United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Zin Technologies, Inc. Appellant, RE: Sierra Lobo, Inc. Appealed From Size Determination No. 04-2024-014 Solicitation No. 80GRC022R0016	SBA No. SIZ-6305 Decided: September 5, 2024

APPEARANCES

Jeffery M. Chiow, Esq., Timothy M. McLister, Esq., Jordan N. Malone, Esq., Eleanor M. Ross, Esq., Greenberg Traurig, LLP, Washington, D.C., for Appellant Zin Technologies, Inc.

Jonathan T. Williams, Esq., Meghan F. Leemon, Esq., Emily A. Reid, Esq., Daniel J. Figuenick III, Esq., PilieroMazza PLLC, Boulder, Colorado, for Sierra Lobo, Inc.

DECISION[1]

I. Introduction and Jurisdiction

On August 2, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 04-2024-14, concluding that Sierra Lobo, Inc. (SLI) was an eligible small business for the subject procurement. On appeal, Zin Technologies, Inc. (Appellant) contends that the Size Determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is DENIED.

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 initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

15 days after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. BACKGROUND

A. Solicitation and Protest

On March 16, 2023, National Aeronautics and Space Administration Glenn Research Center issued the subject Solicitation for Space Flight Systems Development and Operations Contract III (SpaceDOC III). The Contracting Officer (CO) designated the acquisition as a 100% small business set aside and a North American Industry Classification System (NAICS) code 541715, Research and Development in the Physical, Engineering and Life Sciences (except Nanotechnology and Biotechnology) with a corresponding 1,000 employee size standard as the appropriate code. SLI submitted its initial offer, including price, on May 2, 2023. Final proposal revisions were due October 6, 2023.

On January 4, 2024, the CO notified offerors that SLI had been selected for award. On January 9, 2024, Appellant filed a size protest, alleging that SLI was affiliated with HX5 Sierra LLC (HX5 Sierra) and National Aerospace Solutions, LLC (NAS).

In the protest, Appellant noted that SLI's LinkedIn profile states that it has over 800 employees. SLI is a partner in HX5 Sierra, a joint venture with more than 350 employees based upon its LinkedIn profile, and nearly 400 employees based upon another internet source. SLI is also a partner in National Aerospace Solutions, LLC, a joint venture with Bechtel National, Inc. and GP Strategies Corporation, with 1,802 "team members."These employees should be included in SLI's count. (Protest, at 1.)

Further, Appellant claimed that SLI participates as a prime or major subcontractor on contracts valued over $6.1 billion, alleging that it is beyond a small business's capabilities. Appellant further estimated that SLI should have a $161 million average contract year value, and the Federal Procurement Data system shows actions of $219 million. Appellant's calculated SLI employee headcount exceeds the 1,000-employee size standard based upon publicly available information on its contracts. (*Id.*, at 2.)

Lastly, Appellant alleged that SLI has a recent history of misrepresenting its size eligibility through its relationship with HX5 on similar procurements, and that HX5 Sierra had paid over $7.7 million to resolve such allegations. (*Id.*, at 3.)

B. The Size Determination

On February 15, 2024, the Area Office issued its Size Determination. The Area Office noted that SLI acknowledged it has one affiliate, **[Company A]** with no employees. SLI also explained that HX5 Sierra is a populated joint venture between SLI and HX5, LLC (HX5). Whereas HX5 Sierra was formed in 2014 and awarded one contract on March 27, 2015, NAS is a populated joint venture between Bechtel National, Inc. (BNI) and SLI, formed in 2014 and awarded one contract on June 10, 2015. (Size Determination (SD), at 1-2.)

The Area Office first determined SLI's size as of May 2, 2023, the date it submitted its self-certification with its initial offer, including price. (*Id.*, at 3, citing 13 C.F.R. § 121.404(a).) Pursuant to 13 C.F.R. § 121.103(h), which requires that a joint venture may not be a populated joint venture, that is, it could not have its own employees intended to perform contracts awarded to the joint venture except to perform administrative functions, the Area Office found that neither HX5 nor NAS are valid joint ventures on May 2, 2023, the time of SLI's self-certification. (*Id.*, citing *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125 at 3, 11 (2021).) The Area Office thus concluded that HX5 Sierra and NAS were not valid joint ventures and moved to consider whether either firm was affiliated with SLI. (*Id.*, at 4.)

In reviewing claims of affiliation, the Area Office found HX5 Sierra is a joint venture with HX5 holding a **[majority]**% interest and SLI holding a **[minority]**% interest. In the Operating Agreement, HX5 appoints two managers and SLI appoints one manager to the Management Committee. Uder Section 5.1.2 of the Operating Agreement, the Management Committee has exclusive power and authority to manage the business and affairs of the Company, including in performing the Contract. Section 5.3 requires unanimous approval of the members to initiate or settle any litigation or claim, and for bidding or performing any additional federal contracts. Because bringing lawsuits and entering into contracts are essential to the operation of a company, the Area Office found the unanimity requirement gives SLI negative control, and thus affiliates HX5 Sierra with SLI. (*Id.*, at 5, citing *Size Appeal of Southern Contracting Sols., III*, SBA No. SIZ-5956 at 12 (2018).)

NAS is owned **[minority]**% by SLI and **[majority]**% by BNI. This ownership does not confer control of NAS upon SLI. There is no common management between the concerns which would confer control upon SLI, and thus, the Operating Agreement does not give SLI negative control. Accordingly, the Area Office concluded SLI was not affiliated with NAS. (*Id.*)

The Area Office then calculated the number of employees for SLI and its affiliate, HX5 Sierra, and concluded that SLI was a small business. (*Id.*, at 6-7.)

C. Appeal

On March 1, 2024, Appellant filed the instant appeal. With its appeal, Appellant submits as exhibits documents that were not before the Area Office. Particularly, Exhibit G is a list of Industry Day participants to an unnamed procurement, and Exhibit H is a copy of SLI's Chief Operating Officer's (COO) LinkedIn Profile.

Appellant first argues the Area Office failed to consider the longstanding relationship between SLI and NAS and erred in only considering common management and common ownership to determine whether SLI and NAS are affiliated. Appellant maintains that where connecting relationships between firms are so suggestive of dependence as to render them affiliated, SBA will find affiliation based upon the totality of the circumstances. (Appeal, at 9, citing *Size Appeal of A.M. Kinney Assoc.*, SBA No. SIZ-4401 (2000).)

Appellant further argues a joint venture is invalid when it is set up on a continuing basis for conducting business generally. The size status of joint venture partners must be determined in accordance with SBA's general affiliation regulations and OHA precedent. (*Id.*, citing *Size Appeal of Robert M. Gomez & Assoc., Inc.*, SBA No. SIZ-3921 (1994).) NAS is no longer a joint venture under 13 C.F.R. § 121.103(h) because it was populated. (*Id.*, at 2, 10 citing *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125 at 3, 11 (2021).) Furthermore, joint venture partners will be found affiliated when the joint venture submits an offer after two years from the date of the first award. (*Id.*, at 10, citing 13 C.F.R. § 121.103(h); *Size Appeal of Federal Performance Mgmt. Sol., LLC*, SBA No. SIZ-6248 (2023); *Size Appeal of Team Contracting, Inc.*, SBA No. SIZ-3875 (1994).)

Appellant seeks to submit new evidence to show that NAS is pursuing a follow-on contract to its decade-long Air Force contract. This type of long-standing relationship between joint venture partners may lead to a finding of general affiliation among them. (*Id.*, at 11.)

Next, Appellant argues the Area Office failed to consider whether SLI and NAS were affiliated through economic dependence and contractual relationships. Appellant notes that a rebuttable presumption of economic dependence arises if a concern receives 70% or more of its revenues from another concern. (*Id.*, at 12, citing 13 C.F.R. § 121.103(f)(2).) However, Appellant argues the percentage of revenue sufficient to establish economic dependence can be as low as 30% to 40% depending on the facts. Where two concerns are engaged in a joint venture, there is a greater *indicia* of identity of interest. (*Id.*, at 12, citing *Size Appeal of Rockwell Medical, Inc.*, SBA No. SIZ-5559, at 6 (2014); *Size Appeal of David Boland, Inc.*, SBA No. SIZ-4965 (2008).) Here, Appellant claims that publicly available records show SLI derives at least 70% of its receipts from NAS. (*Id.*, at 14.)

Similarly, Appellant alleges the Area Office failed to consider affiliation due to common management. Appellant observes that SLI's Chief Operating Officer sits on the Board of Managers for both HX5 Sierra and NAS. (*Id.*, at 15.)

Asserting that SLI and NAS are affiliated based upon the totality of the circumstances, Appellant claims the interactions between the businesses are so suggestive of affiliation as to render the firms affiliated. In particular, the longstanding contractual relationship between SLI and NAS, the economic dependence between the two concerns, common management outside the four corners of the Operating Agreement, and the overall magnitude of NAS's contract. (*Id.*, at 16.)

Furthermore, the Area Office erred in failing to find HX5 and BNI affiliated with SLI. Populated joint ventures are not recognized as joint ventures under SBA regulations, and the owners of such a venture risk being treated as affiliates. Appellant maintains that in determining the size of a populated joint venture, SBA will aggregate the employees of all partners to the joint venture. Here, Appellant claims the Area Office should have found SLI affiliated with HX5 and BNI and aggregated their employees with SLI, based upon SLI's long relationship with those concerns. (*Id.*, at 17, citing 13 C.F.R. § 121.103(h)(1)(i) &(iii).)

Finally, Appellant argues the Size Determination should be remanded because the Area Office's investigation was inadequate. (*Id.*)

D. Motion to Dismiss

On March 8, 2024, SLI moved to dismiss the appeal. In the alternative, SLI moved to strike Appellant's arguments that the Area Office failed to consider SLI's longstanding relationship with NAS, that the Area Office failed to consider affiliation of SLI with NAS through economic dependence and contractual relationships, and the Area Office failed to consider SLI's affiliation with NAS through common management. SLI also moves to strike Appellant's Exhibits G and H. (SLI's Memorandum in support of Motion to Dismiss, at 1.)

SLI argues the Appeal does not allege any errors of law or fact by the Area Office and does not dispute any factual findings or explain why the size determination is in error. The only errors Appellant alleges are on grounds the Area Office failed to consider allegations that were not raised in the protest. An Area Office has no obligation to investigate issues beyond those specifically raised in the protest. (*Id.*, at 4-5, citing *Size Appeal of DB Sys. Tech., Inc.*, SBA No. SIZ-5961 (2018); *Size Appeal of Cherokee — Technical Specialists, LLC*, SBA No. SIZ-5434 (2013); *Size Appeal of Crop Jet Aviation, LLC*, SBA No. SIZ-5933 (2018.)

The Appeal should be dismissed, because each purported “error” is a new argument raised by Appellant for the first time on appeal. (*Id.*, at 6, citing 13 C.F.R. § 134.316(c); *Size Appeal of Advant-Edge Sols. of Middle Atl., Inc.*, SBA No. SIZ-6194 (2023).)

SLI notes Appellant's first argument is that the Area Office erred in only considering common management and ownership to determine affiliation between SLI and NAS. Appellant stated NAS may be pursuing a follow-on contract to its current contract, which may lead to a finding of affiliation, and in support attempts to submit new evidence. Appellant raised no argument in its protest regarding the purported longstanding relationship between SLI and NAS or BNI, or an argument of general affiliation. This entire argument rests on new evidence, which was available at the time of the protest. (*Id.*, at 6.)

Further, Appellant attempts to introduce industry day information from another procurement dated in 2022, well before the size protest was filed. Appellant is impermissibly attempting to cure its protest by including new arguments and evidence. (*Id.*, citing *Size Appeal of Alrac Escalators, LLC*, SBA No. SIZ-6156 (2022); *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073 (2009).)

SLI asserts Appellant does not even demonstrate what basis for affiliation exists which the Area Office ignored, so that it fails to state a claim. Particularly, Appellant attempts to create an appearance that the joint venture rule of two has been violated, when NAS submitted an offer prior to the relevant date to determine size, May 2, 2023. Information regarding the industry days was available to Appellant at the time it filed its protest, but it did not include it. Further, even if the rule had been violated, SBA's regulations at the time provided that in such a case, SBA would find joint venture partners affiliated, and thus will aggregate their employees, only in

determining the size of the joint venture for all small business programs. It does not result in a finding of general affiliation between the concerns. (*Id.*, citing 13 C.F.R. § 121.103(h).)

SLI argues Appellant's second argument is new, relies on new information, and should be dismissed. Appellant argues the Area Office failed to consider affiliation between SLI and NAS through economic dependence based upon contractual relationships. The crux of the argument is that based on the value of awards to NAS in 2020, 2021, 2022, SLI derives at least 70% of its receipts from NAS. SLI points out that NAS is a populated joint venture and its own entity. SLI receives no revenue from NAS, rather, it receives a share of the profits as a result of being a member. (*Id.*, at 8.) This argument was not presented to the Area Office in the protest and is based on information that was publicly available at the time. Appellant has alleged no error of fact or law by the Area Office and is attempting to assert the Area Office failed to consider bases of affiliation that Appellant could have but did not assert in its size protest. (*Id.*)

As for Appellant's third argument, SLI states that it is new and relies entirely on new evidence. This is the allegation of common management between SLI and NAS, which was not included in the protest. (*Id.*, at 9.) Similarly, SLI asserts Appellant's fourth argument is also new, that SLI and NAS are affiliated based upon the totality of the circumstances. (*Id.*, at 9-10.)

SLI then addresses Appellant's argument that the Area Office should have found SLI affiliated with HX5 or BNI. The protest alleges affiliation with neither concern. Further, Appellant's argument is based upon a version of 13 C.F.R. § 121.103(h)(1) that did not go into effect until May 30, 2023, and thus is not applicable here. (*Id.*, at 10, citing Appeal at 16-17, 88 Fed. Reg., 26164, 26199 (Apr. 27, 2023).)

While SLI asserts there should be no remand of this case because there has been no demonstration of an error of fact or law, if the appeal is not dismissed, Appellant's Exhibits G and H should be struck because they were not presented to the Area Office when they were available at that time. (*Id.*, at 11.)

E. Response to SLI's Motion to Dismiss

On March 25, 2024, Appellant responded to SLI's Motion to Dismiss. Appellant denies it failed to plead a full and specific statement as to why the size determination was in error. Appellant argues that *DB Sys. Tech.*, SBA No. SIZ-5061 is inapposite because that appellant failed to explain how the area office's analysis was in error. Appellant further argues *Cherokee-Technical*, SBA No. SIZ-5434 is inapposite, because that appeal failed to allege any error, but merely tried to submit new evidence. Appellant finds that it adequately alleged the Area Office erred in its size determination relying upon arguments raised in its initial protest. (Zin Response to Motion, at 7-8, citing Appeal at 9, 11, 16-17.)

Appellant explains that its allegations rely on issues raised in its Protest and address issues raised in the Size Determination. A protest which names a specific alleged affiliate is sufficiently specific. The protest need only provide a specific basis for belief the challenged concern is other than small. (*Id.*, at 9, citing *Size Appeal of Bonded Products, Inc.*, SBA No. SIZ-3160 (1989); *Size Appeal of Flowsense Bldg. Svcs. Inc.*, SBA No. SIZ-5072 (2009).) Protests

must, on necessity raise allegations based on little information because the protested concerns necessarily have best access to information about themselves. (*Id.*, citing *Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4848, at 5 (2007).)) It is well established that a protestor has standing to appeal any issue raised in the size determination, even if that issue was not raised in its protest. (*Id.*, at 10, citing *Size Appeal of W&T Travel Svcs., LLC*, SBA No. SIZ-5271 (2016.)

Appellant then revisits its claims that the Area Office failed to consider SLI's longstanding relationship with NAS, asserting that this contention is not based on new evidence. The protest alleged SLI is a partner in NAS, a joint venture with BNI. HX5 and NAS's employees should be included in SLI's employee count pursuant to 13 C.F.R. § 121.103(a)(2), which identifies previous relationships or ties to another concern and contractual relationships in determining whether concerns are affiliated. The Protest listed specific contracts, subcontracts and joint venture contracts involving SLI and alleged affiliates, including NAS. Appellant maintains it adequately pled general affiliation between SLI and NAS. (*Id.*, at 10.)

The Area Office failing to consider SLI's affiliation with NAS based upon previous relationships and ties, Appellant explains that OHA has held when a purported joint venture conducts business on a continuing basis, it will not be treated as a valid joint venture, and a continuing joint venture may give rise to general affiliation of the venturers through a contractual relationship, and parties to a joint venture that conducts business on a continuing basis may be deemed general affiliates under the identity of interest rule. (*Id.*, at 11, citing *Size Appeal of Robert M. Gomez & Assoc., Inc.*, SBA No. SIZ-3921 (1994) and SBA No. SIZ-3875 (1994).)

Appellant also maintains its Protest alleged general affiliation based upon previous relationships and ties to another concern and contractual relationships, nonetheless the Area Office did not consider these, but only affiliation based upon common ownership or management. The Size Determination quoted SLI's Response summarizing its relationship with NAS, which was formed in 2014, and was awarded one contract in 2015. Appellant argues the Area Office failed to consider all aspects of the relationship. (*Id.*, at 12.)

Moreover, the Area Office failed to consider affiliation through economic dependence and contractual relationships. The Protest argued affiliation between SLI and NAS based on public data found on USAspending.gov and FPDS.gov. Appellant also submitted a Test Operations Contract with NAS, worth over $2.5 billion, and the Area Office disregarded the website and Appellant's reliance on contracts and data published there. This was clear error, to ignore facts part of the record. (*Id.*, at 13, citing Exh. D at 1.)

The Area Office failing to consider affiliation through common management, Appellant maintains it raised this issue in its Protest, that HX5 Sierra and NAS's employees should be included in SLI's employee count, by citing 13 C.F.R. § 121.103(a)(2), which refers to common management. (*Id.*, at 14, citing Exh. D at 1, Ex. F at 5.) Thus, the appeal addresses affiliation which was raised in the Protest and responds to the Size Determination.

As for SLI's COO sitting on the boards of both HX5 Sierra and NAS, indicative of common management, but the Area Office denied, Appellant argues this new evidence, i.e., the COO's LinkedIn profile, is admissible under OHA precedent, limited in scope, consistent with

information the moving party had previously presented and addressed in the appeal. (*Id.*, at 15, citing Appeal at 15.)

Similarly, the argument that SLI and NAS are affiliated based upon the totality of the circumstances, may be raised on appeal because the Area Office considered whether SLI and NAS were affiliated under general principles of affiliation and one of the general principles is totality of the circumstances under 13 C.F.R. § 121.103(a)(5). Appellant claims the Area Office is charged with making this determination with every size protest. (*Id.*, at 16-17, citing *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5284, at 9 (2011).)

Despite SLI's argument that the protest failed to raise arguments of affiliation with HX5 and BNI and it is based on a version of 13 C.F.R. § 121.103(h)(1) not in effect on the date to determine size, Appellant claims the Protest clearly identifies BNI as a partner in NAS and argues its employees should be included in size calculations. The Size Determination also acknowledged that NAS and HX5 Sierra are joint ventures between SLI and BNI and HX5, respectively. The issues were raised in the Size Determination, and thus they may be raised on appeal. Further, SBA's commentary on the new regulation stated that SBA's consistent policy is if two or more businesses join through another entity on a continuing, unlimited basis, that is a separate business concern with each partner affiliated with each other. SBA will aggregate the receipts/employees of the parties that formed that entity in determining its size. (*Id.*, at 18-19, citing 88 Fed. Reg. 26161, 26165 (Apr. 27, 2023).)

Thus, the Area Office's investigation was inadequate, and Appellant asks that the case be remanded to the Area Office for further investigation.

On April 9, 2024, OHA denied SLI's Motion to Dismiss to review the merits of the case. OHA also lifted the stay order and directed parties to file a response by April 24, 2024.

F. Response to Appeal

On April 24, 2024, SLI timely responded to the Appeal, and Moved to Supplement the Record, with the Declaration of its COO, detailing the percentage of its receipts received from NAS.

SLI argues the Appeal is moot because the Area Office should have recognized HX5 Sierra and NAS as valid joint ventures. The Area Office erroneously relied on the *Swift & Staley* cases[2] to find the joint ventures were not recognized as joint ventures under 13 C.F.R. § 121.103(h). This error led the Area Office to unnecessarily perform a general affiliation analysis between SLI and the two populated joint ventures. SLI argues the appeal should be dismissed as moot because it is based upon a general affiliation analysis the Area Office should not have performed. (Response to Appeal, at 6-7.)

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[2] *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6095 (2021); *Swift & Staley, Inc. v. U.S.*, 155 Fed. Cl. 630, 636 (2021); *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125 (2021).

SLI explains the Area Office should not have relied upon the *Swift & Staley* cases. HX5 Sierra and NAS are populated joint ventures. These cases relied upon an earlier version of 13 C.F.R. § 121.103(h). They held that a populated joint venture was not a valid joint venture under SBA's regulations, and when a concern was a partner to such a joint venture, SBA must perform a general affiliation analysis. The Area Office did so here, concluding SLI was affiliated with HX5 and not with NAS. (*Id.*, at 8.)

By pointing to SBA's changes to the regulation after the date to determine size for the *Swift & Staley* cases on April 16, 2020, and before SLI's self-certification for the instant Solicitation on May 2, 2023, SLI explains that SBA removed the "for the purposes of this provision" language, which were at the heart of the U.S. Court of Federal Claim's (COFC) ruling, effective on November 16, 2020. (*Id.*, at 9, citing 85 Fed. Reg. 66146, 66148 (Oct. 16, 2020).) SBA made further changes effective January 5, 2022, amending 13 C.F.R. § 121.103(h) to include language requiring that to calculate a concern's size, a concern must include in its count of receipts or employees its proportionate share of its joint venture receipts or employees, whether the joint venture is populated or unpopulated. (*Id.*, citing 87 Fed. Reg. 380, 381 (Jan. 5, 2022).) Thus, the regulation in effect at the time of SLI's self-certification on May 2, 2023 was materially different from the regulation at issue in the *Swift & Staley* cases. (*Id.*, at 10-11.)

SLI maintains the Area Office erred in conducting general affiliation analysis for HX5 Sierra and NAS. Rather it should have determined SLI's proportionate share of employees in the two joint ventures, regardless of whether the joint ventures were populated or not. Concerns are not affiliates of joint ventures of which they are members for size purposes, and only its proportionate share of joint ventures receipts or employees must be included in the calculation of a challenged concern's size. (*Id.*, at 12, citing 87 Fed. Reg. at 381; *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191, at 8 (2011).)

SLI argues that the *Swift & Staley* cases no longer apply, because of the revisions to the regulation. Rather than adding to SLI's employees 100% of HX5 Sierra's employees and none of NAS's employees, the Area Office should have added to SLI's employees **[minority]**% of HX5 Sierra's employees and **[minority]**% of NAS's employees. This would still have resulted in finding SLI was a small business. While the error was harmless, SLI argues that the correct interpretation of the regulation renders the instant appeal moot, because Appellant is arguing that SLI is generally affiliated with NAS. (*Id.*, at 13.)

Appellant has also failed to show an error of law or fact in the Size Determination. There is no longstanding relationship between SLI and NAS nor a violation of the two-year rule. Appellant's argument that NAS may be pursuing a follow-on contract to its current contract, which may lead to a finding of affiliation, and attempting to submit new evidence to support this argument, is based upon speculation and pertains to circumstances that would occur after the date for determining size and is thus irrelevant here. (*Id.*, at 14-15, citing Appeal at 9-11; *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6102 (2019).

Further, SLI explains that NAS has had only one contract. While it has had a ten-year duration, one contract does not constitute a "longstanding inter-relationship or contractual dependence between the same joint venture partners that will lead to general affiliation."(*Id.*, at

15, citing 13 C.F.R. § 121.103(h).) There must be numerous joint ventures and/or contracts between joint venture partners to give rise to contractual dependence. (*Id.*, citing *Size Appeal of Robert M. Gomez & Assoc., Inc.*, SBA No. SIZ-3921 (1994) (fourteen contracts); *Size Appeal of Team Contracting, Inc.*, SBA No. SIZ-3875 (1994) (nineteen contracts); *compare Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5497 (2013) (error in finding affiliation when no evidence but the joint venture itself).)

NAS has not violated the rule of two and Appellant's arguing violation of such is new and based on new evidence, which OHA should deny. (*Id.*, at 16.)

As for Appellant's argument about economic dependence, SLI finds it meritless. Appellant speculates that SLI derives 70% of its receipts from NAS. SLI again asserts Appellant did not raise this argument in its Protest and is now attempting to submit evidence that was available and could have been included in the Protest. Further, the presumption of economic dependence may be rebutted, and SLI only receives profits from NAS commensurate with its **[minority]**% interest, evidencing that NAS could not control one of its owners. Further, the record is clear that SLI performs many contracts. (*Id.*, at 16-18.)

SLI further asserts it is not affiliated with NAS based upon common management. The only basis for this is Appellant's attempt to submit new evidence, SLI's COO's LinkedIn profile. SLI points out this was available at the Protest stage. Appellant did not file and serve a motion establishing good cause for the admission of the evidence. (*Id.*, at 18-21.)

SLI then denies it is affiliated with NAS based upon the totality of the circumstances.

Appellant did not raise this issue in its protest. Further, affiliation under the totality of the circumstances must be based upon at least two independent factors of affiliation under 13 C.F.R. § 121.103. A listing of connections is not enough, when the finding of affiliation must be based upon control or power to control. (*Id.*, at 22-23, citing *Size Appeal of Woods Hole Group, Inc.*, SBA No. SIZ-5009 (2008)). Similarly, SLI denies Appellant's argument that the Area Office erred in failing to find SLI affiliated with its joint venture partners. Appellant raises this argument for the first time on appeal and it must be dismissed. It also ignores the rule that a firm is not automatically affiliated with its joint venture partners. (*Id.*, citing 87 Fed. Reg. at 381.) Further, OHA has rejected "chain affiliation" and made clear a firm is not affiliated with its affiliates' affiliates. (*Id.*, at 24-25, citing *Size Appeal of WisEngineering, LLC*, SBA No. SIZ-5908 (2018).)

Finally, SLI rejects Appellant's request for a remand because it is merely a complaint that the Area Office did not investigate issues Appellant failed to raise in its Protest and alleged for the first time on appeal. (*Id.*, at 26.)

With its response, SLI moves for admission of new evidence, i.e., a declaration of its COO that it has not derived 70% or more of its receipts from NAS over the past three fiscal years. Rather, both joint ventures accounted for less than **[X]**% of SLI's receipts over this period.

III. Discussion

A. Standard of Review and New Evidence

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

Appellant has submitted new evidence for consideration on appeal, i.e., Exhibits G and H, Industry Day participants and SLI's COO's LinkedIn profile, respectively. It is undisputed that this evidence was not presented to the Area Office. New evidence will not be considered unless the Judge on his or her own motion orders the submission of such evidence, or a motion is filed and served establishing good cause for the submission of such evidence. 13 C.F.R. § 134.308(a). OHA's review is based upon the evidence in the record at the time the Area Office made its determination. Evidence that was not previously presented to the Area Office is generally not admissible and OHA will not consider it. Further, OHA will not consider new evidence where the proponent unjustifiably fails to submit the evidence during the size review. *Size Appeal of Rocky Mountain Medical Equipment, LLC*, SBA No. SIZ-6129, at 12 (2021). Here, Appellant could have submitted this evidence to the Area Office but did not do so. Furthermore, Appellant failed to file and serve a motion establishing good cause for the admission of such evidence. Sections II.B and II.C, *supra*. Accordingly, I EXCLUDE Appellant's Exhibits G and H from the record. I also DENY SLI's Motion to Supplement the Record and EXCLUDE SLI's proffered new evidence, which also was available at the protest stage.

B. Analysis

Having reviewed the record and the arguments presented by the parties, I find that Appellant has failed to show clear error in the Size Determination. As a result, I must deny the appeal.

The first issue relates to the Area Office's reliance upon the *Swift & Staley* cases to determine SLI affiliated with HX5 Sierra. The regulation at 13 C.F.R. § 121.103(h) provided that in determining the size of a joint venture, a concern must include its proportionate share of either the receipts or the employees (depending upon the applicable size standard) from its joint ventures. The regulation however, further provided that joint ventures may not be populated with individuals intended to perform the contracts awarded to the joint venture. In interpreting the regulation, on August 20, 2021, the COFC held that a populated joint venture did not qualify for treatment as a joint venture under the regulation, and that therefore the challenged concern in that case was not required to include its proportionate share of receipts from a populated joint venture in determining its size. The COFC emphasized the language in the regulation, that "[*f*]*or the purposes of this provision* . . . a joint venture . . . *may not be populated* . . . ." *Swift & Staley, Inc. v. U.S.*, 155 Fed. Cl. 630, 636 (2021) (emphasis in original). On remand, OHA applied the COFC's decision, finding that the challenged concern's populated joint venture was not to be

treated as a joint venture, was affiliated with the challenged concern and aggregated all of the joint venture's annual receipts in determining the challenged concern's size. *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125 (2021).

In making the instant Size Determination, the Area Office applied the *Swift & Staley* rule, and found that because HX5 Sierra and NAS were populated joint ventures, it could not calculate SLI's size using its proportionate share of employees from each joint venture. Rather, the Area Office considered whether SLI was affiliated with each concern under general principles of affiliation. The Area Office found SLI affiliated with HX5 Sierra under the principal of negative control due to Section 5.3 requiring unanimous approval of the members to initiate or settle any litigation or claim, and for bidding or performing any additional federal contracts.[3] Section II.B, *supra*. While the Area Office found SLI not affiliated with NAS, Appellant argues SLI is affiliated with NAS citing *Swift and Staley*. However, SLI is correct that SBA has revised the regulation since the *Swift & Staley* cases, effective November 16, 2020. 85 Fed. Reg. 66146, 66148, 66179 (Oct. 16, 2020).

In particular, on January 5, 2022, effective immediately, SBA further amended the regulation to explicitly state:

> For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts (whether that joint venture is populated or unpopulated) . . . In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees (whether the joint venture is populated or unpopulated).

87 Fed. Reg. 380, 381 (Jan. 5, 2022) amending 13 C.F.R. § 121.103(h).

In the preamble to the revised rule, SBA also stated:

> It is well established that business concerns are not affiliates of joint ventures of which they are members for size purposes. . . . [S]ince 2004, SBA regulations have required a joint venture partner to include its proportionate share of joint venture receipts and employees in its receipts and employee count, respectively. . . . The final rule of October 16, 2020, revised § 121.103(h) to clarify how a joint venture partner must calculate its proportionate share of joint venture receipts and employees for purposes of determining its own size status. Specifically, the final rule provided that the joint venture partner must include its percentage share of joint venture receipts and employees in its own receipts or employees. . . .

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[3] It is questionable whether this was the correct finding, when the Area Office failed to apply OHA's ruling under *Matter of Strategic Alliance Solutions, LLC*, SBA No. VET-278 (2023) (unanimous approval of litigation does not deprive majority firm of day-to-day management and administration, and thus does not confer control on the minority firm). But this conclusion is harmless error here, because the finding remains that SLI is small.

> It has come to SBA's attention that some have misinterpreted the intent of the final rule. Specifically, because the regulations no longer allow joint ventures to be populated with individuals intended to perform small business set-aside contracts awarded to the joint venture, some have reasoned that a joint venture populated with its own separate contracting-performing employees does not qualify as a joint venture for all SBA program purposes. From this logic, it ostensibly follows that a joint venture partner need not include in its own receipts its proportionate share of receipts and employees from populated joint ventures. This was not SBA's intent. . . .
>
> Nothing, however, in the final rule or the 2016 rulemaking signaled a change in policy concerning the treatment of receipts and employees from populated joint ventures for purposes of determining a joint venture partner's size. . . . [I]t is irrelevant whether the joint venture partner's proportionate share of receipts and employees are from populated or unpopulated joint ventures. Thus, while populated joint ventures are no longer eligible to submit offers for small business contracts, receipts and employees from populated joint ventures are still attributable to the underlying joint venture partners for size purposes. This rule corrects the above misconception by clarifying that a concern must include in its receipts and employee count its proportionate share of joint venture receipts and joint venture employees, respectively, regardless of whether the joint venture is populated or unpopulated.

87 Fed. Reg., at 381.

It is thus clear from SBA's recent revisions to 13 C.F.R. § 121.103(h) that the *Swift & Staley* holding in 2021 — that a concern which was a partner to a populated joint venture, could not include its proportionate share of receipts and employees from that joint venture in determining its size, rather, it must subject that concern to a general affiliation analysis, and depending on the affiliation finding, include either all of its employees and receipts or none — has been overturned by SBA's revision at 13 C.F.R. § 121.103(h). After this regulatory revision, any size determination must include in the calculation of the concern's size, its proportionate share of the receipts or employees of any joint venture to which it is a partner, whether that joint venture is populated or unpopulated.

Here, the date to determine size is May 2, 2023, the date of SLI's initial offer, including price. 13 C.F.R. § 121.404(a). The applicable regulations are those in effect on the date to determine size. *Size Appeal of Rocky Mountain Medical Equipment, LLC*, SBA No. SIZ-6129 (2021). The regulations on that date were not the same regulations in effect on the date to determine size in the *Swift & Staley* cases, but those in place now as a result of the revisions of 2020 and 2022.

Therefore, on the date for determining size, SBA's regulations clearly required that a concern which was a partner to joint ventures include in its calculation of its number of employees or annual receipts its proportionate share of the employees or annual receipts of its joint ventures, whether they were populated (having their own employees) or unpopulated. A

concern is not an affiliate of a joint venture of which it is a member. *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011); 87 Fed. Reg., at 381.

I find the Area Office thus erred in conducting a general affiliation analysis of HX5 Sierra and NAS, and concluding HX5 Sierra was affiliated with SLI, including all of its employees in the calculation of SLI's size and NAS was not an affiliate, excluding any of its employees in its calculation. Rather, SLI's size must be calculated by a number of employees of both HX5 Siera and NAS equal to SLI's percentage ownership in each joint venture. That is, based upon the record before the Area Office, **[minority]**% of the employees of HX5 Sierra, and **[minority]**% of the employees of NAS. The Employee Calculation Worksheet SLI submitted contains this information, as part of its calculation of its employees. A review of this shows that SLI's total number of employees under the correct calculations is well within the applicable size standard. Accordingly, I conclude the Area Office's error here was ultimately harmless, as the matter would reach the same result, that SLI was a small business. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5178, at 8 (2016).

Appellant's remaining arguments fail for the following reasons. While Appellant raises arguments that might cause the partners to a joint venture to be found affiliated, the argument that NAS has violated the "rule of two", where a joint venture partners will be found affiliated when the joint venture submits an offer after two years from the date of the first award under 13 C.F.R. § 121.13(h), is merely speculative and without supporting evidence of such an offer to support it. There is no evidence of any second offer from NAS. Appellant's speculations as to offers NAS could make are also irrelevant, as nothing had happened as of the date to determine size.

Next, Appellant's argument that NAS represents "a longstanding inter-relationship or contractual dependence between the same joint venture partners [that] will lead to a finding of general affiliation" fails as unsubstantiated. In fact, one joint venture between two firms is not enough to support a finding of affiliation. *Size Appeal of DCT, Inc.*, SBA No. SIZ-4996 (2008). OHA has only found affiliation under this ground when there have been numerous contracts awarded to the joint venture in question. *See. e.g. Size Appeal of Robert M. Gomez & Assoc., Inc.*, SBA No. SIZ-3921 (1994); *Size Appeal of Team Contracting, Inc.*, SBA No. SIZ-3875 (1994). Where there is only one contract here, there is no support for finding SLI affiliated with NAS on such ground.

The next set of arguments, from SLI being and NAS being affiliated based upon common management, SLI being economically dependent on NAS, to SLI and NAS being affiliated under the totality of the circumstances, are new arguments on appeal and based upon new evidence and/or speculation. Thus, I will not consider them here. 13 C.F.R. §§ 134.308(a), 134.316(c).

IV. Conclusion

I conclude that Appellant has not met its burden of establishing that the Size Determination is based upon an error of fact or law. Accordingly, I DENY the instant appeal and AFFIRM the Size Determination. SLI is not affiliated with NAS, and it is an eligible small business for the subject procurement.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge