United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:
Global, A 1st Flagship Company,  
Appellant,  
Appealed From
Size Determination Nos. 6-2013-027, -028, -029

SBA No. SIZ-5462  
Decided: April 22, 2013

APPEARANCES


Robert E. Korroch, Esq., William A. Wozniak, Esq., Williams Mullen PC, Newport News Virginia, for Ship Maintenance, LLC

Michael J. Gardner, Esq., Megan E. Burns, Esq., Erik M. Ideta, Esq., Troutman Sanders LLP, Norfolk, Virginia, for George G. Sharp, Inc.

DECISION

I. Introduction and Jurisdiction

On January 16, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination Nos. 6-2013-027, 6-2013-028, and 6-2013-029 concluding that Global, A 1st Flagship Company (Appellant) is not a small business under the 1,000-employee size standard associated with the subject procurements. In the size determinations, the Area Office found that Appellant is affiliated with Owl Companies, Inc. (Owl Companies), a large business, under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5), and the successor-in-interest rule, 13 C.F.R. § 121.105(c). Appellant maintains that the size determinations are flawed and should be reversed. For the reasons discussed infra, the appeal is granted, and the size determinations are reversed.

1 This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.
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 determinations, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitations, Protests, and Response

In February 2012, the U.S. Department of the Navy, Fleet Logistics Center Norfolk (Navy) issued Solicitation Nos. N00189-12-R-Z010 and N00189-12-R-Z008 for Navy inactive ship maintenance operations (NISMO) services at Bremerton, Washington and Pearl Harbor, Hawaii. The acquisitions were set aside entirely for small businesses, and were assigned North American Industry Classification System (NAICS) code 336611, Ship Building and Repairing, with a corresponding size standard of 1,000 employees. Appellant self-certified as a small business on March 22, 2012 for the Pearl Harbor procurement and March 23, 2012 for the Bremerton procurement. (Size Determination Nos. 6-2013-027 and 6-2013-028, at 2.)

On December 10, 2012, the Navy announced that Appellant was the apparent successful offeror for both acquisitions. Ship Maintenance, LLC (Ship Maintenance), an unsuccessful offeror, filed size protests against Appellant in conjunction with both procurements. A second unsuccessful offeror, George G. Sharp, Inc. (Sharp), protested Appellant's size for the Bremerton acquisition. The Navy forwarded the protests to the Area Office for consideration.

In its protest, Ship Maintenance alleged that Appellant is affiliated with Owl Companies through identity of interest, common management, and the ostensible subcontractor rule. (Ship Maintenance Protest, at 8-10.) Ship Maintenance asserted that Appellant is a subsidiary of Owl Companies, a large business with approximately 1,500 to 2,100 employees. (Id. at 2-3.) Further, Ship Maintenance contended that “Global, A 1st Flagship Company” is a fictitious name of Owl International, Inc., a subsidiary of Owl Companies. Ship Maintenance alleged that Appellant “shares the same corporate headquarters” as Owl Companies. (Id. at 4.) According to Ship Maintenance, though, Owl Companies is the only occupant identified on the exterior of the building, and the building is owned by Tecolote Resources, Inc., another affiliate of Owl Companies. (Id. at 7-8.) Ship Maintenance contended that Appellant “lacks the capability to perform the contracts,” and will be dependent upon Owl Companies for personnel and resources. (Id. at 10.) Ship Maintenance also maintained that Appellant's President, Ms. Sherri Bovino, shares interests with the Chairman and CEO of Owl Companies, Mr. Gregory Burden, which “also suggest[s] affiliation among the various entities that they control.” (Id. at 7.) Ship Maintenance pointed out that Ms. Bovino is Executive Director of The Owl Foundation, a charitable organization established by Mr. Burden and Owl Companies. Further, Mr. Burden is the Registered Agent of Palm Desert Shops, LLC, for which Ms. Bovino is the Managing Member. In addition, suggested Ship Maintenance, there could be a family relationship between

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2 Solicitation No. N00189-12-R-Z010 pertained to the Bremerton location, and Solicitation No. N00189-12-R-Z008 to the Pearl Harbor location.
Ms. Bovino and Mr. Burden. (Id. at 9.)

In its protest, Sharp alleged that “Global, A 1st Flagship Company” is a fictitious name of Owl International, “an apparent subsidiary of Owl Companies.” (Sharp Protest at 2.) Sharp observed further that Appellant's principal, Ms. Bovino, is identified as President and CEO of Owl International, and that Appellant shares the same physical address as Owl Companies. Sharp asserted that Appellant is affiliated with Owl Companies under several theories, including common management, identity of interest, and the totality of the circumstances. (Id. at 4-6.)

On December 29, 2012, Appellant submitted to the Area Office its response to the protests, a completed SBA Form 355, charter documents, tax returns, and other requested materials. Appellant explained that, in May 2005, Ms. Bovino, who was at that time an Owl Companies employee, “marshaled her financial resources, business experience, common sense and nerve” and acquired 100% of Owl International, Inc. d/b/a Global Associates (Owl International) through a stock purchase agreement. (Response at 4-5.) Pursuant to this transaction, Ms. Bovino's company, 1st Flagship, Inc. (1st Flagship), acquired complete ownership of Owl International, including its assets, its multi-year lease of office space, a NISMO contract, and the right to use the names “Owl” and “Global”. (Id. at 5.) Thus, Appellant maintained, Appellant and Owl Companies have been “independent companies associated only by their histories” since May 2005. (Id.) Appellant emphasized that Appellant and Owl Companies no longer have any common ownership or management. Appellant acknowledged that it currently has two subcontracts with Owl Companies, but claimed that these subcontracts were the result of arms-length dealings and represent a small fraction (less than 8% combined) of Appellant's total revenues. (Id. at 7-10.) Further, in September 2010, Appellant purchased Owl Companies' entire interest in Global PCCI, a joint venture with a third party. As a result of the September 2010 transaction, Appellant is now the controlling member (51%) of the joint venture, and Owl Companies no longer has any involvement. (Id. at 6, 14 n.9.) Accordingly, in Appellant's view, there is no validity to the contention that Appellant is economically dependent upon Owl Companies. Appellant denied any family relationship between the principals of Appellant and Owl Companies. (Id. at 11.) In addition, although it is true that Appellant leases office space in the same building as Owl Companies, that lease was acquired in 2005 as part of the stock purchase agreement, and Appellant does not share resources, such as computer systems or office equipment, with Owl Companies or other occupants. (Id. at 16.) Appellant urged the Area Office to “please look for hard evidence of control, as opposed to superficial appearances — you will find none of the former, but an abundance of the latter.” (Id. at 3.)

B. Size Determinations

On January 16, 2013, the Area Office issued Size Determination Nos. 6-2013-027, 6-2013-028, and 6-2013-029 concluding that Appellant is not a small business due to affiliation with Owl Companies.3

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3 The Area Office issued two formal size determinations which are substantively identical. One of the determinations, assigned case numbers 6-2013-027 and 6-2013-028, addressed the protests filed by Ship Maintenance. The second size determination, assigned case number 6-2013-029, pertained to the Sharp protest.
The Area Office examined Appellant's corporate structure, and determined that 1st Flagship, a holding company, is the sole shareholder of Appellant. 1st Flagship in turn is wholly-owned by the Sherri Bovino 2009 Revocable Trust (Trust). The Trust identifies Ms. Bovino as Trustee and Mr. Burden as Successor Trustee, and further indicates that Ms. Bovino and Mr. Burden share a close relationship. (Size Determination Nos. 6-2013-027 and 6-2013-028, at 3.) The Area Office found that “[Ms.] Bovino controls the Trust.” (Id.) Ms. Bovino is also Appellant's president and Appellant's sole director. The Area Office concluded that “Ms. Bovino controls or has the power to control [Appellant].” (Id.)

The Area Office summarized the protest allegations and Appellant's response. The Area Office considered that “the information presented in this case is insufficient to establish affiliation under a single independent factor”, but that “the totality of the circumstances shows the interactions between [[Appellant] and the Owl Companies are suggestive of reliance based on the companies' business and personal ties and relationships.” (Id. at 5.) The Area Office identified ten “indicators of control” that “establish a reasonable conclusion” that Appellant and Owl Companies are affiliated under the totality of the circumstances:

1. [Mr.] Burden, Chairman and CEO (and majority shareholder) of Owl Companies is a Successor Trustee named in the [Trust] and in the event Ms. Bovino ceases to act as Trustee of [Appellant], Mr. Burden has the power to control [[Appellant] (and shares a close personal relationship with Ms. Bovino);
2. Ms. Bovino and Mr. Burden and his family members jointly own Palm Desert Shops of which Ms. Bovino is the Managing Member and Mr. Burden is the Registered Agent;
3. In 2005, 1st Flagship acquired all assets and interest in Owl International/Global (entity of Owl Companies), a large concern with which it has an ongoing relationship, and Global PCCI in 2010;
4. 1st Flagship's same use of the “Owl” and “Global” names after the acquisition was completed with Owl International/Global provides a unified corporate connection to the Owl Companies thus creating an impression that the companies are associated and reliant on Owl Companies’ experience and longstanding business relationship with the Government ([Appellant's] website claims it has the legacy of performing operation and maintenance services on Federal contracts since 1964.);
5. [Appellant] and Owl Companies share the same corporate address (in a building which is owned by an Owl Companies' affiliate);
6. [Appellant] (as a subcontractor) currently performs two ongoing administrative services contracts for the Owl Companies since 2007 (and the employees are the same employees that previously performed these services as Owl [C]ompanies employees);
7. Prior to 2005, [Ms.] Bovino held the position of Vice President of Administration at the Owl Companies;
8. [Ms.] Bovino is listed as the Executive Director of the Owl Foundation in news articles, which is a non-profit entity owned by [Mr.] Burden and the Owl Companies;
9. [Ms.] Bovino's tangible contribution is its status as an eligible woman-owned small business; and

(Id. at 5-6.)

The Area Office also stated that, under SBA's successor-in-interest rule, 13 C.F.R. § 121.105(c), a firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. Here, Appellant acquired all interest in, and assets of, Owl International, and therefore must be deemed affiliated with Owl Companies. (Id. at 6.)

Appellant acknowledged affiliation with Palm Desert Shops and certain other entities, and the Area Office found that the combined size of Appellant and its acknowledged affiliates do not exceed the 1,000-employee size standard. (Id. at 3.) Appellant conceded, however, that Appellant does not qualify as small if affiliated with Owl Companies. (Id. at 4.) As a result, the Area Office concluded that Appellant is not an eligible small business for the procurements in question.

C. OHA Proceedings

1. The Appeal

On January 30, 2013, Appellant filed the instant appeal with OHA. Appellant maintains that the Area Office correctly did not find Appellant to be affiliated with Owl Companies under the theories advanced by the protesters, such as common ownership, common management, economic dependence, family interests, and the ostensible subcontractor rule. (Appeal at 8.) Appellant insists, however, that the Area Office erroneously determined that Appellant is affiliated with Owl Companies under the totality of circumstances and the successor-in-interest rule. (Id.)

Appellant reiterates its position that Appellant is owned and controlled solely by Ms. Bovino, and is completely independent from Owl Companies. Appellant emphasizes that Ms. Bovino, using only her own resources, acquired full ownership of Owl International in May 2005. Since the acquisition, Appellant and Owl Companies have been “separately owned, managed, financed and operated in all respects.” (Id. at 1.) Appellant and Owl Companies do not now — and have not since 2005 — shared owners, directors, officers, or employees. Appellant receives no technical or financial assistance from Owl Companies, and the companies do not team with one another to jointly pursue Government contracts. (Id. at 2.) Business dealings between Appellant and Owl Companies are minimal, and the two companies do not operate in the same line of business. Further, although Appellant retains the legal name “Owl International, Inc.,” Appellant does not attempt to associate itself with Owl Companies, and instead does business as “Global, A 1st Flagship Company.” (Id.)

Appellant next turns to the ten “indicators of control” cited by the Area Office as
evidence of affiliation under the totality of the circumstances. Appellant contends that the Area Office violated 13 C.F.R. § 121.1009(e), because the Area Office conducted no substantive analysis but instead “simply lists these indicators, and leaves it to the reader to connect the dots.” (Id. at 3.) Moreover, the Area Office failed to address the core issue in any affiliation case: whether the challenged firm controls, or is controlled by, another concern. (Id. at 8-10.) In this case, although the Area Office identified various connections between Appellant and Owl Companies, the Area Office “has not explained how any of these purported interactions between the companies actually evince Owl Companies' control over [Appellant].” (Id. at 9, emphasis in original.)

Appellant recites each of the ten factors referenced by the Area Office, and offers a rebuttal as to why these factors do not suggest affiliation with Owl Companies. (Id. at 11-18.) According to Appellant, “[n]ot one of the ten 'indicators of control' identified in the Size Determinations, when properly evaluated in the context of all of the evidence and relevant circumstances provided in [Appellant's] protest responses, even comes close to establishing that the Owl Companies or [Mr.] Burden has the power to control [Appellant], or vice versa.” (Id. at 10.)

First, although it is true that Mr. Burden is named as the Successor Trustee of the Sherri Bovino 2009 Revocable Trust, Ms. Bovino herself is the Trustee, and Mr. Burden has no power whatsoever to control the Trust so long as Ms. Bovino remains Trustee. (Id. at 11.) Thus, Mr. Burden's role as Successor Trustee is not evidence of any current power to control Appellant.

Second, with regard to Mr. Burden's and Ms. Bovino's joint investment in Palm Desert Shops, the Area Office failed to consider that Ms. Bovino and her family own more than 90% of the company. (Id.) Mr. Burden and his family hold an 8% interest, which is not sufficient to give him any control over Palm Desert Shops. Moreover, even assuming that Mr. Burden does control Palm Desert Shops, the issue is not relevant to whether Mr. Burden or Owl Companies controls Appellant. (Id. at 12.)

Third, Ms. Bovino's acquisition of Owl International occurred nearly eight years ago, and there is no evidence that Owl Companies or Mr. Burden still controls Appellant. (Id. at 12-13.) It is not unusual for a large company to sell a subsidiary to the subsidiary's management, because the incumbent management is well-positioned to operate the subsidiary successfully. (Id. at 16.) Appellant argues that the size determinations, if affirmed, “would create an impossible standard for entrepreneurs like Ms. Bovino to establish independence and sever affiliation from a former corporate parent.” (Id. at 3.)

Fourth, Appellant retains the legal name “Owl International, Inc.”, but does business as “Global, A 1st Flagship Company” so as to differentiate itself from Owl Companies. Appellant is not known to its customers or to the general public as Owl International. (Id. at 13.) Further, Appellant should not be expected to change its legal name in order to preserve its size status.

Fifth, although it is true that Appellant leases space in same building as Owl Companies, the lease was an asset of Owl International which Appellant acquired as part of the 2005 acquisition. (Id.) There are also other tenants in the building, and the “overwhelming majority”
of Appellant's personnel do not work in this location. (Id. at 14.) Appellant emphasizes that Appellant and Owl Companies each have their own staff, office equipment, and computer systems. (Id.)

Sixth, with regard to Appellant's two subcontracts with Owl Companies, Appellant argued in response to the protests, and the Area Office agreed, that these subcontracts are too small a portion of Appellant's revenues (less than 8% combined) to establish affiliation through economic dependence. Indeed, OHA has suggested in case decisions that economic dependence cannot arise when one firm derives less than 30% of its revenues from another. (Id. at 16, citing Size Appeal of Faison Office Products, LLC, SBA No. SIZ-4834 (2007).)

Seventh, while Appellant does not dispute that Ms. Bovino was formerly a Vice President at Owl Companies, she has not held this position for almost eight years, since acquiring Owl International. Under OHA precedent, prior employment with an alleged affiliate does not give rise to affiliation. (Id., citing Size Appeal of CJW Constr., Inc., SBA No. SIZ-5254 (2011).)

Eighth, Ms. Bovino is Executive Director of The Owl Foundation, a charitable organization, but the Area Office did not attempt to explain how this fact is relevant to the issue of affiliation between Appellant and Owl Companies. Ms. Bovino's charitable pursuits have no bearing on whether Mr. Burden or Owl Companies controls Appellant. (Id. at 17.)

Ninth, the Area Office's assertion that “[Ms.] Bovino's tangible contribution is its status as an eligible woman-owned small business” is “offensive on its face” and unsupported by the record. (Id. at 17-18.) Insofar as the Area Office doubts Ms. Bovino's qualifications, “it is uncontradicted in this record that Ms. Bovino's expertise, training, education, experience and financial resources are her contributions, rather than her gender.” (Id. at 18.)

Tenth, although it is true that many of Appellant's current employees were previously employees of Owl Companies, this merely indicates that much of the incumbent workforce of Owl International chose to remain with the company following the 2005 acquisition. “The fact that many of these employees continue to work for [Appellant] nearly eight years later is not evidence of external control; rather, it is a tribute to Ms. Bovino's stewardship during that time, and the proper benefit of the bargain she drove in buying the company.” (Id. at 18.)

Appellant also contends that the Area Office erred in finding Appellant affiliated with Owl Companies under the successor-in-interest rule. Appellant argues that the rule applies when one concern acquires the assets and/or liabilities of a predecessor company. In that situation, the rule contemplates that “the annual receipts and employees of the predecessor will be taken into account in determining size.” 13 C.F.R. § 121.105(c). In this case, by contrast, 1st Flagship acquired the stock (not the assets) of Owl International. Further, Owl International is now Appellant, so there is no separate “predecessor” entity other than Appellant itself. (Appeal at 19-20.) As a result, Appellant insists, the successor-in-interest rule has no application here.

2. Sharp's Response

On February 18, 2013, after counsel reviewed the record under the terms of a protective
order, Sharp filed its response to the appeal. Sharp asserts that the Area Office correctly found that Appellant and Owl Companies are affiliated under the totality of the circumstances, and correctly concluded that Appellant is the successor-in-interest to Owl Companies.

Sharp observes that SBA regulations and OHA precedent expressly permit an area office to find affiliation under the totality of the circumstances based on a combination of facts, even when none of the specific grounds enumerated under 13 C.F.R. § 121.103 is applicable. Thus, Sharp asserts, the instant appeal rests on the flawed premise that Appellant can prevail by critiquing each individual issue cited by the Area Office. “[Appellant’s] attempt to isolate and explain away each one of these ten indicators as an independent basis for finding control is futile, as the Area Office properly considered all of these indicators together.” (Sharp Response at 2.)

Sharp maintains that the Area Office properly considered the personal relationship between Ms. Bovino and Mr. Burden. Sharp notes that the Trust document not only names Mr. Burden as Successor Trustee, but further states that Ms. Bovino has a “committed relationship” with Mr. Burden. Accordingly, while Ms. Bovino and Mr. Burden are not a married couple, Sharp infers that their relationship is “akin to marriage.” (Id. at 8.) Appellant itself admits that Ms. Bovino and Mr. Burden also have a common investment in Palm Desert Shops, and are jointly involved with The Owl Foundation.

Sharp next contends that Appellant and Owl Companies “share a close business relationship.” (Id. at 9.) Sharp maintains that Appellant could have chosen to relocate itself to different office space, and the fact that Appellant has not done so “demonstrates a concerted plan to remain in close proximity with Owl Companies.” (Id.) Further, in Appellant's proposals for subject procurements, Appellant claimed [XXX] years of [XXXXXXXXXXXXXXXX], dating back to the time when Owl International was part of Owl Companies. In Sharp's view, Appellant's “reliance on the company's history, past experience and goodwill in order to bid on government contracts (including the contract at issue in this appeal) evinces its close connection to, and dependence on, Owl Companies.” (Id. at 10.) Sharp also points to Appellant's two ongoing subcontracts with Owl Companies. Although the dollar value of these subcontracts may be limited, “their nature reveals that Owl Companies entrusts key aspects of its business to [Appellant].” (Id. at 11.)

With regard to the successor-in-interest rule, Sharp insists that the rule can apply to stock purchases as well as asset purchases, because purchasing 100% of a company's stock necessarily results in a “substantial portion” of its assets changing hands. Sharp also rejects Appellant's contention that the predecessor entity in this case was Owl International, rather than Owl Companies. Sharp observes that, at the time of the acquisition, Owl International was a wholly-owned subsidiary — and thus an “asset” — of Owl Companies. (Id. at 15.) Further, OHA has explained that the underlying purpose of the successor-in-interest rule is to prevent large businesses from evading size requirements by nominally transferring assets to new owners or entities. In Sharp's view, “any finding that the successor-in-interest rule does not apply here would allow [Appellant] to circumvent the purpose of 13 C.F.R. § 121.105(c) through crafty corporate restructuring.” (Id.)
3. Ship Maintenance's Response

On February 19, 2013, after counsel reviewed the record under the protective order, Ship Maintenance filed its response to the appeal. Ship Maintenance asserts that “numerous ties bind the Owl Companies, [Appellant], and [their] principals so tightly that the only reasonable conclusion is reliance establishing their affiliation.” (Ship Maintenance Response at 1.) The instant appeal “misses the point” of the size determinations, because Appellant attempts to refute “each of the numerous indicators of affiliation individually without any consideration for the conclusion that is properly drawn from the factors in total.” (Id. at 6.)

Ship Maintenance argues that Appellant has failed to “explain the many ties between the related individuals and companies when it had an opportunity to do so.” (Id. at 9.) Appellant has not, for example, stated why Ms. Bovino named Mr. Burden as Successor Trustee, nor has Appellant defined the relationship between Ms. Bovino and Mr. Burden. (Id. at 6-7.) Viewed in context with the Area Office's other findings, such as the joint investment in Palm Desert Shops, the Area Office reasonably concluded that “the ties between these companies have never truly been severed.” (Id. at 7.)

Ship Maintenance also disputes Appellant's claim that the Area Office failed to comply with 13 C.F.R. § 121.1009(e). Ship Maintenance argues that the Area Office identified relevant facts, and reached a reasonable decision based on those facts. Appellant does not contest the Area Office's factual findings, but instead disagrees with the Area Office as to whether these facts are valid indicia of control. (Id. at 8.) Appellant's mere disagreement with the Area Office does not establish that the size determinations are inadequate or erroneous. (Id. at 9.)

4. Appellant's Reply

Appellant was granted leave to reply to the Responses, and on February 22, 2013 Appellant filed its Reply. Appellant contends that the interveners, like the Area Office, ignore the dispositive issue in the case: whether Appellant controls, or is controlled by, any other concern. (Reply at 1.) “Because no one controls [Appellant] other than [Ms.] Bovino, who bought her company, entirely on her own nearly eight years ago, and has run her company, entirely on her own, every day since, the Appeals should be granted.” (Id. at 2, emphasis in original.)

Appellant maintains that the interveners mischaracterize the appeal petition. Appellant asserts that it addressed the ten alleged indicia of control individually so as to “be as complete as possible”, but that Appellant did not argue that each individual factor cited by the Area Office must independently establish affiliation. (Id. at 3.) Rather, Appellant maintains, Appellant clearly took the position that the interactions do not demonstrate control “‘either individually or collectively.” (Id.)

Appellant denies the allegation that Appellant relies heavily upon the corporate experience of Owl Companies. While Appellant's proposals did refer to [XXX] years of [XXXX], these statements pertained to the “‘[XXXXXXXXXXXXXXXXXXXXXXXXXX] supporting multiple NISMO contracts,” not to Owl Companies' [XXXXXXXXXXXX]. (Id. at 5.)
Appellant emphasizes that Owl Companies exited the NISMO business in 2005, when Owl Companies sold Owl International to Ms. Bovino. (Id.)

Appellant lastly urges OHA to reject the notion that a quasi-family relationship “akin to marriage” may give rise to affiliation. (Id. at 5-7.) SBA regulations do not contemplate affiliation on such grounds, but instead refer to “legally-recognized and well-defined relationships based on blood and marriage.” (Id. at 7.) Appellant warns that “the inchoate, undefined nature of the ‘akin to marriage’ term would be dangerously volatile if adopted by OHA.” (Id. at 6.)

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 that the size determinations are 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

The Area Office in this case concluded that Appellant is affiliated with Owl Companies under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5), and also found that Appellant should not be treated as a business concern that is separate from Owl Companies pursuant to the successor-in-interest rule, 13 C.F.R. § 121.105(c). As discussed below, Appellant has persuasively shown that neither of these grounds for affiliation is valid. Consequently, the appeal must be granted.

1. Totality of the Circumstances

The totality of the circumstances may be the basis for a finding of affiliation if an area office “is unable [to] establish affiliation under any of the other specific affiliation rules, yet the relationship between the parties taken as a whole is indicative of affiliation.” Size Appeal of LOGMET, LLC, SBA No. SIZ-5155, at 10 (2010). Nevertheless, as with any case, affiliation may be found only when “one [concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 C.F.R. § 121.103(a); see also Size Appeal of Native Energy and Technology Inc., SBA No. SIZ-5249, at 11 (2011) (“As in all affiliation analysis...the touchstone issue is control. A connection between two concerns does not necessarily cause affiliation. There must be an element of control present.”); Size Appeal of LGS Management, Inc., SBA No. SIZ-5160, at 4 (2010) (“control is always the principal question when addressing affiliation”). Accordingly, OHA has held that, in order to find affiliation through the totality of the circumstances, “an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.” Size Appeal of Faison Office Products, LLC, SBA No. SIZ-4834, at 11 (2007). A finding of affiliation under the totality of the circumstances will be overturned if the record does not support the conclusion
that any such power to control exists. *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA No. SIZ-5132 (2010); *Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112, at 7 (2010) (“I conclude upon reviewing these ties, or rather, the absence of ties between the firms, that there is simply not enough here to give either [the challenged firm] or [its alleged affiliate] control or power to control the other.”).

In the instant case, the Area Office identified ten interactions between Appellant and Owl Companies, and characterized those interactions as “‘indicators of control.” See Section II.B, *supra*. As discussed below, though, three of these ten interactions (numbers 3, 7, and 10) are entirely historical in nature, and therefore cannot establish any power to control as of March 2012, when Appellant self-certified as a small business. Four other interactions (numbers 4, 5, 8, and 9) were still in existence in March 2012, but are essentially irrelevant to the issue of control. The size determinations do not explain how any of these four interactions sheds light on the question of affiliation. Accordingly, the key issue presented here is whether the remaining three interactions cited by the Area Office (numbers 1, 2, and 6) are collectively sufficient to establish that Owl Companies controls Appellant, or vice versa.

Interactions 3, 7, and 10 relate to events which transpired long before Appellant self-certified as a small business, and therefore are not valid evidence of any current affiliation. Specifically, the Area Office found that: 1st Flagship acquired complete ownership of Owl International, a subsidiary of Owl Companies, in May 2005; Appellant's principal, Ms. Bovino, was formerly an officer of Owl Companies prior to May 2005; and much of Appellant's workforce was employed at Owl Companies before May 2005. It is undisputed that these historic ties were not in effect as of March 2012, the point in time when size must be determined. 13 C.F.R. § 121.404(a). In fact, the record indicates that Appellant and Owl Companies have had no common ownership, management, or employees since May 2005. Accordingly, while these historic ties could be indicative of past affiliation, they do not establish that Appellant and Owl Companies are still affiliated as of March 2012. See 13 C.F.R. §§ 121.104(d)(4) and 121.106(b)(4)(ii) (a concern's former affiliates are excluded from the size determination “if affiliation ceased before the date used for determining size”); *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291 (2011) (historic ties do not give rise to current affiliation); *Size Appeal of CJW Construction, Inc.*, SBA No. SIZ-5254, at 9 (2011) (prior employment of challenged firm's owner with the alleged affiliate was “too far in the past to be relevant to the question of affiliation today.”). Further, Appellant correctly points out that each of these historic ties can be traced directly to Ms. Bovino's purchase of Owl International, as a going concern with its employees intact, in May 2005. To determine that the sale of a company grants its former owner “control” seven years later — even if the former owner no longer has direct involvement with the company, such as continuing ownership or management — is untenable, as it would essentially prevent such firms from ever being disassociated from their original owners.

The Area Office also cited four other interactions (numbers 4, 5, 8, and 9) which were in effect in March 2012, but nevertheless are not relevant evidence of affiliation because they do not evince any power to control. The Area Office specifically found that: Appellant retained, and has continued to use, the “‘Owl” and “Global” names following the acquisition of Owl International; Appellant leases office space in the same building as Owl Companies, and the building is owned by another affiliate of Owl Companies; Ms. Bovino is Executive Director of
The Owl Foundation, a charitable organization associated with Mr. Burden; and Appellant is a woman-owned small business. Beyond simply listing these interactions, however, the size determinations do not explain how these interactions are at all probative of any power to control. The fact that two companies have similar names “is no indicia of affiliation, as many firms may have similar names.” Size Appeal of McLendon Acres, Inc., SBA No. SIZ-5222, at 7 (2011). It is thus immaterial that Appellant retains “Owl International” as its legal name. If anything, Appellant's persistent marketing of itself as “Global, A 1st Flagship Company” demonstrates that Appellant has sought to differentiate itself from Owl Companies. It is true that Appellant and Owl Companies are both tenants in the same office building; however, given that the firms do not share office equipment, computer systems, or personnel, this is not suggestive of affiliation. Size Appeal of Roundhouse PBN, LLC, SBA No. SIZ-5383, at 17-18 (2012) (“The mere fact that companies operate in similar lines of work, or in close proximity to one another, does not give rise to affiliation under 13 C.F.R. Part 121.”). Similarly, barring any unusual provisions in Appellant's lease, it is not significant that Appellant's landlord is an affiliate of Owl Companies. Size Appeal of Rio Vista Management, LLC, SBA No. SIZ-5316, at 12 (2012). Ms. Bovino's philanthropic pursuits likewise are not pertinent to the issue of control between Owl Companies and Appellant. Even supposing, for purposes of argument, that Ms. Bovino may control The Owl Foundation, the Area Office did not explain how this might enable her to influence, or control, Owl Companies. Lastly, the simple fact that Appellant is a woman-owned small business does not suggest control by Owl Companies, or by Mr. Burden. As Appellant emphasizes, Appellant and Owl Companies do not collaborate to perform projects or contracts, nor are they competitors because they operate in different lines of business. Thus, Appellant's status as a woman-owned small business has no bearing on its relationship with Owl Companies. In sum, interactions 4, 5, 8, and 9 are not relevant evidence that Owl Companies controls Appellant, or vice versa.

The remaining three interactions (numbers 1, 2, and 6) cited by the Area Office are potentially relevant, and were still in effect in March 2012. Even viewing these interactions collectively, however, and mindful of the “clear error” standard of review on appeal, these interactions do not support a conclusion that any power to control exists.

In interaction number 1, the Area Office found that:

1. [Mr.] Burden, Chairman and CEO (and majority shareholder) of Owl Companies is a Successor Trustee named in the Sherri Bovino 2009 Revocable Trust [which owns 100% of Appellant through an intervening holding company] and in the event Ms. Bovino ceases to act as Trustee of [Appellant], Mr. Burden has the power to control [Appellant] (and shares a close personal relationship with Ms. Bovino).

(Size Determinations 6-2013-027 and 6-2013-028, at 5.) Earlier in the size determinations, though, the Area Office found that Ms. Bovino herself is the sole Trustee; that Ms. Bovino alone “controls the Trust”; and that Mr. Burden, as Successor Trustee, will become empowered to control the Trust only if Ms. Bovino “ceases to act as Trustee.” (Id. at 3.) Based on the Area Office's own findings, then, Mr. Burden's role as Successor Trustee gives him no present power to control the Trust. Although it is possible that Mr. Burden might control the Trust in the future,
any such control is conjectural as it is contingent upon unknown future events.\textsuperscript{4} OHA has declined to entertain speculative scenarios as evidence of affiliation under the totality of the circumstances. \textit{Native Energy}, SBA No. SIZ-5249, at 11-12. Accordingly, although Mr. Burden is named as Successor Trustee, he currently has no power to control the Trust, nor did he control the Trust as of March 2012. This interaction does not, therefore, suggest affiliation between Appellant and Owl Companies.

Both interveners maintain that the size determinations should be affirmed because of the personal relationship between Ms. Bovino and Mr. Burden, which the interveners suggest may be “akin to marriage” or quasi-familial in nature. (Ship Maintenance Response at 6-7; Sharp Response at 8.) These arguments, though, are problematic for several reasons. The Area Office did not determine that the relationship between Ms. Bovino and Mr. Burden was quasi-familial or akin to marriage, but instead found merely “a close personal relationship.” (Size Determinations 6-2013-027 and 6-2013-028, at 5.) Further, the Area Office appears to have attached little significance to the relationship, mentioning it only as a parenthetical in conjunction with its primary finding that Mr. Burden is the Successor Trustee of the Trust. (\textit{Id.}) Neither intervener argues that the Area Office's analysis of the relationship is flawed or incomplete. Thus, the record provides no real basis for OHA to decide, for the first time on appeal, that the relationship between Ms. Bovino and Mr. Burden is quasi-familial in nature or akin to marriage. Moreover, SBA regulations recognize affiliation through family relationships (\textit{i.e.}, blood or marriage), but not based on friendships or other close personal ties. Under existing law, then, the mere fact that Ms. Bovino and Mr. Burden have a close, but non-familial, personal relationship is not valid grounds to conclude that their respective companies are affiliated.

Turning to interaction number 2, the Area Office found that:

2. Ms. Bovino and Mr. Burden and his family members jointly own Palm Desert Shops of which Ms. Bovino is the Managing Member and Mr. Burden is the Registered Agent.

(Size Determinations 6-2013-027 and 6-2013-028, at 5.) The record indicates, however, that Ms. Bovino and her family own more than 90% of Palm Desert Shops. Accordingly, Appellant acknowledged that Appellant is affiliated with Palm Desert Shops, as both firms are controlled by Ms. Bovino. Mr. Burden's family interests in Palm Desert Shops are less than 10%, which plainly is insufficient to enable him to control that firm. Further, Palm Desert Shops is a distinct entity from Appellant and Owl Companies, and the Area Office offered no explanation how a joint investment in Palm Desert Shops might translate into control over Appellant or Owl Companies. In addition, although it is possible for an identity of interest to arise through common investments, OHA has repeatedly held that such identity of interest requires more than one joint investment. \textit{Size Appeal of Manroy USA, LLC}, SBA No. SIZ-5244, at 4 (2011); \textit{Size Appeal of Eagle Pharms., Inc.}, SBA No. SIZ-5023, at 9 (2009) (“Identity of interest on the basis of 'common investments' plainly requires, at minimum, more than one common investment between two persons.”). Thus, the fact that Ms. Bovino and Mr. Burden share a single common

\textsuperscript{4} It is possible, for example, that Mr. Burden might predecease Ms. Bovino, or that Ms. Bovino might choose to revoke the Trust altogether.
investment is immaterial. Accordingly, interaction number 2 does not suggest affiliation between Appellant and Owl Companies.

Lastly, in interaction number 6, the Area Office found:

6. [Appellant] (as a subcontractor) currently performs two ongoing administrative services contracts for the Owl Companies since 2007 (and the employees are the same employees that previously performed these services as Owl [C]ompanies employees).

(Size Determinations 6-2013-027 and 6-2013-028, at 6.) As Appellant emphasizes in its appeal, however, the subcontracts in question are simply too small a portion (less than 8% combined) of Appellant's receipts to establish any economic dependence or power to control. E.g., Diverse Constr. Group, SBA No. SIZ-5112, at 7-8 (reversing finding of affiliation under the totality of the circumstances when the challenged firm derived only 9.5% of its revenues from the alleged affiliate). Sharp argues that the subcontracts may have greater importance than their limited dollar value indicates, because Owl Companies “entrusts key aspect of its business to [Appellant].” (Sharp Response at 11.) The Area Office, however, made no such finding. Further, the record indicates that Appellant does not provide services to Owl Companies itself, but rather acts as a subcontractor to Owl Companies in performing services for Government entities. Thus, this is not a case where a firm relies upon an alleged affiliate for vital administrative services, such as bookkeeping or payroll, a fact pattern which OHA has sometimes deemed indicative of affiliation. Cf., Size Appeal of L&S Industrial and Marine, Inc., SBA No. SIZ-4978 (2008).

In sum, although the Area Office identified ten interactions between Appellant and Owl Companies, the record does not support the conclusion that either company has the power to control the other. Most of the interactions cited by the Area Office are not relevant, or pertain to historical events which were no longer in effect as of March 2012. The remaining interactions, although potentially relevant, are flawed and do not demonstrate any power to control, particularly given the absence of any common ownership, management, employees, equipment, or facilities. Accordingly, the Area Office clearly erred in finding Appellant affiliated with Owl Companies under the totality of the circumstances.

2. Successor-in-Interest

The Area Office also determined that, because 1st Flagship acquired complete ownership of Owl International in May 2005, Appellant is affiliated with Owl Companies, the former parent of Owl International, through the successor-in-interest rule. (Size Determination 6-2013-027 and 6-2013-027, at 6.) As Appellant correctly observes, this portion of the size determinations is flawed in at least two significant respects.

First, the Area Office improperly invoked the successor-in-interest rule, in lieu of analyzing the case under the newly-acquired affiliate rule. The newly-acquired affiliate rule provides that, if a challenged concern acquires an affiliate during the period of measurement for determining size, the receipts or employees of the acquired concern are added to those of the challenged concern for size purposes. 13 C.F.R. §§ 121.104(d)(2), 121.106(b)(4)(i). By contrast,
the successor-in-interest rule applies when a challenged firm acquires “a substantial portion of [a predecessor's] assets and/or liabilities.” 13 C.F.R. § 121.105(c). SBA's commentary in the Federal Register makes clear that the two rules are not identical, and that the successor-in-interest rule is “intended to apply to the situation where a business entity ceases and a 'new' business entity emerges with basically the same assets and liabilities as the previous entity.” 61 Fed. Reg. 3280, 3282 (Jan. 31, 1996). Accordingly, in interpreting these provisions, OHA has recognized that the successor-in-interest rule applies to the acquisition of assets or liabilities, whereas the newly-acquired affiliate rule involves the purchase of an entire company, such as “a separate corporation, LLC, or division.” Size Appeal of AIS Engineering, Inc., SBA No. SIZ-5348, at 7 (2012).

Here, 1st Flagship acquired complete ownership of Owl International, not merely a substantial portion of Owl International's assets or liabilities. Further, there is no separate “predecessor” entity because Owl International is now Appellant itself. Owl International did not cease to exist following the acquisition, and Appellant still retains the legal name Owl International. Thus, in purchasing Owl International, 1st Flagship acquired an affiliate, and the successor-in-interest rule is not applicable. Had the case been analyzed under the newly-acquired affiliate rule, the Area Office would have found that Appellant and Owl International are the same legal entity, and that Appellant has been in 1st Flagship's hands since May 2005, far longer than 12-month period which is utilized for computing size under an employee-based size standard. As a result, there are no additional employees of Owl International, beyond those of Appellant itself, to aggregate with Appellant's employee count.

A second significant flaw in the size determinations is that, even assuming that the successor-in-interest rule were applicable, the Area Office could not reasonably apply that rule to conclude that Appellant is affiliated with Owl Companies, the former parent company of Owl International. The Area Office made no findings to suggest that Appellant is the successor-in-interest to Owl Companies, or that Appellant has essentially the same assets and/or liabilities as Owl Companies. Moreover, the successor-in-interest rule does not contemplate that, when the rule applies, the acquiring firm becomes affiliated not only with the predecessor company, but also with all affiliates of the predecessor company. On the contrary, OHA has repeatedly held that a firm which acquires most of the assets of a subsidiary or division of a larger firm is affiliated only with that subsidiary or division, and not with the entire parent company. Size Appeal of Mark Dunning Industries, Inc., SBA No. SIZ-5284, at 7-8 (2011); Size Appeal of Alex-Alternative Experts, LLC, SBA No. SIZ-4974, at 5-6 (2008). In short, then, even if the successor-in-interest rule were applicable, the Area Office had no valid basis to conclude that Appellant is thereby affiliated with Owl Companies.

IV. Conclusion

Appellant has demonstrated that it is not affiliated with Owl Companies under either of the grounds identified by Area Office. Further, Appellant itself is a small business, and the Area Office found that Appellant does not exceed the 1,000 employee size standard unless Appellant is affiliated with Owl Companies. Accordingly, the appeal is GRANTED, and the size determinations are REVERSED. Appellant is an eligible small business for the subject
procurements. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge