Cite as: *Size Appeal of Beltsville Industries Group, Inc –Desbuild Incorporated Joint Venture*, SBA No. SIZ-5157 (2010)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Beltsville Industries Group, Inc.– Desbuild Incorporated Joint Venture Appellant RE: Grunley/Goel JV E LLC Appealed from Size Determination No. 2-2010-109	SBA No. SIZ-5157 Decided: October 8, 2010

APPEARANCE

Timothy F. Maloney, Esq., and Levi S. Zaslow, Esq., Joseph, Greenwald & Laake, P.A., Greenbelt, Maryland, for Appellant.

Paul V. Waters, Esq., and Erin A. Behbehani, Esq., The Waters Law Firm, PLLC, Silver Spring, Maryland, for Grunley/Goel JV E LLC.

DECISION[1]

HOLLEMAN, Administrative Judge:

I. Introduction & Jurisdiction

On August 24, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2010-109 (Size Determination) finding Grunley/Goel JV E LLC (Grunley/Goel) to be a small business under the size standard applicable to the procurement at issue. On September 8, 2010, Beltsville Industries

[1] This Decision was issued under a Protective Order to prevent the disclosure of confidential or proprietary information. On October 8, 2010, I issued an Order for Redactions directing each party to file a request for redactions by October 22, 2010, if that party desired to have any information redacted from the published Decision. OHA received no timely request from any party requesting that the original Decision be redacted in any way. Thus, OHA now publishes the Decision in its entirety.

Group, Inc.–Desbuild Incorporated Joint Venture (Appellant) appealed the Size Determination to the SBA's Office of Hearings and Appeals (OHA). For the reasons discussed below, the appeal is denied, and the Size Determination is affirmed.

OHA decides 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. Appellant filed the instant appeal within fifteen days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On June 19, 2009, the Contracting Officer (CO) for the U.S. Department of the Navy, Facilities Engineering Command in Washington, D.C., issued Solicitation No. N40080-09-R-0163 (RFP) for the construction of child development centers at the Naval Air Station in Patuxent River, Maryland. The CO set the procurement totally aside for small business and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in average annual receipts.

On July 14, 2010, the CO notified unsuccessful offerors that Grunley/Goel was the apparent successful offeror. On July 20, 2010, Appellant filed a protest alleging Grunley/Goel is other than small. Appellant asserted that Grunley/Goel is one of a number of joint ventures set up to circumvent the applicable size regulations. On July 20, 2010, the CO referred the protest to the Area Office.

B. Size Determination

On August 24, 2020, the Area Office issued its Size Determination finding Grunley/Goel to be an eligible small business. Grunley/Goel is a joint venture. One member of the joint venture is Goel Services, Inc. (Goel), with a 51% interest. Goel's president and sole shareholder is Piyush J. Goel. Goel is a participant in SBA's 8(a) Business Development (BD) program and is, by itself, small under the applicable size standard.

The other member of the joint venture is Grunley Construction Company, Inc. (Grunley), with a 49% interest. Grunely is an other than small concern, with an approved 8(a) BD program mentor-protégé relationship with Goel. Under the joint venture operating agreement, which was approved by the SBA, Goel controls Grunley/Goel's daily operations.

The Area Office noted that SBA's regulations require that a joint venture submit no more than three offers over a two year period. 13 C.F.R. § 121.103(h). Two firms approved by SBA as a mentor and protégé under the 8(a) BD program regulations may joint venture for any procurement, provided the protégé qualifies as small. 13 C.F.R. § 121.103(h)(3)(iii). The Area Office found that the rule does not limit the number of joint ventures two firms may form to pursue contracting opportunities. The Area Office stated that the SBA has interpreted this rule to

mean that while a joint venture cannot submit more than three offers in two years, the parties to the joint venture may form another joint venture to purse more solicitations once the "3-in-2 rule" has been fulfilled. Goel and Grunley have formed a number of joint ventures, each a separate entity, with a different suffix for the name. The Area Office found that this was sufficient to comply with the rule and concluded that Grunley/Goel is an eligible small business.

C. Appeal Petition

On September 8, 2010, Appellant filed the instant appeal. Appellant notes that the general rule is that joint venture partners are treated as affiliates. An exception to this rule is a joint venture between firms that are in a mentor-protégé relationship pursuant to the SBA's 8(a) BD program. However, Appellant argues that the mentor-protégé exception is not without its limits. Appellant asserts that while a protégé may not be found affiliated with its mentor solely because of the assistance it receives from its mentor, affiliation may be found for other reasons. 13 C.F.R. § 121.103(b)(6). Appellant argues that OHA should consider whether the actual relationship between the mentor and the protégé violates the intent and spirit of 13 C.F.R. § 124.513(a)(2), citing *Size Appeal of Lance Bailey and Associates, Inc.*, SBA No. SIZ-4788 (2006). Appellant argues that the SBA should also consider that totality of the circumstances in determining whether firms are affiliated. 13 C.F.R. § 121.103(a)(5). Finally, Appellant requests an oral hearing in this matter.

Appellant includes with its Appeal a Motion to Submit New Evidence, together with the evidence it seeks to admit. Appellant asserts, based upon the new evidence, that Grunley and Goel have formed no less than fourteen joint ventures, all formed as limited liability companies and all inextricably linked by their contracts. Appellant asserts that it was not able to locate all of the joint ventures prior to filing its protest, but now, after retaining counsel, has been able to do so, and thus there was good cause for its not submitting this evidence to the Area Office at the protest level.

Appellant asserts that all of the joint ventures formed by Grunely and Goel have nearly identical names, changing only the one suffix letter, and so they are Grunley/Goel JV A LLC through Grunley/Goel JV N LLC. Mr. Goel is the filing party for each joint venture. They use one of three addresses for each concern. Grunley/Goel's listed address is also Grunley's address. Appellant thus argues that, under the totality of the circumstances, Grunely/Goel, Grunley, and Goel should all be found affiliated because of the numerous nearly identical joint ventures formed by the firms.

Finally, Appellant alleges the Area Office failed to consider whether these joint ventures are affiliated and also failed to consider the aggregate effect of the joint ventures. Appellant argues Grunley and Goel are closely linked to each joint venture, and the joint ventures are all affiliates. Thus, Appellant contends Grunley/Goel should be found affiliated with any and all of the joint ventures that still exist, and the receipts of all those firms should be aggregated to determine Grunley/Goel's size. *See Size Appeal of Hallmark-Phoenix 8, LLC*, SBA No. SIZ-5046 (2009). If the assets of all the joint ventures are aggregated, Appellant asserts Grunley/Goel is not eligible to receive the instant procurement. Appellant concludes the Size Determination should be reversed.

D. Grunley/Goel's Response

On September 24, Grunley/Goel filed its Response to the Appeal Petition. Grunley/Goel asserts that Appellant does not challenge the Area Office's finding that Grunley/Goel is in compliance with the 3-in-2 rule and instead bases its appeal entirely on its newly submitted evidence. Thus, Grunley/Goel argues the appeal should be dismissed.

Alternatively, Grunley/Goel asserts the Size Determination should be affirmed because the Area Office properly concluded that the 3-in-2 rule does not prohibit firms from creating numerous joint ventures to pursue contract opportunities. *See* 74 Fed. Reg. 55694 (October 28, 2009). Grunley/Goel admits that Grunley and Goel have formed numerous joint ventures by changing the suffix on each joint venture's name, but contends it has complied with the 3-in-2 rule because it has submitted only one other offer.

Grunley/Goel asserts the Area Office correctly concluded that it is a small business for this procurement because Grunley and Goel have an SBA-approved mentor-protégé agreement and my joint venture on any federal procurement. *See* 13 C.F.R. § 121.103(h)(3)(iii); *Size Appeal of Luke & Assocs., Inc.*, SBA No. SIZ-4981 (2008). Because Goel's average annual receipts fall below the applicable size standard, contends Grunley/Goel, the Area Office committed no error in determining that Grunley/Goel is small for this procurement.

Grunley/Goel opposes the admission of Appellant's new evidence. Grunley/Goel argues Appellant was required to submit this evidence to the Area Office with its protest and cannot now cure its failure to do so. 13 C.F.R. § 121.1009(b); *Size Appeal of Creative Recycling Sys., Inc.*, SBA No. SIZ-4757 (2006). Grunley/Goel contends Appellant has failed to establish good cause for admission of this evidence, asserts Appellant cannot enlarge the issues on appeal, and claims because this evidence was available when Appellant filed its protest, it cannot now be admitted. 13 C.F.R. § 134.308(a); *Size Appeal of Eagle Pharms., Inc.*, SBA No. SIZ-5023 (2009). Grunley/Goel also opposes Appellant's request for an oral hearing, arguing Appellant failed to demonstrate any extraordinary circumstances that would warrant a hearing.

III. Discussion

A. 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 upon 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). I will disturb the Area Office's Size Determination only if, after reviewing the record, I have 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).

B. New Evidence and Request for Hearing

Appellant moves to submit new evidence on appeal. New evidence may be admitted upon a showing of good cause. 13 C.F.R. § 134.308(a)(2). After reviewing Appellant's motion

and its new evidence, I conclude Appellant has failed to establish good cause for its admission. Appellant was responsible for presenting all relevant evidence to the Area Office at the protest level. *See* 13 C.F.R. § 121.1009(b); *Size Appeal of Mgmt. Support Tech., Inc.*, SBA No. SIZ-4976, at 3 (2008). Appellant cannot submit evidence on appeal that it neglected to submit with its protest. *Id.* Additionally, Appellant may not submit evidence on appeal that was publicly available at the time it filed its protest. *Size Appeal of Perry Mgmt, Inc.*, SBA No. SIZ-5100, at 3 (2009). All of the documents Appellant attempts to admit to the record are public records, were available at the time of its protest, and should have been submitted to the Area Office. Therefore, Appellant's motion is DENIED, and the proffered new evidence is EXCLUDED from the appeal record.

Appellant also requested an oral hearing on this matter. Hearings are held in size determination cases only upon a showing of "extraordinary circumstances." 13 C.F.R. § 134.311. Because I find Appellant failed to demonstrate any extraordinary circumstances here, Appellant's request for a hearing is DENIED.

C. Analysis

Firms that form a joint venture to submit an offer on a solicitation are generally affiliated for purposes of that procurement. 13 C.F.R. § 121.103(h)(2). However, parties to an SBA-approved mentor-protégé agreement under the 8(a) BD program may form a joint venture for any federal procurement and are not considered affiliates, as long as the protégé firm is small under the size standard applicable to the procurement. 13 C.F.R. § 121.103(h)(3)(iii). Grunley and Goel are parties to an SBA-approved 8(a) BD program mentor-protégé agreement, and they formed Grunley/Goel to submit an offer on the instant procurement. Additionally, the SBA approved Grunley/Goel's joint venture agreement.

SBA's regulations prohibit any joint venture from submitting more than three offers over a two year period (the 3-in-2 rule). 13 C.F.R. § 121.103(h). There is no dispute that this rule applies to 8(a) BD program mentor-protégé joint ventures, such as Grunley/Goel. Thus, if Grunley/Goel were to violate the 3-in-2 rule, argues Appellant, it would be operating outside the joint venture regulations, and Grunley and Goel would be affiliated for this procurement.

In its protest, Appellant alleged Grunley and Goel set up at least four separate joint venture entities (specifically, limited liability companies) with the same name, adding only different alphabetical suffixes to each joint venture to distinguish them, for the purpose of circumventing the 3-in-2 rule. The Area Office determined that despite the fact that Grunley and Goel have set up these various joint venture companies, the joint venture entity that received the instant procurement, Grunley/Goel has not violated the 3-in-2 rule because it has submitted offers on only two solicitations, including the one at issue.

The Area Office committed no clear error of fact or law. The Area Office properly determined that Grunley/Goel has not violated the 3-in-2 rule because it, as an entity, has submitted only two offers in the last two years. The Area Office rejected Appellant's argument that Grunley/Goel has violated the 3-in-2 rule because Grunley and Goel have formed other similar joint venture companies so they could continue submitting additional offers beyond three

in a two year period. I find the Area Office was correct in rejecting this argument because Grunley and Goel formed separate joint venture companies, each with a different name and each constituting a separate legal entity. According to the explicit language of the regulation, it is each joint venture entity that must comply with the 3-in-2 rule, not each combination of companies that forms a joint venture. 13 C.F.R. § 121.103(h) ("[T]he joint venture entity cannot submit more than three offers over a two year period").[2] Thus, Grunley/Goel did not violate the 3-in-2 rule, Grunley and Goel are not affiliated on this basis, and Grunley/Goel is an eligible small firm for this procurement because Goel's average annual receipts do not exceed the applicable size standard.

On appeal, Appellant argues OHA should consider whether Grunley and Goel are affiliated based upon the totality of the circumstances. 13 C.F.R. § 121.103(a)(5). Appellant also asserts the relationship between Grunley and Goel violates the intent and spirit of 13 C.F.R. § 124.513(a)(2), the regulation governing 8(a) BD mentor-protégé joint ventures. *See Size Appeal of Lance Bailey and Assocs., Inc.*, SBA No. SIZ-4788 (2006). I may not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(a). The only issue before the Area Office was whether Grunley and Goel's formation of various joint ventures constitutes a violation by Grunley/Goel of the 3-in-2 rule. Appellant made no argument based upon the totality of the circumstances or upon 13 C.F.R. § 124.513 at the protest level.

Because the Area Office must consider the totality of the circumstances surrounding the relationship between firms in examining issues of affiliation, it may be argued this is not a new issue on appeal. 13 C.F.R. § 121.103(a)(5). Accordingly, I find the Area Office properly considered the facts and circumstances presented to it in this case and made no error in finding that Grunley/Goel did not violate the 3-in-2 rule or that Grunley and Goel are not affiliated on the basis of the information before it. The totality of the circumstances presented here is not indicative of affiliation.

I also find that Appellant's argument based upon 13 C.F.R. § 124.513 lacks merit. The SBA approved Grunley and Goel's 8(a) BD program mentor-protégé agreement. The SBA also approved Grunley/Goel's joint venture agreement. It appears Appellant urges me to investigate the circumstances of the SBA's approval of these agreements underlying Grunley's and Goel's joint venture relationship. I do not have the authority to look behind the SBA's approval of such agreements, and I will not do so here. Whether mentor and protégé firms meet the requirements of the regulations governing that program is a matter solely within the discretion of 8(a) BD program officials. *See Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950, at 2 (2008).

Appellant also argues on appeal that the Area Office failed to consider whether Grunley/Goel is affiliated with the three other joint ventures Appellant identified in its protest and also failed to aggregate their assets. Based on the above analysis, I cannot conclude that

[2] This interpretation is consistent with recent SBA commentary on proposed regulations, which indicates that under the current regulations, "there is nothing . . . prohibiting the same two firms from forming a second joint venture and pursuing three additional contract opportunities." 74 Fed. Reg. 55694, 55695 (October 28, 2009).

Grunley/Goel is affiliated with these other entities. Grunley/Goel did not violate the 3-in-2 rule, Grunley and Goel are mentor and protégé firms generally exempt from affiliation rules, and the SBA approved Grunley/Goel's joint venture agreement. Because the entities are not affiliated, there is no need to aggregate their receipts for the purposes of determining Grunley/Goel's size. *See* 13 C.F.R. § 121.103(a)(6).

I do not hold here that forming multiple joint ventures can never be the basis for a finding of affiliation. It is possible that the continuous formation of similar joint ventures could rise to the level of general affiliation, even in the mentor-protégé context. Instead, I hold that under the facts and circumstances of this case, the four similar joint ventures formed by Grunley and Goel and identified to the Area Office are an insufficient basis on which to conclude that Grunley/Goel is affiliated with all of these other entities or that Grunley and Goel are affiliated generally. Based upon the foregoing, I find the Area Office made no clear error of fact or law in deciding Appellant's protest.

IV. Conclusion

Appellant failed to prove the Area Office committed any clear error of fact or law. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED.

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