United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Excellus Solutions, LLC, Appellant, Appealed From Size Determination Nos. 02-2018-279 and -306	SBA No. SIZ-5999 Decided: April 26, 2019

APPEARANCES

Megan C. Connor, Esq., Meghan F. Leemon, Esq., Anthony M. Batt, Esq., PilieroMazza, PLLC, Washington, D.C., for Excellus Solutions, LLC

Karlee Starr Blank, Esq., McGuireWoods LLP, Washington, D.C., for Segue Technologies, Inc.

Devon E. Hewitt, Esq., Protorae Law PLLC, Tysons Corner, Virginia, for [Member 3]

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION[1]

I. Introduction and Jurisdiction

On December 20, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination Nos. 02-2018-279 and -306, concluding that Excellus Solutions, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand or reverse. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

[1] OHA originally issued this decision under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

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

II. Background

A. Solicitation and Protest

On June 21, 2012, the U.S. Department of the Air Force (Air Force) awarded NETCENTS-2 Application Services Small Business (ASSB) Companion Contract No. FA8771-12-D-1006 to Appellant. The award was one of several indefinite-delivery / indefinite-quantity (ID/IQ) contracts that were set aside for small businesses. The North American Industry Classification System (NAICS) code for the contract is 541511, Custom Computer Programming Services, with a corresponding size standard of $27.5 million average annual receipts. Under the NETCENTS-2 ASSB Companion Contracts, a small business awardee that outgrows the size standard may graduate to an unrestricted (full and open) contract for one or two option periods after submitting a special data package.

On February 21, 2018, before exercising Option Four, the Contracting Officer (CO) issued a memorandum requesting size recertification from all NETCENTS-2 ASSB Companion Contract holders in accordance with 13 C.F.R. § 121.404(g), no later than April 19, 2018. (Protest, Exh. 2.) Appellant submitted its size recertification to the CO on April 16, 2018. (Area Office File, Exh. N.) On May 15, 2018, Segue Technologies, Inc. (Segue), another ASSB Companion Contract holder, asked the CO to "confirm . . . that no ASSB primes had currently submitted packages to Graduate into F&O." (*Id.*, Exh. 1, at 2 (E-mail from C. Nicewaner to P. Kennerson).) On May 16, 2018, the CO responded, "That is correct. All ASSB vendors have recertified as small and option will be exercised." (*Id.* at 1 (E-mail from P. Kennerson to C. Nicewaner).)

On May 21, 2018, Segue filed a size protest against Appellant with the CO. Segue alleged, based on information from publicly-available sources, that Appellant by itself exceeds the applicable $27.5 million size standard, and that Appellant is affiliated with [Member 1] and [Member 12] "through common ownership, management, and other 'ties'." (Protest at 2.) Further, [Member 1], [Member 12], and a third entity, [Member 2], are all partners in Appellant, a joint venture. (*Id.*) Thus, Appellant exceeds the size standard and is not eligible to continue as an ASSB contractor during Option Period Four. (*Id.* at 13.) The CO forwarded the protest to the Area Office for review.

B. Protest Response

The Area Director adopted Segue's protest as her own, explaining that, unbeknownst to Segue, Appellant actually is a joint venture comprised of 19 member firms. (Size Determination at 1.) On September 11, 2018, the Area Office notified Appellant of the protest and requested that Appellant complete an SBA Form 355 and submit various information concerning Appellant and its member firms. (Letter from H. Goza to [Appellant's President] (Sept. 11, 2018).)

Appellant submitted the first part of its response to the protest on September 21, 2018, the second part on September 28, 2018, and the third part on October 5, 2018.

The submitted documents show that Appellant was established on June 4, 2010 as an LLC, and that its original owners were [Original Member 1], then an 8(a) firm, and [Original Member 2]. As noted above, on June 21, 2012, Appellant was awarded a NETCENTS-2 ASSB set-aside contract. On March 29, 2016, [Original Member 1] sold its entire [xxx]% membership interest in Appellant to [Member 1], and continuing member [Original Member 2] consented to [Member 1]'s becoming a substituted member of Appellant. (Area Office File, Exh. C (contract for purchase, sale and assignment of membership interest).) Appellant notified the CO of this ownership change, and about [Original Member 2]'s sale, also on March 29, 2016, of its entire [xxx]% interest in Appellant to [Member 2]. (Area Office File, Exh. D (Letter from [Appellant's President] to P. Kennerson (Apr. 27, 2016).) Appellant also recertified its status as a small business. (*Id.*)

Appellant's Amended and Restated Operating Agreement (Operating Agreement) was executed shortly thereafter, on May 2, 2016. (Area Office File, Exh. B.) The Operating Agreement refers to Appellant as a joint venture, and to its members as venturers. It states:

> The Purpose of the Joint Venture is to invest in the Air Force Netcen[ts]-2 small business trac[k], [Contract 2] small business track, [Contract 3] small business track, [Contract 4] small business track and other similar small business set-aside contracts.

(Area Office File, Exh. B (Operating Agreement § 1.4).)

The management and control of Appellant's business and affairs is vested in the Managing Venturer, which is [Member 1]. (*Id.* §§ 7.1 and 2.6.) As Managing Venturer, [Member 1] also controls day-to-day management, has the authority to appoint officers, and is responsible for all communications with the Government concerning solicitations, proposals, or negotiations. (*Id.* §§ 7.2, 7.3, 7.10.) At the Annual Meeting, the Managing Venturer presents to the other venturers an "Annual Business Plan" including projected financials and a description of proposed activities. (*Id.* § 9.1.)

There are two classes of membership interest in Appellant. Members holding Class A interest have voting rights "equal to their pro rata share of Class A Membership Interest." (*Id.* § 3.2.1.) Members holding Class B interest may vote "only on matters related to task order management." (*Id.* § 3.2.2.) According to Operating Agreement, a venturer may be terminated from the joint venture if it "has outgrown its small business size based upon the NAICS code assigned to the Contracts [Appellant] is holding." (*Id.* § 13.3.)

On December 19, 2016, Appellant again notified the CO of organizational changes: (1) that on December 16, 2016, [Member 12] acquired all of the stock of [Member 1], Appellant's [xxx]% owner; and (2) that Appellant had "created a new Class B membership," with 17 members. (Area Office File, Exh. F (Letter from [Appellant's President] to P. Kennerson (Dec. 19, 2016).) Appellant again recertified as a small business. (*Id.*) On March 21, 2017, STS

International, Inc. (STS), one of the Class B members, voluntarily left the joint venture because it was not a small business and for that reason "it is no longer in the best interest of [Appellant]" for STS to remain a member of the joint venture. (Area Office File, Exh. G (Bi-Lateral Agreement to Terminate).) On April 20, 2017, Appellant notified the CO of the departure of STS. (Area Office File, Exh. L (Letter from [Appellant's President] to P. Kennerson (Apr. 20, 2017).) Appellant again recertified its status as a small business. (*Id.*)

In the first part of its protest response, Appellant provided its own completed SBA Form 355, tax returns, Operating Agreement, and other documents. Appellant asserted that its size should be determined as of April 16, 2018, the date Appellant recertified its small business size status for NETCENTS-2 Option Four, and provided a list of joint venture members and their ownership interests as of that date. (Letter from M. Schoonover to H. Goza (Sept. 21, 2018), at 2-3; Exh. Q (SBA Form 355, Qn. 4).) The three members holding the largest membership interests in Appellant are:

Member	Class A	Class B
[Member 1]	[xxx]%	[xxx]%
[Member 2]	[xxx]%	[xxx]%
[Member 3]	[xxx]%	[xxx]%

(*Id.*) Each of the other 16 members holds [xxx]% of Class A interest, and [xxx]% of Class B interest. These members are: [Member 4], [Member 5], [Member 6], [Member 7], [Member 8], [Member 9], [Member 10], [Member 11], [Member 12], Millennium Corporation (Millennium), [Member 14], [Member 15], [Member 16], [Member 17], [Member 18], and [Member 19]. (*Id.*) Appellant stated that, apart from NETCENTS-2, it has been awarded just one other contract — [Contract 2]. (Letter from M. Schoonover to H. Goza (Sept. 21, 2018), at 7.) Appellant provided information on orders it has been awarded under NETCENTS-2, but noted it has not received any orders under [Contract 2]. (*Id.*) Appellant does not itself participate in any other joint ventures. (*Id.* at 8.)

Appellant's SBA Form 355 indicated that Appellant's President, [Appellant's President], also owns [Member 12] as well as [Sister Company]; [Member 12] in turn owns [Member 1]. (Area Office File, Exh. Q (SBA Form 355, Qn. 9b).) Appellant's CEO, [Appellant's CEO], owns [Member 2]. (*Id.*) Appellant's Form 355 and Federal income tax returns for the applicable years 2015, 2016, and 2017 show that Appellant's average annual receipts exceed the applicable $27.5 million size standard. (Area Office File, Exh. Q (SBA Form 355, Qn. 12); Exhs. S, T, and U (Appellant's tax returns).)

On September 28, 2018, Appellant submitted the second part of its protest response, including documents relating to [Member 1], [Member 2], and [Member 3], the three Class A members of Appellant. Appellant further explained its membership structure, highlighting that so long as each of its members is small, Appellant need not itself be small under the size standard. (Letter from M. Schoonover to H. Goza (Sept. 28, 2018), at 2.) The three Class A members are small businesses because, even after calculating each concern's proportionate share of joint venture receipts and adding those amounts to each concern's own annual receipts as directed by

13 C.F.R. § 121.103(h)(5), [Member 1], [Member 2], and [Member 3] are still below the size standard. (*Id.* at 3-7.)

In its September 28, 2018 letter, Appellant also discussed the other business interests of Class A member [Member 3], which is the [xxx]% owner and managing member of five other joint ventures. (*Id.* at 6-7; *see also* Area Office File, Exh. AA-1 ([Member 3]'s Form 355, Qn. 9b).) For each of these five joint ventures, the other joint venturer is [Member 3]'s mentor, [Original Member 1]. The joint ventures are: [JV-1]; [JV-2]; [JV-3]; [JV-4]; and [JV-5]. (*Id.*) [JV-2] was originally formed in 2011 as [JV-2's Old Name]. [Member 3] became an owner in 2017, and is now its [xxx]% managing member. Only [JV-1] and [JV-2] had any receipts during the applicable three-year period, and these do not cause [Member 3] to exceed the size standard. (*Id.*)

On October 5, 2018, Appellant provided the third part of its protest response. Appellant noted that it "has gone through various ownership changes" since its inception, and for each change it has provided to the CO the recertifications required for the NETCENTS-2 contract. (Letter from M. Schoonover to H. Goza (Oct. 5, 2018) at 2.) Appellant contended that it is a small business under 13 C.F.R. § 121.103(h)(3)(i) for the Option Four recertification because each of its members is a small business under the applicable size standard. (*Id.*) Calculating members' proportionate shares of joint venture receipts is "a relatively easy task" since only the three Class A members — [Member 1], [Member 2], and [Member 3] — have received any contract work from Appellant. (*Id.* at 3.)

In discussing the receipts of [Member 1], the Managing Venturer of Appellant and [xxx]% owner of Appellant's Class A interest, Appellant noted that, in 2017, [Member 1] had changed from a corporation to an LLC, and its name changed from [XXXX] to [Member 1]. (*Id.* at 3, n.3.) [Member 1]'s own three-year average annual receipts, combined with those of its [xxx]% owner, [Member 12], and those of its sister company, [Sister Company], are $[xxx], which is below the $27.5 million size standard.[2] (*Id.* at 3-4.) Even after adding in [xxx]% of Appellant's annual receipts ([Member 1] owned [xxx]% of Appellant's Class A interest for part of the three-year measuring period for receipts),[3] [Member 1] still does not exceed the size standard.[4] (*Id.*)

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[2] As noted *supra*, [Appellant's President] wholly owns both [Member 12] and [Sister Company]. [Member 12] wholly owns [Member 1], and [Member 1], in turn, owns both Class A and Class B interests in Appellant.

[3] SBA regulations provide: "For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts." 13 C.F.R. § 121.103(h)(5). Ownership of Appellant's Class A interests varied during the three-year measuring period for receipts. Appellant calculated proportionate shares using the highest percentage of ownership each Class A owner had during the three years, applying that percentage as if the ownership was for the entire three-year period.

[4] [Member 1]'s average annual receipts (including affiliates [Member 12] and [Sister Company]) are $[xxx]. Adding to that figure [xxx]% of Appellant's average annual receipts ($[xxx] x [.xx] = $[xxx]) brings the total to $[xxx].

Next, Appellant discussed [Member 2], which was established in 2015 and whose average annual receipts, calculated using the formula at 13 C.F.R. § 121.104(c)(2), are $[xxx]. (*Id.* at 4.) Adding in [xxx]% of Appellant's annual receipts ([Member 2] owned [xxx]% of Appellant's Class A interest for part of the three-year measuring period for receipts), [Member 2] still does not exceed the size standard.[5] (*Id.*)

Appellant then further discussed [Member 3], which owns [xxx]% of Appellant's Class A interest and [xxx]% of its Class B interest. [Member 3] is wholly-owned by [Member 3's Owner] and is also the [xxx]% owner and managing member of five SBA-approved joint ventures, with [Member 3's Owner] the President of each. (Area Office File, Exh. AA-1 ([Member 3] SBA Form 355).) [Original Member 1] is the [xxx]% owner of each. (*Id.*) Of these five joint ventures, only [JV-2] had more than nominal receipts over the applicable three-year period, and [Member 3]'s [xxx]% share of those receipts is $[xxx]. (Letter from M. Schoonover to H. Goza (Oct. 5, 2018), at 4-5.) [Member 3]'s own three-year average annual receipts are $[xxx], and its [xxx]% share of Appellant's average annual receipts is $[xxx]. The receipts of [Member 3], combined with its proportionate shares of receipts from joint ventures [JV-2] and Appellant, total $[xxx] — well below the size standard. (*Id.*)

Next, Appellant discussed the receipts of the other members of Appellant, each of whom owns [xxx]% of Appellant's Class B interest and none of whom received any contract work from Appellant during the three-year measuring period for receipts. (*Id.* at 5-13.) Appellant argued that each of these members, by itself, is a small business (except Millennium whose submission went directly to the Area Office, rather than through Appellant).[6]

Next, Appellant argued that Segue's protest is factually and legally incorrect and should be dismissed or denied, in part because NETCENTS-2 contains the graduation provision. (*Id.* at 13-16.) Appellant then argued that its own receipts, though they exceed the $27.5 million size standard, are irrelevant in determining size, because "joint venture size is determined based on the individual sizes of the constituent joint venture members." (*Id.* at 16-17, citing *Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5497 (2013).) Appellant asserted that each of its joint venture members is a small business under the size standard for NETCENTS-2, although Appellant again acknowledged that Millennium had submitted tax return information directly to the Area Office. (*Id.* at 17.) Appellant also argued that the joint venture members, including [Member 1] and [Member 12], are not affiliated with Appellant or with one another, contrary to Segue's allegations. (*Id.* at 18-19.) Finally, Appellant contended that it is in compliance with the "3-in-2" rule because NETCENTS-2 was its first contract. (*Id.* at 20.)

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[5] [Member 2]'s own average annual receipts are $[xxx]. Adding to that figure [xxx]% of Appellant's average annual receipts ($[xxx] x [.xxx] = $[xxx]) brings the total for [Member 2] to $[xxx].

[6] Millennium's Federal income tax returns for 2015, 2016, and 2017 are in the Area Office file, and they show Millennium is not a small business under a $27.5 million size standard.

C. Size Determination

On December 20, 2018, the Area Office issued Size Determination Nos. 02-2018-279 and -306, concluding that Appellant is not a small business. The Area Office briefly recounted Appellant's history and commented:

> The Area Office notes that if [Appellant] is a small firm, it is only small due to changes in ownership resulting in the removal of any other than small firms to ensure the [joint venture] perpetually retains its small business status.

(Size Determination at 4.)

The Area Office first addressed the 3-in-2 rule, agreeing with Appellant that there was no violation "as regards NETCENTS2." (*Id.* at 6.) However, Appellant did submit an initial offer on [Contract 2] in October 2016. (*Id.*) After quoting from the 3-in-2 rule, the Area Office concluded:

> [Appellant's] October 2016 offer on [Contract 2] is more than two years after its June 29, 2010 initial offer on and June 21, 2012 award of NETCENTS2. Consequently, the Area Office finds that [Appellant] is in violation of the 3-in-2 rule and may not avail itself of the referenced exception from affiliation. A firm in violation of the 3-in-2 rule is treated as a standalone business entity.
>
> However, the Area Office notes that even if [Appellant] was not in violation of the 3-in-2 rule it still would not meet the criteria for the all-small exemption due both to general affiliation and the fact that not all of the member firms are small. . . .

(*Id.* at 7.)

Next, the Area Office considered affiliation between Appellant's current and former members, noting that Appellant began as an 8(a) mentor-protégé joint venture between [Original Member 2] and [Original Member 1] (whose 8(a) term ended in 2016), and that [Original Member 2] and [Original Member 1] transferred their ownership interests to [Member 1] and [Member 2] in 2016. (*Id.* at 7-8.) The Area Office found that in addition to their past membership in Appellant, [Original Member 2] and [Original Member 1] have another SBA-approved joint venture called [JV-6], and that [Original Member 2]'s website indicates that the firms are "long-term partners." (*Id.* at 7.) Further, [Original Member 1] is now the SBA-approved mentor for current 8(a) firm [Member 3], and they have five joint ventures together. (*Id.*) [Original Member 1] also is the [xxx]% owner of [JV-7], which began in 2001 and whose [xxx]% member is [XXXX], a former 8(a) firm whose 8(a) term ended in 2011. Thus, Appellant "is not the only joint venture owned by [Original Member 1] that has been transitioned in whole or in part to a current 8(a) firm and [Appellant] member to maintain eligibility." (*Id.* at 8.)

Quoting the adverse inference rule, the Area Office noted that any missing information "would further establish" relationships between Appellant's current and former members, but even without these "additional affiliations" Appellant is "not even close to being a small firm and that the only ultimate effect is to further establish the enormity of the size of this business entity." (*Id.*)

Turning to receipts, the Area Office noted that because Appellant violates the 3-in-2 rule, it will be treated as a standalone entity and each member's proportional share of joint receipts would not be calculated. (*Id.* at 9.) Appellant also is not eligible for the exception to joint venture affiliation because one of the members, Millennium, is not a small business. (*Id.*)

Appellant by itself is not a small business because its own annual receipts exceed the size standard. (*Id.*) [Member 1] owns [xxx]% of Appellant's Class A interest and has the ability to control Appellant because it is Appellant's Managing Venturer. (*Id.* at 9-11.) [Member 12] has the ability to control [Member 1] because it wholly owns [Member 1]. Thus, while both [Member 12] and [Member 1], by themselves, are below the size standard, they do not qualify as small businesses because they are affiliated with Appellant, which is not a small business. (*Id.*)

Next the Area Office looked at Appellant's other Class A interest holders, [Member 2] and [Member 3]. It found both [Member 2] and [Member 3] are below the size standard, although the Area Office did not consider [Member 3]'s receipts from Appellant and possible affiliation with [Original Member 1]. (*Id.* at 11-12.)

With regard to members holding [xxx]% of Appellant's Class B interest, the Area Office found 14 of them below the size standard: [Member 4] (including 2 affiliates), [Member 5], [Member 6], [Member 7], [Member 8] (including 4 affiliates), [Member 9], [Member 10] (including one affiliate), [Member 11], [Member 14], [Member 15], [Member 16], [Member 17], [Member 18], and [Member 19]. (*Id.* at 12-16.) The Area Office found Millennium exceeded the size standard based on its own receipts, and noted it had done no affiliation analysis on Millennium because it had not submitted a completed Form 355. (*Id.* at 13-14.)

The Area Office summarized its findings, stating that Appellant violates the 3-in-2 rule, its members are affiliated based on a totality of the circumstances, and one member, Millennium, is not small. (*Id.* at 16.) It concluded that Appellant is not a small business for any receipts-based size standard, and that Appellant's Managing Venturer, [Member 1], is not a small business because its receipts combined with those of its affiliates, exceed the applicable $27.5 million size standard. (*Id.* at 17.)

D. Appeal

On January 4, 2019, Appellant filed the instant appeal. Appellant contends that the Area Office did not adequately explain its affiliation findings, that the Area Office incorrectly applied an adverse inference, that the Area Office misapplied the 3-in-2 rule, and that the Area Office incorrectly ruled Appellant is not a small business based on the size of one "passive member." (Appeal at 1-2.)

Appellant contends the Area Office's findings of general affiliation are vague and contradictory. Although the Area Office stated that it "will not concern itself" with assessing general affiliation between Appellant's member firms, the Area Office nevertheless did find general affiliation between current and former members of Appellant, and it found affiliation among all members under the totality of the circumstances. (*Id.* at 6-7.) As a result, Appellant and its members cannot discern how the size determination impacts them on future procurements, so the matter should be remanded for clarification. (*Id.* at 7-8.)

Likewise, the Area Office's basis for invoking an adverse inference is unclear. The Area Office suggests, for example, that Appellant did not disclose details on [Member 3]'s sixth joint venture, [XXXX], yet the record reflects that in February 2018, that entity had changed its name to [JV-2]. (*Id.* at 8-10.) Further, as one of [Member 3]'s SBA-approved joint ventures, [JV-2] should be exempt from affiliation findings. (*Id.*) Appellant highlights that the Area Office did not specify the documents it needed, and did not explain what non-production caused the application of the adverse inference rule. Thus, as in *Size Appeal of W&K Container, Inc.*, SBA No. SIZ-5758 (2016), where a non-specific information request failed the three-part test for adverse inference, this case should be remanded. (*Id.* at 10-11.)

Turning to the 3-in-2 rule, Appellant maintains it is in compliance because by April 16, 2016, Appellant had undergone a "complete restructuring" and thus was no longer the same joint venture entity as had initially offered on the NETCENTS-2 contract back in June 2010. (*Id.* at 12-17.) By 2016, Appellant's two member entities — [Original Member 1] and [Original Member 2] — had been replaced by a completely different group of entities, so that Appellant does not fall under the fact pattern of a longstanding inter-relationship "between the same joint venture partners" such as is proscribed in 13 C.F.R. § 121.103(h). Appellant also cites to *Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5497 (2013) and *Size Appeal of Magnum Opus Techs., Inc.*, SBA No. SIZ-5372 (2012) for the proposition that violation of the 3-in-2 rule does not cause general affiliation, but only raises the issue of general affiliation. (*Id.* at 12-17.) Alternatively, Appellant contends, the Area Office conceded Appellant's violation of the 3-in-2 rule pertained to [Contract 2], an unrelated procurement, and not to the NETCENTS-2 contract at issue here. (*Id.* at 15.)

Even if Appellant had violated the 3-in-2 rule, the Area Office erred in deeming Appellant a "standalone" entity and in finding affiliation between it and its Managing Venturer, [Member 1], such that receipts of both are aggregated. The regulations do not provide for affiliation between a partner and the joint venture itself, only between partners, and a finding of affiliation requires the addition of a proportionate share of joint venture receipts, not aggregation of all receipts. (*Id.* at 15-17.) [Member 1] does not exceed the size standard when only the proportionate share of Appellant's receipts are added. (*Id.*)

Finally, Appellant argues that it remains a small-business joint venture despite the fact one partner, Millennium, is not a small business. This is because Millennium does not meet the regulatory definition of a concern participating in a small business joint venture. (*Id.* at 17-18.) The regulation defines a joint venture as "an association of . . . concerns for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis." (*Id.* at 17, quoting 13 C.F.R. § 121.103(h) (emphasis Appellant's).) Here,

Millennium makes no contribution to Appellant beyond its [xxx]% Class B interest, and puts forth no "efforts, property, money, skill, or knowledge" either for Appellant or for the NETCENTS-2 contract, so Millennium is merely "an inactive, passive member." (*Id.* at 17-18.) Appellant urges OHA to conclude that because "Millennium is not truly participating in the joint venture," Millennium's size is irrelevant in determining Appellant's size. (*Id.* at 18.) Apart from Millennium, all of the other joint venturers are small concerns, as the Area Office found, so Appellant's large size would not impede its status as an eligible small business joint venture. (*Id.*)

As relief, Appellant requests that the size determination be reversed or remanded for further proceedings and to correct the errors. (*Id.* at 2, 19.)

E. Segue's Response

On February 22, 2019, after its counsel had reviewed the record under the terms of an OHA protective order, Segue, the original protester, responded to the appeal. Segue urges OHA to uphold the size determination and deny the appeal. Before setting out its arguments, Segue highlights that Appellant's SBA Form 355 shows Appellant by itself exceeds the size standard. (Segue Response at 3 and n.1.) Segue contends, first, that the Area Office correctly applied an adverse inference against Appellant because Appellant did not respond to certain of the Area Office's requests for information. (*Id.* at 6-11.) For example, the Area Office requested a "list of all contractual relationships between [Appellant's] member firms (current and former) from inception of the JV to present" but this was never submitted. (*Id.* at 9, citing Size Determination at 7-8.) Thus, OHA should reject Appellant's request for remand. (*Id.* at 11.)

Second, the Area Office did not err in finding that Appellant had failed to comply with joint venture rules. Appellant's 2016 restructuring did not create a new joint venture, and Appellant itself represented to the CO in 2017 that it was the same joint venture as was initially awarded the NETCENTS-2 contract in 2012. (*Id.* at 12, citing Exhs. K and Q.) Thus, the Area Office properly counted all contracts awarded to Appellant in its 3-in-2 rule analysis. (*Id.* at 15.) Further, the Area Office properly treated Appellant as a "standalone business entity" rather than as a joint venture, correctly determined that it is affiliated with both [Member 1] and [Member 12], and correctly counted Appellant's, [Member 1]'s, and [Member 12]'s combined annual receipts in determining that Appellant exceeds the $27.5 million annual receipts size standard. (*Id.* at 16-17.)

Third, Segue contends the Area Office properly determined that Millennium is a joint venture partner, as indicated in Appellant's Operating Agreement, and as Appellant represented to the CO and to the Area Office during the size investigation. (*Id.* at 18-21.) Thus, OHA should reject Appellant's arguments to the contrary made in its appeal. (*Id.*)

Also on February 22, 2019, Segue moved to introduce new evidence. Exhibit 1 contains pages from the Federal Acquisition Regulation (FAR) Report of Millennium (valid Nov. 13, 2018 - Nov. 13, 2019). Segue offers Exhibit 1 to support the Area Office's conclusion that Millennium is not a small business. (Motion at 2-3.) Exhibit 2 contains several pages of job postings from Appellant's website (visited February 9, 2019). Segue offers Exhibit 2 to show that Appellant is not an "unpopulated" joint venture as required by the regulation. (*Id.* at 3-5.)

Exhibit 3 contains pages from Appellant's FAR Report (valid Mar. 30, 2018 - Mar. 30, 2019, visited Feb. 22, 2019), Appellant's Dynamic Small Business Search (DSBS) - SBA Profile (updated Mar. 30, 2018, visited Feb. 22, 2019), pages from the FAR Report of [Member 1] (valid July 9, 2018 - July 9, 2019, visited Feb. 22, 2019), and that concern's DSBS - SBA Profile (updated Oct. 16, 2018, visited Feb. 22, 2019). Segue offers Exhibit 3 to show that neither Appellant nor [Member 1] has updated its profile on Federal procurement databases as required, even two months after the adverse size determination. (*Id.* at 6.) Exhibit 4 contains the SAM listing for [XXXX.], the GAO Bid Protest Docket entry for [XXXXX], and several pages from that concern's GSA Schedule. Segue offers Exhibit 4 to show the confusion between [Member 1] and [XXXX] (*Id.* at 7.)

As good cause for submitting the proposed new evidence on appeal rather than during the size review, Segue states it "was not aware of—and could not have been aware of—the importance of any of the proffered evidence until it received the Size Determination identifying [Appellant] as a Joint Venture with 19 member firms." (*Id.* at 1-2.) Segue notes it contacted Appellant's counsel about this motion, and was informed that Appellant opposes it. (*Id.* at 1.)

F. SBA's Response

On February 22, 2019, SBA responded to the appeal. SBA limited its response "to addressing three incorrect interpretations of the 3-in-2 rule, 13 C.F.R. § 121.103(h), contained in [the] appeal." (SBA Response at 1.) First, Appellant wrongly argues that as a restructured joint venture, it is exempt from the 3-in-2 rule. (*Id.*) The joint venture regulation does not recognize an exception to the 3-in-2 rule for a restructured joint venture. (*Id.*) Despite the addition and subtraction of members over time, Appellant is the same joint venture entity and must adhere to the rules that prevent it from transforming into an ongoing business concern. (*Id.* at 1-2.)

Second, SBA asserts that Appellant erroneously relies on OHA decisions pertaining to an earlier version of the 3-in-2 rule to claim that violation of the 3-in-2 rule "merely raises a question" of affiliation, whereas a violation of the current iteration of the rule deems the partners to the joint venture "affiliated for all purposes." (*Id.* at 2, quoting 13 C.F.R. § 121.103(h).) Third, Appellant incorrectly suggests it is exempt from recertification for the NETCENTS-2 contract because it had qualified as small at initial award. (*Id.* at 3.) SBA characterizes this notion as "absurd." (*Id.*)

III. Discussion

A. Standard of Review and New Evidence

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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).

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). 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 6 (2009). OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

Here, Segue has not established good cause to supplement the record. Segue offers Exhibit 1, pages from Millennium's FAR Report, to show that Millennium is not a small business, but there is no dispute that Millennium is not small based on Millennium's own tax returns. Accordingly, Exhibit 1 is not probative of any issue in this case. Similarly, Exhibit 2, the job postings, are not relevant to the issue of whether Appellant is a populated venture; Appellant's own responses to Area Office questions and submitted documents such as the Operating Agreement are the evidence for this issue. Segue offers Exhibit 3 to demonstrate Appellant's and [Member 1]'s non-compliance with the requirement to update Federal databases following an adverse size determination, but this non-compliance is not discussed in the size determination and thus is not relevant to any issue in a size appeal. Lastly, Exhibit 4, the GAO docket entry, the SAM listing, and pages from [XXXX]'s GSA Schedule, are offered to show confusion about the correct name of [Member 1]. Such evidence is cumulative of other evidence already in the record. Accordingly, because Segue has not demonstrated good cause for the admission of its new evidence, the motion to supplement the record on appeal is DENIED.

B. Analysis

The Area Office based its decision in this case largely on Appellant's violation of the 3-in-2 rule. The joint venture regulation setting out the 3-in-2 rule provides, in pertinent part:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes. Once a joint venture receives one contract, SBA will determine compliance with the three awards in two years rule for future awards as of the date of initial offer including price. As such, an individual joint

> venture may be awarded more than three contracts without SBA finding general affiliation between the joint venture partners where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which thereafter result in one or more additional contract awards. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may be awarded up to three contracts in accordance with this section.

13 C.F.R. § 121.103(h). Under the regulation, violation of the 3-in-2 rule occurs when a joint venture receives "more than three contracts over a two year period, starting from the date of the award of the first contract." *Id.* While such language, read in isolation, might be understood to mean that a joint venture may not be awarded more than three contracts over any two-year period, the regulation goes on to provide an example clarifying that a joint venture actually cannot receive any additional contract awards arising more than two years after the date of its first contract award:

> *Example 2 to paragraph (h) introductory text.* Joint Venture XY receives a contract on December 19, year 1. It may receive two additional contracts through December 19, year 3. On August 6, year 2, XY receives a second contract. It receives no other contract awards through December 19, year 3 and has submitted no additional offers prior to December 19, year 3. Because two years have passed since the date of the first contract award, after December 19, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Id. Similar to the situation described in the above example, Appellant, the joint venture in question here, was awarded its first contract, NETCENTS-2, on June 21, 2012. Section II.A, *supra*. In October 2016, Appellant submitted its initial offer on a second contract, [Contract 2]. Sections II.B and II.C, *supra*. In considering these facts, the Area Office concluded:

> [Appellant's] October 2016 offer on [Contract 2] is more than two years after its June 29, 2010 initial offer on and June 21, 2012 award of NETCENTS2. Consequently, the Area Office finds that [Appellant] is in violation of the 3-in-2 rule.

Section II.C, *supra*. Accordingly, based on the example set forth in the regulation, the Area Office correctly concluded that Appellant violated the 3-in-2 rule, because more than two years elapsed between the award of Appellant's NETCENTS-2 contract and Appellant's offer for, and the award of, [Contract 2].

On appeal, Appellant argues that its transformation over time renders it a new entity for purposes of compliance with the 3-in-2 rule. As SBA emphasizes in its response to the appeal, however, the regulation clearly indicates that parties to a joint venture must establish a new joint venture if they wish to be awarded additional contracts beyond those permitted under the 3-in-2 rule. I therefore cannot conclude that merely altering the composition of an existing joint venture is sufficient to comply with the rule.

Appellant also contends that the Area Office incorrectly determined that violation of the 3-in-2 rule results in Appellant being treated as a "stand-alone" business entity. I agree with Appellant that, according to the regulation, the consequence of a violation of the 3-in-2 rule is that "the partners to the joint venture [are] deemed affiliated for all purposes," not that the joint venture itself is treated as a separate entity. 13 C.F.R. § 121.103(h). The issue is immaterial here, though, because it is evident from the record that the combined receipts of Appellant's members do exceed the size standard. Section II.B, *supra*. Further, it was not improper for the Area Office to consider whether Appellant's own receipts exceed the size standard, because the regulations require that each member of a joint venture "must include in its receipts its proportionate share of joint venture receipts." 13 C.F.R. § 121.103(h)(5). Logically, if Appellant itself exceeds the size standard, the combined receipts of Appellant's members must also exceed the size standard, once each member's proportionate share of the joint venture's receipts is considered.

Lastly, it should be noted that, even if OHA were to conclude that the Area Office erred in its analysis of the 3-in-2 rule, Appellant still would not qualify as a small business for the instant procurement. This is true because parties to a joint venture are affiliated with one another for any procurement performed by that joint venture, unless an exception applies. 13 C.F.R. § 121.103(h)(2). An exception to joint venture affiliation exists when each member of a joint venture is small. 13 C.F.R. § 121.103(h)(3)(i). In the instant case, however, the Area Office determined — and Appellant does not dispute — that one of Appellant's members, Millennium, is not a small business, based on Millennium's tax returns and without considering any potential affiliates. Sections II.B and II.C, *supra*. As a result, Appellant is not eligible for this exception to joint venture affiliation. *Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5497, at 8 (2013) (exception to joint venture affiliation at 13 C.F.R. § 121.103(h)(3)(i) did not apply because one of the four joint venture partners was not a small business). Appellant's argument that Millennium is not truly a joint venturer because it contributes nothing to Appellant is unavailing. Pursuant to Appellant's Operating Agreement, concerns with class B membership interests, such as Millennium, are nonetheless considered "members" of the joint venture. Section II.B, *supra*. Appellant's response to the protest likewise characterized Millennium and other class B interest holders as "members" of Appellant. *Id.*

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge