

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

SIZE APPEAL OF:

Patriot Construction, Inc.,

Appellant,

RE: K.O.O. Construction, Inc.,

Appealed From
Size Determination No. 6-2013-004

SBA No. SIZ-5439

Decided: January 31, 2013

APPEARANCES

John H. McKinley, Esq., Shore, McKinley, Conger & Scott, LLP, Stockton, CA, for Patriot Construction, Inc.

Christine V. Williams, Esq., Perkins Coie LLP, Anchorage, AK, for K.O.O. Construction, Inc.

DECISION

I. Introduction and Jurisdiction

On November 6, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2013-004 finding that K.O.O. Construction, Inc. (KOO) is a small business under the size standard associated with Solicitation No. VA-261-12-R-0655.

Patriot Construction, Inc. (Appellant) maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and conclude that KOO is not a small business. For the reasons discussed *infra*, this case is remanded to the Area Office for further review and investigation.

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 July 19, 2012, the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA-261-12-R-0655 (RFP) seeking Site Developments and Utilities Upgrade for the VA Palo Alto Health Care System. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned small businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard.

On September 28, 2012, the VA notified unsuccessful offerors that KOO was the apparent awardee. On October 4, 2012, Appellant, an unsuccessful offeror, protested KOO's size. The protest alleged first, that KOO is not a small business concern. Second, that KOO and Total Team Construction Services, Inc. (TTCS) are affiliated due to having common management and common employees. Third, Appellant alleged KOO and TTCS are in fact an ongoing joint venture and are thus the same company.

Appellant submitted evidence that KOO and TTCS shared the same address, that internal company telephone and email listings show the same personnel representing themselves at the same time as management and/or employees of both concerns; printouts from KOO's website showing employees working for both KOO and TTCS at the same time and in the same facility; that one individual is the current Senior Construction Estimator for both KOO and TTCS; and other information purporting to show that there are a number of employees who work for both KOO and TTCS at the same time.

B. Size Determination

On November 6, 2012, the Area Office issued Size Determination No. 06-2013-004 finding that KOO is a small business. The Area Office rejected Appellant's protest allegations regarding affiliation under 13 C.F.R. 121.103(a).

The Area Office found KOO was incorporated on January 1, 2000, and is 100% owned by Keith O. Odister. Mr. Odister also serves as KOO's sole officer, CEO/President/VP/CFO, and director. Thus, the Area Office concluded Mr. Odister controls or has the power to control KOO. Further, the Area Office found Mr. Odister owns Keith Odister Trust (KOT) and Odister Enterprises (OE). Based on Mr. Odister's control or power to control KOT and OE, the Area Office found KOO is affiliated with KOT and OE. The Area Office concluded the annual receipts of KOO, together with its affiliates KOT and OE, do not exceed the \$33.5 million size standard.

The Area Office next examined potential affiliation between KOO and TTCS. The Area Office noted Mr. Odister provided an affidavit stating that he never has been an officer, director, manager or owner of TTCS, and has never exerted control over TTCS. Further, the affidavit states KOO and TTCS do not share office space or employees. The Area Office noted Size

Determination No. 6-2012-101, dated August 1, 2012, found no evidence of KOO being dependent on contracts or subcontracts arising from its relationship with TTCS.

Next, the Area Office noted TTCS is an SBA 8(a) Business Development Program participant. In addition, the Area Office found KOO and TTCS have an SBA-approved mentor/protégé agreement, which is in effect through March 6, 2013, with KOO serving as the mentor and TTCS as the protégé". The Area Office noted KOO issued two subcontracts to TTCS after the mentor/protégé agreement went into effect. The Area Office also acknowledged that KOO and TTCS have entered into four joint venture (JV) agreements since 2009, Total Team/KOO A Joint Venture, TT/KOO TV, TT/KOO A JV, and TT/KOO A Joint Venture II. SBA approved all four joint venture agreements. Further, the Area Office stated none of the JVs between KOO and TTCS received more than three contract awards over a two year period. The Area Office concluded that the subcontracting and JV agreements between KOO and TTCS is the type of assistance expected of a mentor/protégé agreement.

The Area Office next considered affiliation between KOO and TTCS based on identity of interest. The Area Office found Mr. Odister's brother, Kendall Brooks, is the owner of TTCS. The Area Office states that "business transactions occurring after SBA has approved a mentor/protégé agreement cannot be used to show affiliation." The Area Office stated OHA precedent establishes that the existence of a mentor/protégé agreement between family members prohibits finding affiliation based on identity of interest. The Area Office concluded KOO and TTCS established a clear line of fracture based on their mentor/protégé agreement, and thus are not affiliated due to Mr. Odister and Mr. Brooks' familial relationship.

C. Appeal

On November 7, 2012, Appellant filed an appeal of the instant size determination with OHA. Appellant maintains that the determination is clearly erroneous and should be reversed.

Appellant first argues the Area Office erred by relying solely on the affidavit of Mr. Odister. Appellant states the record clearly shows KOO and TTCS share a physical address, interlocking management, employees and common facilities. Appellant argues the record shows the two concerns share an annual employee function, and the sharing of employees based on a State of California Department of Industrial Relations finding, which shows KOO and TTCS paid the same employee. Appellant argues the record also shows KOO and TTCS shared employees and supervisors on contracts awarded solely to TTCS and not any of the approved JVs.

Accompanying its appeal petition, Appellant moves to supplement the record with new evidence. Appellant seeks to introduce as new evidence six declarations made by former KOO employees. Further, Appellant seeks to introduce emails regarding TTCS employees working on contracts awarded to KOO and emails between KOO and the VA regarding TTCS employees. Lastly, Appellant seeks to introduce the award notice of VA Solicitation No. VA-261-12-R-0589.

D. KOO's Motion To Dismiss

On December 5, 2012, KOO filed a Motion to Dismiss. KOO maintains the size determination should be affirmed because Appellant's arguments are based on new evidence that must not be admitted and on the same unsupported protest allegations.

KOO argues Appellant fails to establish the size determination contains clear error of fact or law. KOO argues the new evidence Appellant wishes to introduce is inadmissible because it “fails to establish that good cause supports submission of the evidence.” KOO further argues Appellant failed to establish a clear error of fact or law based upon evidence previously in the record. KOO maintains Appellant “makes no argument or analysis based on this evidence.”

Next, KOO argues Appellant misinterprets the law governing KOO and TTCS's SBA-approved mentor/protégé agreement. KOO argues that, pursuant to its mentor/protégé agreement and 13 C.F.R. § 124.520, KOO can provide TTCS with: “(1) project management assistance, including training and authorizing KOO employees to work with Total Team on its projects; (2) technical assistance, including assisting Total Team in meeting staffing requirements on projects; (3) administrative assistance, including allowing Total Team employees to work in KOO's office and KOO observing and participating at Total Team's locations for field work; (4) business development assistance, encompassing a close relationship between the two entities' managers; and (5) financial assistance, meaning assistance in the area of bonding on joint venture projects.” KOO argues its mentor/protégé agreement with TTCS, along with 13 C.F.R. § 124.520(d)(4), protects it from a finding of affiliation because its relationship activities with TTCS is exactly what the mentor/protégé agreement contemplated.

KOO concludes its activities with TTCS fall within those envisioned by the mentor/protégé agreement, and as such, the size determination must be affirmed and Appellant's appeal dismissed.

E. Appellant's Response¹

On December 20, 2012, Appellant responded to KOO's Motion to Dismiss. Appellant argues KOO provides assistance to TTCS that is not covered by the mentor/protégé agreement, and as such, the two concerns are affiliated.

Appellant argues the mentor protégé agreement requires that any assistance provided by KOO be made either through subcontracts or joint ventures. Appellant maintains KOO “provided assistance in the performance of TCCS' prime contracts, which were not issued under any subcontract or joint venture agreement between the firms.” Appellant argues the regulations are

¹ Appellant's response to KOO's Motion to Dismiss was filed on December 20, 2012, 15 days after the close of record. On December 27, 2012, KOO filed a Motion to Strike Appellant's Response, arguing that it is a supplemental filing to Appellant's original appeal, and thus inadmissible. However, under 13 C.F.R. § 134.211, a non-moving party has 15 days to file a response to a Motion to Dismiss. Thus, Appellant's response is timely and admitted to the record.

clear in that any assistance provided to a protégé on a prime contract must be done through a JV arrangement. Appellant maintains the evidence provided in its protest, along with the new evidence introduced in its appeal, support their claim that a number of prime contracts awarded to TTCS were assisted on by KOO without a subcontract or JV arrangement.

III. 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

Because I have determined that remand is the appropriate disposition of this case, the question of whether Appellant's new evidence should be admitted here is moot. Appellant may submit this information to the Area Office for consideration as part of the remand process.

C. Analysis

The record contains a great deal of evidence that KOO and TTCS are affiliated. First, the two principals are brothers. This would support a finding of affiliation based upon identity of interest due to the family relationship. 13 C.F.R. § 121.103(f). The two concerns have collaborated on a number of joint ventures. The two concerns share an address, but the record establishes that they do not share facilities. TTCS leases its premises from KOO. The two concerns also appear to have freely shared their employees. Indeed, the sharing of employees appears to have gone well beyond that required to perform the joint ventures, extending to joint work on many other contracts. In particular, the position of Senior Construction Estimator, a key employee for any construction concern, appears to be filled by the same individual for both concerns.

It is also clear that KOO and TTCS have an SBA approved mentor/protégé relationship, in which KOO is the mentor. The Area Office concluded that because of this relationship, there could be no finding of affiliation between KOO and TTCS.

The regulations provide that “An 8(a) BD Participant that has an SBA-approved mentor/protégé” agreement is not affiliated with a mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. . . . Affiliation may be found in either case for other reasons.” 13 C.F.R. § 121.103(b)(6). The mentor/protégé agreement thus protects the protégé from a finding of affiliation for only assistance received under the agreement. The concerns may still be found affiliated for other reasons.

I conclude that in this case the Area Office failed to fully consider whether KOO and TTCS were affiliated for other reasons.² It is true that the joint ventures between the concerns were clearly assistance provided under the agreement, and would not support a finding of affiliation. Further, while the familial relationship between the principals of KOO and TTCS creates a rebuttable presumption that the concerns are affiliated due to an identity of interest, this is a rebuttable presumption, and if a clear line of fracture is established between the family members, the challenged concern has rebutted the presumption. *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003). OHA precedent establishes that affiliation based on identity of interest cannot be found due to relationships occurring or created after the SBA approves the mentor/protégé agreement. *Size Appeal of The Orasa Group, Inc.*, SBA No. SIZ-4966 (2008). The existence of the mentor/protégé agreement creates the necessary fracture to rebut the affiliation presumption. Here, the SBA approved the mentor protégé agreement between KOO and TTCS on March 8, 2006. Subsequently, the SBA extended the agreement numerous times since August 2009, with the latest extension occurring March 6, 2012. If the SBA wished to prevent family members from entering into mentor/protégé agreements, then the agreement between KOO and TTCS would not have been approved, let alone extended through March 6, 2013. See *The Orasa Group, Inc.*, at 5 (“If SBA intended to never allow family members to form mentor/protégé agreements, it should make this requirement a part of the regulation and not approve the relationship in the first place.”) Based on OHA precedent, and the existence of a valid SBA-approved mentor/protégé agreement, I cannot find affiliation based on familial identity of interest exists between KOO and TTCS. The existence of the mentor/protégé agreement creates the necessary fracture to rebut the affiliation presumption. Accordingly, the Area Office correctly found that there was a fracture between KOO and TTCS, because of the approved mentor/protégé relationship.

Nevertheless, the Area Office failed to consider whether the extensive sharing of employees between the two concerns, outside of the contracts the approved joint ventures performed, was beyond the scope of assistance provided under the mentor/protégé agreement, and thus constituted a basis for finding affiliation between the KOO and TTCS for other reasons.

Accordingly, I find it appropriate to remand this issue to the Area Office for further consideration. Based on the available record, it appears the Area Office did not consider whether the assistance provided to TTCS went beyond that expected by the mentor/protégé agreement. The evidence provided on Appellant's protest properly supports the allegations within the protest. The size determination lacks a proper discussion and analysis of this issue. Further, there is the question of whether the regulations protect the mentor from a finding of affiliation, as well as the protégé. Under such circumstances, it is proper to remand the size determination for further review. *Eg. Size Appeal of PRO SERVICES-Teltara Joint Venture, LLC*, SBA No. SIZ-5115, at 6 (2010).

IV. Conclusion

The Area Office determined that KOO is not affiliated with TTCS based on their SBA-

² The Area Office also failed to consider whether an approved mentor/protégé agreement protects the mentor from a finding of affiliation, as well as the protégé.

approved mentor/protégé agreement. However, a question remains as to whether the assistance provided by KOO to TTCS falls within the scope of the mentor/protégé agreement. Accordingly, the issue of affiliation between KOO and TTCS is REMANDED to the Area Office for further review. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge