

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

SIZE APPEAL OF:

Mark Dunning Industries, Inc.

Appellant,

RE: The CFS Group, LLC

Appealed From
Size Determination No. 2-2011-114

SBA No. SIZ-5284

Decided: September 26, 2011

APPEARANCES

Doug P. Hibshman, Esq., Fox Rothschild LLP, Washington, D.C., for Appellant

Thomas A. Coulter, Esq., and Nicole Hardin Brakstad, Esq., LeClair Ryan PC.,
Richmond, Virginia, for the CFS Group, LLC

DECISION¹

I. Introduction & Jurisdiction

On June 30, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-114 finding The CFS Group, LLC (CFS) to be a small business eligible for U.S. Department of the Army Solicitation No. W91QF511B0001. On July 29, 2011, Mark Dunning Industries, Inc. (Appellant), the original protestor, filed an appeal of the size determination. For the reasons discussed below, the appeal is granted, and the size determination is remanded for further review and investigation.

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. The record reflects that Appellant received the size determination on July 14, 2011. Appellant filed

¹ This Decision was initially issued on September 15 under a Protective Order to prevent the disclosure of confidential or proprietary information. At that time, I issued an Order for Redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published Decision. OHA received one or more timely requests for redactions and considered any requests in redacting the Decision. OHA now publishes a redacted version of the Decision for public release.

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

II. Background

A. Solicitation and Protest

On April 29, 2011, the U.S. Department of the Army issued Solicitation No. W91QF511B0001 (IFB) for the collection of non-hazardous waste at Fort Lee, Virginia. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of \$12.5 million in average annual receipts. Appellant and CFS submitted bids in response to the IFB.

On June 1, 2011, bids were opened, and CFS was the apparent low bidder. On June 6, 2011, Appellant filed a protest alleging that CFS is not a small business because it is affiliated with numerous entities. Specifically, Appellant contended that CFS is owned, controlled, or otherwise affiliated with Waste Associates, LLC and its holding company, Waste Associates Holdings, LLC (collectively “Waste Associates”). Appellant asserted that Waste Associates consists of a large group of businesses performing an array of waste management services. Appellant identified a number of firms as alleged subsidiaries of Waste Associates: (1) The East End Landfill, LLC; (2) East Coast Resources Group, LLC; (3) East End Metals Recycling, LLC; (4) Skippy's Trucking, Inc.; (5) Terrapin Recycling & Disposal, LLC; and (6) Riverside Recycling and Disposal, LLC. According to Appellant, the combined revenues of Waste Associates and its alleged subsidiaries exceed \$80 million annually, even without considering CFS itself. Appellant claimed that Waste Associates held an ownership interest in CFS, that Waste Associates is the “parent company” of CFS, and that CFS is affiliated with Waste Associates through “common ownership, common control, common management, identity of interest, as joint venture or *de facto* joint venture partners, and/or based on the totality of the circumstances.” (Protest 4.) In addition, Appellant alleged that CFS is affiliated with BlackEagle Partners, LLC and Tri-City Regional Landfill. Appellant explained that Waste Associates is owned by BlackEagle Partners, LLC, a private equity firm. Further, Appellant contended that CFS owns Tri-City Regional Landfill. Appellant concluded that the combined receipts of all these firms exceeds the applicable size standard.

Appellant attached to its protest a Waste Associates marketing brochure which refers to CFS as “A Waste Associates Company.” (Protest Exhibit B.)

B. Size Determination

On June 30, 2011, the Area Office issued its size determination. The Area Office found that Appellant's protest was “timely and specific.” (Size Determination 2.)

The Area Office observed that Appellant had alleged that CFS is affiliated with Waste Associates and its subsidiaries. The Area Office explained that CFS is owned by nine individual stockholders who each hold 11 and 1/9% of CFS's stock. The Area Office further stated that the

focused narrowly on common ownership, management, and control, but disregarded Appellant's remaining theories that CFS is affiliated with Waste Associates “based on an identity of interest, as joint venture or *de facto* joint venture partners, and based on the totality of the circumstances.” (Appeal Petition 9.)

Appellant explains that Waste Associates is a large parent company that owns, controls, or teams with each of the entities identified in Appellant's protest as part of a waste disposal consortium. Appellant notes that the marketing brochure attached to Appellant's protest advertises these companies as “complimentary business units,” which Appellant contends is suggestive of an actual or *de facto* joint venture. (Appeal Petition 10.)

Appellant next claims the Area Office disregarded the affiliation between CFS, RWS, and Waste Associates. According to Appellant, “[t]he purchase of RWS' assets by CFS makes RWS an affiliate of CFS. Further, the fact that RWS was a wholly owned subsidiary of Waste Associates makes Waste Associates and its affiliated businesses (the Waste Associates Consortium) affiliates of CFS.” (Appeal Petition 11.) Appellant relies upon 13 C.F.R. § 121.104(d)(2), which provides that where a concern acquires an affiliate during the period of measurement, the affiliate's receipts must be included in the firm's receipts for the entire period of measurement. Appellant also cites *Size Appeal of Xeno Technix, Inc.*, SBA No. SIZ-4242 (1997), for support. In *Xeno*, a small firm acquired the assets of a large firm's division, and OHA determined that the small firm was affiliated with that division. Appellant argues that the relationship between CFS and RWS is even stronger than that in *Xeno* because CFS was formed for the express purpose of acquiring RWS's assets and did acquire those assets, RWS subsequently retained a 15% ownership interest in CFS, RWS was a wholly owned subsidiary of Waste Associates and continues to exist as an active business concern,³ and Waste Associates owns or owned part of CFS. Based upon these factors, Appellant argues that the receipts of RWS should be included in CFS's average annual receipts. Appellant also asserts that CFS's receipts should include the receipts of Waste Associates because Waste Associates wholly owns RWS, and RWS's receipts should include the receipts of all the Waste Associates consortium entities because of their affiliation with Waste Associates.

Appellant also asserts the Area Office failed to investigate possible affiliation between CFS and two other entities—Invincia Corporation (Invincia) and Citizens Bancorp of Virginia, Inc. (CBV)—based upon common ownership and management. Specifically, Appellant points out that one of CFS's nine owners is the President and 100% owner of Invincia and is a member of CBV's Board of Directors. These allegations are supported by new exhibits submitted with the appeal petition, specifically information found on various websites.

Finally, Appellant argues the Area Office failed to properly calculate CFS's average annual receipts. Appellant contends the Area Office's calculation does not match publically available revenue information reported by CFS itself. In particular, Appellant asserts that a

³ Appellant asserts that RWS is a continuing entity based in part upon newly submitted evidence, specifically a Virginia State Corporation Commission Data Inquiry Report, that Appellant claims indicates RWS has an active LLC registration as of July 28, 2011.

publication it submitted with its protest called “Waste Age,” to which CFS self-reported its revenues for 2009 and 2010,⁴ demonstrates that CFS's receipts are substantially higher than the figure calculated by the Area Office. Appellant also asserts Appellant's receipts should have been aggregated with those of its affiliates, as argued above. Appellant requests that OHA reverse the size determination or remand the matter to the Area Office for further investigation.

D. CFS Response

On August 16, 2011, CFS submitted its response to the appeal petition. CFS argues the appeal should be dismissed because Appellant failed to set forth specific reasons why the size determination is based upon clear error, as required by 13 C.F.R. § 134.305(a)(3). CFS contends Appellant merely rehashes its protest allegations and attempts to supplement those allegations by improperly offering new evidence and new arguments on appeal.

CFS emphasizes that much of Appellant's new evidence was publicly available at the time Appellant submitted its protest. CFS contends it was Appellant's responsibility to present all relevant evidence to support its claims at the protest stage, and the evidence should not be admitted on appeal. *See* 13 C.F.R. § 121.1009(b); *Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100 (2009). Further, CFS contends that many of Appellant's claims were already considered and rejected by the Area Office.

CFS also challenges Appellant's allegations that CFS is affiliated with RWS because CFS purchased RWS's assets and that CFS is affiliated with Invincia and CBV based on those firms' connections to one of CFS's owners. CFS asserts that these allegations were not part of Appellant's protest, and OHA may not consider new substantive issues on appeal. 13 C.F.R. § 134.316(c). With regard to RWS, CFS explains that it submitted information about its relationship with RWS to the Area Office, as required, and the Area Office properly considered that information.

In the alternative, CFS asserts that even if OHA accepts Appellant's new evidence, there is no clear error in the size determination. First, although Appellant repeats its allegation that CFS is affiliated with Waste Associates, the Area Office already considered and rejected that claim because it was not based on any concrete evidence. CFS also asserts the Area Office already properly considered whether CFS is affiliated with RWS. Based upon the information CFS submitted to the Area Office (including that CFS purchased most of RWS's assets and RWS continued to operate as an LLC), CFS contends the Area Office properly concluded that any relationship between CFS and RWS ended in January, 2010. CFS argues Appellant has presented no credible evidence, either with its protest or newly on appeal, that CFS is affiliated with RWS or Waste Associates.

Similarly, CFS argues the Area Office already reviewed the outside ownership interests and officer positions of CFS's owners. CFS's SBA Form 355 disclosed the relationship between a

⁴ The Waste Age publication relating to CFS's 2009 revenues was submitted with Appellant's protest. The Waste Age publication relating to CFS's 2010 revenues was published after issuance of the size determination and is attached to the appeal petition.

CFS owner and Invincia and CBV, and the Area Office did not find CFS affiliated with those entities. CFS asserts that it is controlled by its Board of Directors under 13 C.F.R. § 121.103(c)(3) and thus cannot be affiliated with Invincia and CBV based upon common ownership or common management. CFS claims it does not share an identity of interest with either Invincia or CBV because the firms share only one officer. CFS also contends Appellant has offered no evidence of any current relationship between CFS, Invincia, and CBV.

Finally, CFS disputes Appellant's claim that the Area Office failed to properly calculate CFS's receipts. CFS points out that the Area Office is required to base its calculation upon CFS's tax returns or financial information. 13 C.F.R. § 121.104(a)(1)-(2). CFS asserts that Appellant's proposed approach to calculating CFS's average receipts is nonsensical and contrary to law. CFS concludes Appellant failed to demonstrate any error of fact or law in the size determination, the size determination should be affirmed, and the appeal petition should be dismissed.

E. Appellant's Reply

On August 30, 2011, having been granted leave to reply to CFS's response, Appellant filed its reply. Appellant argues that good cause exists for the admission of the new evidence submitted with its appeal petition. Appellant maintains that the evidence was not discoverable by Appellant until after issuance of the size determination, CFS would not be prejudiced by admission of the evidence, and the evidence is relevant and would not unduly enlarge the issues.

Appellant contends the new evidence is relevant because it demonstrates that RWS is still an active entity, that one of CFS's owners is affiliated with Invincia and CBV, and that CFS's self-reported income is higher than reflected by the Area Office's calculation. Appellant explains that it could not have discovered this evidence before it filed its protest because no publicly available information exists that would have revealed the affiliation between CFS and RWS, Invincia, and CBV.

Appellant thus distinguishes this case from *Perry Management*, by arguing that in *Perry Management*, the protestor simply failed to conduct due diligence, whereas here Appellant could not have presented evidence of CFS's links to RWS, Invincia, and CBV, because it had no way to discover those affiliations. With regard to the Waste Age report published after issuance of the size determination, Appellant reiterates its argument that the report discredits the Area Office's calculation of Appellant's receipts.

Appellant also repeats its assertion that the Area Office failed to consider Appellant's allegation that CFS is affiliated with the Waste Associates consortium based on an identity of interest, as joint venture or *de facto* joint venture partners, and the totality of the circumstances. Appellant again argues that the Area Office erred in failing to recognize the affiliation between CFS and RWS. Appellant explains that CFS was affiliated with RWS between 2008 and 2010 based on the asset purchase agreement between the firms. 13 C.F.R. § 121.104(d)(2). Appellant also reiterates its contention that CFS is affiliated with Invincia and CBV through common ownership and management. Appellant concludes that CFS exceeds the size standard when its receipts are properly calculated.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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

1. Affiliation with RWS

Appellant argues that the Area Office failed to recognize that CFS is affiliated with RWS, a continuing entity, by virtue of the asset purchase agreement executed between the firms. CFS counters that the Area Office knew of the relationship between CFS and RWS but determined that any connection between the firms ceased in January, 2010.

Based on documentation submitted by CFS, the Area Office found that CFS was originally formed to purchase the assets of RWS, a wholly owned subsidiary of Waste Associates, and that CFS did in fact acquire “substantially all of RWS's assets in 2008.” (Size Determination 2.) The assets purchased included trucks, machinery, and other equipment; RWS's customer list; and RWS's contracts with its customers. (Asset Purchase Agreement ¶ 1.1.) In executing the asset purchase, it was understood that CFS would “take over and conduct the operations of the [b]usiness.” (Asset Purchase Agreement ¶ 1.4.) After the sale, RWS remained in existence and retained limited assets, including ownership interests in other companies. (Asset Purchase Agreement ¶ 1.2.) It is undisputed that, after transferring most of its assets to CFS, RWS acquired an ownership interest in CFS, which RWS later relinquished in January, 2010.

Pursuant to 13 C.F.R. § 121.104(d)(2), “If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern.” Interpreting this provision, OHA has held that “acquiring all or substantially all of the assets of a firm as a continuing business enterprise constitutes the acquisition of an affiliate.” *Size Appeal of Xeno Technix, Inc.*, SBA No. SIZ-4242, at 4 (1997); *see also Size Appeal of Atmel Corp.*, SBA No. SIZ-3286 (1990) (determining that a firm that acquires most of the assets, including contracts, of a division of a larger firm and hires a number of employees of that division is affiliated with that division); *Size Appeal of Ace-Federal Reporters, Inc.*, SBA No. SIZ-2814 (1988) (finding that firms are affiliated when one firm purchases a large portion of another's assets, including most of its tangible assets and all of its accounts receivable and also assumes its accounts payable). Here, the purchase of “substantially all” of RWS's assets by CFS renders RWS an affiliate of CFS. The purchase occurred in 2008 — during the “applicable period of measurement.” Accordingly, RWS's receipts must be aggregated with those of CFS for purposes of determining CFS's size. Because RWS's financial information

was never requested and is not in the record, I must remand this matter to the Area Office for a revised calculation of CFS's average annual receipts.

Appellant contends that CFS's receipts should not only be aggregated with RWS's, but also with the receipts of Waste Associates. According to Appellant, "the fact that RWS was a wholly owned subsidiary of Waste Associates makes Waste Associates and its affiliated businesses (the Waste Associates Consortium) affiliates of CFS." (Appeal Petition 11.) OHA considered and rejected such an argument in *Size Appeal of Alex-Alternative Experts, LLC*, SBA No. SIZ-4974 (2008). In that case, OHA determined that a firm which had acquired most of the assets of a division of a larger firm was affiliated only with that division, not the entire parent company. OHA explained:

The Area Office also erred in finding Appellant affiliated with [the parent company] based on Appellant's acquisition of [the division's] assets. The Area Office relied on *Size Appeal of Xeno Technix, Inc.*, SBA No. SIZ-4242 (1997). However, *Xeno* involved the purchase of one division of a firm, and held that the challenged firm was affiliated with that division. It most emphatically did not hold that the purchase of a division by one concern from another results in a finding of affiliation with the selling business as a whole. Indeed, *Xeno* excluded from affiliation firms which had sold some, but not all or substantially all of their assets to the challenged firm.

Alex-Alternative Experts, at 5-6. Similarly, in this case, by acquiring "substantially all" of RWS's assets during the applicable period of measurement, CFS became affiliated with RWS. This transaction does not, however, render CFS automatically affiliated with Waste Associates. Rather, the asset purchase renders only RWS an affiliate of CFS, and only RWS's receipts must be included in Appellant's receipts as a result.

2. Protest Allegations

Appellant contends that the Area Office ignored its protest arguments and evidence that CFS is affiliated with Waste Associates "based on an identity of interest, as joint venture or *de facto* joint venture partners, and based on the totality of the circumstances." CFS claims that, although the Area Office did not comment on these issues, the Area Office rejected those claims because they were not based upon any concrete evidence.

In its protest, Appellant repeatedly alleges that CFS is associated with Waste Associates and its related entities "based on common ownership, common control, common management, identity of interest, as joint venture or *de facto* joint venture partners, and based on the totality of the circumstances." (Protest 3, 4, 5, 6.) The protest offers detailed argument and evidence to support its claims of affiliation based on common ownership and common management. In particular, the protest alleges that Waste Associates owns CFS (based upon documents attached to the protest) and then identifies the subsidiaries of Waste Associates with which Appellant claims CFS is affiliated. The protest also alleges CFS shares specific directors with BlackEagle Partners, LLC and owns Tri-City Regional Landfill. Accordingly, it appears that the allegations of affiliation based upon common ownership and common management were the primary focus

CFS also points out that the size determination provides: “There is no affiliation between CFS and any company owned or controlled by Waste Associates.” (Size Determination 4.) Notwithstanding this broad language, however, the size determination reflects that the Area Office only considered affiliation between CFS and Waste Associates based upon common ownership and common management: “Since January 2010, RWS or any affiliate of Waste Associates has not had any equity ownership or the right to any equity ownership in CFS No officer, director, owner of RWS or Waste Associates is an owner, officer, director, or agent of CFS.” (Size Determination 3.) There is no indication that the Area Office assessed potential affiliation between CFS and the Waste Associates firms on any alternate grounds. Nor does the record reflect any communication between the Area Office and CFS regarding business or contractual ties with Waste Associates or its related entities.

The evidence accompanying Appellant's protest adequately supported the allegations within the protest. Accordingly, the Area Office was required to examine those claims of affiliation. *See* 13 C.F.R. § 121.1009(b) (“The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue.”); *Size Appeal of PRO SERVICES-Teltara Joint Venture, LLC*, SBA No. SIZ-5115, at 6 (2010) (finding, where the protest alleged affiliation with certain entities, and where the challenged firm failed to provide information regarding those entities, that the Area Office should have investigated that failure and the allegations of affiliation); *Size Appeal of Dawson Building Contractors, Inc.*, SBA No. SIZ-4501, at 6 (2002) (remanding the case to the Area Office after finding that “the Area Office failed to consider all the grounds of affiliation [the protestor] raised in its protest. [The protestor] asserted [the challenged firm] was affiliated with the 11 named firms due to four grounds, and the Area Office considered only the first ground.”). On remand, the Area Office must investigate the business and contractual ties between CFS and Waste Associates (and its related entities) to determine whether the entities are affiliated. If the Area Office determines CFS is not affiliated with Waste Associates based upon any specific ground set forth at 13 C.F.R. § 121.103, it must consider whether the totality of the circumstances supports a finding of affiliation between the firms. 13 C.F.R. § 121.103(a)(5).

3. Calculation of Receipts

Appellant argues that the Waste Age publications demonstrate that the Area Office miscalculated CFS's receipts. Appellant maintains that the Waste Age information, as reported by CFS itself, reflects much larger revenues than the Area Office's totals.

SBA regulations governing calculation of a firm's receipts are clear that “[t]he Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern.” 13 C.F.R. § 121.104(a)(1). Likewise, calculations are made using data as “defined and reported on Internal Revenue Service (IRS) tax return forms.” 13 C.F.R. § 121.104(a).

In the event tax returns have not yet been filed, “SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person

with personal knowledge of the facts.” 13 C.F.R. § 121.104(a)(2). As discussed above, the record contains CFS's 2008 and 2009 tax returns, as well as a 2010 profit and loss statement. DRS was formed in 2009, so the record contains DRS's 2009 tax returns and a 2010 profit and loss statement. Thus, although the Area Office indicated in the size determination that “[i]ncome tax returns for 2010, 2009, and 2008 will be used to ascertain size for CFS and DRS,” that statement cannot be entirely accurate.

Nevertheless, Appellant's argument that the Waste Age publication somehow discredits the Area Office's calculation is meritless. *Size Appeal of T-C Transcription, Inc.*, SBA No. SIZ-5063 (2009) (finding published information about the challenged firm's receipts “cannot overcome the hard evidence of [the firm's] tax returns and sworn statements on its SBA Form 355”). Here, it appears that the Area Office properly based its calculation on CFS's 2008 and 2009 tax returns, as well as DRS's 2009 tax returns, as required by 13 C.F.R. § 121.104(a)(1). With regard to 2010, it appears that the Area Office based its calculation on CFS's and DRS's profit and loss statements, as well as the sworn declaration of CFS's Finance Director, Mr. Christopher Elko. This comports with the regulation, which allows the Area Office to base its calculation on “any other available information.” 13 C.F.R. § 121.104(a)(2). Despite the Area Office's failure to clarify the sources underlying its calculation, the Waste Age publications cannot overcome the Area Office's calculation, which apparently was based on reliable and credible information.

4. New Allegations and Evidence

Finally, Appellant argues for the first time on appeal that CFS is affiliated with Invincia and CBV through common ownership and management. Specifically, Appellant asserts that one of CFS's nine owners is the President and 100% owner of Invincia and is a member of CBV's Board of Directors. Appellant claims that it could not have discovered the relationship between these entities before issuance of the size determination because CFS's ownership and management structures are not a matter of public record.

CFS objects that Appellant may not submit new arguments on appeal. CFS also explains that it submitted information regarding the holdings of its owners to the Area Office, which disclosed the potential associations with Invincia and CBV. Therefore, CFS argues that the Area Office already considered this information in performing the size determination and found no affiliation between CFS and Invincia and CBV.

Contrary to CFS's assertions, there is no evidence in the size determination or in the record that the Area Office considered CFS's connection to Invincia or to CBV. As CFS explains, it did disclose the holdings of its owners on its SBA Form 355. Thus, the fact that one of CFS's owners owns Invincia and the fact that the same owner also sits on the CBV Board are clearly in the record. The size determination lists CFS's individual owners, so it is also evident that the Area Office reviewed CFS's SBA Form 355. However, it appears the Area Office failed to consider the fact, unmistakably set forth in the SBA Form 355, that one of CFS's owners owns and/or manages two other firms.

OHA's regulations provide that “[t]he Judge will not decide substantive issues raised for

the first time on appeal.” 13 C.F.R. § 134.316(c). Nevertheless, I find that Appellant is not raising new issues on appeal. Rather, Appellant protested CFS's size based upon affiliation with other firms, primarily based upon common ownership and common management. Upon submission of its SBA Form 355 to the Area Office, CFS provided clear and undisputed factual information that could support a finding of affiliation between CFS and Invincia and CBV based upon common ownership and common management.

Accordingly, I conclude that CFS's potential affiliation with Invincia and CBV was a matter within the scope of the Area Office's initial review. The ownership and management of other firms by one of CFS's owners plainly raises a question of affiliation within the ambit of the original protest that the Area Office should have considered. *See Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4848, at 6 (2007) (“[P]rotests must, by necessity, raise allegations based on little information since the protested concerns necessarily have the best access to information about themselves. Area offices are charged with using the initial information to commence a further investigation which culminates with a size determination that should include a fuller understanding of the facts involved.”); *Size Appeal of Fort Carson Support Servs.*, SBA No. SIZ-4740, at n.3 (2005) (Area Office may not “ignore facts that are plainly part of the record or that are reasonably available to it in making a size determination”). However, as discussed, there is no indication that Area Office considered the possibility of such an affiliation. Consequently, on remand, the Area Office should assess whether CFS is affiliated with Invincia and CBV.⁶

5. Remand

On remand, the Area Office must obtain financial information for RWS for the applicable period of measurement and include the receipts of RWS in the calculation of Appellant's average annual receipts. The Area Office must also investigate whether CFS is affiliated with Waste Associates and its related firms through a joint venture, an identity of interest, or the totality of the circumstances. Additionally, the Area Office must consider whether CFS is affiliated with Invincia and CBV. After consideration of these matters, and upon final calculation of Appellant's average annual receipts, the Area Office should clarify precisely what documents and information were used in the calculation.

IV. Conclusion

Appellant has established that the size determination was based upon clear errors. Accordingly, this appeal is GRANTED, and the size determination is VACATED and REMANDED for further review and investigation in accord with this decision.

KENNETH M. HYDE
Administrative Judge

⁶ Appellant seeks to introduce new evidence to support its allegations that CFS is affiliated with Invincia and CBV. Because I am remanding this matter for further review and investigation, it is unnecessary to rule upon this motion. *See Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 5 (2009).