

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

SIZE APPEAL OF:

Acacia7 JV,

Appellant

RE: Multimedia Environmental
Compliance Group JV

Appealed From
Size Determination No. 06-2024-021

SBA No. SIZ-6331

Decided: January 22, 2025

APPEARANCES

David B. Dixon, Esq., Toghrul M. Shukurlu, Esq., Pillsbury Winthrop Shaw Pittman LLP,
for Appellant Acacia7, JV

Antonio R. Franco, Esq., Meghan F. Leemon, Esq., Patrick T. Rothwell, Esq.,
PilieroMazza, PLLC, Washington, D.C., for Multimedia Environmental Compliance Group N

DECISION¹

I. Introduction and Jurisdiction

On September 5, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting-Area VI (Area Office) issued Size Determination No. 06-2024-021, concluding that Multimedia Environmental Compliance Group JV (MECG) is a small business for Department of the Navy Solicitation No. N62473-21-R-8929. On appeal, Acacia7 JV (Appellant), having previously protested MECG's size status and eligibility, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand it. For the reasons discussed *infra*, the appeal is GRANTED and the Size Determination is REVERSED.

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

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.

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

On June 21, 2022, the Department of the Navy/NAVFAC issued Solicitation No. N62473-21-R-8929 as an Indefinite Delivery/Indefinite Quantity contract for architect and engineering services. The Contracting Officer (CO) set the procurement 100% aside for small business and designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$22.5 million annual receipts size standard, as the appropriate code. Proposals were due on September 15, 2022. MECG submitted its proposal on September 13, 2022. On July 19, 2024, the Navy informed MECG it had been selected for award. On July 26, 2024, Appellant filed its size protest.

A. The Size Determination

MECG is a joint venture established September 1, 2020, between Nicklaus Engineering, Inc. (NEI) and Wood Environment and Infrastructure Solutions, Inc. (WEIS). (WEIS was the concern's name as of the date for determining size.) In October, 2022 this name was changed to WSP USA Environmental and Infrastructure Solutions, Inc. NEI owns XX% of the joint venture, and WEIS owns XX%. Stacy Gutierrez is XXX% owner, President and XXXX Director of NEI. Ms. Gutierrez is also Manager of MECG. This procurement would represent MECG's first contract award, thus it is in compliance with the two-year contract requirement. MECG as a stand-alone entity is within the size standard. (Size Determination, at 1-2, 5.)

WEIS is an other than small concern. On November 23, 2009, NEI was incorporated in Arizona under the name Yuma Newco Engineering. Since October 4, 2015, NEI has been a participant in SBA's 8(a) Business Development program. Ms. Gutierrez also has a XX% holding in XXXXXXXXXXXXXXXX. The following individuals also own XX% each: XXXXXXXXXXXXXXXXXXXX. The Area Office concluded Ms. Gutierrez has the power to control XXX based upon her XXXXXXXX ownership, citing 13 C.F.R. § 121.103(c)(2), and thus found XXX affiliated with NEI. (*Id.*, at 6-7.)

On August 15, 2017, SBA approved a Mentor-Protégé Agreement (MPA) between NEI and AMEC Foster Wheeler (a previous name of WEIS) for the All-Small Mentor-Protégé Program. On September 29, 2022, the MPA was modified to account for another change in the Mentor's name, this time from Wood Environment and Infrastructure Solutions, Inc. to WSP USA Environmental and Infrastructure Solutions, Inc. SBA formally approved this additional change to the MPA on October 13, 2022. As of the date to determine size, August 2, 2022, the MPA was still under WEIS. The MPA has an initial term of three years, subsequently extended. As of the date MECG was established, the members had a valid MPA in place. (*Id.*, at 7-8.)

NEI has a number of other joint ventures:

- Border Solutions LLC: NEI has a XX% membership and Spencer Construction LLC has a XX% membership. This JY was awarded a contract on April 2, 2021. No awards since the 2-year lifespan ended April 2, 2023.
- Four State Border Solutions LLC, is a JV in which NEI has a XX% membership and Spencer Construction LLC has a XX% membership. Awarded a contract on May 14, 2020, with no contracts awarded since the expiration of the two-year contract life limitation.
- Hercules JV is JV in which NEI has XX% ownership and WEIS XX%. On March 1, 2020, it was awarded one contract and has received no awards since the expiration of the two-year contract life limitation.
- Tactical Infrastructure Maintenance Solutions is a joint venture in which NEI has a XX% membership and Spencer Construction LLC a XX% membership. It received its first contract on July 7, 2021, and has received no contract awards since the expiration of the two-year limitation.
- Liberty JV is an entity in which NEI has a XX% membership and WEIS has XX%. It received two contracts in 2020, and none after the expiration of the two-year limitation.
- Multi MAC JV is a JV in which NEI has a XX% membership and WEIS holds a XX% membership. It received its first contract on June 13, 2019, and has received no awards after the expiration of the two-year limitation.

There are NEI joint ventures which have received no contract awards, and thus none of them have exceeded the two-year limitation.

- Greenway-NEI JV LLC is a joint venture between Greenway Global Corp. d/b/a Greenway Technologies, the XX% member, and NEI, the XX% owner.
- Catalina JV is a joint venture between NEI, the XX% member, and WEIS, the XX% member.
- Evergreen JV is a JV between XX% member NEI and WEIS, the XX% member.
- KSWA Niklaus JV LLC is a JV between XX% member NEI and XX% member K.S. Ware and Associates LLC.
- Loven NEI JV LLC is a JV between XX% member NEI and XX% member Loven Contracting, Inc.
- Nicklaus Ameer 8a JV is a JV between XX% member NEI and XX% member WEIS.

- Nicklaus Amee JV is a JV between XX% member NEI and XX% member WEIS.
- Orion JV is a JV between XX% member NEI and XX% member WEIS.
- Sierra JV is a JV between XX% member NEI and XX% member WEIS.

(*Id.*, at 7-9)

The Area Office found that none of the JV entities had exceeded the 2-year limitation requirement of 13 C.F.R. § 121.103(h). Further, of NEI's 17 active joint ventures, only six have received contract awards and reported economic activity. The Area Office included NEI's proportion of receipts for the six active joint ventures in calculating NEI's receipts. These were Hercules JV, Liberty N, Four State Border Solutions, Border Solutions, Tactical Infrastructure Maintenance Solutions LLC and Multi-MAC N. The Area Office concluded that NEI's annual receipts were within the size standard. (*Id.*, at 9-10)

The Area Office then considered whether MECG's joint venture agreement (JVA) met the requirements of the regulation at 13 C.F.R. § 125.8(b) & (c).

The JVA states the joint venture's purpose is to submit proposals in response to NAVFAC small business set aside solicitations. It does not specifically identify the instant procurement, but Area Office found that unnecessary, citing *Size Appeal of Klutina River Contractors*, SB A No. SIZ-6117 (2021). The Area Office found MECG met the requirements of 13 C.F.R. § 125.8(b)(2)(i). The JVA designates NEI as Managing Venturer and Ms. Guterrez as Responsible Manager, meeting the requirements of 13 C.F.R. § 125.8(b)(2)(ii). The JVA contains language required by 13 C.F.R. § 125.8(b)(2)(iii), requiring the small business to own 51% of the entity. The Area Office further found the JVA complied with 13 C.F.R. § 125.8(b)(2)(iv), requiring the small business receive profits from the joint venture commensurate with the work they perform. The JVA met the requirement of 13 C.F.R. § 125.8(b)(2)(v) that a special bank account be established. The JVA complied with the requirement at 13 C.F.R. § 125.8(b)(2)(vi) to identify all the major equipment and other resources to be furnished by each party to the joint venture. The JVA complies with the requirement of 13 C.F.R. § 125.8(b)(2)(vii) that it specify responsibilities for contract negotiation, sources of labor and equipment. The JVA complies with the requirement of 13 C.F.R. § 125.8(b)(2)(viii) that it obligate the parties to ensure performance of the contract. The JVA complies with the requirement of 13 C.F.R. § 125.8(b)(2)(ix) & (x) that it requires the joint venture's accounting and administrative records and the final original contract records be kept at the small business. The JVA complies with the requirements of 13 C.F.R. § 125.8(b)(2)(xi) & (xii) that annual performance of work and project-end performance of work statements be submitted to SBA. (*Id.*, at 14-18.)

The Area Office further found that the JVA complies with the requirements of 13 C.F.R. § 125.8(c) that MECG will perform over XX% of the work, the work to be performed by NEI will be more than merely administrative and it will perform over 40% of the work. (*Id.*, at 18-19.)

The Area Office thus concluded that MECG was an eligible small business.

B. The Appeal

On September 19, 2024, Appellant filed the instant appeal. Appellant argues the Area Office ignored several well-supported allegations in its protest. A size appeal must be sustained when the Area Office fails to fully investigate whether the protested concern is affiliated with another concern. (Appeal at 3, citing *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5284 (2011).)

Appellant alleges that MECG is other than small because NEI is other than small. NEI, together with its joint ventures, received approximately \$91 million in revenue in 2017-2021. The protest detailed the connections of NEI and Ms. Gutierrez to 27 such joint ventures and businesses. Appellant alleges each of these entities shares an address with NEI, lists NEI as its immediate owner or JV member, and lists Ms. Gutierrez as a partner, manager, member or point of contact, and most have NEI or Nicklaus in their name. (*Id.* at 3.)

However, the Area Office investigated and counted only 15 of the 27 joint venture entities Appellant identified and ignored the remaining 12. These 12 are:

- 1.) Allegiance JV
- 2.) Border Construction JV, LLC
- 3.) CBS Nicklaus JV, LLC
- 4.) Multi-Mac Joint Venture
- 5.) MYC Nicklaus JV, LLC
- 6.) Coast JV
- 7.) CSN Solutions, JV LLC
- 8.) Nicklaus ECM JC LLC
- 9.) Nicklaus Ensafe JV LLC
- 10.) RMS Nicklaus JV LLC
- 11.) Specialty Remediations JV LLC
- 12.) Spencer Border Infrastructure JV LLC

Appellant alleges its protest identified their SAM.gov profiles which showed indisputable connection to NEI. (*Id.* at 4.)

Appellant asserts its protest showed NEI likely affiliated with all entities controlled by XXXXXXXXXXXXXXXX and identified at least one such entity, XXXXXXXXXXXXXXXX. XXX includes Ms. Gutierrez's name, and XXX and NEI had a joint website that described XXX as NEI's "XXXXXXXX" as late as 2013 and explained that Ms. Guitierrez and XXXXXX are XXXXXXXXXXXXXXXX. Appellant points to a document from Yuma County which shows XXXXXXXX on a board with her affiliation listed as NEI. In 2018, XXXXXXXXXXXX XXXXX XXXXXXXXXXXX Ms. Canales was listed as XXXXXXXXXXXXXXXXXXXXXXXX. (*Id.* at 5.)

Appellant argues the Area Office erred in ignoring these connections between XXX and NEI, and between Ms. Gutierrez and XXXXXXXX. An Area Office cannot ignore possible affiliation links properly raised in a size protest. Appellant seeks a remand to the Area Office to investigate these affiliations. (*Id.*, at 6.)

C. MECG's Response

On October 7, 2024, moved to extend the record and to supplement the record with a declaration from Ms. Gutierrez. On that same day, MECG Responded to the appeal.

MECG is an unpopulated joint venture between NEI and its mentor WEIS. NEI was admitted to the 8(a) program on October 4, 2015. SBA approved the mentor/protégé agreement on August 15, 2017, for a six-year term, and it expired on August 15, 2023, after the submission of proposals for this Solicitation.

MECG argues the relevant period for determining its size is 2017-2021. This is because proposals were due September 15, 2022, and the relevant period for determining size is the five full fiscal years prior to the date for determining size, here September 13, 2022, the date MECG submitted its proposal.² (Response at 5, citing 13 C.F.R. §§ 121.104(c)(1), 121.404(a).) In response to Appellant's argument that the Area Office ignored some joint ventures NEI and/or Ms. Gutierrez were involved in, MECG asserts that many of the entities were formed after the date to determine size, because events occurring after the date for determining size are not relevant to the size determination. (*Id.*, at 5-6, citing *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012 (2019).)

MECG addressed Appellant's claim that certain joint ventures were ignored by the Area Office:

- Allegiance JV: This entity was formed February 28, 2024, after the date for determining size, as confirmed in its SAM profile. This entity has received no prime contracts.
- Border Constructors JV, LLC: This entity was formed November 16, 2022, after the date to determine size, confirmed by the SAM profile. This entity has received no prime contracts.

² The Area Office gives August 2, 2022 as the date for determining size. As MECG states, this is harmless error as the period of measurement is the same for both dates.

- CBS Nicklaus JV, LLC: This entity was formed June 14, 2023, after the date to determine size, confirmed by the SAM profile. This entity has received no prime contracts.
- Multi-Mac Joint Venture: MECG disclosed this entity to the Area Office in MECG's response to the Protest. This entity had no revenue during the relevant time period.
- MYC Nicklaus JV, LLC: This entity was formed June 14, 2023, after the date to determine size. SAM erred in setting this date as May 14, 2023, which would also be after the date to determine size. This entity has received no prime contracts.
- Coast JV: This entity was formed February 28, 2024, after the date to determine size, confirmed by the SAM profile. This entity has received no prime contracts.
- CSN Solutions N, LLC: This entity was formed in 2023, after the date to determine size. This entity has received no prime contracts.
- Nicklaus ECM JV, LLC: This entity was formed October 13, 2022, after the date to determine size, confirmed by the SAM profile. This entity has received no prime contracts.
- Nicklaus EnSafe JV, LLC: This entity was formed in 2023, after the date to determine size. This entity has received no prime contracts.
- RMS Nicklaus JV, LLC: This entity was formed April 10, 2023, after the date to determine size, confirmed by the SAM profile. This entity has received no prime contracts.
- Specialty Remediation JV, LLC: While this entity was formed October 22, 2018, it has not had an active SAM profile since March 7, 2020, and NEI did not consider it active and did not disclose it on its SBA Form 355. This entity has received no work, and thus has no impact on NEI's size.
- Spencer River Border Infrastructure N, LLC: This entity was formed in 2023, after the date to determine size. This entity has received no prime contracts.

MECG thus maintains that none of these entities had any relevance to the Size Determination. All but one were formed after the date to determine MECG's size, and that one, while formed, was not operational. Further, a concern is not an affiliate of a joint venture of which it is a member. (*Id.*, at 6-8, citing *Size Appeal of Zin Technologies, Inc.*, SBA No. SIZ-6305 (2024), 87 Fed. Reg. 380, 381 (Jan. 5, 2022).)

MECG further asserts the Area Office considered the alleged affiliation with XXX and did not err in finding none. While the Area Office did not discuss this issue in the Size

Determination, MECG submitted information on this issue to the Area Office which demonstrates it was presented to and considered by the Area Office. There is no common management between NEI and XXX. Appellant urges SBA to afford more evidentiary weight to signed, sworn statements as opposed to assertions by Appellant based on information from websites. (*Id.*, at 9 citing *Size Appeal of SSI Technologies, Inc.*, SBA No. SIZ-4755 (2006).)

MECG points to NEI's Form 355, and Ms. Gutierrez's declaration to show that as of the date to determine size, Ms. Gutierrez was NEI's XXXX owner, officer, and director. XXXXXX was not involved with NEI in any capacity as of the date to determine size. Ms. Gutierrez has no ownership or role in XXX, and NEI and XXX have no connections other than minimal subcontracting. (*Id.*, at 9.)

Further, there is no identity of interest between Ms. Gutierrez and XXXXX. The sole concern they both have ownership in is XXX, XXXXXXXXXXXX, an acknowledged affiliate of NEI. A common investment in one company does not support a finding of identity of interest. (*Id.*, citing *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291 (2011).)

MECG submitted with its Response a Declaration by Ms. Gutierrez. Ms. Gutierrez's declaration states she is XXX% owner, President and XXXX director of NEI. NEI is XX% owner and managing member of MECG. MECG submitted its offer on September 13, 2022. In its protest response, NET detailed the joint ventures of which it was a member for the period 2017-2021. NEI did not disclose joint ventures it formed after September 13, 2022, because these were not relevant to the size determination. These were the entities discussed above. NEI did not disclose Specialty Remediation N LLC because it never received any work and has been inactive since 2020 when its SAM registration expired.

D. Appellant's Supplemental Pleading

On October 4, 2024, Appellant filed a Supplemental Pleading. Appellant argues that MECG's JVA does not meet the regulatory requirements.

First, the JVA does not comply with 13 C.F.R. § 125.8(b)(2)(ii) designating the small business as the managing venturer responsible for controlling day-to-day management and administration. Appellant argues MECG is a general partnership, and WEIS, as a general partner, has day-to-day control over management and administration. (Appellant's Supplemental Pleading at 5.)

Appellant argues MECG's JVA is governed by California law (JVA § 21). Under California law a business association between two or more persons is automatically deemed a general partnership regardless of the intent of the parties, unless the persons form a formal entity like a corporation. (Appellant's Supplemental Pleading at 5, citing *Sarcuni v. bZx Dao*, 664 F. Supp.3d 110 (2023), Cal. Corp. Code § 16202(a).) MECG is an association of two persons to carry a business for profit as co-owners. Therefore, it is a partnership. (*Id.*) Further, it is a general partnership, because it is not formally designated as a limited or limited liability partnership. (*Id.*, at 6, citing Cal. Corp. Code §§ 15902.01(a); 16952.) This means WEIS has affirmative control over MECG as a general partner. All general partners are co-owners and have equal rights in the

management of the concern's business. (*Id.*, at 7, citing *Size Appeal of Interactive Resources, Inc.*, SBA No. SIZ-3168, at 4 (1989) (citing 59 Am. Jur. 2d § 411).)

The JVA has no provision where WEIS relinquishes its rights as a general partner, there is no provision which limits WEIS's rights as a general partner. The JVA establishes an Executive Committee where WEIS and NEI have equal votes. (*JVA* § 4.) Nothing in the JVA makes its powers exclusive, so both NEI and WEIS can take unilateral action in the absence of a decision by the Executive Committee that would preempt such action. While NEI is the Managing Party, nothing in the JVA says its rights are to displace WEIS's. Indeed, the Managing Party's rights and powers are not defined. (*Id.*) The Area Office never considered WEIS's status as a general partner.

Appellant argues WEIS's status as a member of the Executive Committee gives it negative control over MECG. The regulatory requirements are violated where the mentor has the power to block or veto the protégé's decisions in the day-to-day management of the joint venture. The JVA establishes an Executive Committee at § 5, whose decisions shall be unanimous, and which has the right to define the powers of the Responsible Manager. The Area Office failed to consider whether WEIS as a member of the Executive Committee has negative control over MECG. (*Id.* at 9.)

Appellant further contends the JVA does not obligate both parties to complete performance of a contract set aside for small business despite withdrawal of any member as required by 13 C.F.R. § 125.8(b)(2)(viii). The Area Office found it did, but without any analysis. The JVA has a provision stating that “each Party will use reasonable efforts to provide time and resources to ensure the performance of the Contract and each Task Order.” (*JVA* § 3.a.) This provision falls short of requirement that each party be obligated to ensure performance “despite the withdrawal of any member.” The JVA is silent as to consequence of a member's withdrawal. It expressly provides that if one party defaults the other “if it so elects” may wind up the venture. (Appellant's Supplemental pleading at 10, *JVA* § 14.b.)

The JVA does not state that MECG will submit annual and project-end performance reports. The Joint Venture agreement requires only that NEI submit annual reports to the SBA. (*JVA*, § 9.d.) It also requires MECG to submit “quarterly financial reports” to SBA. (*JVA*, § 9.f.) The JVA does not require submission of a report after contract completion. (Appellant's Supplemental Pleading at 11.)

Appellant's Supplemental Pleading then recapitulated the contentions made in its Appeal Petition. (*Id.*, at 11-16.)

E. MECG's Response to Appellant's Supplemental Pleading

On October 15, 2024, MECG responded to Appellant's Supplemental Pleading. MECG maintains its JVA complies with the regulation.

The regulation provides that a joint venture may in the form of be a formal or informal partnership or a separate legal entity. (MECG Response to Appellant's Supplemental at 3, citing

13 C.F.R. § 121.103(h)(1).) SBA has said joint ventures may be in the form of a new legal entity or “may be informal arrangements so long as the agreement between the business concerns explains that it is a joint venture and meets the regulation's definition of joint venture.” (*Id.* at 3, citing 69 Fed. Reg. 29192, 29195 (May 21, 2004).) MECG's status as an informal partnership is confirmed by the JVA, which provides nothing in the JVA is intended to create or confirm a general partnership. The Whereas clauses expressly state this JVA is formed to pursue the instant Solicitation. (*Id.* at 4, JVA, § 29.)

MECG looks to California law to say a joint venture has no corporate or partnership designation but is an undertaking by two or more persons to jointly carry out a single business enterprise for profit, and members of a joint venture may delegate control. (*Id.* at 4, citing *Nelson v. Abraham*, 29 Cal.2d, 931,933 (1947); *Cochrum v. Costa Victoria Healthcare, LLC*, 25 Cal. App. 5th 1034, 1053 (2018). A joint venture can have unequal control of operations. (*Stilwell v. Trutanich*, 178 Cal. Spp. 2d 614, 619 (1960).)

MECG maintains it is a joint venture and an informal partnership, and the JVA determines control of the concern.

MECG asserts NEI is the Managing Venturer and has ultimate responsibility for contract performance. The JVA designates NEI as Managing Party and Ms. Gutierrez as Responsible Manager with ultimate responsibility for contract performance. She will administer ordinary day-to-day business of MECG. (*Id.*, at 5, JVA §§ 5a, 5d.) NEI, as Managing Party is responsible for conducting MECG's business affairs, and so is in compliance with the regulation. (*Id.* *VSBC Protest of Systematic Innovations, LLC*, SBA No. VSBC-367-P (2024).)

MECG disputes Appellant's contention WEIS has negative control over it through the Executive Committee. While NEI and Ms. Gutierrez manage the concern, partner venturers may participate in corporate governance activities and decisions as is commercially customary. Partner venturers may participate in decisions and corporate governance activities as is commercially customary and that do not interfere with day-to-day management and contract performance. (*Id.* at 6, citing 13 C.F.R. § 125.8(b)(2)(ii)(A); *Strategic Alliance Solutions, LLC*, SBA No. VET-278 (2023).) The Executive Committee is not concerned with day-to-day management and contract performance, and thus does not give WEIS impermissible negative control. The Committee may only make decisions on general policy matters not specifically delegated to the Managing Party or Responsible Manager or Program Manager. (JVA, §§ 4(e)(i), 5.) The Executive Committee is thus responsible for general policy matters unrelated to contract performance. Other actions taken by the Executive Committee are extraordinary actions, and WEIS participates in these actions as is commercially customary. (*Id.* at 7-8.) While the Executive Committee may specify the powers of the Responsible Manager the JVA provides that NEI's President holds the post and has ultimate responsibility for contract performance, will supervise Task Order Managers and will administer MECG's day-to-day business. Any change to this authority would require an amendment to the JVA, materially altering NEI's rights. This would be an extraordinary action which may require a minority shareholder's input, but such a requirement would not create negative control. (*Id.*; citing *Strategic Alliance Solutions, LLC*, SBA No. VET-277 (2022).)

Appellant argues the JVA fails to comply with 13 C.F.R. § 125.8(b)(2)(viii) because it does not contain a provision obligating both members to complete performance of a contract set aside for small business despite the withdrawal of either member. MECG points out the JVA does say that “each Party will use reasonable efforts to provide time and resources to ensure the performance of the Contract and each Task Order.” (*Id.*, at 8 citing JVA § 3(a).) MECG argues that while this provision does not expressly contain the words “despite the withdrawal of any member,” this obligation can be inferred from this provision in conjunction with other provisions of the JVA. The JVA provides that if either party defaults in performance of a contract or task order, the non-defaulting party will complete performance. A default would essentially be a withdrawal, and thus the JVA does comply with the regulation. (*Id.*, citing JVA, § 15(g).)

Appellant also argues the JVA fails to comply with 13 C.F.R. § 125.8(b)(2)(xii) because it does not include a requirement to submit a project end report as required by that regulation. MECG argues that § 9(d) complies with this requirement. It requires NEI to submit annual reports to SBA during the contract term detailing all contracts entered into with the Government. Annual reports would necessarily include the end of the project. (*Id.*, at 9-10.)

F. Appellant's Reply to Supplemental Pleading

On October 18, 2024, Appellant moved to reopen the record, to file an additional supplemental pleading, together with that pleading. Appellant seeks to address the case law cited by MECG on the issue of whether MECG is a California partnership, arguing that this case law has been overruled by the California Uniform Partnership Act of 1994 and subsequent cases.

On October 28, 2024, MECG filed an Opposition to the Motion and a Surreply. MECG asserts a reply to a response is not permitted unless the Judge directs otherwise. (Opposition at 2, citing 13 C.F.R. § 134.109(d).) Further, OHA does not entertain evidence or argument filed after the close of record. (*Id.*, citing 13 C.F.R. § 134.225(b).) Appellant is merely repeating arguments already made. (*Id.*, citing *Size Appeal of Aerosage, LLC*, SBA No. SIZ-5841 (2017); *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 6 (2012).) MECG then renewed its arguments in response to Appellant's on the partnership issue. (*Id.*, at 3-5.)

After reviewing Appellant's Motion, I conclude that Appellant is merely restating arguments already presented. Accordingly, I DENY its Motion to Reply to MECG's Response to Appellant's Supplemental Pleading.

G. The MECG Joint Venture Agreement

The MECG Joint Venture Agreement sets forth as the purpose of the joint venture submitting a proposal for the NAVFAC procurement. (JVA, at 1, § 2.) NEI will have a XX% interest in MECG, and WEIS shall have XX%. (JVA § 3(d).)

To handle “certain designated matters” an Executive Committee is formed with one member from each venturer. (JVA, § 4.) Each member shall have one vote. The Committee's decisions are to be unanimous. The Committee shall make decisions on general policy matters related to the Joint Venture not specifically delegated to the Managing Party, Responsible

Manager or the Program Manager. These include any extraordinary extension of the Scope of Services; reviewing reports on the progress of Services; to determine the amount of any reserves required for any warranty period or with respect to any unsettled claims; to approve all expenditures not billable to NAVFAC; to provide other services as set forth elsewhere in the JVA; to submit a claim to arbitration or settle any lawsuit or claim; to issue any public release; or to dissolve MECG. (*Id.*)

NEI is designated Managing Party and Ms. Gutierrez as Responsible Manager with ultimate responsibility for contract performance and will supervise the Task Order Managers who will report to her. (JVA, at § 5.) She will administer the ordinary day-to-day business of the Joint Venture. A WEIS employee will be Program Manager. (JVA, § 3(a).) The Responsible Manager and Program Manager will jointly lead contract negotiations. (JVA, § 5(b).) The Managing Party will not consent to any extraordinary extension of the scope of services or extraordinary material change in the services to be performed under the Contract without the approval of the Executive Committee. The Managing Party is responsible for conducting the Joint Venture's business affairs. (JVA, § 5(d).)

Management of the Project will be performed by the Responsible Manager and the Program Manager. They shall be delegated responsibility for practical execution of the contract and shall have such specific powers as the Executive Committee may, from time-to-time delegate. (JVA, § 6(a).) Each party to the joint venture shall make available to the Responsible Manager and Program Manager such of its supervisory managerial and other labor as is required to perform the contract. (JVA, § 6(b).)

If either Party defaults of its obligations under the contract, the Continuing Party may if it elects complete performance of the contract. (JVA, § 15(b).)

III. Discussion

A. Standard of Review and Motions

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).

MECG's Motions to Extend and Supplement the Record are GRANTED.

B. Analysis

Appellant argued in its initial appeal that the Area Office had failed to consider numerous potential affiliates of NEI, consideration of which Appellant alleged would result a finding that NEI itself was other than small. However, MECG's Response identified all of the joint ventures in question. A number of them were not in existence as of September 13, 2022, the date as of

which NEI's and MECG's size must be determined, because that was the date MECG submitted its initial offer, including price. 13 C.F.R. § 121.404(a). These entities are therefore not to be considered in determining MECG's size. *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012, at 17-18 (2019). Further, NEI is not affiliated with these joint ventures, because a concern is not an affiliate of a joint venture of which it is a member. *Size Appeal of Zin Technologies, Inc.*, SBA No. SIZ-6305 (2024). “It is well established that business concerns are not affiliates of joint ventures of which they are members for size purposes.” 87 Fed. Reg. 380, 381 (Jan. 5, 2022). The Area Office properly included NEI's proportion of annual receipts for the six active joint ventures when it calculated NEI's receipts. The Area Office concluded that NEI's receipts were within the size standard. Appellant raises no argument which disputes the Area Office's calculation of NEI's size, other than to raise the issue of a number of joint ventures which had no revenue, and were created after the date to determine size, and thus were not relevant to the question of MECG's size. *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012, at 17 (2019).

Appellant's allegations of NEI's affiliation with XXXX are unsupported by the record. NEI's Form 355 establishes Ms. Gutierrez was NEI's XXXX owner, officer, and director. The record shows XXXXXX as uninvolved with NEI in any capacity as of the date to determine size. Ms. Gutierrez has no ownership or role in XXX. MECG reports that NEI and XXX have no connections other than minimal subcontracting. Ms. Gutierrez and XXXXX have common ownership in only one concern, and this is insufficient to establish an identity of interest between them. *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291, at 4 (2011).

Two firms which Eire approved by SBA to be a mentor and protégé under 13 C.F.R. § 125.9 may joint venture for any Federal small business contract so long as the protégé qualifies as small for the procurement and the joint venture meets the requirements of 13 C.F.R. § 125.8(b) & (c). 13 C.F.R. § 121.103(h)(2)(ii). The regulation at 13 C.F.R. § 125.8(b)(2) sets the requirements for a joint venture agreement between a mentor and a protégé. If a joint venture agreement does not contain the level of detail required by the regulation, then it cannot avail itself of the exception to a finding of affiliation. *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188, at 20 (2023).

In its Supplemental Appeal, Appellant raises the issue of California Partnership law. Under California law, a business association between two or more persons is automatically deemed a general partnership regardless of the intent of the parties, unless the persons form a formal entity like a corporation. *Sarcuni v. bZx* DA 664 F. Supp. 3d 110 (2023), Cal. Corp. Code § 16202(a). Further, it is a general partnership, because it is not formally designated as a limited or limited liability partnership. Cal. Corp. Code §§ 15902.01(a); 16952. Appellant thus argues that WEIS as a general partner has power to control MECG.

However, whether MECG is a partnership or not, it is a joint venture, and if under its JVA the parties have agreed that NEI is the managing partner, then it can meet the regulatory requirements. Partners can agree to designate a particular partner to manage the partnership, and agreeing to relinquish control is part of exercising the right to control. *Fredianelli v. Jenkins*, 931 F. Supp. 1001, 1020 (N.D. Cal. 2013), citing *Dills v. Delira Corp.*, 145 Cal. App. 2d 124, 132, 302 P. 2d 397 (1956). Appellant's argument here thus does not establish that under California

law WEIS exercises control over MECG. The question is whether MECG's JVA meets the regulatory requirements.

The regulation requires that the JVA designate the small business as the managing venturer, designate a named employee of that small business as the Responsible Manager, the manager with ultimate responsibility for performance of the contract. 13 C.F.R. § 125.8(b)(2)(ii). The Managing Venturer is responsible for day-to-day management and administration of contract performance, but other partners to the joint venture may participate in all corporate governance activities as is commercially customary. The JVA may not give to a non-managing venturer negative control of the joint venture's activities, unless those provisions would otherwise be commercially customary for a joint venture agreement for government contract outside of SBA's programs. A non-managing partner's approval may be required for, among other things, determining which contract opportunities to seek and initiating litigation. 13 C.F.R. § 125.8(b)(2)(ii)(A).

Here, NEI, the small business, has designated its Managing Partner and President, Ms. Gutierrez, as Responsible Manager. However, the JVA also gives considerable control to WEIS. An Executive Committee is created above the Responsible Manager. The Committee has two members, one from each concern, and its decisions must be unanimous. The Responsible Manager has such powers as the Executive Committee shall delegate to her. Further, the JVA creates a position unknown to the regulation of Program Manager. This individual will be a WEIS employee. The Responsible Manager and Program Manager will jointly lead contract negotiations. Management of the Project will be performed by the Responsible Manager and the Program Manager together. They shall be delegated responsibility for execution of the contract and shall have such specific powers as the Executive Committee may, from time-to-time delegate. The Responsible Manager authority is thus subject to the Executive Committee's direction, and WEIS has negative control over the Executive Committee, whose decisions must be unanimous. Further, the Project Manager is given an equal authority to manage the contract, with no mechanism for resolving disputes between the two managers.

The JVA thus provides that MECG's contract performance shall be managed jointly by Ms. Gutierrez and a manager from WEIS. The Executive Committee is to determine what their powers are, and they are to conduct contract negotiations and manage the contract together. The Executive Committee's decisions must be unanimous. This gives the WEIS representative negative control. SBA has defined negative control as the ability, granted by a concern's organizing instruments, of a party with a minority interest in the concern to block action by that concern's board of directors or shareholders. 13 C.F.R. § 121.103(a)(3). OHA has held that when the minority partner has negative control of a joint venture's management committee, the joint venture does not meet the regulatory requirements. *Size Appeal of LS3, LLC*, SBA No. SIZ-6239, at 5 (2023); *Size Appeal of Syscom, Inc*, SBA No. SIZ-6195, at 14 (2023).

Further, the Responsible Manager must work with the Project Manager in negotiating and administering the contract. The JVA is silent as to which manager has final authority to make decisions in the management and administration of the contract. The JVA thus gives WEIS significant negative control over the contract. The Responsible Manager simply does not have the control over the joint venture and contract performance the regulation requires.

I must therefore conclude that MECG's JVA does not meet the regulatory requirements of 13 C.F.R. § 125.8(b)(2)(ii), and therefore the Area Office erred in finding it compliant.

Further, I find MECG's JVA does not comply with 13 C.F.R. § 125.8(b)(2)(viii) which requires the JVA to have a provision obligating all parties to ensure performance of the contract and to complete performance despite withdrawal of a member. In the event of a default by one party to the joint venture, MECG's JVA gives a non-defaulting party the right to elect to complete the contract, not an obligation. This does not comply with regulation, which requires that the parties be obligated to complete the contract.

I therefore find that the Area Office erred in finding that MECG's joint venture agreement complied with the regulation, and therefore I further find that MECG is not eligible to use the exception to a finding of affiliation at 13 C.F.R. § 121.103(h)(2)(ii). Accordingly, MECG is not an eligible small business for this procurement.

IV. Conclusion

I conclude that Appellant Acacia7 JN has met its burden of establishing that the Size Determination is based upon an error of fact or law. Accordingly, I GRANT the instant appeal and REVERSE the Size Determination. MECG is not an eligible small business for this procurement. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge