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

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| SIZE APPEAL OF:<br><br>Rocky Mountain Medical Equipment, Inc.,<br><br>Appellant,<br><br>RE: Veterans Choice Medical Equipment, LLC<br><br>Appealed From<br>Size Determination No. 01-SD-2021-15 | SBA No. SIZ-6129<br><br>Decided: November 22, 2021 |

## APPEARANCES

Lawrence J. Sklute, Esq., Sklute & Associates, Potomac, Maryland, for Appellant

David F. Dowd, Esq., Luke Levasseur, Esq., Mayer Brown LLP, Washington, D.C., for Veterans Choice Medical Equipment, LLC

## DECISION[1]

### I. Introduction and Jurisdiction

On June 4, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 01-SD-2021-15 finding that Veterans Choice Medical Equipment, LLC (VCME) is a small business for the instant procurement. VCME is a joint venture between Avenue Mori Medical Equipment, Inc. (AMME) and its SBA-approved mentor, Rotech Healthcare, Inc. (Rotech). On appeal, Rocky Mountain Medical Equipment, LLC (Appellant), which had previously protested VCME's size, contends that the Area Office erred by considering events that occurred after the date to determine size. For reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

[1] This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

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 February 10, 2017, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. VA259-17-R-0100 for home oxygen services to be provided to patients throughout Veterans Integrated Service Network (VISN) 19. The RFP contemplated the award of one or more indefinite-delivery requirements-type contracts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 532291, Home Health Equipment Rental, which at the time the RFP was issued had a corresponding size standard of $32.5 million in average annual receipts.

On December 21, 2018, the CO issued RFP Amendment A00012, reopening the competition and revising certain aspects of the Performance Work Statement (PWS) and contract pricing. Amendment A00012 and its attachments superseded all prior amendments. A revised RFP provided with Amendment A00012 included the full text of Federal Acquisition Regulation (FAR) clause 52.212-3, "Offeror Representations and Certifications — Commercial Items (Jul 2016)," and required new small business certifications. VCME submitted its offer, including price, in response to the revised RFP on February 20, 2019.

On April 30, 2021, following resolution of various bid protests challenging VA's conduct of the procurement, the CO informed Appellant, an unsuccessful offeror, that VCME had been selected for award. On May 6, 2021, Appellant filed a size protest against VCME. Appellant alleged that VCME's Joint Venture Agreement (JVA) does not meet regulatory requirements, and that AMME therefore is affiliated with Rotech for purposes of this procurement. (Protest at 1-2.)

Appellant acknowledged that VCME is a joint venture between AMME and its SBA-approved mentor, Rotech. (*Id.* at 1-2.) AMME owns 51% of VCME's capital stock, and Rotech owns the remaining 49%. (*Id.* at 7.) Appellant noted that AMME and Rotech have established three joint ventures: VCME, on February 16, 2017; Veterans Advantage Medical Equipment, LLC (Veterans Advantage), on May 11, 2017, and Veterans Care Medical Equipment, LLC (Veterans Care), on June 7, 2017. (*Id.*) Appellant argued that it is likely that VCME's JVA is similar to those of the other two joint ventures, because all of the joint ventures perform substantially similar work, involve the same joint venture partners, and were created within close proximity of time. (*Id.* at 8-9.)

Appellant observed that in *CVE Protest of Commonwealth Home Health Care, Inc.*, SBA No. CVE-116-P (2019), OHA considered a challenge to the JVA of Veterans Care, and found the JVA to be noncompliant with applicable rules. (*Id.* at 9.) Appellant reiterated its view that VCME's JVA here likely is similar to the one found deficient in *Commonwealth*. (*Id.*)

More specifically, Appellant contended, VCME's JVA may not designate a project manager, as required by 13 C.F.R. § 125.8(b)(2)(ii). (*Id.*) Further, the JVA may not include itemization of equipment, facilities, and other resources, as required by 13 C.F.R. § 125.8(b)(2)(vi). (*Id.* at 9-10.) Additionally, the JVA may not describe the source of labor and the respective responsibilities of the joint venturers for performance of work, as required by 13 C.F.R. § 125.8(b)(2)(vii). (*Id.*)

Appellant concluded that parties to a joint venture are normally affiliated with one another for purposes of any contract performed by the joint venture. (*Id.*, citing 13 C.F.R. § 121.103(h)(2).) There is an exception for joint ventures between an SBA-approved mentor and protégé under the All-Small Mentor-Protégé Program (ASMPP). (*Id.* at 11, citing 13 C.F.R. § 125.9(d)(1).) In order to qualify for this exception, however, the JVA must meet regulatory requirements. (*Id.*) Because VCME's JVA likely is not compliant, VCME is ineligible for the exception to affiliation, and therefore is not small for this procurement. (*Id.* at 11-12.)

B. Response to Size Protest

On May 17, 2021, VCME responded to the protest, and submitted a copy of its JVA, the Mentor-Protégé Agreement (MPA) between AMME and Rotech, and other documents. VCME first argued that Appellant lacks standing to protest. (Protest Response to at 2.) VCME claimed that Appellant was acquired by AeroCare Holdings, Inc. in 2019, and so Appellant itself is not small. Further, Appellant no longer has an active registration on the System for Award Management and cannot be found using an internet search. (*Id.*)

Even if Appellant does have standing to pursue this protest, however, Appellant's allegations are meritless. Appellant's speculations about the contents of VCME's JVA are incorrect. (*Id.* at 3.) VCME claimed that the problems discussed by OHA in *Commonwealth* are not issues in VCME's JVA, as VCME's JVA is not identical to the one in question in *Commonwealth*. (*Id.*) VCME included a copy of its JVA as an exhibit, highlighting that the JVA does contain provisions pertaining to the project manager and the distribution of labor, and an itemized list of equipment and resources. (*Id.* at 3-4.)

C. Size Determination

On June 4, 2021, the Area Office issued Size Determination No. 1-SD-2021-15, concluding that VCME is small for the instant procurement. (Size Determination at 1.) The Area Office identified February 20, 2019 as the date to determine VCME's size. (*Id.* at 2, 13.) That was the date VCME submitted its proposal with price in response to the revised solicitation. (*Id.*)

The Area Office determined that VCME was formed on February 16, 2017, as an unpopulated joint venture between AMME and Rotech. (*Id.* at 4.) AMME owns 51% of VCME, and Rotech owns the remaining 49%. (*Id.*) Mr. Myo Tun of AMME is the Managing Director of VCME. (*Id.*)

AMME was established on December 1, 2015. (*Id.*) It is 51% owned by Mr. Tun, and 49% owned by Mori Medical Equipment, Inc. (MME). (*Id.*) MME in turn is 100% owned by Mr.

Gordon Mori. (*Id.*) Mr. Tun also owns 100% of two other concerns, Avenue Home Care, Inc. (AMC) and Avenue Medical Equipment, Inc. (AME). (*Id.*) The Area Office determined that Mr. Tun, as majority owner of AMME and sole owner of AMC and AME, has the power to control all three firms. (*Id.*) Accordingly, AMME is affiliated with AMC and AME through common ownership. (*Id.*) AMME also is affiliated with MME through common management and negative control. (*Id.* at 5.) However, the combined receipts of AMME and its affiliates do not exceed the applicable $32.5 million size standard. (*Id.* at 7.)

The Area Office then examined affiliation based on joint ventures under 13 C.F.R. § 121.103(h), as alleged in Appellant's protest.[2] That regulation provides that:

> 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. 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. . . .

(*Id.* at 5-6, quoting 13 C.F.R. § 121.103(h).)

The Area Office found that neither of the two other joint ventures between AMME and Rotech — Veterans Advantage and Veterans Care — have been awarded a contract. (*Id.* at 6.) Nor has VCME previously been awarded a contract. (*Id.*) The Area Office concluded that AMME and Rotech are not in violation of the 3-in-2 rule, and are not generally affiliated. (*Id.*)

The Area Office then explained that participants in a joint venture ordinarily are affiliated with each other for any contract performed by the joint venture, unless an exception applies. (*Id.*)

[2] The Area Office applied the version of SBA regulations in effect on February 20, 2019, the date to determine size.

The regulations state:

> (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract.
>
> (ii) Two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of §§ 124.513 (c) and (d), §§ 125.8(b) and (c), §§ 125.18(b)(2) and (3), §§ 126.616(c) and (d), or §§ 127.506(c) and (d) of this chapter, as appropriate.

(*Id.*, quoting 13 C.F.R. § 121.103(h)(3).) Because Rotech is not small, the first exception would not apply here. (*Id.*) The second exception, however, is potentially applicable, because AMME and Rotech are an SBA-approved mentor and protégé. (*Id.*)

The Area Office observed that, in order to qualify for the exception at § 121.103(h)(3)(ii), the joint venture participants first must have an SBA-approved MPA. (*Id.* at 7.) AMME and Rotech executed such an MPA on February 17, 2017, which SBA subsequently approved for a three-year period ending February 27, 2020. (*Id.*) Accordingly, as of February 20, 2019, the relevant date for determining VCME's size, AMME and Rotech did have a valid SBA-approved MPA. (*Id.*)

The Area Office found that for VCME to be eligible for the exception to affiliation under § 121.103(h)(3)(ii), AMME, the protégé, must be small under the $32.5 million size standard, and VCME's JVA must meet all requirements set forth in 13 C.F.R. § 125.8(b) and (c). (*Id.*) AMME is small because the combined average annual receipts of AMME and its affiliates do not exceed the $32.5 million size standard. (*Id.*)

The Area Office then reviewed the terms of VCME's JVA. Appellant alleged in its size protest that the JVA may not designate a project manager as required by 13 C.F.R. § 125.8(b)(2)(ii). (*Id.* at 9.) The regulation states that a proper mentor-protégé JVA must contain a provision:

> Designating a small business as the managing venturer of the joint venture, and an employee of the small business managing venturer as the project manager responsible for performance of the contract. The individual identified as the project manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the project manager cannot be employed by the mentor and become

> an employee of the small business for purposes of performance under the joint venture[.]

(*Id.* at 7-8, quoting 13 C.F.R. § 125.8(b)(2)(ii).)

The Area Office determined that section 4.1 of the JVA designates AMME as the Managing Venturer. (*Id.* at 9.) In addition, section 5.0 of the JVA identifies Mr. Andrew Mori, an employee of AMME, as project manager. (*Id.*) The project manager is responsible for the performance of the contract, and reports to and implements the instructions of the Managing Venturer. (*Id.*) Mr. Andrew Mori is an employee of AMME, not an employee of VCME, and he is not compensated directly by VCME. (*Id.*) The Area Office concluded that the JVA complies with 13 C.F.R. § 125.8(b)(2)(ii). (*Id.*)

Appellant also alleged in its size protest that VCME's JVA may not itemize major equipment, facilities, and other resources furnished by the members of the joint venture, as required by 13 C.F.R. § 125.8(b)(2)(vi). That regulation states that a valid JVA must contain a provision:

> Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available[.]

(*Id.* at 8, quoting 13 C.F.R. § 125.8(b)(2)(vi).)

The JVA here, however, does document the major equipment to be furnished by AMME and by Rotech. (*Id.* at 10.) According to section 11.0 of the JVA, AMME will furnish delivery trucks and branding, while Rotech will furnish the billing system, central intake function, information technology infrastructure, and other resources. (*Id.*) The JVA also provides an approximate dollar value for each category of equipment being furnished. (*Id.*) The Area Office concluded that the JVA complies with 13 C.F.R. § 125.8(b)(2)(vi). (*Id.*)

Appellant also alleged in its size protest that VCME's JVA may not describe the source of labor as required by 13 C.F.R. § 125.8(b)(2)(vii). That regulation states that a JVA must contain a provision:

> Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set

> forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly [available.]

(*Id.* at 8, quoting 13 C.F.R. § 125.8(b)(2)(vii).)

Section 7.1 of the JVA states that Mr. Andrew Mori, an employee of AMME, will have primary responsibility for contract negotiations and for negotiations of all proposals for task or delivery orders to be awarded under the contract. (*Id.* at 10.) Section 7.3 explains the contract functions to be performed by each member of the joint venture. (*Id.*) AMME will perform project management, initial setups, equipment maintenance in patients' homes, cylinder deliveries, clinical follow-up visits, complaint responses, on-call services, obtaining required insurance coverage, and providing vehicles. (*Id.*) Section 7.2 states that the Managing Venturer, acting through the project manager, will have primary responsibility for ensuring appropriate labor for the effort. (*Id.*) The contract will be staffed using a blend of existing employees and new hires. (*Id.*) AMME will provide the project manager, area managers, customer service representatives, patient service technicians, respiratory therapists, and other employees. (*Id.*) Rotech will provide employees to perform central intake, billing, and services to handle small cluster patients. (*Id.* at 10-11.) The JVA also includes an approximate number of each type of position to be used. (*Id.* at 11.) The Area Office concluded that the JVA is compliant with 13 C.F.R. § 125.8(b)(2)(vii). (*Id.*)

As part of its review of the JVA, the Area Office also addressed the JVA's compliance with 13 C.F.R. § 125.8(b)(2)(v). That regulation requires the creation of a special bank account to be used in the name of the joint venture. Specifically the JVA must:

> Provid[e] for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well[.]

(*Id.* at 8, quoting 13 C.F.R. § 125.8(b)(2)(v).)

The Area Office found that section 10.0 of the JVA provides for the establishment and administration of a special bank account in VCME's name. The JVA further states that the account will "require the signature of all Venturers or designees for withdrawal purposes." (*Id.* at 9.)

The Area Office requested that VCME provide additional documentation to verify that such an account had been created and meets regulatory requirements. (*Id.* at 10.) In response, VCME provided a bank signature card dated March 28, 2018 (hereafter, "the Signature Card"), and a letter from Mr. Ryan J. Santeufemio, vice president of the bank, dated May 26, 2021 (hereafter, "the Bank Letter"). (*Id.*) The Signature Card indicates that four named individuals, two from each joint venturer, "are authorized to execute any and all signature cards and enter into any and all agreements, including, without limitation, the Deposit Agreement, on behalf of [VCME] to effect the opening of any deposit account(s) at Bank." (*Id.*, quoting Signature Card at 2.) The Area Office considered the Signature Card to be "[c]ontrary to the JVA," because the JVA requires the signatures of both parties for withdrawals, whereas the Signature Card appears to indicate that any of the four named individuals may enter into agreements or conduct transactions without limitations. (*Id.*) The Bank Letter, however, states that the bank "has been instructed throughout the formation of the [JVA] between [AMME] and [Rotech] that cash control would require dual involvement of both members of the joint venture. Any amounts disbursed from the bank account would require authorization by a representative from both entities and not just one of the members." (*Id.*, quoting Bank Letter at 1.) The Bank Letter then reiterates that "[b]ased on [the bank's] account administration requirements, representatives from both [AMME] and [Rotech] must sign off for any withdrawals." (*Id.*, quoting Bank Letter at 1.) The Area Office concluded that the JVA and associated bank account do comply with 13 C.F.R. § 125.8(b)(2)(v). (*Id.*)

The Area Office found that VCME is eligible for the exception to affiliation for mentor-protégé joint ventures, and therefore is small for the instant procurement. (*Id.* at 13.)

D. Appeal

On June 15, 2021, Appellant filed the instant appeal. Appellant argues that the Area Office erred in its analysis of VCME's JVA, specifically whether the JVA meets the special bank account requirement at 13 C.F.R. § 125.8(b)(2)(v). (Appeal at 8-10.)

Appellant claims that the Area Office erred by considering evidence or events that transpired after the date to determine size, February 20, 2019. (*Id.* at 9.) A joint venture must comply with regulatory requirements as of the date of self-certification. (*Id.*, citing *Size Appeal of Lance Bailey & Assoc., Inc.*, SBA No. SIZ-4788 (2006).) Here, the date to determine size is February 20, 2019, when VCME submitted its offer including price in response to Amendment A00012. (*Id.* at 10, citing Size Determination at 2.)

Appellant argues that, although the Area Office correctly determined that February 20, 2019 is the appropriate date to analyze VCME's size, the Area Office improperly considered evidence or events that transpired after February 20, 2019 in conducting its review. (*Id.* at 11, citing *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010).) In particular, the Bank Letter is dated May 26, 2021, and thus was created well after the date to determine size. (*Id.*) The Area Office relied on the Bank Letter in determining that VCME's special bank account complied with 13 C.F.R. § 125.8(b)(2)(v). (*Id.*) Conversely, the Signature Card, dated March 28, 2018, was in existence prior to the date to determine size, and the Area Office found that the

Signature Card contradicted the terms of VCME's JVA. (*Id.*) Appellant argues that the Area Office should have attached no weight to the Bank Letter, as it was created more than two years after the date to determine size. (*Id.* at 11-12.) The Area Office's own analysis of the Signature Card shows that VCME did not meet the requirements of 13 C.F.R. § 125.8(b)(2)(v). As a result, the Area Office should have found VCME ineligible for award. (*Id.* at 13.)

E. VCME's Response

On June 30, 2021, VCME responded to the appeal and moved to introduce new evidence. VCME argues that Appellant is incorrect on both the law and the facts. (Response at 2.) First, Appellant is wrong in asserting that any and all evidence created after the date to determine size must be disregarded. (*Id.*) According to VCME, size protests and appeals "regularly feature evidence dated after the certification date," such as sworn declarations produced in response to protest allegations. (*Id.*) Because evidence created after the date to determine size may appropriately be considered, the fundamental premise of the appeal is flawed. (*Id.*)

Second, VCME argues, Appellant also is incorrect with regard to the relevant facts. (*Id.* at 3.) The Signature Card identifies individuals who may sign against an account, not the individuals who must sign. (*Id.*) Conversely, the Bank Letter explains the relationship that was put into place with the bank, and Appellant has not shown that this relationship was improper or inconsistent with regulatory requirements. (*Id.*) Further, VCME argues, the Bank Letter specifically states that the bank was instructed "throughout the formation" of the joint venture that cash control required the involvement of both joint venturers. (*Id.*) The Bank Letter thus shows that a proper arrangement was established years ago, and was in effect as of the date to determine size. (*Id.*)

Accompanying its Response, VCME moved to introduce two additional pieces of evidence. (Motion at 1.) First is a sworn declaration from Mr. Santeufemio, the author of the Bank Letter, asserting that he established VCME's bank account; that VCME's account was established prior to February 20, 2019; and that VCME's account "requires signatures from both AMME and Rotech for transfers." (Santeufemio Decl. ¶¶ 2-3.) Second is a May 10, 2019 letter from Mr. Santeufemio regarding the bank account of Veterans Care, a different joint venture between AMME and Rotech. In this letter, Mr. Santeufemio states that the bank account associated with Veterans Care requires that "both [AMME] and [Rotech] must sign off for any withdrawals." (Letter from R. Santeufemio (May 10, 2019), at 1.)

There is good cause to admit such evidence, VCME argues, because it "corroborates that AMME and Rotech established the appropriate banking relationships from the outset." (Motion at 2.) Mr. Santeufemio's declaration supplements and expounds upon his statements in the Bank Letter. Furthermore, although Mr. Santeufemio's May 10, 2019 letter does not pertain to VCME, the letter nevertheless describes the banking arrangements utilized by AMME and Rotech, at the same bank, for their joint ventures. VCME acknowledges that it did not provide the new evidence to the Area Office during the size review. There was no reason for VCME to have done so, however, because Area Office was satisfied with the original Bank Letter and voiced no "questions or concerns" about it. (*Id.*)

F. Appellant's Reply

On July 1, 2021, Appellant moved for leave to reply to VCME's Response, and opposed VCME's motion to introduce new evidence. In its Reply, Appellant first argues that VCME's Response avoids discussion of relevant OHA case law and mischaracterizes Appellant's allegations. (Reply at 3.) Appellant's appeal contended that "there is no information in the [Bank Letter] that establishes when the cash control process was put into place at the bank to change the March 29, 2018 terms of the [Signature Card]." (*Id.*) OHA may therefore appropriately infer that the cash control process was not implemented until the date of the Bank Letter — May 26, 2021 — which is long after the date to determine size. (*Id.* at 3-4.) Appellant argues that, as of the relevant date to determine size, the Signature Card is the only evidence relating to the terms of cash control. (*Id.* at 4.)

Next, Appellant argues that VCME inaccurately describes the purpose of a bank signature card. (*Id.*) VCME asserts that the Signature Card only shows the signatures of individuals who may sign against an account, not who must sign. (*Id.* at 4-5.) In actuality, though, signature cards are signed only by those individuals who are authorized to make a transfer from a bank account. (*Id.* at 5.) Here, the Signature Card includes terms authorizing any of the four signatories to make a transfer from the bank account. (*Id.*) This is also how the Area Office viewed the Signature Card in the underlying size determination. (*Id.*)

Appellant argues that, in the Bank Letter, Mr. Santeufemio comments that the bank "has been instructed throughout the formation of the [JVA] between [AMME] and [Rotech] that cash control would require dual involvement of both members of the joint venture." The use of the word "throughout," however, refers to when the bank was instructed that cash controls would require approval of both members, not necessarily to when the bank implemented those instructions. (*Id.* at 6.) The Bank Letter thus does not establish that any process was put into place, prior to February 20, 2019, to override the terms of the Signature Card. (*Id.*)

In its opposition to VCME's motion to introduce new evidence, Appellant argues that the new evidence is irrelevant to the issues on appeal. (Opp. at 1.) Mr. Santeufemio's 2019 letter pertaining to the Veterans Care bank account is not relevant because Veterans Care is not the joint venture in question here. (*Id.* at 3.)

Appellant argues that Mr. Santeufemio's declaration similarly is not relevant. (*Id.* at 2-3.) The declaration states that: "Attached is a true and correct copy of a letter I executed in May 2021 describing the arrangement for VCME." (*Id.* at 2, quoting Santeufemio Decl. ¶ 3.) The only letter provided with VCME's motion, however, is the May 10, 2019 letter relating to Veterans Care. As a result, Appellant maintains, Mr. Santeufemio's declaration may in fact be addressing Veterans Care's bank account, not VCME's.

## III. Discussion

### A. Standard of Review

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

### B. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). 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).

In the instant case, I find that VCME has shown good cause to introduce new evidence. Section II.E, *supra*. The evidence in question is limited in scope, consistent with the information VCME previously provided to the Area Office, and responds to and expounds upon issues presented in the appeal. Appellant contends that Mr. Santeufemio's declaration should not be admitted because Mr. Santeufemio may be describing the banking arrangements of Veterans Care, a different joint venture between AMME and Rotech. Section II.F, *supra*. The declaration itself, though, makes repeated references to VCME and does not mention Veterans Care. Section II.E, *supra*. Moreover, the declaration addresses the "letter [Mr. Santeufemio] executed in May 2021 describing the arrangement for VCME," and thus plainly refers to the Bank Letter, dated May 26, 2021, concerning VCME, not to Mr. Santeufemio's earlier 2019 letter pertaining to Veterans Care. *Id.* I therefore see no basis to conclude that Mr. Santeufemio's declaration may not actually be discussing VCME's own banking arrangements.

VCME also has shown good cause to admit Mr. Santeufemio's May 10, 2019 letter. Appellant correctly observes that this letter pertains specifically to Veterans Care and not to VCME. Sections II.E and II.F, *supra*. It does not follow, however, that the 2019 letter can have no probative value. Indeed, Appellant itself argued, in its initial protest, that VCME and Veterans Care likely share numerous common practices, because these joint ventures perform substantially similar work, involve the same joint venture partners, and were created within close proximity of time. Section II.A, *supra*. Mr. Santeufemio's 2019 letter therefore is relevant here, because it

provides contemporaneous evidence of the banking arrangements utilized by AMME and Rotech for their joint ventures during 2019.

For these reasons, VCME's motion is GRANTED and the new evidence is ADMITTED into the record.

C. Analysis

The Area Office determined, and no party disputes, that VCME is a joint venture between AMME and Rotech, an SBA-approved mentor and protégé under the ASMPP. The applicable SBA regulations[3] make clear that an ASMPP mentor is encouraged to provide business development assistance to its protégé, which may include "assistance in performing prime contracts with the Government through joint venture arrangements." 13 C.F.R. § 125.9(a). Further, although joint venturers normally are affiliated with one another for any contract performed by the joint venture, SBA regulations authorize an exception for mentor-protégé joint ventures:

> A protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor).

13 C.F.R. § 125.9(d)(1); *see also* § 121.103(h)(3)(ii). To qualify for the exception, the terms of the JVA must comply with § 125.8(b)(2) and (c). 13 C.F.R. §§ 121.103(h)(3)(ii) and 125.9(d)(1)(ii).

In the instant case, the Area Office found that SBA formally approved the MPA between AMME and Rotech on February 17, 2017, well before VCME submitted its proposal for the instant procurement. Sections II.A and II.C, *supra*. As a result, AMME and Rotech could properly joint venture for the instant procurement, provided that the protégé, AMME, is a small business, and so long as VCME's JVA meets the requirements at § 125.8(b)(2) and (c). The Area Office found that AMME is small and that VCME's JVA does meet these conditions. Section II.C, *supra*. VCME thus was eligible for the exception to joint venture affiliation for SBA-approved mentor and protégé. *Id.*

On appeal, Appellant challenges only one aspect of the Area Office's decision. Sections II.D and II.F, *supra*. Specifically, Appellant contends that the Area Office erred in concluding that VCME's JVA is compliant with 13 C.F.R. § 125.8(b)(2)(v). That regulation stipulates that a

[3] Effective November 16, 2020, SBA introduced substantial changes to the ASMPP and size regulations. *See* 85 Fed. Reg. 66,146 (Oct. 16, 2020). These changes, however, do not apply in the instant case, because they occurred after February 20, 2019, the date VCME self-certified as a small business. Citations throughout this decision refer to the version of SBA's affiliation and ASMPP rules that were in effect on February 20, 2019.

JVA must provide for the establishment and administration of a special bank account in the name of the joint venture, and that this bank account "must require the signature of all parties to the joint venture or designees for withdrawal purposes." 13 C.F.R. § 125.8(b)(2)(v). Although the Area Office determined that VCME's JVA meets this requirement, the Area Office based this conclusion largely on the Bank Letter, dated May 26, 2021. Section II.D, *supra*. Appellant urges that the Area Office should have disregarded the Bank Letter, because this document was created long after February 20, 2019, the relevant date for determining size. *Id.*

I find Appellant's arguments unpersuasive for several reasons. As the Area Office observed, section 10.0 of VCME's JVA states that AMME and Rotech would establish a special bank account in VCME's name, and that this bank account would "require the signature of all Venturers or designees for withdrawal purposes." Section II.C, *supra*. The language of the JVA itself, then, meets the requirements of 13 C.F.R. § 125.8(b)(2)(v). The Area Office then corroborated the JVA with the Bank Letter, which confirmed that a separate bank account had been established for VCME and that "representatives from both [AMME] and [Rotech] must sign off for any withdrawals." *Id.* Although it is true that the Bank Letter was written well after the date to determine size, the Bank Letter describes events and circumstances occurring in the past, and indeed "throughout the formation" of the VCME joint venture. *Id.* The Area Office therefore could appropriately consider the Bank Letter as evidence of the banking arrangement that was in effect as of February 20, 2019. *E.g., Size Appeal of Nationwide Pharm., LLC*, SBA No. SIZ-6027, at 16 (2019) (sworn declaration created after the date to determine size could appropriately be considered, because it provided evidence of an oral understanding that existed as of the date to determine size).

Appellant also maintains that the Bank Letter is ambiguous in that it describes instructions that AMME and Rotech reportedly gave to the bank, but does not indicate when the bank actually implemented those instructions. A document is ambiguous in a legal sense, however, if it is susceptible to "more than one reasonable interpretation." *Size Appeal of U.S. Army Corps of Engineers*, SBA No. SIZ-5915, at 7 (2018). As a result, merely identifying a potential ambiguity in a document does not suffice to show that the Area Office's interpretation of that document was clearly incorrect or unreasonable, as would be necessary for Appellant to prevail on this appeal. Further, even if OHA were to agree that the Bank Letter, by itself, is ambiguous, the meaning of the letter is further clarified and explained by the additional evidence Appellant offers on appeal, including the sworn declaration of Mr. Santeufemio.

## IV. Conclusion

Appellant has not shown that the Area Office clearly erred in finding that VCME's JVA complies with 13 C.F.R. § 125.8(b)(2)(v). 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).

KENNETH M. HYDE
Administrative Judge