

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

SIZE APPEAL OF:

Professional Performance Development  
Group, Inc.,

Appellant,

RE: InGenesis STGi Partners, LLC

Appealed From  
Size Determination Nos. 5-2012-055 &  
5-2012-056

SBA No. SIZ-5398

Decided: September 12, 2012

APPEARANCES

Klaus M. Schonfeld, Professional Performance Development Group, Inc., San Antonio,  
Texas, for Appellant

Edward J. Tolchin, Esq., Offit Kurman, PA, Bethesda, Maryland, for InGenesis STGi  
Partners, LLC

DECISION

I. Introduction and Jurisdiction

This is a protestor's appeal of a size determination in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) concluded that the protested concern, an 8(a) mentor-protégé joint venture, is an eligible small business for the subject procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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. 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. Issue

Whether the Area Office committed a clear error of law or fact in determining the protested concern's size? 13 C.F.R. § 134.314.

## III. Background

### A. Solicitation and Protests

On September 15, 2011, the U.S. Army Medical Command (Army) issued Solicitation No. W81K04-11-R-0023 for ancillary medical services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 622110, General Medical and Surgical Hospitals, with a corresponding size standard of \$34.5 million in average annual receipts. The solicitation stated that the Army planned to award multiple indefinite-delivery indefinite-quantity contracts. On November 15, 2011, InGenesis STGi Partners, LLC (IGSP), an 8(a) mentor-protégé joint venture, submitted its initial proposal, self-certifying as a small business.

On May 22, 2012, the CO announced that IGSP would be awarded a contract. On May 25, 2012, Professional Performance Development Group, Inc. (Appellant), an unsuccessful offeror, filed a size protest with the CO. Appellant asserted that IGSP is affiliated with 12 other concerns and that their combined annual receipts exceed the size standard. Appellant attached to its protest a list of contracts awarded to these concerns.

On May 30, 2012, Angel Staffing, Inc. (Angel), another unsuccessful offeror, filed a size protest with the CO. Angel asserted that InGenesis, Inc. (InGenesis), the protégé member of IGSP, is affiliated with The Arora Group, Inc. (Arora), a large concern with whom InGenesis has had several joint ventures. Angel attached to its protest various State of Texas documents and lists of contracts awarded to these joint ventures.

The CO forwarded both size protests to the Area Office for a size determination.

### B. Size Determination

On June 27, 2012, the Area Office issued its size determination, concluding that IGSP is an eligible small business for this procurement.

The Area Office found that IGSP is an 8(a) mentor-protégé joint venture between protégé InGenesis and its mentor STG International, Inc. (STG). The mentor-protégé agreement between InGenesis and STG was approved on May 6, 2011 by Mr. Darryl K. Hairston, Associate Administrator of SBA's Office of Business Development. The instant procurement is not an 8(a) set-aside, but the Area Office observed that 13 C.F.R. § 121.103(h)(3)(iii) permits that “[t]wo 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.” The Area Office determined that InGenesis, by itself, is below the

applicable size standard. (Size Determination at 4-5.) Thus, IGSP qualifies as a small business.

The Area Office also noted that, prior to its relationship with STG, InGenesis had an 8(a) mentor-protégé arrangement with Arora. The mentor-protégé agreement between InGenesis and Arora was approved by SBA on May 1, 2008, and ended December 29, 2010. While their mentor-protégé agreement was in effect, InGenesis and Arora formed 12 joint ventures, which collectively bid on 30 procurements and were awarded 14 contracts. The Area Office found that InGenesis and Arora did not violate the “3-in-2” rule, 13 C.F.R. § 121.103(h), because none of the joint ventures bid on, or won, more than three contracts in any two-year period. (Size Determination at 3-4.)

The record contains an earlier size determination, 5-2012-042, pertaining to InGenesis. In the prior determination, the Area Office found that InGenesis and Arora complied with the 3-in-2 rule, and were not affiliated with one another. The prior size determination involved the same fiscal years (2008- 2010) and size standard (\$34.5 million) as the current size determination, and the Area Office concluded that “[t]he average annual receipts of InGenesis, [including] its proportionate share of joint venture receipts, are less than \$34.5 million.” (Size Determination 5-2012-042, at 5.)

### C. Appeal Petition

On July 5, 2012, Appellant filed an appeal of the size determination with OHA.<sup>1</sup>

Appellant maintains that SBA should not have approved the mentor-protégé agreement between InGenesis and STG. Appellant recites the conditions for an 8(a) participant to initially qualify as a protégé, as set forth in 13 C.F.R. § 124.520(c)(1), and contends that InGenesis did not meet those conditions at the time the mentor-protégé agreement was approved. Appellant requests “review of the [InGenesis and STG] Mentor/protégé application and approval process which may have been flawed.” (Appeal at 5.)

Appellant also disputes the Area Office's conclusion that each of the joint ventures between InGenesis and its former mentor, Arora, complied with the 3-in-2 rule. In actuality, asserts Appellant, one of those joint ventures — InGenesis Aurora Staffing, LLC — may have violated the 3-in-2 rule. Appellant lists ten contracts purportedly awarded to that joint venture, but offers no documentation or evidence to support its claim.

### D. IGSP Response

On July 25, 2012, IGSP responded to the appeal petition. IGSP maintains that the Area Office properly did not examine whether the mentor-protégé agreement between InGenesis and

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<sup>1</sup> A protester generally has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest. *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359, at 11 n.9 (2012). Accordingly, the fact that the allegations in this appeal are different than those in Appellant's protest does not deprive Appellant of standing to bring the appeal.

STG should have been approved, because SBA's Office of Business Development is solely responsible for such matters. (Response at 2-3.) IGSP further argues that the joint ventures between InGenesis and Arora occurred in the context of an approved 8(a) mentor-protégé relationship, and may not give rise to affiliation. (*Id.* at 5-6, citing 13 C.F.R. §§ 121.103(b)(6) and 124.520(d)(4).)

#### 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. Analysis

Appellant's principal contention in this appeal is that InGenesis should not have been found eligible to participate in the 8(a) mentor-protégé program. OHA has long recognized, however, that a firm's compliance with 8(a) mentor-protégé requirements is a matter that lies solely within the authority of SBA's Office of Business Development, not an area office. *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.”). As a result, an area office may not review questions of mentor-protégé eligibility as part of a size determination. *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950 (2008), *recons. denied*, SBA No. SIZ-4968 (2008) (PFR) (“[t]he regulations do not authorize the area offices to play a role in the approval or review of mentor-protégé agreements.”). Accordingly, I find no error in the instant size determination. The Area Office properly did not review InGenesis' eligibility for the 8(a) mentor-protégé program, and correctly did not second-guess the approval granted by the Office of Business Development.

Appellant also contends that the Area Office erroneously determined that each of the joint ventures between InGenesis and Arora complied with the 3-in-2 rule. On the contrary, maintains Appellant, one of those joint ventures did not comply with the rule.

There are two significant flaws in Appellant's argument. First, Appellant bears the burden of proof and has not persuasively shown any violation of the 3-in-2 rule. Although Appellant asserts that one of the joint ventures violated the rule, Appellant offers no concrete evidence to support the allegation. Second, Appellant overlooks the crucial fact that, at the time of the supposed violation of the 3-in-2 rule, InGenesis and Arora were parties to an approved 8(a) mentor-protégé agreement. Pursuant to 13 C.F.R. § 124.520(d)(4), a mentor and protégé are broadly immunized from affiliation with one another, and OHA has held that “violations of the 3-in-2 rule ... cannot strip the relationship between [a mentor and protégé] of the protection

offered them by § 124.520(d)(4).” *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 27 (2010). Non-compliance with the 3-in-2 rule may be grounds for an area office to “investigate the relationship underlying the joint entity for general, all-purpose affiliation.” *Id.* at 26. An area office is not required to undertake such a review, however, and may reasonably choose not to do so, particularly when (as here) the alleged violation of the 3-in-2 rule occurred several years ago, under a mentor-protégé agreement that is no longer in effect, and involved a joint venture unrelated to the instant procurement.

#### 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