

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

SIZE APPEAL OF:

TFab Manufacturing, LLC,

Appellant,

RE: Redstone Defense Systems

Appealed From

Size Determination No. 6-2012-62

SBA No. SIZ-5379

Decided: August 6, 2012

APPEARANCES

Susan Mason, President, TFab Manufacturing, LLC, Madison, Alabama, for Appellant

S. Lane Tucker, Esq., Stoel Rives LLP, Anchorage, Alaska, For Redstone Defense Systems

DECISION¹

I. Introduction and Jurisdiction

This is a protestor's appeal of a size determination pertaining to Redstone Defense Systems (Redstone). Redstone is an 8(a) Business Development (BD) joint venture between Yulista Aviation, Inc. (YAI), an 8(a) BD participant, and Science and Engineering Services, Inc. (SES), a non-8(a) BD participant. Both YAI and its sister company, Yulista Management Services, Inc. (YMS), are wholly-owned by Yulista Holding, LLC, which in turn is wholly-owned by Calista Corporation (Calista), an Alaska Native Corporation (ANC). The U.S. Small Business Administration (SBA) District Office in Anchorage, Alaska, approved Redstone's joint venture agreement effective March 11, 2011.

On April 17, 2012, SBA's Office of Government Contracting, Area VI (Area Office) issued Size Determination number 6-2012-62, finding that Redstone is a small business under the

¹ This decision was initially issued on July 18, 2012 under a Protective Order designed to prevent the disclosure of confidential or proprietary information. Pursuant to 13 C.F.R. § 134.205, I afforded the challenged firm an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. On July 25, 2012, Redstone Defense Systems responded that it did not propose any redactions.

size standard associated with Solicitation No. W58RGZ-11-R-0003. Tfab Manufacturing, LLC (Appellant), which had protested Redstone's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter with instructions to consider whether affiliation exists between Redstone and the predecessor contractor. For the reasons discussed *infra*, 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). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On June 3, 2011, the U.S. Department of the Army (Army) issued Solicitation W58RGZ-11-R-0003 (RFP) seeking a contractor to provide technical and analytical support to the Aviation and Missile Research, Development, and Engineering Center (AMRDEC) Prototype Integration Facility (PIF). The Contracting Officer (CO) set aside the procurement exclusively for participants in the 8(a) BD program, and assigned North American Industry Classification System (NAICS) code 336413, Other Aircraft Parts and Auxiliary Equipment Manufacturing, with a corresponding size standard of 1000 employees. The RFP indicated that the Army planned to award a cost-plus-fixed-fee, indefinite-delivery indefinite-quantity contract. The RFP is the successor to an existing contract for similar work. Joint Venture Yulista/SES (JVYS), a joint venture between YMS and SES, is the incumbent contractor.

Redstone and Appellant submitted initial offers for the instant RFP on August 2, 2011. On March 22, 2012, the CO announced that Redstone had been selected for the award.

On March 27, 2012, Appellant protested the size of Redstone. Appellant argued that, for Redstone to be an eligible 8(a) BD joint venture, YAI must have fewer than 500 employees. Appellant alleged that YAI exceeded this size standard because it was affiliated with its sister company, YMS, which employs over 600 people. (Protest at 2.)

Appellant alleged YAI was affiliated with YMS under the totality of the circumstances. Specifically, asserted Appellant, YAI needs YMS to perform the contract, and YAI and YMS share facilities, operational resources, and employees. In Appellant's view, YAI and YMS share employees because YMS's employees working for JVYS on the predecessor contract "will also be providing direct and indirect support for the new PIF contract." (*Id.*) Appellant warned that "a Yulista employee working in a Yulista facility could be billing hours to a JVYS charge number and later, possibly on the same day, bill work to [a Redstone] charge number. (*Id.* at 3.)

Appellant also asserted that a joint venture agreement is permissible only where an 8(a) BD concern lacks the necessary capacity to perform the contract on its own. (*Id.*) Citing YAI's interactions with the Government and portions of YAI's website, Appellant argued YAI has the

necessary capacity to perform the contract independently. As a result, argued Appellant, the Redstone joint venture should not have been approved. (*Id.* at 4-5.)

On April 2, 2012, Appellant submitted follow-up correspondence in support of its protest. In the letter, Appellant provided “specific and credible information related to [Redstone] and YAI’s eligibility to participate in the 8(a) BD Program.” Appellant also noted that Redstone is being awarded a follow-on contract previously performed by JVYS. As YMS is part-owner of JVYS, Appellant asserted this arrangement violates the prohibition against tribally-owned subsidiaries winning follow-on contracts performed by a sister company.

B. Response

On April 10, 2012, Redstone requested that the Area Office dismiss the protest for lack of subject matter jurisdiction. According to Redstone, the Area Office has no authority to review compliance with 13 C.F.R. Part 124, which governs the 8(a) BD program. The Area Office declined to dismiss the protest.

Redstone also responded to the protest allegations. Attached to its response, Redstone submitted a sworn declaration from Mr. Darrell L. Harrison, Project Manager of Redstone and President of YAI. Mr. Harrison stated that:

7. YAI and YMS are two separate legal and corporate entities that operate independently.

...

9. YAI employees are employees of YAI only and are not employees of YMS.

10. Facilities used by YAI are leased by YAI and not leased by YMS.

...

14. With respect to its work for JVYS, YAI accomplishes this work using YAI employees and YAI facilities under a formal Inter-Organization Transfer (“IOT”). YAI and YMS do not share common facilities or have common employees.

15. When the JVYS contract ends, YMS employees, including managers, may be offered a job working for YAI or SES in support of the [Redstone] contract, if a requirement exists for their services.

16. When YMS facilities are no longer required to perform the JVYS contracts, their leases could be made available to YAI or SES, if those facilities are required to perform the work under the [Redstone] contract.

17. It is also possible that YAI could utilize YMS employees under a formal IOT process in support of the new [Redstone] contract.

(Response, Attachment A, at 2-3.)

C. Size Determination

On April 17, 2012, the Area Office issued its size determination finding that Redstone is an eligible small business.

The Area Office determined that YAI was not affiliated with YMS, as the Small Business Act (Act) required the Area Office to disregard any affiliation between YAI and YMS in the context of a competitive 8(a) BD procurement. Specifically, the Act provides:

(I) Except as authorized by subclauses (II) or (III), no award shall be made pursuant to section 637(a) of this title to a concern other than a small business concern.

(II) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(III) Any joint venture established under the authority of section 602(b) of Public Law 100-656, the "Business Opportunity Development Reform Act of 1988", shall be eligible for award of a contract pursuant to section 637(a) of this title.

15 U.S.C. § 636(j)(10)(J)(ii). The Area Office noted that the instant procurement was set aside for participants in the 8(a) BD program and that YAI and YMS both are wholly-owned subsidiaries of Calista, an ANC. Because the Act, for 8(a) BD procurements, exempts ANC subsidiaries from affiliation with any business enterprise owned by the tribe, the Area Office determined that YAI and YMS were not affiliated. (Size Determination at 8.)

The Area Office found further that, in addition to the Act, SBA's size regulations also exempt ANC entities from affiliation. The regulation provides:

Business concerns owned and controlled by Indian Tribes, ANCs, [Native Hawaiian Organizations (NHOs)], [Community Development Corporations (CDCs)], or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

13 C.F.R. § 121.103(b)(2)(ii). Given that YAI and YMS are subsidiaries of the same ANC, the Area Office did not consider their common ownership, management, and administrative services grounds for finding affiliation.

The Area Office also declined to find that YAI and YMS are affiliated for "other reasons." Contrary to Appellant's allegations, the Area Office found that YAI and YMS do not

share facilities or employees. Further, the proposal did not identify YMS as a subcontractor, and the “record does not contain any evidence that YMS controls YAI, or vice versa.” (*Id.* at 9.)

Finally, the Area Office addressed Appellant's argument that the Alaska District Office improperly approved the Redstone joint venture agreement because YAI could perform the contract on its own. The Area Office determined it lacked jurisdiction to review this issue, or to reverse the approval of Redstone's joint venture agreement, the Area Office's “sole task is to evaluate affiliation and determine eligibility as a small business concern.” (*Id.*) The Area Office emphasized that it does “not reach questions such as the permissibility of a joint venture agreement in the context of a competitive 8(a) procurement.” (*Id.* (citing *Size Appeal of Alutiiq Diversified Services, LLC*, SBA No. SIZ-5318 (2012) and *Size Appeal of Trident³, LLC*, SBA No. SIZ-5315 (2012)).)

D. Appeal Petition

Appellant argues the Area Office erred because it did not address the relationship between Redstone and the incumbent contractor, JVYS. Appellant contends that the Area Office should have considered the relationship between the joint ventures because SES is a party to both ventures, and YAI and YMS are sister companies. (Appeal at 2.) Appellant argues that once the Area Office discovered the connections between Redstone and JVYS, it should have considered whether affiliation existed between them. (*Id.* at 10 (citing *Size Appeals of Ross Aviation, Inc., et al.*, SBA No. SIZ-4829, at 8 (2006) (“if in addition to grounds for affiliation or control offered by a protestor the area office discovers or should discover, through the exercise of due diligence, that there are other grounds for its size determination, it must consider, analyze, and discuss them in its size determination.”).)

Appellant argues that there will be overlap in performance of the current and follow-on contracts. Appellant concludes from this overlap that Redstone is “totally dependent” on JVYS and its facilities and personnel. (*Id.* at 3.)

Appellant argues further that, even if JVYS has already transferred its facilities and key personnel to Redstone, JVYS would then be dependent on Redstone for its performance of the incumbent contract. Therefore, argues Appellant, Redstone and JVYS are affiliated because there is common management and Redstone can exercise negative control over JVYS. (*Id.* at 3.)

Appellant goes on to argue that the exception to affiliation for ANCs does not apply to joint ventures. So, in Appellant's view, the size determination stopped short of a complete analysis. Appellant requests that OHA direct the Area Office to reopen the size determination and review Redstone's proposal. Appellant states that, “On information and belief, the SBA Area Office never reviewed Redstone's proposal when it rendered its size protest.” (*Id.* at 4.)

Appellant next argues that the Area Office erred in determining that YAI and YMS do not share employees. According to the JVYS website, argues Appellant, Mr. Harrison is JVYS's general manager for Huntsville Operations. Appellant notes, however, that because JVYS is unpopulated, Mr. Harrison must be an employee of one of the joint venture partners, YMS or SES. (*Id.* at 5.)

Appellant then notes that the companies' public information shows that Mr. Harrison is an employee of YAI/Redstone and YMS/JVYS. Appellant argues that since Mr. Harrison is a senior executive in both companies, the companies can coordinate their business activities, making it so that there is no clear line between them. Appellant asks the SBA to find that the leveraging of resources, past performance and facilities amounts to unfair competitive advantage. (*Id.* at 6.)

Appellant also argues that, contrary to the size determination, YAI and YMS do share facilities. Appellant argues that according to public websites, Central Contractor Registration (CCR) accounts, SBA profiles, and Business Entity Annual Reports (filed with the Alabama Secretary of State), YAI, Redstone, and YMS share an address in Huntsville, Alabama; YAI and YMS also have a common address in Anchorage, Alaska.

Appellant then argues that even though Redstone may not have proposed YMS as a subcontractor, the practice on the predecessor contract “indicates a pattern of allocating work between sister companies.” (*Id.* at 7.) Appellant points out that, although JVYS did not report any subcontracting, websites indicate that YAI has been performing the current contract's aviation integration work. Appellant hypothesizes that the pattern of allocating work between sister companies will continue on the new contract, such that YMS will perform work.

Appellant argues further that Redstone will rely on JVYS to perform the follow-on contract. Appellant argues that should YMS continue to employ the employees it shares with YAI, that is grounds for finding affiliation. If YMS formally transfers these employees to YAI, it would conflict with the intent of the 8(a) BD program because “YAI's growth and development will come directly at the expense of its sister company, YMS.” (*Id.* at 8 (citing 76 Fed. Reg. 8222, 8234 (Feb. 11, 2011) (“SBA does not believe that a Tribally-owned or ANC-owned firm should be able to perform a specific 8(a) contract for many years and then, when it leaves the BD program, to pass that contract on to another 8(a) firm owned by the Tribe or ANC.”).)

Next, Appellant argues that Redstone may not rely on JVYS's past performance, as the exception permitting ANC subsidiaries to rely on the past performance of their sister companies does not also apply to joint ventures between an ANC-owned firm and a non-ANC-owned firm. Therefore, argues Appellant, although YAI may rely on YMS's past performance, Redstone may not do the same, as Redstone is partially-owned by SES, a non-ANC. Appellant avers that if Redstone relied at all on YMS's past performance, Redstone has admitted affiliation with YMS and JVYS.

E. Motion to Submit Additional Evidence

On May 4, 2012, Appellant moved to supplement the record with additional evidence. Appellant emphasizes two points to support its claim of affiliation. First, Appellant highlights that the current contract “has several months of performance remaining and Redstone is totally dependent on JVYS' facilities and personnel to enable it to perform its contract.” (Motion at 2.) Second, Appellant reiterates that when aggregating the employees claimed by both joint ventures, Redstone is not an eligible small business.

IV. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, I find that Appellant has not shown good cause to supplement the record. First, the “evidence” Appellant seeks to admit is not evidence at all, but argument. Moreover, Appellant's arguments merely reiterate allegations Appellant relied upon in the appeal. Therefore, Appellant's motion to admit new evidence is DENIED.

C. Analysis

Appellant's principal complaint is that the Area Office failed to investigate whether Redstone was affiliated with the incumbent contractor, JVYS. The problem for Appellant is that this issue was never raised in Appellant's underlying protest. *See* Section II.A, *supra*. Indeed, the Area Office examined Appellant's protest allegation that YAI and YMS were affiliated, but specifically chose not to expand the scope of its review, explaining:

[Appellant's protest] only alleged affiliation between YAI and YMS. We see no reason to investigate any affiliations of [SES], or any affiliation between YAI and any other firms. There is nothing in the record to raise those issues. We therefore exercise our discretion not to investigate issues other than those raised in the protest. We will discuss only whether YAI and YMS are affiliated.

(Size Determination at 7.)

It is well-settled that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012); *see also Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3-4 (2009) (“Contrary to [the protestor's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.”); *Size Appeal of Fort Carson Support Services*, SBA No. SIZ-4740, at 4 (2005) (PFR) (“neither 13 C.F.R. § 121.1007 nor any other regulatory provision requires the Area Office to investigate matters [the protestor] did not identify in the protest.”). Appellant does not dispute that its protest was silent with respect to potential affiliation between Redstone and JVYS. Appellant contends, however, that the Area Office should have undertaken a more comprehensive investigation, citing *Size Appeals of Ross Aviation, Inc., et al.*, SBA No. SIZ-4829 (2006). In *Ross Aviation*, OHA remarked that “if in addition to grounds for affiliation or control offered by a protestor the area office discovers or should discover, through the exercise of due diligence, that there are other grounds for its size determination, it must consider, analyze, and discuss them in its size determination.” *Ross Aviation*, SBA No. SIZ-4829, at 8.

I find *Ross Aviation* readily distinguishable from the instant appeal. In that case, two protestors alleged that the challenged firm was affiliated with other concerns on multiple grounds, and OHA agreed that the area office had “essentially ignored” many of the protest allegations. *Ross Aviation*, SBA No. SIZ-4829, at 10. Such circumstances are not present here. Rather, the Area Office analyzed Appellant's protest allegations and determined that YAI was not affiliated with YMS. The protest did not allege affiliation between Redstone and JVYS, and the Area Office elected not to examine issues beyond those raised in the protest. It would pose a heavy burden on the agency to require that area offices investigate every possible theory of affiliation. *Perry Mgmt.*, SBA No. SIZ-5100, at 3-4. Thus, while it is true that an area office must consider the allegations raised in a protest, and may not willfully disregard facts that are plainly part of the record, an area office is vested with the discretion to decide whether or not it will examine additional issues beyond those raised in the protest.

In sum, Appellant's protest did not allege affiliation between Redstone and JVYS. Consequently, the Area Office was not required to, and reasonably chose not to, examine that issue.

V. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge