United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF: NSR Solutions, Inc. and Kaegan Corporation Appellants Re: Data Management Services JV Appealed from Size Determination Nos. 2-2007-70 & 71	SBA No. SIZ-4859 Decided: July 24, 2007

APPEARANCES

James R. Taylor, Executive VP/CTO, for Kaegan Corporation.

Joseph G. Billings, Esq., for Data Management Services JV.

Daniel S. Koch, Esq., Paley Rothman, for NSR Solutions, Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.,* and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protests

On April 13, 2006, the Naval Air Warfare Center Training Systems Division (NAVAIR), Orlando, Florida, issued Solicitation No. N61339-05-R-0116 (RFP) as a 100% 8(a) small business set-aside. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) codes 541611, 611420, 611513, and 611519 with corresponding $6.5 million size standards. The RFP required the contractor to provide instructional, professional, management, administrative, and technical support services at various geographical locations. Initial offers were due June 2, 2006.

On February 8, 2007, the CO notified unsuccessful offerors that Data Management Services JV (DMS) was the apparent successful offeror. DMS is a joint venture (JV) consisting of Data Management Systems, Inc. (Data), an 8(a) small business, and American Systems Corporation (ASC), a large business. SBA had approved a mentor-protégé agreement between Data (the protégé) and ASC (the mentor) on February 4, 2004.

On February 13, 2007, Kaegan Corporation (Kaegan or Appellant) filed a protest with the CO. Kaegan alleged that DMS was not listed as a certified 8(a) firm on the central contractor registration (CCR) database, and thus was ineligible for award. Kaegan further alleged that DMS may be ineligible for award because its CCR profile did not list two of the four cited NAICS codes for the solicitation.

On February 15, 2007, NSR Solutions, Inc. (NSR or Appellant) also filed a size protest with the CO. NSR contended that Data "can bring nothing to this joint venture, other than its 8(a) status" in violation of 13 C.F.R. § 124.513. Specifically, Data's CCR profile lists only one NAICS code applicable to the instant solicitation and Data "is not in business to do the type of training work that NAVAIR seeks to procure." NSR also provided public data which NSR alleged showed "ASC is appropriating the vast majority of the benefits [from prior joint venture contracts], and that virtually none of the revenues is reaching the 8(a) firm." On February 15, 2007, the CO issued stop-work orders, which were lifted on May 4, 2007 upon receipt of the size determination. Therefore, DMS is currently performing the contract.

B. The Size Determination

On May 1, 2007, the Small Business Administration (SBA), Office of Government Contracting, Area II, in Philadelphia, Pennsylvania (Area Office) issued Size Determination Nos. 2-2007-70 & 71 (the size determination), which addressed both protests and concluded DMS was an eligible small business for the solicitation.

First, the Area Office noted that DMS submitted its offer as a JV based on a mentor-protégé agreement that was approved by the SBA Washington District Office on February 4, 2004. In addition, the SBA Washington District Office approved DMS's joint venture agreement (JVA) on October 17, 2006, and confirmed DMS's 8(a) eligibility via email to the CO on February 1, 2007. The Area Office then referenced 13 C.F.R. § 121.103(h)(3)(iii) for the

proposition that two firms approved by SBA to be a mentor and protégé may joint venture as a small business and be exempt from a finding of affiliation.

Despite the SBA's prior approval of the JVA, the Area Office examined the JVA for compliance with 13 C.F.R. § 124.513. *See Size Appeal of Lance Bailey & Associates, Inc*., SBA No. SIZ-4799 (2006). The Area Office confirmed that Data was referred to (although not designated) as the managing venturer in Section 10 of the JVA and the JVA itemized all resources and specified the responsibilities of the parties. *See* 13 C.F.R. § 124.513(c)(2), (5), (6). In addition, Ms. Magdalah Silva, Data's President, is listed as the point of contact and Project Manager. Further, DMS's cost and technical proposals reflect that Data has prior contract experience providing training related services on at least three prior contracts with the Navy; Data will perform over 51% of the work with its own personnel and will incur over 51% of the labor costs on the instant procurement; and Data and ASC have been assigned discrete tasks. Accordingly, the Area Office concluded that Data was not merely bringing its 8(a) status to the procurement.

With regard to NSR's allegation that ASC obtained the vast majority of the revenues on previous joint ventures with Data, the Area Office cited DMS's response that the information was inaccurate and only reflected the total value of the contract award and not the actual dollars derived from previous contracts. The Area Office also noted DMS's assertion that every joint venture agreement stipulates that Data receives 51% of the profits.

C. The Appeals

On May 3, 2007, NSR filed an appeal of the size determination. NSR asserts that DMS's mentor-protégé agreement was invalid and should never have been approved. NSR contends that Data could not have qualified as a protégé in 2004 because Data had obtained two 8(a) contracts in 2003, in violation of 13 C.F.R. § 124.520(c). Therefore, because the mentor-protégé agreement was invalid, Data and ASC are affiliated, and DMS is other than small. NSR then moved for the admission of this new evidence relating to Data's previous 8(a) contracts because NSR could not have presented this evidence at the protest level because it did not know that Data and ASC had entered into a mentor-protégé agreement.

NSR also alleges that "the Area Office neglected to obtain or to review actual experience data for the joint venture under previous contracts, which upon information and belief would have shown that the joint venture is not affording the promised benefits to [Data]." NSR presents the same figures it presented in its protest to support its position that ASC received the vast majority of the revenue on previous joint ventures, in violation of 13 C.F.R. § 124.513(c). NSR asserts that the Area Office should have consulted actual data, including public record data, and not relied upon "the assurances in the joint venture agreements that [Data] would receive 51% of the profits."

On May 15, 2007, Kaegan also filed an appeal of the size determination. Kaegan asserts that the size determination was erroneous because the Area Office did not address the fact that DMS was not an approved JV at the time of proposal submission and thus was ineligible for award. Kaegan cites FAR 52.219-18 for the proposition that offerors must certify that they are

entitled to participate in the solicitation "at the time of submission of the offer" and FAR 19.301(a), which requires a business to certify its small business status "at the time of its written representation." Accordingly, since DMS's JVA was approved on October 17, 2006, more than four months after DMS's proposal submission on June 2, 2006, Kaegan asserts that DMS was ineligible to participate in the procurement.

D. DMS's Responses

On May 16, 2007, DMS filed its response to NSR's appeal petition, and a motion to dismiss NSR's appeal petition. With regard to the validity of the mentor-protégé agreement, DMS asserts that Data did not have to qualify as a protégé firm under 13 C.F.R. § 124.520(c)(ii), as claimed by NSR, because it qualified under 13 C.F.R. § 124.520(c)(iii). DMS also requests that OHA not allow NSR to submit new information relating to Data's prior contracts because it is irrelevant as Data qualified as a protégé firm under a separate provision.

DMS then argues that NSR's allegation that Data did not receive a fair share of the revenues on prior joint ventures to support its claim that Data is probably not receiving a fair share of the revenues on the current joint venture is without merit. DMS asserts that NSR failed to acknowledge that the Area Office found that DMS's cost proposal showed that Data would perform over 51% of the work, including labor costs, on the procurement. In addition, the Area Office found the JVA provided that Data would receive 51% of the profits. In sum, DMS argues that its cost proposal and JVA are the relevant evidence as to whether Data will receive an appropriate share of the revenues under the instant contract, not NSR's internet data.

In DMS's motion to dismiss, DMS argues that OHA lacks jurisdiction to hear any of the issues in NSR's appeal. First, OHA cannot consider the validity of the mentor-protégé agreement because the issue was raised for the first time by NSR on appeal and was not considered by the Area Office. 13 C.F.R. § 134.316(a). DMS then argues that NSR's second argument relating to the validity of the JVA should be dismissed pursuant to 13 C.F.R. § 121.1101(b) because the issue is contract-specific and DMS is currently performing the contract. *See Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007). Accordingly, DMS urges OHA to dismiss NSR's appeal.[1]

On May 30, 2007, DMS filed its response to Kaegan's appeal petition, and a motion to dismiss Kaegan's appeal petition. In its response, DMS argues that "[c]ontrary to Kaegan's assertion that the SBA had to approve the [JVA] before submission of the [DMS] proposal on June 2, 2006, the SBA had to approve the [JVA] prior to award." *See* 13 C.F.R. § 124.513(e) ("SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture."). Since award was made on February 8, 2007, DMS contends the SBA timely approved the JVA on October 17, 2006.

In DMS's motion to dismiss Kaegan's appeal, DMS argues that OHA lacks jurisdiction

[1] DMS also asserts that NSR abandoned on appeal its argument that Data lacks the expertise to perform the work. As NSR does not raise this issue on appeal, I need not consider it here. *Size Appeal of the Apex Group, Inc.*, SBA No. SIZ-4300 (1998).

over Kaegan's argument relating to the validity of the JVA because (1) this issue was not presented to the Area Office; and (2) the issue is contract-specific and DMS is currently performing the contract. *See* 13 C.F.R. § 121.1101(b).

E. Consolidation Order

On June 1, 2007, in the interest of judicial economy, I consolidated NSR and Kaegan's appeals because both appeal petitions concerned the same challenged concern, the same solicitation, and both were subject to motions to dismiss.

F. Appellants' Responses

On June 18, 2007, Kaegan filed its Response to DMS's Motion to Dismiss. Kaegan asserts that it did not raise new issues on appeal; both its protest and appeal state that DMS was not certified as an 8(a) at the time of proposal submission. Kaegan also maintains that its appeal should be considered regardless of contract award to DMS. Kaegen then argues that although 13 C.F.R. § 134.513(e) states that a joint venture agreement must be approved by SBA prior to an 8(a) award, FAR 52.219-18 provides that bidders must certify themselves as an 8(a) prior to submission of an offer.

On June 19, 2007, NSR filed its Opposition to DMS's Motion to Dismiss. NSR contends that its protest did challenge the validity of the mentor-protégé agreement, thus it was not a new issue raised on appeal. NSR then argues that the Area Office improperly relied upon the assurance in DMS's JVA that Data would receive 51% of the profits but did not indicate whether it had consulted DMS's previous quarterly financial reporting to SBA, which was required by the JVA and 13 C.F.R. § 124.513(c)(10). NSR urges OHA to remand the case to the Area Office to clarify and/or supplement the record by consulting DMS's previous quarterly accounting data.

NSR also requests that OHA direct the Area Office upon remand to consider the additional basis for invalidity of the mentor-protégé agreement raised by NSR on appeal, i.e., whether Data's previous 8(a) contracts disqualify Data as a protégé firm. Finally, NSR argues that while the validity of a joint venture agreement may normally be a contract-specific issue, DMS "apparently represented to the Area Office that the [JVA] will be re-used and repeated for future procurements, because it is closely based upon its model agreement...." Therefore, NSR contends that the JVA's "validity has significance that transcends this procurement" and to the extent NSR's appeal addresses this issue, OHA should deny DMS's Motion to Dismiss.

IV. Discussion

A. Timeliness

Appellants filed their respective appeals within 15 days of receiving the size determination, and thus the appeals are timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of their appeal. Specifically, they must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). This Office will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction 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).

C. The Merits

The issues raised by the Appellants do not address the question of the size of the companies which together compose DMS; there is no doubt that Data is small and ASC is not. Further, there is no question DMS is a joint venture and, thus, would ordinarily be found other than small because the members of a joint venture are held to be affiliates with the receipts of both firms aggregated to determine the joint venture's size. 13 C.F.R. §§ 121.103(h)(2); 121.104(d). However, there is an affiliation exception for joint ventures between two firms approved by SBA to be a mentor and protégé under 13 C.F.R. § 124.520. *See* 13 C.F.R. § 121.103(h)(3)(iii). It is this exception which the Area Office applied to find DMS small and which Appellants assert is inapplicable.

DMS argues that the challenges to the size determination are not reviewable by OHA under 13 C.F.R. § 121.1101(b). OHA has held that appeals in cases where the contract has been awarded and which raise the contract-specific issues particularly identified in 13 C.F.R. § 121.1101(b) (which includes the joint venture rule at 13 C.F.R. § 121.103(h)) are, by the plain language of the regulation, not reviewable and must be dismissed. *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007), *aff'd on reconsideration*, SBA No. SIZ-4854 (2007). Accordingly, any contract-specific issue raised by Appellants may not be considered here. I must therefore consider whether the challenges raised by the Appellants are contract-specific.

Kaegan asserts DMS did not properly comply with the clause at FAR 52.219-18, and was not an SBA-approved 8(a) joint venture at the time of proposal submission. In response, DMS asserts it complied with SBA's regulation that merely requires a joint venture agreement be approved by SBA prior to award of the contract, and SBA did so in this case. 13 C.F.R. § 124.513(e). At first, this appears to be an issue of considering the priority of SBA size regulations over the more general FAR in reviewing size determinations. *See Size Appeal of Trees of Hawaii, Inc.*, SBA No. SIZ-4372 (1999). However, the issue of whether this particular JVA was approved prior to the submission of this particular proposal is clearly specific to this procurement. This issue is thus contract-specific, and concerns whether this particular joint venture is eligible for the exception at 13 C.F.R. § 121.103(h)(3)(iii). Therefore, this contract-specific issue cannot be considered here, because the contract has been awarded. 13 C.F.R. § 121.1101(b).

NSR asserts that the mentor-protégé agreement between Data and ASC was void *ab initio*. Because the validity of the mentor-protégé agreement applies not only to this

procurement, but any procurement which these two firms may seek together, it is not specific to this contract, and must be considered. NSR asserts that Data cannot qualify as a protégé because Data received 8(a) contracts prior to the approval of the mentor-protégé agreement on February 4, 2004. NSR moved to submit new evidence on appeal which it asserts demonstrates that Data had obtained two 8(a) contracts in 2003.

New evidence may be submitted on appeal only if the Judge orders its submission or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308(a). While NSR moved for the admission of evidence of Data's previous 8(a) contracts, I find this evidence irrelevant, for the reasons discussed below, and thus EXCLUDE it from the record.

NSR has misread the applicable regulation. The regulation provides that:

> In order to initially qualify as a protégé firm, a Participant must:
>
> (i) Be in the developmental stage of program participation;
> (ii) Have never received an 8(a) contract; or
> (ii) (sic) Have a size that is less than half the size standard corresponding to its primary SIC code.

13 C.F.R. § 124.520(c)(1).

Thus, the regulation is written in the disjunctive and clearly establishes alternative standards to qualify as a protégé. A firm may qualify as a protégé if *either* it has never received an 8(a) contract, *or* it has a size that is less than half the size standard for its primary NAICS code.[2] In 2004, Data listed as its primary NAICS code 541511, Custom Computer Programming Services, with a corresponding $21 million annual receipts size standard. 13 C.F.R. § 121.201 (2004). It is clear from the financial information in the record that Data's size in 2004 was less than half of $21 million, qualifying Data under the third prong of 13 C.F.R. § 124.520(c)(1). Therefore, the question of whether Data had received any prior 8(a) contracts is irrelevant. On this issue, NSR has failed to establish any error by SBA in approving the mentor-protégé agreement and, therefore, by the Area Office in the size determination.

NSR's other argument that this particular joint venture fails to comply with the regulatory requirements for 8(a) joint venture agreements is clearly a challenge to this particular procurement. NSR asserts, based upon public information it has obtained, that Data will receive very little benefit from this contract. But that is a question for this contract, and thus is contract-specific and cannot be reviewed here.[3] 13 C.F.R. § 121.1101(b).

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[2] Effective October 1, 2000, the NAICS code system replaced the SIC (Standard Industrial Classification) code system as the basis for the SBA's small business size standards. 65 Fed. Reg. 30836 (May 15, 2000).

[3] Even if the issue were not contract-specific, NSR's evidence is of questionable probative value. NSR has distilled information from OMB Watch's website into a simple chart which purports to show that Data has received a small proportion of the receipts from DMS contracts. It does not explain how it compiled the data and cannot be considered reliable

Accordingly, I find that the issues raised on appeal by the Appellants are either not subject to review under 13 C.F.R. § 121.1101(b) because they are contract-specific (joint venture) and this contract has been awarded, or they are based upon a misreading of the mentor-protégé regulation, and thus fail to demonstrate a clear error of law.

V. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DENY the instant appeals.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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CHRISTOPHER HOLLEMAN
Administrative Judge

financial information. Nor does it establish that this joint venture's receipts will be divided in that fashion in the face of the plain language of the JVA.