

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

SIZE APPEAL OF:

HealthVerity, Inc.,

Appellant,

RE: Truveta, Inc.

Appealed From
Size Determination No. 06-2023-043

SBA No. SIZ-6266

Decided: February 14, 2024

APPEARANCES

Stephanie M. Harden, Esq., David L. Bodner, Esq., Shane M. Hannon, Esq., Blank Rome LLP, Washington, D.C., for Appellant

Daniel J. Cook, Esq., Christie M. Alvarez, Esq., DLA Piper LLP, Washington, D.C., for Truveta, Inc.

DECISION¹

I. Introduction and Jurisdiction

On September 28, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2023-043, concluding that Truveta, Inc. (Truveta) is a small business under the size standard associated with the subject procurement. The Area Office rejected protest allegations filed by HealthVerity, Inc. (Appellant) that Truveta is affiliated with Microsoft Corp. (Microsoft) and/or various investors in Truveta. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is granted in part, 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

¹ This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. 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 size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

On May 1, 2023, the Centers for Disease Control and Prevention (CDC) issued Request for Proposals (RFP) No. 75D301-23-R-72635, seeking a contractor to provide deidentified and interoperable national health data. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 513210, Software Publishers, with a corresponding size standard of \$47 million average annual receipts. (RFP at 1.) Truveta submitted its initial proposal, including price, on June 5, 2023, self-certifying as a small business.

B. Protest

On September 1, 2023, the CO notified Appellant, an unsuccessful offeror, that Truveta was the apparent awardee. On September 8, 2023, Appellant filed a size protest with the CO challenging Truveta's size. Appellant alleged that Truveta is controlled by, and affiliated with, a group of large businesses. (Protest at 1-2.) Appellant advanced several theories in support of its claims. (*Id.* at 5.)

Appellant argued, first, that Truveta is affiliated with its investors through stock ownership pursuant to 13 C.F.R. § 121.103(c). (*Id.* at 6.) According to Appellant, Truveta is owned by a group of 17 investors, all of which are large businesses with annual revenues exceeding \$1 billion. (*Id.* at 7.) Appellant identified the following as investors of Truveta: Microsoft, the “Lead Investor”; Advocate Aurora Health; Northwell Health; Baylor Scott & White Health; Novant Health; Henry Ford Health System; Providence; Baptist Health; Memorial Hermann Hospital; Tenet Healthcare Corporation; MedStar Health; AdventHealth; Trinity Health; Sentara Health; Bon Secours Mercy; Hawaii Pacific Health; and CommonSpirit Health. (*Id.* at 7-8.) Appellant acknowledged that it does not know the specific ownership interest held by each entity, but if these concerns have the power to control Truveta through stock ownership, Truveta would be considered affiliated with these concerns. (*Id.* at 9.)

Next, Appellant alleged that Truveta is affiliated with members of the consortium under 13 C.F.R. § 121.103(e) through common management. (*Id.*) Appellant observed that many of Truveta's Board members are executives from its other-than-small investors. (*Id.* at 10.) Appellant provided the following management chart:

Truveta Management (Board of Directors - Officers at [Other-Than Small Businesses])				
Name	Title	Organization	Organization Listed as Data provider	Organization qualifies as “small business” on sam.gov
Terry Myerson	Chief Executive Officer / Co Founder	Truveta, the Carlyle Group (“operating executive”), Madrona Venture Group (“venture partner”)	No	Listed as small - contested in this protest
Bobbie Byrne	Chief Information Officer	Advocate Health	Yes	No
Deepesh Chandra	Chief Administrative Officer	Bon Secours Mercy Health	Yes	No
Robin Damschroder	EVP & Chief Financial Officer	Henry Ford Health System	Yes	No
Ernest Franklin	SVP & Chief Clinical Operations Officer	Tenet Health	Yes	No
Deborah Gash	SVP & Chief Digital Officer	Saint Luke's Health System	Yes	No
Jeffrey R. Graff	SVP & Chief Corporate Development Officer	AdventHealth	Yes	No
Clay Holderman	President & CEO	UnityPoint Health	Yes	No
Laurence Kraemer	General Counsel	Northwell Health	Yes	No
Onyeka N Nchege	SVP & CIO	Novant Health	Yes	No
Wasif Rasheed	Executive Vice President	Providence	Yes	No
Nick Reddy	SVP & Chief Digital Officer	Baylor Scott & White Health	Yes	No
Daniel J. Roth	EVP and Chief Clinical Officer	Trinity Health	Yes	No
Rich Roth	SVP & Chief Strategic Officer	CommonSpirit Health	Yes	No
Eric Smith	Chief Digital Officer	Memorial Hermann Health System	Yes	No
[ENDNOTE REDACTED]				

(*Id.* at 10-11.) Appellant also alleged common management with Microsoft because Truveta's executive leadership team consists of several former Microsoft executives, including the following:

- Terry Myerson, Truveta's CEO, left Microsoft and co-founded Truveta
- Jay Nanduri, Chief Technology Officer, left Microsoft and co-founded Truveta
- Lisa Gurry, Chief Growth Officer, left Microsoft and co-founded Truveta

- Dave Heiner is the Chief Policy Officer and General Counsel of Truveta and previously worked at Microsoft.
- Fabien Mousseau is the Chief Financial Officer of Truveta and previously worked at Microsoft.

(*Id.* at 11-12.) Appellant cited a media report which indicated that “Microsoft is also investing an undisclosed amount in Truveta,” and that “Microsoft and Truveta will work together to build up Truveta's customer base and health system membership.” (*Id.* at 11 fn.6.)

Third, Appellant argued affiliation under 13 C.F.R. § 121.103(f) through identity of interest. (*Id.* at 12.) Appellant contended that Truveta is economically dependent upon its investors. (*Id.*) Truveta “is inextricably dependent on the organizations that conceived of it, funded it, and now supply the data and hosting services it sells, and presently staff the entirety of its Board of Directors.” (*Id.*) Appellant also alleged that these investors share an identity of interest “with Truveta and each other through their common investments” based on their common investments and business relationships. (*Id.*) In support of this claim, Appellant cited the “ownership table” from its protest, listing the concerns that invested in Truveta. (*Id.*)

Next, Appellant alleged affiliation under the newly-organized concern rule. (*Id.*) According to 13 C.F.R. § 121.103(g), “[a]ffiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise.” (*Id.*) These circumstances are present here, Appellant alleged, as Truveta's founders and executives are former high-ranking employees of Microsoft. (*Id.* at 13.)

Appellant additionally argued that Truveta should be treated as a joint venture under the ostensible subcontractor rule. (*Id.* at 14.) Appellant claimed that Truveta will be unusually reliant upon its investors to perform the primary and vital requirements of the procurement. (*Id.*) Because the investors furnish Truveta with its product, *i.e.*, healthcare data, and comprise most of its Board of Directors, Truveta should be considered unduly reliant upon the investors. (*Id.* at 15.)

Lastly, Appellant argued that Truveta should be found affiliated with its investors based on the totality of the circumstances. (*Id.*) Appellant claimed that “[t]he above information demonstrates that Truveta is affiliated with a large web of entities tied together by significant financial, management, and ownership connections.” (*Id.*) These connections to strongly suggest Truveta's reliance on its investors. (*Id.*)

C. Protest Response

The CO forwarded Appellant's protest to the Area Office for review. On September 18, 2023, Truveta responded to the protest and provided a sworn SBA Form 355, business records, and other supporting documents. On its SBA Form 355, Truveta identified its primary industry

as NAICS code 513210. (Form 355 at 3.) Truveta denied any affiliation with Microsoft or other concerns, asserting that Appellant's arguments “are based on factual errors and misplaced assumptions about Truveta's history, organization, and ownership structure.” (Protest Response at 1.)

Truveta first highlighted that it has no single majority owner. (*Id.* at 3.) The largest shareholder, [XXXXXX], holds [XX]% of Truveta. (*Id.*) [XXXXXX] hold approximately [XX]% of the outstanding equity interests. (*Id.* at 4.) The remaining [XX]% is held by 17 different health systems, with ownerships ranging from [XX]% to [XX]%. (*Id.*) As for the 10 members of Truveta's Board of Directors, one seat is held by [XXXXXX], another is filled by an independent director, and the other eight are reserved for the health systems that first invested in Truveta. (*Id.*) Truveta added that “all but one health system are non-profit organizations, and as such, the director does not and cannot have an ownership interest in the health system.” (Form 355, Attach. at 8.) Health systems to have later invested in Truveta are permitted to attend Board meetings but have no voting rights. (Protest Response at 3.) Microsoft, on the other hand, holds no equity interest in Truveta, nor does it have a Board seat. (*Id.*) Microsoft does provide cloud computing services to Truveta, as it does to many other businesses. (*Id.*) Microsoft also [XXXXXXXXXXXX]. (*Id.* at 5.) Truveta asserted that it has not [XXXXXXXXXXXX]. (*Id.*) Furthermore, according to Truveta, even if [XXXXXXXXXXXX], “Microsoft would have no special governance rights over the company relative to those of the other outside investors.” (*Id.*) Truveta provided the Area Office a copy of [XXXXXXXXXXXX], dated June 25, 2021.

Truveta disputed potential affiliation since Truveta is not controlled by Microsoft or any of the health systems. (*Id.* at 6.) [XXXXXX] holds Truveta's largest voting bloc, and [XXXXXX] does not own or control any other businesses. (*Id.*) The remaining ownership interest is widely dispersed, so Truveta should be deemed to be controlled by its Board of Directors and CEO. (*Id.*) Likewise, affiliation based on common management under 13 C.F.R. § 121.103(e) cannot exist because “[n]o one on Truveta's executive leadership team serves on the board or manages any of its health system investors.” (*Id.* at 7.)

For affiliation through identity of interest, Truveta explained that it does not derive more than 70% of its receipts from any of its investors. (*Id.*) Rather, most of Truveta's sales are to pharmaceutical customers and thus affiliation under 13 C.F.R. § 121.103(f) fails. (*Id.*) Truveta argued that Appellant misconstrues the identity of interest rule as applying “any time two companies have a shared business interest.” (*Id.*, emphasis omitted.) Appellant's interpretation would create affiliation whenever two businesses engage in arrangements where both companies share an interest in the success of the arrangement. (*Id.*) Truveta receives healthcare data from the health systems and then repackages them to be sold to others for various uses. (*Id.*) Truveta contended that this relationship does not equate to an identity of interest. (*Id.* at 8.)

Next, Truveta denied being a spin-off or “newly organized concern” affiliate of Microsoft under 13 C.F.R. § 121.103(g). (*Id.*) Truveta emphasized that most of the individuals who formed the company had no prior experience with the industry Truveta operates, *i.e.*, “the healthcare sector.” (*Id.*) Even though five of Truveta's senior executives formerly worked at Microsoft, only two — Jay Nanduri and Lisa Gurry — left Microsoft directly to join Truveta. (*Id.* at 5.)

Regardless, Microsoft was not involved in the formation of Truveta and has no control over Truveta. (*Id.* at 8.)

Lastly, Truveta disputed being a joint venture with the health systems. (*Id.* at 8-9.) The health systems are not subcontractors to Truveta and will be doing no specific work identified in the procurement. (*Id.* at 9.) As a result, they are not ostensible subcontractors under 13 C.F.R. § 121.103(h). (*Id.*)

D. Size Determination

On September 28, 2023, the Area Office issued Size Determination No. 06-2023-043, concluding that Truveta is a small business. The Area Office reviewed Appellant's allegations and found that Truveta is not affiliated with Microsoft and/or its health system investors on any of the protest grounds. (Size Determination at 2.)

The Area Office first explained that, under SBA regulations, size generally is determined as of the date that an offeror submits its initial offer including price. (*Id.*, citing 13 C.F.R. § 121.404(a).) Here, Truveta submitted its initial offer including price on May 31, 2023. (*Id.*) As of this date, Truveta's ownership split as follows: “[XX]% held by [XXXXX]; [XX]% held by [XXXXX]; [XX]% held by [XXXXX]; [XX]% held by 12 unrelated entities, [XXXXXX]; and [XX]% held by 5 unrelated entities holding [XX]%.” (*Id.* at 4.) [XXXXXXXXXXXXXXXXXXXX]

The Area Office next noted that management of Truveta is comprised of: “Terry Myerson, CEO; Jay Nanduri, Chief Technical Officer; Lisa Gurry, Chief Growth Officer; Ryan Ahern, Chief Medical Officer; David Heiner, Chief Policy Officer & General Counsel; Fabien Mousseau, Chief Financial Officer; Deb Nielsen, Chief People Officer; Oscar Papel, Chief Information Security Officer; and Martin Doerfler, Executive Vice President, Healthcare.” (*Id.*) Additionally, Truveta's Board consists of 10 directors, including Mr. Myerson and eight employees of entities invested in Truveta and appointed by their respective employers. (*Id.*) None of the directors are related to one another and they do not hold seats together on the board of any other company. (*Id.*) The Area Office concluded that the Board also has the power to control Truveta. (*Id.* at 6, citing 13 C.F.R. § 121.103(a)(1).)

Turning to the protest allegations, the Area Office explained that, contrary to Appellant's assertions, Microsoft currently has no ownership interest in Truveta or representation on Truveta's Board. (*Id.*) The Area Office reviewed [XXXXX] between Microsoft and Truveta and found that it is “arms-length in nature.” (*Id.*) Since Truveta has not [XXXXX], the Area Office found that Microsoft has no mechanism to control Truveta through [XXXXX]. (*Id.* at 7, citing 13 C.F.R. § 121.103(d).) Furthermore, there is no affiliation between Truveta and Microsoft on the basis of ownership. (*Id.*)

As for affiliation through common management under 13 C.F.R. § 121.103(e), the Area Office likewise found no viable connection. (*Id.*) The Area Office determined that “[XXXXX], along with nine other Board members, control the management at Truveta.” (*Id.*) Furthermore, eight of Truveta's directors “are employees of entities that have invested in [Truveta] and have been appointed by their respective employers to serve as directors.” (*Id.* at 5.) Nevertheless,

according to the Area Office, “[t]hese Board members do not control the board or management at any other entity.” (*Id.* at 7.)

Next, the Area Office found no basis for affiliation through identity of interest under 13 C.F.R. § 121.103(f). (*Id.*) In the instant case, “[d] ocumentation submitted by [Truveta] indicate[s] that no single entity accounts for 70% or more of the receipts generated by Truveta.” (*Id.*) Therefore, there is no affiliation based on economic dependence. (*Id.*)

Turning to the next allegation, the Area Office found that there was no affiliation based on the newly-organized concern rule, 13 C.F.R. § 121.103(g). (*Id.*) Although Mr. Myerson founded Truveta in August 2020, and previously worked at Microsoft, he was an employee of a venture capital firm immediately before forming Truveta. (*Id.*) Additionally, as of May 31, 2023, the date for determining size, Truveta had been in operation for “almost three years.” (*Id.*) Furthermore, as of May 31, 2023, “Mr. Myerson was an employee at Truveta but was not employee at Microsoft or at the venture capital firm.” (*Id.* at 7-8.) The Area Office concluded that “[a]s the current owners, officers, directors, principal stockholders at Truveta do not currently serve as owners, officers, directors, principal stockholders at any other entity, [the Area Office] finds that affiliation based on the newly organized concern rule under [§ 1]21.103(g) does not apply to [Truveta].” (*Id.* at 8.)

Finally, the Area Office rejected Appellant's allegation of affiliation based on the ostensible subcontractor rule, since Truveta indicated that it does not intend to use any subcontractors for the subject procurement. (*Id.*) Absent affiliation with any other concern(s), the Area Office found that Truveta alone is small under the size standard associated with the instant procurement. (*Id.*)

E. Appeal

On October 13, 2023, Appellant filed the instant appeal. Appellant asserts that the Area Office clearly erred in its review and failed to adequately investigate Appellant's protest allegations. In particular, Appellant renews its contentions that Truveta and Microsoft are affiliated under the newly-organized concern rule. (Appeal at 1.) Appellant additionally reasserts its belief that Truveta is affiliated with the health network investors through identity of interest. (*Id.*)

Appellant argues, first, that the Area Office's examination of the newly-organized concern rule was deficient. (*Id.* at 2-5.) The Area Office incorrectly reasoned that the rule is inapplicable because the “current owners, officers, directors, principal stockholders at Truveta **do not currently serve** as owners, officers, principal stockholders at any other entity.” (*Id.* at 3, quoting Size Determination at 8 (emphasis added by Appellant).) Many of Truveta's directors are, in fact, officers of the health network investors. (*Id.* at 6.) Moreover, under the plain text of 13 C.F.R. § 121.103(g), the newly-organized concern rule applies where current or former key employees of one concern establish a new concern. (*Id.* at 3.) Appellant highlights that, under OHA case law, the newly-organized concern rule consists of four elements:

1. Current or former officers, directors, principal stockholders, managing members, or key employees of one concern organizes a new concern;
2. the new concern is in the same or related industry or field of operation;
3. the persons who organized the concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and
4. the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise.

(*Id.*, citing *Size Appeal of Coastal Mgmt. Sols., Inc.*, SBA No. SIZ-5281, at 3 (2011).)

Appellant argues that the first element is met because Truveta was formed by former officers and/or key employees of Microsoft. (*Id.*) Based on Truveta's leadership biographies, Appellant identifies the following individuals:

- Truveta's CEO, Terry Myerson, worked at Microsoft for 21 years as an Executive Vice President.
- Truveta's Chief Technology Officer, Jay Nanduri, was a Technical Fellow and one of Microsoft's top engineers for over 20 years.
- Truveta's Chief Growth Officer, Lisa Gurry, worked 23 years at Microsoft holding various leadership positions.
- Truveta's Chief Policy Officer and General Counsel, David Heiner, worked 25 years at Microsoft as Vice President and Deputy General Counsel.
- Truveta's Chief Financial Officer, Fabien Mousseau, led Microsoft's Customer Lifetime Value Program and was CFO of the Windows Business Group.

(*Id.* at 3-4.) Mr. Myerson, Mr. Nanduri, and Ms. Gurry are described on Truveta's website as “co-founders” of the company. (*Id.* at 4.) Appellant argues that their roles at Microsoft made them, at a minimum, former key employees who went on to establish Truveta. (*Id.*)

Appellant contends that the second element is met because Truveta and Microsoft are in the same or related industries. Truveta operates under NAICS codes 513210, Software Publishers; 518210, Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services; and 541990, All Other Professional, Scientific, and Technical Services. (*Id.*) Microsoft operates under, amongst others, NAICS codes 518210 and 541990. (*Id.*) Furthermore, Microsoft has been awarded federal procurements issued under all three of these codes. (*Id.*) Therefore, Truveta and Microsoft operate in “the same or related industry or field of operation.” (*Id.*, citing *Size Appeal of Alterity Mgmt. and Tech. Sols., Inc.*, SBA No. SIZ-5514, at 5 (2013).)

As for the third element, the aforementioned former Microsoft officers/key employees now hold leadership positions at Truveta. (*Id.*) They therefore are “the new concern's officers, directors, principal stockholders, managing members, or key employees.” (*Id.*, citing *Alterity Mgmt.*, SBA No. SIZ-5514, at 5.)

The last element of the newly-organized concern rule, Appellant argues, was wholly ignored by the Area Office. (*Id.*) Appellant contends that Microsoft provides financial and technical assistance to Truveta. (*Id.*) Truveta uses Microsoft Azure, a cloud computing platform, to host the data it sells to customers. (*Id.*) Microsoft reportedly [XXXXXX]. (*Id.* at 5.) Additionally, Truveta itself acknowledges that [XXXXXXXX] from Microsoft. (*Id.*) Appellant alleges that, even if Microsoft does not directly invest in Truveta, Microsoft provides Truveta with financial and/or technical assistance through other means such as data hosting. (*Id.*)

With regard to affiliation based on an identity of interest, Appellant observes that “[i]ndividuals or firms that have identical or substantially identical business or economic interests . . . may be treated as one party with interests aggregated.” (*Id.* at 5-6, quoting 13 C.F.R. § 121.103(f).) An identity of interest may be found through joint investments when “the common investments of the persons [are] substantial, either in number of individual investments, or in total value.” (*Id.* at 6, quoting *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 11 (2015), *vacated in part on alternate grounds*, SBA No. SIZ-5747 (2016).)

Appellant claims that the Area Office erred by not considering the shared interests of Truveta's investors. (*Id.*) The Area Office determined that, because [XXXXXX] is unrelated to other holders of Truveta stock, there can be no identity of interest. (*Id.*, citing *Size Determination* at 4.) Appellant argues that the Area Office's analysis was flawed for two reasons. (*Id.*) First, apart from familial relations, common investments also may give rise to an identity of interest. (*Id.*, citing 13 C.F.R. § 121.103(f).) Second, the Area Office did not consider whether Truveta's investors may be affiliated with one another. (*Id.*) Appellant notes that, according to public information, some of Truveta's investors jointly invest in other companies. (*Id.*) Furthermore, “numerous sources” refer to two of Truveta's investors — Advent Health and Baylor Scott & White — as “partners.” (*Id.*)

If affiliated, the investors that hold seats on Truveta's Board could collectively control Truveta. (*Id.*) Appellant contends that the substantial number of shared investments amongst the investors shows affiliation through identity of interest, or otherwise under the totality of the circumstances. (*Id.*)

F. Truveta's Response

On October 31, 2023, Truveta responded to the appeal. Truveta argues that Appellant “failed to identify any clear errors of fact or law in the Area Office's Size Determination.” (Response at 2.) The appeal therefore should be denied. (*Id.*)

Truveta asserts, first, that the Area Office properly applied the newly-organized concern rule to find that Truveta and Microsoft are not affiliated. (*Id.* at 3.) OHA precedent makes clear that all four elements must be present to find affiliation under the newly-organized concern rule.

(*Id.* at 3-4, citing *Size Appeal of Coastal Mgmt. Sols., Inc.*, SBA No. SIZ-5281 (2011).) Furthermore, even if the four elements are established, affiliation may be rebutted “by demonstrating a clear line of fracture between the two concerns.” (*Id.* at 4, quoting *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 6 (2010).) Notwithstanding Appellant's contentions to the contrary, the Area Office appropriately determined that “Truveta and Microsoft are independent organizations that operate in different industries, and neither has the power or ability to control the other.” (*Id.*)

Truveta disputes Appellant's claim that the Area Office improperly analyzed the first element of the newly-organized concern rule by focusing on whether Mr. Myerson is currently employed by Microsoft. (*Id.* at 4-5.) Truveta highlights that the Area Office quoted the text of 13 C.F.R. § 121.103(g), including the phrase “former or current,” and that the Area Office elsewhere discussed Mr. Myerson's former and current roles. (*Id.* at 5.) Furthermore, in Truveta's view, the Area Office concluded that “there was a clear line of fracture between Mr. Myerson and Microsoft.” (*Id.*) Regardless, Truveta asserts, the first element of the test should fail because Appellant merely recited the prior job titles held by Truveta's founders at Microsoft without substantively demonstrating that these same individuals were ever officers, directors, or key employees of Microsoft. (*Id.* at 5-6, citing *Size Appeal of Hum. Learning Sys., LLC*, SBA No. SIZ-5769 (2016).) In the same vein, Truveta contends that the third element is not met because, even though they founded Truveta, the individuals were not former key employees of Microsoft. (*Id.* at 7.)

Regarding the second element, Truveta claims that it operates in a different industry than Microsoft. (*Id.* at 6-7.) Microsoft is “a quintessential software publisher” whereas Truveta is a “healthcare data and analytics company.” (*Id.* at 6.) Appellant's allegation that the two companies operate in the same industry is premised merely on the fact that they have similar NAICS code designations. (*Id.* at 7.) However, Truveta notes, many companies utilize these codes, and Microsoft performs work under several other codes that Truveta does not. (*Id.*) Truveta contends that its “core business” of health care data analytics is distinct from Microsoft's core business of software publishing. (*Id.*)

For the last element, Truveta disputes Appellant's contention that the Area Office did not adequately examine that assistance Microsoft provides to Truveta. (*Id.* at 8.) The Area Office reviewed both the alleged investment by Microsoft and [XXXXXXX]. (*Id.*) The Area Office correctly found that Microsoft has no current ownership interest in Truveta nor representation on its Board. (*Id.*) As for [XXXXXX], the Area Office rightfully determined that it was arms-length in nature and not unusual for technology companies [XXXXXXXXXXXX]. (*Id.*) The Area Office reasonably reached this conclusion because Truveta has [XXXXXX] and [XXXXXX] does not provide Microsoft with any mechanism to control Truveta. (*Id.*) Appellant's assertion that this element is met because Truveta uses Microsoft Azure also must fail, because then Microsoft would be considered to provide “technical assistance” to thousands of Microsoft Azure users, including 95% of Fortune 500 companies. (*Id.* at 9.)

Turning to the identity of interest arguments, Truveta maintains that Appellant's protest failed to allege any credible grounds to support a finding of affiliation through common investments. (*Id.* at 10.) Truveta observes that Appellant submitted a table listing Truveta's

owners, but did not further identify any other joint investments. (*Id.*) Based on OHA precedent, such an identity of interest “is premised on the idea that entities that have ownership interests in the same concerns may, because of their shared investments, act in concert with one another.” (*Id.*, citing *Size Appeal of The H.L. Turner Grp., Inc.*, SBA No. SIZ-4896, at 6 (2008).) In other words, there must be more than one significant investment shared between two concerns. (*Id.*, citing *Size Appeal of Eagle Pharms., Inc.*, SBA No. SIZ-5023, at 9 (2009).)

According to Truveta, Appellant's protest did not properly allege an identity of interest because Appellant did not produce “meaningful evidence that Truveta's investors have shared interests in multiple other entities such that these owners would have cause to operate in unison to control Truveta.” (*Id.* at 11.) Appellant merely recited Truveta's minority owners without offering any reason to believe that these owners would act together to control Truveta. (*Id.*) Any potential common investments by the healthcare networks are likely insignificant in any event due to the sheer size of these concerns. (*Id.*)

G. OHA's Request for Comments

While the appeal was pending, Truveta informed OHA that the CDC will undertake corrective action on the subject procurement. (Truveta Response at 1-2.) Truveta attached letters from the CDC describing the planned corrective action and terminating the award to Truveta. (*Id.*, Attachs. 1 and 2.)

On November 1, 2023, OHA invited Appellant and other interested parties to submit comments as to whether corrective action rendered the appeal moot, either in whole or in part. OHA explained that, under OHA precedent, corrective action on a procurement and subsequent award cancellation may render a size appeal moot if the issues presented in the case are contract-specific. (Request for Comments at 1, citing *Size Appeal of HAL-PE Assocs. Eng'g Servs., Inc.*, SBA No. SIZ-5374, at n.1 (2012) and *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 5 (1998).)

H. Appellant's Comments

On November 9, 2023, Appellant responded to OHA's request. Appellant urges that OHA should not dismiss the appeal as moot because the issues raised in the appeal are not contract-specific. (Appellant's Comments at 2.) The appeal will “have future applicability, including in [the instant] procurement.” (*Id.*)

Appellant explains that the appeal concerns potential affiliation under the newly-organized concern rule, the identity of interest rule, and the totality of the circumstances. (*Id.*) These issues turn on Truveta's relationships with Microsoft and/or its investors and do not hinge on a single contract. (*Id.*) Irrespective of the instant procurement, Truveta may still be found affiliated with these other-than-small businesses. (*Id.* at 2-3.) Furthermore, Truveta may remain the awardee after the corrective action and potential affiliation should still be analyzed. (*Id.* at 3.)

In *Size Appeal of HAL-PE Assocs. Eng'g Servs., Inc.*, SBA No. SIZ-5374 (2012), a case cited in OHA's Order, OHA found these issues are not contract-specific. (*Id.*) That appeal

addressed the newly-organized concern, identity of interest, and totality of the circumstances rules. (*Id.*, citing *HAL-PE*, SBA No. SIZ-5374, at 5-7.) Even though the procuring agency cancelled the award, OHA determined that the dispute was not moot because those issues were not contract-specific, and the size determination had future applicability for the challenged concern. (*Id.*)

I. Truveta's Comments

On November 9, 2023, Truveta submitted comments in response to OHA's request. Truveta argues that it would be inappropriate for OHA to proceed with consideration of the instant appeal. (Truveta's Comments at 4.) The award in question has been rescinded and the size determination has no adverse impact on Appellant. (*Id.* at 3-4.)

Truveta allows that corrective action could render a size appeal moot if the issues presented are contract-specific. (*Id.* at 1.) Here, the issues before OHA are not contract-specific. (*Id.* at 3.) However, Truveta argues, OHA has dismissed other appeals as moot after corrective action without a detailed analysis of whether issues were contract-specific. (*Id.* at 2.)

In *Size Appeal of Bosco Constructors, Inc.*, SBA No. SIZ-5345 (2012), OHA dismissed an appeal without analyzing whether the issues were contract-specific “[b]ecause a new evaluation is underway and a different awardee may be selected.” (*Id.*, quoting *Bosco*, SBA No. SIZ-5345, at 2.) OHA explained that a new awardee had yet to be selected so the appellant was not adversely affected by the original size determination. (*Id.*) The appeal was therefore moot because no live controversy remained. (*Id.*)

Likewise, in *Size Appeals of Blueprint Consulting Servs., LLC d/b/a Excelicon and STS-Optimo, CTA*, SBA No. SIZ-6077 (2020), OHA did not address the contract-specific question at all. (*Id.* at 3.) In that case, after the procuring agency cancelled the award, OHA summarily dismissed the appeal as moot because termination of the contract meant that there was no live controversy to be decided. (*Id.*)

In light of *Bosco* and *Blueprint*, Truveta contends that the instant appeal should be dismissed because, after cancellation of the award, Appellant is no longer adversely affected by the size determination. (*Id.*) Since Appellant is not adversely affected, there is no longer any controversy to be decided. (*Id.*)

III. Discussion

A. Mootness

I agree with Appellant that the instant appeal is not moot. It is well-settled law that “a size appeal is not moot even if a procurement is canceled, if the issues are not contract-specific and the size determination at issue has future applicability.” *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 5 (1998); *see also Size Appeal of HAL-PE Assocs. Eng'g Servs., Inc.*, SBA No. SIZ-5374, at n.1 (2012). Here, the issues before OHA relate to questions of general affiliation, such as the newly-organized concern rule, identity of interest,

and the totality of circumstances. Sections II.D, II.E, and II.F, *supra*. In *HAL-PE*, OHA expressly found these issues are not contract-specific. Furthermore, neither party disputes that the issues presented here are not contract-specific. Sections II.H and II.I, *supra*.

Truveta points to two cases in which OHA dismissed appeals as moot without discussing whether the issues were contract-specific, but neither case is apposite here. Section II.I, *supra*. While it is true that the decisions did not expressly analyze the question, the issues presented in those cases nevertheless were contract-specific. In *Bosco*, a protestor appellant challenged the dismissal of its size protest for lack of standing, and OHA concluded that the dispute had been rendered moot by corrective action, because the appellant retained the ability to file a new size protest against any new awardee at the conclusion of corrective action. *Bosco*, SBA No. SIZ-5345, at 1-2. Likewise, in *Blueprint*, the appellants were protestors whose size protests had been rejected as untimely, and neither appellant opposed dismissal of the respective appeals in light of corrective action. *Blueprint*, SBA No. SIZ-6077, at 1-2. Unlike general affiliation, issues of protest standing or timeliness are inherently related to a particular procurement. In other words, a finding by OHA that a given protestor has standing or timely filed a protest has no future implications as to whether a challenged concern is, or is not, a small business for other procurements. Questions of general affiliation, conversely, do have future applicability.

B. 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).

C. Analysis

Appellant has persuasively shown that the Area Office erred in its analysis of the newly-organized concern rule, 13 C.F.R. § 121.103(g). Accordingly, the appeal is granted to that extent, and that portion of the size determination is remanded to the Area Office for further review.

1. Newly-Organized Concern Rule

The Area Office found, and no party disputes, that Appellant specifically alleged in its protest that Truveta is affiliated with Microsoft under the newly-organized concern rule. Section II.B, *supra*. Although the Area Office considered the allegation and discussed it in the size determination, the Area Office conducted only a flawed and perfunctory review. In particular, the Area Office apparently found the rule inapplicable because Truveta's CEO, Mr. Myerson, “was an employee at Truveta but was not employee at Microsoft” as of May 31, 2023, the date for assessing Truveta's size. Section II.D, *supra*. The Area Office concluded that, because “the current owners, officers, directors, principal stockholders at Truveta do not currently serve as owners, officers, directors, principal stockholders at any other entity,” there could be no affiliation under the newly-organized concern rule. *Id.*

As Appellant observes in its appeal, the Area Office's analysis was deficient for two principal reasons. First, the newly-organized concern rule does not require that the organizers of a new concern must still be concurrently employed by the other concern. Rather, by its own terms, the rule applies if “former or current” officers or key employees of one concern establish a new concern. 13 C.F.R. § 121.103(g). The Area Office thus clearly erred by rejecting Appellant's allegations solely on the grounds that Mr. Myerson did not work for Microsoft as of May 31, 2023, without considering that he may be a former Microsoft officer or key employee. Second, the Area Office also clearly erred by limiting its analysis solely to Mr. Myerson. As Appellant highlighted in its protest, in addition to Mr. Myerson, Mr. Nanduri and Ms. Gurry are also identified on Truveta's website as “co-founders” of Truveta, and like Mr. Myerson, Mr. Nanduri and Ms. Gurry are both former high-level Microsoft employees. Sections II.B and II.E, *supra*.

In response to the appeal, Truveta argues that any defects in the Area Office's analysis are immaterial, because the Area Office ultimately correctly found no affiliation under the newly-organized concern rule. Truveta maintains that its founders were never “key employees” of Microsoft within the meaning of 13 C.F.R. § 121.103(g) and OHA case precedent. Section II.F, *supra*. Additionally, Truveta argues, Truveta and Microsoft do not operate in the same or related industries. *Id.* Truveta also highlights that the Area Office reviewed [XXXXX] between Truveta and Microsoft, and found that the arrangement does not enable Microsoft to control Truveta. *Id.*

I agree with Truveta that the Area Office may, upon further examination, conclude that Appellant's allegations are meritless. Nevertheless, a more thorough review is warranted, because the record reflects sufficient facts that could plausibly form the basis for affiliation under the newly-organized concern rule. Appellant identified three individuals who co-founded Truveta after previously holding senior positions at Microsoft: Mr. Myerson, Mr. Nanduri, and Ms. Gurry. Sections II.B and II.E, *supra*. Mr. Myerson's 21-year tenure at Microsoft included time spent as an Executive Vice President. *Id.* Mr. Nanduri “was a Technical Fellow and one of Microsoft's top engineers for over 20 years.” *Id.* Ms. Gurry “worked 23 years at Microsoft holding various leadership positions.” *Id.* Accordingly, additional review is appropriate to consider whether Mr. Myerson, Mr. Nanduri, and/or Ms. Gurry are former officers or key employees of Microsoft.

Truveta also disputes whether Microsoft and Truveta operate in the same or related industries. According to Truveta, Microsoft is “a quintessential software publisher” whereas Truveta is a “healthcare data and analytics company.” Section II.F, *supra*. On its sworn SBA Form 355, however, Truveta identified NAICS code 513210 — Software Publishers — as its own primary industry. Section II.C, *supra*. It thus appears conceivable that the Area Office could, upon further investigation, find that Truveta and Microsoft do operate in the same or related industries.

Affiliation under the newly-organized concern rule also would require that Microsoft provides Truveta with technical and/or financial assistance, and this also issue also warrants additional review by the Area Office. Truveta observes that the Area Office examined [XXXXX] between Microsoft and Truveta, under which [XXXXX]. Section II.F, *supra*. Because Truveta

[XXXXX], and because [XXXXX] does not otherwise enable Microsoft to control Truveta, the Area Office found no affiliation under 13 C.F.R. § 121.103(d). Section II.D, *supra*. Nevertheless, the Area Office does not appear to have analyzed [XXXXX] in the context of the newly-organized concern rule. Even if Truveta has not [XXXXX], [XXXXX] may still be a form of “financial assistance” within the meaning of the newly-organized concern rule. Accordingly, a more thorough analysis should be conducted in conjunction with the newly-organized concern rule.

“OHA will remand a case for further review when an area office does not fully explore allegations raised in the underlying protest.” *Size Appeal of PDS Consultants, Inc.*, SBA No. SIZ-6107, at 5 (2021); *see also Size Appeal of TelaForce, LLC*, SBA No. SIZ-5970, at 12 (2018); *Size Appeal of Veterans Constr. Coal., LLC*, SBA No. SIZ-5824, at 10 (2017). Such is the case here, as the Area Office did not adequately investigate Appellant's claim that Truveta may be affiliated with Microsoft under the newly-organized concern rule, an allegation that was specifically raised in Appellant's protest. Remand therefore is appropriate.

2. Identity of Interest

Appellant additionally argues on appeal that the Area Office clearly erred by not considering whether Truveta's healthcare network investors are affiliated with one another through identity of interest, 13 C.F.R. § 121.103(f). That regulation provides:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). Appellant highlights that, in the size determination, the Area Office found that Truveta is not economically dependent upon any concern because “no single entity accounts for 70% or more of the receipts generated by Truveta.” Section II.D, *supra*. However, in Appellant's view, the Area Office overlooked that an identity of interest could arise on alternate grounds, such as common investments. Here, Appellant maintains, the Area Office should have investigated whether there is an identity of interest among Truveta's healthcare network investors. Section II.E, *supra*. Appellant further posits that, if an identity of interest were found, such investors, collectively, could control Truveta. *Id.*

The problem for Appellant, though, is that, unlike Appellant's allegations pertaining to the newly-organized concern rule, an identity of interest through common investments was not an issue clearly alleged in Appellant's protest. While the protest did allude to the possibility that “consortium members [may] have an identity of interest with Truveta and each other through their common investments,” Appellant provided no evidence of any other joint investments apart from the single investment in Truveta. Section II.B, *supra*. Moreover, Appellant offered no

reason to believe that other, unidentified joint investments are so substantial as to give rise to an identity of interest. *Id.* This latter omission is significant because OHA has made clear that “common investments of the persons must be substantial, either in number of individual investments, or in total value, in order to find that there is an identity of interest between the investors.” *Size Appeal of W. Harris, Gov't Servs. Contractor, Inc.*, SBA No. SIZ-5717, at 5 (2016).

On this record, then, I find that the Area Office did not clearly err by failing to conduct a more detailed review of whether Truveta's healthcare network investors may share an identity of interest through common investments. Appellant did not offer any credible or specific basis for this allegation in the protest, and it is well-settled law 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); *see also 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.”).

IV. Conclusion

For the above reasons, the appeal is GRANTED with respect to whether Truveta may be affiliated with Microsoft under the newly-organized concern rule, and that question is REMANDED to the Area Office for further review. Appellant has not otherwise shown clear error in the size determination. I therefore DENY the appeal and AFFIRM the size determination with regard to all other findings.

KENNETH M. HYDE
Administrative Judge