

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

SIZE APPEAL OF:

C&C International Computers and  
Consultants, Inc.

Appellant

Re: REDE-Critique JV

Appealed from  
Size Determination No. 05-2008-038

SBA No. SIZ-4970

Decided: June 23, 2008

APPEARANCES

John J. Shahady, Esq., Adorno & Yoss LLP, Ft. Lauderdale, Florida, for Appellant.

Carol L. O’Riordan, Esq., The O’Riordan Bethel Law Firm, LLP, Washington, D.C., for  
REDE-Critique JV.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from an April 11, 2008 size determination (Case No. 5-2008-038) finding REDE-Critique JV to be a small business for a \$6.5 million size standard. The size determination arose from a March 20, 2008 protest filed by C&C International Computers and Consultants, Inc.

OHA has jurisdiction to decide 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.

II. Issues

Whether Appellant raised substantive issues for the first time on appeal, without raising the issues at the protest level, in violation of 13 C.F.R. § 134.316(a).

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

### III. Background

#### A. Findings of Fact

1. On December 7, 2007, the National Aeronautics and Space Administration, Kennedy Space Center, Florida (NASA) issued Request for Proposals No. NNNK08217230J (RFP) for KSC Institutional Support Services as an 8(a) competitive set-aside.

2. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 561110, Office Administrative Services, as the applicable NAICS code for this procurement, with a corresponding \$6.5 million annual receipts size standard. Proposals were due January 7, 2008.

3. On March 13, 2008, the CO notified unsuccessful offerors that the apparent successful offeror was REDE-Critique JV (REDE-Critique). REDE-Critique is a joint venture under SBA's mentor-protégé program consisting of REDE, Inc. (REDE), an 8(a) business, and Critique Resource Consulting Corporation (Critique). On March 14, 2008, NASA awarded the contract to REDE-Critique and as of May 1, 2008, the contract is in performance. On March 20, 2008, C&C International Computers and Consultants, Inc. (Appellant), an unsuccessful offeror, protested REDE-Critique's size with the CO.

4. Appellant's protest stated, in full:

[Appellant] hereby formally protests the REDE-Critique award decision of the subject RFP based on the fact that REDE-Critique is other than a small business with an annual Size Standard of \$6.5 million. The rationale to support this premise is as follows:

- SBA Regulations - "A large business cannot be a JV participant on a set aside procurement with one exception: 8(a) Mentor Protégé."

- SBA regulations clearly documents that if the joint venture is not under the Mentor-Protégé Program then both companies must meet the \$6.5 million size standard (NAICS Code 561110). A review of the CCR concludes that Critique does not meet the Size Standard. They are only small under the \$32 [million] Size Standard.

- Again CCR information on the record indicates that REDE reports the following contracts:

- DOE .... \$14M
- NASA JSC .... \$26M
- And several others ..... (see attachments to this

correspondence)

The above contracts appear to put REDE over the dollar threshold \$6.5 million (NAICS Code 561110).

- In addition to the above, a review of 13 C.F.R. § 121.103 notes a restriction of three (3) offers submitted as a Joint Venture over a two (2) year period. The record shows that REDE-Critique has submitted the following joint ventures:

- Johnson Space Center (resulted in award)	1
- One with Spacelab, Inc. As a small business subcontractor to SAIC	1
-One with the Department of Energy	<u>1</u> 3

It is hereby concluded that the current REDE-Critique submittal at KSC represents the fourth (4) JV submittal in a two (2) year period.

In view of the above, [Appellant] is submitting this Protest to the Contracting Officer offering that REDE-Critique exceeds the applicable Size Standard for this procurement. These concerns are based on SBA Firm Profile, REDE and Critique websites and the CCR information on file (see attached documents).

Appellant attached to its protest a link to an SBA mentor-protégé report, which Appellant asserted “does not include REDE as a protégé to Critique. It does include, however, Deltha Corporation as a SBA Protégé to Critique....It is also noted that REDE and Deltha have NAICS Codes 561110 in common which precludes REDE and Deltha from being simultaneously mentored by Critique (SBA Regulations regarding firm competition).”

5. On March 31, 2008, the CO referred the size protest to the SBA Office of Government Contracting, Area V, in Denver, Colorado (Area Office), for a size determination.

6. On March 31, 2008, the Area Office notified REDE-Critique of the protest and requested certain information, including copies of any SBA-approved mentor-protégé agreement and joint venture agreement. On April 4, 2008, REDE-Critique supplied the information, including a copy of its joint venture agreement and mentor-protégé agreement, and filed its Response. REDE-Critique stated that it has only submitted three proposals in a four year span, including the proposal on the instant RFP.

#### B. The Size Determination

On April 11, 2008, the Area Office issued its size determination finding REDE-Critique a small business concern under the \$6.5 million size standard. First, the Area Office found that the mentor-protégé agreement between REDE and Critique was approved by SBA on July 3, 2003. Further, on January 3, 2008, SBA approved REDE-Critique’s joint venture agreement. Because

of the valid mentor-protégé agreement, the Area Office found there was no affiliation between REDE and Critique. *See* 13 C.F.R. § 121.103(b)(6). The Area Office also noted that SBA approved the mentor-protégé agreement with full knowledge of Critique's relationship with Deltha, and did not find the Deltha relationship adversely affected REDE.

In addition, the Area Office found REDE-Critique has submitted only three offers as a joint venture between January 2006 and January 2008. Accordingly, REDE-Critique complied with 13 C.F.R. § 121.103(h). The Area Office concluded that REDE's average annual receipts, including its proportionate share of the joint venture's receipts, did not exceed \$6.5 million and thus REDE was a small business under the \$6.5 million size standard.<sup>1</sup>

### C. The Appeal

On April 25, 2008, Appellant filed the instant appeal. Appellant argues that Critique does not qualify as a mentor because Critique mentors another firm, Deltha, that is REDE's competitor. Further, Appellant argues that REDE does not qualify as a protégé under 13 C.F.R. § 124.520(c) because it failed to satisfy the requirements of 13 C.F.R. § 124.520(c) at the time of offer (Issue 1).

Appellant then argues that a current REDE employee is not designated as REDE-Critique's Project Manager, in violation of 13 C.F.R. § 124.513(c)(2) (Issue 2). Next, Appellant argues that REDE and Critique failed to respond to the Area Office's specific request for their 2007 tax returns, and thus the Area Office should have applied an adverse inference and found REDE-Critique other than small (Issue 3). Appellant also contends that REDE's average three year revenue exceeds the \$3.5 million 8(a) sole source contract dollar limit for protégé firms (Issue 4).

Appellant then argues that REDE-Critique have submitted more than three offers as a joint venture over a two year period (Issue 5). Finally, Appellant asserts that Critique is serving as the prime contractor with REDE for the instant solicitation while simultaneously serving as the subcontractor for the instant procurement in a joint venture with another firm, Deltha (Issue 6).

### D. REDE-Critique's Motion to Dismiss

On May 20, 2008, REDE-Critique filed a "Motion for Leave to Submit New Evidence and Motion to Dismiss." REDE-Critique moved to submit two exhibits: (1) a letter from the NASA contracting officer suspending performance due to the size protest; and (2) a letter from the NASA contracting officer authorizing REDE-Critique to commence contract performance on May 1, 2008. On May 27, 2008, I admitted Appellant's new evidence.

REDE-Critique's Motion to Dismiss argues (1) certain issues raised in Appellant's appeal

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<sup>1</sup> Although not explained in the size determination, because the Area Office found REDE, the 8(a) protégé, small for the procurement, the joint venture, REDE-Critique, is also small for the procurement. 13 C.F.R. § 124.520(d)(1).

were not considered by the Area Office and are beyond the scope of the Record and must be dismissed under 13 C.F.R. § 134.316(a); (2) certain issues raised in the appeal are contract-specific and must be dismissed under 13 C.F.R. § 121.1101(b); (3) one of Appellant's issues fails to provide a full and specific statement as to why the size determination is in error; and (4) certain issues raised in the appeal "implicate policymaking decisions outside the jurisdiction of ... OHA. . . ."

#### E. Appellant's Response to the Motion to Dismiss

On June 16, 2008, Appellant filed its response to REDE-Critique's Motion to Dismiss. Appellant argues that each issue presented in its appeal is "inextricably intertwined to the original size determination protest (which is the ultimate issue) and its timely submitted supplement, or are based on errors made by SBA's New Orleans District Office and/or SBA Denver Area Office and not due to Appellant's own negligence." Response, at 2-3. Appellant also argues that its appeal does not assert contract-specific issues nor implicate policymaking decisions outside of OHA's jurisdiction. Appellant then asserts that if OHA dismisses the portion of its appeal concerning REDE-Critique's mentor-protégé compliance, OHA should dismiss those portions without prejudice so that Appellant may bring those issues before the proper forum.

### IV. Discussion

#### A. Timeliness

Appellant filed its original appeal within 15 days of receiving the size determination. Thus, the original appeal is timely. 13 C.F.R. § 134.304(a)(1). On April 30, 2008, Appellant filed an "Amendment to Size Appeal," more than 15 days after Appellant received the size determination. This Amendment added a new issue and did not merely correct an error in its appeal. Further, Appellant failed to submit a motion requesting leave to amend as mandated by 13 C.F.R. § 134.207(a). Accordingly, I will not consider Appellant's Amendment to Size Appeal (Issue 7).

#### B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon a clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider REDE-Critique's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006). Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

### C. The Merits

In discussing the merits of the Appeal, I have adopted the organization and nomenclature used by Appellant and REDE-Critique.

#### Issue 1: Critique does not qualify as a mentor and REDE does not qualify as a protégé

The issue of whether Critique and REDE qualify as a mentor and protégé, respectively, under 13 C.F.R. § 124.520 is an issue outside of OHA's jurisdiction. In *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950 (2008) (*White Hawk/Todd*), OHA held that it lacked subject matter jurisdiction over allegations of compliance with SBA's mentor-protégé regulations. Specifically, OHA held:

Whether a protégé firm meets the requirements of 13 C.F.R. § 124.520(c) or a mentor firm meets the requirements of 13 C.F.R. § 124.520(b) is a determination vested solely with the SBA's Director, Office of Business Development (D/BD). 13 C.F.R. § 124.520(e)(2). The regulations do not authorize the area offices to play a role in the approval or review of mentor-protégé agreements. 13 C.F.R. § 124.520.

....

In holding that an area office and OHA may not review mentor-protégé eligibility issues, I note that anyone with concerns with an 8(a) Participant's mentor-protégé agreement may raise these concerns with the 8(a) BD program office. 13 C.F.R. §§ 124.112(c), 124.517(e). Further, the SBA 8(a) BD program office monitors mentor-protégé relationships as part of its annual review of 8(a) participants. 13 C.F.R. § 124.520(f). Thus, a concerned party is not without recourse.

*White Hawk/Todd*, at 2-3.

In addition, REDE's ability to qualify as a protégé is a substantive issue raised for the first time on appeal and thus cannot be considered. 13 C.F.R. § 134.316(a); *see Size Appeal of Fort Carson Support Services*, SBA No. SIZ-4724 (2005). Accordingly, Issue 1 is DISMISSED.

#### Issue 2: SBA regulations require the JV's project manager to be an 8(a) employee

Appellant did not mention this issue in its protest (Fact 4). Therefore, regardless of the merits of the issue, Appellant has raised a new substantive issue on appeal and Issue 2 must be DISMISSED. *See* 13 C.F.R. § 134.316(a).

#### Issue 3: REDE and Critique's failure to provide 2007 tax returns

Appellant alleges REDE and Critique's failure to provide their 2007 tax returns required the Area Office to take an adverse inference that if they had provided these returns, the returns would prove REDE and Critique exceeded the applicable size standard. First, because REDE and Critique have an approved mentor-protégé agreement, the issue is REDE's size (including its

proportionate share of revenue from the joint venture), not Critique's size. *See* 13 C.F.R. § 124.520(d).

While 13 C.F.R. § 121.1009(d) permits the Area Office to take an adverse inference, it does not apply to a situation where the protested concern has not yet filed a tax return for the fiscal year that must be included in the period of measurement. When concerns have yet to file a return, 13 C.F.R. § 121.104(a)(2) permits the concern to provide information to SBA that enables SBA to "calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts." I find the Record contains the information anticipated by 13 C.F.R. § 121.104(a)(2) and that the information was sufficient for the Area Office to calculate REDE's annual receipts for 2007. Accordingly, the Area Office was correct as a matter of law not to draw an adverse inference and did not commit clear error with regard to Issue 3.

#### Issue 4: REDE's sales exceed \$3.5 million dollars

For reasons not made clear in its appeal, Appellant alleges REDE's average annual receipts exceed \$3.5 million, which Appellant alleges is the "current SBA 8(a) sole source contract dollar limit."<sup>2</sup> Thus, Appellant argues REDE-Critique is precluded from participating in the mentor-protégé program. Appellant incorrectly interprets the law because 13 C.F.R. § 121.103(h)(3)(iii) provides, in relevant part:

Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

The regulations at 13 C.F.R. § 124.519 then set forth the dollar limits above which a firm can no longer receive sole source 8(a) contracts. The instant solicitation, however, is a competitive, not sole source, 8(a) procurement. Therefore, REDE, as the protégé, only needs to qualify as small for the size standard on the instant procurement, \$6.5 million. Accordingly, I find the Area Office did not commit a clear error of fact or law with regard to Issue 4.

#### Issue 5: REDE submitted more than three offers as a joint venture over a two year period

Appellant alleges that REDE-Critique has submitted four offers in a two year period violating 13 C.F.R. § 121.103(h), which states:

Affiliation based on joint ventures. A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three

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<sup>2</sup> It is unclear how Appellant derived \$3.5 million from 13 C.F.R. § 124.519.

specific or limited-purpose 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 the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer.*

(emphasis added). Appellant contends the Area Office did not include REDE-Critique's contract at Johnson Space Center. Appellant also references joint venture contracts allegedly awarded to REDE-Critique by Spacelab, Inc. and the Department of Energy (DOE).

The Record, however, supports the Area Office's conclusion that REDE-Critique is in compliance with 13 C.F.R. § 121.103(h). Appellant does not provide any evidence or argument to dispute the finding that the DOE and Spacelab contracts were awarded to REDE and not REDE-Critique. Further, the Area Office did include the REDE-Critique offer on the Johnson Space Center solicitation in its calculation. Therefore, I cannot find clear error on the part of the Area Office with regard to Issue 5.

Issue 6: It is improper for Critique to be both a prime contractor and a subcontractor

Appellant alleges Critique may not be part of the joint venture with REDE and also act as a separate subcontractor under the RFP, utilizing a joint venture with Deltha. Appellant did not raise this issue in its protest (Fact 4). Nor does Appellant explain why Critique's joint venture with Deltha as a subcontractor violates any SBA size regulation. Consequently, I must DISMISS Issue 6 because 13 C.F.R. § 134.316(a) forbids me from deciding a substantive issue raised for the first time on appeal.

Issue 7: REDE-Critique did not meet SBA joint venture application requirements

As explained above, Appellant's amendment submitting this new issue was untimely and failed to include a motion requesting leave to amend and thus will not be considered.

V. Conclusion

For the above reasons, the Area Office's size determination is AFFIRMED and Appellant's appeal is DENIED.

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

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THOMAS B. PENDER  
Administrative Judge