

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

SIZE APPEAL OF:

JXM, Inc.

Appellant

Solicitation Nos. W81K04-09-R-0016
W81K04-09-R-0017

SBA No. SIZ-5091

Decided: November 23, 2009

ORDER DISMISSING APPEAL

I. Background

On May 28-29, 2009, the Contracting Officer (CO) for the U.S. Department of the Army, U.S. Army Medical Command, Center for Health Care Contracting issued Solicitation Nos. W81K04-09-R-0016 and W81K04-09-R-0017 as set-asides for the U.S. Small Business Administration's (SBA) 8(a) Business Development program. JXM, Inc. (Appellant), through its joint venture with MBM, Inc., submitted offers for each solicitation.

On September 21, 2009, the SBA's San Antonio District Office issued a letter to Appellant notifying it that its joint venture with MBM, Inc. had been disapproved for the solicitations at issue based on Appellant's size. The letter also provided that Appellant may no longer use the Data Universal Numbering System (DUNS) number approved for Appellant's joint venture with MBM, Inc.

On October 2, 2009, Appellant filed the instant appeal with SBA's Office of Hearings and Appeals (OHA). The Appeal Petition is entitled "Appeal of the Size Determination by the San Antonio District Office." Appellant contends (1) the District Office improperly calculated its size because it failed to consider the mentor/protegé exemption from the affiliation regulations and (2) the District Office misapplied the regulation concerning DUNS numbers.

On November 6, 2009, OHA requested comments from SBA's Office of General Counsel due to the unusual posture of this appeal. OHA noted that the determination Appellant seeks to challenge does not appear to be a formal size determination. On November 20, 2009, the Agency filed its comments. The Agency confirms that the San Antonio District Office's September 21, 2009, letter is not a formal size determination and contends that OHA does not have jurisdiction over this appeal.

II. Discussion

The regulation setting forth OHA's jurisdiction provides in pertinent part: "OHA has authority to conduct proceedings in the following cases: . . . Appeals from size determinations and NAICS code designations under part 121 of this chapter." 13 C.F.R. § 134.102(k). Part 121 sets forth the regulations governing size protests and formal size determinations. The relevant part of 13 C.F.R. § 121.1002, "Who makes a formal size determination?" provides: "The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination" 13 C.F.R. § 121.1002.

The September 21, 2009, letter is not a formal size determination according to this definition. It was not issued by a Government Contracting Area Director, and it was not issued as the result of either a size protest or a request for a formal size determination. Furthermore, as the Agency explains, "SBA cannot render a formal size determination concerning the size of any offeror, including a joint venture, in connection with a specific procurement until the procuring agency has identified the offeror as the apparent successful offeror. 13 C.F.R. § 121.1004(e); *Size Appeal of S4, Inc.*, SBA No. SIZ-4959 (2008)." (Agency's Comments, at 3.) There is no evidence the Army has chosen Appellant's joint venture as the successful offeror for the solicitations at issue. Therefore, the September 21, 2009, letter at issue is not a formal size determination and, as the Agency points out, OHA does not have jurisdiction to hear this appeal.

The Agency also notes that on October 7, 2009, the San Antonio District Office requested that the SBA's Office of Government Contracting, Area V, perform a formal size determination of Appellant. That size determination is currently pending. OHA does have jurisdiction to review any appeal of that size determination. 13 C.F.R. § 134.102(k). Thus, OHA must dismiss this appeal for lack of jurisdiction, but this appeal is dismissed without prejudice to any appeal of the forthcoming formal size determination.

III. Conclusion

OHA does not have jurisdiction over this appeal. Thus, this appeal is DISMISSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge