSL further emphasized that SBA regulations do not preclude hiring former employees of another business in the same industry, nor is there any basis for finding affiliation on that ground. (*Id.* at 8, citing 13 C.F.R. §§ 121.101 and 121.103.) GSL observed that Appellant itself “*also employs at least one former employee of TriMark.*” (*Id.*, emphasis GSL's.)

GSL further denied affiliation with TriMark based on identity of interest or economic dependence. (*Id.* at 8.) GSL reiterated that “TriMark has no ownership interest in GSL, nor any common or closely connected executives, management, or employees.” (*Id.*) Appellant's allegation that GSL is economically dependent upon TriMark is “illogical and unsupported,” and “categorically disregards the fact that GSL's primary business operations historically and presently concern food and kitchen supplies and equipment” and have “nothing to do with TriMark.” (*Id.* at 9.) “[A]part from occasional purchases of installation services made by GSL from TriMark on an as-needed basis, in arm's length transactions through individual purchase orders,” GSL has no contractual or otherwise significant business ties with TriMark. (*Id.*) Contrary to Appellant's contentions, “GSL's actual purchases from TriMark over the last two years total approximately \$320,000” — meaning that “GSL has the ability to procure” services without contractually or economically relying on TriMark. (*Id.*) Additionally, GSL has been awarded prime federal contracts “without the assistance or control of TriMark.” (*Id.*) GSL emphasized that TriMark and GSL have “absolutely no interest” in each other's financial success, nor do the two companies “share equipment, facilities, employees, management, or other resources.” (*Id.*)

Lastly, GSL denied affiliation based on the totality of the circumstances. (*Id.* at 10.) GSL argued that, instead, that consideration of the totality of the circumstances reflects that TriMark “has no control, or power to control GSL.” (*Id.*) In so arguing, GSL reiterated that TriMark has held no ownership interest in GSL since 2018; that GSL and TriMark have no common management or shared employees or resources; that GSL and TriMark do not have significant contractual or other relationships; and that there exists no economic interdependency between GSL and TriMark. (*Id.*)

C. Area Office Files

1. Member Withdrawal Agreement

The MWA, signed by representatives of GSL (“Buyer”) and TriMark (“Seller”), became effective February 9, 2018. (Protest Response, Exh. 18, at 1.) Under the MWA, GSL agreed to purchase TriMark's 49% ownership interest in GSL. (*Id.*) The MWA contains the following provisions pertinent to these appeals:

ARTICLE I. PURCHASE OF MEMBERSHIP INTERESTS

Section 1.1 Purchase of Interest. Subject to the terms and conditions hereof, on the Closing Date Seller shall sell, transfer, convey, assign and deliver to Buyer and Buyer shall purchase and assume from Seller, all of Seller's right, title and interest in and to the Purchased Interest

Section 1.2 Purchase Price. The purchase price [] for the Purchased Interest shall be [\$XXXX]. The Purchase Price shall be paid by Buyer to Seller by wire transfer of immediately available funds to the account designated by Seller.

(*Id.*) TriMark further agreed to immediately assign its ownership interest to GSL. (*Id.*, at 9.)

2. Operating Agreement

GSL is structured as an LLC in the state of North Carolina. (Protest Responses, Exh. 2 at 1.) The current version of GSL's Operating Agreement became effective February 9, 2018, and contains the following provisions pertinent to these appeals:

ARTICLE II FORMATION OF THE COMPANY

...

2.3 REGISTERED OFFICE AND REGISTERED AGENT. The Company's registered office shall be 4644-A Arendell Street, Morehead City, Carteret County, North Carolina 28557, and the name of the initial registered agent at such address shall be [Mr. Robinson].

2.4 PRINCIPAL PLACE OF BUSINESS. The principal place of business of the Company within the State of North Carolina shall be 4644-A Arendell Street, Morehead City, North Carolina 28557. The Company may locate its place(s) of business and registered office at any other place or places as the Members may from time to time deem necessary or advisable.

2.5 TERM. The Company shall continue in existence until the close of the Company's business on **January 1, 2062**, as specified in the Company's Articles of

Organization, unless the Company is either earlier dissolved and its affairs wound up in accordance with the provisions of this Agreement and [North Carolina law].

...

ARTICLE III MEMBERS

3.1 NAMES AND ADDRESSES OF MEMBERS. The names, addresses and Membership Interest of the Members are set forth in Schedule I, attached hereto and incorporated herein by reference. Schedule I shall be deemed automatically amended upon the effectiveness of any transfer or subsequent issuance of any Membership Interest done in accordance with the provisions of this Agreement and [North Carolina law].

...

(*Id.* at 3-4.)

According to the attached Schedule I, Mr. Robinson holds a 98% ownership interest in GSL. (*Id.* at 20.) His wife, Mrs. Pamela Robinson, owns the remaining 2%. (*Id.*)

3. SBA Form 355

Accompanying its responses to the protests, GSL submitted a completed SBA Form 355, signed by Mr. Robinson. (Protest Responses, Exh. 9.) GSL averred that Mr. Robinson owns a 98% ownership interest in GSL, and that he serves as GSL's Managing Member. (*Id.* at 4.)

D. Size Determinations

On October 21, 2022, the Area Office issued Size Determination No. 3-2022-032, concluding that GSL is a small business under the 500-employee size standard applicable to RFQ No. 36C25222Q0753.

The Area Office reviewed Appellant's allegations of affiliation between GSL and TriMark. The Area Office found that TriMark previously held a 49% ownership interest in GSL. (Size Determination No. 3-2022-032, at 4.) However, pursuant to the MWA dated February 9, 2018, TriMark withdrew from GSL and sold its entire interest to Mr. Robinson. (*Id.* at 4-5.) GSL's current Operating Agreement, dated February 9, 2018, shows that Mr. Robinson holds 98% ownership of GSL and his wife owns the remaining 2%. (*Id.* at 5.) The Area Office concluded that Mr. Robinson alone has the power to control GSL based on his ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).) The Area Office found no affiliation between GSL and TriMark based on common management, noting that Mr. Robinson is GSL's sole manager and that he holds no position at TriMark. (*Id.* at 6, citing 13 C.F.R. § 121.103(e).)

Turning to identity of interest, the Area Office found no evidence of affiliation between GSL and TriMark through economic dependence under 13 C.F.R. § 121.103(f). (*Id.*) Mr.

Robinson previously was employed by TriMark from 2008 to 2012, but since 2012 “[he] has been solely employed by GSL and has not concurrently worked or held any management position with [TriMark].” (*Id.*) Similarly, although Appellant identified six other employees of GSL who previously worked for TriMark, the Area Office found that “none of those employees worked concurrently at [TriMark] and GSL and none of those employees held management positions at [TriMark] nor do they hold management positions at GSL.” (*Id.*) The Area Office reiterated that “Mr. Robinson is the sole manager of GSL.” (*Id.*) Furthermore, GSL “does not have any long[-]term contractual relationships” with TriMark, and GSL “has won numerous Government contracts over the past five years without the assistance of [TriMark].” (*Id.*)

The Area Office concluded that GSL and TriMark are not affiliated. GSL is affiliated with two other concerns — AAA Financial Services, Inc. (AAA) and Rexion, Ltd. (Rexion) — based on common ownership and management by Mr. Robinson. (*Id.* at 4-6, 8.) Neither AAA nor Rexion, however, has any employees, and GSL's size therefore is not impacted by these affiliates. (*Id.* at 8.) Upon examining GSL's “payroll records for the 24 months preceding July 30, 2022,” the date GSL submitted its initial offer for RFQ No. 36C25222Q0753, the Area Office found that GSL does not exceed the size standard. (*Id.*)

On April 4, 2023, the Area Office issued Size Determination No. 3-2022-038, concluding that GSL is a small business under the 1,250-employee size standard applicable to RFQ No. 36C24922Q0678. The Area Office findings in Size Determination No. 3-2022-038 are substantively identical to Size Determination No. 3-2022-032, except that the Area Office additionally found that GSL is affiliated with Wilson Legacy, LLC (Wilson) and Witt Street Properties, LLC (Witt) based on stock ownership. (Size Determination No. 3-2022-038, at 6-7.) None of GSL's affiliates (AAA, Rexion, Wilson, and Witt), however, have any employees, and they therefore do not affect GSL's size. (*Id.* at 7, 9.) Upon examining GSL's “payroll records for the 24 months preceding September 13, 2022,” the date GSL submitted its initial offer for RFQ No. 36C24922Q0678, the Area Office found that GSL is small. (*Id.* at 9.)

E. Appeals and Responses

1. The First Appeal

On November 4, 2022, Appellant appealed Size Determination No. 3-2022-032 to OHA. Accompanying the appeal, Appellant attached copies of the Settlement Agreement and a press release, which previously had been submitted with its initial size protest.

Appellant does not challenge the Area Office's findings pertaining to AAA and Rexion, nor does Appellant specifically dispute GSL's size. Instead, Appellant's sole argument on appeal is that the Area Office did not adequately explore or “properly re-investigate” how GSL and TriMark became “disaffiliate[d].” (Appeal at 1.) According to Appellant, a joint investigation by DOJ and SBA's Office of the Inspector General (OIG) determined, based on the totality of the circumstances, that “GSL and TriMark willingly and knowingly entered into an affiliated relationship for the purpose of defrauding the federal government and receiving federal funds specifically set aside for legitimate small businesses from 2013 to 2021.” (*Id.* at 1-2.)

Appellant complains that the Area Office “did not make a reasonable effort to perform additional fact finding or request additional documentation related to the SBA OIG/DOJ joint investigation,” which Appellant argues would have “provided specific examples of how GSL and TriMark were willingly and knowingly affiliated through 2021.” (*Id.* at 2.) Referencing the Settlement Agreement, Appellant offers a list of eight “specific examples”:

- i. Large business TriMark employees devised and engaged in a scheme to secure small business set-aside contracts using a company, GSL, formed by one of TriMark's employees.
- ii. GSL, with TriMark, knowingly and willfully made material misrepresentations in its submissions to SBA in connection with the 2018 size determination.
- iii. TriMark employees represented themselves as GSL employees, identified, priced and worked on GSL government contracting opportunities.
- iv. TriMark “exerted significant influence over” GSL's decision-making process during bid, award and performance of these contracts. TriMark dictated pricing and contract terms and decided which contracts to pursue.
- v. GSL had office space at TriMark and shared office supplies.
- vi. GSL was an affiliated entity of TriMark for buying group participation.
- vii. After TriMark sold its membership interest back to GSL, it still listed GSL as a TriMark company location and purchased GSL's website domain.
- viii. GSL's “role was generally limited to being the face of the contract, to billing the government for the work, and using its small business status to qualify for work that [TriMark] could not bid on itself.”

(*Id.* at 2-3 (internal citations omitted).) Appellant urges that the Area Office “must further investigate and ensure the fraud that took place through 2021 ceased prior to July 30, 2022, the date when proposals were due.” (*Id.* at 3.) Appellant concludes that, if GSL and TriMark remain affiliated, GSL “should be deemed ‘Other Than Small’ to ensure federal contracts and federal funds are specifically set aside for and awarded to legitimate small businesses.” (*Id.*)

2. Supplemental Appeal

On November 23, 2022, after its counsel reviewed the Area Office file under an OHA protective order, Appellant moved to supplement its appeal. Appellant renews its argument that the Area Office should have found GSL and TriMark affiliated, because the two firms “have shared personnel, and continue to share personnel, in order to stay coordinated,” which gives TriMark “significant influence and control over GSL.” (Supp. Appeal at 1.) TriMark is a large business, so if the firms are affiliated, GSL exceeds the applicable size standard. (*Id.*)

Appellant first summarizes at length the Area Office file, which in Appellant's view “shows GSL's problematic history as a supposed small business government contractor.” (*Id.* at 2-6.) Appellant re-emphasizes, *inter alia*, that Company 2 referenced in the Settlement Agreement is GSL, as the agreement “describes only Company 2 as ever having any involvement in furniture sales,” which “matches GSL's reported FPDS data.” (*Id.* at 6.) Appellant also alleges that GSL and TriMark “still coordinat[ed] on a level indicative of affiliation” following the Area Office's January 25, 2018 size determination, which found affiliation between the two entities. (*Id.* at 7.)

Appellant elaborates on GSL and TriMark's “current affiliation.” (*Id.*) Appellant claims that the Area Office's errors become “more conspicuous” upon reviewing the Area Office file. (*Id.* at 8.) Appellant focuses on eight individuals whom it continues to claim “have worked and/or are still working” for both GSL and TriMark. (*Id.* at 8-16.) According to Appellant, specific examples of these eight individuals establish “continued” affiliation through “shared personnel” or “personnel dual-hatting.” (*Id.*)

Appellant maintains that the February 22, 2022 Settlement Agreement, “which occurred only approximately five months before quotations were due,” shows that GSL and TriMark “were previously sharing personnel, and coordinating through those personnel.” (*Id.* at 16.) This, in Appellant's view, “undercut[s] GSL's status as a small business.” (*Id.*) Appellant asserts that GSL and TriMark are “still sharing personnel”; in particular, Ms. Ashley Otterbacher and Ms. Carol Caldwell appear to be current “principals” of GSL and also simultaneously employed by TriMark. (*Id.*) Appellant complains that despite its counsel being admitted under a protective order, OHA did not make available a copy, nor “even a redacted copy,” of GSL's “Exhibit 5 Payroll Records,” which GSL submitted to the Area Office in response to Appellant's first protest. (*Id.*) However, payroll records here are of dubious validity in any event, “due to the long history of individuals work for and/or on behalf of GSL who were not paid by GSL.” (*Id.*) Similarly, “a signed SBA Form 355 does not resolve the issue” of affiliation, because there is “[t]here is too much flexibility in how many of those questions are interpreted and applied.” (*Id.*) Accordingly, “regardless of the payroll records or the SBA Form 355,” the record shows that the size determination contains “many instances of clear error.” (*Id.*) Appellant adds:

To what end [TriMark] exercises this influence and control [over GSL] is unclear. . . . [A]t this juncture, it does not appear that GSL is using TriMark as a subcontractor. Possibly, TriMark obtains a commission, rebate, or credit from the manufacturers for each instance of supporting GSL. Possible, but unclear. Despite whatever utility both [TriMark] and GSL continue to obtain from their longstanding and significant interrelationship, the affiliation continues.

(*Id.* at 17.) Appellant concludes that “the continued sharing of personnel” between GSL and TriMark constitute affiliation based on affirmative/negative control; common management; identity of interest; and/or the totality of the circumstances. (*Id.*)

3. GSL's Response to First Appeal

On November 22, 2022, GSL responded to the appeal, urging that OHA dismiss or deny it. (Response at 10.) GSL maintains that Appellant's allegations are “conclusory, unsupported, and *entirely false*.” (*Id.* at 4, emphasis GSL's.) Specifically, Appellant “grossly misrepresented the facts” by suggesting that SBA OIG and DOJ found GSL and TriMark affiliated based on the totality of the circumstances, despite “effectively conced[ing]” that GSL “was not a party to the Settlement Agreement.” (*Id.*) According to GSL, such a finding was “*never made*.” (*Id.*, emphasis GSL's.)

Next, GSL insists that the appeal is “procedurally deficient” because it “fail[s] to reference *any* factual or legal finding in the Size Determination that [Appellant] believes to be clearly erroneous.” (*Id.*, emphasis GSL's.) GSL continues:

The crux of [Appellant's] allegation is that “[t]he Area Office failed to consider the totality of the circumstances in this instance” because it “did not make a reasonable effort to perform additional fact finding or request additional documentation related to the SBA OIG/DOJ joint investigation.” Curiously, [Appellant] does not cite the Size Determination—*not even once*—in its purportedly “full and specific statement as to why the size determination is alleged to be in error.” [Appellant] cannot possibly have articulated a clear error of fact or law in the Size Determination when it *does not even reference* that determination in its appeal, other than to note that it is attached.

(*Id.*, emphasis GSL's (internal citations omitted).) Appellant “speculate[s]” that Company 2 named in the Settlement Agreement “must be GSL,” without “actually” proving that the Settlement Agreement “even discusses or pertains to GSL.” (*Id.* at 6.) Furthermore, although Appellant provides a list of specific examples that purportedly should have led to affiliation between GSL and TriMark under the totality of the circumstances, these examples are “nothing more than a reiteration of [Appellant's] baseless and disproven Size Protest allegations.” (*Id.* at 5.) These examples also have been “rendered irrelevant” by TriMark's subsequent disaffiliation from GSL and GSL's recertification as a small business. (*Id.* at 5-6.) In addition, Appellant's allegation that TriMark “still listed GSL as a TriMark company location and purchased GSL's website domain” after selling its membership interest back to GSL is “factually incorrect,” nor does TriMark's “failure to update its marketing brochures and website information” evidence affiliation. (*Id.* at 6-7.) GSL is unaware that TriMark purchased or owns its website domains “currently used by GSL and in use by GSL as of July 30, 2022.” (*Id.* at 7.) GSL, therefore, claims that the Area Office properly found no affiliation on the basis of the examples cited by Appellant. (*Id.*)

GSL argues that the Area Office correctly concluded that GSL and TriMark were not affiliated through common ownership, the totality of the circumstances, or otherwise as of July 30, 2022, because the two entities have been “affirmatively disaffiliated since early 2018.” (*Id.* at 8.) GSL claims that the Area Office properly considered relevant evidence, and carefully reviewed each of the allegations of affiliation based on “common management or employees, economic dependence, or an identity of interest” as of July 30, 2022. (*Id.* at 7-8.) Notably, as

correctly recognized by the Area Office, GSL “underwent a corporate restructuring in order to remove all doubts as to affiliation with TriMark” by executing the MWA and the new Operating Agreement, both dated February 9, 2018. (*Id.* at 8.) Following the restructuring, GSL “**sought and received an affirmative recertification of its small business status by the SBA.**” (*Id.*, emphasis GSL’s.) TriMark has not held an ownership interest in GSL since 2018, GSL and TriMark have no shared employees or other resources, and GSL and TriMark do not have any long-term contractual relationship or economic interdependency. (*Id.* at 9.) TriMark, in short, “has no control over, or power to control, GSL.” (*Id.*)

GSL concludes that because “[a]ny affiliation which may have existed between GSL and TriMark has certainly ceased as of early 2018,” no further investigation is warranted either by OHA or by the Area Office. (*Id.*) Appellant’s request for “a further investigation into GSL’s size status” by OHA is procedurally improper, as it is well-established that OHA “‘does not conduct a separate investigation into the size of the challenged firm,’ but rather only ‘assess[es] whether an area office’s size determination is clearly erroneous’D”. (*Id.* at 5, quoting *Size Appeal of Cherokee-Technical Specialists, LLC*, SBA No. SIZ-5434, at 1 (2013).)

With regard to Appellant’s supplemental appeal, GSL argues that Appellant is improperly and untimely attempting to “re-file” its initial appeal. (Supp. Response at 1, 3.) GSL contends that the supplemental appeal “seeks to amend, enlarge, and change the bases of” its size protest, and essentially asks “OHA to investigate, *de novo*, a newly drafted size protest.” (*Id.*)

More specifically, Appellant identified no “new [record] information that would require a supplemental pleading.” (*Id.* at 2.) Rather, Appellant’s supplemental appeal is “a re-write not of its [initial] [a]ppeal, but of multiple, previous size protests” that are irrelevant to the issues in the instant appeal. (*Id.*) “The only arguably ‘new’ evidence” discussed in Appellant’s supplemental appeal is evidence that was produced as part of Appellant’s own motion to supplement the record. (*Id.*)

Additionally, Appellant’s supplemental appeal sets forth “**entirely new** theories of factual and legal error”—that “‘sharing of personnel constitute[s] affiliation’”. (*Id.* at 5, emphasis GSL’s.) Such arguments are not only “vague and conclusory,” but also legally invalid. (*Id.*) None of the eight individuals identified in Appellant’s supplemental appeal “have any bearing on the question of current affiliation that was thoroughly analyzed and documented by the Area Office.” (*Id.* at 6.) GSL reiterates that “individuals’ employment histories,” which allegedly show affiliation between GSL and TriMark, “have been rendered irrelevant by intervening events”D— ‘F‘the sale of TriMark’s membership interest in GSL[,] subsequent successful disaffiliation of GSL from TriMark and [GSL’s] recertification as a small business.” (*Id.* at 6, 8.) Furthermore, Appellant continues to speculate that Company 2 referenced in the Settlement Agreement is GSL. (*Id.* at 8.) Even assuming this were true, the “‘specific examples’ of alleged affiliation provided by [Appellant] in its [a] ppeal are either factually incorrect and/or rendered irrelevant by intervening events.” (*Id.*)

4. New Evidence

On November 17, 2022, Appellant moved to supplement the record with additional evidence. Specifically, Appellant seeks to introduce “source information (from TriMark's website, GSL's website, LinkedIn and Facebook, and third-party websites).” (Motion at 2.) According to Appellant, the new evidence establishes that, to this day, five individuals “are still holding themselves out as, and being held out by others as, representatives and/or managers” for both GSL and TriMark. (*Id.*) Appellant argues that it should not be faulted for failing to provide this new evidence with its protest because (1) the new information post-dates its protest and (2) “given the conclusory way in which [Size Determination No. 3-2022-032] addressed the previous evidence, more details are warranted.” (*Id.* at 2-3.)

GSL opposes Appellant's motion. GSL complains that Appellant made “no effort” to contact GSL to find out whether GSL would oppose the motion, in contravention of 13 C.F.R. § 134.211. (Response at 11.) Moreover, Appellant's motion “wholly fails to establish good cause” for admission of new evidence. (*Id.*) Appellant continues to “request[] that OHA conduct an entirely new investigation to reevaluate the size status of GSL.” (*Id.*) However, “OHA does not conduct its own investigation” in the context of a size appeal, nor will OHA “consider [new] evidence not previously submitted to the Area Office.” (*Id.*, citing *Cherokee-Technical Specialists*, SBA No. SIZ-5434, at 1, and *Size Appeal of HBC Mgmt. Servs., Inc.*, SBA No. SIZ-5409, at 4 (2012).)

GSL asserts that Appellant “disingenuously mischaracterizes” the availability of the new evidence. (*Id.* at 12.) Although Appellant claims that the new information post-dates its protest, the evidence “was, in reality, readily available in the public domain” at the time of Appellant's protest. (*Id.*) Timestamps of when Appellant obtained this information from the internet “do not represent the date and time on which this information **became available in the public domain.**” (*Id.*, emphasis GSL's.) Instead, the onus was on Appellant, as the protestor, to present “all relevant evidence and arguments to the Area Office when it submits its protest.” (*Id.*, citing *Cherokee-Technical Specialists*, SBA No. SIZ-5434, at 1.) Appellant did not present all evidence that purportedly supported its allegations, and thus cannot now seek a new investigation on the basis of information that was publicly available at the time of its protest. (*Id.*) Furthermore, most of Appellant's alleged new evidence is either already part of the Area Office file or has no possible relevance. (*Id.* at 13.) Notably, Appellant proffered “unverified and outdated LinkedIn profiles or screenshots of third-party websites,” which shed no light on the question of affiliation, *i.e.*, “control of TriMark over GSL, or vice versa.” (*Id.* at 16.)

5. Second Appeal

On April 19, 2023, Appellant appealed Size Determination No. 3-2022-038 to OHA. Accompanying the appeal, Appellant submitted several website printouts, LinkedIn profiles, Zoominfo Directory, and two articles pertaining to TriMark, most of which were submitted as part of its earlier Motion to Introduce New Evidence, or were already part of the Area Office record.

Appellant contends that the Area Office incorrectly found the applicable size standard to be 1,250 employees because “GSL and TriMark are not manufacturers.” (Appeal of Size Determination No. 3-2022-038, at 9 (emphasis Appellant’s).) The correct size standard for a “non-manufacturer re-seller” should have been 500 employees. (*Id.*) Irrespective of the size standard, though, GSL is not small due to its affiliation with TriMark. (*Id.*)

Next, Appellant maintains that Mr. Robinson worked for TriMark while he was the principal for GSL. (*Id.*) Mr. Robinson was directly employed by TriMark from 2008 to 2012, and in effect continued to work for TriMark thereafter “because the relationship between his company, GSL, and TriMark[] made [him] beholden to TriMark.” (*Id.*) In Appellant’s view, “it was Mr. Robinson himself who set the example of personnel working for both companies in order to fully leverage the connections with TriMark—a practice that continues to this day.” (*Id.* at 10.)

Appellant renews its argument that GSL and TriMark have shared and continue to share personnel and managers. (*Id.*) In support, Appellant highlights six individuals, apart from Mr. Robinson, who Appellant claims still work for both GSL and TriMark, and some of whom hold a management role at either GSL or TriMark. (*Id.* at 10-14.) Appellant asserts that Ms. Carol Caldwell is “still a manager in both organizations,” while Ms. Ashley Otterbacher “was a manager in both organizations until September 2022, is still a manager at GSL, and her present role at TriMark is vaguely described as ‘Inside Sales.’” (*Id.* at 14.) Appellant argues that “it is flummoxing that the Area Office concluded that none of the above-named individuals concurrently worked at both companies, that none of the above-named managers held a management role in either company, and that [Mr.] Robinson is the only manager at GSL.” (*Id.* at 14-15.) Appellant further claims that the Area Office erred in rendering its determination because: (1) “there is a long history of TriMark individuals working for and/or on behalf of GSL while not being paid by GSL”; (2) “a signed SBA Form 355 does not resolve the issue” due to “too much flexibility as to how many of those questions are interpreted and applied”; and (3) GSL submitted “inaccurate and incomplete information to SBA and OHA.” (*Id.* at 15, emphasis Appellant’s.)

Appellant renews its contention that the Area Office’s findings that GSL has no long-term contractual relationships with TriMark and has won numerous federal contracts without the assistance of TriMark “misses the larger issue.” (*Id.*) According to Appellant:

[W]hat is likely happening is that TriMark obtains a commission, rebate, credit, and/or other benefit from the manufacturers for each instance of GSL using the manufacturers. In turn, GSL gets to take advantage of the significantly discounted pricing that the manufacturers normally reserve to the billion-dollar distributor, TriMark. And it is that discounted pricing which keeps GSL winning Federal small business-set aside competitions. And, of course, to keep the whole thing running smoothly, TriMark and GSL share people.

(*Id.*) Appellant requests that OHA conduct an oral hearing to “permit the deposition of the individuals mentioned in this appeal, in order to gain a fulsome understanding as to what is going on.” (*Id.* at 16.)

6. GSL's Response to Second Appeal

On May 8, 2023, GSL responded to the second appeal. At the outset, GSL points out that Appellant's appeal exhibits include documents that were not previously produced to the Area Office, and thus should be excluded from the record. (Response to Second Appeal at 5-7.)

GSL reiterates its view that Appellant's protests and appeals are “based on nothing more than speculation and unsupported [] inferences,” highlighting that Appellant itself uses language that implies ambiguity. (*Id.* at 7-8.) GSL claims that Appellant's False Claims Act arguments rely entirely on events that took place “before the due date for submission of quotes in response to the [RFQ]” and thus are simply “irrelevant” as a matter of law. (*Id.* at 9, citing 13 C.F.R. § 121.404(a).) Contrary to Appellant's suggestions, TriMark did not admit liability in the Settlement Agreement arising out of the False Claims Act litigation, and GSL was not even a party to that agreement. (*Id.*) Moreover, “it is not within the OHA's jurisdiction to conduct broad investigations of contractor conduct in the context of a size appeal.” (*Id.*, citing 13 C.F.R. § 134.102.)

Next, GSL denies Appellant's allegations that GSL has relied, and still relies, upon personnel provided by TriMark, a “food service equipment industry behemoth.” (*Id.* at 10.) The Area Office considered a myriad of documents provided by both Appellant and GSL and correctly concluded that GSL and TriMark are not affiliated through economic dependence. (*Id.*) Appellant's “guesswork about who is working where now” is unsupported by the record. (*Id.*)

The Area Office reviewed GSL's Operating Agreement and the MWA and properly concluded that GSL is controlled solely by Mr. Robinson and that there is no affiliation between GSL and TriMark based on common ownership or management. (*Id.* at 11-12.) Appellant's proffered evidence, *i.e.*, a Corporationwiki.com printout, in support of its argument that “TriMark *may* be affiliated with GSL through ownership or control” provides no detail regarding the nature of the alleged connection. (*Id.* at 11.) A prior connection between Mr. Robinson and TriMark does not give rise to current affiliation, nor demonstrate “Mr. Robinson is still beholden to TriMark.” (*Id.* at 12.) Appellant does not otherwise provide any “factual support for that premise.” (*Id.*) Particularly, Appellant does not even attempt to show that the MWA, whereby TriMark fully divested its interest in GSL, is false or inaccurate. (*Id.*)

The Area Office also appropriately found no affiliation between GSL and TriMark based on identity of interest. (*Id.* at 12.) The Area Office specifically found that “(1) Mr. Robinson was not now working for TriMark, (2) none of employees listed by [Appellant] work concurrently at GSL and TriMark, and (3) GSL does not have any long[-]term contractual relationships in place with TriMark.” (*Id.* at 12-13.) Appellant's speculation that GSL and TriMark have shared and still share personnel and managers “lacks any credible factual support.” (*Id.* at 13.) For instance, Ms. Caldwell and Ms. Otterbacher, two employees identified by Appellant as working concurrently for GSL and TriMark, ceased to be employed by TriMark well before the date for the submission of quotes in response to the RFQ. (*Id.* at 13-15.) Appellant's claims regarding “remaining GSL employees” and their supposed past connections with TriMark are equally

implausible. (*Id.* at 15-17.) Thus, the alleged “ongoing business arrangements” between GSL and TriMark are “blatantly speculative.” (*Id.* at 17-18.)

The Area Office further properly found no affiliation between GSL and TriMark under the totality of the circumstances. (*Id.*) In this case, “there is absolutely no evidence of affiliation between GSL and TriMark” that could have led the Area Office to a reasonable conclusion that either firm has the power to control the other. (*Id.* at 19.) Therefore, Appellant failed to meet its burden of showing that the Area Office committed any error of law or fact.

Lastly, GSL opposes Appellant's request for an oral hearing. (*Id.* at 19-20.) GSL asserts that Appellant has not demonstrated extraordinary circumstances that would justify such a hearing, and because the record clearly establishes that there was no error on the part of the Area Office, a hearing is not necessary. (*Id.*)

7. New Evidence

Accompanying its response, GSL moved to introduce new evidence. GSL offers four records of termination from employment with TriMark: a TriMark employee termination letter dated February 10, 2022; a retirement e-mail to TriMark dated December 11, 2020, with a retirement date of December 31, 2020; a TriMark vendor letter dated January 12, 2018, announcing retirement effective February 28, 2018; and a TriMark letter of recommendation dated June 2, 2009 confirming an employment period from 2007 to 2009. GSL claims that these records show that employees identified by Appellant in its protests and appeals do not work concurrently for GSL and TriMark nor have a continuing relationship with TriMark. (Motion at 1.) GSL represents that Appellant does not oppose this motion. (*Id.*)

On May 8, 2023, Appellant also moved to admit new evidence. Appellant offers GSL's May 2023 SAM.gov registration update and General Services Administration (GSA) SAM.gov policy update. According to Appellant, the new evidence shows that Ms. Leon not only works for GSL but that “she is a Board Member, Manager, or at least an employee in which significant trust and responsibility is reposed.” (Motion at 2.) This contradicts the Area Office's finding that Mr. Robinson is the sole manager at GSL, and that none of the employees Appellant identified held or hold a managerial position at GSL or TriMark. (*Id.*)

GSL opposes Appellant's motion to admit new evidence. GSL argues that Appellant “never” alleged that Ms. Leon was concurrently employed at both GSL and TriMark as of the date GSL submitted its initial offers for the subject procurements. (Response at 3-4.) “[A] concern's size is generally determined as of the date of its initial offer, including price.” (*Id.*, quoting *Size Appeal of Modern Healthcare Servs., J.V. LLC*, SBA No. SIZ-6114, at 10 (2021).) Even if Appellant's new evidence indicates that “Ms. Leon has some sort of management role *now* at GSL,” a document filed “more than half a year after Protest was filed” is “not relevant to the question of whether the Size Determination was based on clear error.” (*Id.* at 5, emphasis GSL's.) Moreover, “the document unduly enlarges the issues by expanding them beyond the information that the Area Office considered at the time of the Protest.” (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellant must prove the size determinations are 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).

B. New Evidence

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

Here, Appellant has not established good cause for the admission of new evidence. As GSL observes, the bulk of Appellant's new evidence — comprised of source information from TriMark's and GSL's websites, Linked-In and Facebook profiles, and third-party websites — appears to have been readily available at the time of its protests. OHA has consistently held it will not accept new evidence when the material in question was available during the course of the size investigation but not submitted to the Area Office. *E.g.*, *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 10 (2015). Furthermore, because GSL's size is assessed as of July and September 2022, when GSL self-certified as small for the instant procurements, information pertaining to events that transpired after those dates is not relevant to this case. *E.g.*, *Size Appeal of SC&A, Inc.*, SBA No. SIZ-6059, at 9 (2020). GSL's new evidence, similar, appears to have been available at the time of Appellant's second protest, and thus could have been submitted as part of GSL's response to the second protest. Moreover, GSL offers its new evidence for purposes of rebutting Appellant's new evidence. Accordingly, it is unnecessary to consider GSL's new evidence unless Appellant's new evidence is admitted.

For these reasons, the parties' respective motions to supplement the record and/or admit new evidence are DENIED.

C. Request for a Hearing

OHA generally may conduct an oral hearing “upon concluding that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses.” 13 C.F.R. § 134.222(a)(2). An oral hearing seldom is necessary for size appeals, though, because OHA does not conduct an independent investigation into the size of a challenged firm. Rather, OHA's role is to determine “whether the area office committed any clear error of fact or law, based on the contemporaneous record available to the area office.” *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 7 (2014). OHA's rules of procedure thus stipulate that OHA will conduct an oral hearing in a size appeal proceeding “only upon a finding by the Judge of extraordinary circumstances.” 13 C.F.R. § 134.311.

Here, I agree with GSL that an oral hearing is not required to resolve this dispute. The principal issue in the case is whether the Area Office adequately explored the alleged ties between GSL and TriMark, which may be assessed through review of the documents and information before the Area Office. Nor has Appellant established any “extraordinary circumstances” that would warrant an oral hearing under § 134.311. For these reasons, Appellant's request for an oral hearing is DENIED.

D. Analysis

The key issue presented here is whether the Area Office properly investigated the alleged connections between GSL and TriMark as of July 30, 2022 and September 13, 2022, when GSL submitted its quotations for the instant procurements. In seeking to overturn the size determinations, Appellant contends that the Area Office's review was inadequate, because GSL and TriMark may be affiliated through common ownership and management, previous relationships and/or contractual arrangements, identity of interest, and the totality of the circumstances. Sections II.E.1, II.E.2, and II.E.5, *supra*. These arguments, in turn, rest on two principal claims: (1) that GSL and TriMark have shared, and continue to share, personnel and managers; and (2) that GSL received federal contract awards from 2019 to 2021 through a TriMark small business fraud scheme.

I find no merit to Appellant's contentions. Under SBA regulations, an area office must base its decision “primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue,” and must “give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” 13 C.F.R. § 121.1009(b) and (d). Here, the Area Office appropriately found that, although GSL and TriMark were affiliated prior to 2018, TriMark's withdrawal from GSL, and the sale of its ownership interest in GSL on February 9, 2018, had disaffiliated the two entities. Sections II.C.1 and II.D, *supra*. Following the restructuring, as evidenced by GSL's amended Operating Agreement and sworn SBA Form 355, Mr. Robinson holds a 98% ownership interest in GSL. Sections II.C.2 and II.C.3, *supra*. Mr. Robinson also is GSL's Managing Member. *Id.* Thus, the Area Office correctly concluded that Mr. Robinson alone has the power to control GSL. Section II.D, *supra*. As Mr. Robinson plainly controls GSL, and he holds no ownership or managerial interest in TriMark, the Area Office had no grounds to find GSL and TriMark affiliated through common ownership or common management as of July and

September 2022. While GSL and TriMark were affiliated prior to 2018, it is well established that “[h]istoric ties between a challenged concern and an alleged affiliate do not establish current affiliation when the historic ties no longer exist as of the date to determine size.” *Size Appeal of Atlantic Diving Supply, Inc.*, SBA No. SIZ-6005, at 14 (2019).

In its appeals, Appellant maintains that GSL's efforts to disentangle itself from TriMark were unavailing because their ties persist—namely, based on the terms of the Settlement Agreement and through previous or continued sharing of employees. Sections II.E.1, II.E.2, and II.E.5, *supra*. Appellant therefore urges that the Area Office should have found affiliation under the totality of the circumstances. OHA has repeatedly explained, however, that “in order to find affiliation through the totality of the circumstances, ‘an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.’” *Size Appeals of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015) (quoting *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007)); *see also Size Appeal of Crew Training Int'l, Inc.*, SBA No. SIZ-6128 at 23 (2021); *Size Appeal of Nat'l Sec. Assocs., Inc.*, SBA No. SIZ-5907, at 10 (2018); *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807, at 9 (2017). Indeed, “the fundamental issue in any affiliation case is whether one concern controls, or has the power to control, another concern.” *Size Appeal of A&H Contractors, Inc.*, SBA No. SIZ-5459, at 9 (2013).

Here, the record supports the Area Office's conclusion that GSL and TriMark were no longer affiliated after 2018, well before GSL self-certified as small for the subject procurements. Sections II.C and II.D, *supra*. Following the restructuring, GSL was re-certified as a small business. Sections II.B.2 and II.E.3, *supra*. Given this record, Appellant has not persuasively explained how prior shared employees, or the terms of the Settlement Agreement, might enable TriMark to control GSL or *vice versa* as of July or September 2022. As GSL emphasizes, GSL was not a party to, nor even expressly named in, the Settlement Agreement. Section II.E.3, *supra*. GSL also denies sharing employees with TriMark, and OHA has recognized in any event that the mere fact that “firms share, or previously shared, one or more employees” does not suffice to establish affiliation. *Crew Training*, SBA No. SIZ-6128, at 23. Appellant itself concedes that it is, at best, “unclear” to what extent TriMark currently exercises any influence or control over GSL. Section II.E.2, *supra*. Accordingly, Appellant has not advanced any persuasive showing that GSL and TriMark are affiliated under the totality of the circumstances. *E.g.*, *Size Appeal of Navarro Research and Eng'g, Inc.*, SBA No. SIZ-6065, at 26 (2020).

Appellant also posits that GSL and TriMark may be affiliated through economic dependence. SBA regulations provide that affiliation through identity of interest may arise between “firms that are economically dependent through contractual or other relationships.” 13 C.F.R. § 121.103(f). In interpreting this provision, OHA has long held that, when one concern depends upon another concern for 70% or more of its revenues, a rebuttable presumption arises that the concern is economically dependent upon, and therefore affiliated with, the other. *Faison*, SBA No. SIZ-4834, at 8. Such circumstances, however, are not present in the instant case. Appellant does not argue, and points to no evidence suggesting, that GSL has derived 70% or more of its revenues from TriMark. Furthermore, although Appellant alleges that GSL has had “problematic history” as a small business contractor, the Area Office determined that GSL has

procured and independently performed numerous federal contracts without assistance from TriMark, and Appellant has not articulated reason to believe that the Area Office erred in this conclusion. Nor does Appellant cite any OHA precedent where an affiliation based on identity of interest is found solely due to their past connections. *Cf.*, *Size Appeal of B.L. Harbert Int'l LLC*, SBA No. SIZ-4525, at 7-9 (2002).

Appellant also argues that the Area Office should have “further investigate[d] . . . the fraud that took place through 2021,” and revisited its determination that GSL and TriMark are no longer affiliated. Section II.E.1, *supra*. OHA's case decisions have made clear, though, that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012). Here, the Area Office examined Appellant's protest allegations of “ongoing entanglements” between GSL and TriMark, and found no affiliation between the two entities as of July and September 2022, the relevant dates for determining size. Sections II.B and II.D, *supra*. Having investigated the allegations specifically raised in the protest, then, the Area Office was not obliged to more broadly explore all aspects of “fraud that took place through 2021” or the joint investigation by SBA OIG and DOJ. *E.g.*, *Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3-4 (2009) (“Contrary to [the protester's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.”).

In sum, Appellant has not met its burden of demonstrating clear error in the size determinations. The record reflects that the Area Office reviewed Appellant's protest allegations and reasonably found them to be unpersuasive. Sections II.B and II.D, *supra*. Given that Mr. Robinson is currently the 98% owner and sole manager of GSL, and that he holds no interest in TriMark, the Area Office could appropriately find that GSL and TriMark are not affiliated through stock ownership or common management. The mere fact that GSL and TriMark historically were affiliated, or that certain individuals may have worked for both companies, is not sufficient to show control, affiliation, or identity of interest as of July and September 2022.

IV. Conclusion

Appellant has not shown clear error in Size Determination Nos. 3-2022-032 and 3-2022-038. The appeals therefore are DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge