

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

SIZE APPEAL OF:

Innovative Resources,

Appellant,

RE: Unity Contractor Services, Inc.

Appealed From

Size Determination No. 5-2011-041

SBA No. SIZ-5238

Decided: June 1, 2011

APPEARANCES

Yolanda Lewis, for Appellant

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the protested concern is affiliated with its various joint venture partners.

III. Background

A. Solicitation and Protest

On October 27, 2010, the U.S. Department of the Air Force, Air Force Space Command, Patrick AFB, Florida, issued Solicitation No. FA2521-10-R-0029 for Grounds Maintenance Services. The contract is set aside for the 8(a) Business Development (BD) program and the designated North American Industry Classification System (NAICS) code is 561730, Landscaping Services, with a corresponding \$7 million annual receipts size standard. Initial offers were due on November 23, 2010.

On February 28, 2011, the Contracting Officer (CO) gave notice that Unity Contractor Services, Inc. (Unity) was the apparent successful offeror.

On March 7, 2011, Innovative Resources (Appellant), filed a timely size protest alleging

that Unity was not an eligible small business. Appellant alleged Unity was affiliated with Superior Landscaping Company, Inc. (Superior), Unity Building Services, LLC (UBS), KPE Development, LLC and UNS Contracting Services, LLC (UNS), based upon statements on Unity's website. Appellant noted Unity stated it was participating in UNS, a joint venture with Superior. Appellant asserted that Unity has common ownership and common management with several other companies, which share the same address, officer (Patrick Carter) or contact Director (LaSha Lenzy).

Appellant identified Carter & Juarez Contracting, LLC, UBS, UNS Contracting Services, LLC, and Unity/Journeyman Construction as Unity's affiliates. Journeyman is a large business. Appellant also states that Liquidlux, LLC (Liquidlux) is a concern located in Houston, Texas (all other addresses connected with Unity are in Austin, Texas) with Patrick Carter and Philip James Shields listed as officers, and National Registered Agents, Inc. (NRA), as its agent.

The CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting - Area V (Area Office). On March 11, 2011, the Area Office informed Unity of the protest, and requested it to submit its response to the protest allegations, together with a completed SBA Form 355, and certain other information. On March 15, 2011, Unity responded to the protest.

B. The Size Determination

On March 31, 2011, the Area Office issued Size Determination No. 5-2011-041 (Size Determination) concluding Unity is an eligible small business.¹ The Area Office found that Unity had submitted its initial offer, including price, on November 22, 2010, and thus Unity's size would be determined as of that date.

Unity was incorporated January 24, 2007. Patrick Carter is Unity's sole shareholder, president and director. Mr. Carter does not own stock and does not participate as an officer or director in any concern other than Unity. Unity maintains it has no affiliates. While Unity described some concerns as affiliates on its website, this was an error by the individual who maintained the website. The Area Office made the following findings on Unity's alleged affiliates, based upon the information provided in Unity's response to the protest.

Unity had a Mentor-Protégé Agreement with Superior, which SBA approved on August 19, 2009. UNS was a joint venture under this agreement, approved by SBA on September 23, 2009.² UNS was formed to bid on two specific solicitations. UNS received only one contract for \$21,000. Unity terminated this joint venture on March 14, 2011.

¹ The Size Determination's date is typed as March 11, 2011, and changed by pen and ink to March 31, 2011. As the pen and ink date is consistent with the dates of the notice of the protest, the response, and the date Appellant received the Size Determination, I conclude that the date of the Size Determination is March 31st. Appellant's attempts to argue that the Size Determination is dated March 11, 2011 are meritless.

² UNS was also known as UNS Contracting and UNS Joint Venture.

UBS was a joint venture formed between Unity and KPE Development, LLC. SBA approved this joint venture on September 23, 2009. The purpose of the joint venture was to bid on two specific solicitations, neither of which it received. UBS had no revenue, and was terminated on March 14, 2011.

Unity formed a joint venture with Journeyman Construction titled Unity/Journeyman Construction. This joint venture received no work, had no receivables, and was terminated on March 14, 2011.

Unity formed Carter & Juarez Contracting as a joint venture with ABECO Contracting (aka Juarez Contracting). Unity maintained that the companies decided not to proceed. Carter & Juarez has never submitted any offers and has never generated any revenue. The joint venture is inactive.

Unity gave the name Allied Tree Specialists to one of its departments. It was never an independent concern. As to Liquidlux, LLC, Unity has no connection with or knowledge of this company, Mr. Shields or NRA, and speculated that another Patrick Carter was involved with the firm.

The Area Office found credible Unity's responses as to the factual questions at issue in the protest. The Area Office found that Unity is not generally affiliated with any of its joint venture partners. The Area Office further found that Unity was affiliated with its joint venture partners only for those procurements on which those joint ventures had bid. Only one of these joint ventures, UNS, resulted in a contract that produced revenue. The Area Office held that Unity must include its proportionate share of that revenue in its annual receipts. As to the other joint ventures, they produced no revenue to add to Unity's annual receipts. The Area Office then reviewed Unity's Federal Income Tax returns to compute its annual receipts, and concluded Unity's receipts were within the applicable size standard, and that Unity was an eligible small business.

C. The Appeal

On April 1, 2011, Appellant received the Size Determination. On April 15, 2011, Appellant filed the instant appeal.

Appellant argues the Area Office failed to state the legal and regulatory basis for its conclusions. Appellant further argues that the Area Office erred in finding that Unity's March 14th dissolution of its joint ventures affected its affiliation with these concerns, because Unity's size must be determined as of November 22, 2010. Appellant argues that the existence of the joint ventures as of the date size is determined establishes that the Area Office's finding that Mr. Carter owns no stock nor is an officer or director in any other company is clear error. Appellant argues that the joint ventures should have been included in determining Unity's size.

Appellant further argues the Area Office's acceptance of Unity's explanation for the use of the term "affiliate" on its website permits Unity to redefine the term affiliate. Appellant further argues the Area Office failed to establish any legal basis for a finding Unity's Mentor-

Protégé relationship with Superior exempt from affiliation. Appellant further argues that Unity is affiliated with its other joint venture partners, KPE, Journeyman, and ABECO, because it had established new companies (the joint ventures) with them. Appellant argues that the Area Office should have included in its calculations of Unity's size the receipts of each joint venture partner.

Finally, Appellant argues that Unity could not be performing on the instant procurement by itself, and assigns error to the Area Office's failure to investigate this issue.

Unity did not respond to the appeal.

IV. Discussion

A. Threshold Matters

Appellant filed its appeal within 15 days of receiving the Size Determination and, thus, the appeal is timely. 13 C.F.R. § 134.304(a).

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. OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the record 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. The Merits

Under SBA's regulations, concerns are affiliated when one controls, or has the power to control the other or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). Control may arise from common ownership (13 C.F.R. § 121.103(c)(1)) or common management (13 C.F.R. § 121.103(e)) or both.

Here, Unity had a Mentor-Protégé relationship with Superior. No determination of affiliation or control may be found between a protégé firm and its mentor based upon the Mentor-Protégé Agreement or assistance provided pursuant to it. 13 C.F.R. § 124.520(d)(4). Accordingly, the Area Office properly found that there was no affiliation between Unity and Superior based upon this Mentor-Protégé relationship.

The Area Office's finding that Mr. Carter owned no stock in and did not participate as an officer in any other company is correct, excluding the joint ventures formed. It is Unity itself that is the participant in these ventures, not Mr. Carter as an individual. Further, regardless of whether the description of the other firms as “affiliates” on Unity's website was mistaken or not, it is not the challenged concern's characterization of other concerns' status that determines their status as affiliates, but rather the objective nature of the relationship between the concerns.

Appellant is correct that Unity's size must be determined as of November 22, 2010, the day of Unity's submission of its initial offer, including price. 13 C.F.R. § 121.404(a). Unity's

March 11th dissolution of the joint ventures had no effect on its size for this size determination. The Area Office did not fail to determine Unity's size as of November 22nd. While the Area Office noted the dissolution of Unity's joint ventures on March 11th, the Area Office did not fail to include these joint ventures when calculating Appellant's annual receipts. Unity's proportionate share of the receipts from its joint ventures must be included in determining its size. 13 C.F.R. § 121.103(h)(5). However, because all of Unity's joint ventures produced only one small contract, their addition to Unity's annual receipts is negligible. Therefore, that Area Office did not err in computing Unity's annual receipts by excluding its share of receipts from its joint ventures. Rather, the small amount of those receipts had only minor impact in determining Unity's overall annual receipts.

Appellant's main contention is that Unity should be found affiliated with all of its joint venture partners, and thus other than small. However, this theory is without support. The size regulations address the nature of a joint venture.

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 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.

13 C.F.R. § 121.103(h) (emphasis added).

Simply put, a joint venture is a combining of two or more concerns for a limited purpose, that of conducting certain specific business ventures. Involvement in a joint venture does not give one concern control of the operations of its joint venture partner. Therefore, being engaged in a joint venture with another concern does not render a concern affiliated with its joint venture partner. The exception to this rule is that if one concern enters into a number of joint ventures with another concern, it eventually may be found to be affiliated due to being economically dependent through contractual relations with the other concerns. 13 C.F.R. § 121.103(f). However, Unity cannot be considered economically dependent upon any of its joint venture partners, because these ventures have produced only one small contract.

It is true that in computing a concern's size its proportionate share of joint venture receipts must be included (13 C.F.R. § 121.103(h)(5)), but the Area Office did include those receipts here. It is also true that joint venturers on a particular procurement are affiliated with each other with regard to the performance of that contract. 13 C.F.R. § 121.103(h)(2). However, Appellant does not assert Unity is affiliated with its joint venture partners on any particular contract, but that Unity is affiliated with them generally. This position is unsupported by the regulation, and the Area Office properly rejected it.

Finally, Appellant raises the issue of how Unity could qualify for the instant procurement, and asserts that it could only have done so by partnering with another concern. In other words, Appellant raises an ostensible subcontractor issue, arguing that Unity must be unusually reliant upon, and thus affiliated with, its subcontractor on the instant procurement. 13

C.F.R. § 121.103(h)(4). However, Appellant failed to raise this issue in its protest. The record reflects that the Area Office decided not to address this issue in the Size Determination because Appellant had not raised it in the protest. I cannot address an issue which is raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Emergency Pest Control, Inc.*, SBA No. SIZ-5129 (2010). Accordingly, I may not consider the ostensible subcontractor issue here.

Appellant's arguments are without merit. Appellant attempts to argue that Unity is generally affiliated with its joint venture partners, a position that is contrary to the regulation. Appellant also argues that the determination of Unity's size must include its share of the joint venture receipts, but the Area Office performed this calculation. Finally, Appellant attempts to impermissibly raise a new issue on appeal. Appellant has failed to meet its burden of establishing clear error in the Size Determination, and I must deny the appeal.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

CHRISTOPHER HOLLEMAN
Administrative Judge