United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
David Boland, Inc.	SBA No. SIZ-4965
Appellant	Decided: June 12, 2008
Re: Arviso Construction Company, Inc.	
Appealed from Size Determination No. 05-2008-018	

APPEARANCES

Denis L. Durkin, Esq., Michael S. Vitale, Esq., Baker & Hostetler, LLP, for Appellant David Boland, Inc.

Charles R. Lucy, Esq, Holland & Hart, LLP, for Arviso Construction Company, 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 Protest

On September 18, 2007, the U. S. Army Corps of Engineers, Albuquerque District, issued the subject Invitation for Bids (IFB) for replacement of the existing Wingate High School

and Dormitory. The Contracting Officer (CO) issued the IFB as an unrestricted procurement, with a 10% price evaluation preference for HUBZone small business concerns, and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding $31 million annual receipts size standard, as the applicable code for this procurement.

On December 19, 2007, bids were opened, and Arviso Construction Company, Inc. (Arviso) was the low bidder, after allowing for the HUBZone price evaluation preference. On December 28, 2007, David Boland, Inc. (Appellant) filed a protest alleging Arviso was other than small, due to its affiliation with Okland Construction Company, Inc. (Okland), a large business.

Appellant asserted that Arviso is affiliated with the Arviso Okland Joint Venture (AOJV) in which it owns a 51% interest and Okland owns the rest. Appellant further asserted that Arviso and Okland held themselves out as affiliates, and an Arviso official said Arviso's bid would be submitted out of Okland's office. Appellant submitted affidavits reporting other statements indicating that Arviso and Okland worked closely together as a team.

William Byrne, one of Appellant's employees, asserted that he heard from several sources that Arviso was bidding on this procurement as a team with Okland, while Arviso itself had informed him it would be bidding alone. Craig Hildebrandt, another of Appellant's employees, stated that he also heard from several sources that Arviso was bidding on this procurement as a team with Okland.

Appellant alleged that Arviso could not independently provide a sufficient bond for this procurement and had never performed a procurement this large before, and therefore must be relying on Okland for its bond. Appellant further argued that Arviso is dependent upon Okland due to its long association with AOJV, and thus is dependent upon Okland for much of its revenue. In addition, Arviso and Okland share payroll websites, and Appellant alleged Okland was processing Arviso's payroll.

Appellant argued that Arviso and Okland were affiliated the under identity of interest rule, the ostensible subcontractor rule, and the totality of circumstances.

On January 18, 2007, Arviso responded to the protest, denying affiliation with Okland. An affidavit from Orville Arviso emphasized the firm's independence of Okland. The firms have no common employees, stockholders, officers, or directors. Arviso has its own offices, equipment and line of credit. Mr. Arviso discussed his own role in bid preparation on this procurement, soliciting bids from subcontractors, placing advertising and submitting the final proposal in Albuquerque. Mr. Arviso states Arviso retained Okland Management Corporation (OMC) for assistance in bid preparation, but that he and other Arviso employees worked on the bid as well.

Arviso included an affidavit from Erik Dunn, an estimator for OMC. Mr. Dunn stated that Arviso engaged OMC for assistance in bid preparation on this procurement, and he was assigned the job. Mr. Dunn prepared an Invitation for Bids (IFB) which Arviso distributed to

prospective subcontractors, helped create a bid list, called prospective subcontractors, clarified bids, identified low bidders and relayed cost information to Arviso for inclusion in its final proposal. He operated out of OMC's offices, and so those offices were designated as a contact point. OMC billed Arviso for these services. The IFB is attached, and clearly states that Arviso is the contractor.

An affidavit from Orlinda Arviso stated that as Arviso's Secretary, she handled Arviso's payroll, no payroll functions were performed by any other entity, and Arviso never submitted or received an invoice from Okland for payment. An affidavit from Steve Holland, owner of Fusecast, asserted he designed Okland's website as an independent contractor. The website allows access to employees of Okland, OMC, and AOJV. The name "Arviso" on the website refers only to AOJV employees, not to Arviso employees, and no employee of Arviso may access the site. He also designed Arviso's website, and the two websites share some common information from AOJV's projects. Affidavits from subcontractors Winston Cole, David Dallago, Robert Bowers and Frank Kozeliski stated that they submitted bids on this project to Arviso and always considered this project an Arviso project.

Arviso submitted the AOJV Joint Venture Agreement and partnership tax returns. The Joint Venture Agreement (JVA), is dated December 23, 1992, and was amended on April 30, 2002. It contains a choice-of-law provision providing that the laws of Arizona will govern its validity, interpretation, performance, and enforcement. JVA, Article IX. B. The JVA limits the joint venture relationship between Arviso and Okland to contracts bid under the AOJV name. JVA, Article I. B. It further provides that Okland will obtain necessary surety bonds "until such time as the joint venture can obtain its own bonds." JVA, Article VII. B.

B. The Size Determination

On February 7, 2008, the Small Business Administration (SBA) Office of Government Contracting - Area V (Area Office) in Fort Worth, Texas, issued a size determination finding Arviso a small business.

The Area Office found that Arviso was established in 1982, incorporated in 1993, and located in Fort Wingate, New Mexico. It is certified as a HUBZone small business. Arviso is owned entirely by members of the Arviso family, who are Native Americans. The Area Office reviewed Arviso's tax returns and concluded that Arviso is, by itself, a small business.

Okland is located in Salt Lake City, Utah. Arviso and Okland have no common employees, stockholders, officers or directors.

AOJV was established in December, 1992, and has the same Salt Lake City address as Okland. Arviso owns 51% of AOJV. Arviso's President, Olsen Arviso, Sr.,[1] is Managing Partner and CEO of AOJV. Okland owns 49% of AOJV, and William Okland of Okland represents AOJV as Chief Operating Officer. AOJV was initially organized to run for five years,

[1] The April 30, 2002, Amendment replaced Olsen Arviso, Sr., with Orville Arviso.

but since then Arviso and Okland have established it as a partnership and a perpetually continuing joint venture.

The Area Office concluded Arviso controls AOJV and shares common management with it, and is thus affiliated with, AOJV.

The Area Office found that Arviso hired OMC, an Okland affiliate, for assistance in bid preparation on this contract. Among the tasks OMC performed was contacting subcontractors. The Area Office concluded that this was the reason Appellant's affiants received the impression Okland and Arviso were bidding together on this procurement. The Area Office found that this was no basis for a finding of affiliation.

The Area Office found that Arviso's surety wanted AOJV to guarantee the bond for this procurement, because this project is larger than any project Arviso has performed on its own. Arviso is indemnifying AOJV from any claims related to the bond.

The Area Office found that for the years 2004 to 2006, revenue generated by AOJV accounted for less than 44% of Arviso's revenue. Since 1999, revenue from AOJV accounts for 48.3% of Arviso's revenue.

The Area Office found that while AOJV can access payroll information from Okland's website, this is for employees working AOJV projects only. Arviso has its own payroll website for its own employees.

The Area Office found Arviso affiliated with AOJV, but that their aggregated revenues were within the applicable size standard.

The Area Office found no affiliation between Arviso and Okland based on the totality of the circumstances. AOJV is clearly defined, controlled by Arviso, and used to pursue certain contracts for the specific purposes of pursuing work on Native American land and promoting the use of Native American workers. There are no contacts between the two firms other than AOJV. There is no common ownership or common management. Arviso has its own place of business, workers and equipment, and pursues and performs contracts on its own, from which it receives most of its revenue.

The Area Office found no affiliation between Arviso and Okland based on identity of interest. The two firms are independent. Both firms have individual locations, their own equipment, their own licenses and financing, and their own subcontractors. Neither is economically dependent on the other, and there is no basis for a finding of an identity of interest.

The Area Office found no affiliation between Arviso and Okland based on the ostensible subcontractor rule. Arviso will manage and supervise the contract and will perform the primary and vital requirements, and is not unduly reliant on Okland. Okland will perform no work on this contract. OMC merely assisted with bid preparation. AOJV will be a subcontractor, but will perform only 27% of the total project cost, including small discrete items like doors, hardware,

and fire extinguishers. Arviso could not obtain bonding without AOJV, and thus is reliant upon it but the Area Office found these two entities affiliated, and still small.

The Area Office thus determined that Arviso was an eligible small business for this procurement. Appellant received the size determination on February 8, 2008. On February 19, 2008, the CO awarded the contract to Arviso.

C. The Appeal

On February 12, 2008, Appellant filed the instant appeal. Appellant asserts Arviso stated that it would be submitting its bid out of Okland's office, and that Arviso and Okland have repeatedly held themselves out as affiliates. Appellant refers to the affidavits filed with its protest to support these assertions.

Appellant further asserts that Arviso's not being able to independently provide a bond for this contract and the fact that it has never performed a contract this large both are indicia of affiliation with Okland. Appellant further asserts that AOJV earns much more revenue than Arviso on its own, and thus is further evidence of Arviso's dependency on Okland.

Appellant also asserts AOJV is working on a number of projects, and that Arviso listed its contact information on one project as Okland's Tempe, Arizona, office.

Appellant further asserts that Arviso and AOJV's own figures demonstrate that Arviso is not a small business. Appellant argues that it presented evidence as to the size of Okland's revenues, which it asserts the Area Office did not dispute. Appellant notes Arviso's statement that Okland receives less that 7% of its revenue from AOJV. Appellant then argues, given its estimate of the size of Okland's revenues, and Okland's 49% interest in AOJV, that 7% of that revenue would mean that Arviso's 51% interest in AOJV would result in its having revenue in excess of the size standard, and that Arviso must thus be other than small.

Appellant further argues that Arviso and Okland are affiliates due to the frequency and magnitude of AOJV's projects. Appellant argues that two concerns which are parties to a continuing joint venture are affiliated under the identity of interest rule. Further, where a concern derives a substantial portion of its revenue from a second concern, and the two concerns represent their ongoing relationship as a "strategic alliance," there is evidence of identity of interest. Arviso's dependence on AOJV makes it dependent upon Okland.

Appellant further argues that Arviso is unusually reliant on Okland, and asserts that Okland will perform the primary and vital requirements of the contract. Arviso and Okland are thus affiliated under the ostensible subcontractor rule.

Appellant also argues that Arviso's hiring OMC for assistance in bid preparation means that Okland controlled the bidding process. Appellant asserts that preparation of the bid is an important part of the process, and it could not have been more important for Appellant's president to merely deliver the bid than to oversee the process. Further, the Area Office gave

undue weight to the affidavit of Erik Dunn, OMC's estimator, who worked on preparing the estimate and gave conclusory testimony that Arviso was general contractor for the project.

Appellant argues that the Arviso's inability to obtain bonding on its own is further evidence of dependency on, and thus affiliation with, Okland. Appellant argues that concern is unusually reliant on a subcontractor when the basis of its ability to submit an offer, qualify for a contract, and be bonded is the qualification of its subcontractors.

Appellant argues the totality of the circumstances establishes affiliation between Arviso and Okland. Arviso has never performed a contract the size of the instant procurement, is dependent upon its relationship with Okland for revenue, and has been partners with Okland in a joint venture for over 15 years. Arviso presented no evidence of attempting to negotiate the best price for the work subcontracted to AOJV. Okland and AOJV share offices, which Arviso needed for bid preparation assistance, and Arviso is dependent upon Okland for business and revenue, and for bonding. Finally, the Area Office erred in finding Arviso and Okland share a payroll website, as "Arviso" is an option for one of the companies on the site. The contractual relations between the two companies are so suggestive of reliance as to render them affiliated.

D. Arviso's Response

In its February 28, 2008, Response to the Appeal, Arviso denies any affiliation with Okland. Arviso asserts it has no common ownership, management, directors or employees with Okland. Arviso asserts AOJV represents the only relationship between Arviso and Okland. Appellant argues that, absent other indicia of affiliation there is no basis for finding affiliation, between two owners of a third business entity. Affiliation is based upon control or power to control and Arviso controls AOJV as a 51% owner, and thus controls the one connection between the two firms.

Arviso further asserts there is no identity of interest between itself and Okland, as there are no familial connections, common investments or economic dependence through contractual or other relationships. Arviso owns its own warehouse, facilities, equipment, tools and vehicles. Arviso has its own line of credit and licenses and obtains and performs many contracts completely independent of Okland and AOJV.

AOJV accounted for less than 44% of Arviso revenue in the period 2004-2006. This percentage is less than that OHA has found suggestive of economic dependence. The number of projects AOJV has performed is less than the number of joint projects OHA has found indicative of dependence in other cases. Further, in other OHA cases where a joint venture was found to create affiliation, the challenged firm's alleged affiliate was dominant in the joint venture, which is not the case here.

Arviso also asserts it is not affiliated with Okland under the ostensible subcontractor rule. First, that issue cannot be considered here, because the contract has been awarded. Second, the ostensible subcontractor rule is inapplicable here, because Okland is not a subcontractor on this procurement.

Arviso also asserts it is not affiliated with Okland based on the totality of the circumstances. Arviso is an independent business. Arviso actively solicited subcontractors for this procurement through personal contacts and an advertisement in *The Navajo Times*. The bid was prepared by Arviso without assistance from Okland or AOJV, and Arviso is the single offeror. Arviso reasserts its lack of ties with Okland. Okland has no involvement with Arviso's payroll. Okland did not represent to the state of Utah that it is the owner of AOJV, merely the registered agent, who must be a Utah resident. Arviso did not represent that it would bid on this project with any partner, and AOJV's Tempe office was merely used as a collection point for bid information. Arviso has the experience necessary to perform this procurement, and any suggestion it does not is really an attack on its responsibility, an issue which the CO has already resolved in its favor.

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. The Merits

Affiliation between firms is based upon whether one firm controls, or has the power to control, the other. 13 C.F.R. § 121.103(a)(1). It is clear from the record that the Area Office correctly found Arviso affiliated with AOJV. Arviso has a majority interest in the partnership, receives over 40% of its revenue from it, and relied upon it for bonding for this contract. However, Arviso's and AOJV's aggregated annual receipts are within the size standard.

Arviso has no common ownership with Okland, no common employees, management, officers or directors. Arviso has its own place of business, workers and equipment, and pursues and performs contracts on its own, from which it receives most of its revenue. Arviso also has its own line of credit. Further, Arviso and Okland do not share a payroll website, as established by Mr. Holland's affidavit. The Arviso icon on Okland's website is for AOJV employees. Orlinda Arviso's affidavit establishes that Arviso and Okland share no payroll operations.

Appellant's arguments as to the amount (as opposed to the proportion) of Arviso's revenue which must come from AOJV are mere speculation. The Area Office properly

concluded, after reviewing Arviso's and AOJV's tax returns and other financial information, that Arviso and AOJV are, when their receipts are aggregated, small.

Appellant asserts this procurement establishes ties between Arviso and Okland. Appellant alleges that Arviso held itself out as bidding with Okland as a team. Appellant offers in support two affidavits of its employees, recounting hearsay of conversations between Arviso representatives and potential subcontractors. These affiants are refuted by the affidavits Arviso submits from the subcontractors themselves, who are not Arviso employees. These subcontractors explicitly contradict the hearsay reported by Appellant's employees, and state that they understood this contract to be an exclusively Arviso project. One affiant, Mr. Kozeliski, directly contradicted statements attributed to him by Appellant's affiants. Arviso's IFB to potential subcontractors identifies this procurement as an exclusively Arviso project. The affidavit from Mr. Dunn is far from conclusory; rather, it specifies what his duties were. Mr. Dunn was assigned by his employer, OMC, to assist Arviso in bid preparation. He did not perform all, or even most, of Arviso's bid preparation.

Based upon the record that was before the Area Office, I find the Area Office correctly found that Arviso hired OMC to assist in bid preparation; it did not prepare its bid in concert with Okland. Arviso approached subcontractors on its own behalf and did not represent itself as bidding as part of an "Arviso/Okland team."

Affiliation under the ostensible subcontractor rule cannot be considered here. Even if Okland were an ostensible subcontractor, that issue could not be raised in this appeal, because the CO has awarded the contract. 13 C.F.R. § 121.1101(b); *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844, at 5 (2007). If such affiliation could be considered, I would have to weigh OHA's precedents that an ostensible contractor only can be a firm formally named as a subcontractor in the procurement that occasioned the size determination (*Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4647, at 13-14 (2004)), against Okland's participation in AOJV, the named subcontractor.

Nevertheless, it is clear that Arviso is dependent on AOJV for bonding on this contract. The real issue raised here is whether Arviso is affiliated with Okland because Arviso and Okland have been partners in AOJV for 15 years, and because of Arviso's affiliation with AOJV, which produces over 40% of its revenue, and upon which Arviso relied for bonding on this project.

AOJV is not a corporation or limited liability company. It is like a partnership between Arviso and Okland, and thus all the assets of both firms are available to meet the obligations of the joint venture**.** The Joint Venture Agreement provides that the laws of Arizona govern the validity, interpretation, performance, and enforcement of the agreement. JVA, Article IX. B. Under Arizona law, a joint venture is a form of partnership. *E.g., State v. Moore*, 841 P.2d 231, 239 (Ariz. Ct. App. 1992); *see* 46 Am. Jur. 2d Joint Ventures § 2. A joint venture differs from a partnership only in its more limited scope. *First State Service Corp. v. Hector's Concrete Construction, Inc.* 814 P.2d 783 (Ariz. Ct. App. 1991). It is treated as a partnership in all important respects. *Id.*

Arizona law provides: "[A]ll partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." Ariz. Rev. Stat. § 29-1026 (2008).

AOJV consists of only two firms, Arviso and Okland. Arviso alone could not receive bonding, but it could in reliance on AOJV. When AOJV undertakes an obligation both Arviso and Okland are jointly and severally liable for the entire obligation, and there are no other obligors. It is therefore impossible to avoid the conclusion that the bonding company's reliance on AOJV for bonding it was not prepared to provide Arviso alone was based upon Okland's financial standing as a large business. In essence, Arviso was dependent, through AOJV, upon Okland for bonding on this contract.

Arviso cites *Size Appeal of H.R. Allen, Inc.*, SBA No. SIZ-2830 (1988) in support of its argument that assistance in bonding is not an indicia of affiliation. However, that case merely said bonding assistance alone cannot give rise to a finding of affiliation, but can support a finding of affiliation in connection with other indicia. *H.R. Allen*, at 6. Arviso's reliance on AOJV, and thus Okland, for bonding assistance is evidence of affiliation between Arviso and Okland on the basis of contractual relationships. 13 C.F.R. § 121.103(a)(2).

Further, for over 15 years Arviso has been partnered with Okland in AOJV. This has been a long-term relationship, producing in recent years over 40% of Arviso's revenue. This longstanding relationship renders Arviso dependent upon this relationship with Okland for a substantial portion of its income, no business could tolerate the jeopardization of 44% of its revenue.[2] Arviso's dependence on AOJV for such a large proportion of its income makes Arviso dependent on this joint venture with Okland. This dependence gives rise to affiliation on the basis of a continuing contractual relationship. 13 C.F.R. § 121.103(a)(2). Further, Arviso and Okland now have an identity of interest in their long-term partnership in AOJV. 13 C.F.R. § 121.103(f). OHA has held this type of long-term participation in a joint venture by a challenged firm with another firm to mandate a finding of affiliation with the second firm on the basis of contractual relationships and identity of interest. *Size Appeal of Team Contracting, Inc.*, SBA No. SIZ-3875, at 20-22 (1994); *Size Appeal of Christenson, Raber, Kief & Associates, Inc.*, SBA No. SIZ-2648, at 5-7 (1987).

Arviso relies upon another line of OHA precedent, holding that mere ownership by a challenged firm of a second firm with a third firm does not mandate a holding that the challenged firm and the third firm are affiliated. *Size Appeal of Cortez III Service Corporation*, SBA No. SIZ-3394 (1990); *Size Appeal of CHEMFAB*, SBA No. SIZ-2379 (1986). However, those cases predate *Team Contracting*, and further, they explicitly exclude from their rule instances where the joint venture is not the only indicia of affiliation. Here, the dependency of Arviso on AOJV

[2] Contrary to Arviso's argument, *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007), did not lay down a "rule" that a challenged firm must receive 70% of its revenue from a venture with another firm to be found affiliated, but held that in that particular case there was affiliation. The decision explicitly states there could be affiliation due to economic dependence where a firm receives as little as 30% or 40% of its revenue from one other firm, based on the facts of a particular case. *Faison*, at 10.

(and thus, Okland) for bonding assistance would be such an instance. *Cortez III*, at 6-7; *CHEMFAB*, at 5.

In sum, while most of Appellant's allegations are meritless, Arviso is affiliated with Okland, because its 15-year participation with Okland in AOJV, a venture which accounts for a substantial portion of its revenue, and its dependency on AOJV, and thus Okland, for assistance in obtaining bonding.

V. Conclusion

For the above reasons, I GRANT the instant appeal and REVERSE the Area Office's size determination. Arviso is not a small business.

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

CHRISTOPHER HOLLEMAN
Administrative Judge