

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

SIZE APPEAL OF:

Oak Grove Technologies, LLC

Appellant,

RE: F3EA, Inc.

Appealed From
Size Determination No. 03-2020-030

SBA No. SIZ-6051

Decided: April 20, 2020

APPEARANCES

Todd R. Overman, Esq., Sylvia Yi, Esq., Bass, Berry & Sims PLC, Washington, District of Columbia, for Appellant

Joshua Mullen, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, Tennessee, for F3EA, Inc.

DECISION¹

I. Introduction and Jurisdiction

On February 24, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2020-030 finding that F3EA, Inc. (F3EA) is a small business under the \$38.5 million annual receipts size standard for North American Industry Classification System (NAICS) code 541330. 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*, the appeal is denied.

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.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA 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.

II. Background

A. Solicitation and Protest

On October 30, 2018, the U.S. Army (Army), Contracting Command — Orlando issued Request for Proposals (RFQ) No. W900KK-19-R-0078 for Special Operations Forces Requirements, Analysis, Prototyping, Training, Operations and Rehearsal services as a single award, Indefinite Delivery Indefinite Quantity (ID/IQ) contract. The Contracting Officer (CO) set aside the ID/IQ for Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns under North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$38.5 million annual receipts size standard.² Proposals were due on December 14, 2018.

On January 10, 2020, the CO notified unsuccessful offerors, including Appellant, that F3EA was the apparent successful offeror. On January 22, 2020, Appellant filed a protest with the Area Office, alleging that (1) F3EA is affiliated with Raptor Training Services, LLC (RTS) and ProActive Technologies Inc. (ProActive), based on an identity of interest and the totality of circumstances; (2) F3EA will not perform the primary and vital requirements of the contract and is unduly reliant on ProActive, in violation of the ostensible subcontractor rule; and (3) as a result of the affiliations, the aggregated receipts of the concerns exceed the applicable size standard. The CO subsequently forwarded the protest to the Area Office for review.

B. Size Determination

On February 24, 2020, the Area Office issued Size Determination No. 03-2020-030 finding that F3EA is small under the applicable size standard. (Size Determination, at 9-10.)

The Area Office determined that Tim Pearson, President and Chief Executive Officer (CEO) of F3EA, is the 100% owner and has the power to control the firm. F3EA Holdings, LLC was formed on September 28, 2017 and dissolved on September 7, 2018. Since that firm was dissolved and affiliation ceased prior to the date to determine size, the firm's revenues are not included. (*Id.*, at 5.)

F3EA and ProActive formed F3EA Joint Venture (F3EA JV) on April 5, 2017, after SBA approved their mentor-protégé agreement on March 17, 2017. F3EA, the protégé, is 51% owner and has the power to control F3EA JV. ProActive, the mentor, is 49% owner of the joint venture. The Area Office found that F3EA did not utilize F3EA JV in its proposal for the subject procurement “so an analysis related to affiliation due to joint ventures would not apply.” (*Id.*, at 6.) However, F3EA must include in its receipts its proportionate share of the joint venture receipts. (*Id.*)

² It appears that the CO designated the procurement under the exception for Military and Aerospace Equipment and Military Weapons, which allows for a \$38.5 million annual receipts size standard.

The Area Office considered whether F3EA was affiliated with any other concerns due to common management and identity of interest. Mr. Tim Pearson, as noted above, is President, CEO, and sole shareholder of F3EA. F3EA's shareholder agreement provides that all shareholders will be members of the Board of Directors. Mr. Pearson is thus F3EA's sole Director and controls the Board of Directors. (*Id.*, citing F3EA Shareholder Agreement at 1, and SBA Form 355, at 4.) F3EA's bylaws provide that all corporate powers are exercised by or under the Board's direction. F3EA's shareholder agreement provides that the President of F3EA controls the day-to-day operations of the firm. The Area Office concluded Mr. Pearson has the power to manage the firm and control the Board of Directors. (*Id.*, citing to 13 C.F.R. § 121.103(e); F3EA Shareholder Agreement at 2; F3EA Bylaws at 5.)

[Individual #1] is the Chief Operating Officer of F3EA, owns no stock in the firm, and did not hold a position that had the power to control the firm at the time relevant for determining size.³ Mr. Pearson, however, retains the power to control and manage the firm as Chairperson and President. (*Id.*) [Individual #1]'s husband, [Individual #2], is the 100% owner and manager of [Corporation #1], which has conducted no business with F3EA. Because [Individual #1] has no power to manage either F3EA or [Corporation #1], no affiliation due to common management exists. Additionally, Mr. Pearson has no familial relationship, nor does F3EA share an economic interest with [Individual #2] or [Corporation #1]. The Area Office thus found no affiliation between F3EA and [Corporation #1] based on either common management or an identity of interest. (*Id.*, at 6-7.)

In a personal declaration dated February 7, 2020, Mr. Pearson stated that [Individual #3], who previously held a role in F3EA as Secretary, Treasurer, and Director, left the firm in May 2018 and has no management control of F3EA. The Area Office concluded there is no affiliation between F3EA and [Individual #3]. (*Id.*, at 7.)

Ms. Jessica Pearson, wife of Mr. Tim Pearson, is 100% owner of Mission Hardware LTD Co. (Mission Hardware), and has the power to control the firm. A familial relationship between the Pearsons exists and the two concerns contract with one another. Ms. Pearson is also 100% owner of Pearson Interiors and has the power to control the firm. The Area Office thus found Pearson Interiors and Mission Hardware affiliated with F3EA, based upon identity of interest and common management. (*Id.*, citing to 13 C.F.R. § 121.103(e) & (f).)

F3EA is a Class B member of RTS, has 0% ownership interest, and has no power to control RTS. RTS is 100% owned by ProActive, which has the power to control the firm. The Area Office determined that, from FY2015 to FY2017, F3EA did not derive 70% or more of its receipts from RTS nor did it derive 70% or more of its receipts from ProActive. When combined, F3EA did not receive 70% of its receipts from RTS and ProActive. "These figures do not change when evaluated year by year or with the three-year average of receipts." (*Id.*) As a result, the Area Office found F3EA is not affiliated with either RTS or ProActive due to an identity of interest based upon economic dependence. (*Id.*, citing to 13 C.F.R. § 121.103(f)(2).)

³ [Individual #1] was elected to serve on the F3EA's Board of Directors on March 11, 2019. However, because this was after the date for determining F3EA's size (December 14, 2018) it is not relevant here.

The Area Office next analyzed Appellant's allegations of an ostensible subcontractor relationship, which stated, “. . . ProActive, whether as itself, RTS, or F3EA JV, is not only F3EA's subcontractor for this solicitation, but its ostensible subcontractor.” (*Id.*, at 8, citing to Protest, at 6.) The protest alleged that ProActive, who is the incumbent contractor for the instant procurement, is ineligible to submit a proposal because it is not an SDVOSB and that F3EA utilized both ProActive's past performance in their proposal and the ProActive's experience or resources to perform the primary and vital requirements of the procurement.

The Area Office found that F3EA's proposal for the subject procurement shows no subcontracting nor partnership agreements with the incumbent contractor, RTS, nor its owner, ProActive. Therefore, there is no affiliation between F3EA and RTS or ProActive based on an ostensible subcontractor relationship. (*Id.*, citing to 13 C.F.R. § 121.103(h)(4).)

F3EA's proposal includes a subcontracting agreement with [Subcontractor], who is not the incumbent contractor. The Area Office found that F3EA does not intend to hire the majority of its workforce from [Subcontractor]. F3EA's management did not previously work for [Subcontractor]. The Area Office found that F3EA, with its subcontracting experience on the previous procurement for this requirement, does not lack experience, nor did F3EA rely on [Subcontractor] to win the contract. (*Id.*) Thus, the Area Office found no affiliation between F3EA and any other firm based on the ostensible subcontracting rule for the instant procurement. (*Id.* at 9, citing to 13 C.F.R. § 121.103(h)(4).)

The Area Office also addressed Appellant's allegation that there exists affiliation with ProActive based on the totality of circumstances. The Area Office determined that “[a]nalysis under the previous sections demonstrate a clear lack of affiliation between F3EA and RTS and its owner ProActive beyond participation in the F3EA JV.” (*Id.*) The Area Office concluded that additional analysis related to affiliation based on the totality of circumstances is not required. (*Id.*, at 9.)

The Area Office calculated the combined average annual receipts of F3EA and its affiliates: F3EA Holdings, F3EA JV, Mission Hardware, and Pearson Interiors, and determined they do not exceed the applicable size standard of \$38.5 million, and that F3EA is a small business concern for the applicable size standard. (*Id.*, at 10.)

C. Appeal Petition

On March 10, 2020, Appellant filed the instant appeal. Appellant argues the Area Office committed clear error, because the record relied upon by the Area Office was incomplete, resulting in a flawed analysis. Appellant also contends the Area Office failed to make adequate inquiries as to Appellant's allegations in its size protest. (Appeal, at 1.)

Appellant claims the Area Office failed to properly consider F3EA's economic dependence on RTS as of the date to determine size — December 14, 2018. Appellant contends it alleged F3EA has a “continued and growing economic dependence upon RTS following the three-year period of measurement.” (*Id.*, at 4, citing to Protest, at 2-4 where Appellant opined

F3EA relied upon RTS for at least 89% of its receipts in 2018 and 95% of its receipts in 2019.) The Area Office limited its economic dependence analysis to the three-year period of measurement of 2015, 2016, and 2017. Appellant argues the Area Office erred in ignoring or disregarding activity occurring between the three-year measurement period and the date of self-certification, when recent data might have revealed a significant change in circumstances. (*Id.*, at 4-5, citing to *Size Appeal of Strategic Defense Solutions, LLC*, SBA No. SIZ-5475, at 5 (2013) and *Size Appeal of OBXtek*, SBA No. SIZ-5451 at 10. (2013))

Appellant maintains the Area Office's analysis consisted of conclusory statements devoid of any rationale or discussion of the information provided to it and reviewed by it to support its conclusion that F3EA was not economically dependent on RTS. Appellant argues the Area Office concluded that the receipts from RTS and/or ProActive did not exceed 70% of F3EA's receipts for 2015, 2016, and 2017, but provides no discussion regarding what evidence was relied upon to reach its determination. Appellant maintains its protest demonstrated F3EA's dependence upon RTS by identifying RTS's estimated percentage of F3EA's receipts. (*Id.*, at 5.) The Area Office also failed to determine whether F3EA was economically dependent upon RTS as of December 14, 2018.

Appellant contends the Area Office relied upon an incomplete record in reaching its size determination. Appellant maintains the Area Office was required to undertake a further investigation based upon the information in its Protest. (*Id.*, at 6, citing *Size Appeal of Corporate Training and Development, Inc.*, SBA No. SIZ-4849 (2007) and *Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4848 (2007).) Appellant maintains it established with specificity the prior subcontracting relationship between F3EA and RTS and identified the RTS past performance references it believed F3EA relied upon in its Proposal. Yet the Area Office determined F3EA's only subcontracting relationship was with [Subcontractor]. (*Id.*)

Appellant further argues that it learned after the issuance of the size determination that F3EA's proposal should have included at least two additional teaming agreements with [Corporation #2] and with ProActive. (*Id.*, at 6; citing to a Declaration by Moner Attawa; and a teaming agreement between F3EA and [Corporation #2].) The [Corporation #2] teaming agreement was executed on February 23, 2018, prior to proposal submission and should have been included in F3EA's proposal. The proposal also should have included a teaming agreement with ProActive. Thus, Appellant questions whether the Area Office made inquiries regarding Appellant's allegations in its size protest. (*Id.*, at 6.)

With the appeal, Appellant seeks to introduce new evidence including a copy of a teaming agreement between [Corporation #2] and F3EA, a declaration from Moner Attawa, Appellant's Chief Financial Officer (CFO) and Executive Vice President attesting that he received the F3EA-[Corporation #2] teaming agreement from F3EA's former employee, and confirmed, with F3EA's former employee, the existence of a teaming agreement between F3EA and ProActive. (*Id.*, at 7.)

D. F3EA's Response

On March 25, 2020, F3EA responded to the Appeal. F3EA contends Appellant's original size protest and current size appeal “make various arguments asserting purported facts that are simply false.” (Response, at 1.)

In response to Appellant's allegation that the Area Office erred in its economic dependence analysis due to an incomplete record, F3EA submits that the Area Office was provided with “extensive documentation,” including its SBA Form 355, F3EA's FY 2015-2017 tax returns, Mr. Tim Pearson's FY2015-2017 tax returns, financial statements, at least three sworn declarations, F3EA's Response to Appellant's size protest, and other supporting information. (*Id.*, at 5.) Based on the information provided, the Area Office correctly concluded that F3EA did not derive 70% of its receipts from RTS or ProActive, or from the two concerns combined. (*Id.*)

F3EA argues a rebuttable presumption of economic dependence arises only when the concern in question derived 70% or more of its receipts from another concern over the previous three complete fiscal years before the date of self-certification. (*Id.*, at 6, citing to 13 C.F.R. § 121.103(f)(2) (June 30, 2016)). F3EA contends the record confirms that the Area Office properly considered economic dependence as of the date of self-certification. Appellant's reliance on *Size Appeal of Strategic Defense Solutions, LLC*, SBA No. SIZ-5475 (2013) and *Size Appeal of OBXtek*, SBA No. SIZ-5451 (2013) is misplaced, because those decisions were based on the prior version of 13 C.F.R. § 121.103(f), which did not include 13 C.F.R. § 121.103(f)(2), clarifying that economic dependence is based on the concern deriving 70% or more of its receipts from another concern “over the previous three fiscal years.” (*Id.*, at 7.) F3EA explains it had no contract with RTS in 2015 or 2016, and first received revenue from RTS in 2017. F3EA received no income from ProActive in 2015, 2016, or 2017. F3EA completed nine task orders as a subcontractor for RTS, receiving from those task orders only 14.05% of its total gross receipts over the three previous fiscal years. The Area Office conducted a thorough investigation of F3EA's receipts and referred to many of the documents in its size determination. (*Id.*, at 9-10.)

F3EA also argues the record proves F3EA was not economically dependent on RTS or ProActive because F3EA “made a clear fracture with RTS and ProActive before submitting its proposal in response to the Solicitation.” (*Id.*, at 11.) F3EA contends it made a conscious decision not to involve RTS or ProActive in competing for the instant solicitation and did not include either concern as a partner or subcontractor in its proposal in response to the solicitation. (*Id.*) F3EA exercised independent business judgment when it rejected requests by RTS and ProActive to partner for the solicitation.

In response to Appellant's argument that the record was incomplete, F3EA explains that the Area Office “reviewed the significant amount of information that was submitted by F3EA, made additional inquiries to gain additional information to deduce an accurate understanding of F3EA's size, and then rightly determined that the annual receipts of F3EA and its affiliates are below the size standard of \$38.5 million.” (*Id.*, at 13.) The Area Office addressed each of Appellant's allegations and analyzed the facts in light of the allegations and information provided by F3EA to make its determination.

F3EA maintains its Proposal establishes that it will manage the entire contract and perform the primary and vital requirements, while using [Subcontractor] only to participate at the task order level and then only when [Subcontractor]'s [XXXXXXXXXXXXX] capabilities align with the customer's needs or [XXXXXXXXXXXXX] is required. (*Id.*, at 15, citing Proposal, Vol. I, Capability, at 27-28.) F3EA asserts its Proposal confirms that it will use its own resources and capabilities to perform the primary and vital requirements of the contract. Three of its four sample task orders were to be performed solely by F3EA, with the fourth being performed by F3EA and [Subcontractor]. (*Id.*, at 16, citing Proposal, Vol. I, Capability, at 32-70, Vol. III, at 1.)

F3EA clarifies that it did not include [Corporation #2] in its proposal because it did not team with [Corporation #2], but did team with [Subcontractor] for the instant proposal. F3EA believes the confidential and proprietary teaming agreement document submitted by Appellant was obtained through improper means and was not included in the Area Office file. F3EA argues it has the requisite experience supporting the Army, as it did so on the incumbent contract, and was awarded the contract without involvement of [Corporation #2], RTS, or ProActive. Lastly, Appellant has not identified any alleged deficiencies in the record that would result in a different decision by the Area Office. (*Id.*, at 18.)

With its Response, F3EA includes a motion to admit a declaration from Mr. Tim Pearson explaining that F3EA did not partner with [Corporation #2] for the instant procurement, along with a copy of a blank agreement for F3EA's employees. F3EA also included an opposition to Appellant's motion to admit new evidence because [Corporation #2] is not a teaming partner, Appellant did not provide the document as evidence during the size review, and Appellant likely obtained the document through improper means.

E. Supplemental Appeal

On March 25, 2020, Appellant filed a motion to supplement its appeal. In the supplemental Appeal, Appellant argues the Area Office file demonstrates that the Area Office did not adequately investigate the allegations raised in the size protest. (Supplemental Appeal, at 1.)

Appellant contends the nine task orders performed by F3EA were issued under a master subcontract, which was not included in the Area Office File. "Surely a review of the underlying subcontract governing the relationship of the parties specifically alleged to be affiliates was necessary to conduct a fulsome (sic) review of economic dependence."⁴ (*Id.*) Appellant argues F3EA also performed work through RTS's minority owner, Advanced Training Group Worldwide, Inc. (ATG) beginning or around March 20, 2015. (*Id.*, at 2-3, citing to Size Protest.) Appellant argues its protest provided evidence of F3EA's performance under the ID/IQ contract prior to 2017. The Area Office erred in relying on F3EA's assertion that nine tasks orders were performed under the ID/IQ contract. (*Id.*, at 3.)

⁴ Appellant is presumably calling for a thorough review, and not one which was excessively complimentary, or exceeded the bounds of good taste.

Appellant argues the Area Office erroneously limited its review regarding F3EA's alleged economic dependence to F3EA's receipts for 2015, 2016 and 2017, instead of considering evidence up to the date of self-certification. (*Id.*, at 4.) Appellant contends nothing in the final rule is inconsistent with OHA case law, which examines economic dependence analysis as inclusive of the period of the date of self-certification. (*Id.*, citing to *Size Appeal of Avar Consulting, Inc.*, SBA No. SIZ-6017 (2019).) Appellant contends F3EA's increasing and continuing relationship with RTS required the Area Office to inquire as to the receipts from RTS up to the date of self-certification. (*Id.*)

Appellant concludes that F3EA's responses to the Area Office were inadequate, because the Area Office file did not include the teaming agreements with [Corporation #2] or ProActive for the instant procurement.

F. Opposition in Response to Supplemental Appeal

On April 9, 2020, F3EA filed an opposition to Appellant's motion to supplement its appeal. F3EA argues the motion should be denied, as Appellant is restating arguments already made, and bringing forth new allegations for the first time on appeal. (Opposition, at 1.) *8 F3EA contends that the proposal, which is a part of the record, confirms that neither RTS nor ProActive are listed as teaming partners. This issue has already been fully briefed by all parties. (*Id.*, at 2.)

The Area Office conducted a thorough investigation, including a review of the operating agreement that shows F3EA's role as a Class B Member of RTS, which confirms that F3EA did not perform every assigned task order, but instead had a right of first refusal to task orders that it pursued under the ID/IQ contract. F3EA's Answers to the Allegations provided to the Area Office confirmed that F3EA executed only nine task orders for RTS in 2017 and did not perform any work for RTS before 2017. (*Id.*, at 3.)

Appellant's arguments regarding a partnership with [Corporation #2] have no merit because F3EA did not team with the concern for the instant procurement. F3EA submitted its proposal without [Corporation #2], thus there was no reason for F3EA to submit any documents related to [Corporation #2] in regard to the instant procurement. (*Id.*, at 4.)

Appellant seeks to bring forth new allegations regarding F3EA's purported affiliation with ATG. F3EA had no reason to submit information about an old subcontract between F3EA and ATG because Appellant did not allege affiliation in its size protest. (*Id.*, at 4-5.)

The relevant three fiscal years for analyzing affiliation based on economic dependence are between January 1, 2015 and December 31, 2017, which were the three most recently completed fiscal years before F3EA's submission of its proposal on December 14, 2018. (*Id.*, at 6.) F3EA maintains that the holding in *Size Appeal of Avar Consulting*, SBA No. SIZ-6017 (2019) actually supports its arguments since, like here, there existed an SBA-approved mentor-protégé agreement and OHA found the assistance, provided by the mentor to the protégé, to be covered by the mentor-protégé agreement. (*Id.*, at 8.)

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. Threshold Issues

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. 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).)

First, Appellant seeks to admit a declaration from Moner Ottawa, Appellant's CFO and Executive Vice President, stating that he received the [Corporation #2] teaming agreement from a former F3EA employee, and confirmed with that employee that F3EA would team with ProActive for the instant procurement. Appellant seeks to introduce evidence that was not available at the time of the size review. 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).) 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.”). Further, this proffered evidence is not relevant to the instant case. F3EA's complete Proposal is in the record, and [Corporation #2] is not a subcontractor, and has no role in F3EA's performance of the procurement.

Second, the declaration also states that it was confirmed by a former F3EA employee that F3EA has executed a teaming agreement with ProActive for the instant procurement. Although the statement that F3EA teamed with ProActive for the instant procurement was argued in the size protest, the fact that Appellant has received confirmation from a former employee of F3EA does not clarify a fact already stated in its size protest and appeal. Again, F3EA's Proposal is in the record and establishes that ProActive has no role in the procurement. Appellant's attempts at industrial espionage have failed to produce relevant evidence. I therefore EXCLUDE Appellant's proffered new evidence.

However, I will GRANT Appellant's Motion to file a Supplemental Appeal, because OHA customarily permits such filing after counsel admitted under a Protective Order has been

granted access to the Area Office file. *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047 (2020). I also order F3EA's response to the Supplemental Appeal be included in the record.

F3EA seeks to introduce a declaration from Mr. Tim Pearson, President and CEO of F3EA, stating that the concern did not team with [Corporation #2] for the instant procurement and provided a copy of a blank agreement of confidentiality and non-competition for F3EA employees. Because Appellant's proposed evidence has been excluded from the record, I find that the new evidence F3EA attempts to introduce in response is irrelevant. Thus, F3EA's proposed new evidence is EXCLUDED from the record.

C. Analysis

Appellant argues the size determination is erroneous because the Area Office limited its analysis of F3EA's alleged economic dependence on RTS to F3EA's receipts for 2015, 2016, and 2017. Appellant contends the Area Office was required to review F3EA's receipts up to the date of self-certification — December 14, 2018.

The date to determine a concern's size is the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response, which includes price. 13 C.F.R. § 121.404(a). Here, that date is December 14, 2018. The measurement period for averaging a firm's annual receipts is based on its three most recently completed fiscal years. 13 C.F.R. § 121.104(c). Thus, even if a concern submits its self-certification that it is small with its offer, including price, on December 31 of a given year, SBA will determine that concern's size based on the *most recently completed* fiscal years, excluding the year the concern submitted its self-certification because that year had not yet been completed.

Affiliation may arise between concerns based upon an identity of economic interest. 13 C.F.R. § 121.103(f). There is a rebuttable presumption of identity of interest based upon economic dependence if the challenged concern derives 70% or more of its receipts from another concern over the three previous fiscal years. 13 C.F.R. § 121.103(f)(2). Appellant argues that under *Size Appeal of Strategic Defense Solutions, LLC*, SBA No. SIZ-5475 (2013) and *Size Appeal of OBXtek*, SBA No. SIZ-5451 (2013) the Area Office should have considered the proportion of F3EA's receipts derived from RTS up to December 14, 2018. However, these cases predate the current version of the regulation, promulgated in 2016, and are therefore inapposite. 81 Fed. Reg. 34243, 34251-2 (May 31, 2016). In this rule SBA explicitly decided to adopt the same three-year measurement period for determining economic dependence, as is used for averaging a firm's annual receipts for size purposes.

Therefore, because F3EA submitted its self-certification with its offer, including price, on December 14, 2018, an analysis of economic dependence required a review of F3EA's receipts for its three most recently completed fiscal years, i.e. 2015, 2016, and 2017. Thus, the Area Office's calculation of F3EA's receipts complied with the regulation, and it did not err in only reviewing those receipts.

Appellant cites to *Size Appeal of Avar Consulting, Inc.*, SBA No. SIZ-6017 (2019) to support its contention that OHA will review a concern's receipts up to the date of self-

certification. However, this is a misinterpretation of the ruling in this case. The decision states, “by [the protested concern's] own admission, [the alleged affiliate] accounted for more than 70% of [the protested concern's] revenues from the date of [the protested concern's] founding through the date of its self-certification.” *Size Appeal of Avar Consulting*, SBA No. SIZ-6017, at 13. However, this evidence did not invoke a rebuttable presumption of economic dependence because there existed a mentor-protégé agreement between the two concerns. OHA did not review the protested concern's receipts up to the date of self-certification and did not find evidence of economic dependence. This case is inconsistent with Appellant's arguments, and further bolsters the position of F3EA, since even when the protested concern admitted it generated more than 70% of its revenue from another firm, OHA did not find the concerns affiliated based on economic dependence. Instead, OHA determined that the assistance provided by the mentor to the protégé in *Avar Consulting* was anticipated by the mentor-protégé agreement, and not considered economic dependence. Thus, Appellant's reliance on *Avar Consulting* to support its argument that the Area Office should have reviewed F3EA's receipts up to the date of self-certification is misplaced.

Appellant argues the Area Office File is deficient because it lacks the master subcontract between F3EA and RTS for the incumbent contract. However, in an economic dependence analysis, the key evidence is the allocation of funds produced by one concern as a result of its relationship with another. The details of the master subcontract in a procurement other than the procurement at issue are irrelevant to the analysis of whether F3EA is affiliated with RTS. Here, F3EA's financial records, including its tax returns, are sufficient for an economic dependence analysis, aside from the terms of the subcontract between F3EA and RTS. The Area Office file includes a completed SBA Form 355 for F3EA, along with calculations of receipts from its alleged affiliates, financial statements, organizational charts for all F3EA affiliates, Task Order award subcontracts, numerous declarations, and responses to the Area Office's subsequent inquiries. The Area Office thus had all the financial information necessary to determine whether F3EA was economically dependent upon RTS. Therefore, I find that the documentation in the Area Office file was adequate and the size determination was appropriately based on the record.

Appellant argues that the investigation was inadequate, and that I should remand the case, as OHA did in *Size Appeal of Corporate Training and Development, Inc.*, SBA No. SIZ-4849 (2007) and *Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4848 (2007). However, these cases are inapposite. The size determination in *Corporate Training and Development* lacked a detailed analysis as it was only two pages long, and the size determination in *Tiger Enterprises* failed to discuss the relevant affiliation regulations. Here, the Area Office reviewed the extensive record, including F3EA's SBA Form 355, tax returns, and the Proposal, and provided a thorough analysis of the record. The size determination here is based upon a solid and extensive record, which supports the conclusions reached. Appellant insists that its speculations about the relationship between F3EA and RTS and other alleged affiliates be credited over the hard evidence of F3EA's Proposal, SBA Form 355, and tax returns, yet its position is meritless and contrary to OHA precedent. *Size Appeal of T-C Transcription, Inc.*, SBA No. SIZ-5063 (2009); *Size Appeal of Hallmark-Phoenix Joint Venture*, SBA no. SIZ-4870 (2007).

Appellant alleges that F3EA failed to provide the Area Office with teaming agreements for ProActive and [Corporation #2] for the instant procurement, which Appellant learned of after

issuance of the size determination. Appellant's claims of F3EA partnering with ProActive and [Corporation #2] for the instant procurement are based on hearsay and mere unfounded speculation. After a review of F3EA's Proposal for the instant procurement provided to the Army, it is clear that the only teaming agreement included in the Proposal was between F3EA and [Subcontractor]. Appellant insists that the other firms are teaming with F3EA on this procurement, but the hard evidence of the Proposal contradicts Appellant's baseless assertions. Thus, Appellant's arguments that F3EA failed to provide pertinent information to the Area Office in response to Appellant's allegations is meritless.

Appellant also argues the Area Office failed to conduct an affiliation analysis between F3EA and ATG. However, any such allegation of affiliation *supra*, I cannot conclude that the Area Office erred in failing to investigate claims Appellant raises for the first time on appeal. *See* 13 C.F.R. § 134.316(c); *Size Appeal of W&T Travel Servs., LLC*, SBA No. SIZ-5721, at 13 (2016) (“OHA will not consider an issue that was neither raised to, nor investigated by, the Area Office.”).

Appellant seeks a remand order from me to have the Area Office confirm its speculations through documentation that either does not exist or is irrelevant to this matter. However, the record reflects the facts of the case, which do not align with Appellant's allegations regarding F3EA's relationships for the instant procurement.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge