United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: OBXtek, Inc., Appellant, Appealed From Size Determination Nos. 2-2013-23 and -24	SBA No. SIZ-5451 Decided: March 1, 2013

APPEARANCES

Isaias, "Cy" Alba, IV, Esq., Jonathan T. Williams, Esq., Megan C. Connor, Esq., Grant D.P. Madden, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant

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DECISION [1]

I. Introduction

On January 15, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination Nos. 2-2013-23 and 2-2013-24 [2] finding OBXtek, Inc. (Appellant) ineligible for the subject procurement. Specifically, the Area Office determined Appellant was economically dependent on, and therefore affiliated with, MicroTechnologies, LLC (MicroTech). Appellant maintains the size determination is clearly erroneous. For the reasons discussed below, the appeal is granted, and the size determination is reversed.

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[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant's counsel an opportunity to file a request for redactions, which counsel submitted. OHA considered those proposed redactions and now publishes a redacted version of the decision for public release.

[2] The size determinations are nearly identical and differ only in their references to the protestors. For ease of reference, they are referred to collectively as one size determination.

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

II. Background

A. Solicitation, Protests, and Response to the Protests

On December 14, 2011, the U.S. Department of State issued Solicitation No. SAQMMA12R0020 (RFP) seeking professional, management, and administrative employee support services. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned (SDVO) Small Businesses Concerns (SBCs) and designated North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding $7 million average annual receipts size standard.[3]

On February 1, 2012, Appellant submitted its initial offer and certified as a small business for this procurement. On November 5, 2012, the CO notified offerors that Appellant was the apparent successful offeror. The next day, ITility, LLC, a disappointed offeror, protested Appellant's size, alleging, among other things, that Appellant is economically dependent on MicroTech. [4] On November 9, 2012, CLMS, LLC (CLMS), another disappointed offeror, also protested Appellant's size. [5]

On December 3, 2012, Appellant responded to the protests. Appellant contended it was not economically dependent on MicroTech because, at that time, it derived "less than 20% of its revenues from subcontracts with MicroTech." Response at 13. Appellant stressed it "has 13 active contracts, including the subcontract with MicroTech. Of the remaining 12 contracts, all of these are [[Appellant's] prime contracts with Government agencies." *Id.* at 16.

Appellant explained the contract with MicroTech was its second contract ever. Accordingly:

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[3] . Effective March 12, 2012, SBA increased the size standard for NAICS code 541611 to $14 million. 77 Fed. Reg. 7,490, 7,514 (Feb. 10, 2012). SBA regulations provide, "the size standard in effect on the date the solicitation is issued" is controlling, unless the CO formally amends the solicitation to adopt the new size standard. 13 C.F.R. § 121.402(a). No such solicitation amendment occurred here, so the applicable size standard remains at $7 million average annual receipts.

[4] The Area Office considered these other allegations. Those issues, however, are not before OHA on appeal and are therefore not summarized in this appeal.

[5] ITility and CLMS also challenged Appellant's eligibility as an SDVO SBC. Only the size determination is before OHA on appeal.

> a mechanical application of the [economic dependence] rule in this case would be an injustice. It places too large a significance on too small a contract. It would unduly penalize start-up operations, which may have had the chance to obtain only one or two contracts at the time they face a size determination.

Id. at 14 (quoting *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204, at 6 (2011)). Appellant then argued its remaining ties with MicroTech are not so significant that they allow MicroTech to control Appellant. *Id.* at 16-17.

In addition to the response, Appellant submitted an affidavit from its majority owner, Mr. Bruce Jesson, in which Mr. Jesson provided further detail of Appellant's active contracts. Soon after Mr. Jesson formed Appellant, he sought subcontracting opportunities from multiple government prime contractors. MicroTech selected Appellant as a subcontractor "for a single Social Security Administration effort," and the subcontract would expire in January 2013. Appellant started winning prime Government contracts in fiscal year 2010. Affidavit, ¶ 12.

In August 2011, Mr. Jesson sought to purchase a GSA Veterans Technology Services (VETS) contract from a prime contractor who had outgrown the size standard and could not recertify its size for the five-year option period. Mr. Jesson approached several GSA VETS prime contractors, including MicroTech. *Id.* ¶ 13. On November 28, 2011, Appellant and MicroTech entered into an asset purchase agreement for the sale of MicroTech's GSA VETS contract. Appellant would pay MicroTech $XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. *Id.* ¶ 14.

B. Size Determination

On January 15, 2013, the Area Office issued its size determination. The Area Office determined Appellant was not an eligible small business under the $7 million size standard due to its economic dependence on MicroTech. 13 C.F.R. § 121.103(f).

The Area Office reasoned Appellant was economically dependent on MicroTech because, from 2009 to 2011, Appellant derived a large share of its revenues from "contracts" with MicroTech. Size Determination at 6. These contracts accounted for XX% of Appellant's revenue in 2009, XX% of Appellant's revenue in 2010, and XX% of Appellant's revenue in 2011. Between January 1, 2012 and October 31, 2012, these contracts accounted for XX% of Appellant's revenue. *Id.* at 2.

The Area Office then explained that when one firm relies on a second firm for 70% or more of its revenue, the first firm is economically dependent on the second. 13 C.F.R. § 121.103(f); *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007). The challenged firm can rebut this presumption if it can "prove, by clear and convincing evidence, that its interests are separate from [those of] the other concern." *Faison*, SBA No. SIZ-4834, at 10. The Area Office also explained that, because a firm's size is determined as of the date it self-certified as an eligible small business, dealings after that date are not relevant to the size determination. *Size Appeal of Incisive Tech., Inc.*, SBA No. SIZ-5122 (2010); *Size Appeal of*

Eagle Consulting Corp., SBA No. SIZ-5267 (2011); *Size Appeal of Norris Prof'l Servs., Inc.*, SBA No. SIZ-5289 (2011). Therefore, such later dealings do not rebut the presumption of affiliation.

The Area Office also noted that, "once heavy economic dependence is shown OHA has seldom, if ever, found the presumption to be rebutted." *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 15 (2011). There have only been two instances in which a firm has rebutted the presumption of economic dependence. *See e.g., Argus and Black, Inc.*, SBA No. SIZ-5204 (2011); *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5186 (2011). In *Argus and Black*, the challenged firm had only been in operation for four months, so it did not have the requisite longstanding relationship with its business partner to justify a finding of affiliation. In *C2G*, the challenged firm had no more contractual relationships and had completely severed its relationship with its business partner.

In this case, the Area Office explained that, from 2009 to 2011, Appellant derived [over 70%] of its revenues from contracts with MicroTech. The Area Office rejected Appellant's contention that the presumption of identical business interests is rebutted by the decrease in this percentage to XX% for the period of January through October 2012. The Area Office explained it was determining Appellant's size as of February 1, 2012, "merely one month into [[fiscal year] 2012." Therefore, the relative decrease in contract revenue did not overcome the presumption of identical interests. Size Determination at 6.

The Area Office then noted that Appellant's average annual receipts do not exceed the size standard. However, Appellant conceded MicroTech was a large business. As a result, Appellant was not an eligible small business for the instant procurement due to its affiliation with MicroTech. *Id.* at 7.

C. Appeal

On January 25, 2013, Appellant filed the instant appeal.[6] Appellant argues the size determination is clearly erroneous and should be reversed.

Appellant contends OHA's cases regarding economic dependence have created confusion among SBA's area offices. Appeal at 10. As a result of this confusion, the Area Office found MicroTech could control Appellant "not through an analysis of circumstances extant at the time Appellant certified its size status, but by examining [its] past relationship with MicroTech." *Id.* at

[6] By regulation, appeal petitions ordinarily are limited to 20 pages, excluding attachments. 13 C.F.R. § 134.203(d)(2). The appeal petition here is 30 pages. Appellant moves to exceed the standard page limitation, arguing that a lengthier appeal is warranted due to "the complexity of the economic dependence issued raised by . . . the Size Determination." Motion at 1. Appellant argues "there is widespread confusion among area offices regarding the appropriate applications of OHA's prior cases regarding economic dependence," that requires "a detailed analysis ... of how and when affiliation is calculated given the unique facts of the case." *Id.* For good cause shown, Appellant's request to exceed the page limit is GRANTED.

2.

Appellant asserts that for affiliation to exist, the alleged affiliate must have the power to control the protested concern (or a third party can control both). 13 C.F.R. § 121.103(a). Thus, the ultimate inquiry is whether, at the specific date the protested concern self-certified as small, an alleged affiliate actually controlled, or had the power to control, the protested concern. Appellant argues that if control exists at some prior time, but ceases to exist on the date for determining size, it is clear error to find affiliation. Appeal at 13.

Appellant emphasizes it derived only 18.16%, or less than one-fifth, of its revenues from MicroTech at the time it self-certified as an eligible small business. Appellant argues affiliation does not exist where, as here, revenues from a single source account for less than 20% of a concern's total revenues on the operative date for determining size, and the concern has multiple other contracts with multiple other vendors. *See Alutiiq Educ. & Training, LLC,* SBA No. SIZ-5371 (2012) (upholding an area office determination that 20% of revenues from a single source was "a small portion of its receipts, and that the [challenged concern] is not affiliated with [the alleged affiliate] based upon an identity of interest"). Appellant contends that even if all of the MicroTech contracts were terminated on February 1, 2012, it would have only a minor impact on Appellant. Thus, on the operative date for determining size, MicroTech did not control Appellant. Appeal at 14-15.

Appellant argues the Area Office found MicroTech could control Appellant as of the self-certification date as a result of past dealings no longer significant to Appellant. Appellant points out the Area Office did not explain how "MicroTech can reach into the past to influence the current or future behavior of [Appellant]." *Id.* at 15. Appellant contends the Area Office did not make such an explanation because the finding is contrary to the regulation. *Id.* at 16.

Appellant argues SBA regulations prohibit finding affiliation based on circumstances no longer present on the operative date. 13 C.F.R. § 121.104(d)(4) ("The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size"). Appellant emphasizes that this regulation does not require complete fracture between the two firms, just that "affiliation cease." Here, Appellant contends, affiliation ceased because Appellant derived only 18% of its revenues from MicroTech. The firms were therefore former affiliates. Accordingly, the Area Office erred by combining the firms' average annual receipts. Appeal at 16.

Appellant argues there is no requirement that a certain amount of time pass before a former affiliate can be treated as such for purposes of a size determination. Appellant points out, however, that the Area Office determined, "because the firm's size is being determined as of February 1, 2012, merely one month into [fiscal year] 2012, [the fact that Appellant derived only 18% of its revenues from MicroTech] is insufficient to overcome the presumption of identity of interests." Appellant emphasizes the Area Office did not explain why one month is insufficient, and argues that to require the passage of a certain amount of time is "an arbitrary construct developed by the Area Office out of whole cloth." *Id.* at 17 (citing *C2G Ltd. Co.,* SBA No. SIZ-5186, at 7 (2011) (finding clear error where the area office "imposed arbitrary constraints on [the challenged firm], basing its determination on whether sufficient time had passed to reflect a

change in [the challenged firm]'s revenue").

Next, Appellant argues the Area Office erroneously disregarded evidence of Appellant's viability and economic autonomy. Appellant contends the following facts clearly rebut the presumption of economic dependence: (1) Appellant has just one contract with MicroTech, and it was the second contract Appellant had ever received; (2) Appellant and MicroTech do not have a long-term relationship; and (3) the percentage of Appellant's revenue derived from the contract with MicroTech diminished to less than 20% of Appellant's revenues.

Appellant argues the Area Office applied the 70% rule mechanically and disregarded the fact that the MicroTech contract was one of Appellant's first contracts. *Cf. Argus and Black,* SBA No. SIZ-5204, at 6 ("a mechanical application of the [economic dependence] rule ... would be an injustice . . . [[because] . . . it would unduly penalize start-up operations, *which may have had the chance to obtain only one or two contracts* at the time they face a size determination") (emphasis added). As in *Argus and Black*, there is only one subcontract with the alleged affiliate. Given Appellant's twelve other contracts, this single subcontract is a small portion of Appellant's work. Appeal at 19-20.

Appellant contends it does not meet the duration requirement for economic dependence because its relationship with MicroTech is only three years old. *See Argus and Black*, SBA No. SIZ-5204, at 6 (contrasting the four-month relationship at issue with the five-year relationship in *Faison* and the six-year relationship in *Incisive Technologies*). Appellant argues the Area Office did not analyze whether Appellant's relationship with MicroTech was of sufficient duration. Without this finding there can be no finding of affiliation through economic dependence. *See Norris Prof'l Servs.*, SBA No. SIZ-5289 (2011).

Appellant argues the Area Office arbitrarily refused to consider the relative decline in revenues from MicroTech. Although the Area Office relied on *Incisive Technology* for disregarding this downward trend, Appellant asserts such reliance is misplaced. In *Incisive Technology*, the challenged firm argued it could be subcontracting with firms other than the alleged affiliate. OHA dismissed this argument, finding that the challenged firm chose to be dependent and work "almost exclusively" with the large affiliate up to the date of self-certification. *Incisive Tech.*, SBA No. SIZ-5122, at 3. Here, Appellant contends, the facts are distinguishable, because Appellant was not heavily reliant on revenues from MicroTech at the time of self-certification. Rather, twelve of Appellant's thirteen active contracts were prime contracts with Federal agencies, and the MicroTech subcontract represented only 18.16% of Appellant's revenues. *Cf. Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 16 (2011) (finding the percentages of revenue from other customers were "dwarfed when compared with the business the [challenged firm] conducts with [the alleged affiliate].") Indeed, Appellant argues, it "has done exactly what [OHA] encourages new concerns to do: it 'has obviously taken other steps to establish itself as a viable business entity."' Appeal at 23 (quoting *C2G*, SBA No. SIZ-5186 at 7.)

Appellant argues OHA's earlier decisions do not compel a finding of economic dependence in this case. Unlike Appellant's relationship with MicroTech, the business relationships in the cases cited by the Area Office were both uninterrupted and substantial. *See,*

e.g., TPG Consulting, SBA No. SIZ-5306, at 3 (finding "[the challenged firm] had a relationship with [the alleged affiliate] for two years prior to self-certification and *continues to have a relationship* with [the alleged affiliate] now") (emphasis added); *Eagle Consulting*, SBA No. SIZ-5267, at 5 (2011) (finding the challenged firm applied to the 8(a) program in 2010 and "derived an average of 80% of its revenues from [the large alleged affiliate] during fiscal years 2007 *through 2010*") (emphasis added); *Incisive Tech.*, SBA No. SIZ-5122 (finding the challenged firm continued to draw 100% of its revenues from its affiliate as of the date for determining size). Appellant argues the converse is true here, as the revenue derived from the MicroTech contract had dropped to 18% of Appellant's revenues as of the date for determining size. Indeed, "a finding of affiliation cannot be based solely on the fact that a firm draws 20% of its revenues from a single source." Appeal at 28 (citing *Alutiiq Educ*. SBA No. SIZ-5371).

Appellant argues in the alternative that should OHA determine the Area Office correctly applied OHA precedent in finding Appellant affiliated with MicroTech, then OHA should overrule those decisions as arbitrary, capricious, and abusive of OHA's discretion under the law. Appellant argues it "strains credulity" to hold that one firm has the power to control a second firm just because the first firm is the source of 18% of the second firm's revenue. It is "equally illogical" to hold that MicroTech has the power to control Appellant based on previous dealings no longer significant to Appellant as of the date for determining size. *Id.* at 29.

D. ITility's Motion to Submit New Evidence and Appellant's Response Thereto

On February 8, 2013, ITility moved to supplement the record with two categories of new evidence. The first category contains information from the Federal Procurement Data System, which, ITility argues, shows MicroTech transferred to Appellant two GSA VETS contracts, which GSA approved on December 14, 2011. ITility argues these novations explain the precipitous drop in the relative share of revenue from MicroTech. The second category of evidence includes a photograph of the directory in MicroTech's building and the Industry Day attendance list. ITility argues this information shows Appellant's majority owner, Mr. Jesson, currently works for MicroTech.

ITility argues there is good cause to admit this evidence because it refutes the argument that Appellant was not economically dependent on MicroTech in January 2012. ITility also argues the record contains sufficient information to find Appellant and MicroTech affiliated under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5).

On February 23, 2013, [7] Appellant responded to ITility's motion. Appellant urges OHA

[7] Appellant filed the response after 5 p.m. eastern time on Saturday, February 23, 2013. "The response [to a motion] is due no later than 15 days after the motion is served." 13 C.F.R. § 134.211(c). "Any submission received at OHA after 5 p.m. eastern time is considered filed the next business day." *Id.*§ 134.204(b)(2). However, "[i]f the last day [for a filing] is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day." 13 C.F.R. § 134.202(d)(1)(ii). In this case, the response is timely because the fifteenth day fell on Saturday, February 23, 2013. Accordingly, the deadline for filing the response was Monday, February 25, 2013.

to deny the motion because the proffered evidence was publicly available at the time ITility fled its protest on November 6, 2012.

Appellant argues further the proffered evidence is not relevant to the issue on appeal. Appellant contends the evidence of novations shows Appellant's ownership of two contract vehicles, not economic dependence. Nor are the lobby photograph and attendance sheet probative of whether Appellant is economically dependent on MicroTech.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its 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 the 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. New Evidence

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

In this case, I find ITility has not shown good cause to admit the new evidence. The evidence ITility seeks to admit was publicly available at the time ITility submitted its protest. *See Size Appeal of HBC Mgmt. Servs., Inc.*, SBA No. SIZ-5409, at 5 (2012) (excluding evidence presented on appeal that was publicly available at the time the protest was filed). Thus, if ITility wished to have the new evidence considered, ITility could, and should, have produced it to the Area Office during the size review. *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which "sets forth factual information that could have been communicated to the Area Office"); *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 17 (2010) (rejecting new evidence because "Appellant knew its relationship with [the alleged affiliate] was at issue and should have presented this information to the Area Office"). Accordingly, ITility's motion to admit new evidence is DENIED, and the proffered evidence is EXCLUDED.

C. Analysis

In this case, the record does not support the conclusion that Appellant is economically dependent upon MicroTech as of the date of self-certification. Thus, for the reasons discussed below, I find the Area Office erred in concluding that Appellant is affiliated with MicroTech based on an identity of interest.

The applicable regulation provides:

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

13 C.F.R. § 121.103(f). Based upon this regulation and OHA case precedent, the Area Office reasoned that because Appellant derived [over 70%] of its 2009-2011 revenues from contracts with MicroTech, Appellant is economically dependent upon MicroTech as of February 1, 2012, the date Appellant self-certified as an eligible small business.

In analyzing questions of affiliation, the ultimate question is always whether one concern can control the other: "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. § 121.103(a)(1); *see also Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244, at 5 (2011) (finding no identity of interest and noting "there is simply no evidence that [the challenged firm and its alleged affiliate] can control one another or that a third party can control both entities") (citing *Size Appeal of LGS Mgmt., Inc.*, SBA No. SIZ-5160, at 3 (2010) ("[C]ontrol is always the principal question when addressing affiliation."); *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128, at 5 (2010) ("The ultimate inquiry in any type of affiliation case . . . is the power to control.").

A concern's size is determined as of the self-certification date. 13 C.F.R. § 121.404(a). The average annual receipts of the protested concern and its affiliates are determined based on the three years preceding the date of self-certification. *Id.* § 121.104(c)(1). In *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007), OHA held that a challenged firm is economically dependent upon another firm as a matter of law if it receives 70% or more of its revenue from that firm. Nevertheless, as Appellant noted, in *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204 (2011), OHA rejected mechanical application of this rule, because it would unduly penalize start-ups, and did not find economic dependence based upon one contract.

Prior to the ruling in *Argus and Black*, OHA decided *Size Appeal of C2G Ltd. Co.*, SBA

No. SIZ-5186 (2011). There, the challenged firm was heavily dependent on another firm over the three-year period used to determine average annual receipts. OHA held that, where there is such heavy dependence in the three years preceding the self-certification date, the challenged firm must persuasively demonstrate it is no longer economically dependent on its alleged affiliate, and the alleged affiliate does not have the ability to control the challenged firm. Because the challenged firm in *C2G*demonstrated that, as of the date SBA determined its size, it was no longer dependent upon its alleged affiliate, OHA found the challenged firm was no longer affiliated with that concern. ("I find [the challenged firm] sufficiently proved that it is no longer affiliated with [the alleged affiliate] because it proved there was a significant change in factors affecting its size"). *C2G*, at 7.

Similarly, in *Size Appeal of SP Technologies, LLC,* SBA No. SIZ-5319 (2012), OHA determined the challenged firm, which had been entirely dependent upon another firm for its revenue for most of the three-year period for determining size, was not economically dependent upon the alleged affiliate. OHA reasoned there was not economic dependence because the challenged firm had severed its business relationship with the alleged affiliate and had obtained a new subcontract from yet another firm. Further, in *Size Appeal of Cherokee Nation Healthcare Services, Inc.*, SBA No. SIZ-5343 (2012), OHA determined there was not economic dependence, and a mechanical application of the rule would unduly penalize a startup firm which had received nearly all its revenue from two contracts with the alleged affiliate.

In *Size Appeal of Larry Grant Construction,* SBA No. SIZ-5337 (2012), a challenged firm's size was to be determined as of August 9, 2011. The fiscal years used for measurement of the firm's receipts were 2008-2010. In 2010, the firm was dependent on another firm for 70% of its revenues. The record also reflected that this dependence increased to 95% in 2011, up to the date for determining size. OHA found the challenged firm economically dependent, and held it was appropriate to use financial information from outside the three-year period for the purpose of assessing economic dependence, so long as it was not from a time subsequent to the date for determining size. Similarly, in *Size Appeal of VMX International, LLC,* SBA No. SIZ-5427 (2012), OHA found the challenged firm was economically dependent on another firm. In addition to considering the high percentage of receipts attributable to contracts with the affiliate during the three-year period for determining annual receipts, OHA considered that this dependence had continued, if at a slightly lesser percentage, for nearly another year, up to the date size was determined.

In calculating a firm's average annual receipts, the regulation explicitly requires that the preceding three-year period be used. However, because size is determined as of the self-certification date, a size determination must determine affiliation—in this case, economic dependence—as of that date. Therefore, it is appropriate to examine the challenged concern's receipts from the end of the three-year period up to the date for determining size, to assess the relationship between the challenged firm and the alleged affiliates as of the date for determining size. *See e.g., Larry Grant Constr.*, SBA No. SIZ-5337; *VMX Int'l*, SBA No. SIZ-5427. It is also appropriate to examine the nature of the business relationship between the two firms as of the date for determining size, to determine whether the same business relationship has continued and whether the challenged firm may have developed contracts with firms other than the alleged affiliate. *See e.g., C2G*, SBA No. SIZ-5186; *SP Techs*. SBA No. SIZ-5319. The challenged firm

may no longer be economically dependent by the date for determining size, even if it was so earlier. Thus, the proportion of a concern's receipts attributable to an alleged affiliate over the three-year period for determining average annual receipts is probative of, but does not control, whether economic dependence exists as of the self-certification date. *C2G*, SBA No. SIZ-5186.

In this case, Appellant has persuasively demonstrated its economic autonomy from MicroTech. Like the challenged firm in *C2G*, Appellant had already taken significant steps to establish itself as a viable business entity independent of its alleged affiliate as of the date for determining size. Since fiscal year 2010, Appellant has won many prime Government contracts. Appellant also purchased GSA VETS contracts.[8] While the three-year period was properly used to determine Appellant's annual receipts, the assessment of whether Appellant was economically dependent upon MicroTech should have been conducted as of the self-certification date of February 1, 2012, and taken into account the relationship between Appellant and MicroTech as of that date. As of the self-certification date, twelve of Appellant's thirteen active contracts were prime contracts with Federal agencies, and the subcontract with MicroTech represented just 18.16%, less than one-fifth, of Appellant's revenues.[9] Therefore, Appellant's situation is closer to that in *Alutiiq Education*, SBA No. SIZ-5371, where the challenged firm drew only 20% of its revenues from a single source, than *TPG Consulting*, SBA No. SIZ-5306 or *Incisive Technology*, SBA No. SIZ-5122, where the relationships of the challenged firms to the alleged affiliates were longstanding, represented a substantial portion of the challenged firm's receipts, and continued up to the date for determining size. Accordingly, I find the Area Office erred in determining Appellant and MicroTech were affiliated on February 1, 2012. At this time, the firms were former affiliates.

Moreover, I agree with Appellant that it does not follow that MicroTech could control Appellant as of the date of self-certification, just because MicroTech had that power at an earlier time. By the time Appellant self-certified as small, the relative share of Appellant's revenue derived from contracts with MicroTech had declined significantly. The Area Office was not persuaded by this decline, noting the date of self-certification was “merely one month” into fiscal year 2012, the period during which Appellant established its independence from MicroTech. As Appellant notes, however, the regulations do not prescribe a specific waiting period for establishing independence. So long as affiliation ceases before the date for determining size, the firms are former affiliates and their receipts will not be aggregated. 13 C.F.R. § 121.104(d)(4).

IV. Conclusion

The Area Office determined that Appellant exceeded the size standard due only to its economic dependence on MicroTech. By itself, Appellant is an eligible small business.

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[8] It is immaterial, and not evidence of economic dependence, that Appellant purchased this contract from MicroTech. The record reflects this was an arm's length commercial transaction. Affidavit, ¶ 14.

[9] Nevertheless, Appellant's receipts subsequent to the date of self-certification, and the proportion of those attributable to MicroTech, cannot be considered here, because Appellant received these receipts after the date for determining size.

Appellant has shown that the economic dependence portion of the size determination is clearly erroneous. I therefore GRANT this appeal and REVERSE the Area Office's size determination. Appellant is a small business for purposes of the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge