United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Luke & Associates, Inc.	SBA No. SIZ-4981
Appellant	Decided: August 7, 2008
RE: Innovative Health Applications, LLC	
Appealed from Size Determination Nos. 03-2008-52 & 03-2008-54	

APPEARANCES

Ralph C. Thomas III, Esq., Barton, Baker, McMahon & Tolle, McLean, Virginia, for Appellant.

Katherine S. Nucci, Esq. and Timothy Sullivan, Esq., Thompson Coburn LLP, Washington, D.C., for Innovative Health Applications, LLC.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a June 23, 2008 size determination (03-2008-52 & 03-2008-54) finding Innovative Health Applications, LLC (IHA) to be a small business for a $9 million annual receipts size standard. The size determination arose from protests filed by Luke & Associates, Inc. (Appellant) and the Contracting Officer (CO). For the reasons discussed below, the size determination is affirmed.

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issues

Whether 13 C.F.R. § 124.513 can be applied to a non-8(a) procurement.

III. Background

A. Findings of Fact

1. On September 17, 2007, the National Aeronautics and Space Administration (NASA)/Kennedy Space Center issued Solicitation No. NNK07204121R (RFP) for medical services, environmental health services, and occupational health program support at NASA. The CO set the procurement totally aside for small businesses and designated North American Industry Classification System (NAICS) code 621111, Office of Physicians (except Mental Health Specialists), with a $9 million annual receipts size standard. Final proposal revisions were due on April 16, 2008.

2. On October 17, 2007, InoMedic Inc. (IMI), an 8(a) firm, executed a joint venture agreement with Comprehensive Health Services, Inc. (CHS), an acknowledged other than small firm, that formed a joint venture, IHA.

3. On November 15, 2007, SBA informed IMI that SBA had approved the Mentor-Protégé Agreement[1] between IMI (protégé) and CHS (mentor) on November 9, 2007. On November 16, 2007, IHA submitted its proposal in response to the RFP. On April 16, 2008, IHA submitted its final proposal revision.

4. On June 2, 2008, the CO notified offerors that IHA was the apparent successful offeror. Also on June 2, 2008, the CO requested the SBA, Office of Government Contracting, Area III (Area Office) perform a size determination on IHA. The CO alleged that IMI was incapable of performing the primary and vital requirements of the RFP and was affiliated with CHS, the incumbent other than small contractor.

5. On June 3, 2008, the Area Office notified IHA of the CO's size protest and requested it submit its SBA Form 355, a response to the allegations in the protest, and other organizational and financial information within three working days.

6. On June 5, 2008, Appellant also protested IHA's size to the CO. Appellant alleged that IHA's joint venture agreement did not comply with 13 C.F.R. § 124.513 and that IMI and CHS were affiliated under the ostensible subcontractor rule at 13 C.F.R. § 121.103(h)(4).

7. On June 9, 2008, IHA responded to the CO's request for a size determination. IHA argued that the CO ignored the SBA-approved Mentor-Protégé Agreement, which creates an affiliation exception between mentors and protégés. IHA noted the RFP was not a 8(a) procurement and thus the requirements of 13 C.F.R. § 124.513 did not apply. IHA also argued the ostensible subcontractor rule was inapplicable because there was no subcontracting arrangement between IHA and CHS. IHA maintained that it was a separate legal entity as an SBA-approved joint venture and enjoyed an exemption from affiliation through operation of 13 C.F.R. § 124.520(d)(1).

[1] The Mentor-Protégé Agreement between CHS and IMI was executed on June 22, 2007.

8. On June 12, 2008, IHA responded to Appellant's size protest and essentially reiterated its response to the CO's protest.

B. The Size Determination

On June 23, 2008, the Area Office issued its size determination. The Area Office found IHA is an SBA-approved joint venture of an 8(a) mentor-protégé team. The team members are the 8(a) firm and protégé, IMI, and its mentor, CHS, an acknowledged large firm. First, the Area Office found the ostensible subcontractor rule inapplicable because IHA's final proposal does not propose any subcontractors and provides that IHA's personnel would perform the entire contract.

Because this procurement is a small business set-aside, and not an 8(a) procurement, the Area Office found that it did not have to evaluate whether IHA met the joint venture requirements of 13 C.F.R. § 124.513(c). *See Size Appeal SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008) (*SES-Tech*). Instead, under 13 C.F.R. § 121.103(h)(3)(iii), the only issue to resolve was whether the protégé, IMI, is a small business under the NAICS code assigned to the RFP. The Area Office reviewed IMI's receipts and found the firm by itself is small. Accordingly, the Area Office found that because IMI and CHS had an approved mentor-protégé agreement at the time IHA self-certified as a small business and IMI is a small concern, IHA qualified as small for the RFP.

C. The Appeal

On July 8, 2008, Appellant filed an amended appeal. Appellant alleges that CHS performs similar work on other NASA contracts and sought to evade the size requirements on the instant RFP by forming a mentor-protégé joint venture with IMI. CHS's "suspicious" motivation, Appellant alleges, occurred prior to the formation of the mentor-protégé relationship and thus constitutes affiliation.

Appellant then requests that OHA overturn *SES-Tech* wherein OHA held that the Area Office had no authority to review a joint venture agreement under 13 C.F.R. § 124.513 because the procurement at issue was not an 8(a) procurement. Appellant asserts that "[w]hile OHA probably feels that its interpretation [in *SES-Tech*] is correct because of the plain language of the applicable regulations, it must consider whether such interpretation is consistent with the spirit and letter of all of the related federal regulations regarding 8(a) firms." Appeal, at 7.

D. IHA's Response

On July 18, 2008, IHA filed its response to the appeal. IHA asserts that Appellant raises new issues on appeal that must be dismissed pursuant to 13 C.F.R. § 134.316(a). Specifically, Appellant's contention that the Area Office erred by not considering evidence of affiliation occurring prior to IHA's Mentor-Protégé Agreement was not raised at the protest level and thus cannot be considered by OHA on appeal. Nonetheless, IHA maintains that a concern's motive

for entering into a mentor-protégé relationship cannot form the basis for a finding of affiliation and the issue could also be dismissed on the merits.

Next, IHA asserts that OHA cannot overrule *SES-Tech* because it conforms to the plain language of 13 C.F.R. § 124.513. IHA argues that Appellant, in challenging the validity of *SES-Tech*, is effectively challenging the validity of a duly promulgated regulation and requesting that OHA revise the regulation. IHA maintains that OHA has no authority to revise a regulation. *See Size Appeal of Eagle Helicopter, Inc.*, SBA No. SIZ-4809 (2006).

IV. Discussion

A. Timeliness

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

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon 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 IHA'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), for a full discussion of the clear error standard of review. 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

The general rule is that firms submitting an offer on a particular procurement as a joint venture are affiliates with regard to that contract, and their size will be aggregated for that procurement. 13 C.F.R. § 121.103(h)(2). One exception to this general rule involves firms that have an SBA-approved mentor-protégé agreement under 13 C.F.R. § 124.520. *See* 13 C.F.R. §§ 124.520(a), (d)(4) and 121.103(h)(3)(iii).

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). This joint venture becomes exempt from the normal rules of affiliation. 13 C.F.R. § 121.103(b)(6), (h)(3)(iii). 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).

Here, IHA is a joint venture seeking to compete for a small business set-aside, not an 8(a) set-aside procurement. As held in *SES-Tech*, the requirements of 13 C.F.R. § 124.513 do not apply to non-8(a) set-aside procurements under the express language of the 13 C.F.R.

§ 124.513(a) and (c). Appellant all but concedes that *SES-Tech* is in accordance with the plain language of 13 C.F.R. § 124.513, but argues the effect of *SES-Tech* is inconsistent "with the spirit and letter" of federal regulations regarding 8(a) firms. Appeal, at 7. While I note the effect of not applying the requirements of 13 C.F.R. § 124.513 to non-8(a) procurements is problematic, I do not have the authority to revise the regulation. *See Size Appeal of Eagle Helicopter, Inc.*, SBA No. SIZ-4809, at 5-6 (2006).

The regulation clearly permits a mentor and 8(a) 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 for 8(a) sole source procurements, the protégé has not reached the dollar limit in 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 IMI, the protégé, was small, which it answered in the affirmative. Accordingly, the Area Office did not commit clear error in finding IHA, the joint venture, qualified as small for the RFP.

The Area Office also properly found the ostensible subcontractor rule inapplicable to a mentor-protégé 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, IHA, is a given and because IHA has an SBA-approved mentor-protégé agreement, IHA enjoys an exemption from affiliation. 13 C.F.R. §§ 121.103(h)(3)(iii), 124.520(d)(1)

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).

_____

THOMAS B. PENDER
Administrative Judge