

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

SIZE APPEAL OF:

LGS Management, Inc.

Appellant

RE: Alutiiq-Mele, LLC

Appealed from
Size Determination 6-2010-133

SBA No. SIZ-5160

Decided: October 15, 2010

APPEARANCE

Timothy H. Power, Esq., Power Law Office, Sonoma, California, for Appellant.

Amy J. Shimek, Esq., Vice President of Legal Affairs and Associate General Counsel, for Alutiiq-Mele, LLC.

DECISION

HOLLEMAN, Administrative Judge:

I. Introduction & Jurisdiction

On September 22, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2010-133 (Size Determination) finding Alutiiq-Mele, LLC (Alutiiq-Mele) to be an eligible small business for the procurement at issue. On September 28, 2010, LGS Management, Inc. (Appellant) appealed the Size Determination to the SBA 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, so 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 May 29, 2010, the Contracting Officer (CO) for the Department of the Air Force issued Request for Proposals No. FA8601-10-R-0035 (RFP) seeking military family housing maintenance services at Wright Patterson Air Force Base. The RFP was a total 8(a) Business Development (BD) program set-aside, and the CO designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of \$35.5 million in average annual receipts.

On August 26, 2010, the CO notified unsuccessful offerors, including Appellant, that Alutiiq-Mele was the apparently successful offeror. On September 2, 2010, Appellant filed a protest challenging Alutiiq-Mele's size. Specifically, Appellant argued that Alutiiq-Mele has multiple affiliates, and its revenues exceed the applicable size standard.

B. Size Determination

On September 22, 2010, the Area Office issued its Size Determination finding Appellant is an eligible small business for the instant procurement. The Area Office found Alutiiq-Mele was admitted to the 8(a) BD program on February 2, 2004, and is 100% owned by Alutiiq, LLC, an Alaska Native Corporation (ANC). Alutiiq, LLC also owns a number of other firms. The Area Office explained that because Alutiiq, LLC is an ANC, the firms it owns cannot be considered affiliates based upon common ownership. 13 C.F.R. § 121.103(b)(2)(ii).

The Area Office next considered Appellant's contention that Alutiiq-Mele is affiliated with Mele Associates, Inc. (MAI), Mele Associates Pacific (MAP), and Mele Pacific, Inc. (MPI). Appellant alleged that Alutiiq-Mele shares an address with MAI and MPI. Alutiiq-Mele explained to the Area Office that it has not used that address since July, 2007, and offered documentation of its notification of an address change to the SBA District Office as support. The Area Office indicated it requested that Alutiiq-Mele submit the names of the subcontractors it would use for this procurement, and Alutiiq-Mele responded that it would not use subcontractors but may use vendors as needed. The Area Office determined MAI, MAP, and MPI were not on the list of potential vendors provided by Alutiiq-Mele. The Area Office also found that Alutiiq, LLC has the power to control Alutiiq-Mele, and Alutiiq-Mele cannot be considered a joint venture with MAI, MAP, or MPI for this contract. 13 C.F.R. § 121.103(c)(1).

Accordingly, the Area Office concluded that Alutiiq-Mele is not affiliated with MAI, MAP, or MPI based on the information provided. The Area Office also found Alutiiq-Mele's average annual receipts for the past three years fall within the applicable size standard. Thus, the Area Office determined Alutiiq-Mele is an eligible small business for this procurement.

C. Appeal Petition

On September 28, 2010, Appellant filed the instant appeal claiming the Size Determination is conclusory and fails to address the issues raised in Appellant's protest.

Appellant first contends it argued in its protest that Alutiiq-Mele is affiliated with MAI based upon the joint venture relationship between the firms. 13 C.F.R. § 121.103(h). Appellant asserts it presented evidence that a joint venture relationship existed prior to the instant solicitation—namely that the firms shared an address and telephone number during which time Alutiiq-Mele was awarded four contracts—and such pre-existing affiliation disqualified Alutiiq-Mele from eligibility for this procurement. Appellant claims the Area Office failed to address its argument regarding prior affiliation and erred by focusing on whether the firms are affiliated for this procurement.

Appellant argues the fact that Alutiiq-Mele changed its address does not preclude a finding of affiliation based upon a joint venture relationship. Instead, Appellant contends, if the previous joint ventures between Alutiiq-Mele and MAI earned any revenue in the past three years, such receipts must be aggregated with Alutiiq-Mele's own receipts for size purposes. Appellant also claims any joint ventures formed by these firms cannot be considered ANC's because management and control of a joint venture lies within the joint venture itself, and a joint venture comprised of an ANC and a non-ANC is not controlled by the ANC. Hence, affiliation between the joint venture and an ANC is not exempt from a finding of affiliation under 13 C.F.R. § 121.103(b)(2)(ii). Moreover, contends Appellant, affiliation between an ANC and a non-ANC "should extend to all of the ANC companies that operate under the Parent ANC Company, Alutiiq LLC." (Appeal Petition 3.) In this vein, Appellant explains it provided evidence that MAI lists Alutiiq Management Services, LLC (AMS), another entity owned by Alutiiq, LLC, as a teaming partner on MAI's website. Appellant concludes its evidence is sufficient to show that Alutiiq-Mele is not a small business for this procurement.

C. Alutiiq-Mele's Response and Motion to Dismiss

Alutiiq-Mele first moves to dismiss the appeal because it construes the appeal to allege a violation of the ostensible subcontractor rule set forth at 13 C.F.R. § 121.103(h)(4). Alutiiq-Mele contends the appeal must be dismissed because OHA lacks jurisdiction to hear appeals alleging contract-specific violations, such as a violation of the ostensible subcontractor rule, relating to procurements that have already been awarded. 13 C.F.R. § 121.1101(b).

In the alternative, Alutiiq-Mele claims the appeal should be denied. First, Alutiiq-Mele asserts the totality of the circumstances do not demonstrate that it is engaged in a joint venture with MAI. Alutiiq-Mele contends one shared address is insufficient to prove the existence of a joint venture between the firms, especially when Alutiiq-Mele vacated that address in July, 2007, and when Alutiiq-Mele is wholly owned by Alutiiq, LLC. Alutiiq-Mele emphasizes that Appellant presented no other evidence of a joint venture relationship between it and MAI.

Second, Alutiiq-Mele explains that MAI was Alutiiq-Mele's mentor pursuant to an SBA-approved 8(a) BD program mentor-protégé agreement. Alutiiq-Mele asserts it was as part of this agreement that MAI offered office space to Alutiiq-Mele and highlights that affiliation cannot be found on the basis of assistance rendered pursuant to a mentor-protégé agreement. 13 C.F.R. § 124.520(d)(4). Alutiiq-Mele again concludes the totality of circumstances is not indicative of either a joint venture relationship or general affiliation between it and MAI.

Finally, Alutiiq-Mele expresses that the Area Office reviewed its financial statements for the past three years and concluded that its average annual receipts fall below the applicable \$35.5 million size standard. Thus, Alutiiq-Mele concludes the Area Office made no clear error of fact or law in determining that Alutiiq-Mele is an eligible small business for this procurement. Accordingly, Alutiiq-Mele requests that OHA deny the appeal because Appellant failed to identify any clear error of fact or law in the Size Determination.

III. Discussion

A. Standard of Review

The standard of review for this appeal is whether the Area Office based the 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 a firm's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the evidence before it. Consequently, I may not disturb the Area Office's Size Determination unless I have a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. Analysis

Firms are considered affiliates when one has the power to control the other or when a third party has the power to control both. 13 C.F.R. § 121.103(a)(1). Appellant is correct in asserting that the Area Office must consider the totality of the circumstances when analyzing issues of affiliation. 13 C.F.R. § 121.103(a)(5). Nevertheless, control is always the principal question when addressing affiliation.

Appellant's primary contention is that Alutiiq-Mele is affiliated with MAI based upon the affiliation regulations applicable to joint ventures. Specifically, Appellant refers to 13 C.F.R. § 121.103(h), which defines a joint venture as an association of firms that combine their efforts for joint profits on a limited basis. The regulation also provides that joint ventures may not submit more than three offers over a two year period. *Id.* Although Appellant's argument is far from cogent, it appears Appellant claims that because Alutiiq-Mele shared an address and telephone number with MAI, and because Alutiiq-Mele was awarded four contracts during that time, Alutiiq-Mele and MAI were operating one or more joint ventures and are thus affiliated. It is unclear whether Appellant argues that Alutiiq-Mele is affiliated with MAI generally or on a contract-specific basis.

The appeal can be construed to argue that the firms are affiliated generally because Appellant indicates Alutiiq-Mele is ineligible for this procurement due to its preexisting affiliation with MAI. Given Appellant's criticism of the Area Office (Appellant asserts the Area Office "missed the mark by focusing on whether or not an affiliation arose of the present solicitation"), I believe this is the most reasonable interpretation of the appeal petition.¹ The

¹ Because I interpret the appeal to allege general affiliation, rather than contract-specific affiliation, Alutiiq-Mele's Motion to Dismiss is DENIED.

critical problem with this argument is that there is no evidence that any joint venture ever existed between Alutiiq-Mele and MAI. Appellant presents no evidence that the firms have worked together to obtain contracts. The fact that Alutiiq-Mele was awarded four contracts during the time when it shared an address with MAI does not demonstrate a joint venture between the firms. Appellant seems to suggest that Alutiiq-Mele and MAI pursued those contract opportunities together, thus violating the rule that joint ventures may not submit more than three offers over a two year period, but presents no evidence to support such an allegation. There are no teaming agreements, subcontract agreements, or any other evidence that Alutiiq-Mele and MAI have ever formed a joint venture. Instead, Appellant offers only unfounded speculation in arguing that Alutiiq-Mele have engaged in one or more joint ventures.

In fact, even if Alutiiq-Mele and MAI still shared an address, that would not be evidence that the firms have engaged in a joint venture. A common address may be indicative of affiliation between the firms generally based upon the totality of the circumstances, 13 C.F.R. § 121.103(a)(2), but it is not indicative of the firms combining their efforts for joint profit. Thus, the common address is actually irrelevant to the issues Appellant raises—whether Alutiiq-Mele and MAI formed one or more joint ventures and whether the firms are affiliated generally on that basis. Moreover, if Appellant argues Alutiiq-Mele and MAI should be affiliated generally based upon the totality of the circumstances, the common address between Alutiiq-Mele and MAI is insufficient to prove affiliation on its own, especially in light of Alutiiq-Mele’s explanation (and supporting documentation) that it has not shared an address with MAI since 2007 and that MAI was Alutiiq-Mele’s mentor in the 8(a) BD mentor-protégé program at that time.

Most importantly, Appellant presents no evidence that MAI can control Alutiiq-Mele or vice versa. Alutiiq, LLC owns 100% of Alutiiq-Mele, and MAI holds no ownership interest in the firm. Appellant seems to argue that because Alutiiq-Mele and MAI shared an address at one time, they are affiliated for all purposes for the life of each firm’s existence. This is incorrect. As stated, although a common address can be indicative of affiliation, it is not conclusive evidence thereof, nor does potential past affiliation necessarily result in present affiliation. Accordingly, I find there is insufficient evidence to conclude that Alutiiq-Mele, and MAI are generally affiliated.

The second possible interpretation of the appeal, as Alutiiq-Mele points out in its response, is that Appellant argues Alutiiq-Mele is affiliated with MAI for this contract. Affiliation based upon a joint venture relationship is usually a contract-specific issue. Firms that joint venture on a procurement are generally affiliated for purposes of that procurement. 13 C.F.R. § 121.103(h)(2). An ostensible subcontractor is considered a joint venture partner and affiliated with the prime contractor for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). Here, Appellant argues Alutiiq-Mele and MAI are joint venture partners and states that MAI is Alutiiq-Mele’s “ostensible team member.” Thus, although Appellant finds fault with the Area Office for focusing on the procurement at issue, it is the form of Appellant’s arguments that precipitated such a focus. In any case, as explained above, there is no evidence of any past or present joint venture relationship between Alutiiq-Mele and MAI. Appellant has presented no evidence that Alutiiq-Mele and MAI have worked together to submit an offer on the instant procurement or that the firms would perform the contract together. Thus, there is no contract-specific affiliation between Alutiiq-Mele and MAI based upon a joint venture between

the firms.

One other possible interpretation of the appeal (taken in conjunction with Appellant's protest) is that Appellant intended to argue that Alutiiq-Mele is itself a joint venture between Alutiiq, LLC and MAI. Again, however, this argument lacks merit. Alutiiq, LLC owns 100% of Alutiiq-Mele. Thus, Alutiiq-Mele is a wholly owned subsidiary, not a joint venture. Alutiiq, LLC absolutely and entirely controls Alutiiq-Mele, and MAI has no control over Alutiiq-Mele.

Given my finding that there is no joint venture between any of the firms at issue here under any interpretation of the appeal petition, I need not address Appellant's argument that a joint venture between an ANC and a non-ANC is not exempt from affiliation.

Based on the information before it, the Area Office made no clear error of fact or law in determining that Alutiiq-Mele is not affiliated with MAI or any of the other alleged affiliates listed in Appellant's protest. Accordingly, because Alutiiq-Mele's average annual receipts fall within the applicable size standard, Alutiiq-Mele is an eligible small business for the instant procurement.

IV. Conclusion

Appellant failed to meet its burden to prove that the Area Office committed clear errors based upon the record before it. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge