

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

SIZE APPEAL OF:

Alutiiq Diversified Services, LLC,

Appellant,

RE: Sumo-Nan JV II, LLC

Appealed From
Size Determination No. 6-2012-002

SBA No. SIZ-5318

Decided: January 19, 2012

APPEARANCES

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Alutiiq Diversified Services, LLC

Brain Darst, Esq., Fairfax, Virginia, for Sumo-Nan JV II, LLC

DECISION

This is an appeal of a size determination in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) concluded that Sumo-Nan JV II, LLC (Sumo-Nan JV II) is an eligible small business. For the reasons discussed below, I affirm the Area Office and deny the appeal.

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 size determination finding Sumo-Nan JV II to be an eligible small business for this procurement was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On June 23, 2010, the Department of the Navy, Naval Facilities Engineering Command Hawaii (Navy), issued Request for Proposal No. N62478-0-R-4024 (RFP) as a multiple-award

competitive 8(a) Business Development (BD) procurement. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard as the appropriate code for this procurement. Initial offers were due on July 29, 2010, per Amendment 006 of the RFP.

On September 23, 2011, the Navy notified unsuccessful offerors that Sumo-Nan JV II was the apparent successful offeror. On September 30, 2011, Alutiiq Diversified Services, LLC (Appellant) filed a protest of Sumo-Nan JV II's size with the CO. Appellant asserted Sumo-Nan JV II was other than small based on joint venturing, multiple contract awards made to the joint venture, the ostensible subcontractor rule, the identity of interest, common ownership, and common management rules.¹

D. The Size Determination

On November 3, 2011, the Area Office issued Size Determination No. 6-2012-002 (Size Determination), concluding that Sumo-Nan JV II is small for this procurement.

The Area Office determined to use the size regulations in effect in June 2010, the date the Navy issued the RFP, and that Sumo-Nan JV II's size would be determined as of July 29, 2010, that date of its self-certification as small.

The Area Office found Sumo-Nan JV II is a joint venture whose members are Su-Mo Builders, Inc. (Su-Mo) and Nan, Inc. (Nan). Su-Mo is an SBA 8(a) BD participant in good standing, and is wholly-owned by its president Su Yong Yi. Nan is not a small business concern under the applicable size standard.

On September 6, 2006, SBA approved a Mentor-Protégé agreement between Nan as Mentor and Su-Mo as Protégé. The agreement is current. Sumo and Nan have entered into four joint venture agreements under their Mentor-Protégé agreement. Su-Mo Nan JV, on September 7, 2006; Sumo-Nan, JV II, the challenged firm here, established on July 20, 2009; and Sumo-Nan, LLC, established on January 8, 2010. Sumo-Nan, a joint venture was established on August 15, 2011, over a year after Sumo-Nan JV II's self-certification for this procurement.

The Area Office noted that an 8(a) BD participant with an SBA approved mentor-protégé agreement may submit offers on a competitive 8(a) BD set-aside as a joint venture with their mentor so long as the protégé is small for the size standard for the procurement. 13 C.F.R. § 121.103(h)(3)(iii). The Area Office found that Sumo-Nan JV II is a small business for this procurement only.

The Area Office further found that the ostensible subcontractor rule is not applicable in this case because Nan is not a subcontractor, but a party to the joint venture, the prime

¹ Appellant also raised an issue regarding the conviction for altering a bid document of the owner of Nan, Inc., one of Sumo-Nan JV II's members. The Area Office properly ruled this outside the scope of a size determination.

contractor. The Area Office concluded that no finding of affiliation based on the ostensible subcontractor rule was appropriate because the exclusion from affiliation applies based on the mentor-protégé relationship between the parties who comprise the joint venture.

Further, the Area Office found that there was no common ownership or common management between Su-Mo and Nan, and so there could be no finding of affiliation based upon common ownership.

The Area Office further concluded there was no identity of interest among Sumo-Nan JV II, Su-Mo, and Nan based upon the joint ventures because the joint ventures are not by nature ongoing business concerns, and with an SBA-approved mentor-protégé agreement and joint venture agreements Sumo-Nan JV II is exempt from findings of affiliation. Further, because none of the joint ventures between Su-Mo and Nan had submitted more than three offers in a two-year period, they had complied with the requirements of SBA's regulations, and did not have an ongoing business relationship due to participating in multiple joint ventures.

The Area Office thus concluded that Sumo-Nan JV II was an eligible small business for the instant procurement.

E. The Appeal

On November 17, 2011, Appellant filed its appeal with SBA's Office of Hearings and Appeals (OHA). Appellant asserts that under the joint venture rules, a joint venture relationship is not to be on a continuing or permanent basis for conducting business generally. Appellant points to OHA dicta that it is possible that the continuous formation of similar joint ventures between two concerns could result in a finding of general affiliation, even in a mentor-protégé context, citing *Size Appeal of Beltsville Industries Group, Inc.— Desbuild Inc. Joint Venture*, SBA No. SIZ-5157 (2010). Appellant asserts the Area Office erred in not considering whether the cumulative effect of the multiple joint ventures between Su-Mo and Nan rose to the level of general affiliation.

Appellant asserts the Area Office should have reviewed the number of contracts awarded to each of the joint ventures, the size of the contract, the NAICS code assigned to each contract, and the proportion of Su-Mo's revenues these contracts represented. Appellant asserts that if SuMo had done nothing of significance outside the joint venture framework, it must be found affiliated with Nan. Appellant asserts the Area Office erred in failing to adequately investigate whether there was affiliation among Sumo-Nan JV II, Su-Mo, and Nan based upon multiple joint ventures.

F. Sumo-Nan JV II, LLC Response to the Appeal

On December 5, 2011, Sumo-Nan JV II filed its response to the appeal. Sumo-Nan JV II first asserts that the appeal should be dismissed because it presents issues and arguments not presented to the Area Office. Appellant's protest centered around the number of joint ventures between Su-Mo and Nan, and an argument that the mentor-protégé relationship had gone on long enough. Appellant did not raise the issue of the number of contracts awarded, or the other issues

addressed at the protest level. Sumo-Nan JV II asserts that merely raising an issue of general affiliation does not require the Area Office to review every aspect of the relationship between the alleged affiliates. Accordingly, Sumo-Nan JV II argues the appeal should be dismissed.

Sumo-Nan JV II further argues that Appellant is not adversely affected by the size determination. The Navy was to award a minimum of two contracts under this RFP, and ultimately awarded seven, none to Appellant. Appellant cannot show it will attain any meaningful relief. Sumo-Nan JV II argues that if an offeror who has been eliminated for reasons other than size may not protest, neither should an offeror who has no chance to receive an award from the procuring agency have a right to protest or appeal a size determination.

Sumo-Nan JV II further argues that the Area Office and OHA lack subject matter jurisdiction over allegations regarding SBA's mentor-protégé regulations or the scope of assistance a mentor has provided to a protégé.

Sumo-Nan JV II also asserts that the Area Office did request and Sumo-Nan JV II did submit the types of information Appellant argues should have been provided. The Area Office received a complete listing of all of Su-Mo's joint venture contract titles/locations, award dates, contract numbers, and types of procurements. Sumo-Nan JV II's Response at Attachment 1 (Oct. 31, 2011). Sumo-Nan JV II points out that at the date for determining size, there were three joint ventures between Su-Mo and Nan. Sumo-Nan JV II had been awarded only one other contract prior to the instant procurement. Sumo-Nan JV II's Response (Oct. 12 & 31, 2011). As noted by the Area Office, as of July 29, 2010, the date for determining size, all the joint ventures had carefully followed the rule of not submitting more than three offers in a two-year period.

Sumo-Nan JV II asserts that Appellant's speculation as to contract values is meaningless, because most of the contracts awarded the joint ventures were Indefinite Quantity/Indefinite Delivery (ID/IQ) contracts, where the amount of work depends on the number of task orders issued by the government. Sumo-Nan JV II further asserts that the documentation it provided the Area Office establishes that only one joint venture between Su-Mo and Nan had realized any receipts during the relevant period, and Sumo-Nan JV II itself had not received any receipts thus far.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within fifteen days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

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 on 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). OHA will disturb the size determination only if the judge, after reviewing the record and pleadings, has 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. The Merits of the Appeal

I must reject Sumo-Nan JV II's argument that Appellant has raised new issues on appeal. The protest does raise the issue of Sumo-Nan JV II's affiliation with Su-Mo and Nan, and whether the joint venture complies with SBA's regulations, and thus Appellant has not raised new issues on appeal. I also find, as an unsuccessful offeror, Appellant has sufficient standing to file an appeal.

The general rule is that two concerns which form a joint venture to perform a contract will be considered affiliated for that contract. 13 C.F.R. § 121.103(h); *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, one exception to the rule is a joint venture 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).

The RFP at issue was set aside for 8(a) BD program participants. Su-Mo is a participant in the 8(a) BD program, certified on May 13, 2004. Sumo-Nan JV II's response at Tab 4 (Oct. 12, 2011). SBA approved the mentor-protégé agreement between Sum-Mo and Nan on September 6, 2006. *Id* at Tab 8. SBA approved the Sumo-Nan JV II joint venture for the instant procurement on March 3, 2011. *Id* at Tab 6. A mentor-protégé joint venture must meet the requirements set forth at 13 C.F.R. § 124.513 and must be approved in accordance with 13 C.F.R. § 124.513(e) to be eligible for an 8(a) BD contract. *Size Appeal of Trident, LLC*, SBA No. SIZ-5315, at 9 (2012).

It is thus clear that Sumo-Nan JV II is an SBA-approved joint venture of two concerns in

an SBA-approved 8(a) BD mentor-protégé relationship. Therefore, Sumo-Nan JV II, as an approved 8(a) BD joint venture, is entitled to a regulatory exemption from a finding of affiliation. *Trident*, at 9.

Appellant does not dispute that Sumo-Nan JV II is an approved joint venture. Nor does Appellant raise any of the issues concerning the ostensible subcontractor rule, identity of interest, common management, or common ownership raised in its protest.²

Appellant's appeal rests entirely on its argument that the Area Office erred in not considering whether the cumulative effect of the multiple joint ventures between Su-Mo and Nan rose to the level of general affiliation. I find this argument, and the appeal, meritless.

It is true, as Appellant notes, that in previous dicta OHA stated that a continuous formation of similar joint ventures could give rise to a finding of general affiliation. *Beltsville* at 7. Nevertheless, OHA has held an area office does not have subject matter jurisdiction over protest allegations regarding compliance with SBA's mentor-protégé regulations. *Trident*, at 13 (citing *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950, at 2 (2008), *recons. denied*, SBA No. SIZ-4968 (2008) (PFR)). 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 “[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) BD contracts, may not be challenged outside the Office of Business Development, and concluded that an area office may not review 8(a) BD mentor-protégé compliance issues. *Id.*

Further, subsequent to the *Beltsville* decision, OHA has held that when SBA had examined and approved the relationship between a concern and its mentor an area office should not reach behind those approvals to examine a relationship which had already been examined and approved by SBA. *Trident*, at 14 (citing *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.”) and *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.”)).

OHA has held:

[An]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

² Because Appellant did not raise these issues on appeal, they are not before OHA and I will not consider them. *Size Appeal of The Apex Group, Inc.*, SBA No. SIZ-4300 (1998).

agreement should be approved are matters solely within the discretion of the Office of Business Development. The Area Office cannot review those determinations.

Trident, at 15.

Here, Appellant raises the issue of whether the mentor and protégé firms have formed so many joint ventures as to be affiliated despite their approved mentor-protégé relationship. However, SBA has already approved Sumo-Nan JV II as a joint venture with the regulation for this procurement. The Area Office determined that Su-Mo was an 8(a) BD program participant, in an approved mentor-protégé relationship with Nan, and that Sumo-Nan JV II was an approved joint venture. This meant that SBA had already examined Sumo-Nan JV II's compliance with SBA's regulations. The Area Office thus properly did not further review Sumo-Nan JV II's compliance with the mentor-protégé joint venture regulations. The Area Office did review whether there were any other grounds for finding affiliation, apart from the mentor-protégé relationship, and concluded there were none. The Area Office thus properly found Sumo-Nan JV II an eligible small business for this procurement. Appellant has failed to establish error in the size determination, and I must deny the appeal.

V. Conclusion

The record on appeal supports the Area Office's conclusion that Appellant is an eligible small business. The Size Determination is AFFIRMED and the Appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge