United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Aerospace Engineering Spectrum, Appellant, Appealed From Size Determination No. 6-2013-072	SBA No. SIZ-5497 Decided: September 5, 2013

APPEARANCE

S. Lane Tucker, Esq., Stoel Rives LLP, Anchorage, Alaska, for Appellant

DECISION[1]

I. Introduction and Jurisdiction

On June 14, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2013-072 finding that Aerospace Engineering Spectrum (Appellant) is not an eligible small business for the subject procurement. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and conclude that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted in part and is otherwise denied.

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. Procedural History

On June 3, 2010, the U.S. Department of the Air Force, Air Force Sustainment Center, Hill Air Force Base, Utah (Air Force), issued Solicitation No. FA8224-10-R-1000 for engineering and related services under the Design and Engineering Support Program III

[1] This decision was initially issued on September 5, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to file a request for redactions if it desired to have any information withheld from the published decision. Appellant responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

(DESP3). The solicitation stated that the Air Force planned to award multiple Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541330, Engineering Services (Military and Aerospace Equipment and Military Weapons), with a corresponding size standard of $27 million in average annual receipts. Appellant submitted its initial offer with price on July 14, 2010, self-certifying as a small business.

On January 10, 2012, the CO posted a notice on FedBizOps identifying 26 apparent successful offerors, including Appellant. The next day, Appellant was awarded contract number FA8222-12-D-0001.

On January 24, 2013, more than a year after contract award, another DESP3 contractor, Global Consulting International (GCI), filed a size protest against Appellant. On January 29, 2013, the CO referred GCI's protest to the Area Office. The CO also stated that, because GCI's protest might be untimely, he was initiating his own size protest against Appellant. The CO explained that Appellant is a joint venture comprised of four businesses,[2] and that Air Force records indicate that Appellant had been awarded orders valued at $247.6 million under the predecessor DESP2 contract. The CO reasoned that dividing the $247.6 million equally among the four joint venture partners would be $61.9 million per member, such that each of the members individually exceeds the $27 million size standard.

On February 4, 2013, the Area Office dismissed GCI's protest as untimely and notified Appellant it would commence an investigation based on the CO's protest. On February 22, 2013, the Area Office issued Size Determination No. 6-2013-36, finding Appellant not to be an eligible small business because the average annual receipts of the joint venture itself exceeded the $27 million size standard. In light of this finding, the Area Office determined, it did not matter whether each of the member firms of the joint venture was individually small.

On March 8, 2013, Appellant appealed Size Determination No. 6-2013-36 to OHA, arguing that the Area Office erred because "the size of the joint venture itself is immaterial." Instead, Appellant contended, the Area Office should have examined the size of each of the joint venture's four members. Had the Area Office done so, Appellant asserted, it would have found that none of the members exceeded the $27 million size standard.

On May 16, 2013, OHA issued its decision in *Size Appeal of Aerospace Engineering Spectrum*, SBA No. SIZ-5469 (2013)(*Aerospace I*), granting the appeal and remanding the size determination. OHA agreed with Appellant that the Area Office incorrectly focused on the size of the joint venture itself. OHA explained: "[T]he applicable regulation requires that, for a joint venture to be small, each member of the joint venture itself must be small, and the procurement must satisfy certain conditions ... If these criteria are met, it is not necessary that the joint venture itself also be small." *Aerospace I*, SBA No. SIZ-5469, at 5. OHA remanded the matter for the Area Office to consider whether each of Appellant's member firms is a small business under the

[2] The four joint venture partners are Aerospace Engineering & Support, Inc. (AESI), E-Spectrum Technologies, Inc. (ESTI), Total Quality Systems, Inc. (TQSI), and Mark G. Miller Inc., dba Select Engineering Services (SES).

$27 million size standard. *Id.* at 6. In particular, OHA instructed the Area Office to consider whether the average annual receipts of SES, one of Appellant's four member firms, had been properly adjusted in accordance with 13 C.F.R. § 121.104(a). *Id.* OHA noted that Appellant subtracted $160,185 per year from SES's receipts, for an item identified as "2006 Sec 481 Income Adjustment."

B. Instant Size Determination and Investigation

On May 24, 2013, the Area Office requested that Appellant identify all offers it had submitted since beginning operations in October 1995, provide a copy of the bylaws for each joint venture partner, and explain the deduction of $160,185 annually from SES's receipts during the years 2007, 2008 and 2009. (Size Determination at 3.)

On May 31, 2013, Appellant responded to the Area Office's request. With regard to the $160,185, Appellant maintained that this "amount was not a 'deduction' from receipts, nor was it 'income excluded from SES's receipts."' (Declaration of Robert S. Deamer, ¶ 4.) Rather, this amount was an adjustment stemming from a change in SES's accounting methodology. Appellant asserted that, in 2007, SES switched from a cash method of accounting to an accrual method. As a result, SES reported income on its 2007-2010 tax returns which had been earned— but not taxed—in prior years. Appellant maintains that it was appropriate to remove the $160,185 per year, because this amount was not actually earned during those years. (*Id.* ¶ 6.)

Appellant stated that the joint venture has been comprised of various member firms since its inception. "The goal of this series of specific joint venture arrangements was to specifically bid on the [Air Force] DEP/DESP IDIQ contract vehicles." (Response at 1-2.) Appellant has been awarded a prime contract on each of the last four DESP procurements. Between 2003 and 2005, the current four joint venture partners, along with a passive fifth partner, operated Appellant, until the fifth partner withdrew from the joint venture. Since 2005, the current four partners have operated Appellant with each partner holding 25% ownership. In 2009, the four partners entered a new joint venture agreement to submit a proposal on the DESP3 procurement. Although the joint venture agreement was new, the legal entity was not—the four partners used Appellant to submit the proposal. (*Id.*)

Appellant identified nine procurements[3] awarded to Appellant or to its member firms. Of these nine, Appellant claimed that one was awarded to AESI, rather than Appellant, and three others[4] were intended for AESI but ""erroneously directly awarded to [Appellant]." (*Id.* at 3-4.)

[3] F42620-96-D-0054 (offer submitted by Appellant July 1995), F42620-00-D-0028 (offer submitted by Appellant May 1999), F42650-03-P-3491 (no offer submitted by Appellant, awarded to AESI in September 2003), FA8201-040P-2076 (no offer submitted by Appellant, direct award to Appellant in June 2004), FA8201-05-P-0070 (no offer submitted by Appellant, direct award to Appellant in October 2004), FA8222-05-D-0001 (offer submitted by Appellant November 2004), FA8201-05-P-1311 (no offer submitted by Appellant, direct award to Appellant in July 2005), DRS/F2AST-853 (no offer submitted by Appellant, awarded to DRS in January 2007), and FA8222-12-D-0001 (offer submitted by Appellant July 2010).

[4] FA8201-040P-2076, FA8201-05-P-0070, and FA8201-05-P-1311.

For contract FA8201-05-P-1311, Appellant provided contractual documents whereby the procuring agency formally reassigned the contract to AESI. In addition, for two of the procurements—FA8201-040P-2076 and FA8201-05-P-0070—Appellant asserted that neither Appellant nor AESI submitted any written proposal, because AESI was contacted by telephone and was asked to build additional parts at a previously-agreed contract price. In subsequent correspondence with the Area Office, Appellant explained that the erroneous awards to Appellant occurred when the procuring agency "issued the contracts directly to [Appellant] in error getting the two 'AES' names confused. The work was completed and [[Appellant] did invoice the government and got paid, passing those funds directly to [AESI] without fee or expense." (E-Mail from Dave Christensen dated June 10, 2013.)

On June 14, 2013, the Area Office issued the instant Size Determination No. 6-2013-072. The Area Office stated that it was applying the version of SBA's joint venture regulation, 13 C.F.R. § 121.103(h), in effect as of July 14, 2010, when Appellant self-certified as a small business.[5] (Size Determination 6-2013-072, at 4.) The Area Office explained that, ordinarily, where the challenged concern is a joint venture, the partners to the joint venture are affiliated for purposes of the contract at issue. Where a joint venture submits more than three offers over a two-year period (the "3-in-2" rule), SBA may consider its partners to be cooperating "on a continuing or permanent basis" and the partners generally affiliated for all purposes.

There are exceptions, however, to affiliation based on a joint venture. Here, the only potentially applicable exception provides that where the procurement in question is not bundled, "[a] joint venture of two or more business concerns may submit an offer as a small business ... without regard to affiliation ... so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract" and "the dollar value of the procurement, including options, exceeds half the size standard." (Size Determination 6-2013-072 at 5.) Because the value of the procurement exceeds half the size standard, the Area Office examined the receipts of each of Appellant's member firms. The Area Office determined that, although three of the firms (AESI, ESTI, and TQSI) do qualify as small businesses under the $27 million size standard, the average annual receipts of SES and its acknowledged affiliate exceed the size standard. Therefore, the joint venture exception to affiliation found in 13 C.F.R. § 121.103(h)(3)(i) (2010) did not apply. (*Id.* at 6.)

In concluding that SES exceeds the size standard, the Area Office determined that SES was not allowed to exclude the $160,185 annually from its receipts. According to OHA precedent, such "[a]djustments under the Internal Revenue Code are not among the enumerated exceptions [in 13 C.F.R. § 121.104(a)], and thus may not be excluded from the calculation of a firm's receipts." *Size Appeal of J.M. Waller Assocs., Inc.*, SBA No. SIZ-5108, at 4 (2010). Thus, the Area Office reasoned, because the joint venture exception to affiliation found in 13 C.F.R. §

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[5] The joint venture regulations were significantly revised in 2011, but those revisions did not become effective until March 14, 2011. 76 Fed. Reg. 8222 (Feb. 11, 2011) ("The amendments to 13 CFR part 121 apply with respect to all solicitations issued and all certifications as to size made after March 14, 2011."). Unless otherwise indicated, all citations to 13 C.F.R. § 121.103(h) are to the 2010 iteration of the rule.

121.103(h)(3)(i) (2010) did not apply, the joint venture partners are affiliated for the DESP3 procurement. (Size Determination at 6.)

The Area Office also concluded the joint venture partners are generally affiliated, and offered two reasons to support this conclusion. First, the Area Office found Appellant submitted "at least five offers" between 2003 and 2005, and therefore violated the 3-in-2 rule.[6] The Area Office rejected Appellant's contention that several of these contracts were mistakenly awarded to Appellant rather than to AESI, noting that "award documentation clearly shows [Appellant] is the offeror on these contracts except for contract F42650-03-P-3491 which was issued to AESI." (*Id.* at 7.) In addition, the Area Office stated, Appellant's website indicates that, "[Appellant] has numerous contract vehicles immediately available," then proceeds to list four contracting vehicles. (*Id.*, citing www.teamaes.com/contracting/vehicles.html.) The website further indicates that Appellant is the prime contractor on GSA Schedule 70 with a period of performance from 2000-2005.

Second, the Area Office determined the joint venture partnership was "of such long duration that it cannot be seriously argued that the relationship is "not on a continuing basis for conducting business generally."' (*Id.* at 7, quoting 13 C.F.R. § 121.103(h).) To support this conclusion, the Area Office reasoned that Appellant's tax returns show that the joint venture has been in existence since October 1995. (*Id.*) The Area Office stated further that, even if the current joint venture partners had been in business together only since 2005, as Appellant claimed, eight years collaboration is sufficient to render the joint venture partners generally affiliated.

Lastly, the Area Office concluded its analysis by stating, "If these factors alone are insufficient to establish affiliation, certainly all of these factors together establish general affiliation." (*Id.* at 8, citing 13 C.F.R. § 121.103(a)(5).)

C. Appeal

On June 13, 2013, Appellant filed the instant appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.

Appellant argues that the Area Office misunderstood or misconstrued Appellant's position with regard to the adjustment of SES's receipts. Appellant maintains that it "submitted a declaration from its licensed tax accountant and CPA establishing that the amount at issue—$160,185—was neither a 'deduction from receipts' nor was it 'income excluded from SES' receipts."' (Appeal at 5.) Appellant reiterates that this amount was "a reconciliation that became necessary (solely for income tax purposes) when SES was required to change its accounting method from a cash to an accrual basis." (*Id.*, citing Deamer Decl. ¶ ¶ 5-6.) Appellant insists that the $160,185 was not excluded or deducted from receipts because it was never part of SES's receipts. (*Id.* at 6.)

[6] The five procurements referenced by the Area Office are F42650-03-P-3491, FA8201-040P-2076, FA8201-05-P-0070, FA8222-05-D-0001, and FA8201-05-P-1311. (Size Determination at 7.)

Appellant contends that the instant case is readily distinguishable from the *Waller* decision cited by the Area Office. In that case, Appellant points out, the challenged firm did not raise its Section 481 argument to the area office, and OHA declined to consider new issues raised for the first time on appeal. Here, by contrast, Appellant submitted a declaration to the Area Office explaining the adjustment in detail.

Appellant challenges the Area Office's reliance on the statement in *Waller* that "[a]djustments under the Internal Revenue Code are not among the enumerated exceptions, and thus may not be excluded from the calculation of the firm's receipts." Appellant argues it would be erroneous to construe this remark as precluding any Section 481 adjustments, without regard to the surrounding circumstances.

Further, although OHA expressed concern in *Waller* that firms could attempt to evade size limitations by "adjusting" their annual receipts, Appellant insists that SES's "method of calculating receipts would [not] permit a firm approaching a size limit to circumvent the size regulations and exclude large amount of revenue by changing its accounting method." (Appeal at 7, citing *Waller*, SBA No. SIZ-5108, at 4.) Appellant also argues that, insofar as *Waller* may be understood as prohibiting the removal of Section 481 adjustments in determining annual receipts, such a position is inconsistent with Federal Acquisition Regulation (FAR) 19.101(7)(v)(i), which specifically addresses the change from cash to accrual accounting, and requires a restatement of revenues for the three-year period prior to the calculation of the annual average receipts. (Appeal at 8-9.)

Next, Appellant argues the 3-in-2 rule does not apply to Appellant, because Appellant's joint venture partners are exempt from affiliation under 13 C.F.R. § 121.103(h)(3)(i). (Appeal at 10.) However, even assuming the 3-in-2 rule were applicable, Appellant did not violate the rule. Appellant argues its responses to the Area Office made clear that neither Appellant nor AESI ever submitted offers for contracts FA8201-04-P-2076 or FA84201-05-P-0070. (Appeal at 13.) Appellant emphasizes that it submitted sworn statements to this effect, which the Area Office simply ignored. Appellant asserts that the Area Office evidently based its decision on data from the usaspending.gov website, which Appellant attacks as unreliable. Appellant argues the Area Office conceded this unreliability by acknowledging that the website erroneously listed F42650-03-P-3491 as one of Appellant's contracts. Accordingly, the Area Office should have afforded greater weight to Appellant's sworn statements than to usaspending.gov. *Size Appeal of Abel Converting, Inc.*, SBA No. SIZ-2895, at 3 (1988) (OHA has "held on numerous occasions that sworn or verified factual information concerning a firm's size will be accorded greater evidentiary weight than unsupported assertions or Dun and Bradstreet reports").

Appellant argues it has only submitted offers to the Government on four procurements: DEP II (July 1995), DESP (May 1999), DESP2 (November 2004), and DESP3 (July 2010). Because no three of these offers fall within a two-year period, Appellant contends, there can be no violation of the 3-in-2 rule. Appellant argues that even if FA8201-04-P-2076 (June 2004) and FA8201-050-P-0070 (October 2004) are counted for purposes of the 3-in-2 rule, there is still no violation.

Appellant then addresses the Area Office's finding that the joint venture partners have been affiliated since October 1995. Appellant argues this finding is clearly erroneous because SES did not even exist at that time.

Appellant goes on to challenge the Area Office's statement that "a partnership of eight years is of such longstanding duration that it cannot be seriously argues that the relationship is 'not on a continuing or permanent basis for conducting business generally."' Appellant points out that, counting from 2005, the relevant time period then is five years, not eight, because size is determined as of 2010, the year Appellant submitted its initial offer on DESP3. In any case, argues Appellant, whether five or eight years, such a period is not a long time given the five-year ordering periods for the DESP contracts.

Appellant further disputes the finding of general affiliation, arguing that no joint venture partner has the ability to control the other, and a "joint venture alone is insufficient to justify a finding of [general] affiliation." *Size Appeal of DCT, Inc.*, SBA No. SIZ-4996, at 6 (2008). Like the parties to the joint venture in *DCT*, these four joint venture partners "simply agreed to seek and perform a contract together." *Id.* Accordingly, without more, they are not generally affiliated.

Alternatively, Appellant argues, even if there were a violation of the 3-in-2 rule, general affiliation does not automatically follow its violation. Therefore, it is incumbent on the Area Office to put forth a theory of general affiliation and cite supporting evidence. *Size Appeals of Safety & Ecology Corp.*, SBA No. SIZ-5177 (2010) (reversing the finding of general affiliation based on identity of interest where the challenged firm violated the 3-in-2 rule.) Here, Appellant contends, "the Area Office cited no facts whatsoever to support a finding of general affiliation." (Appeal at 19.)

Appellant argues the Area Office found, without support, that the joint venture partners are generally affiliated under the totality of the circumstances. Appellant argues the Area Office did not identify which factors it was referring to. Appellant stresses that the totality of the circumstances cannot be used as a substitute for finding independent bases of affiliation. (*Id.* at 19 n.6.)

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. Analysis

SBA regulations indicate that concerns proposing to perform a contract as a joint venture ordinarily are affiliated with one another for purposes of that contract. 13 C.F.R. § 121.103(h)(2) (2010). As discussed in *Aerospace I*, however, an exception exists if each member of the joint venture is small, and the procurement itself satisfies certain conditions.[7] Here, the Area Office found that Appellant cannot qualify for this exception because one member of the joint venture, SES, is not a small business. Specifically, the Area Office found that SES could not exclude $160,185 annually from its receipts due to a Section 481 adjustment. But for this adjustment, SES exceeds the $27 million size standard.

Appellant asserts that the Area Office erroneously counted the Section 481 adjustment in determining SES's average annual receipts. Appellant highlights that the $160,185 represents funds earned in prior years, not for the years under review. Appellant's contention is unavailing, though, as OHA considered, and rejected, this exact argument in *Waller*. It is true, as Appellant observes, that the challenged firm in *Waller* did not raise its Section 481 argument to the area office, unlike Appellant here. Nevertheless, OHA made clear that the result of *Waller* would not have been different even if the challenged firm had raised its arguments earlier. Specifically, OHA explained that:

> Even had [the challenged firm's] Section 481(a) adjustments been before the Area Office, they would not have altered the outcome of the size determination. The regulation defines "receipts" as total income plus cost of goods sold, as reported on the challenged firm's Federal tax returns. 13 C.F.R. § 121.104(a). The only exclusions from receipts are those specifically provided for in the regulation. *Id.* OHA's cases have held these exclusions are to be interpreted strictly and are limited to those enumerated in the regulation. [[Citations omitted.]

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[7] The applicable regulation stated, in pertinent part:

> A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:
> (A) The procurement qualifies as a "bundled" requirement, at any dollar value, within the meaning of § 125.2(d)(1)(i) of this chapter; or
> (B) The procurement is other than a "bundled" requirement within the meaning of § 125.2(d)(1)(i) of this chapter, and:
> (1) For a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or
> (2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

13 C.F.R. § 121.103(h)(3)(i) (2010).

> Adjustments under the Internal Revenue Code are not among the enumerated exceptions, and thus may not be excluded from the calculation of a firm's receipts. [The challenged firm] argues these adjustments do not constitute current income, and should not be included in the calculation of receipts. However, the regulation does not refer to "current income", but instead relies on "total income" and "cost of goods sold" as those terms are reported on a challenged firm's tax returns. [The challenged firm's] argument is therefore without support in the regulation. Further, adopting [the challenged firm's] method of calculating receipts would permit a firm approaching a size limit to circumvent the size regulations and exclude large amounts of revenues by changing its accounting method.

Waller, SBA No. SIZ-5108, at 4.

Appellant further argues that the Area Office construed *Waller* too broadly as prohibiting all Section 481 adjustments in calculating receipts, regardless of surrounding circumstances. I find no such error. In *Waller*, OHA considered whether Section 481 adjustments in general may be excluded from a calculation of average annual receipts, and clearly concluded that they may not. *Waller* drew no distinction concerning the circumstances surrounding the adjustment.[8] Accordingly, I find the Area Office correctly included the $160,185 from SES's Section 481 adjustment when calculating SES's size. Because SES is not a small business, Appellant does not qualify for the exception at 13 C.F.R. § 121.103(h)(3)(i) (2010). Appellant does not argue that any other exception is potentially applicable. Thus, the four members of Appellant's joint venture are affiliated for purposes of this procurement, and Appellant is not a small business for the instant procurement.

There remains an issue as to whether Appellant's member firms are also generally affiliated with one another. Here, I must agree with Appellant that the Area Office erred in finding general affiliation.

As Appellant correctly observes, a "joint venture alone is insufficient to justify a finding of [general] affiliation." *Size Appeal of DCT, Inc.*, SBA No. SIZ-4996, at 6 (2008). Rather, under the 2010 version of the regulations extant at the time of Appellant's self-certification, a finding of general affiliation was linked to non-compliance with the 3-in-2 rule.[9] In other words, if a joint

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[8] Appellant argues that the concern raised in *Waller*—that a company could attempt to circumvent size limitations by changing its accounting system—is exaggerated because the FAR requires a concern to restate its revenues for the entire three-year period of measurement. Even if so, however, Appellant's argument does not address the larger point in *Waller* that Section 481 adjustments must be included in receipts because SBA regulations do not permit or authorize their exclusion.

[9] The 2010 regulation pertinently stated:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which they combine their

venture made more than three offers on federal procurements within a two-year period, such "non-compliance with the 3-in-2 rule could precipitate a broader review of the facts and circumstances underlying the relationship between [the parties to the joint venture]" to determine whether they are generally affiliated. *Size Appeal of Magnum Opus Techs.*, SBA No. SIZ-5372, at 7 (2012). In the instant case, Appellant has persuasively shown that there was no violation of the 3-in-2 rule, because Appellant did not submit more than three offers in any two-year period. The Area Office did identify a two-year period in which Appellant apparently received five contract awards: F42650-03-P-3491 (no offer submitted by Appellant, awarded to AESI in September 2003), FA8201-040P-2076 (no offer submitted by Appellant, direct award to Appellant in June 2004), FA8201-05-P-0070 (no offer submitted by Appellant, direct award to Appellant in October 2004), FA8222-05-D-0001 (offer submitted by Appellant November 2004), FA8201-05-P-1311 (no offer submitted by Appellant, direct award to Appellant in July 2005). (Size Determination at 7.) However, the Area Office itself recognized that contract F42650-03-P-3491 actually was awarded to AESI, not Appellant. (*Id.*) Of the remaining four contracts, Appellant represented that three[10] were intended for, and performed by, AESI, but had been erroneously awarded to Appellant. For contract FA8201-05-P-1311, Appellant provided the contractual documents to the Area Office whereby the procuring agency corrected its mistake and reassigned the contract to AESI. Further, the Area Office did not address Appellant's claim that neither Appellant nor AESI had submitted any formal "offer" for several of the procurements in question, because the procuring agency contacted AESI telephonically and requested additional parts at a previously-agreed contract price. In any event, it is clear that at least two (*i.e.*, F42650-03-P-3491 and FA8201-05-P-1311) of the five procurements identified by the Area Office should not have been counted against Appellant for purposes of the 3-in-2 rule, because those contracts belonged to AESI and Appellant itself did not submit an offer. The Area Office cited no other evidence, beyond the joint venture itself, demonstrating general affiliation between Appellant's member firms. Therefore, the Area Office erred in determining the joint venture partners are generally affiliated.

IV. Conclusion

Appellant has established that the finding of general affiliation among Appellant's joint venture partners is based on clear error. To that extent, the appeal is GRANTED. In all other respects, the appeal is DENIED, and the size determination is AFFIRMED. Appellant does not qualify as a small business for the DESP3 procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

> efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the first offer.

13 C.F.R. § 121.103(h) (2010).

[10] FA8201-040P-2076, FA8201-05-P-0070, and FA8201-05-P-1311.