

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

SIZE Appeal of:

DecisionPoint-Agile Defense JV, LLC,

Appellant

Appealed from  
Size Determination No. 02-2026-006

SBA No. SIZ-6336

Decided: February 12, 2025

APPEARANCES

Edward J. Tolchin, Esq., Offit Kurman, Esq., for Appellant DecisionPoint - Agile Defense, JV LLC

Carmody G. Daman, Esq., Senior Associate General Counsel, General Services Administration

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On December 3, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2026-006 (Size Determination) finding that DecisionPoint-Agile Defense JV, LLC (Appellant) was other than small. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

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 15 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.

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<sup>1</sup> This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. No redactions were requested, and OHA therefore now issues the entire decision for public release.

## II. Background

### A. Solicitation and Protest

On March 25, 2022, the U.S. General Services Administration (GSA) posted the Polaris Governmentwide Acquisition Contract (GWAC) Small Business Pool Request for Proposals (RFP) No. 47QTCB22R0001. This will be a multiple award, indefinite delivery, indefinite-quantity (IDIQ) contract to provide customized Information Technology (IT) services and IT services-based solutions. The principal nature of any resulting task order procurement will be for IT services. The designated North American Industry Classification System (NAICS) is 541512 - Computer Systems Design Services, with a corresponding \$30 million annual receipts size standard.

On October 2, 2024, GSA posted a pre-award notification of apparent successful offerors, one of which was Appellant. On October 16, 2024, the Contracting Officer (CO) filed a size protest because Appellant's joint venture agreement (JVA) did not appear to include all the provisions required by the regulation. The CO thought the JVA did not include the provisions required by 13 C.F.R. § 125.8(b)(2)(vi), (vii), (viii), (ix), (x), (xi), and (xii). The Area Office also initially thought the JVA lacked the provision required by 13 C.F.R. § 125.8(b)(2)(H) and (iv). (Size Determination, at 1-3.)

On October 22, 2024, the Area Office informed Appellant of the protest and requested a response. On October 25, 2024, Appellant responded. Appellant submitted its JVA dated December 1, 2021; a Joint Venture Operating Agreement dated January 28, 2022 (Operating Agreement); SBA's Mentor-Protege Agreement Approval letter dated March 16, 2022; the Articles of Organization as a Limited Liability Company (LLC) dated October 22, 2024, and other documents. Appellant asserted that it is defined by three documents: the JVA, the Operating Agreement, and the Certificate of Compliance, all attached and part of the JVA. Appellant argues that *VET Appeal of Seventh Dimension, LLC*, SBA No. VET-6057 (2020) allowed for the incorporation of documents to supplement the JVA. Appellant also argued that under OHA precedent some of the provisions of 13 C.F.R. § 125.8(b)(2) are inapplicable to services and IT procurements, and that in IT services procurements, no major equipment is required. (*Id.*, at 4-5.)

### B. Size Determination

Appellant is an unpopulated joint venture organized as a Maryland LLC. It is owned 51% by DecisionPoint Corporation (DPC), a small business, and 49% by Agile Defense Inc. (ADI), an other than small business. Appellant's Managing Partner/CEO is Brian Flood. DPC and AGI are in an SBA-approved Mentor-Protege relationship. (*Id.*)

The Area Office found that the JVA does not mention or reference the other two documents Appellant relies upon, and notes Appellant failed to provide GSA with the Operating Agreement. The Area Office concluded that the Operating Agreement and Certificate of Compliance are not attachments or a part of the JVA, but rather separate documents. The Area

Office distinguished *Seventh Dimension* because there the concern's operating agreement was also its joint venture agreement, and it submitted a contract-specific addendum. The Area Office found that Appellant's compliance with 13 C.F.R. § 125.8(b)(2) must be determined based upon its JVA alone, without the inclusion of the Operating Agreement or Certificate. Further, 13 C.F.R. § 121.404(d) supports the argument that the joint venture agreement requirements should be in the joint venture agreement because the regulation stipulates the date of final proposal revisions as the date for which the joint venture agreement must be in compliance. (*Id.*, at 7.)

The Area Office found Appellant's JVA deficient, in that it failed to meet the requirements of the following regulatory provisions:

The Area Office found Appellant's JVA non-compliant with 13 C.F.R. § 125.8(b)(2)(ii). The Area Office found that the JVA at ¶5.7 states DPC is the Managing Venturer; Article IV states Mr. Flood is Managing Director and CEO and will supervise employees; at ¶7(a)(1) it states DPC is Managing Venturer and responsible for all bookkeeping and payroll, and it is signed by Mr. Flood as DPC's CEO. The Area Office concluded that while the JVA designated a named individual employee with supervision over personnel it fails to indicate that this individual is the manager with ultimate responsibility for contract performance. (*Id.*, at 8.)

The Area Office found Appellant's JVA compliant with 13 C.F.R. § 125.8(b)(2)(iv). (*Id.*, at 9.).

The Area Office found Appellant non-compliant with 13 C.F.R. § 125.8(b)(2)(vi). The JVA states the Venturers will contribute property to the venture and their Capital Account will be credited with the appropriate value of their contributions. JVA, ¶ 5.6. The JVA also provides that DPC and ADI will share responsibility for business development and recruiting. JVA, ¶ 7.1(b). The Area Office concluded the JVA fails to: (1) itemize all major equipment, facilities and other resources to be furnished by each venturer, with a detailed schedule of cost or value of each; (2) provide a general description of the anticipated major equipment, facilities or other resources to be furnished by each venturer or (3) specify how the venturers will furnish such resources once a definite scope of work is publicly available. The Area Office noted that for an IDIQ contract the regulation requires a general description of the major equipment, facilities and other resources to be furnished by each party. The Area Office found Appellant's JVA failed to comply with this provision because it merely states the venturers will contribute property and share responsibility. It does not explain that elaboration of these provisions is not possible due to the IDIQ nature of the contract, or the type of work (IT services) required. The JVA does not even identify the contract or solicitation number to which it applies. This a generic JVA and it is deficient because an addendum should have been created to provide the contract-specific information the regulation requires. (*Id.*, at 10-11.)

The Area Office found the JVA compliant with 13 C.F.R. § 125.8(b)(2)(vii). (*Id.*, at 12.)

The Area Office found Appellant's JVA non-compliant with 13 C.F.R. § 125.8(b)(2)(viii). The JVA states that all parties to the joint venture are obligated to complete contract

performance. The Area Office found the JVA deficient because it does not obligate the parties to complete performance despite the withdrawal of any member. (*Id.*, at 13)

The Area Office Appellant's JVA noncompliant with 13 C.F.R. 125.8(b)(2)(ix). The JVA provides that Appellant's Administrative Managing Partner shall keep separate books of account (JVA, ¶ 9.1), and identifies a Gaithersburg, MD address for the concern (JVA, ¶2.2). The Area Office found the JVA deficient because the regulation requires that the accounting records be kept in the office of the small business Managing Venturer, and there is no mention of DPC's address. (*Id.*, at 13-14.)

The Area Office found Appellant's JVA non-compliant with 13 C.F.R. § 125.8(b)(2)(x). The Area Office found the JVA failed to meet this requirement that its final original records be retained by the small business upon contract completion. The JVA's records provisions did not provide for this. JVA, ¶¶, 9.1, 9.2.) (*Id.*, at 14.)

The Area Office found Appellant non-compliant with 13 C.F.R. § 125.8(b)(2)(xi). The Area Office found the JVA failed to require that annual performance of work statements be submitted to SBA and the CO not later than 45 days after year-end. The JVA merely provides that there be quarterly statements given to ADI and that SBA may inspect the records without notice. (JVA, ¶¶ H-7, 11.8) (*Id.*, at 15.)

The Area Office found Appellant non-compliant with 13 C.F.R. § 125.8(b)(2)(xii). The Area Office found the JVA failed to meet the requirement that a project-end performance of work statement be submitted to SBA. No JVA provision addressed this requirement. (*Id.*)

The Area Office concluded that Appellant's JVA failed to meet the requirements of the regulation. Therefore, because ADI is other than small, Appellant could not avail itself of the exception to a finding of affiliation in the regulation and was therefore other than small.

### C. Appeal

On December 3, 2024, Appellant filed the instant appeal of the Size Determination. Appellant first argues the Area Office was in error to limit its analysis to the JVA, and not consider the Operating Agreement. (Appeal at 3.) Appellant argues in evaluating the eligibility of a joint venture, OH A will consider not only the JVA, but any additional documents executed prior to final proposal revisions, and no specific format is mandated with respect to joint venture agreements. (*Id.*, citing *Systematic Innovations, LLC*, SBA No. VSBC-339 (2024); 81 Fed. Reg. 48,558, 48,576 (July 25, 2016).)

Appellant asserts it is untrue that an Operating Agreement's purpose is “separate and apart from the requirements” of a JVA and that it is not tied to the JVA. Appellant argues under Maryland law, which controls here, a later dated document controls over a prior document which addressed the same issues and are deemed to implicitly amend them with respect to those issues. (*Id.*, citing *U.S. v. Gilman*, 360 F.Supp. 828, 838 (D.Md.1973).) Further, a limited liability company is governed by its operating agreement. (*Id.*, citing Md. Code Ann., Corps & Ass'ns §§ 4A-402(a), 4A-101(q).) Appellant maintains that the JVA and Operating Agreement are tied, and

both constitute an operating agreement, and to the extent of any inconsistency, the later Operating Agreement controls. Consequently, the Area Office erred in not considering the Operating Agreement.

Appellant asserts its JVA and Operating Agreement, taken together, comply with the regulation. It first argues compliance with 13 C.F.R. § 128.5(b)(2)(ii). The regulation does not require that a JVA use the exact words “ultimate responsibility for performance of the contract” in describing the Responsible Manager's duties. It requires that a JVA designate a protege employee as the person to manage contract performance. Further, no LLC member can be legally liable personally for contract performance. (*Id.*, at 5, citing Md. Code Ann. Corps & Ass'ns § 4A-301.) The rule must mean the designated person will have management responsibility for contract performance. The JVA identifies DPC as the Managing Venturer and Mr. Flood as Appellant's Managing Director. The JVA and Operating Agreement identify Mr. Flood as DPC's CEO. The Operating Agreement explicitly identifies Mr. Flood as Appellant's Responsible Manager. (JVA, ¶ 5.7, signature; Operating Agreement, ¶ 5.8, signature.) This meets the regulatory requirements.

Appellant argues that it has complied with 13 C.F.R. § 125.8(b)(2)(vi). Appellant points to the Operating Agreement, § 10, Major Equipment, Facilities and Other Resources. The Managing Venturer was to contribute \$5,100 for registration fees, legal services and other expenses, and other resources by mutual agreement, included to support specific task orders. The Partner Venturer will contribute \$4,900 for registration fees, legal services and other expenses. Also \$15,000 for website development and maintenance, \$5,000 per annum for office supplies, and \$5,000 for marketing and public relations support. (Appeal at 6-7.) Appellant maintains these provisions meet the regulatory requirement.

Appellant maintains its JVA meets the requirements of 13 C.F.R. § 125.8(b)(2)(viii). The Area Office found the requirement in the JVA that all parties were obligated to complete contract performance was deficient because it did not explicitly require completion of contract performance despite withdrawal of a member. Appellant argues that this requirement is in the Operating Agreement and further, the language in the JVA requires completion of performance by both parties whether the other withdraws or not. (*Id.*, at 7-8.)

Appellant maintains its JVA meets the requirements of 13 C.F.R. § 125.8(b)(2)(ix). The Operating Agreement, ¶ 9.7, states that the accounting and administrative records will be kept in the office of the Managing Venturer. Appellant argues this meets the requirement. (*Id.*, at 8.)

Appellant maintains its JVA meets the requirements of 13 C.F.R. § 125.8(b)(2)(x). The JVA ¶ 9.1) and Operating Agreement (¶ 9.3) both contain a provision stating: “separate books of accounts shall be kept by the Administrative Managing Partner.” Either Venturer may inspect the books at any reasonable time on reasonable notice. The Operating Agreement contains a provision (¶ 5.17) that in accordance with 13 C.F.R. § 125.8(b)(2)(x) upon contract completion the final original records will be retained by the Managing Venturer. Appellant asserts these provisions meet the regulatory requirement. (*Id.* at 8-9.)

Appellant maintains its JVA meets the requirements of 13 C.F.R. § 125.8(b)(2)(xi). The JVA and Operating Agreement both provide (at ¶¶ 11.7 and 11.8) that SB A may inspect Appellant's records at any time without notice and the records which include financial statements showing cumulative contract receipts and expenditures (including principals' salaries) must be available no later than 45 days after the end of each quarter. Appellant argues that since the end of the year is included in the end of quarters, these provisions should be sufficient to meet the regulatory requirement. Further, the Operating Agreement states (¶ 5.12) that DPC shall submit to SBA and the CO in accordance with 13 C.F.R. § 125.8(b)(2)(xi) the performance of work statement required by 13 C.F.R. § 125.8(h)(1) not later than 45 days after each of Appellant's operating years. Appellant argues this provision meets the regulatory requirement. (*Id.* at 9)

Appellant maintains its JVA meets the requirements of 13 C.F.R. § 125.8(b)(2)(xii). The Operating Agreement provides ¶ 5.13) that DPC will submit to SBA and the CO the project end performance of work statement required by 13 C.F.R. § 125.8(h)(2) within 90 days of contract completion. Appellant argues this complies with the regulation and that the Area Office failed to consider it because it ignored the Operating Agreement. (*Id.*, at 9-10.)

#### D. GSA's Response

On December 19, 2024, GSA responded to the Appeal. GSA states Appellant failed to submit its Operating Agreement with its offer, although it did submit its JVA. GSA points out the solicitation requires submission of an offeror's JVA, and that failure to submit this information will result in GSA rejecting the proposal. (GSA Response at 3.)

GSA argues the Area Office correctly declined to consider the Operating Agreement because the regulation (13 C.F.R. § 125.8(b)(2)) requires a JVA to have all 12 required elements. The regulation requires these elements to be in the JVA and does not state they can be included in other organizational documents. GSA points out the JVA does not contain language incorporating the Operating Agreement. GSA maintains the plain language of the regulation requires the elements be included in the JVA itself, and nowhere else. (*Id.*)

GSA distinguishes the instant case from *VSBC Protest of Systematic Innovations, LLC*, SBA No. VSBC-339 (2024). There, the supplemental documents were actually amended into the JVA, and that joint venture operating agreement included an “Entire Agreements, Amendments” clause. Therefore, the documents were expressly connected. Appellant's JVA lacks a similar clause. Further, in *Systematic* the later amended details were specific to the contract at issue, that could not have been known when the initial JVA was executed. Here, Appellant's JVA lacks nine of the twelve basic required provisions of a JVA between a mentor and protege. (*Id.*)

GSA also rejects Appellant's reliance on Maryland law as misplaced. The issue here is Appellant's size status under the regulations applicable to small businesses seeking to do business with the Federal government under the SBA's Mentor/Protege Joint Venture program. This is a Federal matter and pursuant to the Supremacy clause, Maryland law does not control. (*Id.*)

GSA asserts Appellant could have prepared a compliant JVA but failed to do so. Appellant could have explicitly incorporated its Operating Agreement into the JVA but failed to do so. GSA did not have the Operating Agreement during evaluation and will not accept it now.

### III. Discussion

In reviewing this case, I find that the appeal was filed within 15 days of the issuance of the Size Determination and is thus timely. 13 C.F.R. § 134.304(a). 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

I find first that the Area Office erred in failing to consider the Operating Agreement, together with the JVA, in determining whether Appellant's JVA met the regulatory requirements of 13 C.F.R. § 125.8(b)(2). OHA has consistently considered a concern's operating agreements together with its joint venture agreements in judging a concern's compliance. *VSBC Protest of Systematic Innovations, LLC*, SBA No. VSBC-339-P (2024); *VET Appeal of Seventh Dimension, LLC*, SBA No. VET-6057 (2020). The important consideration is whether the documents in question were executed prior to the concern's final proposal revisions, that date as of which size must be determined. *Id.*; 13 C.F.R. § 121.404(d). That the Operating Agreement was not explicitly incorporated into the JVA is irrelevant. An Operating Agreement is the basic organizing document of a limited liability company and is thus always relevant in an examination of the company's organization. Md. Code Ann., Corps & Ass'ns §§ 4A-402(a), 4A-101(q). The Area Office's attempt to distinguish *Seventh Dimension* is misplaced. OHA did not find that the fact the JVA was also the concern's operating agreement was determinative of whether it would be considered. In *Systematic Innovations*, OHA took into consideration a number of organizational documents, which were all executed prior to the submission of final proposal revisions. GSA's objection to Appellant's failing to submit the Operating Agreement with its proposal is an issue to be addressed by GSA itself in its evaluation of the proposal, it does not concern us here in determining Appellant's size.

The regulation at 13 C.F.R. § 125.8(b)(2)(ii) requires that the JVA designate the small business as the Managing Venturer and a named employee of that concern as the Responsible Manager with ultimate responsibility for contract performance. The JVA designated DPC as the Managing Venturer, who will appoint the General Manager, "through whom it shall direct charge and supervision of all matters necessary and connected with the performance of the contracts," ¶ 5.7. It is signed by Brian Flood as CEO of DPC. It also provides the Managing Venturer is responsible for day-to-day management and administration. JVA, Article IV. Mr. Flood is Appellant's CEO and will provide daily leadership and supervision. *Id.* The Operating Agreement designates DPC as the Managing Venturer at ¶¶ 5.8, 7.1(a) and provides that DPC will appoint the General Manager "through whom it shall direct charge and supervision of all matters necessary and connected with the performance of the contracts." ¶ 7.2. Appellant's documents thus designate DPC, the small business venturer, as Managing Venturer and a named

individual, DPC's CEO, as the Responsible Manager. The Area Office found the JVA noncompliant because the Responsible Manager did not have “ultimate responsibility for contract performance.” However, as Appellant points out, the regulation does not mandate particular language, and the JVA does give Mr. Flood supervision of all matters necessary and connected with the performance of the contract. SBA has stated that no specific format is required for a joint venture agreement. 81 Fed. Reg. 48,558, 45,576 (July 25, 2016). I find that the description of Mr. Flood's duties in the JVA and Operating Agreement gives Mr. Flood responsibility for contract performance. Accordingly, I find the Area Office erred in finding Appellant noncompliant with 13 C.F.R. § 125.8(b)(2)(h).

The Area Office found Appellant noncompliant with 13 C.F.R. § 125.8(b)(2)(vi). The regulation requires the joint venture agreement 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 (c) 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 (c) 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; (emphasis supplied).

Appellant's Operating Agreement, § 10, Major Equipment, Facilities and Other Resources contains a provision responsive to the requirements of this regulation. The Managing Venturer was to contribute \$5,100 for registration fees, legal services and other expenses, and other resources by mutual agreement, including specific resources needed to support task orders. The Partner Venturer will contribute \$4,900 for registration fees, legal services and other expenses, \$15,000 for website development and maintenance, \$5,000 per annum for office supplies, and \$5,000 for marketing and public relations support. The Partner Venturer will provide other resources by mutual agreement on request, including specific resources to meet task orders.

The subject contract is an ID/IQ contract, and the requirements are thus indefinite and will only be known upon the issuance of task orders. Further, the contract is for IT services. As the emphasized portion of the regulation makes clear, when a contract is indefinite, such as an indefinite quantity contract or a multiple award contract, the JVOA need only provide a general description of anticipated major equipment without a detailed schedule of cost. *VSBC Protest of Thunderyard Liberty JV II LLC*, SBA No. VSBC-332-P, at 11 (2024); *VSBC Protests of Beshenich Muir & Associates, LLC & ELB Services LLC*, SBA No. VSBC-292-P, at 15 (2023). OHA has determined it is reasonable to omit major equipment details in a joint venture



agreement in instances where the procurement is for services. *Thunderyard*; *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012, at 20 (2019) (determining that because the procurement calls for nursing services and because contract performance would occur on government facilities, “there would have been no major equipment, facilities or other resources for [protested concern] to have detailed in the JVA”); *see also*, *Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5822, at 11 (2017) (in a procurement of professional services, using information technology provided by the procuring agency, “[b]ecause the contract does not require major equipment, facilities, or other resources, [the joint venture] was not required to list them in its JVA.”). In the case of a procurement for IT services, the contract does not require major equipment, facilities or other resources and so there is no requirement to list them in the JVA. In the case of a procurement for IT services, a general listing of resources is sufficient. *Thunderyard*, at 11; *VSBC Protest of Beshenich Muir & Assoc, et al*; SBA No. VSBC-343-P (2024). Accordingly, I find that Appellant's general listing of resources is sufficient to comply with 13 C.F.R. § 125.8(b)(2)(vi), and the Area Office erred in finding it noncompliant.

The Area Office found Appellant noncompliant with § 125.8(b)(2)(viii). The Area Office found the JVA deficient because it does not obligate the parties to complete contract performance despite the withdrawal of any member. The JVA states “All parties to the Joint Venture are required to complete contract performance.” JVA, Article IV. This is a flat, absolute requirement with no exceptions. The withdrawal of a member would not lessen in any way the obligation of the other member to perform. This provision alone meets the regulatory requirement. *VSBC Protest of Systematic Innovations, LLC*, SBA No. VSBC-339-P (2024). Further, the Operating Agreement provides “All parties to the Joint Venture are obligated to complete contract performance despite the withdrawal of any party to the Joint Venture.” Operating Agreement, Article IV. This provision explicitly includes the regulatory language which the Area Office considered crucial. The Area Office erred in finding Appellant noncompliant with this regulation.

The Area Office found Appellant noncompliant with 13 C.F.R. § 125.8(b)(2)(ix) because the regulation requires the accounting records be kept in the office of the Small Business Managing Venturer, and there was no mention of DPC's address. The Area Office here committed an error of fact. DPC's Gaithersburg, MD address is included in the JVA, and the JVA is thus compliant.

The Area Office found Appellant noncompliant with 13 C.F.R. § 125.8(b)(2)(x) because the JVA failed to include a requirement that original records be retained by the small business upon contract completion. The Operating Agreement provides that upon contract completion, the final original records will be retained by the Managing Venturer. Operating Agreement, ¶ 5.17. Because DPC is the Managing Venturer, this provision meets the regulatory requirement, and the Area Office erred in finding Appellant noncompliant.

The Area Office found Appellant noncompliant with 13 C.F.R. § 125.8(b)(2)(xi) because it failed to meet the requirement that annual performance of work statements be submitted to SBA not later than 45 days after each operating year. The Operating Agreement contains a provision requiring DPC to submit annual performance of work statements to SBA no later than 45 days after the end of each operating year, specifically requiring compliance with 13 C.F.R. §

125.8(b)(2)(xi). Operating Agreement, ¶ 5.12. The Area Office erred as a matter of fact in finding Appellant noncompliant here.

The Area Office found Appellant noncompliant with 13 C.F.R. § 125.8(b)(2)(xii), requiring the project end performance of work statements required by 13 C.F.R. § 125.8(h)(2) be submitted to SBA and the CO within 90 days of contract completion. The Operating Agreement provides that such performance of work statements will be submitted to SBA and the CO within 90 days of contract completion, in accordance 13 C.F.R. § 125.8(h)(2). Operating Agreement, ¶ 5.13. Accordingly, the Area Office erred in fact to find Appellant noncompliant here.

After reviewing the record here, I conclude that the Area Office erred in failing to the consider Appellant's Operating Agreement, and in failing to find that Appellant's JVA and Operating Agreement, taken together complied with the regulations at 13 C.F.R. § 125.8(b)(2). I therefore GRANT the appeal and REVERSE the size determination. Appellant is an eligible small business for the subject procurement.

#### IV. Conclusion

Appellant has demonstrated clear error of fact or law in the size determination. The appeal therefore is GRANTED, and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge