

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

SIZE APPEAL OF:

Drace Anderson Joint Venture

Appellant,

Appealed From
Size Determination No. 3-2013-111

SBA No. SIZ-5531

Decided: January 30, 2014

APPEARANCE

William R. Purdy, Esq., Bradley Arant Boult Cummings LLP, Jackson, Mississippi,
for Appellant

DECISION

I. Introduction and Jurisdiction

On November 1, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2013-111 finding that Drace Anderson Joint Venture (Appellant) is not a small business under the \$33.5 size standard associated with Solicitation No. N69450-12-R-0759. Appellant is a joint venture between Drace Construction Corporation (DCC), an 8(a) Business Development (BD) participant, and Roy Anderson Corporation (RAC), its SBA-approved mentor. The Area Office found that DCC and RAC are affiliated under 13 C.F.R. § 121.103(h)(2), affiliation based on joint ventures.

Appellant maintains that the size determination is flawed in numerous respects. For the reasons discussed *infra*, the appeal is granted and the size determination is remanded for further review.

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. Background

A. Solicitation and Protest

On June 16, 2012, the Naval Facilities Engineering Command (NAVFAC) Southeast issued Request for Proposals (RFP) No. N69450-12-R-0759 for a multiple-award construction contract. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$33.5 million average annual receipts. Proposals were due January 23, 2013.

On September 17, 2013, the CO announced that Appellant was one of seven apparent awardees. On September 24, 2013, the CO received a size protest from J&S Construction Company, Inc. (J&S), an unsuccessful offeror. In its protest, J&S challenged the small business size status of Appellant and two other apparent awardees that were structured as joint ventures. J&S asserted that all three joint ventures had a large business as one of the members. In addition, J&S maintained, “[s]ince this is not an 8a competitive RFP the SBA Mentor Protégé rules would not apply to these three Joint Ventures.” (Protest at 1.) J&S attached documentation demonstrating that RAC and participants in the other two joint ventures are large businesses. The CO forwarded the protest to the Area Office for consideration.

B. Size Determination

On November 1, 2013, the Area Office issued Size Determination No. 3-2013-111 concluding that DCC and RAC are affiliated for the instant procurement.¹ The Area Office found that Appellant is a joint venture between DCC and RAC, and that DCC and RAC are parties to an SBA-approved mentor-protégé agreement. (Size Determination at 5.) The mentor/protégé agreement was “approved by SBA on January 29, 2010 with a current extension until January 29, 2014.” (*Id.*) The Area Office determined that DCC and RAC complied with SBA’s “3-in-2” rule, 13 C.F.R. § 121.103(h), because their joint ventures did not bid on, or win, more than three contracts in any two-year period. (*Id.* at 7.)

The Area Office explained that “[t]he general rule is that firms submitting offers on a particular procurement as joint ventures are affiliates with regard to that contract.” (*Id.*) There are exceptions to this general rule, but the Area Office concluded that none of the exceptions are applicable in this case. Therefore, “[b]ased on 13 C.F.R. § 121.103(h)(2), DCC and RAC are found to be affiliated for this procurement since no exceptions apply.” (*Id.* at 8.)

Appellant acknowledged that RAC is not a small business, so the Area Office found that Appellant could not avail itself of the exception at 13 C.F.R. § 121.103(h)(3)(i). (*Id.*) The Area Office also reviewed Appellant’s joint venture agreement, which accompanied its proposal for

¹ The Area Office also found DCC affiliated with two other concerns, Four Aces Properties, LLC and Venture III, LLC. Appellant does not dispute these findings of affiliation, so further discussion of them is not warranted.

this procurement, and determined that “day to day business cannot be conducted without unanimous approval of the partners.” (*Id.*) As a result, “RAC has as much control over the operation of [Appellant] as the alleged controlling partner, DCC.” (*Id.*) The Area Office concluded that Appellant “is not eligible for the exception to affiliation afforded to 8(a) joint ventures that are controlled by 8(a) concerns.” (*Id.*)

The Area Office found that the combined average annual receipts of DCC and RAC exceed the applicable size standard. (*Id.* at 9.) Therefore, Appellant is not an eligible small business for this procurement.

C. Appeal Petition

On November 15, 2013, Appellant filed its appeal of the size determination with OHA. Appellant contends that the size determination is clearly erroneous and should be vacated or reversed.

Appellant first argues that J&S's protest should have been dismissed as insufficiently specific. Appellant asserts that the protest was based on the false premise that the exception for mentor-protégé joint ventures could not apply, because the underlying procurement was not an 8(a) set-aside. SBA regulations, however, expressly authorize a mentor and protégé to joint venture as a small business for any Federal prime contract. (Appeal at 3.) Further, J&S's sole protest allegation was that Appellant was not small business due to the joint venture between DCC and RAC. Pursuant to 13 C.F.R. § 121.103(h)(3)(iii), though, joint ventures by an approved mentor and protégé are exempt from the joint venture affiliation rule. As a result, J&S's protest was “groundless and should have been dismissed pursuant to 13 C.F.R. § 121.1007(c) as not adequately setting forth any valid basis for affiliation.” (*Id.*)

Appellant next argues that the Area Office lacked jurisdiction to examine any aspect of the mentor-protégé relationship between DCC and RAC. OHA has repeatedly recognized 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 (2008). Further, Appellant contends, whether a mentor-protégé joint venture is eligible for a particular procurement depends upon compliance with 8(a) rules, specifically 13 C.F.R. § 124.513(c) and (d), and is beyond the subject matter jurisdiction of an area office. (Appeal at 4-5, citing *Size Appeal of Carntribe-Clement 8AJV # 1, LLC*, SBA No. SIZ-5357 (2012), *Size Appeal of Trident³, LLC*, SBA No. SIZ-5315 (2012), and *Size Appeal of SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008)). According to Appellant, “the only issue even arguably before the Area Office was whether [DCC], as protégé, was itself small,” and the Area Office should have confined its review to that question. (*Id.* at 5.)

Appellant asserts that the Area Office improperly found affiliation between DCC and RAC based solely on 13 C.F.R. § 121.103(h)(2), while ignoring 13 C.F.R. § 121.103(h)(3)(iii), which permits an exception to affiliation for joint ventures between approved an SBA-approved mentor and protégé, as well as 13 C.F.R. § 121.103(b)(6), which provides that assistance from mentor to protégé is not grounds for affiliation. (*Id.* at 6-7.) Appellant insists that, even if OHA concludes that J&S's protest was proper and within the Area Office's jurisdiction, the appeal still

should be granted because Appellant does in fact meet all the requirements of 13 C.F.R. § 124.513(c) and (d). (*Id.* at 7-10, 13-16.) Appellant contends that the size determination offers no analysis or rationale for concluding that Appellant does not meet the requirements of 13 C.F.R. § 124.513(c) and (d). Furthermore, the size determination did not address, or even mention, a power of attorney document whereby RAC delegated certain authority to DCC for the instant procurement. (*Id.* at 14-16.)

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

1. Protest Specificity

Appellant initially contends that J&S's protest was insufficiently specific and should have been dismissed. SBA's regulation governing protest specificity requires that:

A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest.

13 C.F.R. § 121.1007(b). In assessing the sufficiency of protests, OHA will focus upon “(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protester was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds.” *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009). A non-specific protest must be dismissed. 13 C.F.R. § 121.1007(c).

In this case, I find that J&S's protest did set forth sufficiently specific grounds for challenging Appellant's size. J&S alleged that Appellant is not an eligible joint venture because one of the parties to the joint venture, RAC, is a large business. *See* Section II.A, *supra*. In addition, J&S offered factual evidence to support its claim that RAC is other than small. These allegations, which were accompanied with factual support, were sufficient to give Appellant notice that the validity of the joint venture would be reviewed, and thus met the minimum threshold for specificity under 13 C.F.R. § 121.1007(b). *See, e.g., Size Appeal of Continuant, Inc.*, SBA No. SIZ-4839, at 4 (2007) (determining a protest was adequately specific because the protester “identified [the challenged firm] and gave a specific reason why it believed the firm

was other than small. [The challenged firm] was on notice of the grounds upon which its size was questioned. This is sufficient to meet the criteria for a specific protest.”). Although Appellant emphasizes that J&S's protest incorrectly stated that the mentor-protégé exception could not be applicable to this case, there is no requirement that a protester's allegations ultimately prove to be meritorious. *Size Appeal of The MayaTech Corporation*, SBA No. SIZ-5269, at 7 (2011). Accordingly, I reject Appellant's contention that the protest should have been dismissed for lack of specificity.

2. Mentor-Protégé Joint Venture

Appellant's stronger argument is that the Area Office failed to give proper consideration to the fact that Appellant is a joint venture between an SBA-approved mentor and protégé. The Area Office recognized that RAC and DCC are an SBA-approved mentor and protégé, and determined that RAC and DCC have complied with the “3-in-2” rule. *See* Section II.B, *supra*. The Area Office went on, however, to find that RAC and DCC are affiliated based on 13 C.F.R. § 121.103(h)(2), which states that “[e]xcept as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.” *Id.* Paragraph (h)(3) of the regulation in turn identifies three exceptions, one of which — 13 C.F.R. § 121.103(h)(3)(iii) — applies specifically to mentor-protégé joint ventures. The size determination, though, did not address whether Appellant qualifies for the exception from affiliation for mentor-protégé joint ventures. Rather, the size determination summarily stated that “[b]ased on 13 C.F.R. § 121.103(h)(2), DCC and RAC are found to be affiliated for this procurement since no exceptions apply.” *Id.*

The exception from affiliation for mentor-protégé joint ventures states that:

Two 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 and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.519 of these regulations.

13 C.F.R. § 121.103(h)(3)(iii). For small business set-asides, such as found in this case, the regulation further states that:

If the procurement is to be awarded other than through the 8(a) BD program (*e.g.*, small business set aside, HUBZone set aside), SBA need not approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§ 124.513(c) and (d) will apply. This means that the joint venture must meet the requirements of §§ 124.513(c) and (d) in order to receive the exception to affiliation authorized by this paragraph.

Id. Accordingly, under 13 C.F.R. § 121.103(h)(3)(iii), Appellant would be exempt from affiliation under 13 C.F.R. § 121.103(h)(2) if DCC, the protégé, qualifies as small for the

procurement, and Appellant meets the requirements of 13 C.F.R. § 124.513(c) and (d). The record does not reflect that any such analysis was performed in this case. *See* Section II.B, *supra*. As a result, the Area Office clearly erred by failing to consider and apply 13 C.F.R. § 121.103(h)(3)(iii), and the case must be remanded for further review.

Appellant also contends that its compliance with 13 C.F.R. § 124.513(c) and (d) should be assessed by 8(a) BD program officials, rather than by an area office. It is true that, in the context of 8(a) BD procurements, OHA has recognized that 8(a) BD officials are responsible for reviewing and approving mentor-protégé joint venture agreements, and for applying substantive provisions of 13 C.F.R. Part 124. *E.g.*, *Size Appeal of Trident3, LLC*, SBA No. SIZ-5315 (2012). OHA has not, however, previously extended these holdings to procurements outside the 8(a) BD program, such as found here. The distinction is significant because, for non-8(a) BD procurements, a joint venture's compliance with 13 C.F.R. § 124.513(c) and (d) would normally not be reviewed unless a size protest is lodged, so an area office's examination of such matters would not duplicate or contradict a determination already rendered by 8(a) BD program officials. In any event, Appellant has not, at this juncture, been found non-compliant with 13 C.F.R. § 124.513(c) and (d) by any SBA office. It therefore is unnecessary for OHA to resolve this question at this time.

3. Remand

On remand, the Area Office must solicit a narrative response from Appellant as to the applicability of 13 C.F.R. § 121.103(h)(3)(iii). The Area Office will then issue a new size determination considering the regulation, the record, and Appellant's response. If Appellant wishes to argue that compliance with 13 C.F.R. § 124.513(c) and (d) should be reviewed by 8(a) BD program officials, Appellant may do so in its response to the Area Office.

IV. Conclusion

The Area Office, without explanation, failed to consider whether Appellant was eligible for the exception to affiliation for mentor-protégé joint ventures as set forth at 13 C.F.R. § 121.103(h)(3)(iii). Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further determination.

KENNETH M. HYDE
Administrative Judge