

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

SIZE APPEAL OF:

Reliable Contracting Group,

Appellant,

RE: JM Industrial Supply, Inc.

Appealed From
Size Determination No. 4-2012-35

SBA No. SIZ-5384

Decided: July 13, 2012

APPEARANCES

Steve J. Thornberry, President, for Reliable Contracting Group

John M. Manfredonia, Esq., Cresskill, New Jersey, for JM Industrial Supply, Inc.

DECISION

I. Introduction and Jurisdiction

This is a protestor's appeal of a size determination concluding the protested concern is an eligible small business. For the reasons discussed below, I deny the appeal.

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.

II. Issue

Whether the Area Office's determination that JMI is an eligible small business was based on clear error of fact or law.

II. Background

A. Solicitation and Protest

On December 8, 2010, the National Guard Bureau, U.S. Property & Fiscal Office for Illinois, issued Solicitation No. W91SMC-11-R-0001 (RFP) to upgrade facilities. The

Contracting Officer (CO) set the procurement aside for small business and designated it under North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard. JM Industrial Supply, Inc. (JMI), submitted its offer on December 13, 2011.

On March 8, 2012, the CO notified offerors that JMI was the apparent successful offeror. On March 13, 2012, Reliable Contracting Group (Appellant), an unsuccessful offeror, protested JMI's small business size status. Appellant asserted JMI is affiliated with River City Construction, LLC (RCC), a large business, because JMI lacks relevant corporate experience and relies heavily on RCC. Appellant attached to its protest pages from JMI's website identifying RCC as JMI's mentor.

Appellant also asserted that neither of the two scenarios exist under which a joint venture may offer on a set-aside contract. Thus, JMI and RCC are affiliated, and JMI is other than small and ineligible for this procurement. The CO forwarded the size protest to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) for a size determination.

B. Size Determination

On April 18, 2012, the Area Office issued Size Determination No. 4-2012-35 (Size Determination). The Area Office found JMI majority-owned by Ronald Givens, whose only other business interest is in GIVSCO, Inc. (GIVSCO). Appellant admits affiliation with GIVSCO. The combined annual receipts of JMI and GIVSCO do not exceed the \$33.5 million size standard.

The Area Office found that JMI submitted an offer on this contract in its own name, and not that of a joint venture. Further, under the Teaming Agreement, RCC is to be JMI's subcontractor, and not a joint venture partner.

The Area Office also found that: (1) JMI is an 8(a) concern; (2) JMI had entered into a Mentor-Protégé Agreement (MPA) with RCC on November 20, 2008; and (3) SBA had approved the MPA on April 30, 2009. After checking with the SBA District Office servicing JMI, the Area Office determined that JMI's MPA was currently valid and in good standing. Reviewing the subcontracting agreement and the MPA, the Area Office determined that the assistance rendered by RCC to JMI for this procurement was within the scope of the MPA. Thus, citing 13 C.F.R. §§ 121.103(b)(6), 124.520(d)(4), and OHA case law on the mentor-protégé program, the Area Office concluded JMI is an eligible small business for this procurement.

The Area Office also noted it lacks the authority to decide Appellant's claims about JMI's experience and capacity to perform the instant contract, explaining those issues are for the contracting officer to determine, not SBA.

C. Appeal Petition

Appellant received the Size Determination on April 20, 2012, and filed the instant appeal on May 3, 2012. On appeal, Appellant asserts that GIVSCO, identified as JMI's affiliate in the Size Determination, has completed "several multi-million dollar projects" in the last two years in joint venture with RCC. Appellant attached to its appeal pages from GIVSCO's website showing various projects. Appellant asserts there is no mentor-protégé relationship between GIVSCO and RCC. Thus, GIVSCO is affiliated with RCC and, therefore, JMI cannot qualify as a small business for the instant procurement.

D. JMI's Response to the Appeal

On May 21, 2012, JMI responded to the appeal. JMI asserts Appellant's GIVSCO allegation is raised for the first time on appeal and that GIVSCO is already its admitted affiliate. Further, the website pages are new evidence on appeal. JMI requests OHA to dismiss Appellant's appeal because it is based on evidence not before the Area Office and argument not raised in Appellant's protest below.

JMI also asserts Appellant does not challenge any of the Area Office findings in its appeal, and in any event has failed to show that the Size Determination is based on any clear error of fact or law. Referring to its response to the protest, JMI denies affiliation with RCC.

III. Discussion

A. Timeliness and Standard of Review

Appellant filed this appeal within 15 days of its receipt of the Size Determination. Therefore, 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. OHA will disturb the 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 and New Issue

OHA's review is based on the record that was before the Area Office. New evidence may be admitted on appeal if a motion is filed establishing good cause for the submission of that evidence. 13 C.F.R. § 134.308(a). I find that Appellant has failed to file the required motion and, in any event, has not shown good cause to admit the material from GIVSCO's website at this late stage. Therefore, I EXCLUDE the GIVSCO material from the record on appeal, and will not consider it in deciding this appeal.

OHA will not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c). Appellant raises the GIVSCO allegation for the first time in its appeal, and thus it is not properly before OHA. Therefore, I DISMISS this allegation.

C. Mentor-Protégé Agreement

The mentor/protégé program is designed to encourage mentors to provide various forms of assistance to eligible Participants. 13 C.F.R. § 124.520(a). Another benefit of this program is that no determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement. 13 C.F.R. § 124.520(d). The size regulations also reflect this affiliation exception: A protégé firm is not an affiliate of a mentor firm solely because the protégé firm receives assistance from the mentor firm under Federal Mentor-Protégé programs. Affiliation may be found for other reasons. 13 C.F.R. § 121.103(b)(6).¹

Under these regulations OHA has held that assistance pursuant to an 8(a) mentor-protégé agreement does not result in a finding of affiliation between the mentor and the protégé. *Size Appeals of Safety and Ecology Corporation*, SBA No. SIZ-5177, at 23-24 (2010).

Here, the Area Office correctly determined that there is no joint venture on the instant procurement, that a mentor/protégé agreement was in place and valid, and that the assistance RCC will provide to JMI is pursuant to the Mentor/Protégé Agreement. Thus, the Area Office correctly determined that JMI and RCC are not affiliated because of the assistance RCC will provide to JMI on the instant contract.²

IV. Conclusion

Appellant has not met its burden of proving that the Size Determination is based on clear error of fact or law. Accordingly, I DENY this appeal and AFFIRM the Size Determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

¹ SBA made revisions to § 124.520 effective March 14, 2011. 76 Fed. Reg. 8222, 8251 (Feb. 11, 2011). These revisions were substantive only with respect to the mentor-protégé programs of other Federal agencies. 76 Fed. Reg. at 8222-23 (preamble to final rule)

² The Area Office also correctly determined it has no authority to decide Appellant's claims about JMI's experience and capacity to perform the instant contract. Those issues are for the contracting officer, and are excluded from the size determination process. *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5057, at 6 (2009).