United States Small Business Administration
Office of Hearings and Appeals

SIZE Appeal of: Hometown Veterans Medical LLC, Appellant, Re: Veterans Choice Medical Equipment, LLC Appealed From Size Determination No. 06-2025-011	SBA No. SIZ-6343 Decided: March 17, 2025

APPEARANCES

William M. Jack, Esq., Dickinson Wright PLLC, Washington, D.C., for Hometown Veterans Medical LLC

David F. Dowd, Esq., Holland & Knight LLP, Tysons, Virginia, for Veterans Choice Medical Equipment, LLC

DECISION[1]

I. Introduction and Jurisdiction

On December 23, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2025-011, concluding that Veterans Choice Medical Equipment, LLC (VCME) is eligible for award of the subject procurement. VCME is a joint venture between Avenue Mori Medical Equipment, Inc. (AMME) and its SBA-approved mentor, Rotech Healthcare, Inc. (Rotech). The Area Office found that VCME was first awarded a contract more than two years prior to submission of its proposal for the contested procurement. However, because that first award was cancelled and VCME derived no benefit from it, the Area Office instead substituted VCME's next award for purposes of assessing VCME's compliance with the two-year requirement set forth at 13 C.F.R. § 121.103(h). The Area Office concluded that VCME met the regulatory requirement since this second contract was awarded less than two years before VCME was awarded the contested contract.

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

On appeal, Hometown Veterans Medical LLC (Appellant), which had previously protested VCME's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is 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 did not initially receive a copy of the size determination, but nevertheless filed the instant appeal within 15 days after receiving notice that a size determination had been issued, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

On September 29, 2022, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C25622R0128 for in-home oxygen and ventilator services in the southeastern United States. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses, and assigned North American Industry Classification System (NAICS) code 621610, Home Health Care Services, which at that time had a corresponding size standard of $16.5 million average annual receipts. (RFP, SF 1449.) The RFP stated that the VA planned to award a single, indefinite-delivery/indefinite-quantity contract to the offeror whose proposal was most advantageous to the Government. (*Id.* at 56, 91.)

Initial proposals, including price, were due November 1, 2022. VCME and Appellant timely submitted offers. On January 3, 2023, the CO announced that VCME was the apparent awardee.

B. Protests

On October 31, 2024, Appellant, an unsuccessful offeror, filed a protest with the CO challenging VCME's size. The protest alleged that VCME is not eligible for award because it does not comply with the two-year rule for joint ventures. (Protest at 1.)

Appellant observed that, according to 13 C.F.R. § 121.103(h), SBA "will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award." (*Id.* at 4.) Here, VCME received its first award in March 2018 but submitted its offer for the subject procurement on November 1, 2022. (*Id.*) Appellant thus alleged that the receipts of the joint venturers, AMME and Rotech, must be aggregated to calculate VCME's size. (*Id.*) Because Rotech is a large business, the joint venturers' combined receipts exceed the relevant size standard, rendering VCME ineligible for award. (*Id.*)

On November 15, 2024, the Area Office dismissed Appellant's size protest as untimely. (Size Determination No. 06-2025-007, at 3.) The Area Office also dismissed a similar size protest filed against VCME by a different unsuccessful offeror, Eagle Home Medical Corp. Perceiving merit to the protests, however, the Area Director initiated his own protest against VCME on November 26, 2024.[2] (Memorandum of N. Manalisay (Nov. 26, 2024), at 1-2.)

C. Size Determination

On December 23, 2024, the Area Office issued Size Determination No. 06-2025-011, concluding that VCME is an eligible small business for the subject procurement. The Area Office found that VCME is compliant with the regulatory two-year lifespan for a joint venture. (Size Determination No. 06-2025-011, at 7.)

The Area Office explained that VCME is a joint venture 51% owned by AMME and 49% owned by Rotech. (*Id.* at 6.) AMME and Rotech are an SBA-approved mentor and protégé. (*Id.* at 8.) The Area Office noted that AMME and Rotech have established two other joint ventures, in addition to VCME. (*Id.*)

The Area Office found that VCME was first awarded a contract "back in 2018." (*Id.* at 7.) Due to a bid protest, however, performance of the contract was suspended, and the contract subsequently was terminated for convenience. VCME performed no work, and received no benefit, from the 2018 contract. (*Id.*) Therefore, the Area Office reasoned, it would be "unfair" to count the 2018 award "for purposes of calculating the two-year period addressed under 13 C.F.R. § 121.103(h)." (*Id.*) The Area Office instead treated VCME's next contract, awarded on April 30, 2021, as its first award for purposes of § 121.103(h). (*Id.*) VCME was awarded a contract in October 2022, and the instant contract was awarded in January 2023, but both of these awards occurred within the two-year window beginning April 30, 2021. (*Id.*) The Area Office therefore did not aggregate the receipts of AMME and Rotech in computing VCME's size. (*Id.*)

The Area Office next found that AMME, the protégé member of VCME, is 51% owned by Mr. Myo Tun and 49% owned by Mori Medical Equipment, Inc. (MME). (*Id.*) Mr. Tun has the power to control AMME through his ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).) MME is 100% owned by Mr. Gordon Mori, who controls MME based on his ownership. (*Id.*) Messrs. Tun and Mori are not related to one another. (*Id.*) Mr. Tun also owns and controls two other companies, Avenue Home Care, Inc. (AHC) and Avenue Medical Equipment, Inc. (AME). (*Id.* at 9.) The Area Office thus found AMME affiliated with AHC and AMME. (*Id.*) After aggregating the receipts of AMME, its affiliates AHC and AME, and AMME's proportionate share of joint venture receipts, the Area Office found that AMME is small under the size standard applicable to this procurement. (*Id.* at 10.)

[2] There is no time limit on a size protest brought by SBA itself. 13 C.F.R. § 121.1004(b).

The Area Office also analyzed whether VCME's Joint Venture Agreement (JVA) meets the requirements set forth in 13 C.F.R. § 125.18(b)(2) and (3). (*Id.* at 10-18.) The Area Office determined that the JVA does meet each requirement.[3]

D. Appeal

On January 7, 2025, Appellant filed the instant appeal. Appellant explains that, at the time of the appeal, it had not received a copy of Size Determination No. 06-2025-011. In light of the result, however, Appellant contends that the Area Office must have erred in its consideration of 13 C.F.R. § 121.103(h). (Appeal at 2, 6.)

Appellant first observes that SBA revised § 121.103(h) in 2020 to "eliminate the three-contract limit for a joint venture, but continue to prescribe that a joint venture cannot exceed two years from the date of its first award." (*Id.* at 7, quoting 85 Fed. Reg. 66,146, 66,148 (Oct. 16, 2020).) In *Federal Register* commentary accompanying the final rule, SBA expressed the view that "allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture." (*Id.* at 8, quoting 85 Fed. Reg. at 66,148.)

Here, according to the Federal Procurement Data System, VCME received its first contract award in March 2018. (*Id.*) As a result, pursuant to § 121.103(h), VCME could only submit offers through March 2020 in order for its joint venturers to remain exempt from affiliation. (*Id.*) VCME, though, submitted its offer for the instant procurement more than two years later, on November 1, 2022. (*Id.*) VCME's joint venturers must therefore be considered affiliated. (*Id.*) Since Rotech is a large business, it follows that VCME is ineligible for this award. (*Id.* at 9.)

Appellant analogizes the instant case to OHA's decision in *Size Appeal of Fed. Performance Mgmt. Sols., LLC*, SBA No. SIZ-6246 (2023), *aff'd sub nom Fed. Performance Mgmt. Sols., LLC v. United States*, 2024 U.S. Claims LEXIS 4 (2024). (*Id.*) There, OHA found that a joint venture was awarded its first contract in September 2018, so the joint venture could continue to submit offers until September 2020 without causing its joint venturers to become affiliated. (*Id.*, citing *Fed. Performance*, SBA No. SIZ-6246, at 10.) Because the joint venture submitted its offer for the procurement in question in June 2022, OHA concluded that the joint venturers were affiliated, and that the joint venture was ineligible for award since the joint venturers' combined receipts exceeded the applicable size standard. (*Id.*, citing *Fed. Performance*, SBA No. SIZ-6246, at 10-11.) The same result should apply here. (*Id.* at 10.)

[3] On appeal, Appellant does not contest the Area Office's analysis of VCME's JVA, so further discussion of the JVA is unnecessary. *E.g., Size Appeal of Env't Restoration, LLC*, SBA No. SIZ-5395, at 6 (2012) (when issue is not appealed, the area office's determination "remains the final decision of the SBA.").

E. Supplemental Appeal

On January 23, 2025, after its counsel reviewed the Area Office file and Size Determination No. 06-2025-011 under the terms of an OHA protective order, Appellant supplemented its appeal. Appellant renews its argument that the Area Office erred in its analysis of the two-year rule by disregarding the plain language of 13 C.F.R. § 121.103(h). (Supp. Appeal at 5.) Appellant also moves to introduce new evidence, namely System for Award Management (SAM) records documenting the award of Contract No. 36C25918D0037 to VCME on March 5, 2018; RFP No. VA259-17-R-0100, the VA solicitation which gave rise to the 2018 award; a bid protest filed by VCME in March 2018, challenging aspects of VA's source selection; and a U.S. Government Accountability Office (GAO) decision dated May 2, 2018, dismissing VCME's bid protest as academic because VA agreed to undertake corrective action. (*Id.* at 3-4.)

Appellant highlights that public records reflect that VCME was awarded Contract No. 36C25918D0037 on March 5, 2018. (*Id.* at 13.) As such, based on the plain language of 13 C.F.R. § 121.103(h), March 5, 2018 is the applicable start date of the two-year period. (*Id.*) Furthermore, RFP No. VA259-17-R-0100, the solicitation which gave rise to Contract No. 36C25918D0037, stated that "[a] written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party." (*Id.* at 13, quoting RFP No. VA259-17-R-0100 at 89.) VCME received noticed of the award on or about March 5, 2018. (*Id.* at 14.) Appellant argues that, contrary to the Area Office's decision, it is irrelevant whether VCME benefited from the contract, since the regulatory text of § 121.103(h) does not provide for any different analysis if there are contractual changes post-award. (*Id.* at 14-15.)

Appellant maintains that the regulatory history of § 121.103(h) further supports its position. (*Id.* at 15.) In 2020, SBA modified § 121.103(h) to eliminate the three-contract limit for each joint venture, while continuing the two-year maximum duration from the date of the joint venture's first award. (*Id.* at 15-16, citing 85 Fed. Reg. at 66,148.) SBA expressed no intent that post-award contract changes would impact the analysis. (*Id.*) Appellant argues that the Area Office's interpretation of § 121.103(h) impermissibly re-writes the rule, or creates a new regulation, without conducting the requisite public notice and comment. (*Id.* at 16, citing *Size Appeal of Digital Mgmt., Inc.*, SBA No. SIZ-5709, at 15 (2015).) Additionally, the Area Office's interpretation is not entitled to deference because § 121.103(h) is unambiguous. (*Id.*, citing *Digital Mgmt.*, SBA No. SIZ-5709, at 15.) Not only is there no ambiguity in the plain language of § 121.103(h), but the Area Office's reasoning also contravenes SBA's expressed intent to limit the duration of joint ventures to a maximum of two years. (*Id.* at 17.)

Appellant disputes the notion that Contract No. 36C25918D0037 was cancelled through no fault of VCME. (*Id.*) Although events occurring after contract award are irrelevant under § 121.103(h), Contract No. 36C25918D0037 was not, in fact, simply cancelled. (*Id.*) Rather, according to Appellant, "VA and VCME entered into a bilateral modification terminating VCME's contract for the convenience of the Government," as part of the resolution of a bid protest brought by VCME. (*Id.* at 17-18.) Insofar as VCME failed to benefit from the contract award, then, this can be attributed at least in part to VCME's own actions. (*Id.*)

Lastly, Appellant rejects the Area Office's view that it would be "unfair" to count Contract No. 36C25918D0037 as VCME's first award. (*Id.*) In prior decisions, OHA has held that arguments grounded in policy or equity "cannot overcome the fact that the regulatory text does not support the interpretation SBA offers." (*Id.* at 19, quoting *Digital Mgmt.*, SBA No. SIZ-5709, at 15.) As such, Appellant argues, any supposed fairness concerns do not justify reading new language into § 121.103(h). (*Id.*) If anything, "fairness" dictates that AMME and Rotech should have adhered to SBA rules, particularly since they easily could have created a new joint venture to compete for this procurement yet chose not to do so. (*Id.*)

F. VCME's Response

On February 21, 2025, VCME responded to the appeal and supplemental appeal.[4] VCME notes that OHA previously considered VCME's size in *Size Appeal of Rocky Mountain Med. Equip., LLC*, SBA No. SIZ-6129 (2021). (Response at 1.) In *Rocky Mountain*, OHA "referenced the fact that VCME did not have any contracts." (*Id.*) Although OHA's decision is publicly available, Appellant never contested this finding, and Appellant later argued in a GAO bid protest that VCME lacked the requisite experience because it had not performed any work. (*Id.* at 1-2.)

Regardless, VCME maintains that the Area Office appropriately disregarded the 2018 contract for purposes of assessing compliance with § 121.103(h), because VCME "(i) did not and lawfully could not operate to perform and (ii) did not obtain any benefit due to a statutory stay and subsequent termination at no cost to the Government." (*Id.* at 3.) Appellant fails to establish any factual error on the part of the Area Office, since Appellant has not shown that VCME performed work or was compensated for the 2018 contract. (*Id.*) Furthermore, the 2018 contract was cancelled through a bilateral modification prior to any work being performed. (*Id.* at 4-5.) Under these circumstances, VCME had no right to seek reimbursement from the government. (*Id.* at 5.)

Next, VCME contends that Appellant fails to show that the Area Office committed any error of law. (*Id.*) In VCME's view, Appellant's reading of § 121.103(h) is too narrow. (*Id.* at 6.) VCME asserts that the first sentence of § 121.103(h) "contemplates that the parties [to a joint venture] are engaged in some effort more tangible and of more immediate effect (and benefit) than mere preparation and pursuit of proposals." (*Id.* at 7-8.) Only after a joint venture is performing a contract and earning revenue can it be considered carrying out business venture as

[4] VCME initially moved to dismiss the appeal as noncompliant with OHA's rules of procedure and for lack of standing. OHA denied the motion by Order dated February 6, 2025. In its ruling, OHA found that, although the underlying size protest here was initiated by the Area Director rather than by Appellant, OHA precedent establishes that a party has standing to appeal, even if that party was not also a protestor, if it is "an otherwise eligible small business offeror on the procurement." (Order at 3 (quoting *Size Appeal of Straughan Env't, Inc.*, SBA No. SIZ-5767, at 3 (2016), *recons. denied*, SBA No. SIZ-5776 (2016) (PFR).) Since there is no dispute that Appellant was an offeror on the procurement, and was not excluded from the competition, Appellant has standing to pursue this appeal. (*Id.*)

contemplated by the regulation. (*Id.* at 8.) As such, VCME maintains, the Area Office's interpretation comports with the regulatory text. (*Id.*)

Additionally, VCME observes that the word "generally" is used in the second sentence of § 121.103(h), which connotes that there are exceptions to the strict two-year limit. (*Id.* at 9.) The regulation elsewhere uses the phrase "receives a contract." (*Id.*) According to VCME, such language indicates that the joint venture "possesses," "can use," or otherwise "can do something with" the contract. (*Id.* at 10.) This coincides with VCME's view that the two-year limit begins only when a joint venture "starts to have some business in contract(s) that it can perform, make money and derive experience." (*Id.*) VCME reiterates that it did not perform any work under the 2018 contract. (*Id.*) Rather, the first contract under which VCME performed work was not awarded until April 30, 2021. (*Id.* at 10-11.)

Lastly, VCME argues that Appellant's interpretation of § 121.103(h) is untenable and unreasonable. (*Id.* at 11.) If OHA were to agree with Appellant, this "would start the clock running against entities (and particularly small businesses, which have limited resources) for events outside of their control and which would necessitate the formation of multiple joint venture entities to counteract the prospect of protests." (*Id.* at 11-12.) Furthermore, although SBA no longer utilizes the "3-in-2" rule for joint ventures, Appellant's interpretation would mean that the 2018 contract would have been treated as one of VCME's three awards under the prior rule, an irrational outcome. (*Id.* at 12.) VCME additionally claims that Appellant's arguments here are at odds with its position during recent GAO bid protest proceedings, where Appellant insisted that VCME gained no experience from the 2018 award. (*Id.* at 12-13.)

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

B. New Evidence

Accompanying the supplemental appeal, Appellant moved to admit new evidence. Specifically, Appellant seeks to introduce: records documenting the award of Contract No. 36C25918D0037 to VCME on March 5, 2018; RFP No. VA259-17-R-0100, the solicitation which gave rise to the 2018 award; a bid protest pleading filed by VCME in March 2018; and a GAO decision dismissing VCME's bid protest as moot. Section II.E, *supra*.

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum*

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

Here, Appellant's new exhibits are relevant to the question of whether VCME was awarded a contract in 2018 for purposes of 13 C.F.R. § 121.103(h). These exhibits are limited in scope and shed light upon issues raised in the size determination and the appeal. For these reasons, Appellant's motion to supplement the record is GRANTED and the new evidence is ADMITTED into the record.

C. Analysis

SBA regulations explain that joint venture's duration typically is limited to a maximum of two years, beginning from the date of the joint venture's first contract award. The regulations thus stipulate:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. However, a joint venture may be issued an order under a previously awarded contract beyond the two-year period. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates.

13 C.F.R. § 121.103(h).

In the instant case, the Area Office determined that VCME, a joint venture between AMME and Rotech, was awarded its first contract on March 5, 2018. Section II.C, *supra*. Nevertheless, because that contract was terminated before VCME performed any work or derived significant benefits, the Area Office deemed it "unfair" to treat the 2018 contract as

VCME's first award for purposes of 13 C.F.R. § 121.103(h). *Id.* The Area Office instead substituted VCME's next contract, awarded on April 30, 2021, as the first award. *Id.* As discussed *infra*, the Area Office's reasoning was flawed, because it is inconsistent with the plain text of § 121.103(h) as well as with SBA's intent in adopting the rule, which SBA discussed in *Federal Register* commentary. As a result, the appeal must be granted and the size determination reversed.

The plain language of § 121.103(h) makes clear that "a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture." 13 C.F.R. § 121.103(h). The rule then reiterates that "SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award." *Id.* Significantly, and as Appellant observes, the rule contains no exceptions for situations in which a joint venture derives little, or no, benefit from an award, such as when a joint venture is unsuccessful in competing for orders under a contract, or when (as here) a contract is terminated without the joint venture performing substantial work.

Likewise, although § 121.103(h) contains the caveat that a joint venture "generally" cannot be awarded contracts beyond the two-year window, the word "generally" is explained elsewhere in the rule as referring to two particular situations: (1) a "joint venture may be awarded one or more contracts after [the] two-year period as long as it submitted an offer prior to the end of that two-year period"; and (2) "a joint venture may be issued an order under a previously awarded contract beyond the two-year period." *Id.* Neither of these scenarios applies here, and § 121.103(h) authorizes no further exceptions under which a joint venture may continue to receive contracts once two years have passed since the date of the joint venture's first award. *Id.*

Applying the plain language of § 121.103(h), then, the Area Office should have found AMME and Rotech affiliated, and should have aggregated their receipts, because VCME submitted its offer for the instant procurement more than two years after March 5, 2018, the date of VCME's first contract award. Contrary to the Area Office's reasoning, the extent to which VCME benefited, or failed to benefit, from its 2018 contract is not a relevant consideration under § 121.103(h).

A review of the regulatory history of § 121.103(h) confirms that SBA intended that the term "contact award" would encompass all awards, irrespective of whether the joint venture actually performed, or benefitted from, the contract. Thus, in implementing a change to the predecessor "3-in-2" rule for joint ventures, SBA explained:

> One commenter asked for more clarity regarding what constitutes a contract. That commenter was concerned that a contract could be awarded [to a joint venture] and then ultimately not performed due to a protest or otherwise and that such an award would still count against the three contract award limit for that joint venture. SBA does not see this as a significant problem. As previously noted, two partners could

> form an additional joint venture entity and that new entity could be awarded three additional contracts. The fact that one of the three contracts awarded to the first joint venture entity was not performed in no way inhibits the ability of the two firms from forming a new joint venture and receiving additional contracts. As such, SBA does not adopt the comment that recommended the word contract to mean only a contract that was kept and performed by the joint venture.

76 Fed. Reg. 8,222, 8,223 (Feb. 11, 2011). Accordingly, SBA considered — but expressly rejected — a proposal to revise § 121.103(h) such that a "contract award" would mean "only a contract that was kept and performed by the joint venture." *Id.* SBA further opined that such a change would serve no useful purpose, as SBA regulations already permit the same joint venture partners to establish multiple joint ventures. *Id.* As a result, joint venturers could simply "form an additional joint venture entity," which may then be awarded additional contracts, thereby obviating any need to delineate which awards to "count" as "contract awards" for purposes of § 121.103(h). *Id.*

More recently, in its *Federal Register* commentary accompanying the current version of § 121.103(h), SBA again expressed the view that "allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture." 85 Fed. Reg. 66,146, 66,148 (Oct. 16, 2020). SBA stated that it therefore broadly "opposes" proposed changes to § 121.103(h) that would "extend[] the amount of time a joint venture could operate and seek additional contracts." *Id.*

In sum, the Area Office found, and the record confirms, that VCME, a joint venture, was awarded its first contract on March 5, 2018. Sections II.C and II.E, *supra*. The Area Office should have treated the 2018 contract as VCME's first award for purposes of 13 C.F.R. § 121.103(h), and since VCME submitted its offer for the instant procurement more than two years later, the Area Office should have found that the receipts of VCME's joint venturers, AMME and Rotech, must be aggregated to determine VCME's size. Rotech is not a small business, so it follows that VCME is not eligible for award for the instant procurement. While the Area Office expressed concern that it would be "unfair" to VCME to count the 2018 contract as VCME's first award, the text of § 121.103(h) and the regulatory history do not contemplate an exception to the rule based on whether a joint venture actively performed, or benefitted from, a contract. Any "fairness" concerns also are mitigated by the fact that AMME and Rotech could simply have established a new joint venture, rather than continuing to submit offers in the name of VCME, thereby avoiding any issue with the two-year limit altogether.

IV. Conclusion

For the above reasons, the appeal is GRANTED and Size Determination No. 06-2025-011 is REVERSED. Because VCME received its first contract award more than two years before submitting its offer for the instant procurement, AMME and Rotech are considered affiliated. Since Rotech is a large business, VCME is not eligible for award. This the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge