

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

SIZE APPEAL OF:

SysCom, Inc.,

Appellant,

RE: SNI United, LLC

Appealed From
Size Determination No. 04-2022-023

SBA No. SIZ-6195

Decided: March 7, 2023

APPEARANCES

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

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

DECISION¹

I. Introduction and Jurisdiction

On November 23, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area IV (Area Office) issued Size Determination No. 04-2022-023, concluding that it could not ascertain whether the challenged concern, SNI United, LLC (SNI), qualifies as a small business for the subject procurement “until a decision whether [SNI's] *sui generis* business and ownership structures are found to be valid and enforceable.” (Size Determination at 4.) On appeal, SysCom, Inc. (Appellant), which had previously protested SNI's size, contends that the Area Office should have sustained the protest and concluded that SNI is not small. For the reasons discussed *infra*, the appeal is granted.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within 15 days after receiving the size determination, so the

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Prior Proceedings

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

On January 18, 2022, the CO informed Appellant, an unsuccessful offeror, that SNI was the apparent awardee. On January 25, 2022, Appellant submitted a size protest alleging that SNI, a joint venture between an 8(a) participant, 1-855-US-TRASH, LLC (US Trash), and a small business, Six Nations, Inc. (Six Nations), is ineligible for award of the instant procurement. Appellant contended that US Trash, the 8(a) member of the joint venture, does not control day-to-day management and administration of SNI, in contravention of 13 C.F.R. § 124.513(c)(2). Appellant alleged, *inter alia*, that SNI's joint venture agreement (JVA) does not designate US Trash as the Managing Venturer, and does not name an employee of US Trash as the “Responsible Manager.” (Protest at 4.) Rather, SNI's JVA and operating agreement identify Ms. Linda McMahan (President of Six Nations) and Messrs. Paul Davis (Vice President of Operations of Six Nations) and Steve Foutch (Vice President of Business & Finance of Six Nations) as managers of SNI. (*Id.* at 5-6.) Because “managers” control the day-to-day administration of an entity, and Ms. McMahan and Messrs. Davis and Foutch are officers or managers of Six Nations, they are “deemed to control” SNI. (*Id.* at 6.)

In response to the protest, SNI asserted, *inter alia*, that its JVA reflects that: (1) US Trash is the majority (51%) owner of SNI; (2) US Trash is the Managing Venturer of SNI; and (3) Mr. Ashraf Hamad, an employee of US Trash, is the Project Manager for all contracts performed by SNI. (Protest Response at 5-6.) SNI stated that Mr. Hamad is the President and Treasurer of SNI. (*Id.* at 6.) Although Mr. Hamad and Ms. McMahan “are the only two Directors of SNI,” this should not give rise to any finding of “negative control” by Ms. McMahan or Six Nations. (*Id.*) SNI also argued that Appellant's allegation that managers control the day-to-day administration of the entity is flawed because SNI has no operating agreement and its corporate governance documents do not give managers any type of power or control of decisions for SNI. (*Id.* at 7.) Rather, SNI's corporate documents show that “power is held by the directors of the joint venture and voting power is distributed by ownership interest.” (*Id.* at 8.) SNI acknowledged that “SNI is affiliated with Six Nations and US Trash,” but maintained that Six Nations and US Trash are not affiliated with one another. (*Id.* at 14.)

On March 2, 2022, the Area Office issued Size Determination No. 04-2022-008, concluding that SNI is small for the instant procurement. (Size Determination No. 04-2022-008, at 10.) In particular, the Area Office addressed Appellant's allegation that Six Nations controls SNI. The Area Office found that “neither [SNI's] By-Laws nor its [JVA] confer control on managers because [SNI] has no managers.” (*Id.* at 6.) In addition, the Limited Liability Company (LLC) Act of the state of Michigan, where SNI is established, does not “require that organizers even create such a title or position.” (*Id.*) The Area Office also found that SNI's JVA, JVA Addendum, and Bylaws reflect that US Trash controls SNI: US Trash is “the majority owner and Managing Venturer” of SNI, and Mr. Hamad is the Project Manager for all contracts performed by SNI. (*Id.* at 9.)

On March 17, 2022, Appellant appealed Size Determination No. 04-2022-008 to OHA, and moved to supplement its appeal on April 4, 2022. Appellant contended, *inter alia*, that the Area Office clearly erred by “disregarding” evidence of Ms. McMahan's “unequivocal ability to control” SNI, reflected in SNI's Bylaws. (Suppl. Appeal at 3.) The Bylaws identify Ms. McMahan as Vice President, Secretary, and one of two directors of SNI. (*Id.*) This establishes both “affirmative and negative control” over SNI. (*Id.* at 4, citing 13 C.F.R. § 121.103(a)(3).) Specifically, the Bylaws provide the Board of Directors “express authority” over “[t]he business, property, and affairs” of SNI and to “designate management duties” and control of “salaries, loans, declarations, and dividends” of SNI. (*Id.* at 4-5.) The Bylaws also authorize Ms. McMahan to “perform duties of President, or such other duties that may be assigned by the “Board of Directors' if the President is absent or refuses to act.” (*Id.* at 6.) With regard to negative control, SNI's Bylaws state that “[t]he act of the majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.” (*Id.* at 7.) The Bylaws also require “a majority of the members of the Board to be present to establish a quorum.” (*Id.* at 8.) Because there are only two directors, the Board cannot take any action without Ms. McMahan's consent or participation. (*Id.* at 7-8.) As such, Ms. McMahan “at minimum” has negative control over SNI. (*Id.* at 8-9.)

In response to the appeal and supplemental appeal, SNI argued that its Bylaws “explicitly provide that **Mr. Hamad controls the Board** because, as the majority shareholder, **he has the power to remove Ms. McMahan as director.**” (Supp. Response at 4, emphasis SNI's.) Although the Bylaws provide that the “Vice President shall perform the duties of President” in the event that the President is absent or refuses to act, this does not suggest control. (*Id.* at 6.) Instead, the Bylaws establish that the President “*shall in general supervise and control all of the business and affairs of the corporation.*” (*Id.* at 7, emphasis SNI's.) SNI's JVA, JVA Addendum, and Bylaws clearly indicate that “US Trash is the majority owner and Managing Venturer and it controls SNI.” (*Id.* at 9.) Contrary to Appellant's allegation pertaining to Bylaws' quorum provision, “the Bylaws require majority of shareholders to be present for a quorum to voice, and the power to take action lies with the shareholders, and not the directors.” (*Id.* at 13.) “[W]hile SNI's Bylaws may require the Board to pass resolutions to act upon certain matters, this does not evidence that Ms. McMahan has negative control over SNI as voting power is maintained by the majority owner.” (*Id.*)

On September 8, 2022, OHA issued its decision in *Size Appeal of SysCom, Inc.*, SBA No. SIZ-6171 (2022) (*SysCom I*), granting the appeal. OHA found that although SNI represented to the Area Office that it is a joint venture between two business concerns, majority-owned and controlled by US Trash, its Managing Venturer, these assertions appear inconsistent with Michigan state law as well as with other evidence in the record, much of which SNI itself submitted to the Area Office. *SysCom I*, SBA No. SIZ-6171, at 19. Michigan law “statutorily vests management of an LLC in all of its members,” unless a particular Managing Member is identified in the Articles of Organization or in an operating agreement. (*Id.*) SNI here did not do so, and the Area Office expressly found that SNI “has no managers.” (*Id.*) Furthermore, SNI’s organizational documents appeared to reflect that SNI is structured as “a stand-alone corporation of indefinite (perpetual) duration,” rather than as a joint venture. (*Id.*) SNI also asserted, including in sworn declarations and in SBA Form 355s, that it is not in fact owned by the purported joint venturers themselves, but instead is owned by two individuals (Mr. Hamad and Ms. McMahan). (*Id.*) These facts cast doubt on “whether SNI’s business and ownership structure is sufficient to meet SBA requirements pertaining to joint ventures.” (*Id.*) In addition, there appeared to be a significant question as to whether Ms. McMahan - one of only two directors of SNI’s Board - could exert negative control over SNI. (*Id.* at 20.) Although SNI maintained that any such control would be illusory, because Mr. Hamad could unilaterally remove Ms. McMahan from the Board at any time, it was not clear that he holds a sufficiently large ownership interest to accomplish this result under SNI’s Bylaws. (*Id.*) OHA remanded the matter to the Area Office to further: (1) assess whether SNI’s business and ownership structures meet SBA joint venture requirements; and (2) review and obtain clarification to determine whether Ms. McMahan could indeed prevent a quorum or block action by SNI’s Board of Directors, and whether Mr. Hamad could unilaterally remove her from the Board in light of cumulative voting restrictions in SNI’s Bylaws. (*Id.* at 19-20.)

B. Area Office's Initial Inquiries

Following OHA’s decision in *SysCom I*, the Area Office posed several additional questions to SNI. On November 1, 2022, SNI responded to the Area Office as follows:

1. Question: *Is SNI a joint venture? If so, who is (or are) the Managing Venturer(s) of SNI? Regardless of the answer, please provide complete documentary evidence to substantiate your response.*

Yes, SNI is a joint venture and has complied, in good faith, with SBA’s regulations governing 8(a) joint ventures.

In accordance with 13 C.F.R. § 124.513(c)(2), SNI’s Managing Venturer is US Trash, the 8(a) participant SNI’s [JVA] designates [Mr.] Hamad, a US Trash employee and an “Employee of the Managing Venturer” as the Responsible Manager who is “responsible with regard to negotiation of the contract, source of labor, and contract performance”

In accordance with 13 C.F.R. § 124.513(c)(3), US Trash owns 51% of SNI (i.e., a majority ownership interest) and Six Nations owns 49% of SNI (i.e., a minority interest)

2. Question: *If [SNI] is a joint venture, 8(a) program regulations require that the 8(a) participant to a JV have control over the management and administration of contract performance. [SNI's] Bylaws state that the entity, organized as a limited liability company, is governed by a Board of Directors. Notwithstanding the language in the [JVA], how does this comply with the 8(a) program requirement?*

As explained in prior filings, SNI's members, US Trash and Six Nations, drafted the corporate documents related to the joint venture themselves without assistance of legal counsel, based on forms they found online. To the extent mistakes were made in drafting these documents, SNI maintains all documents were drafted with the good faith intent to be compliant with SBA regulations and requirements. SNI also maintains that it entered into the [JVA], and created the joint venture, in good faith and at the request of SBA's own Detroit office

SNI is a limited liability company. It therefore was not required to have a board of directors. However, because SNI's small business members drafted the corporate documents for the joint venture itself based on forms found online, the joint venture created bylaws and adopted a board of directors to manage the joint venture (because that is what the form it found online did).

SNI's Bylaws show that its Board of Directors is comprised of two individuals, [Mr.] Hamad (from US Trash) and [Ms.] McMahan (from Six Nations). When utilizing a board of directors, it is standard for each side of a joint venture to have a member sitting on the board, as this ensures that each party is adequately represented in managing administrative affairs of the unpopulated entity that do not reflect control or management over the business affairs of the company.

Although SNI has two directors, this does not mean both have equal control. It was always the intent of SNI for US Trash, as the Managing Venturer and majority owner of SNI, to control the management and administration of contract performance of any contracts awarded to the joint venture. In drafting the Bylaws themselves, SNI's small business members tried to show this by stating that Mr. Hamad, as President of SNI (and owner/president of SNI's 8(a) Managing Venturer, US Trash), “*shall in general supervise and control all of the business affairs of the corporation*” Therefore, SNI's Bylaws unambiguously prescribe Mr. Hamad with the ultimate responsibility of controlling SNI.

Additionally, SNI's Bylaws show an intent for control of the joint venture to be based on voting based on a majority ownership. [The Bylaws provide that] special meetings of shareholders can be called “at the request of the holders of *not less than fifty percent (50%)* of all the outstanding shares of the corporation entitled

to vote at the meeting” . . . [and permit] “[a] majority of the outstanding shares” to be present or represented to constitute a quorum[.]

This is further indicated by the fact that the Bylaws provide that any director “may be removed from office *by a vote of a majority of all the shares* of stock outstanding and entitled to vote.” That is, because US Trash owns a majority of SNI, a majority of US Trash votes is needed to remove any director of the board—and US Trash can therefore remove [Ms.] McMahan from the Board of Directors. And conversely, this means that Six Nations cannot remove [Mr.] Hamad from the Board of Directors.

3. Question: *In light of the cumulative voting restriction, please explain how Mr. Hamad can remove Ms. McMahan.*

Pursuant to SNI's Bylaws, US Trash has the ability to remove [Ms.] McMahan from the Board of Directors. Specifically, as discussed above, SNI's Bylaws provide that a “director may be removed from office by a vote of a majority of all the shares of stock outstanding and entitled to vote.” SNI's [JVA] shows that US Trash “maintains an ownership interest of 51%” of SNI. Therefore, because US Trash is the majority owner of SNI, US Trash has the unilateral ability to remove Six Nation's director, [Ms.] McMahan, through a majority shareholder vote.

(Letter from T. Elling to D. Gordon (Nov. 1, 2022), at 1-4 (internal citations omitted) (emphasis added by SNI).)

C. SBA Form 355

Accompanying its response to the Area Office's initial inquiries, SNI submitted a completed SBA Form 355, signed by Mr. Hamad. In the SBA Form 355, SNI stated that it is an LLC, established on January 22, 2020. (SBA Form 355 at 1.) Asked to “[n]ame the members of the Board of Directors, if a corporation,” SNI identified Mr. Hamad as “Managing Director” and Ms. McMahan as “Director.” (*Id.* at 2.) In response to Question 4 regarding its ownership structure, SNI indicated that it is 51% owned by Mr. Hamad and/or US Trash, and 49% owned by Ms. McMahan and/or Six Nations. (*Id.*) SNI maintained that it has no affiliates. (*Id.* at 4.)

In an attachment to its SBA Form 355, SNI asserted that it has no operating agreement. (Attach. 2, at 1.) Rather, SNI has Bylaws, Articles of Organization, and a JVA. (*Id.*) SNI further asserted that, although “various corporate filings” identify Mr. Hamad as the Responsible Manager, Contract Manager, and Project Manager, Mr. Hamad fulfills the duties of the Responsible Manager pursuant to 13 C.F.R. § 124.513(c)(2). (*Id.*)

D. Area Office's Supplemental Inquiries

Upon review of SNI's responses, the Area Office posed additional inquiries to SNI. SNI responded, in pertinent part:

1. Question: *Among the question[s] raised in the remand is the question of ownership. Your cover letter responding to [the Area Office 's] initial set of questions states unequivocally that [SNI] is owned by its constituent parties— both corporate entities. However, the SBA Form 355 submitted lists not only the names of the corporate owners but the names of individuals. Please explain why individuals' names even appear in answer to question 4 of that form if the owners are the corporate entities.*

...

SNI is, and for its corporate existence has been, owned by two corporate entities: (1) [US Trash], which owns 51% of SNI; and (2) [Six Nations], which owns 49% of SNI. The [JVA] provides (and confirms) that [SNI] is owned by these two corporate entities.

...

SNI included both the names of the corporate entities (i.e., US Trash and Six Nations) and the ultimate owners of the two corporate entities on its SBA Form 355 in order to be responsive to Question 4's direction to “provide the *names of all owners* of the entities . . . for all entities until the applicant identifies the ultimate owners who are natural persons.”

...

2. Question: *In addition, please explain the patent contradiction between the owners listed now and the original response to the protest in which Mr. Hamad and Ms. McMahan each certified, under oath, in answer to the same question on their SBA Forms 355 that they personally owned [SNI]. These answers are buttressed by the sworn declarations provided by both individuals. Even if the individuals were responsible for both the Forms 355 and the declarations, we presume that you reviewed and approved the responses submitted.*

...

Because [Mr.] Hamad is the 100% owner of US Trash and [Ms.] McMahan is the 100% owner of Six Nations, their perception is that each of them, as individuals, are the ultimate natural persons owning SNI, through their respective ownership of the US Trash and Six Nations entities.

...

[E]ach of the declarations may be read as the individuals['] statement of their understanding that they (as natural persons) ultimately own SNI. However, as the corporate documents irrefutably indicate, SNI is in fact directly owned by two corporate entities—US Trash and Six Nations.

(Letter from T. Elling to D. Gordon (Nov. 18, 2022) at 1-4 (internal citations omitted) (emphasis added by SNI).)

E. SNI's Articles of Organization

In response to Appellant's protest, SNI provided the Area Office a copy of its Articles of Organization. According to SNI's Articles of Organization, SNI is an LLC based in the state of Michigan. (Protest Response, Exh. J-4 at 2.) SNI's Articles of Organization do not designate a Manager or Managing Member.

F. Declarations

In response to Appellant's protest, SNI provided the Area Office sworn statements from Mr. Hamad and Ms. McMahan. (Protest Response, Exhs. L and M.)

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

Mr. Hamad states that, sometime in late 2019 or early 2020, SBA's Michigan District Office connected him with Six Nations, a graduate from the 8(a) program, and recommended that US Trash form a joint venture with Six Nations so that US Trash may gain experience, “learn how to do federal contracting,” and expand beyond the state of Michigan. (*Id.* ¶ 7.) In 2020, US Trash and Six Nations formed SNI. (*Id.* ¶ 8.) US Trash is the Managing Venturer SNI. (*Id.* ¶ 9.) Mr. Hamad owns 51% of SNI, is President and Treasurer of SNI, and also “serve[s] as the Project Manager for all 8(a) contracts awarded to SNI.” (*Id.* ¶¶ 2, 10-11.)

In her declaration, Ms. McMahan avers that she is the President and sole owner of Six Nations. (McMahan Decl. ¶ 3.) SBA's Michigan District Office introduced Six Nations to US Trash and urged that they form a joint venture so that “Six Nations could assist US Trash achieve its goal of expanding beyond the Detroit Metropolitan area.” (*Id.* ¶ 4.) SNI was formed as an 8(a) unpopulated joint venture in 2020. (*Id.* ¶ 5.) US Trash is the Managing Venturer of SNI, and Mr. Hamad owns 51% of SNI. (*Id.*) Mr. Hamad also is President, Treasurer, and Project Manager of SNI. (*Id.*) Six Nations is the “Non-Managing Venturer” of SNI, and Ms. McMahan owns 49% of SNI. (*Id.* ¶¶ 2, 5.)

G. Joint Venture Agreement and Addendum

In response to Appellant's protest, SNI provided the Area Office an undated JVA for SNI, signed by Mr. Hamad and Ms. McMahan. (Protest Response, Exh. J-1.) The JVA states that SNI is “an unpopulated Joint Venture” organized as an LLC in order to bid on a procurement conducted by the U.S. Department of the Army. (JVA § 1.) US Trash, an 8(a) participant, owns 51% of SNI, and Six Nations owns the remaining 49%. (*Id.* § 3.) The JVA identifies US Trash as the Managing Venturer and Six Nations as the Partner Venturer, and designates Mr. Hamad, an

employee of US Trash, as “the Project Manager responsible for performance of the contract.” (*Id.* § 2.)

The JVA specified that:

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

(*Id.* § 7.)

SNI also provided an undated Addendum (the “JVA Addendum”), signed by Mr. Hamad and Ms. McMahan. (Protest Response, Exh. J-2.) The JVA Addendum states that SNI intends to bid on the instant procurement. (JVA Addendum § 1.) The JVA Addendum contains an updated list of “Major Equipment, Facilities, and Other Resources” that US Trash “will lease . . . from Six Nations,” or that will be directly contributed by Six Nations. (*Id.* § 6.) The JVA Addendum further states that US Trash “will perform 50% of the work on the contract.” (*Id.* § 12.) The JVA Addendum otherwise contains provisions substantively identical to the original JVA.

H. SNI's Bylaws

In response to Appellant's protest, SNI provided the Area Office a copy of its Bylaws, executed on February 28, 2020 by Mr. Hamad and Ms. McMahan. (Protest Response, Exh. J-3.) The Bylaws indicate that SNI is a corporation based in the state of Michigan, subject to the Michigan Business Corporations Act. (Bylaws, Art. I.) Mr. Hamad is President/Treasurer of SNI as well as a Director. (*Id.*, Art. XL) Ms. McMahan is SNI's Vice President/Secretary and also a Director. (*Id.*)

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

ARTICLE II

SHAREHOLDERS

...

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

...

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

...

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

...

ARTICLE III

BOARD OF DIRECTORS

...

Section 4. Removal. At a special meeting of the shareholders of this corporation called for the purpose of removing any Director, such Director may be removed from office by a vote of a majority of all the shares of stock outstanding and entitled to vote, (provided, however, that the shareholders shall have the right to vote cumulatively on such removal and no Director shall be removed if the number of votes recorded against his removal would be sufficient, if cumulatively voted at an election of the entire Board of Directors to elect one or more Directors. All such shares voted cumulatively against the removal of a Director shall not be voted against the removal of any other Director during the term of which the Board

of Directors shall have been elected.) No more than one meeting of shareholders of this corporation shall be called for the purpose of removing any individual Director during the term for which he is elected. When any director is removed, a new Director may be elected at the same meeting of the shareholders for the unexpired term of such Director removed. If the shareholders fail to elect a person to fill the unexpired term of the Director removed, such unexpired term shall be considered a vacancy on the Board of Directors to be filled by the remaining Directors.

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

I. Michigan Limited Liability Company Act

The Michigan Limited Liability Company Act states:

450.4401 Management vested in members.

Sec. 401.

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

(a) The members are considered managers for purposes of applying this act, including section 406 regarding the agency authority of managers, unless the context clearly requires otherwise.

(b) The members have, and are subject to, all duties and liabilities of managers and to all limitations on liability and indemnification rights of managers.

Mich. Comp. Laws § 450.4401.

J. Size Determination No. 04-2022-023

On November 23, 2022, the Area Office issued Size Determination No. 04-2022-023. The Area Office first addressed SNI's form of organization, and found that SNI is an LLC under the laws of state of Michigan. (Size Determination No. 04-2022-023, at 1.) In response to the Area Office's inquiries on remand, SNI stated “unequivocally” that it is owned by US Trash and Six Nations, rather than by Mr. Hamad and Ms. McMahan. (*Id.*)

The Area Office observed that under Michigan law, an LLC “may choose to designate a Managing Member in its Articles of Organization; if [it] decline[s] to do so, the law provides that ‘the business of the [LLC] shall be managed by the members’ and, further, that ‘[t]he members are considered managers for purposes of applying this act.’” (*Id.* at 1-2, quoting Mich. Comp.

Laws § 450.4401.) SNI did not identify a Manager or a Managing Member in its Articles of Organization. (*Id.* at 2.)

The Area Office noted that, according to SNI, US Trash and Six Nations “drafted the corporate documents related to [SNI] themselves without assistance of legal counsel, based on forms they found online.” (*Id.*) US Trash and Six Nations also “created a Board of Directors” for SNI, even though “Boards of Directors are creatures of corporations, not limited liability companies.” (*Id.*) The Area Office found SNI's claim that it is not required to have a Board of Directors “disingenuous.” (*Id.*) SNI “was not ‘required’ to have a board because Michigan limited liability companies do not have such boards.” (*Id.*) Instead, Michigan law makes clear that an LLC “is not a corporation” and that a “‘Board’ is the ‘board of directors or other governing board of a *corporation*’”. (*Id.*, emphasis added by Area Office.) The Area Office added that, because US Trash and Six Nations “chose to act as their own lawyers” in creating SNI, they “assumed the risk of acting incorrectly and, as events have proved, they acted incorrectly.” (*Id.*)

The Area Office found that SNI further “complicated matters because its [JVA] names a Managing Venturer [in] clear contradiction of its organizational documents which do not do so.” (*Id.* at 3.) As a result, it would be “meaningless for [the Area Office] to determine, as OHA directed, ‘whether SNI's business and ownership structures meet SBA joint venture requirements.’” (*Id.*) Satisfying SBA's joint venture requirements “will not avail [SNI] of its benefits if the state statute is dispositive of the question of who controls [SNI].” (*Id.*) The Area Office continued:

[M]erely because [US Trash and Six Nations] did not name a Manager according to state law does not exempt them from the statute's control. SNI remains bound by the provision stating that all members of the [LLC] control the management of the company. The parties to [SNI] created a circumstance in which all of the members control the joint venture under the terms of Michigan law and a single member is the Managing Venturer under its JVA. It cannot be both. That this was done in good faith and even inadvertently matters not at all. Michigan law supersedes a private [JVA].

(*Id.*)

With regard to control over SNI, while SNI maintained that its intent was for US Trash alone to control the management and administration of all contracts awarded to SNI, this intent is “irrelevant” because “[t]he creation of a Board and of bylaws . . . constitute a hybrid LLC with corporation-like-appendages.” (*Id.*)

With regard to the cumulative voting restrictions in SNI's Bylaws, the Area Office explained that it has no “expertise in interpreting or applying Michigan state law,” nor does it have “the luxury of time nor other assistance and resources to undertake such an effort.” (*Id.* at 3-4.) The Area Office concluded:

[The Area Office] cannot decide the enforceability or scope of this provision or the other peculiarities of [SNI's] organization and their effect on its control. Any

inquiry into “whether SNI's business and ownership structures meet SBA joint venture requirements” is premature until a decision whether [SNI's] *sui generis* business and ownership structures are found to be valid and enforceable. Only once such a determination is made does an analysis of [SNI's] compliance with 8(a) program regulations make sense.

(*Id.* at 4.)

K. Appeal

On December 7, 2022, Appellant appealed Size Determination No. 04-2022-023 to OHA. Appellant maintains that, although the Area Office essentially found, as a factual matter, that SNI is “jointly controlled by both venturers,” the Area Office erred by failing to sustain Appellant's size protest. (Appeal at 2.)

Appellant argues that the Area Office did not follow OHA's remand instructions in *SysCom I* to determine whether SNI is a proper 8(a) joint venture eligible for an 8(a) contract award. (*Id.* at 2-3.) At a minimum, the Area Office should have drawn an adverse inference that the joint venture is invalid, because SNI failed to carry its burden of persuasion to demonstrate that it qualifies as an 8(a) joint venture. (*Id.* at 9, citing 13 C.F.R. § 121.1009(c).) Appellant highlights that the Area Office itself “clearly found that [SNI] **did not** demonstrate that it was a valid business entity, let alone demonstrate that it is qualified as an 8(a) joint venture.” (*Id.* at 16, emphasis Appellant's.)

Appellant insists that SNI is not an eligible 8(a) joint venture. Specifically, the factual findings of OHA and the Area Office “unequivocally” show that SNI is “at least equally controlled” by both US Trash and Six Nations. (*Id.* at 9-10.) In *SysCom I*, OHA explained several reasons why US Trash does not control SNI, though the matter was remanded to the Area Office with “specific directives.” (*Id.* at 11.) The Area Office, however, “failed to specifically rule on the matters remanded to it by OHA, and is apparently punting this issue back to OHA for a final ruling.” (*Id.* at 12.) The Area Office's reasoning that “no decision could be reached as to ‘whether SNI[]'s *sui generis* business and ownership structures are found to be valid and enforceable’” shows that SNI did not persuade the Area Office that it meets the joint venture requirements. (*Id.*) Furthermore, many of the Area Office's factual findings support the conclusion that SNI was “improperly formed under applicable state law and [is] controlled by both joint venturers,” and thus cannot qualify as an 8(a) joint venture. (*Id.*)

Appellant urges that the instant case is analogous to *Matter of Piedmont Contracting & Design, Inc.*, SBA No. VET-169 (2009), wherein OHA found that a service-disabled veteran did not have exclusive control over the challenged concern, because the operating agreement provided that “unanimous consent is required to run [the challenged concern],” as required by applicable state law, and that “each officer of [the challenged concern] has equal power.” (*Id.* at 14.) In the instant case, the Area Office found that SNI's members “created a circumstance in which all of the members control the joint venture under the terms of Michigan law.” (*Id.*) “[B]ecause US Trash does not have the exclusive power to control [SNI] and/or because the joint venture is controlled by both venturers, the Area Office was required to find that [SNI] does

not qualify as an[] 8(a) joint venture under 13 C.F.R. § 124.513.” (*Id.* at 15.) Alternatively, the Area Office “at the very least [was] required to make adverse inference against SNI,” affording greater weight to its own and OHA's factual findings than to SNI's unsupported assertions. (*Id.* at 15-16.)

Appellant requests that OHA rule that: (1) SNI is not an 8(a) joint venture for the purposes of the instant procurement; (2) SNI “falsely certified” to be an 8(a) joint venture; and (3) SNI is “not qualified by [] SBA regulations to receive or perform the contract award.” (*Id.* at 3.)

L. SNI's Response

On December 22, 2022, SNI responded to the appeal. SNI maintains that the joint venture was formed “in good faith and at the request of SBA's *own* Detroit office,” and without the assistance of legal counsel. (Response at 2, emphasis SNI's.) SNI “has operated [at] all times in substantive accord [with] 8(a) joint ventures,” and argues that it should not be penalized for “inadvertent mistakes” made in filing and drafting corporate documents. (*Id.* at 3.)

SNI reiterates its view that the JVA shows that US Trash holds a majority ownership interest and controls SNI's day-to-day management. (*Id.* at 2.) Mr. Hamad, an employee of US Trash, is listed as the point of contact and Project Manager responsible for performance of the instant procurement. (*Id.*)

SNI insists that when drafting its Bylaws, SNI did not create equal control between Ms. McMahan and Mr. Hamad. (*Id.* at 3.) SNI named Ms. McMahan and Mr. Hamad as Directors “to ensure” that each venturer “had a director sitting on the Board.” (*Id.*) SNI asserts that “[a]s President and the majority shareholder of SNI, Mr. Hamad *alone* holds the power to control SNI, which is shown by his ability to remove Ms. McMahan from the Board of Directors.” (*Id.*, emphasis SNI's.) Therefore, OHA should find that SNI qualifies as an 8(a) joint venture under 13 C.F.R. § 124.513. (*Id.*)

III. Discussion

A. Standard of Review

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

B. Analysis

Upon review of the record, the parties' arguments, and the Area Office's factual findings, I agree with Appellant that the Area Office should have sustained Appellant's size protest. This appeal must therefore be granted.

Pursuant to SBA regulations, a joint venture between an 8(a) participant and one or more other small businesses may compete for an 8(a) set-aside contract, provided that the joint venture complies with 13 C.F.R. § 124.513(c) and (d). *See* 13 C.F.R. § 121.103(h)(1)(i). Among other requirements, the joint venture must designate an 8(a) participant as its “managing venturer,” responsible for “controlling the day-to-day management and administration of the contractual performance of the joint venture.” 13 C.F.R. § 124.513(c)(2).

Here, although US Trash and Six Nations entered into a JVA purporting to name US Trash as Managing Venturer of SNI, Michigan law makes clear that such authority actually is vested equally in all members of SNI. As the Area Office correctly recognized, SNI is an LLC based in the state of Michigan, and is subject to Michigan law. Section II. J, *supra*. Michigan law stipulates that, unless a particular Manager or Managing Member is identified in an LLC's operating agreement or articles of organization, all members are deemed to be managers of the LLC. Section III, *supra*. SNI informed the Area Office that it does not have an operating agreement, and according to SNI's Articles of Organization, US Trash is not designated as the Manager or Managing Member of SNI. Sections II.C and II.E, *supra*. Given this record, then, the Area Office properly found a “clear contradiction” between SNI's JVA and Michigan law, and correctly concluded that Michigan law must take precedence. Section II. J, *supra*. It follows that US Trash is not the Managing Venturer of SNI, in contravention of 13 C.F.R. § 124.513(c)(2).

An additional problem for SNI involves its corporate Bylaws. As the Area Office properly recognized, SNI's Bylaws indicate that SNI is governed by a Board of Directors, which was comprised of two individuals (Mr. Hamad and Ms. McMahan) as of the date to determine size. Sections II.H and II.J, *supra*. The Bylaws further provide that a “majority” of the Board is needed to establish a quorum or to take action. Section II.H, *supra*. Based on this structure, then, Ms. McMahan (one of SNI's two Directors) can exert negative control over SNI by, for example, declining to attend Board meetings, thereby blocking a quorum. *See generally* 13 C.F.R. § 121.103(a)(3) (negative control includes situations where a minority shareholder can “prevent a quorum or otherwise block action by the board of directors”); *see also Size Appeal of Cartribe-Clement 8AJV # 1, LLC*, SBANo. SIZ-5357, at 14 (2012) (“Negative control exists if a minority owner can block ordinary actions essential to operating the company.”). In response to the Area Office's inquiries following remand, SNI renewed its claims that Ms. McMahan's control over SNI is illusory, because Mr. Hamad, as SNI's majority shareholder, may unilaterally remove her from the Board. SNI's Bylaws, however, state that “no Director shall be removed if the number of votes recorded against his removal would be sufficient, if cumulatively voted at an election of the entire Board of Directors to elect one or more Directors.” Section II.H, *supra*. In light of this cumulative voting restriction, it does not appear that Mr. Hamad, with only 51% ownership, has a sufficiently large ownership interest in SNI to unilaterally remove Ms. McMahan from SNI's Board. Accordingly, under SNI's Bylaws, the power to control daily operations of SNI does not rest solely with Mr. Hamad and/or US Trash, because Ms. McMahan may exert negative control

over SNI. *See, e.g., Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 9 (2011) (holding that the challenged concern has not established that the majority owner of the concern could unilaterally divest the minority owner of the right to veto under the terms of its operating agreement, therefore, the minority owner had negative control over the concern).

Ultimately, although the Area Office was sympathetic to the fact that US Trash and Six Nations established SNI without the benefit of legal assistance, the Area Office's own factual findings compel the conclusion that SNI's business structures do not meet SBA joint venture requirements at 13 C.F.R. § 124.513. At a minimum, given that the Area Office harbored serious doubts as to whether SNI is a valid joint venture, the Area Office should have resolved such doubts in the protestor's (*i.e.*, Appellant's) favor. Pursuant to 13 C.F.R. § 121.1009(c), “[t]he concern whose size is under consideration has the burden of establishing its small business size.”

IV. Conclusion

For the above reasons, the appeal is GRANTED. SNI does not qualify as an 8(a) joint venture under 13 C.F.R. § 124.513, and is not an eligible small business for the instant procurement. The Area Office erroneously concluded that it could not decide the merits of Appellant's protest, and Size Determination No. 04-2022-023 is REVERSED to that extent. The Area Office's factual findings in Size Determination No. 04-2022-023 are otherwise AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge