United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Swift & Staley, Inc., Appellant, Appealed From Size Determination No. 3-2021-026	SBA No. SIZ-6095 Decided: April 20, 2021

APPEARANCES

. Richard P. Rector, Esq., Daniel J. Cook, Esq., Christie M. Alvarez, Esq., DLA Piper LLP (US), Washington, D.C., for Appellant

Stephen P. Ramaley, Esq., C. Peter Dungan, Esq., Jarrod R. Carman, Esq., Miles & Stockbridge P.C., Washington, D.C., for Akima Intra-Data, LLC

DECISION[1]

I. Introduction and Jurisdiction

On January 13, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area III (Area Office) issued Size Determination No. 3-2021-026, sustaining a size protest filed by Akima Intra-Data, LLC (AID) against Swift & Staley, Inc. (Appellant). The Area Office determined that Appellant's average annual receipts, combined with Appellant's proportionate share of a joint venture's revenues, exceed the size standard applicable to the subject procurement. On appeal, Appellant maintains that 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 and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant received the size determination on January 13, 2021, and filed the instant appeal within fifteen days thereafter, 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 originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

II. Background

A. The Solicitation

On February 3, 2020, the U.S. Department of Energy (DOE) issued Request for Proposals (RFP) No. 89303319REM000057 for Infrastructure Support Services at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of $41.5 million average annual receipts. Initial proposals, including price, were due April 16, 2020, and there were no subsequent proposal revisions. Appellant and AID submitted timely offers.

B. Size Protest

On December 10, 2020, the CO announced that Appellant was the apparent awardee. On December 17, 2020, AID filed a protest challenging Appellant's size. AID alleged that Appellant is not a small business for the instant procurement, because Appellant's receipts from its own business activities and from its ownership interest in an 8(a) populated joint venture, Portsmouth Mission Alliance, LLC (PMA), exceed the size standard. (Protest at 1.)

AID acknowledged that, based on publicly-available information from the Federal Procurement Data System (FPDS), Appellant's receipts alone do not exceed the size standard. (*Id.* at 2-3.) Specifically, according to FPDS data:

Year	Swift & Staley Obligations Reported on FPDS
2015	$37,254,488.33
2016	$28,821,353.56
2017	$31,756,925.00
2018	$43,095,194.56
2019	$44,683,213.98
5-year average:	**$37,122,235.09**
9-year average:	**$39,845,111.18**

(*Id.* at 3.)

Nevertheless, when calculating size, SBA combines the challenged firm's own receipts with its "proportionate share of joint venture receipts." (*Id.*, quoting 13 C.F.R. § 121.103(h)(3) (effective Nov. 16, 2020).) Here, Appellant derives substantial revenues from PMA, a populated joint venture minority owned by Appellant and majority owned by North Wind Dynamics, LLC (North Wind), a subsidiary of an Alaska Native Corporation (ANC), Cook Inlet Region, Inc. (*Id.*)

AID cited current SBA regulations (effective November 16, 2020) for the proposition that, when calculating the receipts or employees of a joint venture, each participant:

> must include in its total number of employees, its proportionate share of joint venture employees. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's share of the work performed by the joint venture.

(*Id.*, quoting 13 C.F.R. § 121.103(h)(3) (effective Nov. 16, 2020).) This version of the rule, however, did not become effective after the date Appellant self-certified for the instant procurement. The version of the rule in effect on April 16, 2020, the date Appellant self-certified as small in its proposal, stated that:

> (5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees.

(*Id.*, quoting 13 C.F.R. § 121.103(h)(5) (effective until Nov. 16, 2020).)

Applying the older version of the rule, AID argued that a "proportionate share" of PMA's receipts must be attributed to Appellant, but SBA need not, and should not, apply the newer regulation's definition of "proportionate share" as corresponding with a particular percentage of work performed. (*Id.* at 3-4.)

Next, AID argued that PMA is a "populated" joint venture, a form of business arrangement recognized until 2016 when SBA required that only "unpopulated" joint ventures would be eligible for small business awards. (*Id.* at 4.) Because PMA is populated with its own employees, neither venture partner has any "share" of the work; instead, all work would be done by PMA's own employees and profits would be distributed to the joint venture partners according to their respective ownership interests. (*Id.*) As such, AID maintained, SBA should interpret the "proportionate share" of a populated joint venture to mean a share proportionate to each partner's ownership interest. (*Id.*) Otherwise, a populated joint venture would have "zero impact on the receipts of its joint venture partners," an untenable result. (*Id.*, emphasis AID's.)

AID offered a chart showing PMA's annual receipts, based on data acquired from FDPS:

Year	PMA Obligations Reported on FPDS
2015	$0
2016	$18,598,237
2017	$36,010,749
2018	$33,520.054.15
2019	$36,620,829.48

(*Id.*) AID stated that this data reflects a 5-year average of $24,949,973.93. (*Id.* at 5.) Combining Appellant's proportionate share of these receipts with Appellant's own receipts will likely exceed the $41.5 million size standard. According to AID, to remain small, Appellant could have had no more than a 17.54% ownership interest in PMA, as anything above that would cause the combined receipts to exceed the size standard. (*Id.*) AID alleged, upon information and belief, that Appellant does own more than a 17.54% interest in PMA. (*Id.*)

C. Protest Response

The CO forwarded AID's protest to the Area Office for review. On December 23, 2020, Appellant responded to the size protest. Appellant contended that PMA's receipts should not be included in Appellant's receipts calculation, and that, even if such receipts were included, Appellant would not exceed the $41.5 million size standard. (Protest Response at 2-3.)

Appellant argued, first, that there is no requirement to include a proportionate share of PMA's annual receipts in Appellant's receipts calculation, because PMA is not a recognized joint venture. (*Id.* at 2.) PMA was established as a "populated" joint venture in 2015. (*Id.*) At that time, SBA regulations permitted "populated" joint ventures, but required that each joint venture partner must include a proportionate share of the joint venture's receipts in their respective annual receipt calculations. (*Id.*) In 2016, SBA amended its rules to specify that joint ventures may not be populated. (*Id.*, citing 81 Fed. Reg. 48,558, 48,575 (July 25, 2016).) After this rule change, two small businesses forming a "populated" joint venture would risk be treated as affiliates. (*Id.*) Appellant argued that, because "populated" joint ventures were no longer recognized after 2016, Appellant: 1) could no longer assume that its relationship with North Wind would be exempt from affiliation; but 2) also was no longer subject to the rule at 13 C.F.R. § 121.103(h)(5) to include a proportionate share of PMA's receipts in Appellant's own receipts calculation. (*Id.* at 3.)

Appellant contended that it is not affiliated with PMA or North Wind. (*Id.*) Appellant holds no ownership interest in North Wind and only a minority ownership interest in PMA. (*Id.*) Only [xx] of PMA's [xx] board members is an employee of Appellant, whereas the other [xx] are North Wind employees. (*Id.*) There is nothing in PMA's operating agreement that allows Appellant to exert negative control over PMA. (*Id.*) Nor is Appellant involved in the day-to-day operations of PMA, as contract work is performed by PMA's own employees and North Wind has overall management responsibilities. (*Id.*) Because there is no affiliation between Appellant and PMA, none of PMA's receipts should be attributed to Appellant. (*Id.* at 4.)

Next, Appellant argued that, even if it is required to assume a proportionate share of PMA's annual receipts, the combined total average annual receipts would not exceed the $41.5 million size limit. (*Id.*) Appellant provided a table showing Appellant's receipts from 2015-2019, based on tax returns:

	2015	2016	2017	2018	2019
Total Income	***	***	***	***	***
Cost of Goods Sold[4]	***	***	***	***	***
Permitted Reductions[5]	***	***	***	***	***
Total	***	***	***	***	***

(*Id.*) Appellant also included a table showing PMA's annual receipts from 2015-2019:

	2015	2016	2017	2018	2019
Total Income	***	***	***	***	***
Cost of Goods Sold	***	***	***	***	***
Permitted Reductions[6]	***	***	***	***	***
Total	***	***	***	***	***

(*Id.*) Appellant then argued that, as only [xx] of [xx] PMA board members is Appellant's representative, Appellant holds a [xx]% "controlling interest" in PMA. Therefore, only [xx]% of PMA's receipts should be applied to Appellant:

	2015	2016	2017	2018	2019
Total Income	***	***	***	***	***
Cost of Goods Sold[7]	***	***	***	***	***
Permitted Reductions[8]	***	***	***	***	***
+ 20% of PMA's receipts	***	***	***	***	***
Adjusted total	***	***	***	***	***

(*Id.* at 5.) To avoid double-counting income associated with PMA, income related to PMA should be removed from Appellant's annual receipts. (*Id.*, citing *Size Appeal of Crown Moving & Storage Co. d/b/a Crown Worldwide Moving and Storage*, SBA No. SIZ-4872 (2007).) Therefore, the combined total receipts, as adjusted, are:

	2015	2016	2017	2018	2019
Total Income	***	***	***	***	***
Cost of Goods Sold[9]	***	***	***	***	***
Permitted Reductions[10]	***	***	***	***	***
+ 20% of PMA's receipts	***	***	***	***	***
Less income from PMA	***	***	***	***	***
Final adjusted total	***	***	***	***	***

(*Id.*) This results in total annual receipts for 2015-2019 of $[xxxx], which is less than the $41.5 million size standard. Therefore, Appellant should be considered small for the instant solicitation, even if it is charged with a proportionate share of PMA's revenues. (*Id.*)

D. Size Determination

On January 13, 2021, the Area Office issued Size Determination No. 3-2021-026, concluding that Appellant is not a small business. The Area Office explained that Appellant's size is assessed as of the date it self-certified as small as part of its initial offer including price. (Size Determination at 4, citing 13 C.F.R. § 121.104.) Here, Appellant submitted its proposal for the instant procurement on April 16, 2020, and that date must be used when considering Appellant's size. (*Id.* at 6-7.) Furthermore, the Area Office must apply the version of SBA's regulations in effect as of the date of self-certification. (*Id.* at 6.)

The Area Office found that Appellant must include its proportionate share of receipts from PMA when determining size. (*Id.*, citing 13 C.F.R. § 121.103(h)(5) (effective until Nov. 16, 2020) and *Size Appeal of SIETech LLC Joint Venture*, SBA No. SIZ-5667 (2015).) As of April 16, 2020, 13 C.F.R. § 121.103(h)(5) stated that "[f]or size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees." (*Id.*) Appellant owns [a minority] of PMA, a populated joint venture; the remaining [xx]% is owned by Cook Inlet Region, Inc., the ANC parent of North Wind. (*Id.* at 4.)

In an e-mail to the Area Office, Appellant acknowledged that PMA was awarded a contract in 2016, while populated joint ventures still were recognized by SBA. (*Id.* at 6.) Further, PMA continued to perform that contract through April 16, 2020. (*Id.*) Therefore, the Area Office reasoned, PMA is an active joint venture, generating revenues for its owners, including Appellant. (*Id.*) The Area Office concluded that Appellant must include its proportionate share of PMA's receipts when determining Appellant's size, in accordance with 13 C.F.R. § 121.103(h)(5) (effective until Nov. 16, 2020). (*Id.*) The Area Office also commented that, even if PMA were not considered a joint venture on April 16, 2020, such that Appellant would not have to include its proportionate share of receipts from PMA, Appellant still would be required to include receipts from PMA due to Appellant's ownership interest in that company. (*Id.* at 6-7, citing 13 C.F.R. § 121.104(a).)

The Area Office used Appellant's [xx]% ownership percentage in PMA to attribute that portion of PMA's receipts to Appellant, but excluded transactions between the concerns in accordance with 13 C.F.R. § 121.104(a) to avoid double-counting of receipts. (*Id.* at 7.) The combined total average annual receipts exceed the size standard, so Appellant is not a small business. (*Id.*)

E. Appeal

On January 28, 2021, Appellant filed the instant appeal. Appellant argues that the Area Office should not have included any portion of PMA's receipts in the size calculation, and that even if Appellant is required to accept some of PMA's receipts, the Area Office incorrectly performed the calculations.

Appellant first contends that concerns with ownership interests in a joint venture are not required to assume a proportion of that joint venture's receipts, unless the joint venture is compliant with the requirements of 13 C.F.R. § 121.103(h). (Appeal at 6.) Appellant maintains that, under SBA's affiliation rules, two small businesses that decide to work together for joint profit are at risk being treated as affiliates under 13 C.F.R. § 121.103(a). (*Id.*) The joint venture provisions at 13 C.F.R. § 121.103(h) provide a "quasi-exception to affiliation" whereby small businesses may cooperate for joint profit without affiliation, so long as the joint venture operates within certain restrictions. (*Id.* at 6.) Appellant continues by claiming that these rules create two "logical extensions." (*Id.*) First, if a joint venture owned by two or more small businesses does not meet regulatory requirements, the joint venturers may be treated as affiliates. (*Id.*) Second, owners of a joint venture that does not comply with 13 C.F.R. § 121.103(h) are not required to assume a "proportionate share" of the joint venture's annual receipts, because the "proportionate

share" requirement presupposes a valid joint venture compliant with SBA's rules. (*Id.*) To hold otherwise would mean that the owners of non-compliant joint ventures not only may be treated as affiliates, but also must assume a proportionate share of the joint venture's annual receipts, an "absurd result" inconsistent with the spirit of the regulations. (*Id.* at 6-7.)

Appellant next argues that because PMA is populated, PMA is not a valid joint venture within the meaning of 13 C.F.R. § 121.103(h). (*Id.* at 7.) Appellant observes that, since the 2016 rules change that excluded populated joint ventures from the quasi-exception to affiliation, OHA and federal courts have concluded that populated joint ventures are not recognized under SBA's rules and that the owners of such a joint venture risk being treated as affiliates. (*Id.*, citing *Senter, LLC v. United States*, 138 Fed. Cl. 110 (2018) and *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P (2020).) The Area Office's conclusion that populated joint ventures formed prior to the 2016 rules change are still joint ventures for purposes of determining size is therefore incorrect and inconsistent with OHA case law. (*Id.* at 7-8.) Appellant cites *KTS Solutions* for the proposition that populated joint ventures will be "excluded from the benefits of the joint venture regulation." (*Id.* at 8-9, quoting *KTS Solutions*, SBA No. CVE-146-P, at 11.) It is irrational to require that Appellant include a "proportionate share of the joint venture receipts" when that same joint venture is "excluded from the benefits of the joint venture regulation." (*Id.* at 9.) If affirmed by OHA, the Area Office's decision to the contrary will sow confusion in the small business community as to whether a populated joint venture is, or is not, a joint venture in the eyes of SBA. (*Id.*)

Appellant also maintains that, even if Appellant is required to assume some of PMA's receipts, the Area Office was wrong to use "percentage of ownership" to determine Appellant's "proportionate share." (*Id.* at 10.) While Appellant holds a [xx]% ownership interest in PMA, [xx]% of PMA's profits go directly to a PMA subcontractor, so only [xx]% of PMA's gross profits ([xx]% of the remaining [xx]%) flow to Appellant. (*Id.*) Additionally, Appellant has only a [xx]% controlling interest in PMA, because only [xx] of [xx] board members is Appellant's representative. (*Id.* at 10-11.) The Area Office failed to consider the disparity between Appellant's ownership interest in PMA and the actual financial benefits Appellant enjoys from PMA. (*Id.* at 11.)

On November 8, 2019, several months before Appellant self-certified for the instant procurement, SBA issued a proposed rule which stated, in part, that when calculating receipts, "the appropriate proportionate share is the same percentage of receipts as the joint venture partner's percentage share of the work performed by the joint venture." (*Id.*, quoting 84 Fed. Reg. 60,846, 60,868 (Nov. 8, 2019).) This rule eventually became final on November 16, 2020, after self-certification but prior to award. (*Id.*) Appellant argues that the Area Office erred by interpreting the meaning of "proportionate share" without consulting the proposed regulation, which defined "proportionate share" to be "commensurate with the work performed." Although the rule did not become final until after the date of Appellant's self-certification, the final rule was essentially identical to the proposed rule and should have been considered in calculating receipts. (*Id.* at 12.)

Appellant asserts that, prior to the proposed and final rules, SBA regulations did not explain what was meant by a "proportionate share" of joint venture receipts. (*Id.* at 12-13.) When,

as here, a proposed regulation merely clarifies the meaning of an existing rule, the proposed rule should be given effect, even as to events which occurred before the proposed rule became final. (*Id.* at 13, citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).)

Appellant then argues that the financial benefit Appellant receives from PMA, rather than Appellant's ownership interest, should have been used to calculate receipts. (*Id.* at 14-15.) If only [xx]% of PMA's receipts (equivalent to Appellant's share of profits) are attributed to Appellant, and other permissible deductions are also made, the combined average annual receipts for 2016-2018 would be $[xxxx], below the $41.5 million size standard. (*Id.* at 18.)

F. AID's Response

On February 16, 2021, AID responded to the appeal. AID argues that populated joint ventures are still joint ventures for size purposes, albeit joint ventures that are no longer eligible for new set-aside contract awards. Therefore, owners of populated joint ventures, such as Appellant, are charged with their proportionate share of joint venture receipts. AID further contends that the Area Office properly found that ownership percentage should be used to measure a proportionate share of receipts.

AID first argues that the 2016 regulatory changes did not result in populated joint ventures ceasing to be joint ventures. (AID Response at 4.) AID rejects Appellant's suggestion that 13 C.F.R. § 121.103(h) no longer applies to populated joint ventures. (*Id.*) Under SBA regulations, members of joint ventures are affiliated with each other, unless they satisfy an enumerated exception, and the 2016 rule changes merely narrowed the exceptions to only apply to unpopulated joint ventures. (*Id.*) This rule change does not mean that SBA treats populated joint ventures as normal operating companies rather than as joint ventures, as Appellant argues. (*Id.* at 4-5.)

AID highlights that an offeror's size is calculated as of the date of its self-certification with its initial offer including price. (*Id.* at 5, citing 13 C.F.R. § 121.404(a).) Likewise, the regulations applicable are those in effect as of the date of self-certification. (*Id.*) AID claims that PMA, a populated joint venture, presumably did comply with SBA's joint venture regulations at the time PMA submitted its proposal for Contract #DEEM0004062, which was awarded by DOE for Infrastructure Support Services at the Portsmouth Gaseous Diffusion Plant (the "Portsmouth Contract"). (*Id.*) PMA's receipts for the Portsmouth Contract are at issue in this appeal. (*Id.*) AID reasons that, because PMA was a joint venture when it was awarded the Portsmouth Contract, SBA still considers it a joint venture now, even though after the 2016 rules changes PMA would no longer be eligible to bid on a contract such as the Portsmouth Contract. (*Id.*)

AID states that under 13 C.F.R. § 121.103(h)(5), effective until November 16, 2020, "a concern must include in its receipts its proportionate share of joint venture receipts." (*Id.* at 6.) The rule is not limited only to joint ventures that could qualify for new set-aside awards. PMA was a joint venture at the time of its proposal for the Portsmouth Contract, and continues to be a joint venture even when it cannot obtain new set-aside contracts, and so the members of PMA, including Appellant, must include in their receipts a "proportionate share" of PMA's receipts. (*Id.*) Appellant asserts that in April 2020, when Appellant self-certified for the instant

procurement, PMA was no longer a joint venture that would be eligible for new set-aside awards. (*Id.*) AID advances that this would be relevant if PMA's size were in dispute; however, it is Appellant's size that is in dispute, not PMA's, and determining Appellant's size requires attribution of a proportionate share of PMA's receipts. (*Id.*)

AID argues that OHA in *KTS Solutions* merely opined that populated joint ventures are excluded from "the benefits" of 13 C.F.R. § 121.103(h), but did not state that populated joint ventures are not considered joint ventures at all. (*Id.* at 6-7.) Requiring inclusion of joint venture receipts by joint venture owners is not a "benefit." (*Id.* at 7.) "While after 2016 populated joint venture lost access to this 'benefit,' they are not excepted from the rest of Section 121.103(h)." (*Id.*)

AID further claims that there is no inconsistency in requiring a populated joint venture's members to assume a proportionate share of receipts without permitting such joint ventures to be awarded new set-aside contracts. (*Id.*) PMA still is a joint venture in the eyes of SBA, just one that is not eligible for new set-aside awards. (*Id.*) The requirement that a joint venture be unpopulated is only one of several compliance requirements for joint ventures, and it would not make sense that a joint venture that falls out of compliance any requirement ceases to be a joint venture. (*Id.* at 8-10.) Instead, a non-compliant joint venture is still treated as a joint venture for purposes of contract performance and receipts attribution, but SBA will not allow that joint venture to obtain a new set-aside award. AID further posits that Appellant's interpretation, if adopted by OHA, would have disastrous policy implications. In the context of a mentor-protégé joint venture, for example:

> By [Appellant's] logic, falling out of compliance with one of the above requirements would cause the joint venture to be treated as an operating entity, which would have the effect of affiliating the protégé majority owner with the joint venture entity. This would mean that the protégé would have to include *all receipts* of the joint venture entity in its size calculation.

(*Id.* at 8-9, emphasis AID's.)

AID also argues that ownership percentage is the proper measure for determining a joint venturer's "proportionate share" of receipts. (*Id.* at 10.) The applicable regulation, 13 C.F.R. § 121.103(h)(5), which was effective until November 16, 2020, plainly states that when calculating size, a joint venture participant "must include in its receipts its proportionate share of joint venture receipts." (*Id.*) SBA revised the rule, effective November 16, 2020, to state that "[f]or the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture." (*Id.*)

AID argues that the regulations used to determine size are those that were in effect on the date of self-certification, which occurred here on April 16, 2020, well before the effective date of the regulatory revisions. (*Id.* at 10-11.) The regulations in effect on April 16, 2020 required joint venture participants to assume a "proportionate share of joint venture receipts" but did not define what a "proportionate share" is. (*Id.* at 11.) OHA case law, however, has interpreted ownership

percentage to be the proper way to calculate "proportionate share." (*Id.*, citing *Size Appeal of SIETech LLC*, SBA No. SIZ-5667 (2015) and *Size Appeal of Alpha Protective Servs., Inc.*, SBA No. SIZ-5035 (2009).) At the very least, OHA has recognized ownership percentage as an appropriate method to determine proportionate share, so the Area Office could not have committed reversible error by using it. (*Id.* at 11-12.)

AID claims that the new version of the regulation, which states that the attributed joint venture receipts are calculated using each "partner's percentage share of the work performed by the joint venture," should not be applied in determining Appellant's size. (*Id.* at 12.) The new regulation did not become effective until after self-certification and was not intended to be retroactive. (*Id.*) The expectation at the time of Appellant's self-certification was that joint venture partners must assume their proportionate share of joint venture receipts, and that expectation should not now be disturbed. (*Id.* at 12-13.)

Further, even if OHA were to conclude that the new regulation should have retroactive effect, the new regulation logically could apply only to unpopulated joint ventures. (*Id.* at 13.) The "work performed" language only makes sense in the context of unpopulated joint ventures, where all work is performed by employees of the members, rather than by employees of the joint venture itself. (*Id.*)

AID disputes Appellant's calculations of proportionate share of receipts, as offered in the appeal. (*Id.* at 15.) Appellant's calculation uses an incorrect period of measurement - *i.e.*, 2016-2018, instead of the three most recent fiscal years prior to self-certification, 2017-2019 - and notwithstanding that Appellant elected to use a five-year period of measurement for purposes of the instant size determination. (*Id.*) Although Appellant argued in its appeal that 2019 receipts should not be considered, because 2019 tax returns were unavailable in April 2020 when Appellant self-certified as small, the receipts of a completed fiscal year must be counted even if the tax returns are not yet available. (*Id.* at 17, citing *Size Appeal of Educational Servs., Inc.*, SBA No. SIZ-4782 (2006).)

AID maintains that Appellant's [xx]% calculation also is flawed because Appellant improperly removed [xx]% of PMA's profits, which are paid to a subcontractor, to generate that number. (*Id.* at 15-16.) There is no regulatory or case law to support Appellant's approach. (*Id.* at 16.) On the contrary, SBA has long defined receipts as including "all revenue in whatever form received or accrued," and has further stipulated that "items, such as subcontractor costs . . . may not be excluded from receipts." (*Id.*, quoting 13 C.F.R. § 121.104(a).)

AID concludes that Appellant has failed to show that the Area Office made any clear error of fact or law. (*Id.* at 17-18.) SBA has provided no explicit instruction on how to calculate the "proportionate share" of receipts of a populated joint venture, and the Area Office's interpretation comports with OHA case law, regulatory guidance, and SBA policy objectives, and so is not clearly erroneous. (*Id.*)

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. SBA Regulatory Changes

SBA's regulations governing affiliation historically permitted that a joint venture could be either populated (*i.e.*, where the joint venture had its own separate employees) or unpopulated. Thus, SBA regulations stated, in pertinent part:

> (h) *Affiliation based on joint ventures.* 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. . ..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. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture must be in writing and must do business under its own name, and it may (but need not) be in the form of a separate legal entity, and if it is a separate legal entity it may (but need not) be populated (*i.e.*, have its own separate employees).

13 C.F.R. § 121.103(h) (2015).

The regulations further provided that the parties to a joint venture, whether populated or unpopulated, normally "are affiliated with each other with regard to the performance of that contract." 13 C.F.R. § 121.103(h)(2) (2015). Such affiliation, though, could be avoided if the joint venture met certain conditions. 13 C.F.R. § 121.103(h)(3) (2015). The regulations stated that "[f]or size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees." 13 C.F.R. § 121.103(h)(5) (2015).

In 2016, SBA revised its regulations as pertaining to populated joint ventures. 81 Fed. Reg. 48,557 (July 25, 2016). The regulations, as revised, state in pertinent part:

> (h) *Affiliation based on joint ventures*. . . For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture: must be in writing and must do business under its own name; must be identified as a joint venture in the System for Award Management (SAM); may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.*, the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture).

13 C.F.R. § 121.103(h) (effective Aug. 24, 2016).

The language at 13 C.F.R. § 121.103(h)(5), requiring that each joint venture partner assume a "proportionate share" of the joint venture's receipts, remained unchanged by the 2016 rulemaking. Effective November 16, 2020, though, SBA also amended that regulation. 85 Fed. Reg. 66,146 (Oct. 16, 2020). The latter regulation, as revised, now states in pertinent part:

> (3) *Receipts/employees attributable to joint venture partners*. For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (*e.g.*, subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee count.

13 C.F.R. § 121.103(h)(3) (effective Nov. 16, 2020).

C. Analysis

Appellant raises two principal arguments in attempting to overturn the size determination. Appellant contends, first, that it should not have been required to assume any portion of PMA's receipts. Section II.E, *supra*. Appellant reasons that PMA is a populated joint venture, a type of business arrangement no longer recognized under SBA regulations after the 2016 rulemaking. Therefore, Appellant urges, the Area Office should have considered PMA a separate operating company, rather than a joint venture. Second, even if PMA is properly deemed to be a joint

venture, Appellant disputes the "proportionate share" of PMA's receipts that should have been attributed to Appellant. *Id.*

Appellant's argument that populated joint ventures, such as PMA, should not be considered joint ventures for size purposes is unpersuasive. There is no dispute that PMA was established as a populated joint venture in 2015, and SBA regulations at that time expressly recognized populated joint ventures. Section III.B, *supra*. SBA revised its regulations pertaining to populated joint ventures in 2016, specifically the rules governing "[a]ffiliation based on joint ventures." *Id.* The regulations, as revised, indicated that populated joint ventures would no longer be eligible to be awarded new small business set-aside contracts, and that the parties to a populated joint venture would no longer be eligible for an exception to the general rule that they are affiliated with each other with regard to the performance of that contract. *Id.* The revised regulations, though, did not preclude populated joint ventures from continuing to perform existing contracts, and did not alter the requirement that joint venture partners include their "proportionate share" of the joint venture receipts or employees in determining size. *Id.* Accordingly, while it is true that, after the 2016 rulemaking, PMA would no longer have been eligible to be awarded new small business set-aside contracts, PMA could still continue to perform its existing contracts, and is still a "joint venture" for purposes of calculating size of the joint venture's members.

Appellant also argues that the requirement that joint venturers include their "proportionate share" of joint venture receipts presupposes a joint venture that is fully compliant with 13 C.F.R. § 121.103(h). This argument, though, is not supported by the text of the regulations. Even as revised in 2016, the regulations continued to stipulate that "a concern must include in its receipts its proportionate share of joint venture receipts" without regard to whether the joint venture is populated or unpopulated, and irrespective of whether the joint venture meets all requirements for the joint venture partners to be excepted from affiliation. Section III.B, *supra*.

Appellant additionally posits that it would be confusing for populated joint ventures to be excluded from the benefits of the joint venture regulation if their members still are required to assume a proportionate share of joint venture receipts. Appellant points to *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P, at 11 (2020), where OHA remarked that, under current rules, "a populated joint venture, an entity with its own employees and equipment, [] is excluded from the benefits of the joint venture regulation." I see no merit to Appellant's contentions. As AID correctly observes in response to the appeal, requiring that joint venture partners assume their proportionate share of joint venture receipts is not a "benefit" of the joint venture regulation. OHA's comments in *KTS Solutions* are, thus, not at odds with the notion that members of a populated joint venture must accept their proportionate share of the joint venture's receipts. There is no inconsistency between SBA's requirements, on the one hand, that only unpopulated joint ventures will be eligible for new set-aside contract awards, while, on the other hand, permitting populated joint ventures to perform already-awarded contracts and instructing that all joint venture partners, including the partners of populated joint ventures, must include their proportionate share of joint venture receipts.

In sum, Appellant has not established error in this aspect of the size determination. It is clear that populated joint ventures, such as PMA, are still considered "joint ventures" after the 2016 rulemaking, albeit a type of joint venture that is not eligible to be awarded new set-aside contracts. It follows that the members of a populated joint venture still are required to assume their proportionate share of joint venture receipts.

Appellant's second argument is that the Area Office incorrectly used Appellant's percentage of ownership in PMA to determine Appellant's "proportionate share" of receipts. Appellant maintains that the Area Office should have considered SBA's recent regulatory revisions which defined "proportionate share" as corresponding with the "share of work performed" by each member. Section III.B, *supra*. Although this change became effective November 16, 2020, and thus was not in existence on April 16, 2020, the date that size is determined, Appellant maintains that the change merely clarified the intent of the prior regulation, which did not define "proportionate share." Further, in situations where no work is performed by the joint venture members, as is the case with a populated joint venture, Appellant asserts that the "share of work performed" by a joint venture member should be understood to mean the "profit share" that each member enjoys from the joint venture. With regard specifically to PMA, Appellant claims that, although Appellant owns a [xx]% interest in PMA, [xx]% of profits are paid to a PMA subcontractor, so Appellant receives only [xx]% of the remaining [xx]% of profits, or [xx]%. Accordingly, Appellant reasons, the Area Office should have utilized the [xx]% figure in calculating the percentage of receipts from PMA attributable to Appellant.

Appellant's arguments fail for two reasons. First, OHA's prior decisions have found ownership percentage to be an appropriate method for calculating the members' "proportionate share" of joint venture receipts. *Size Appeal of SIETech LLC Joint Venture*, SBA No. SIZ-5667 (2015); *Size Appeal of Alpha Protective Servs., Inc.*, SBA No. SIZ-5035, at 3 (2009) (when the challenged firm owned a 51% interest in a joint venture, the area office properly "took 51% of the total income for the joint venture, and added [the challenged firm's] receipts to obtain the total amount of receipts"). Given this precedent, the Area Office did not clearly err by utilizing Appellant's ownership interest in PMA to determine Appellant's proportionate share.

Second, while Appellant disagrees with the percentage of ownership approach, Appellant has not offered any reasonable or viable alternative. As Appellant seemingly acknowledges in its appeal, a "share of work performed" approach makes sense when applied to unpopulated joint ventures, because the joint venture members themselves perform work on behalf of an unpopulated joint venture. Such an approach, though, cannot logically be applied to populated joint ventures, which have their own employees. Appellant proposes to substitute "profit share" in lieu of "share of work performed" but such a methodology is not supported by the text of the regulations or OHA case law. On the contrary, the 2020 rulemaking itself refers to the use of "the joint venture partner's percentage ownership share in the joint venture" in calculating employee counts. Section III.B, *supra*. Nor does Appellant point to any authority for deducting [xx]% of PMA's profits because they are paid to a subcontractor, or for disregarding data from 2019, the most recently completed fiscal year prior to self-certification. Appellant thus has not shown that the Area Office erred by failing to adopt Appellant's approach for determining "proportionate share."

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. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge