

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

SIZE APPEAL OF:

GC&V Construction, LLC,

Appellant,

Appealed From  
Size Determination No. 3-2023-004

SBA No. SIZ-6236

Decided: August 11, 2023

APPEARANCES

Edward T. DeLisle, Esq., Andrés M. Vera, Esq., Thompson Hine LLP, Washington, D.C., for Appellant

D. Matthew Jameson III, Esq., Burns White LLC, Pittsburgh, Pennsylvania, for RBVetCo, LLC d/b/a Rocky Bleier Construction Group

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On February 1, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2023-004, concluding that GC&V Construction, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. On appeal, Appellant contends that the Area Office committed errors in calculating Appellant's receipts, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. 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

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<sup>1</sup> 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.

15 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 Prior Proceedings

On April 21, 2022, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C10F22R0030 for a construction project at the Indiantown Gap National Cemetery in Pennsylvania. (RFP at 1, 8.) The contractor will provide “all labor, materials, equipment, and supervision for the construction.” (*Id.*) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$39.5 million average annual receipts. (*Id.* at 13.) Proposals were due May 25, 2022. (*Id.*, Amendment 0003, at 1.) On August 1, 2022, the CO informed unsuccessful offerors that Appellant was the apparent awardee.

On August 5, 2022, RBVetCo, LLC d/b/a Rocky Bleier Construction Group (RBVetCo) filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant is not small due to affiliation with the following entities:

- Creter Vault Corp. and several associated concerns, which RBVetCo described as the “Creter Companies”
- G&C Fab-Con, LLC (GCFC)
- MGC Services A Joint Venture, LLC (MGC 1)
- MGC Services A Joint Venture 2, LLC (MGC 2)
- A-Vet/MGC A Joint Venture, LLC (A-Vet JV 1)
- A-Vet MGC 2 A Joint Venture, LLC (A-Vet JV 2)

(Protest at 2.)

The protest contended that the Creter Companies have engaged in “a concerted, relentless and deliberate effort to gain access” to VA cemetery construction projects set aside for SDVOSBs. (*Id.* at 3.) GCFC, formed by Mr. Richard E. Creter and Dr. James C. Griffith, was awarded three VA cemetery construction projects. (*Id.*) GCFC later was found not to be a small business, and OHA affirmed that determination in *Size Appeals of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015), based on GCFC's affiliation with the Creter Companies. (*Id.*)

In 2017, Richard E. Creter's sons, Messrs. Richard K. Creter and Matthew T. Creter (T. Creter), and Dr. Griffith formed another SDVOSB entity, Appellant. (*Id.*) In 2018, Appellant was awarded a VA contract. (*Id.*) The award was protested, the Area Office found Appellant not small for the applicable size standard, but OHA reversed the Area Office's determination in *Size Appeal of GC&V Construction, LLC*, SBA No. SIZ-5952 (2018). (*Id.*) In RBVetCo's view, “[t]he primary focus of the OHA decision was on the Area Office's analysis of [Appellant's] Operating Agreement; there was no record of an analysis of [the] Creter Companies involvement with the

management, identity of interest, or the totality of the circumstances that would lead an objective observer to conclude that [Appellant] was affiliated with the Creter Companies.” (*Id.*)

RBVetCo argued that the “affiliation scheme” between Appellant and the Creter family companies expanded. (*Id.* at 4.) Dr. Griffith participates in the MGC 1 and MGC 2 joint ventures, which pursue VA cemetery construction projects. (*Id.* at 4-5.) In 2020, MGC 1 was awarded a VA project, a size protest was filed, and the Area Office found that MGC 1 was not small for the applicable size standard “due to issues with the firm's joint venture agreement.” (*Id.* at 5.) RBVetCo claimed that while it is not privy to the identity of MGC 1's joint venture partners or the terms of the joint venture agreement, “[w]hen an investigation ‘follows the money,’ we suspect it will substantially flow to the Creter Companies and the Creter family.” (*Id.*)

RBVetCo continued to assert that “throughout the complex [affiliation] scheme, there is at least one common marker: each of the SDVOSB entities have the first letter of Griffith's and Creter's respective last names in the name of the company.” (*Id.* at 6.) This, according to RBVetCo, shows that Dr. Griffith and Richard E. Creter “will continue to abuse the SDVOSB program by expanding their scheme to create as many additional companies as necessary to influence the award of VA National Cemetery SDVOSB set-aside construction projects to one of their affiliated companies.” (*Id.*)

On August 19, 2022, Appellant responded to the protest. Appellant acknowledged affiliation with GCFC and Creter & Griffith Investments, LLC (C&GI) through common ownership, but denied affiliation with other companies associated with minority owner Richard E. Creter or his family. (Response to Protest at 3.) Specifically, Appellant asserted that it is not broadly affiliated with the Creter Companies because Richard E. Creter is the only member of the Creter family involved in Appellant. (*Id.* at 5.) Richard E. Creter, though, is “not an officer, director, managing member, or partner of any of the Creter Companies.” (*Id.*) Furthermore, Richard E. Creter “ceased all employment and other involvement” with the Creter Companies in 2017. (*Id.*) The other owners of Appellant, Dr. Griffith and Mr. Cole Vettraino, have “never been employees or officers of any Creter Company.” (*Id.*)

GCFC is a minority (49%) member of four joint venture entities: MGC 1, MGC 2, SGC Services, LLC (SGC 1), and SGC Services 2, LLC (SGC 2). (*Id.* at 6.) MGC 1 and MGC 2 are joint ventures between GCFC and Maverick Constructors, LLC (Maverick). (*Id.*) SGC 1 and SGC 2 are joint ventures between GCFC and Seabee Construction, Inc. (Seabee). (*Id.*) RBVetCo's contention that GCFC and/or the Creter Companies are ostensible subcontractors to Appellant must fail because Appellant does not have any subcontracts with any of the Creter Companies, nor does it intend to enter into any such agreements. (*Id.* at 7.)

Lastly, SBA regulations provide that “[w]hen determining the size of an entity with affiliates, the SBA calculates the average annual receipts of that entity ‘by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.’” (*Id.*, quoting 13 C.F.R. § 121.104(d)(1).) “[W]ith respect to a concern's participation in [a joint venture], the 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).” (*Id.*, quoting 13 C.F.R. § 121.103(h)(3).)<sup>2</sup> “However, a concern’s receipts shall not include capital gains or proceeds from transactions between a concern and its affiliates.” (*Id.*, citing 13 C.F.R. § 121.104(a)(1).) Appellant’s only affiliates are GCFC and C&GI. (*Id.*) Accordingly, only GCFC’s and C&GI’s annual receipts should be added to Appellant’s in determining Appellant’s size, plus GCFC’s proportionate share of joint venture receipts from MGC 1, MGC 2, SGC 1, and SGC 2. (*Id.* at 7-8.) Appellant asserted that “[t]he majority of the JV receipts are derived from the revenues paid pursuant to the subcontracts between [GCFC] and the JV entity and are reported on [GCFC’s] tax returns as Gross Receipts (IRS Form 1120-S, Line 1).” (*Id.*) Additionally, “[t]he remaining JV receipts derive from distributions of profit paid from the JV entity to [GCFC] in accordance with the JV entity’s JV Agreement and/or Operating Agreement and are reported on [GCFC’s] tax returns as Other Income (IRS Form 1120-S, Line 5).” (*Id.* at 8.) The five-year average annual receipts for Appellant, GCFC, and C&GI are \$[XXXX], “clearly below the \$39.5 million size standard threshold.” (*Id.*) Appellant, therefore, is a small business for the subject procurement, despite its affiliation with GCFC and C&GI. (*Id.*)

On October 13, 2022, the Area Office issued Size Determination No. 3-2022-029, finding that Appellant is not a small business due to affiliation with GCFC and C&GI. (I Size Determination No. 3-2022-029 at 10.) The Area Office noted that Appellant had provided “the FY2017 — 2021 Federal tax returns or certified financial statements for itself, the affiliates, and the four Joint Ventures.” (*Id.*) Upon reviewing the receipts for Appellant and its affiliates, “including the proportionate share of revenues of the four [] joint ventures,” the Area Office found that the combined average annual receipts exceed the applicable size standard of \$39.5 million. (*Id.* at 10-11.)

Appellant timely appealed Size Determination No. 3-2022-029 to OHA. On November 21, 2022, SBA moved that OHA remand the matter to the Area Office for further review. On November 22, 2022, OHA issued its decision in *Size Appeal of GC&V Construction, LLC*, SBA No. SIZ-6181 (2022), granting SBA’s motion.

On December 6, 2022, Appellant supplemented its response to the Area Office. Appellant states that remand was appropriate in order for Appellant to provide certain missing documentation. (Remand Response at 2.) Appellant claims that its arguments raised in response to the initial protest and in the appeal “are not impacted by the remand and have not challenged.” (*Id.*) Appellant, therefore, “incorporates all factual arguments set forth therein” and reiterates its contention that the combined average annual receipts for Appellant, GCFC, and C&GI are “well below” the applicable size standard. (*Id.* at 5.)

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<sup>2</sup> Citations in this decision are the version of SBA regulations in effect on May 25, 2022, the date Appellant self-certified as small for the subject procurement. SBA subsequently redesignated the rule previously found at § 121.103(h)(3) as § 121.103(h)(4). 88 Fed. Reg. 26,164 (Apr. 27, 2023).

B. Tax Records

Appellant provided the Area Office tax returns for itself; for its acknowledged affiliates GCFC and C&GI; and for each of the four joint ventures (MGC 1, MGC 2, SGC 1, and SGC 2) in which GCFC holds a 49% minority interest. The tax returns cover the years 2017-2021, the five most recently completed fiscal years preceding Appellant's self-certification for the instant procurement on May 25, 2022. The tax returns reflect the following information pertinent to this appeal:

<b>Appellant's Tax Returns</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>
Cost of Goods Sold (line 2)	[X]	[X]	[X]	[X]	[X]
Total Income (line 6)	[X]	[X]	[X]	[X]	[X]
<b>Total</b>	[X]	[X]	[X]	[X]	[X]

Appellant's total receipts over the five years from 2017-2021 were \$[XXXX]. Dividing this total by five yields average annual receipts of \$[XXXX].

<b>GCFC Tax Returns</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>
Cost of Goods Sold (line 2)	[X]	[X]	[X]	[X]	[X]
Total Income (line 6)	[X]	[X]	[X]	[X]	[X]
<b>Total</b>	[X]	[X]	[X]	[X]	[X]

GCFC's total receipts over the five years from 2017-2021 were \$[XXXX]. Dividing this total by five yields average annual receipts of \$[XXXX].

<b>C&amp;GI's Tax Returns</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>
Cost of Goods Sold (line 2)	-	-	[X]	[X]	[X]
Total Income (line 6)	-	-	[X]	[X]	[X]
<b>Total</b>	-	-	[X]	[X]	[X]

C&GI's total receipts over the five years from 2017-2021 were \$[XXXX].

<b>JV Tax Returns<sup>3</sup></b>		<b>2018 Federal Tax Return</b>	<b>2019 Federal Tax Return</b>	<b>2020 Federal Tax Return</b>	<b>2021 Federal Tax Return</b>
MGC 1 (est. June 14, 2017)	Cost of Goods Sold (Line 2)	[X]	[X]	[X]	[X]
	Total Income (Line 8)	-	[X]	[X]	[X]
	<b>Total Receipts</b>	[X]	[X]	[X]	[X]

<sup>3</sup> The earliest joint venture was established in 2017; therefore, tax returns for 2017 are not included.

MGC 2 (est. April 25, 2019)	Cost of Goods Sold (Line 2)	-	-	-	[X]
	Total Income (Line 8)	-	-	-	[X]
	<b>Total Receipts</b>	-	-	-	[X]
SGC 1 (est. February 16, 2018)	Cost of Goods Sold (Line 2)	-	[X]	[X]	[X]
	Total Income (Line 8)	-	[X]	[X]	[X]
	<b>Total Receipts</b>	-	[X]	[X]	[X]
SGC 2 (est. March 3, 2021)	Cost of Goods Sold (Line 2)	-	-	-	[X]
	Total Income (Line 8)	-	-	-	[X]
	<b>Total Receipts</b>	-	-	-	[X]

C. Area Office's Investigation

After OHA granted SBA's motion to remand Size Determination No. 3-2022-029, Appellant renewed its claim that the combined receipts of Appellant and its affiliates do not exceed the \$39.5 million size standard. Appellant urged that the Area Office must exclude capital gains from GCFC's receipts, in the amounts of \$[XXXX] for 2017; \$[XXXX] for 2020; and \$[XXXX] for 2021. (Letter from E. DeLisle to G. Heard (Dec. 6, 2022), at 3.) Furthermore, to avoid duplication, inter-affiliate transactions between Appellant and its affiliates should be counted only once. Appellant stated that the amounts of these inter-affiliate transactions were: \$[XXXX] during 2017; \$[XXXX] during 2018; \$[XXXX] during 2019; \$[XXXX] during 2020; and \$[XXXX] during 2021. (*Id.* at 4.)

With regard to GCFC's proportionate share of receipts from the four joint ventures, Appellant maintained that much of these receipts are already reflected on GCFC's tax returns. (*Id.* at 3.) Specifically, "Payments under JV Subcontracts" are incorporated as part of the Cost of Goods Sold. Appellant stated that such payments were \$[XXXX] during 2019; \$[XXXX] during 2020; and \$[XXXX] during 2021. (*Id.*) In addition, GCFC received "JV Distributions" which are reflected as part of its Total Income. Appellant stated that such distributions were \$[XXXX] during 2019; \$[XXXX] during 2020; and \$[XXXX] during 2021. (*Id.*) In total, over the years in question, \$[XXXX] of "Payments under JV Subcontracts" as well as \$[XXXX] of "JV Distributions" are already reflected on GCFC's tax returns. (*Id.*)

The Area Office requested that Appellant produce income statements for Appellant and C&GI for the period of January 1, 2022 through May 25, 2022. (E-mail from G. Heard to A.

Vera (Jan. 9, 2023).) Upon reviewing the documents produced by Appellant, the Area Office sent the following e-mail to Appellant:

You provided me with interim financial statements for [C&GI] through May 25, 2022, but provided interim financial statements for [Appellant] through June 30, 2022. Were statements through May 25, 2022 not available for [Appellant]?

Are you agreeable to me using the one through June 30, 2022, which is after the date proposals were submitted for the proposed contract?

(E-mail from G. Heard to A. Vera (Jan. 26, 2023).) Appellant responded that it is agreeable to the Area Office using its income statement through June 30, 2022. (E-mail from A. Vera to G. Heard (Jan. 26, 2023).) Appellant stated that “because its accounting is handled on an accrual work in process basis, it is not practicable to cut off billing and expenses for construction on a daily basis.” (*Id.*)

#### D. The Instant Size Determination

On February 1, 2023, the Area Office issued Size Determination No. 3-2023-004, again concluding that Appellant is not a small business. The Area Office found that Dr. Griffith is Appellant’s President and Managing Member. (Size Determination at 11.) Dr. Griffith also owns 52% of Appellant. (*Id.* at 5.) Appellant has two other Members, Messrs. Richard E. Creter and Vettraino, each of whom own 24% of Appellant. (*Id.*) The Area Office determined that Dr. Griffith controls Appellant by virtue of his majority ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

Next, the Area Office found that Dr. Griffith also is President and Managing Member of GCFC and owns 21.25%. (*Id.* at 5, 11.) GCFC has four other Members: Richard E. Creter, who owns 21.25%; Richard K. Creter (son of Richard E. Creter), who owns 21.25%; Matthew T. Creter (son of Richard E. Creter), who owns 21.25%; and Mr. Vettraino, who owns 15%. (*Id.* at 5.) According to the GCFC’s Operating Agreement, Richard K. Creter delegated his 21.25% voting proxy to Dr. Griffith. (*Id.* at 6.) The Area Office determined that Dr. Griffith controls GCFC through his 42.5% voting interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

The Area Office determined that the Creter family members share an identity of interest with one another due to their family relationships. (*Id.* at 6-9.) They collectively hold an interest of 42.5% in GCFC, which is “identical in size to the holding controlled by Dr. Griffith.” (*Id.* at 6.) The Area Office determined that the Creters also have the power to control GCFC based on minority ownership. (*Id.* at 7, citing 13 C.F.R. § 121.103(c)(2).) Likewise, Dr. Griffith and Richard E. Creter each own 37.5% of ownership interest of C&GI and Mr. Vettraino owns the remaining 25%. (*Id.* at 9.) Dr. Griffith and Richard E. Creter control C&GI based on minority ownership. (*Id.*)

Apart from their interests in Appellant, GCFC and C&GI, the Creters control several other businesses (collectively, “the Creter companies”): Creter Vault Corp. (CVC); Flemington

Granite & Architectural Supply, LLC (FGAS); Flemington Concrete Products, LLC (FCP); RM Creter, LLC (RMC); American Columbarium LLC (AC); Creter Family Limited Partnership (CFLP); and RL Creter Corporation (RLCC). (*Id.* at 7.) The Area Office found that these concerns are not affiliated with Appellant. (*Id.* at 7-8.)

Mr. Vettrano owns and controls Vettrano Development LLC. (*Id.* at 8.) Vettrano Development LLC, however, is not affiliated with Appellant because Mr. Vettrano, with his minority ownership interest, has no power to control Appellant. (*Id.*)

The Area Office concluded that Appellant is affiliated with GCFC and C&GI. (*Id.* at 9, 11, citing 13 C.F.R. § 121.103(c)(1), (e), and (f).) The Area Office noted that GCFC is 49% owner of four joint ventures: MGC 1, MGC 2, SGC 1, and SGC 2. (*Id.* at 10.) Therefore, GCFC's proportionate share from the revenues of these joint ventures must be "included in the revenues of GCFC." (*Id.*, citing 13 C.F.R. § 121.103(h)(3).)

The Area Office then computed the five-year average annual receipts of Appellant, GCFC, and C&GI, including GCFC's proportionate share of joint ventures receipts, as follows:

[Appellant] was established October 24, 2017. Therefore, its five-year average revenues contain a short year in 2017. Therefore, the revenues for [Appellant] were calculated in accordance with 13 C.F.R. § 121.104(c)(3). SBA requested that [Appellant] provide financial statements showing its revenues through May 25, 2022, the date that size was to be determined. [Appellant] stated that financial statements through May 25, 2022 were not available. [Appellant] prepares its statements on a quarterly basis and because its accounting is handled on an accrual work in process basis, it is not practicable to cut off billing and expenses for construction on a daily basis. [Appellant] instead provided financial statements through June 30, 2022. SBA made [Appellant] aware that the receipts through June 30, 2022 were after May 25, 2022, the date that proposals were submitted, and confirmed that [Appellant] was agreeable to the use of that data.

Per 13 C.F.R. § 121.104(c)(3), annual receipts for [Appellant] were determined by dividing the total receipts by the number of weeks from October 24, 2017 through June 30, 2022 and then multiplying by 52.

[Appellant] provided the FY2017 — 2021 Federal tax returns for GCFC along with the tax returns for joint ventures MGC 1, MGC 2, SGC 1, and SGC 2 for the JV's years of operation. SBA subtracted from the revenues of GCFC the distributions to GCFC from each JV reported on Schedule K-1 of each JV's Federal tax returns. SBA then added the receipts reported on each JV's tax return multiplied by 49%, GCFC's percent ownership of each JV to GCFC's receipts. Per 13 C.F.R. § 121.104(c)(1), the total receipts were then divided by 5.

C&GI was established on March 15, 2019. Federal tax return[s] for FY2019-2021 were provided for C&GI. C&GI has been in business for less than five complete fiscal years. Therefore, the revenues for C&GI were calculated in



accordance with 13 C.F.R. § 121.104(c)(2). SBA requested, and the firm provided, financial statements for C&GI through May 25, 2022, the date that size is to be determined. Annual receipts for C&GI were determined by dividing the total receipts by the number of weeks from March 15, 2019 through May 25, 2022, and then multiplying by 52.

The firm provided a list of inter-affiliate transactions. The inter-affiliate transactions were subtracted from the receipts of the firm receiving the payment in the year it was received prior to averaging or annualizing the receipts.

(*Id.* at 13-14.) The Area Office concluded that Appellant's average annual receipts, when combined with those of its affiliates, including GCFC's proportionate share of revenues of the four joint ventures, exceed \$39.5 million, so Appellant is not a small business. (*Id.* at 14.)

### E. Appeal

On February 16, 2023, Appellant appealed Size Determination No. 3-2023-004 to OHA. Appellant maintains that the size determination is clearly erroneous and should be remanded.

Appellant first argues that the Area Office's "mechanical attribution of a percentage of the total receipts reported in a [j]oint [v]enture's tax returns results in double counting of [GCFC's] receipts," in contravention of 13 C.F.R. § 121.103(h)(3). (Appeal at 7.) The regulation provides that "a firm 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).*'" (*Id.* at 6-7, quoting 13 C.F.R. § 121.103(h)(3) (emphasis added by Appellant).) In the instant case, GCFC's proportionate share of its joint venture receipts are "clearly" accounted for in GCFC's tax returns. (*Id.* at 7.) "[S]ubcontract payments for self-performed work are already accounted for in [GCFC's] tax returns under the 'Cost of Goods Sold' line . . . [and] the distributions from the [j]oint [v]entures to [GCFC] are reported in the tax returns under the 'Total Income' line." (*Id.*) OHA precedent instructs that "where the joint venture income reported on a firm's tax returns accounts for the proportionate share of joint venture receipts, adding additional joint venture receipts would amount to double counting." (*Id.*, citing *Size Appeal of SIETech LLC Joint Venture*, SBA No. SIZ-5667 (2015) and *Size Appeal of Optimal GEO, Inc.*, SBA No. SIZ-6140 (2022).) Not only did the Area Office "fail[] to reduce over \$[XXXX] in revenues that [GCFC] received under its subcontracts with the joint venture entities," the Area Office had "no basis to add joint ventures receipts" in the computation as the proportionate share of joint venture receipts had already been largely accounted for in tax returns. (*Id.* at 8.) Appellant complains that the Area Office, without explanation, also failed to exclude net capital gains reported by GCFC on its tax returns, in contravention of 13 C.F.R. § 121.104(a). (*Id.* at 8-9.)

Next, Appellant claims that the Area Office considered receipts outside the applicable period of measurement. More specifically, after finding that one of Appellant's fiscal years to be "a short year," the Area Office improperly considered receipts generated during the same year Appellant submitted its proposal for the subject procurement, *i.e.*, January 1, 2022 through June

30, 2022. (*Id.* at 9-10, emphasis Appellant's.) This is essentially a “*six-year average*” of Appellant's receipts. (*Id.* at 10, emphasis Appellant's.) SBA regulations define a “‘completed fiscal year’ as ‘a taxable year *including any short year.*’” (*Id.* at 9, quoting 13 C.F.R. § 121.104(b) (emphasis added by Appellant).) “[A]nnual receipts means the total receipts for the short year and the 4 full fiscal years divided by the total number of weeks in the short year and the 4 full fiscal years, multiplied by 52.” (*Id.*, quoting 13 C.F.R. § 121.104(c)(3).) Appellant adds that the calculation apparently performed by the Area Office under 13 C.F.R. § 121.104(c)(2) “is *not* appropriate for a firm that has been in business for five completed fiscal years, even if one of those fiscal years is a ‘short year.’” (*Id.* at 10, emphasis Appellant's.)

Appellant contends that the Area Office based its findings on insufficient evidence. Particularly, despite addressing the ownership interests, recent sales, and activities of potential alleged affiliates, the Area Office never inquired about all the entities it mentioned, and thus Appellant did not provide the Area Office with any documents or data related to them. (*Id.*) Appellant speculates that the Area Office may have relied on previous, unrelated size determinations involving Appellant or its affiliates. (*Id.* at 11.)

Appellant then claims that the Area Office did not adequately protect Appellant's and its principals' private and proprietary information, defeating the “entire point of 13 [C.F.R.] § 121.1008(d) and similar Size Protest procedures.” (*Id.* at 12.)

Lastly, Appellant offers a series of tables that purport to reflect “an *accurate* calculation” of Appellant's and its affiliates' average annual receipts in accordance with SBA regulations. (*Id.* at 13-14, emphasis Appellant's.) In the tables, Appellant computes the following average annual receipts: \$[XXXX] for Appellant; \$[XXXX] for GCFC; and \$[XXXX] for C&GI. (*Id.* at 13.) Appellant derived the average annual receipts of GCFC by adding Cost of Goods Sold and Total Income for the years 2017-2021, subtracting \$[XXXX] in capital gains, and then dividing the combined total (\$[XXXX]) by five. (*Id.*) After excluding \$[XXXX] in inter-affiliate transactions, the collective average annual receipts of Appellant and its affiliates are \$[XXXX]. (*Id.* at 14.) Although this amount “is slightly higher than the amount” previously claimed by Appellant, it is “still well below” the \$39.5 million size standard. (*Id.*)

#### F. RBVetCo's Response

On March 6, 2023, RBVetCo responded to the appeal. RBVetCo maintains that the Area Office correctly found Appellant other than small. (Response at 1.)

RBVetCo, first, argues that while Appellant properly claims that “deductions for ‘self-performed work’ are necessary to avoid ‘double counting’ the receipts by counting them both for the joint venture and for the affiliate entity that is a member of the joint venture,” Appellant's calculations are fundamentally flawed because Appellant “fails to ever account for the non ‘self-performed’ work of the four joint ventures at all.” (*Id.* at 5.) RBVetCo explains:

[Appellant] completely ignored the requirements of 13 CFR § 121.103(h)(3), which states[,] “For the calculation of 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.” In addition, in the commentary accompanying this rule the SBA makes clear that the receipts that should be proportionally split are all receipts on the project, including subcontractor receipts. “As with all contracts, SBA does not exclude revenues generated by subcontractors from the revenues deemed to be received by the prime contractor. Where a joint venture is the prime contractor, 100 percent of the revenues will be apportioned to the joint venture partners, regardless of how much work is performed by other subcontractors.”

(*Id.* at 5-6, citing 85 Fed. Reg. 66,146, 66,149 (Oct. 16, 2020).) Appellant's proposed calculation makes no mention of the tax returns for MGC 1, MGC 2, SGC 1, and SGC 2 for the joint ventures' years of operation, which the Area Office reviewed and considered. (*Id.* at 6.)

RBVetCo offers its own calculations that purportedly take into account “the receipts from the four joint ventures which GCFC owns 49[%], and performs more than that percentage share of the work.” (*Id.* at 7-9.) When the joint venture receipts attributable to GCFC are included, Appellant's average annual receipts “greatly exceed” the applicable size standard. (*Id.* at 9.) Appellant improperly “fail[ed] to ever count [GCFC's proportionate share of receipts from the four joint ventures] in the first instance.” (*Id.*)

Next, RBVetCo contends that Appellant's claim that the Area Office failed to exclude capital gains reported by GCFC from the receipts is “directly contrary” to 13 C.F.R. § 121.104(a), which the Area Office referenced in the size determination. (*Id.* at 10.) The Area Office specifically commented that “[r]eceipts do not include net capital gains or losses.” (*Id.*, quoting Size Determination at 10.) Appellant offers “no explanation” for why it believes the Area Office excluded such gains or losses. (*Id.*)

RBVetCo insists that the Area Office used the proper period of measurement for computing Appellant's receipts. Notably, Appellant “consented to the use of its 2022 receipts” and Appellant's own receipts “are not the driver of the size determination” in any event, because “the receipts of GCFC and its four joint ventures” completely dwarf those of Appellant. (*Id.* at 11.) Even assuming *arguendo* that some or all of Appellant's 2022 receipts should not have been considered, Appellant and its affiliates would still far exceed the size standard. (*Id.*) If anything, the Area Office “may have understated the joint venture receipts that should be assigned to GCFC.” (*Id.*) This is true because the Area Office “should have used ‘the joint venture partner's percentage share of the work performed by the joint venture,’ and not the percentage of ownership.” (*Id.* at 12.)

RBVetCo denies that the Area Office improperly disclosed Appellant's confidential or proprietary information. (*Id.*) Contrary to Appellant's suggestions, the information in question is publicly available. (*Id.* at 12-13.)

Lastly, RBVetCo claims that, even if OHA believes the appeal to be meritorious, OHA could affirm the size determination on alternate grounds. (*Id.* at 13, citing 13 C.F.R. § 121.103(a)(5).) According to RBVetCo:

[It] is clear that the Creter family of companies, despite their status as a group of large, successful, non-Veteran owned companies, is making every attempt to secure improper awards for SDVOSB set-aside projects. . . . [T]he owners of the Creter family of companies are involved in . . . [Appellant, GCFC, C&GI, MGC 1, MGC 2, SGC 1, SGC 2, and several other concerns.] . . . This corporate gamesmanship . . . creates the “totality of the circumstances” that permits [] OHA to find affiliation [with] the entire family of Creter companies, including CVC.

(*Id.* at 13-15, citing *Size Appeals of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015).)

#### G. SBA's Comments

On May 9, 2023, SBA submitted comments in response to the appeal. SBA agrees with RBVetCo that there is a “fundamental flaw” in Appellant's reasoning. (SBA Comments at 1.) Specifically, Appellant disregards all non-self-performed work of GCFC's four joint ventures. (*Id.* at 1-2.) According to SBA:

Appellant argues that the amount of affiliates revenue that should be attributed to it is Y. Y being equal to the amount that has already been distributed to [GCFC] by the joint venture (either through direct payments such as subcontracts or through capital distributions). And since this amount is already reflected on [GCFC's] tax returns it, the number should not be added to its joint venture's revenue because it is already on its tax return. This is completely incorrect, and incredibly confusing. Appellant's affiliate revenue that should be attributed is actually X. X being the “proportionate share of joint venture receipts.” 13 C.F.R. § 121.103(h). Further, “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.* 121.103(h)(3). Under SBA's rules X and Y are numbers from different places. X being the amount that must be attributed and Y being the amount that SBA allows to be subtracted in order to avoid double counting. Sometimes X and Y can have the same value, but that is not always that case.

In this case, Appellant completely ignores X, and says the only number that matters is Y. As clear in this case, Y represents that amount of earned value that has already been transferred from the Joint Venture to [GCFC] (either through subcontracts or distributions). Therefore, this amount shows up as revenue on [GCFC's] tax returns already. However, Y is not the full amount of revenue that the joint venture has earned, or that should be attributed to Appellant as affiliate revenue.

(*Id.* at 2-3.) Referencing RBVetCo's Response to the Appeal, SBA asserts that there is an “approximately \$[XXXX] hole” in Appellant's calculations, which Appellant “never mentions” nor “account[s] for” in any of its proposed calculations or submissions to the Area Office and OHA. (*Id.* at 3.) The fact that Appellant “would like to not count” all joint venture receipts is not a valid basis to disturb the size determination. (*Id.*)

Lastly, SBA claims that the Area Office used a proper period of measurement for computing Appellant's receipts, pointing out that “any revenue after the date of offers” was not considered. (*Id.*) Because “five full years of tax returns” were unavailable, the Area Office used “all the available information and clearly explained how the average was calculated given the lack of the full five years,” consistent with SBA regulations. (*Id.*) However, “even if this was incorrect, this would be a minor discrepancy that would not affect the finding of [Appellant] to be other than small.” (*Id.*)

#### H. Appellant's Response to SBA's Comments

On May 19, 2023, Appellant responded to SBA's comments. Appellant asserts that “the Area Office interpreted [13 C.F.R. § 121.103(h)(3)] as requiring only a *reduction* of joint venture *distributions* from the *concern's* total revenues.” (Response to Comments at 4, emphasis Appellant's.) The Area Office's interpretation “entirely misapplies” the regulation because “it acts to double count joint venture receipts already accounted for in [GCFC's] tax returns.” (*Id.*) SBA's arguments in support of the Area Office also are “incredibly confusing” and “clearly inconsistent” with the plain language of the regulation. (*Id.* at 5.) According to Appellant, SBA disregards the relevant phrase in the regulation, which states:

A concern must include 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).*”

(*Id.*, quoting 13 C.F.R. § 121.103(h)(3), emphasis Appellant's.) The plain language of the regulation dictates that “if [joint venture] receipts are accounted for in such transactions—as is the case here—then the proportionate share, as a percentage of the joint venture's workshare, should *not* be added, otherwise those receipts would be counted twice.” (*Id.*, citing *SIETech*, SBA No. SIZ-5667, at 6 and *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047 (2020) (emphasis Appellant's).) The alleged \$[XXXX] shortfall in Appellant's calculations is “irretrievably flawed” because (1) RBVetCo admits that it has not reviewed the tax returns of GCFC or the joint ventures; and (2) both SBA and RBVetCo ignore the language of 13 C.F.R. § 121.103(h)(3). (*Id.* at 6-7.)

Next, Appellant argues that SBA “offers no substantive response” to its allegation that the Area Office failed to exclude capital gains reflected in GCFC's tax returns. (*Id.* at 9.) Appellant adds:

SBA's apparent belief that the exclusion of capital gains and inter-affiliate transactions represents “creative accounting to make revenue completely disappear,” is plainly inconsistent with SBA's regulations. [] 13 [C.F.R. §] 121.104(a) explicitly states that “[r]eceipts do not include net capital gains.” OHA has also consistently remanded size determinations that fail to account for inter-affiliate transactions because a failure to do so would result in double counting receipts.

(*Id.* at 9, citing *Size Appeal of Birmingham Industrial Construction, LLC*, SBA No. SIZ-5984, at 10 (2019).)

Lastly, Appellant insists that SBA's comments “confirm[] that the Area Office considered receipts outside the applicable measurement period.” (*Id.* at 9.) SBA's contentions that the Area Office “only considered five fiscal years of revenue” and that any revenue “after the date of offers” was not considered are “plainly belied” by the description of the calculations in the size determination. (*Id.* at 10.) Furthermore, SBA's reasoning “tacitly acknowledge[s]” that the Area Office's calculations “may have been ‘incorrect.’” (*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. Analysis

Appellant raises three arguments in its attempt to overturn the size determination. First, Appellant contends that the Area Office improperly double-counted GCFC's “proportionate share” of joint venture receipts, in contravention of 13 C.F.R. § 121.103(h)(3). Section II.E, *supra*. Second, Appellant maintains that the Area Office incorrectly utilized 13 C.F.R. § 121.104(c)(2), rather than (c)(3), in computing Appellant's own average annual receipts. Third, Appellant complains that the Area Office did not exclude capital gains reported by GCFC in its tax returns, in contravention of 13 C.F.R. § 121.104(a). *Id.*

Although Appellant attacks the Area Office's calculations on multiple grounds, I agree with SBA and RBVetCo that this case ultimately turns upon whether the Area Office appropriately calculated GCFC's proportionate share of joint venture receipts, pursuant to 13 C.F.R. § 121.103(h)(3). Sections II.F and II.G, *supra*. The joint venture issue is dispositive because the other errors alleged by Appellant are not of sufficient magnitude to render Appellant small.

Having reviewed the record and the arguments of the parties, I find that Appellant has not shown that the Area Office clearly erred in calculating GCFC's joint venture receipts. There is no dispute that Appellant is affiliated with GCFC, and likewise no dispute that GCFC held a 49% ownership interest in each of the four joint ventures — MGC1, MGC2, SGC 1, and SGC 2 — during the relevant period to determine size. SBA regulations stipulate that “a concern must include in its receipts its proportionate share of joint venture receipts.” 13 C.F.R. § 121.103(h)(3). Furthermore, OHA has repeatedly upheld ownership percentage as 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 (2009). Given this precedent, the Area Office did not clearly err by attributing 49% of the receipts of each of the four joint ventures to GCFC.<sup>4</sup>

Appellant maintains that GCFC's proportionate share of joint venture receipts were already reflected on GCFC's tax returns, but the record simply does not support this conclusion. According to their respective tax returns, the four joint ventures had receipts during the years in question as follows:

	2018	2019	2020	2021
MGC 1	[X]	[X]	[X]	[X]
MGC 2	-	-	-	[X]
SGC 1	-	[X]	[X]	[X]
SGC 2	-	-	-	[X]

See Section II.B, *supra*. As a result, GCFC's "proportionate share" (49%) of joint venture receipts are:

	2018	2019	2020	2021
MGC 1	[X]	[X]	[X]	[X]
MGC 2	-	-	-	[X]
SGC 1	-	[X]	[X]	[X]
SGC 2	-	-	-	[X]

During the course of the size review, Appellant informed the Area Office that, over the years in question, GCFC received a total of \$[XXXX] of "Payments under JV Subcontracts" and a total of \$[XXXX] of "JV Distributions," which already were included on GCFC's tax returns. Section II.C, *supra*. Contrary to Appellant's suggestions, then, it clear that GCFC's tax returns do not already reflect GCFC's entire proportionate share of all joint venture receipts.

Furthermore, although OHA agrees with Appellant that, under 13 C.F.R. § 121.103(h)(3), the Area Office should have deducted from GCFC's proportionate share of joint venture receipts any amounts already included on GCFC's tax returns so as to avoid double-counting, such an approach here still renders GCFC (and thus Appellant) other than small:

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<sup>4</sup> As RBVetCo observes in its response to the appeal, SBA regulations now instruct that "[f]or the calculation of receipts, the appropriate proportionate share [of joint venture receipts] is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture." 13 C.F.R. § 121.103(h)(3). Under current law, then, it would have been appropriate for the Area Office to consider GCFC's percentage share of the work performed for each joint venture, rather than mere ownership percentage. The issue is immaterial here, however, because Appellant does not argue that this aspect of the Area Office's decision was erroneous, and because it appears in any event that GCFC's percentage share of the work performed was greater than 49%. Section II.F, *supra*.

	2017	2018	2019	2020	2021
GCFC's receipts per its tax returns	[X]	[X]	[X]	[X]	[X]
Proportionate (49%) share of JV receipts	-	[X]	[X]	[X]	[X]
Less: Appellant's claimed "Payments under JV Subcontracts" to GCFC	-	-	[X]	[X]	[X]
Less: Appellant's claimed "JV Distributions" to GCFC	-	-	[X]	[X]	[X]
<b>Total</b>	[X]	[X]	[X]	[X]	[X]

Accordingly, as shown above, GCFC's own receipts, reflected on its tax returns, over the five-year period from 2017-2021 are \$[XXXX]. Adding GCFC's proportionate share of receipts of the four joint ventures, \$[XXXX], creates a five-year total of \$[XXXX]. Subtracting Appellant's claimed \$[XXXX] of "Payments under JV Subcontracts" and \$[XXXX] of "JV Distributions" yields a five-year total of \$[XXXX]. Dividing these combined total receipts — which include GCFC's 49% proportionate share of receipts of each joint venture as adjusted to avoid double-counting — by five, results in average annual receipts for GCFC of \$[XXXX].

The size standard applicable to the instant procurement is \$39.5 million. Section II.A, *supra*. As a result, because the average annual receipts of GCFC alone substantially exceed this size standard, even without considering Appellant's own receipts (which apparently total at least another \$[XXXX] annually) it is clear that Appellant is not small for the subject solicitation.

On appeal, Appellant also contends that, in calculating Appellant's size, the Area Office improperly considered receipts during the period January 1, 2022 through June 30, 2022. Section II.E, *supra*. I agree with Appellant that the Area Office did err on this point. Under SBA regulations, a "completed fiscal year" is defined as "a taxable year, including any short year." 13 C.F.R. § 121.104(b); *see also Size Appeal of Thomas Computer Solutions, LLC d/b/a TCS Translations*, SBA No. SIZ-4841 (2007). Accordingly, although Appellant was established during 2017, that year may still be considered a "completed fiscal year" for purposes of calculating Appellant's receipts. Nevertheless, an inconsequential error is not, by itself, proper grounds to disturb a size determination, if the error could not have altered the outcome of the case. *E.g., Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected the outcome). Here, as discussed above, Appellant far exceeds the size standard once its receipts are combined with those of GCFC, based only on the years 2017-2021. The fact that Area Office mistakenly considered Appellant's receipts from January 1, 2022 through June 30, 2022 was, therefore, harmless.

Lastly, Appellant asserts the Area Office improperly failed to exclude GCFC's "net capital gains," as required under 13 C.F.R. § 121.104(a). Section II.E, *supra*. Appellant claims, however, a total of \$[XXXX] for GCFC's capital gains for the over the entire five-year period. *Id.* This amount, again, is not of sufficient magnitude to affect the outcome. Even if such amounts were excluded, the combined receipts of Appellant and GCFC, as discussed *infra*, are still well above the size standard.



IV. Conclusion

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

KENNETH M. HYDE  
Administrative Judge