United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Trident[3], LLC, Appellant, Appealed From Size Determination Nos. 3-2011-125, -133	SBA No. SIZ-5315 Decided: January 24, 2012

APPEARANCES

Allen Perkins, Esq., A. Perkins Law Firm LLC, Birmingham, Alabama, for Appellant

Kenneth A. Martin, Esq., The Martin Law Firm PLLC, McLean, Virginia, for Pacific Weather, Inc.

Jonathan T. Williams, Esq., Steven J. Koprince, Esq., and Peter B. Ford, Esq., Piliero Mazza PLLC, Washington, D.C., for Atmospheric Technology Services Company, LLC

DECISION[1]

I. Introduction and Jurisdiction

On October 14, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued a size determination in case numbers 3-2011-125 and 3-2011-133 finding that Trident[3], LLC (Appellant), a joint venture, is other than small for the subject procurement. Appellant contends that the size determination contains various errors of fact and law. For the reasons discussed below, the appeal is granted, and the size determination is reversed.

SBA's Office of Hearings and Appeals (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.

[1] This decision was initially issued on January 13, 2012, under a protective order to prevent the disclosure of confidential or proprietary information. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered those requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On May 24, 2011, the U.S. Department of the Navy, Naval Supply Systems Command, Fleet and Industrial Supply Center in Norfolk, Virginia (Navy) issued Solicitation No. N00189-11-R-0027 (RFP) seeking weather observation and forecasting services. The contracting officer (CO) set aside the procurement for participants in SBA's 8(a) Business Development (BD) program and designated North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific, and Technical Services, with a corresponding size standard of $7 million in average annual receipts. Appellant submitted its proposal on June 30, 2011, self-certifying as a small business.

On August 30, 2011, the CO notified offerors that the contract had been awarded to Appellant. On September 7, 2011, Atmospheric Technology Services Company (ATSC), a disappointed offer, filed a protest challenging Appellant's size. ATSC's primary claim was that the relationship between Appellant's members, Trident Technologies, LLC (Trident Tech) and 3D Research Corporation (3D Research) renders Appellant ineligible for the instant contract. ATSC also alleged that Appellant is affiliated with [Alleged Affiliate 1], [Alleged Affiliate 2], and [Alleged Affiliate 3].

On September 9, 2011, the CO notified offerors that "[b]ased on information discovered during the debriefing process, the [Navy] has decided to re-evaluate the proposals that were received in response to [the RFP] and issue a new award decision. The existing contract has not been terminated, pending the outcome of the re-evaluation." Letter from Jordan T. Dorsey, Contracting Officer, U.S. Department of the Navy, to Suzanne Arroyo, President & CEO, Trident Technologies, LLC (Sept. 9, 2011).

On September 13, 2011, SBA's Alabama District Office issued a one-page letter approving Appellant's joint venture agreement.[2] The District Office voiced no concerns about the substance or timeliness of the agreement, and stated that the agreement "has been found legally sufficient and has been approved by the Alabama District Office." Letter from Teresa Wilson, Business Development Specialist, U.S. Small Business Administration, to Suzanne Arroyo, President & CEO, Trident Technologies, LLC (Sept. 13, 2011).

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[2] The joint venture agreement forming Appellant was originally approved by the District Office on June 1, 2011, with regard to a U.S. Army solicitation for technical support services for post-deployment software support (Solicitation No. W900KK-11-R-0001). However, to be awarded a contract for the subject RFP, Trident Tech and 3D Research were required to prepare an addendum to the joint venture agreement reflecting the requirements of this particular acquisition. 13 C.F.R. § 124.513(e)(2). For simplicity, this decision refers to the addendum as the "joint venture agreement."

On September 19, 2011, the Navy completed its reevaluation of proposals and confirmed the award to Appellant. On September 23, 2011, Pacific Weather, Inc. (Pacific Weather), another disappointed offeror, filed a protest challenging Appellant's size.[3] Like ATSC, Pacific Weather contended that Appellant is an ineligible joint venture.

B. Size Determination

On October 14, 2011, the Area Office issued its size determination. The Area Office explained that Trident Tech, an information-technology (IT) services company, participates in the SBA 8(a) BD program, and 3D Research serves as Trident Tech's mentor under an SBA-approved mentor-protégé agreement. Appellant is a joint venture between Trident Tech and 3D Research. The joint venture agreement provides that Trident Tech is the managing partner and will employ the program manager for the procurement at issue. The agreement also indicates that Trident Tech will receive 51% of the joint venture's profits, and 3D Research will receive 49%.

The Area Office next explained that an 8(a) BD program participant may joint venture with another firm to obtain an 8(a) BD set-aside contract where the 8(a) BD participant lacks the capacity to perform the contract, and the joint venture agreement is fair and beneficial to the 8(a) BD participant. However, the SBA will not approve a joint venture agreement where it determines that the 8(a) BD participant brings little more to the venture than its 8(a) status. 13 C.F.R. § 124.513(a)(2). The Area Office found, based upon the joint venture agreement, that Trident Tech has little experience in weather services and no experience in training weather observers. The Area Office determined that 3D Research will assist Trident Tech in developing these capacities, will prepare Trident Tech to pursue weather-related data engineering contracts, and has invested significant resources in teaching Trident Tech weather services. The Area Office concluded that Trident Tech is bringing very little expertise and resources to the joint venture and, therefore, Appellant is not in compliance with 13 C.F.R. § 124.513(a)(2).

The Area Office also determined Appellant is not in compliance with 13 C.F.R. § 124.513(c), which requires that the 8(a) BD participant be the managing member of the joint venture and that the 8(a) BD participant designate one of its own employees as the project manager. The Area Office recognized that Trident Tech is Appellant's managing member, and the project manager is Trident Tech's employee. However, the project manager's resume indicates that he has over twenty-seven years experience in IT services and no experience in weather observation or forecasting, so the Area Office concluded Appellant operates in violation of 13 C.F.R. § 124.513(c).

Finally, the Area Office explained that whereas Appellant submitted its proposal in response to the RFP on June 30, 2011, Appellant was not formed (relative to the instant RFP) until July 29, 2011. Additionally, although the contract was awarded on August 30, 2011, the joint venture agreement was not approved by SBA's Alabama District Office until September 13,

[3] By letter dated September 27, 2011, the CO forwarded Pacific Weather's protest to the Area Office, adopted the protest as his own, and requested that it be considered timely in accordance with Federal Acquisition Regulation (FAR) 19.302(d)(2) and 13 C.F.R. § 121.1004(b).

2011. Consequently, the Area Office determined the affiliation exemption set forth at 13 C.F.R. § 121.103(h)(3)(iii) does not apply to Appellant, and Trident Tech is affiliated with 3D Research. The Area Office explained that even though the SBA District Office did ultimately approve the joint venture agreement, the Area Office was still required to analyze the agreement for compliance with 13 C.F.R. § 124.513 to determine whether the affiliation exception applies. *Size Appeal of Lance Bailey & Assocs.*, SBA No. SIZ-4788 (2006). Because the Area Office found that the joint venture agreement does not comply with those provisions, the affiliation exception does not apply. Upon aggregating the average annual receipts of Trident Tech and 3D Research, the Area Office concluded that Appellant is other than small for the procurement at issue.

At the outset of the size determination, the Area Office noted that the ATSC protest alleged that Trident Tech is affiliated with "several firms," including [Alleged Affiliate 1]. (Size Determination 1.) The Area Office also indicated that the Pacific Weather protest alleged affiliation with [Alleged Affiliate 1]. In response to the [Alleged Affiliate 1] allegations, the Area Office explained: "Trident Tech has been admitted to the [Alleged Affiliate 1] mentor-protégé program, but that program is sponsored through [Alleged Affiliate 1] and not connected to SBA. Therefore, Trident Tech does not have more than one SBA approved Mentor-Protégé agreement." (Size Determination 4.)

C. Appeal Petition

On October 25, 2011, Appellant filed its appeal petition. Appellant first details the alleged errors of fact in the size determination. Appellant contends the Area Office erroneously concluded that its program manager was not qualified. Appellant points out that the RFP required the program manager to have at least four years of experience managing federal contracts, previous experience managing contracts valued over $500,000 or managing twenty or more employees, and previous experience managing a contract that requires work to be performed in multiple states or foreign locations. (RFP 122.) Appellant asserts that its program manager, an employee of Trident Tech at the time the proposal was submitted, meets those requirements. Appellant argues the program manager was not required to have weather experience, and the Area Office erred in imposing such a requirement.

Appellant also asserts that, contrary to the Area Office's conclusion, Trident Tech does bring relevant and substantial weather experience to the joint venture. Appellant explains that Trident Tech is providing the program manager and deputy program manager, two of the three employees identified as critical personnel in the RFP. 3D Research is providing the third key employee, the quality manager. Appellant maintains that the key personnel staffing for the contract demonstrates that Trident Tech is not reliant on 3D Research. Appellant also argues that the provision of employees by a mentor firm to a joint venture undertaken with its protégé firm is an acceptable type of assistance contemplated by the 8(a) BD program. *See Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010). Appellant claims the Area Office improperly focused on the fact that Trident Tech lacks the capability to perform some of the RFP requirements and failed to recognize that Trident Tech will perform 64% of the work, including management and control of the project by its own employees. Additionally, Appellant explains that although it offered employment to the incumbent employees, as contemplated by Executive

Order No. 13,495,[4] Trident Tech created a database of resumes of more than 100 qualified weather observers and forecasters so that it would be prepared to supply non-key personnel if necessary. Appellant argues that some assistance from the mentor firm is clearly permitted by 13 C.F.R. § 124.513, and Trident Tech is bringing sufficient resources to the joint venture to satisfy the relevant statutory requirements.

Appellant asserts that Trident Tech will also bring significant experience to the joint venture. Appellant explains that both Trident Tech and 3D Research have made investments in developing Trident Tech's weather expertise and skills. Additionally, Appellant explains that Trident Tech's IT and quality control experience will result in significant cost savings to the Government. "Weather services, just like any other services profession, are clearly amenable to and will substantially benefit from [Trident Tech's] experience and 100% of the cost savings in [Appellant's] proposal were directly tied to [Trident Tech's] contribution in the ... joint venture." (Appeal Petition 5.) In support of its arguments, Appellant sets forth in detail several examples of Trident Tech's efforts, with substantial assistance from 3D Research, to develop its weather skills. Appellant explains that, among other things, Trident Tech has, under 3D's supervision, created a weather-specific quality control plan, created software to automate the weather quality control data and reporting process, and made presentations to weather companies and Government weather managers in order to broaden its understanding of the industry.[5] Appellant concludes that these efforts have resulted in a viable and experienced joint venture ready to perform the Navy RFP, and the Area Office erred in determining that Trident Tech was bringing too little experience to the joint venture.

The final factual error alleged by Appellant is that the Area Office omitted relevant facts. Specifically, Appellant explains that although the contract was initially awarded on August 30, 2011, the Navy subsequently suspended that award and reevaluated the proposals it received in response to the RFP. Appellant, as a joint venture, was approved by the SBA District Office on September 13, 2011. The Navy completed its reevaluation and affirmed its award to Appellant on September 19, 2011. Appellant thus argues the Area Office erred when it claimed that the joint venture was not approved prior to contract award.

Appellant next alleges that the Area Office committed numerous legal errors in addition to the factual errors outlined above. Appellant contends the Area Office erroneously relied upon the protestors' unsupported allegations instead of properly weighing the specific factual evidence Appellant presented. Appellant claims its signed rebuttal evidence should have been entitled to

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[4] Exec. Order No. 13,495, "Nondisplacement of Qualified Workers Under Service Contracts," 74 Fed. Reg. 6103 (Feb. 4, 2009).

[5] With its appeal petition, Appellant filed a Motion to Admit New Evidence seeking to admit these explanations and evidence thereof into the record. Pacific Weather opposes Appellant's request. Because Appellant only seeks to respond specifically to the allegations in the size determination, and because Appellant's new evidence does not enlarge the issues on appeal, I find there is good cause to admit the evidence. 13 C.F.R. § 134.308(a)(2); *see generally Size Appeal of Nat'l Sourcing, Inc.*, SBA No. SIZ-5305, at 8-9 (2011). Appellant's motion is thus GRANTED, and the evidence submitted with the appeal petition is ADMITTED to the record.

greater weight than the protestors' allegations pursuant to 13 C.F.R. § 121.1009(d).

Appellant also claims the Area Office failed to properly apply the rules of the 8(a) BD mentor-protégé program because it relied solely upon language in the joint venture agreement to conclude that Trident Tech would rely upon 3D Research to perform the contract. Appellant argues that "[r]eliance on the mentor is the sine qua non of the mentor-protégé program," and as long as Trident Tech is performing 40% of the contract work, 3D Research may assist Trident Tech in performance of the contract under 13 C.F.R. § 124.513. (Appeal Petition 9.)

Appellant reiterates that the Area Office failed to consider Trident Tech's contributions to the joint venture. Appellant points out that SBA's size regulations define a joint venture as an association of firms with interests "in any degree or proportion" that combine their "efforts, property, money, skill, or knowledge." 13 C.F.R. § 121.103(h). Appellant argues, based on this definition, that the Area Office's decision was arbitrary and not based on the facts of this case. Appellant also asserts that the statements in the joint venture agreement explaining how Trident Tech needs assistance from 3D research were required by law and do not support the Area Office's conclusion that Trident Tech brings little to the joint venture.

Finally, Appellant alleges the Area Office failed to properly apply SBA Standard Operating Procedures. Appellant asserts that it submitted its joint venture agreement to the SBA District Office on July 29, 2011, more than twenty business days before the initial August 30, 2011, award date, as required by SBA Standard Operating Procedure (SOP). SOP 80 05 3A ch. 8 ¶ 8(a), *available at* http://www.sba.gov/sites/default/files/serv sops sop80053a.pdf. Appellant claims it also orally alerted the District Office on August 22, 2011, that award was imminent. Appellant argues "[i]t is a miscarriage of justice when the failure of the District Office to timely process the approval of the ... joint venture [agreement] within the guidelines published to [Appellant] now becomes the Area Office's basis for a finding of [Appellant] as other than small." (Appeal Petition 10.) Appellant emphasizes that the District Office did ultimately approve the joint venture. Appellant requests that OHA reverse the size determination.

D. ATSC's Response

On November 14, 2011, ATSC filed its response to the appeal petition. ATSC's first argument is that Appellant was ineligible for award because the District Office had not approved the joint venture agreement prior to award, as required by SBA regulations. 13 C.F.R. § 124.513(e)(2); SOP 80 05 3A ch. 8 ¶ 8(d). ATSC contends the language of the regulation is mandatory, so neither the Area Office nor OHA may relax the requirement, and the reason why the joint venture was not approved before the award date is irrelevant. ATSC challenges Appellant's contention that the contract was not awarded until September 19, 2011. According to ATSC, when the Navy undertook its reevaluation, the Navy specifically indicated that it was not terminating Appellant's contract, awarded on August 30. Thus, ATSC explains that the Navy did not make a new award to Appellant on September 19, because no award was necessary; the Navy merely affirmed the award it had already made. ATSC also claims OHA has rejected a similar argument before. *See Size Appeal of SDS Int'l*, SBA No. SIZ-4541 (2003). ATSC concludes that Appellant was not eligible for the contract, and because Appellant failed to comply with 13 C.F.R. § 124.513(e)(2), Appellant is also other than small, as it is ineligible for the affiliation

exception set forth at 13 C.F.R. § 121.103(h)(3)(iii).

ATSC next argues that the District Office should not have approved the joint venture agreement. ATSC first explains the similarities between this case and the *Lance Bailey* cases. *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA No. SIZ-4788 (2006) (*Lance Bailey I*), *recons. denied*, SBA No. SIZ-4799 (2006) (PFR) (*Lance Bailey II*). Under these precedents and 13 C.F.R. § 124.513(c)(2), ATSC contends Appellant was required to name a specific employee of Trident Tech as project manager as of the date of its proposal. ATSC asserts that Appellant failed to comply with this requirement because the joint venture agreement only indicates that the program manager *will be* employed by Trident Tech upon award. ATSC argues that Appellant's post hoc explanation, offered for the first time in response to the size determination, that its project manager would be an existing Trident Tech employee is insufficient to meet the terms of13 C.F.R. § 124.513(c)(2). Appellant also asserts that even if the Trident Tech project manager had been identified in the joint venture agreement, he is not qualified to manage the contract because he has no experience in weather observation and forecasting, which are highly technical services. *See Size Appeal of B&M Constr., Inc.*, SBA No. SIZ-4805 (2006). Instead, the proposed project manager's expertise is in the IT industry. ATSC claims Appellant's failure to name its project manager in the joint venture agreement and the project manager's lack of relevant experience "render [] Trident Tech's management of the contract illusory." (Appeal Petition 10.)

ATSC also contends that the Area Office properly concluded that Trident Tech has no relevant experience and will contribute little to the joint venture. The joint venture agreement itself indicates that Trident Tech lacks the experience of 3D Research, especially with regard to weather services. ATSC points out that Appellant's proposal includes three past performance references for 3D Research, but none for Trident Tech. ATSC also challenges Appellant's evidence presented to the Area Office intended to demonstrate that Trident Tech has weather services experience. For instance, according to ATSC, Trident Tech's weather-related business development plan was only developed after the RFP was issued, "strongly suggesting that Trident Tech only became interested in such services after 3D Research had identified a valuable 8(a) contract opportunity." (Appeal Petition 10.) Additionally, a presentation submitted by Appellant appears to reflect only 3D Research's extensive weather experience, thereby suggesting that Trident Tech has no relevant capabilities. Moreover, ATSC asserts that, pursuant to the joint venture agreement, Trident Tech will not bring any other concrete resources to the joint venture, such as equipment, financing, or facilities. Nor did Trident Tech intend to provide any of its current employees to staff the contract, which ATSC contends indicates that Trident Tech is not bringing anything to the joint venture besides its status as an 8(a) BD program participant.

Finally, ATSC asserts that although the Area Office reached the correct result in this case, the Area Office did not investigate all of ATSC's protest allegations. ATSC requests that if OHA finds that the size determination is based on clear error, the matter be remanded to the Area Office for further consideration of those allegations. However, ATSC supports the size determination and urges OHA to deny the appeal.

E. Pacific Weather's Response

On November 14, 2011, Pacific Weather filed its response to the appeal petition. Like ATSC, Pacific Weather argues that Trident Tech has no experience performing weather services and brings very little to the joint venture. Pacific Weather emphasizes that Trident Tech is an IT services firm and disputes Appellant's argument that its management experience will be a substantial contribution to the contract. Instead, Pacific Weather contends that Trident Tech's IT experience does not carry over into other technical disciplines such as weather forecasting. Pacific Weather also highlights that the joint venture agreement itself demonstrates Trident Tech's lack of past performance experience, as opposed to 3D Research's wealth of expertise.

According to Pacific Weather, 3D Research brings all the relevant experience and capabilities necessary to perform the contract. Pacific Weather alleges that Appellant failed to employ a qualified program manager for the project. Pacific Weather also asserts that Appellant's arguments on appeal are nothing more than post hoc rationalization. Pacific Weather concludes that Appellant has failed to comply with the 8(a) BD program joint venture regulations, and the Area Office correctly concluded that Trident Tech is affiliated with 3D Research.

Pacific Weather also argues that Appellant's joint venture agreement was not approved before award and is not in compliance with 13 C.F.R. § 124.513. Pacific Weather claims August 30, 2011, was the only award date, and Appellant cannot overcome that fact. Based upon its analysis, Pacific Weather urges OHA to deny the appeal.

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 size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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. Analysis

Generally, two firms that form a joint venture to perform a contract will be considered affiliates for purposes of that contract. 13 C.F.R. § 121.103(h); *see also Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 26 (2010) ("A finding of affiliation based upon § 121.103(h) is usually contract-specific."); *Size Appeal of Med. and Occupational Servs. Alliance*, SBA No. SIZ-4989, at 4 (2008) ("The general rule is that firms submitting offers on a particular procurement as joint venturers are affiliates with regard to that contract, and they will be aggregated for the purpose of determining size for that procurement."). However, the regulations recognize several exceptions to the general rule. One such exception is afforded to joint ventures formed by 8(a) BD program mentor and protégé firms:

> Two firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.519 of these regulations. If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513. If the procurement is to be awarded other than through the 8(a) BD program (*e.g.*, small business set aside, HUBZone set aside), SBA need not approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§ 124.513(c) and (d) will apply. This means that the joint venture must meet the requirements of §§ 124.513(c) and (d) in order to receive the exception to affiliation authorized by this paragraph. In either case, after contract performance is complete, the 8(a) partner to the joint venture must submit a report to its servicing SBA district office explaining how the applicable performance of work requirements were met for the contract.

13 C.F.R. § 121.103(h)(3)(iii).

Because the RFP at issue was set aside for 8(a) BD program participants, the particular language relevant to this case is: "If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513." *Id.* 13 C.F.R. § 124.513 governs the circumstances in which a joint venture may be awarded a contract set aside for 8(a) BD program participants. To be eligible for an 8(a) contract, a mentor-protégé joint venture must meet the requirements set forth at § 124.513 and must be approved in accordance with subsection (e):

> (1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.
> (2) Where a joint venture has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture provided an addendum to the joint venture agreement, setting forth the performance requirements on that second or third contract, is provided to and approved by SBA prior to contract award.
> (i) After approving the structure of the joint venture in connection with the first contract, SBA will review only the addendums relating to performance of work on successive contracts.
> (ii) SBA must approve the addendums prior to the award of any successive 8(a) contract to the joint venture.

13 C.F.R. § 124.513(e).

Applying these regulations, the Area Office found that that Trident Tech is affiliated with 3D Research because: (1) the joint venture agreement was not approved as of the date of contract award, and (2) the joint venture agreement does not otherwise meet the requirements of 13 C.F.R. § 124.513, notwithstanding approval by the SBA District Office. Upon examination of

the size determination, the relevant regulations and OHA case law, and the arguments of the parties, I find that both of the Area Office's conclusions were in error. Accordingly, this appeal is granted.

1. Joint Venture Approval Before Award

The Area Office determined that because the subject contract was awarded to Appellant on August 30, but Appellant's joint venture agreement was not approved by the District Office until September 13, Appellant is in violation of 13 C.F.R. § 124.513(e)(2). As a result, the Area Office determined that the mentor-protégé joint venture affiliation exemption does not apply to Appellant, and Trident Tech is affiliated with 3D Research for this procurement.

Appellant counters that the August 30 contract award to Appellant was suspended while the Navy reevaluated proposals, and the award was not finalized until September 19. Appellant thus contends it is in compliance with 13 C.F.R. § 124.513(e)(2) because the joint venture agreement was approved before the award became final. ATSC and Pacific Weather dispute Appellant's arguments and assert that the only award to Appellant occurred on August 30, that the CO specified that he was not terminating Appellant's contract during the reevaluation period, and that no new award was made on September 19; rather, the CO merely confirmed the prior August 30 award. ATSC and Pacific Weather maintain that because the joint venture agreement was not approved before August 30, Appellant cannot be in compliance with 13 C.F.R. § 124.513(e)(2).

I agree with Appellant. FAR 15.504 permits that a contract "award" may be made by executing the appropriate standard form, or by furnishing "other notice of award" to the successful offeror. Here, although the CO initially awarded the contract to Appellant on August 30, the CO then notified offerors on September 9 that "[b]ased on information discovered during the debriefing process, the [Navy] has decided to re-evaluate the proposals ... and issue a new award decision. The existing contract has not been terminated, pending the outcome of the reevaluation." This notice makes clear that the Navy was reopening the proposal evaluation process and reconsidering the award decision, such that any offeror could have been selected for award. Accordingly, the August 30 "award" to Appellant was not yet final, as it was essentially rescinded by the September 9 notice. The final award did not occur until September 19, when the Navy confirmed Appellant as the successful offeror. The fact that the Navy chose not to formally terminate Appellant's contract during the re-evaluation process is not significant. Performance of the contract had not begun, so the Navy merely left the empty shell of the contract in place while the re-evaluation proceeded. Had the Navy reached a different award decision, the agency could, and presumably would, have simply terminated Appellant's contract for convenience without any cost or obligation.[6]

[6] It is worth noting that, rather than leaving the August 30 contract in place, the Navy could instead have immediately terminated the contract for convenience and awarded Appellant an entirely new contract on September 19, thereby rendering this issue moot. The fact that the Navy chose not to do so (most likely for reasons of simplicity and expediency) should not prevent Appellant, an SBA-approved mentor-protégé joint venture at the time award was finalized, from receiving a contract.

Furthermore, it is significant that the District Office ultimately approved Appellant's joint venture agreement and did not find any problem with the timing of the approval. Had the District Office determined that the contract was improperly awarded to Appellant, SBA procedure would have called for the District Office to request termination of the award. SOP 80 05 3A ch. 8 ¶ 8(c) ("Failure to obtain SBA approval of the [joint venture agreement] prior to award of the contract will result in SBA's request that the buying activity terminate the award to the Joint Venture.").

In arguing that contract award occurred August 30, ATSC relies upon *Size Appeal of SDS Int'l*, SBA No. SIZ-4541 (2003). That decision, however, is readily distinguishable. In *SDS Int'l*, the procuring agency selected the challenged firm for award in August 2002. The protester filed an untimely size protest, which was dismissed, and the protester did not appeal the dismissal to OHA. Separately, the protester also filed a bid protest with the General Accounting Office (GAO- now the Government Accountability Office). In December 2002, GAO sustained the bid protest and recommended re-evaluation of proposals and other remedial measures. In January, 2003, the procuring agency confirmed the award to the challenged firm and authorized the challenged firm to begin performance. The protester then filed a second size protest, which again was dismissed as untimely. On appeal, OHA found that the second size protest was properly dismissed because the award had been made in August 2002, and the protester did not file a timely size protest at that time. OHA reasoned that the protester should not be permitted a second opportunity to protest size, given that the protester's first attempt was untimely and contract performance was already underway. Unlike the instant case, then, the agency in *SDS Int'l* did not terminate the contract or otherwise rescind the award. By contrast, as explained above, the Navy here did revoke its award decision through its September 9 notice. *SDS Int'l* is thus distinguishable because it did not consider whether a contract "award" remains in place after rescission by the procuring agency.

Based on the foregoing, I conclude that a contract cannot be considered awarded where source selection is ongoing and performance has not yet begun. Accordingly, the approval of Appellant's joint venture agreement was timely because it occurred before final award was made on September 19.

2. Area Office Review of Joint Venture Agreement

Having decided that there is no violation of 13 C.F.R. § 124.513(e)(2) here, I must now consider whether the Area Office erred in determining that Trident Tech and 3D Research failed to meet the other requirements of 13 C.F.R. § 124.513. I find the Area Office did err because the language of 13 C.F.R. § 121.103(h)(3)(iii) precludes the Area Office from reviewing the substance of a mentor-protégé joint venture agreement that has been approved by the SBA Office of Business Development (or a District Office acting thereunder). Such a review is outside the Area Office's jurisdiction, and creates the potential — as occurred here — that small businesses will receive conflicting determinations from different SBA offices.

As the Area Office, ATSC, and Pacific Weather point out, OHA has previously indicated that it is proper for the Area Office to evaluate an 8(a) BD program participant's joint venture agreement for compliance with § 124.513. In *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA

No. SIZ-4788 (2006) (*Lance Bailey I*), OHA determined that an area office was obligated to review an 8(a) BD program participant's joint venture agreement for compliance with § 124.513, and that the area office had erroneously concluded that "the District Office's approval meant it did not have to consider the issue." *Lance Bailey I*, SIZ-4788, at 10-11. *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA No. SIZ-4799 (2006) (PFR) (*Lance Bailey II*) denied reconsideration of *Lance Bailey I* and emphasized that exceptions to affiliation, such as that available for 8(a) mentor-protégé joint ventures, must be strictly construed. *Lance Bailey II*, SIZ-4799, at 6-7, 13-14. The rationale in the *Lance Bailey* cases was subsequently followed in *Size Appeal of Tikigaq Eng'g Servs., LLC*, SBA No. SIZ-4842, at 14 (2007), where OHA stated:

> OHA has previously ruled [in the *Lance Bailey* cases] that area offices are obligated to review approvals of joint venture agreements allegedly compliant with 13 C.F.R. § 124.513 when making a size determination .... This means SBA area offices may review joint venture agreements (including size assessments) approved by district offices to ensure compliance with applicable rules and regulations, for only the area office has the authority to make a formal size determination.

Tikigaq Eng'g Servs., SIZ-4842, at 14.

Although these older cases do support the Area Office's review of Appellant's joint venture agreement, OHA more recently has held that area offices lack jurisdiction to review the substantive requirements of Part 124. In *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4888 (2008) (*White Hawk I*), the protestor alleged that the 8(a) contract awardee—a joint venture between an 8(a) BD protégé and its mentor—was operating in violation of various provisions of 13 C.F.R. § 124.520. The Area Office dismissed the protest for lack of standing and determined the allegation of a violation of § 124.520 was beyond the scope of a size protest. *White Hawk I*, SIZ-4888, at 3. Upon determining that the protestor did have standing, OHA remanded the matter to the area office for further consideration of whether the awardee had violated § 124.520, which OHA found the area office could review pursuant to the *Lance Bailey* decisions. *Id.* at 6.

Following remand, the matter was again appealed to OHA. This time, OHA vacated its earlier remand order and specified that OHA "should not have found the Area Office had subject matter jurisdiction over Appellant's protest allegation regarding [the challenged firm's] compliance with SBA's mentor-protégé regulations." *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950, at 2 (2008) (*White Hawk II*), *recons. denied*, SBA No. SIZ-4968 (2008)(PFR) (*White Hawk III*). OHA explained that a firm's compliance with 8(a) BD mentor-protégé requirements is a matter that lies solely within the authority of the Director of the Office of Business Development, and that "[t]he regulations do not authorize the area offices to play a role in the approval or review of mentor-protégé agreements." *Id.* OHA further reasoned that other 8(a) BD program regulations support the conclusion that a firm's compliance with mentor-protégé requirements, and thus its eligibility to receive 8(a) contracts, may not be challenged outside the Office of Business Development. *Id.* at 2-3. Specifically, § 124.517 provides: "The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum

as part of a bid or other contract protest." 13 C.F.R. § 124.517(a). The same regulation also provides: "Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under [the process for eligibility reviews at] § 124.112(c)." 13 C.F.R. § 124.517(e). OHA thus concluded that an area office may not review 8(a) mentor-protégé compliance issues. *Id.* at 3.

Although *White Hawk* dealt strictly with mentor-protégé issues, not a mentor-protégé joint venture agreement, its underlying rationale is applicable here: compliance with substantive 8(a) BD program requirements falls exclusively within the purview of the Office of Business Development. OHA has repeatedly recognized that only the Office of Business Development can approve a mentor-protégé agreement. *E.g., Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997, at 9 (2008) ("The power to approve mentor-protégé agreements, and their renewals, is vested solely with SBA's Director, Office of Business Development." (citing 13 C.F.R. § 124.520(e)(2)). There is no persuasive reason that the same should not be said of an 8(a) BD mentor-protégé joint venture agreement. I find, therefore, that once the Office of Business Development has approved a mentor-protégé agreement or a joint venture agreement as compliant with the applicable regulations, the Area Office has no authority to perform the same review. Nor would it serve any useful purpose for different offices within SBA to conduct duplicative, and potentially contradictory, reviews. This result is consistent with recent OHA case precedent that has followed the *White Hawk II* line of reasoning. *Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254, at 7 (2011) ("SBA had already examined the relationship between Appellant and [its mentor] when it approved Appellant's 8(a) application and mentor/protégé agreement. The Area Office should not have reached behind these approvals to examine a relationship which had already been examined and approved by SBA."); *Size Appeal of Innovative Resources*, SBA No. SIZ-5259, at 5 (2011) ("The Area Office was not responsible for reviewing the terms of the [8(a)] joint venture agreement, and the Area Office properly did not second-guess SBA's approval of the joint venture.").

Recent changes to § 121.103(h)(3)(iii) further confirm that area offices are not expected to examine compliance with substantive 8(a) BD program requirements. 76 Fed. Reg. 8222 (Feb. 11, 2011). The older version of § 121.103(h)(3)(iii), applied in *Lance Bailey* and *White Hawk*, provided only that:

> Two firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.519 of these regulations.

13 C.F.R. § 121.103(h)(3)(iii)(2010). In 2011, following language was added to the regulation:

> If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513. If the procurement is to be awarded other than through the 8(a) BD program (*e.g.*, small business set aside,

> HUBZone set aside), SBA need not approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§ 124.513(c) and (d) will apply. This means that the joint venture must meet the requirements of §§ 124.513(c) and (d) in order to receive the exception to affiliation authorized by this paragraph. In either case, after contract performance is complete, the 8(a) partner to the joint venture must submit a report to its servicing SBA district office explaining how the applicable performance of work requirements were met for the contract.

13 C.F.R. § 121.103(h)(3)(iii) (2011); 76 Fed. Reg. 8222, at 8252. The first sentence specifies that in the context of an 8(a) BD program contract, SBA must approve the mentor-protégé joint venture pursuant to § 124.513. By specifying that mentor-protégé joint ventures pursuing 8(a) contracts must be approved in accordance with § 124.513, the revised regulation effectively removes any jurisdiction the area offices may have had to review the substance of those joint venture agreements. As discussed, it is the SBA's Office of Business Development that presides over and applies the regulations at Part 124 applicable to 8(a) BD program participants. Thus, it is undoubtedly the SBA Office of Business Development that must approve a joint venture agreement pursuant to § 124.513. Again, once the Office of Business Development approves such an agreement, there is no authority (or reason) for the Area Office to repeat the review.

Accordingly, based upon OHA case precedent and the updated joint venture regulations, I find the Area Office has no authority to review the substance of an 8(a) mentor-protégé joint venture agreement in connection with a size protest. Whether an 8(a) mentor-protégé joint venture agreement complies with § 124.513 and whether the agreement should be approved are matters solely within the discretion of the Office of Business Development. The Area Office cannot review those determinations. Therefore, the size determination at issue is based upon a clear error of law because the Area Office should not have examined Appellant's compliance with § 124.513.

3. ATSC's Additional Protest Allegations

ATSC lastly contends that in the event OHA finds the size determination is clearly erroneous, the matter should be remanded to the Area Office for further investigation of its remaining protest claims. Specifically, ATSC argues the Area Office failed to consider its allegations that Trident Tech is affiliated with [Alleged Affiliate 1],[7] [Alleged Affiliate 2], and [Alleged Affiliate 3], and that Trident Tech and 3D Research are not in compliance with the mentor-protégé program requirements or the intent of that program.

Based upon the above analysis, it is clear that the Area Office lacks jurisdiction to hear ATSC's complaints about Trident Tech's and 3D Research's compliance with the 8(a) BD mentor-protégé program. The Office of Business Development approved the mentor-protégé agreement between the firms, and that Office reviews that relationship annually. 13 C.F.R. § 124.520. The Area Office may not review that agreement. 13 C.F.R. § 124.517; *White Hawk II*, SIZ-4950, at 2.

[7] Pacific Weather also alleged affiliation with [Alleged Affiliate 1].

ATSC's remaining protest allegations do not concern alleged affiliation between Appellant and other entities, but only between Trident Tech (the protégé member of the joint venture) and other entities. SBA regulation permits that "[t]he size status of the apparent successful offeror for a competitive 8(a) procurement may be protested." 13 C.F.R. § 124.517(b). In this case, however, the apparent successful offeror is Appellant, not Trident Tech. There is no mechanism for ATSC to now challenge the size of Trident Tech. Furthermore, the size of Trident Tech would have already been considered in determining whether to approve the joint venture. 13 C.F.R. § 124.513(b). Accordingly, I find that the Area Office properly did not consider ATSC's allegations that Trident Tech is affiliated with [Alleged Affiliate 1], [Alleged Affiliate 2], and [Alleged Affiliate 3].

IV. Conclusion

The size determination is based upon clear errors of law. Appellant's joint venture agreement was approved before final award of the contract at issue, and the Area Office lacks jurisdiction to examine a mentor-protégé joint venture agreement for compliance with § 124.513 where an 8(a) contract is at issue. Consequently, the appeal is GRANTED, and the size determination is REVERSED.

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

KENNETH M. HYDE
Administrative Judge