United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Birmingham Industrial Construction, LLC, Appellant, Appealed From Size Determination Nos. 3-2019-007 and 3-2019-008	SBA No. SIZ-5984 Decided: February 12, 2019

APPEARANCES

` J. Dale Gipson, Esq., Katherine E. McGuire, Esq., Michael W. Rich, Esq., of Maynard Cooper & Gale, P.C., Hunstville, Alabama, for Appellant

DECISION

I. Introduction and Jurisdiction

On November 7, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 03-2019-007 and 03-2019-008 finding Birmingham Industrial Construction, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, this matter is remanded to the Area Office for a new calculation of Appellant's average annual receipts.

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 and Protest

On June 18, 2018, the U.S. Department of Veterans Affairs (VA), Veterans Integrated Service Network (VISN) 7 Construction, Atlanta, Georgia issued Multiple Award Task Order (MATO) No. 3624718R0307 requesting a broad range of construction, maintenance, alteration, and repair services affecting real property at eight VISN major medical facilities and other various related off-site VA-owned medical facilities. The Contracting Officer (CO) set the procurement aside entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding $36.5 million annual receipts size standard.

On September 20, 2018, the CO awarded the contract to Appellant. On September 24, 2018, the CO notified unsuccessful offerors of the award. On October 4, 2018, unsuccessful offerors, Coburn Contractors, LLC (Coburn) and Nacci Construction Services, Inc. (Nacci), protested Appellant's size. Coburn alleged Appellant's overall revenue should include its earnings from joint venture projects "with [Company #1], [Company #2], and other businesses" as well as the revenue from Appellant's affiliate, [Company #3]. (Coburn protest, at 1.) Nacci alleged Appellant "may have annual revenue exceeding the $36.5 million dollar maximum as it was listed in Inc. 5000's 2016 ranking as having a 2015 revenue of $43.3 million" and a bonding capacity of $75 million, "suggesting its average annual revenue could well exceed $36.5 million." (Nacci protest, at 1.)

B. Appellant's Protest Response and Area Office Investigation

On October 29, 2018, Appellant responded to the protests. Appellant argued its "federal income tax returns for the past three years demonstrate its average annual [r]eceipts (as defined by 13 C.F.R. § 121.104) equal [$XXXXXX] — well below the applicable size standard for the procurement of $36.5 Million." (Protest Response, at 1.) In response to Coburn's allegations that Appellant's revenue should include its earnings from its joint ventures with [Company #1], [JV #1] and [JV #2], and [Company #2], [JV #3], Appellant argued that the joint ventures were "SBA approved" and Appellant's "share of profits from both joint ventures is included in its total Receipts as reflected in its tax returns." (*Id.* at 2.) Thus, Coburn's allegations fail to establish that Appellant is other than small. With respect to Appellant's association with [Company 3], Appellant stated:

> The last three years' federal income tax returns for [Company #3] are submitted with this letter. (*See* Exhibits, G, H, and I). Assuming [Company #3] is an affiliate of [Appellant], the combined three year average Receipts for the two entities ([Company #3] and [Appellant]) equal [$XXXXXX] — well below the applicable size standard for the procurement of $36.5 million. Because the combined Receipts of the companies [do] not exceed the applicable size standard, [Appellant] chooses not [to] contest its affiliation with [Company #3] for purposes of this Size Determination.

(*Id.*) Appellant's statement regarding its association with [Company #3] included a footnote noting that Appellant has undergone eight years of eligibility reviews as a participant in SBA's 8(a) Business Development Program and "never has SBA made a finding of affiliation" between Appellant and [Company #3]. (*Id.*) In response to the Area Office's inquiry regarding the relationship between Appellant and [Company #3], Appellant stated:

> The relationship between [Company #3] and [Appellant] is strictly as subcontractors. [Company #3] operates from its main office located in Montgomery, AL and [Appellant] from Alabaster, AL. [Individual #1] is a member of [Company #3] Enterprises and he is employed by [Appellant]. Both entities have vehicle leases and [a] plane sharing arrangement; beyond the stated relationships, there are no shared employees, facilities, or other shared resources between [Company #3] and [Appellant].

(Letter from Rafael Cabello to Ivette Bascumbe, November 2, 2018). Appellant also submitted its SBA Form 355 and 2015, 2016, and 2017 federal income tax returns for itself, [Company #3], [JV #1], [JV #2], [JV #3], [Company #4], (which is 50% owned by [Individual #1] and 50% owned by Ms. Cabello), [Company #5], (which is a holding company owned 100% by [Company #3]), and [Company #6], (which is 33.3% owned by [Individual #1], where Ms. Cabello and her father, [Individual #2], have a 33.3% share each).

Appellant also included its consolidated financial statements and all of its agreements with [Company #1], [Company #2], and [Company #3]. Note 11-Related Party Transactions - of the consolidated financial statements states:

> **11. Related Party Transactions**
>
> [Appellant] leases equipment and facilities from related parties on a year-to-year basis. One related party performs work as a subcontractor and [Appellant] provides construction services for that entity. Following is a schedule of related party transactions as of and for the year ended December 31, 2017:

Equipment Leases	$[XXX]
Building Leases	[XXXX]
Subcontractor Costs	[XXXX]
Accounts Receivable	[XXX]
Accounts Payable	[XXXX]
Vehicle rental income	[XXXXX]

(Exhibit K of Protest File). The Area Office requested clarification from Appellant regarding this financial statement: "In the financial statements it indicated 'Related Party Transaction.' Who are these entities. The financial statement also states [Appellant] leases from a related party who is this entity? Provide the lease agreement. Disclose all related transactions and the details of the relationship." (Email from Ivette Bascumbe to Rafael Cabello, November 1, 2018.) In response, Appellant stated:

> Rafael Cabello — [Appellant]; Angelia Cabello — [Company #3], [Company #4], [Company #5].
>
> [Company #4]: Leases office space in Alabaster, AL and Gulfport, MS to [Appellant]
>
> [Company #3]: Leases seven (7) vehicles from [Appellant] & [Company #3] leases three [sic] vehicles from [Appellant]
>
> [Company #5]: leases small aircraft to [Appellant]
>
> [Appellant] and [Company #3] provide construction services to each other as subcontractors

(Letter from Rafael Cabello to Ivette Bascumbe, November 2, 2018). When asked if all revenues from [Company #3] are earned from Appellant, Appellant responded, "No, please see Letter from [Company #3] enclosed," and provided a letter from [Company #3] stating:

> . . .
>
> Please see below requested revenue for [Company #3] for 2015-2017 separated by our customers:

XXXXXXXXX	$[XXXXXX]
XXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXX	$[XXXXX]
XXXXXX	$[XXXXX]
XXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXX	$[XXXXX]
XXXXXXXXXXXXXXXXX	$[XXXXX]

(Letter from Rafael Cabello to Ivette Bascumbe, November 2, 2018 providing [Company #3] revenues.)

Appellant's financial statements included financial documentation for [JV #1] and [JV #3], including figures describing its consolidated and eliminations of contract revenue, cost of contract revenue, operating expenses and other income.

C. Size Determination

On November 7, 2018, the Area Office issued its size determination finding Appellant to be other than small because its annual receipts exceed the $36.5 million size standard.

The Area Office first analyzed Appellant's ownership and management. The Area Office found that Appellant is 100% owned by Mr. Rafael Cabello who is the President of Appellant and thus has the power to control Appellant. (Size Determination, at 4.)

The Area Office then analyzed [Company #3]'s ownership and management, finding Ms. Angelia Cabello, wife of Mr. Rafael Cabello, owns 51% of [Company #3] and [Individual #1] owns 49% of [Company #3]. (*Id.*) Appellant stated in its response to the Area Office that [Company #3] is managed by its owners and has no officers or directors. Thus, Ms. Cabello has the power to control [Company #3] based on her ownership interest. (*Id.*, citing to 13 C.F.R. § 103(c)(1).)

Appellant stated to the Area Office that [Individual #1] is not an officer of Appellant, however, [Individual #1] is listed as Senior Program Specialist for Appellant and is listed as an officer on Appellant's 2015, 2016, and 2017 tax returns, with Mr. Cabello being listed as Appellant's other officer. (*Id.*) The Area Office also found [Individual #1]'s salary to be "commensurate to the President of [Appellant] so we can assume he has a position of authority and influence." (*Id.*) The Area Office found that [Individual #1] is an officer of Appellant and oversees [Company #3]'s management, and has ownership interests with Ms. Cabello, wife of Appellant's President, in [Company #4] and [Company #6]. (*Id.* at 5.)

The Area Office reasons "[a]s an Officer of [Appellant] and member of [Company #3], [Individual #1] clearly has significant control over the operations of [Appellant]." (*Id.*) Appellant and [Company #3] subcontract and lease to each other, and Appellant rents space from [Company #4], which is 50% owned by [Individual #1]. [Company #5] leases a plane to Appellant - its only customer. (*Id.*) Thus, [Company #3] and [Company #4] are affiliated with Appellant due to common management through [Individual #1]'s positions at the two companies under 13 C.F.R. §§ 121.103(a)(1-2), and 103(e). (*Id.*) The Area Office also found that all entities in which [Individual #1] had controlling ownership interest are also affiliated with Appellant through common management. (*Id.*, citing 13 C.F.R. §§ 121.103(c)(1); and 103(c)(2).)

The Area Office then turned to an identity of interest analysis concluding that Ms. Angelia Cabello shares an identity of interest with her husband, Mr. Rafael Cabello, based on their familial relationship, and the couple may be treated as one party with such interests aggregated. (*Id.* at 5.) The Area Office notes that Mr. Cabello chose not to contest its affiliation

with [Company #3] and did not respond to the Area Office's email providing Mr. Cabello with the opportunity to rebut the existence of an identity of interest between Mr. and Ms. Cabello. (*Id.* at 6.) Thus, the Area Office found no clear fracture of interests between the Cabellos, "as the family members are working together for the betterment of their companies," which include Appellant, [Company #3], [Company #4], [Company #5], and [Company #6]. (*Id.*) The Area Office also found the entities to be affiliated based on the totality of the circumstances, under 13 C.F.R. § 121.103(a)(5), due to the "ownership and leasing of the corporate headquarters facility by [Appellant], long-term officer position held by [Individual #1], [Company #4], and [Company #5] sharing office space with [Appellant], ongoing long-term relationships, [and] contractual relationships between [Company #3], [Company #4], [Company #5], and [Appellant]." (*Id.*)

In response to Appellant's argument that its profits from its joint ventures are included in its total receipts on its tax returns, the Area Office stated, "[i]n accordance with 13 C.F.R. § 121.104(h)(4), a concern must include its proportionate share of joint venture receipts not profits." (*Id.* at 3, fn. 1.) The Area Office found that [JV #1], [JV #2], and [JV #3] are true joint ventures and are not affiliated with Appellant. (*Id.* at 6), citing to 13 C.F.R. § 121.103(h)). Therefore, Appellant's proportionate share of revenue of 51% from the joint ventures would be included in its revenue calculations. (*Id.*)

The Area Office noted that Note 11 of Appellant's 2016-2017 financial statements are consolidated and refer to the company's leases of equipment and facilities from "related parties." (*Id.* at 7.) When the Area Office inquired regarding "related parties," Appellant explained that [Company #3], [Company #4], and [Company #5] are the related parties. Thus, because Appellant's financial statements were consolidated, the inter-affiliate revenues for these entities were taken into account on Appellant's tax return by the Area Office. (*Id.*) In its calculations of Appellant's revenues, the Area Office explained, "Due to the fact that the [Appellant] audited financial statements are consolidated and Note 11 states Related Party Transactions no deductions were made for interaffiliates for [Company #3], [Company #4], and [Company #5]." (Area Office Worksheet).

The Area Office concluded that Appellant is affiliated with [Company #3]; [Company #4]; [Company #5], and [Company #6], and the average annual receipts of Appellant and its affiliates exceeded $36.5 million and is, thus, other than small for the size standard of $36.5 million in annual receipts. (Size Determination, at 7.)

D. Appeal Petition

On November 21, 2018, Appellant filed the instant Appeal petition challenging the Area Office's size determination. Specifically, Appellant argues that the Area Office mistakenly double-counted interaffiliate transactions between Appellant and [Company #3], double-counted in its calculations of Appellant's joint venture receipts, and made three calculation errors in its worksheet. (Appeal, at 1-2.) Appellant also filed a Request to Admit New Evidence, which included the Area Office's calculations provided in a spreadsheet; Appellant's Revised Calculations, which include an analysis, revision, and correction of the Area Office's calculations completed by Appellant's accountant; and a declaration by Appellant's accountant explaining the reasons for the corrections to the Area Office's calculations.

Appellant contends the Area Office miscalculated its receipts, resulting in the erroneous inclusion of a total of $[XXXXX] in Appellant's cost of goods sold for 2016 and 2017. (*Id.* at 6.) "This same amount was included in [Company #3]'s total income for the same tax years - $[XXXXX] was included in [Company #3]'s income for 2016, and $[XXXXX] was included in [Company #3]'s income for 2017." (*Id.*) Appellant does not contest its affiliation with [Company #3]. (*Id.* at 9.) Appellant argues, "OHA has held that, where an Area Office failed to properly exclude inter-affiliate transactions to prevent the double-counting of income, the Area Office's decision was clearly erroneous[] and therefore must be vacated." (*Id.* at 7, citing to *Size Appeal of Pynergy, LLC*, SBA No. SIZ-5558 (2014).) Appellant asserts the Area Office is required to consider interaffiliate transactions in determining a concern's annual receipts. (*Id.* at 8, citing to 13 C.F.R. § 121.104(a) and *Size Appeal of Hal Hays Constr. Inc.*, SBA No. SIZ-5217 (2011).) In such cases where the area office fails to exclude interaffiliate transactions, OHA will remand the size determination back to the area office for reconsideration. (*Id.*, citing to *Size Appeal of Pynergy, LLC*, SBA No. SIZ-5558 (2014).) Appellant argues the information required to decipher its interaffiliate transactions was provided in its tax returns, [Company #3]'s tax returns, and its consolidated financial statements for the preceding three years. (*Id.* at 9.)

Appellant contends the Area Office double-counted its revenue equal to $[XXXXXX] by miscalculating its share of receipts from its joint ventures. (*Id.* at 11.) Appellant asserts the Area Office's failure to exclude Appellant's share of [JV #1]'s income from the calculation of Appellant's receipts resulted in double-counting [JV #1]'s income in 2017. (*Id.* at 12.) Appellant highlights its consolidated financial statements include eliminating entries that are "intercompany revenue," totaling $[XXXXXX] where 51% of the total amount eliminated is attributable to Appellant in accordance with its proportionate share of [JV #1] and [JV #3]. (*Id.*) Thus, this amount should be excluded from Appellant's receipts to avoid double-counting. (*Id.*)

Lastly, Appellant argues the Area Office made three calculations errors, resulting in a total of $[XXXXXX] erroneously included in Appellant's annual receipts by mistakenly utilizing spreadsheet formulas that pulled from the wrong source of information. (*Id.* at 14-15.)

Appellant included revised calculations for the Area Office's alleged errors and requested the size determination either be overturned or remanded to address the errors noted in the Appeal.

III. Discussion

A. Standard of Review

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

B. 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).

I find that the evidence Appellant moves to admit is relevant to the Appeal and does not enlarge the issues before me. However, the inclusion of the Area Office's calculations is superfluous as they are already included in the record. Further, I characterize Appellant's "Revised Calculations" as merely argument rather than evidence, as the Appellant's interpretation of the financial information is already in the record. Lastly, the declaration by Appellant's accountant does nothing more than reiterate what Appellant argues in its Appeal. Therefore, I hereby DENY Appellant's Motion for Admittance of the Area Office's calculations and the accountant's declaration. I GRANT Appellant's Motion for Admittance with respect to Appellant's Revised Calculations.

C. Analysis

SBA's regulations explain how SBA calculates a concern's receipts:

> Receipts means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered "total income" (or in the case of a sole proprietorship "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms . . . Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from receipts.

13 C.F.R. § 121.104(a) (2018). The regulation's exclusions of certain revenue from a concern's receipts must be strictly construed, and all of a concern's revenues must be counted when calculating its annual receipts. *See Size Appeal of Johnson Development, LLC*, SBA No. SIZ-5863, at 17 (2017), citing to *Size Appeal of Western River Restoration Partners*, SBA No. SIZ-5695, at 10 (2015).

With respect to interaffiliate transactions, SBA has issued an interpretive rule that states in part:

> SBA will apply the exclusion to properly documented transactions between a concern and its domestic or foreign affiliates, regardless of the type of relationship that resulted in the finding of affiliation. . .
>
> The intent of this exclusion is to avoid counting the same receipts twice when determining the size of a particular concern. . .
>
> SBA believes the current regulatory language is clear on its face. It specifically excludes all proceeds from transactions between a concern and its affiliates, without limitation. Moreover, the regulatory history supports the position that the exclusion for interaffiliate transactions is available regardless of the manner of affiliation between a concern and its affiliate. SBA recognized that excluding interaffiliate transactions only when they are identified on a consolidated tax return often perpetuated the double-counting of receipts. . . . SBA did not mean to imply that a concern and its affiliates must be able to file a consolidated tax return in order to receive the exclusion from double-counting interaffiliate transactions. Conversely, SBA was attempting to make clear that it did not support the practice of double-counting receipts between affiliates generally. . . .
>
> SBA will not restrict the exclusion for interaffiliate transactions to transactions between a concern and a firm with which it could file a consolidated tax return. The exclusion for interaffiliate transactions may be applied to interaffiliate transactions between a concern and a firm with which it is affiliated under the principles in 13 C.F.R. § 121.103. Where SBA is conducting a size determination, SBA requires that exclusions claimed under section 121.104(a) be specifically identified by the concern whose size is at issue and be properly documented. This policy is effective immediately.

Size Policy Statement No. 3, 81 Fed. Reg. 32,635-36 (May 24, 2016) (Statement).

1. Interaffiliate Transactions

An area office should consider whether there are any properly-excludable interaffiliate transaction receipts between a firm and its affiliates even if the concern does not specifically enumerate the amounts it considers to be excludable under this regulation. *See Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217, at 7 (2011). Where an area office fails to

properly exclude interaffiliate transactions in its calculation of a concern's receipts in its size determination, the size determination must be remanded for a recalculation of the concern's receipts and take into account any interaffiliate transactions. (*Id.*)

On Appeal, Appellant does not challenge the Area Office's finding that it is affiliated with [Company #3], [Company #4], [Company #5], and [Company #6]. (Even though in its protest response Appellant made a point of noting that SBA's reviews of its 8(a) eligibility status had never found it affiliated with [Company #3].) The Area Office found Appellant affiliated with [Company #3] based on an identity of interest due to the familial relationship between Mr. Cabello, Appellant's President, and his wife, Ms. Cabello, who owns 51% of [Company #3], which owns 100% of [Company #5]. The Area Office also determined Appellant, [Company #6], and [Company #4] were affiliated through common management by [Individual #1]. When the Area Office inquired to the relationship between Appellant and its affiliates, Appellant explained that [Company #3] leases vehicles from Appellant; Appellant and [Company #3] provide construction services to each other as subcontractors; [Company #5] leases a small aircraft to Appellant; and [Company #4] leases office space to Appellant. This led the Area Office to conclude that, aside from its finding of affiliation through common management, there exists affiliation through the totality of the circumstances due to the relationships between the companies.

The Area Office provided multiple bases to find affiliation between Appellant, [Company #3], [Company #4], [Company #5], and [Company #6] in its size determination, yet it failed to properly account for any interaffiliate transactions between the entities. Appellant provided ample financial information regarding [Company #3], [Company #4], [Company #5], and [Company #6] to be considered in the Area Office's calculations of Appellant's receipts, including each company's tax returns, and multiple documents displaying [Company #3]'s revenues, including those collected from Appellant. The Area Office requested Appellant provide clarification regarding the parties referred to in Note 11 of Appellant's 2017 Consolidated Financial Statement, to which Appellant explained that those parties refer to [Company #3], [Company #4], and [Company #5] — the same entities the Area Office found to be affiliates of Appellant. Appellant submitted complete and separate tax returns from all the affiliated entities and joint ventures. While Appellant's financial statements were consolidated, the tax returns were not. However, the Area Office appears to have assumed that since Appellant's financial statements are consolidated, interaffiliate transactions had already been taken into account in Appellant's tax returns. Thus, the Area Office then made no deductions of any possible interaffiliate transactions. I find this reasoning by the Area Office conclusory and unsupported by the record and counter to SBA regulations and OHA precedent.

In *Hal Hays*, the area office found the appellant affiliated with another concern despite appellant's denial of affiliation. *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217 (2011). Although that appellant did not specifically enumerate amounts that should have been excluded as interaffiliate transactions in its receipts, because they were affiliated and did a great deal of business with each other, OHA held the area office had the obligation to determine whether there were any excludable transactions that should be deducted from that appellant's receipts. *Id.* at 6.

Here, the Area Office clearly erred by assuming Appellant's tax returns took into account interaffiliate transactions simply because its financial statements were consolidated, where Appellant made no such statement, and where each entity filed its own separate tax return. Thus, the Area Office should have considered whether there were any excludable interaffiliate transactions in light of the financial data and explanations provided by Appellant.

Appellant's average annual receipts must be recalculated due to the Area Office's failure to take into account Appellant's interaffiliate transactions. OHA reviews the size determinations on appeal. 13 C.F.R. §§ 121.1101, 134.102(k). OHA does not perform size determinations, as that is the province of the Area Offices. 13 C.F.R. § 121.1002. Thus, I must remand the decision for a new size determination. *See Size Appeal of Drace Anderson Joint Venture*, SBA No. SIZ-5531 (2014).

2. Exclusions for Joint Venture Eliminations

Appellant now seeks to make additional exclusions from its receipts in reference to its dealings with [JV #1] and [JV #3]. I find this point without merit. Appellant is attempting to raise a new issue on appeal that I cannot consider here. 13 C.F.R. § 134.316(a). Appellant never once made any request to exclude "intercompany revenue" or "eliminating entries" with the Area Office. Thus, I cannot hold that the Area Office erred by not excluding these amounts when the issue was never before it. *See Size Appeal of Serviam Construction, LLC*, SBA No. SIZ-5872 (2017) (finding that "[i]t is settled law that an area office cannot have erred by failing to address information or arguments that were never presented to it in the first instance.")

3. Calculation Errors

Appellant raises issue with the Area Office's alleged miscalculations contained in a few cells of its overall worksheet that amount to $[XXXXX]. There were two worksheets provided by the Area Office, and one of those worksheets does not include the errors Appellant identifies. Further, the average annual receipts contained in the worksheet without those errors still exceed the size standard. Nevertheless, even if I were to find that the Area Office miscalculated the amounts, I find the error harmless, as the reduction of Appellant's receipts by $[XXXXX] would still result in Appellant being other than small for the $36.5 million size standard.

4. Remand

On remand, the Area Office must reopen its size investigation and determine the amount of interaffiliate transactions between Appellant and its affiliated entities for 2015, 2016, and 2017. Appellant must submit to the Area Office any additional evidence of its interaffiliate transactions, such as invoices, setting out the total amounts it paid for services rendered between the concerns. If the Area Office determines these amounts are excludable interaffiliate transactions, the Area Office must recalculate Appellant's size, considering the exclusions. Further, Appellant may take the opportunity to argue its position regarding the alleged double-counting of its joint venture receipts on remand.

IV. Conclusion

The size determination contains clear errors. Accordingly, consolidated Size Determinations Nos. 3-2019-007 -008 are VACATED, and this matter is REMANDED to the Area Office for a recalculation of Appellant's average annual receipts.

CHRISTOPHER HOLLEMAN
Administrative Judge