United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
SES-TECH Global Solutions	SBA No. SIZ-4951
Appellant	Decided: May 7, 2008
Appealed from Size Determination No. 6-2008-006	

APPEARANCES

Antonio R. Franco, Esq., Jonathan T. Williams, Esq., Isaias "Cy" Alba, IV, Esq., Gunjan R. Talati, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant.

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. The Procurement and Size Determination

On October 13, 2006, the Department of Energy (DOE) National Nuclear Security Agency (NNSA) issued Solicitation No. DE-RP52-07NA26990 for the installation of sustainable radiation detection equipment with associated communication systems at selected locations in order to strengthen the government's capability to deter, detect, and interdict illicit trafficking in nuclear and other radiological materials. The Contracting Officer (CO) set the procurement totally aside for small businesses and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding

$31 million annual receipts size standard. Initial offers were due on December 12, 2006. Final revised proposals were due on August 6, 2007.

On October 1, 2007, NNSA notified the unsuccessful offerors of the identity of the three apparent successful offerors. One of these offerors was SES-TECH Global Solutions (Appellant). On October 1, 2007, NNSA filed a timely protest of Appellant's size status with the Small Business Administration (SBA) Office of Government Contracting - Area 6 (Area Office) in San Francisco, California.

B. The Size Determination

On October 23, 2007, the Area Office issued its size determination. The Area Office found Appellant is an SBA-approved joint venture of an 8(a) mentor-protégé team. The team members are the 8(a) firm and protégé, Sealaska Environmental Services, LLC (SES), and its mentor, Tetra Tech EC, Inc. (TTE), an acknowledged large firm. On June 9, 2004, SBA approved the mentor-protégé agreement between SES and TTE and, on September 5, 2007, SBA approved its continuation. The Area Office reviewed SES's receipts and found the firm by itself is small.

Because TTE is large, and Appellant is a joint venture, the question remained whether the exception to the affiliation rules at 13 C.F.R. § 121.103(h)(3)(iii) applies to Appellant. The Area Office found that the exception to affiliation under 13 C.F.R. § 121.103(h)(3)(iii) is applicable as long as: the protégé is itself small; the joint venture meets the applicable regulatory requirements; and the joint venture agreement is sufficient. Additionally, the Area Office found that in order for an 8(a) firm protégé and its mentor to qualify for a small business set-aside procurement, they must meet the requirements of 13 C.F.R. § 124.513.

Here, while this is not an 8(a) procurement, SBA's Alaska District Office approved Appellant's joint venture agreement on July 30, 2007.

The Area Office reviewed Appellant's proposal at length. The Area Office also reviewed Appellant's joint venture agreement (the Agreement). The Area Office referenced the ostensible subcontractor rule's principles in its analysis of the Agreement and the proposal. The Area Office found that the Agreement must specify the responsibilities of the parties with regard to contract performance, source of labor, and negotiation of the 8(a) contract. The Agreement provided that SES would retain overall management and control of Appellant's business affairs and that it would perform a significant portion of the proposed contract. The Agreement stated that no action may be taken by Appellant without SES's concurrence, and that SES, as the managing venturer, would use reasonable efforts to implement all major decisions approved by both SES and TTE. The Area Office noted the Agreement did not specifically state what TTE's responsibilities will be in connection with the contract, nor what SES's significant portion of performance will entail.

The Area Office noted that SES and TTE entered into a Supplemental Agreement on November 24, 2006, for the purpose of pursuing the NNSA procurement. The Supplemental Agreement stated that the designation of key personnel in this procurement would require the

designation of some TTE personnel, and that the parties would "endeavor" to give two key personnel posts to SES personnel. The Supplemental Agreement also stated the parties will attempt to split the contract work 15% for SES and 85% for TTE.

The Area Office found that SBA will not approve a joint venture agreement if SBA concludes the 8(a) concern brings little to the joint venture other than its 8(a) status. While the Area Office acknowledged that the regulation applies to joint venture agreements entered into for the purposes of 8(a) contracts, the Area Office concluded it would be remiss in its obligations if it allowed 8(a) firms to enter into joint venture agreements on any contracts, including non-8(a) contracts, without meeting these regulatory requirements. The Area Office determined that SBA's interpretation of its regulations must be given due deference, citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986).

The Area Office found that SES lacks the resources and expertise to perform the instant procurement, and that all key personnel (with one exception) would be employees of TTE and SES would not be performing a significant portion of the contract. The Area Office concluded that Appellant did not meet the joint venture requirements of 13 C.F.R. § 124.513, and thus was not entitled to the joint venture exception from affiliation. Accordingly, the Area Office determined Appellant was other than small. Appellant received the size determination on October 23, 2007.

C. The Appeal

On November 7, 2007, Appellant filed the instant appeal. Appellant argues the Area Office made several errors. First, Appellant alleges the Area Office improperly ignored the exemption for affiliation for mentor-protégé joint ventures. Second, Appellant argues the Area Office misapplied the regulations governing joint ventures on 8(a) contracts to a non-8(a) small business set-aside. Third, Appellant asserts the Area Office improperly applied the ostensible subcontractor rule to the joint venture. Fourth, Appellant argues the Area Office erroneously relied on an Office of Hearings and Appeal (OHA) decision, *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006). Fifth, Appellant alleges the Area Office erroneously drew adverse inferences based on information not in the record and which the Area Office never requested.

Appellant also filed a Motion for the Admission of new evidence on appeal.

IV. Discussion

A. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant 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). OHA 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. New Evidence

Evidence not previously presented to the Area Office will not be considered unless the Administrative Judge orders its submission or a motion is filed establishing good cause for its submission. 13 C.F.R. § 134.308(a). The instant appeal turns on a question of law, and so Appellant's proffered new evidence is not necessary to decide the case. Accordingly, good cause not having been shown, Appellant's Motion for Admission of New Evidence is DENIED.

D. The Merits

The general rule is that firms submitting offers on a particular procurement as joint venturers are affiliates with regard to that contract, and they will be aggregated for the purpose of determining size for that procurement. 13 C.F.R. § 121.103(h)(2). When a subcontractor is performing the vital and primary requirements of a contract, or the prime contractor is unusually reliant upon that subcontractor, the subcontractor is deemed to be an ostensible contractor, and thus a joint venturer, and the firms are aggregated for the purpose of determining size for that procurement. 13 C.F.R. § 121.103(h)(4).

However, certain joint ventures are excepted from this finding of affiliation. One exception covers firms which are approved as mentor and protégé under 13 C.F.R. § 124.520. 13 C.F.R. § 121.103(h)(3(iii). The purpose of the program is to encourage mentor firms to provide various forms of assistance to firms which are participants in SBA's 8(a) program. 13 C.F.R. § 124.520(a); *Size Appeal of American Security Programs*, SBA No. SIZ-4797, at 4 (2006) (*ASP*). Two firms approved by SBA to be a mentor and protégé may form a joint venture for any Federal Government procurement. 13 C.F.R. § 121.103(h)(3)(iii); *ASP*, at 4. The joint venture becomes exempt from the normal rules of affiliation. 13 C.F.R. § 121.103(b)(6), (h)(3)(iii); *ASP*, at 4. The exemption continues as long as the protégé concern qualifies as small for the size standard applicable to the contract. 13 C.F.R. § 121.103(h)(3)(iii). The assistance which a mentor extends to its protégé under an approved joint venture agreement cannot be relied upon to make a finding of affiliation. 13 C.F.R. §§ 121.103(b)(6) & 124.520(d)(4); *ASP*, at 4.

Here, Appellant is a joint venture seeking to compete for a small business set-aside, not an 8(a) procurement. The Area Office reviewed the joint venture agreement under 13 C.F.R. § 124.513, which is expressly titled "Under what circumstances can a joint venture be awarded

an 8(a) contract?" and expressly includes language limiting that regulation to 8(a) contracts. 13 C.F.R. § 124.513(c), (d). The Area Office relied upon *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006) for its authority to conduct this review, but that decision is inapposite here, because it dealt with an 8(a) award. The 8(a) program is a unique government contracting program with unique features. OHA has consistently held that the 8(a) regulations do not apply to a procurement that is not within the 8(a) program. The 8(a) program's regulations apply to a size determination or size appeal only when the procurement is an 8(a) procurement. The 8(a) regulations are otherwise irrelevant to the case. *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477, at 10 (2002).

Further, OHA has recently held that an area office and OHA may not review mentor-protégé eligibility issues, regarding the mentor-protégé agreement. *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950, at 3 (2008). Thus, the Area Office has no authority to review this mentor-protégé agreement and joint venture agreement under 13 C.F.R. § 124.513, because this procurement is not an 8(a) procurement.

The regulation clearly permits an 8(a) mentor and protégé firm to joint venture for any government procurement, with the only conditions being that the protégé firm qualifies as small under the applicable NAICS code for the procurement, and that for 8(a) sole source procurements, the protégé has not reached the dollar limit of 13 C.F.R. § 124.519. 13 C.F.R. § 121.103(h)(3)(iii). Here, the only question properly before the Area Office was whether SES was small, which it answered in the affirmative. The inquiry should have ended there with a finding Appellant was small. Instead, the Area Office erred in reviewing the joint venture agreement for this procurement under an inapplicable 8(a) regulation to find Appellant other than small.

The Area Office further erred in attempting to import the principles of the ostensible subcontractor rule into the analysis of the joint venture. The ostensible subcontractor rule is used to determine whether two firms are actually in a contractor/subcontractor relationship or are in fact engaged in a joint venture. Here, the joint venture is a given. The principles of the ostensible subcontractor rule are inapposite, as it does not matter what contract requirements TTE is performing. The regulation states that the joint venture may compete for <u>any</u> contract, exempt from the normal rules of affiliation. The Area Office may not use an ostensible subcontractor analysis to review an 8(a) mentor-protégé joint venture.

The Area Office's rationale for its actions here, that it would be remiss if it allowed 8(a) firms to enter into joint ventures on non-8(a) contracts without meeting the 8(a) regulatory requirement, is unsupported by the regulation and seems made of whole cloth. The Area Office's determination that it is entitled to deference in its interpretation of the regulation is meritless. OHA has held that this type of deference is reserved for notice and comment rulemaking or other final agency action on review in Federal court. *Matter of Ferrotherm Corporation*, SBA No. VET-118, at 4 (2007). Agency interpretations contained in policy statements, positions in litigation, or determinations by an agency's subordinate office are not entitled to this deference. *Id.*

Accordingly, I find that the instant size determination was based on a clear error of law; the size determination applied an 8(a) regulation to a procurement unrelated to the 8(a) program. Appellant is an SBA-approved joint venture between an 8(a) protégé firm and its mentor, and the protégé has been found to be small. Appellant may thus compete for any Government contract exempt from the affiliation rules. Therefore, I must REVERSE the size determination and find Appellant an eligible small business under 13 C.F.R. § 121.103(b)(6), (h)(3)(iii).

V. Conclusion

For the above reasons, I REVERSE the Area Office's size determination, and find that Appellant SES-TECH Global Solutions, an SBA-approved joint venture between the 8(a) protégé firm Sealaska Environmental Services, LLC, and its mentor Tetra Tech EC, Inc., is a small business for the instant National Nuclear Security Agency procurement.

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