United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Lukos-VATC JV, LLC, Appellant, Appealed From Size Determination No. 3-2014-003	SBA No. SIZ-5532 Decided: February 6, 2014

APPEARANCES

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DECISION FOR PUBLIC RELEASE

DECISION[1]

I. Introduction and Jurisdiction

This appeal involves a size determination of Lukos-VATC JV, LLC (Appellant), a joint venture formed by Lukos, LLC (Lukos) and Visual Awareness Technologies and Consulting, Inc. (VATC). Lukos is majority owned and controlled by Mr. Garth Arevalo, a socially and economically disadvantaged individual. Lukos is also a participant in the U.S. Small Business Administration (SBA) 8(a) Business Development (BD) program. Seeking approval into SBA's Mentor-Protégé Program, Lukos and VATC executed a mentor-protégé agreement and submitted it along with the required supporting documentation to SBA for approval. SBA received these materials on March 18, 2013. The date that SBA approved the mentor-protégé agreement is disputed and represents the thrust of this appeal.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to propose redactions to the published decision. Appellant stated it did not wish to propose any redactions. Accordingly, OHA now publishes the decision without redactions for public release.

On November 4, 2013, the SBA Office of Government Contracting, Area III (Area Office) issued Size Determination 3-2014-003, finding Appellant not to be an eligible small business for the subject procurement. Appellant contends the size determination is clearly erroneous and should be vacated. For the reasons discussed below, 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. Background

A. Solicitation and Protest

On May 16, 2013, the U.S. Special Operations Command (SOCOM) in MacDill AFB, Florida issued Solicitation H92222-13-R-0013, seeking training and exercise support services. The Contracting Officer (CO) set the procurement aside for participants in SBA's 8(a) BD program and designated North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific, and Technical Services, with a corresponding size standard of $14 million in average annual receipts. Offers were due June 17, 2013. On that date, Appellant submitted its proposal, self-certifying as a small business.

On September 25, 2013, the CO notified offerors that the contract had been awarded to Appellant. Five days later, ITA International, LLC (ITA), a disappointed offeror, filed a protest challenging Appellant's size. ITA contended that Appellant does not qualify for the 8(a) mentor-protégé exemption from affiliation because Appellant's mentor-protégé agreement had not been approved as of the date Appellant submitted its proposal. Protest at 2. ITA claimed the "agreement was not approved until on or about July 25, 2013." *Id.* ITA explained, "Both Lukos and VATC announced the SBA's approval of their mentor-protégé agreement on their company websites as being effective as of July 25, 2013." *Id.* To support this claim, ITA provided printouts of press releases from the firms' websites indicating approval of the mentor-protégé agreement.

B. Response to the Protest and AA/BD's Letter

On October 23, 2013, Appellant responded to the protest. Appellant first argued the protest was not sufficiently specific, so the Area Office should dismiss it. Second, Appellant argued the Area Office lacked jurisdiction to find Appellant ineligible for award because SBA's South Florida District Office (District Office) had already approved the joint venture. Third, Appellant argued that SBA had in fact approved the mentor-protégé agreement before Appellant submitted its offer. On this point, Appellant represented that SBA expressly informed Appellant on June 10, 2013, that it had approved the mentor-protégé agreement. Alternatively, Appellant argued, should the Area Office determine SBA approved the mentor-protégé agreement on a

later date, SBA should be equitably estopped from penalizing Appellant for its reasonable reliance on SBA's June 10 statement.

On October 25, 2013, Mr. Darryl Hairston, SBA's Associate Administrator for Business Development (AA/BD) issued a letter stating that SBA did not ""ultimately approve" the mentor-protégé agreement until June 19, 2013.

The same day the AA/BD submitted his letter, Appellant submitted a supplementary response. Appellant disputed the June 19 approval date, arguing that the District Office informed Appellant on June 10 that the agreement was approved.[2]

C. Size Determination

On November 4, 2013, the Area Office issued the size determination finding Appellant not to be an eligible small business for the instant procurement. The Area Office determined Appellant did not qualify for the mentor-protégé exception to affiliation because SBA did not approve the mentor-protégé agreement until June 19, 2013, two days after Appellant submitted its proposal for the instant procurement. 13 C.F.R. § 121.103(h)(3)(iii). The Area Office then noted that VATC's average annual receipts when combined with those of its affiliate, AAZMV, LLC,[3] exceed the $14 million size standard. Therefore, without the protection of the mentor-protégé exception to affiliation, Appellant is not an eligible small business. *Id.* § 121.103(h)(3)(i)(1).

D. Appeal Petition

On November 19, 2013, Appellant filed an impermissibly long version of its appeal petition[4] and moved to admit new evidence. On December 2, 2013, Appellant submitted a

[2] Appellant also argued that, according to SBA's Standard Operating Procedure (SOP), the District Office has exclusive authority over reviewing and approving 8(a) joint ventures. SOP 80 05 3, at 175.

[3] The Area Office noted Ms. Sara Moola controls VATC because she is the 51% owner. She is also the 50% owner and managing member of AAZMV, LLC. The Area Office therefore concluded VATC and AAZMV, LLC are affiliated based on Ms. Moola's common ownership. 13 C.F.R. § 121.103(c)(1).

[4] By regulation, appeal petitions are limited to 20 pages, excluding attachments. 13 C.F.R. § 134.203(d)(2). Parties appearing before OHA may move to exceed the page limitation for good cause. *Id.* Here, the original appeal petition was 31 pages. Appellant moved to exceed the standard page limitation, arguing that a lengthier appeal was warranted because "giving short shrift to either the facts or the case law in an effort to fit within the 20-page limit could adversely affect [its] ability to prevail. . . ." Motion at 1. Appellant construed SBA's regulation on format as an "optional regulation," and offered to resubmit its appeal with tight spacing and shrunken margins and font should OHA deny the motion. *Id.* at 2 n.1.

Noting that unnecessarily long summaries of the procedural history and case law constituted a substantial portion of the appeal, I denied the motion on November 22, 2013, and

revised appeal and a second motion to admit additional evidence into the record.

In the revised appeal, Appellant claims the Area Office improperly ignored Appellant's argument that the protest was not specific. *Size Appeal of Jupiter Corp.*, SBA No. SIZ-5110, at 4 (2010) (PFR) ("Once raised the area office must evaluate the protested concern's claim and decide, in an exercise of discretion, whether the protest is specific."). Appellant contends in the alternative that, to the extent the Area Office impliedly determined the protest was specific, such a determination amounts to clear error. In Appellant's view, the premise of the protest was that "[b]oth Lukos and VATC announced the SBA's approval of their mentor-protégé agreement on their company websites as being effective as of July 25, 2013." However, Appellant argues, the evidence ITA submitted does not support this assertion. The press releases state that SBA approved the mentor-protégé agreement and "subsequently ... approved Lukos-VATC JV LLC as an 8(a) joint venture." Protest Exhs. 5 & 6. Therefore, although the press releases indicate that the mentor-protégé agreement had been approved by July 25, 2013, they are silent as to the date the agreement was actually approved. As a result, the premise of the protest does not survive scrutiny. Appellant concludes that this faulty premise renders the protest non-specific. Accordingly, the Area Office should have dismissed the protest, and OHA should vacate the size determination. *E.g., Size Appeal of Callahan Timber Co. Inc.*, SBA No. SIZ-4961 (2008).

Appellant then argues that the Area Office lacked jurisdiction to decide the size protest, contending that an area office may not second guess a district office's approval of a joint venture. Appellant argues that, in evaluating its eligibility for award, "the District Office necessarily concluded that the mentor-protégé agreement was effective as of the date of Appellant's offer or that Appellant otherwise qualified as small." Appeal at 14 (citing 13 C.F.R. § 124.513(b)). Because the District Office approved the joint venture agreement, "the Area Office [has] no authority to perform the same review." *Size Appeal of Trident*[3]*, LLC*, SBA No. SIZ-5315, at 13 (2012).

Although the Area Office did not mention *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997 (2008), Appellant distinguishes that case from this one. The procurement at issue in *DCS* was set aside for small businesses, not 8(a) program participants like the instant procurement. Because there was no previous district office approval of the joint venture, the Area Office did not reach behind any prior SBA approvals.

Next, Appellant argues, given the facts of this case, SBA should be equitably estopped from finding Appellant ineligible. Appellant explains that it submitted the mentor-protégé agreement to SBA for approval on March 18, 2013, and followed up with SBA weekly. When SOCOM issued the solicitation on May 16, 2013, with a proposal due date of June 17, 2013, Appellant informed the District Office of the due date and its intent to submit a proposal. Appellant explains that it contacted the District Office "nearly every business day" to check on the status of the mentor-protégé agreement and stress the need for a prompt decision. On June 3,

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directed Appellant to submit a revised 20-page version of the appeal in a clear, easy-to-read format no later than December 2, 2013. I also explained that the terms "should be" and "preferably" in 13 C.F.R § 134.203(d)(1) indicate reasonable flexibility but do not render the regulation completely optional or create a license to exceed the length limitation by half.

2013, the District Office informed Mr. Arevalo that the mentor-protégé agreement had been forwarded to SBA Headquarters for final review.[5] On June 10, 2013, an SBA Business Opportunity Specialist (BOS) notified Mr. Arevalo by telephone that SBA Headquarters had approved the mentor-protégé agreement.[6] Appellant contends this statement was clear and unequivocal, and Appellant reasonably relied on this statement to its detriment. As a result, SBA should be equitably estopped from finding Appellant ineligible. Revised Appeal at 4-5.

Appellant argues that an agency may be prohibited from taking adverse action against a contractor if: (1) the agency knows the true facts; (2) the agency intends or expects that its statements will be relied upon; (3) the contractor is ignorant of the true facts; (4) the contractor relies on the agency's conduct to its injury; and (5) there is affirmative misconduct on the part of the Government. *See e.g., Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000)(citing *Rel-Reeves v. United States*, 534 F.2d 274, 296-97 (Ct. Cl. 1976)). In Appellant's view, these elements are met because, first, as of June 10, only the SBA knew whether the mentor-protégé agreement had been approved. Second, by informing Appellant of the approval, SBA should have known that Appellant would rely on SBA's statement by submitting an offer as a joint venture. Third, to the extent the mentor-protégé agreement had not been approved, Appellant was not aware of this fact. Fourth, the determination that Appellant is not an eligible small business severely injures Appellant. Finally, SBA's express statement that the mentor-protégé agreement was approved exceeds mere negligence and arises to affirmative misconduct. *See Miller v. Department of the Interior*, 635 F. Supp. 2d 1224, 1235 (D. Co. 2009) ("Defendants' repeated pattern of conduct with regard to Plaintiffs' multiple payments, coupled with the delay, constituted more than mere negligence but rather affirmative misconduct.")

E. ITA's Response

On December 11, 2013, ITA responded to the appeal. ITA argues the Area Office correctly determined that Lukos and VATC are affiliated based on their joint venture.

ITA addresses the contention that the Area Office erred by not addressing Appellant's argument that the protest lacked specificity. ITA argues this was not clear error, and that Appellant's reliance on *Jupiter* for this point is misplaced. ITA explains that *Jupiter* stands for the proposition that specificity is a substantive issue that must be argued during the size investigation for a party to argue it on appeal. Under *Jupiter*, then, by arguing to the Area Office that the protest was not specific, Appellant preserved its right to renew this argument on appeal.

[5] Appellant explains that Lukos and VATC decided they would submit the proposal with Lukos as the prime contractor and VATC as a major subcontractor if they were not soon notified that the mentor-protégé agreement had been approved. They also began planning to send a representative to SBA Headquarters to lobby for timely approval of the agreement "and would have involved its Congressional representatives if necessary." Revised Appeal at 19.

[6] Appellant represents that Mr. Arevalo requested a copy of the approval letter, but was told that formal approval letters were not issued; rather, SBA Headquarters logs record of mentor-protégé approvals in its files.

As a result, Appellant is not prejudiced by the Area Office's lack of discussion on this point.

ITA then counters the assertion that the protest was not specific. To be specific, a protest must give reasonable notice as to the size protest grounds and give some factual basis for the allegations. 13 C.F.R. § 121.1007(b). In ITA's view, Appellant does not dispute that the protest provided Appellant with reasonable notice as to the grounds of the protest, but instead takes issue with the factual basis of the protest. ITA argues, however, that "there is no requirement that a protest be accurate." *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828, at 7 (2006) (citing *Size Appeal of Emergency Beacon Corp.*, SBA No. SIZ-4813, at 14 (2006) (finding specificity where protestor alleged two entities were affiliated but provided inaccurate statements regarding nature of affiliation)). Accurate protests are not required because much of the information necessary to prove a size protest is not publicly available. *Jupiter Corp.*, SBA No. SIZ-5110, at 5 (2010) (PFR). Here, ITA argues, it alleged Appellant's mentor-protégé agreement was not approved prior to Appellant's submission of its proposal, and ITA included supporting evidence from Lukos's and VATC's websites. Thus, it provided Appellant with reasonable notice as to the grounds of the protest and a factual basis for the allegations. The protest was therefore specific.

Next, ITA contends the Area Office properly exercised jurisdiction because the protest at issue was a size protest. ITA alleged that Appellant "is not qualified to receive award of the contract because Lukos and VATC are affiliated for this procurement" and "[t]he joint venture does not qualify for an exemption from the affiliation rule for joint ventures." Protest at 2 (emphasis omitted). ITA adds that the protest does not allege that SBA did not properly approve the joint venture or mentor-protégé agreements. Rather, it stated clearly, "The joint venture between Lukos and VATC does not qualify for the 8(a) mentor/protégé exemption from affiliation because the mentor/protégé agreement was not approved until after the joint venture had . . . submitted its proposal in response to the Solicitation." *Id.* at 3. Thus, ITA limited its allegation—and the Area Office limited its inquiry—to whether the mentor-protégé exemption to affiliation applied. The Area Office did not inquire into whether Lukos was a proper protégé, whether VATC was a proper mentor, or whether the joint venture and mentor-protégé agreements were legally sufficient. Thus, the Area Office did not exceed its jurisdiction.

ITA argues equitable estoppel is not an available remedy because Appellant has not established affirmative misconduct on the part of SBA. To do so, ITA argues, Appellant must demonstrate personal animus, prejudice, or other irregular conduct with clear and convincing evidence. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 13 (2007). ITA argues Appellant has asserted no facts that would establish intentional wrongdoing or bad faith. At most, Appellant has alleged that the BOS made a mistake during the June 10 telephone conference.

ITA also argues that "more than mere negligence" is not the standard for determining affirmative misconduct. ITA points out that *Miller*, the authority on which Appellant relies for this point of law, was vacated. ITA contends, however, that even if this lower standard were legally correct, Appellant still does not meet its burden of persuasion because a good faith mistake does not exceed the bounds of mere negligence.

Appellant's equitable estoppel argument also fails, ITA argues, because Appellant's reliance on the BOS's advice was not reasonable. ITA argues that the BOS was not authorized to approve the mentor-protégé agreement, and emphasizes that the statement at issue was oral, not written. OHA has held, "Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *In the Matter of Curtoom Constr.*, SBA No. 540, at 12-13 (1996) (quoting *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 n. 17 (1984)). "The power to approve mentor-protégé agreements and their renewals is vested solely with SBA's [[(AA/BD)]." *Size Appeal of DCS Night Vision JV*, LLC, SBA No. SIZ-4997, at 9 (2008) (citing 13 C.F.R. § 124.520(e)(2)). Moreover, OHA has held that "receipt of oral advice should not be the basis of an estoppel defense." *Curtoom* at 12. Here, Appellant relied on the oral statement from the BOS, not the AA/BD. Accordingly, because the BOS was not authorized to approve the mentor-protégé agreement, and this statement was not in writing, Appellant's reliance was unreasonable.

F. New Evidence and Opposition Thereto

In its first motion, Appellant seeks to admit an affidavit from its manager, Mr. Garth Arevalo, and internal SBA documents. In the affidavit, Mr. Arevalo attests to his efforts to gain approval of the mentor-protégé agreement and SBA's June 10 statement. In support of Mr. Arevalo's statements, Appellant provides phone records and emails documenting Mr. Arevalo's communications with SBA. The internal SBA documents provide details on the mentor-protégé and joint venture approvals. Appellant argues OHA should admit this evidence because it is directly relevant and does not enlarge the issues on appeal.

ITA counters that there is not good cause to admit the affidavit or the phone and email records. Rather than clarifying issues, ITA argues, the affidavit enlarges the issues by raising a question of fact for which "OHA would be compelled to hold a hearing so that Mr. Arevalo could be cross-examined." Moreover, Appellant could have submitted the affidavit to the Area Office, but did not. *See Size Appeal of HBC Mgmt. Servs., Inc.*, SBA No. SIZ-5409 (2012). As for the phone and email records, ITA argues these documents shed no light on the key issue in this appeal: the date mentor-protégé agreement was approved.

In the second motion, Appellant seeks to admit a letter from Mr. Jeffrey Campbell, SBA's Assistant District Director for 8(a) BD (ADD/8(a)BD), dated November 25, 2013. According to Appellant, this letter confirms that Appellant received notice of SBA's approval of the mentor-protégé agreement and that Appellant's reliance on this notice was detrimental. Thus, Appellant argues, this letter is directly relevant to the matters on appeal and does not enlarge the issues before OHA. Moreover, because the ADD/8(a)BD issued this letter after the Area Office issued the size determination, Appellant could not have presented it to the Area Office.

ITA opposes this motion. ITA argues that Appellant's possession of these letters constitutes "suspicious events that threaten to taint the integrity of the [subject] procurement." ITA argues there is not good cause to admit this evidence because "[i]t serves only to perpetuate [Appellant's] wholly inappropriate effort to exert undue influence over [SBA], OHA, and the [CO]."

G. Agency Comments

On December 20, 2013, I requested that SBA submit comments on the issue of equitable estoppel and clarify its process for approving mentor-protégé agreements. Specifically, I requested that SBA address the AA/BD's "ultimate approval" of the mentor-protégé agreement on June 19, 2013. I inquired whether, by using the word "ultimate," the AA/BD signified other levels of approval on which Appellant could have reasonably relied in submitting its proposal as a joint venture. I also asked SBA to explain the legal effect of the District Office's oral statement that the mentor-protégé agreement had been approved.

On January 16, 2014, SBA responded to the request for comments. SBA argues the Area Office properly applied the size regulations, Appellant's mentor-protégé agreement was approved in accordance with 13 C.F.R. § 124.520(e)(2), and the BOS's June 10 statement cannot estop the Area Office from applying the correct size regulation.

SBA explains that for a joint venture to be small, it must be small as of the date it submits its initial offer including price. 13 C.F.R. § 121.404(a). Unless an exception applies, the joint venture partners' revenues are aggregated when determining size. *See id.* § 121.103(h)(2). One exception allows a mentor and protégé to joint venture on 8(a) procurements and procurements set aside for small businesses, without being affiliated, so long as the protégé qualifies as small for the procurement. *Id.* 121.103(h)(3)(iii). To qualify for this exception, joint venturers must comply with the requirements of SBA's Mentor-Protégé Program, 13 C.F.R. § 124.520, including the requirement that the participating firms enter into a written mentor-protégé agreement "setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs." *Id.* § 124.520(e)(1). Importantly, "SBA must approve the mentor/protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation." *Id.* § 124.520(d)(1)(i). The regulations also make plain that "[t]he written agreement must be approved by the AA/BD." *Id.* § 124.520(e)(2) (emphasis added).

SBA explains that this requirement of AA/BD approval has existed since SBA implemented the Mentor-Protégé Program. In the proposed regulations establishing the program, SBA explained: "In order to be recognized as mentors/protégés, the AA/8(a)BD would have to approve a written agreement between the mentor and protégé firms under which the mentor commits to provide management and/or technical assistance to the protégé firm for at least one year." 62 Fed. Reg. 43584, 43595 (Aug. 14, 1997).

In a later proposed rule, SBA clarified that mentors and protégés may take advantage of the affiliation exception "only if the mentor/protégé agreement is approved by SBA prior to the submission of the bid or offer on the procurement." 74 Fed. Reg. 55694, 55709 (Oct. 28, 2009). SBA explained this was not a new requirement:

> Although this is the current practice, SBA felt it was useful to make this practice clear in its regulations, as some companies have mistakenly assumed that, like

> joint ventures between mentors and protégés on 8(a) procurements, a mentor/protégé agreement could be approved after submission of an offer as long as it was approved prior to the date of award. This is not the case. Joint ventures are tied to procurements and often there is insufficient time to obtain SBA's approval between the issuance of a solicitation and the submission of an offer. Therefore, SBA has permitted joint ventures to be approved on 8(a) procurements after the submission of offers, as long as the approval takes place prior to the actual award. Unlike joint ventures, mentor/protégé agreements should not be specifically connected with procurements. Size benefits for purposes of joint ventures are a benefit of engaging in a mentor/protégé agreement, not the reason for the relationship. Therefore, there are no strict time limitations at issue. Because it is possible that SBA might not approve a mentor/protégé agreement in a given situation, it believes that it is important that approval occur prior to a joint venture's submission of its bid or offer.

Id. (emphasis added). SBA implemented this rule as proposed and noted in the final rule: "It seems obvious to SBA that if SBA has not yet approved the mentor/protégé agreement, a joint venture between proposed protégé and mentor firms is not entitled to receive the benefits of the mentor/protégé program, including the exclusion from affiliation." 76 Fed. Reg. 8222, 8246 (Feb. 11, 2011).

In this case, SBA maintains, the Area Office properly applied these regulations. The instant procurement was set aside for 8(a) participants, and Appellant submitted its offer on June 17, 2013. In accordance with 13 C.F.R. § 121.404(a), the Area Office determined Appellant's size as of that date. For Appellant to avail itself of the mentor-protégé exception to affiliation, then, the AA/BD must have approved Appellant's mentor-protégé agreement before Appellant submitted its offer as a joint venture. *See* 13 C.F.R. § 121.103(h)(3)(iii). Otherwise, both Lukos and VATC would have to be small under the $14 million size standard. *Id.* § 121.103(h)(3)(ii). SBA observes that the record contains two documents relevant to this issue: (1) a memorandum dated June 19, 2013, issued by the AA/BD notifying the District Office of his approval of Appellant's mentor-protégé agreement; and (2) a letter issued by the AA/BD on October 25, 2013, in which the AA/BD affirms that the date of his approval was June 19, 2013. From these two documents, the Area Office reasonably concluded that the AA/BD approved the mentor-protégé agreement on June 19, 2013, two days after Appellant submitted its offer. Therefore, the Area Office correctly determined that the mentor-protégé exception did not apply.

Next, SBA argues Appellant's mentor-protégé agreement was approved in accordance with SBA regulations. SBA notes the regulations explicitly state that a mentor-protégé agreement must be approved by the AA/BD. 13 C.F.R. § 124.520(e)(2). According to SBA, this regulation makes clear that the AA/BD has the exclusive authority to approve a mentor-protégé agreement. SBA observes there is nothing in the regulations indicating that a district office or BOS has the authority to approve a mentor-protégé agreement. Because approval can only come from the AA/BD, the regulations do not provide for other levels of approval. The method by which a mentor-protégé agreement is received and processed prior to the AA/BD's approval is governed by internal agency procedures. However, such procedures are not binding. *See, e.g., Matter of Inter-Con Sys. Inc.*, B-227008 July 24, 1987, 87-2 CPD P 81 ("SBA's Standard

Operating Procedure represents internal SBA policies and guidelines rather than regulations having the force and effect of law.")

SBA submits that the AA/BD's use of the phrase "ultimate approval" properly describes how a mentor-protégé agreement is processed and ultimately approved or declined by the AA/BD. When a mentor-protégé agreement is submitted to a district office, the district office reviews the mentor-protégé agreement and may submit a recommendation for approval to the Office of Business Development. When the AA/BD receives a recommendation for approval, the AA/BD has the authority to either approve or disapprove the agreement, and the decision is documented in writing. Therefore, only the AA/BD's approval can effectuate the establishment of the mentor-protégé relationship. Accordingly, until the AA/BD approves a mentor-protégé agreement, the participating firms do not have a valid mentor-protégé relationship and cannot avail themselves of the exception from affiliation.

SBA argues there is no basis for applying the doctrine of equitable estoppel in this case. OHA has explained that "when government employees offer assurances contrary to federal law, they do not speak for the United States, and the government may not be estopped by their actions." *L. Freedman & Assoc., P.C.,* SBA No. 4247 at 7 (1997) (internal citations omitted). "Otherwise, if the government were barred from enforcing the law every time one of its agents erred, laws intended to be generally applicable would become riddled with exceptions." *Id.* OHA later stated that "SBA is obligated to follow its own regulations. If a district or area office makes a mistake in applying a regulation, it cannot be bound by that act because it had no authority to act contrary to the regulation in the first place." *Size Appeal of Tikigaq Eng'g Servs., LLC,* SBA No. SIZ-4842, at 14 (2007).

OHA has made clear that "affirmative misconduct is required before invoking equitable estoppel against the Government," and that "affirmative misconduct requires intentional behavior. This means the actor must know he is acting wrongfully." *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA No. SIZ-4799, at 12 (2006). In other words, "the existence of affirmative misconduct necessarily requires the Government to have acted in bad faith." *Size Appeal of Doyon Props., Inc.*, SBA No. SIZ-4838, at 14 (2007) (citing *Faison Office Prods., LLC,* SBA No. SIZ-4834, at 13 (2007)). OHA has specifically held that there is a "presumption that SBA acted in good faith in issuing a size determination" which "can only be overcome by clear and convincing evidence of personal animus, prejudice, or other irregular conduct." *Faison*, at 13.

Based on this case law, SBA argues, the BOS's statement that the mentor-protégé agreement had been approved cannot estop the Area Office from applying the correct regulation when makings its formal size determination. If SBA were bound by this error, then a large business could be awarded a contract set aside for small businesses. Such a result would contravene the Small Business Act. Moreover, the BOS's statement cannot overcome the requirement of § 124.520(e)(2) that the AA/BD approve the mentor-protégé agreement. SBA argues that if a BOS's mistaken statement that a mentor-protégé agreement had been approved could itself constitute approval, § 124.520(e)(2) would be meaningless.

SBA also points out that if SBA were estopped from properly applying its own size regulations, the scope of the mentor-protégé exception would expand. OHA has held, however,

that exceptions to affiliation must be narrowly construed. *Lance Bailey*, SBA No. SIZ-4799, at 6, 10.

Further, SBA argues, equitable estoppel does not apply in this case because the BOS's statement did not cause Appellant severe injury. Appellant argues it was severely injured because, had the BOS not represented that the mentor-protégé agreement was approved, Appellant would have lobbied SBA and involved its representatives in Congress. Appellant also would have submitted its offer as a prime contractor with VATC as the subcontractor. SBA takes this argument to task on several grounds. First, SBA contends, the argument is misplaced because the question before the Area Office was whether Appellant was small on June 17, and neither the BOS's statement nor Appellant's reliance on that statement bears on that issue. Second, the assertion that the BOS's statement caused Appellant to cease efforts to ensure timely approval does not represent a harm that warrants estoppel because Appellant cannot control the timing of the mentor-protégé agreement's approval, and the approval was not significantly delayed. Third, it is speculative to argue that were it not for the BOS's statement, Lukos would have submitted the offer as the prime contractor, as this statement assumes Lukos would have been awarded the contract under this alternative arrangement. Finally, Appellant's argument of severe injury conflicts with the purpose of the mentor-protégé relationship, which is "to enhance the capabilities of the protégé, assist the protégé with meeting the goals established in its SBA-approved business plan, and to improve the ability to successfully compete for contracts." 13 C.F.R. § 124.520(a). For this reason, SBA has explained that mentor-protégé agreements should not be tied to specific procurements because "size benefits for purposes of joint ventures are a benefit on engaging in a mentor/protégé agreement, not the reason for the relationship." 74 Fed. Reg. 554694, 55709.

SBA argues equitable estoppel also does not apply here because there is no affirmative misconduct. SBA contends there is no proof in the record that the BOS, the District Office, the Area Office, or the Office of Business Development acted in bad faith in any of the actions underlying this appeal, and there is no evidence that the BOS intentionally misled Appellant.

H. Appellant's Response to Agency Comments

On January 24, 2014, Appellant responded to SBA's comments. Appellant argues the AA/BD's final approval is not required prior to proposal submission because the BOS has the authority to approve the mentor-protégé agreement; the AA/BD then ratifies this approval.

Appellant scrutinizes 13 C.F.R. § 124.520, which provides, "SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation." 13 C.F.R. § 124.520(d)(1)(i) (emphasis added). Appellant contends the regulation's use of the term "SBA" refers to the District Office, not the AA/BD, because in other instances where § 124.520 refers to SBA actions, SOP 80 05 03 assigns those actions to the District Office. *Compare* § 124.520(e)(4) ("SBA will review the mentor-protégé relationship") *with* SOP 80 05 3, at 188 (specifying that "[t]he BOS will approve the mentor-protégé relationship"); *compare also* § 124.520(e)(5) ("SBA must approve all changes to a mentor-protégé agreement in advance") *with* SOP 80 05 3, at 187 (specifying that "[t]he

Mentor/Protégé Agreement may be modified if the modification is approved by the District Director") Appellant argues that had the regulatory drafters intended the term ""SBA" to mean "AA/BD," the drafters would have explicitly stated as much. *Size Appeal of CBR Labs., Inc.*, SBA No. SIZ-4423, at 8 (2001) ("in statutory interpretation, the presumption is that identical words used in different parts of the same act are intended to have the same meaning.")

Appellant then argues that the AA/BD's approval of a mentor-protégé agreement is in addition to the District Office's initial approval and is therefore a ratification. Appellant cites the SOP for this proposition, which states:

> b. After the BOS reviews the Agreement and prepares a thorough evaluation and recommendation, which must include the comments of District Counsel, the agreement is forwarded to the Assistant District Director for 8(a) BD (ADD/8(a)BD).
> c. If the ADD/8(a)BD does not approve the Mentor/Protégé Agreement, the process stops. The ADD/8(a)BD notifies both parties to the proposed Mentor/Protégé Agreement of the SBA's final decision at whatever point the process stops.
> d. If the ADD/8(a)BD recommends approval of the Agreement, he/she will forward the recommendation to the District Director.
> e. If the District Director agrees with the approval recommendations, he or she will forward the Agreement to the Office of Management and Technical Assistance in Headquarters.

SOP 80 05 3, at 187. Based on this SOP and principles of regulatory construction, § 124.520(d)(1)(i) should be understood as providing that it is the District Office that must approve the mentor-protégé agreement before a joint venture may avail itself of the mentor-protégé exception from affiliation. Appellant argues that, although § 124.520(e)(2) specifies that the AA/BD must give final approval, it does not specify that such approval must occur prior to proposal submission. Thus, by using the term "SBA," the regulatory drafters indicated that the AA/BD's approval is not required before proposal submission.

Next, Appellant argues that, even though the BOS did not have authority to approve the mentor-protégé agreement, he had authority to notify Appellant of such approval. From Appellant's perspective, the June 10 notification was the approval. Moreover, Appellant questions how it would have known of the AA/BD's approval, arguing that it never received notice of the AA/BD's June 19 approval.

Appellant contends that the AA/BD knew or should have known of the June 10 notification when he approved the mentor-protégé agreement on June 19. He therefore ratified the BOS's unauthorized act, "resulting in the act being given effect as if originally authorized." *Appeal of Healthcare Practice Enhancement Network, Inc.*, VABCA-5864, 2001-1 BCA ¶ 34,636.

Appellant reiterates that it reasonably relied on the BOS's approval and points out that OHA has held that a small business's detrimental reliance on erroneous advice from SBA has, in

some instances, caused SBA to relax certain regulatory restrictions, such as filing deadlines. *See Size Appeal of Cabrini Med. Ctr.*, SBA No. SIZ-4610 (2004); *Size Appeal of Browning Constr. Co.*, SBA No. SIZ-4523 (2002). These decisions, Appellant points out, did not use the term "estoppel" or find that "affirmative misconduct" was required to deem the appeals timely, but instead relied on equitable principles. Appellant urges OHA to do the same here.

Even applying the law of estoppel, Appellant argues, SBA should be estopped from denying the effectiveness of the June 10 notification because affirmative misconduct is not required for estoppel to lie against the Government. *Broad Avenue Laundry v. United States*, 681 F.2d 746, 749 (Ct. Cl. 1982) (finding the Government was bound by a mistaken increase in the claimant's contract because the CO's action "though erroneous, was within the scope of her authority" and "[t]he Government can be estopped by the promises of an official within the scope of her authority.)

Appellant argues further that even assuming affirmative misconduct is a required element of equitable estoppel, this element does not require proof of bad faith or intentional misconduct. Rather, "[e]stoppel generally requires that government agents engage—by commission or omission—in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result." *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 187 (D.C. Cir. 2009). Moreover, affirmative misconduct "does not require that the government intend to mislead a party." *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989). In this case, Appellant argues, during multiple calls and emails between Appellant and the District Office the week of June 10, the District Office did not disavow the June 10 notification and continued to act as if the mentor-protégé agreement was approved. These statements and actions, Appellant contends, constitute a ""misrepresentation or concealment" that "at least ... will cause an egregiously unfair result." *Morris Commc'ns, Inc*. at 187. Accordingly, the District Office's actions amount to affirmative misconduct.

Appellant maintains there is no harm to the public interest in estopping SBA from disavowing the June 10 notification. Appellant argues the public would in fact benefit because Appellant's offer was priced considerably lower than the other offers.

III. Discussion

A. Standard of Review

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 upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

Appellant seeks to admit an affidavit from its manager, phone records and emails documenting his communications with SBA, internal SBA documents providing details on the mentor-protégé and joint venture approvals, and a letter from the ADD/8(a) BD dated November 25, 2013. Some of this evidence is admissible; some is not. The affidavit and supporting phone records and emails were available during the course of the size investigation, and Appellant offers no reason for why it could not submit this evidence to the Area Office. Accordingly, these pieces of evidence are inadmissible. *See Size Appeal of HBC Mgmt. Servs., Inc.*, SBA No. SIZ-5409, at 5 (2012) (excluding evidence from the record that was available during the course of the size investigation). The November letter, however, was not available until after the Area Office issued the size determination, so Appellant could not have submitted it to the Area Office. Because this document is directly relevant to the issue of equitable estoppel, I am admitting it into the record. As for the internal SBA correspondence, this evidence is already in the record, so I need not admit it. *Size Appeal of Advanced Projects Research, Inc.*, SBA No. SIZ-5504, at 3 n.2 (2013) (declining to rule on motion to admit new evidence when the proffered evidence was already in the record).

C. Analysis

I find the Area Office did not err in determining Appellant was not an eligible small business for the instant procurement. The appeal is therefore denied.

Generally, two firms that form a joint venture to perform a contract will be considered affiliates for purposes of that contract. 13 C.F.R. § 121.103(h); *see also Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 26 (2010) ("A finding of affiliation based upon § 121.103(h) is usually contract-specific."); *Size Appeal of Med. and Occupational Servs. Alliance*, SBA No. SIZ-4989, at 4 (2008) ("The general rule is that firms submitting offers on a particular procurement as joint venturers are affiliates with regard to that contract, and they will be aggregated for the purpose of determining size for that procurement."). However, the regulations recognize several exceptions to the general rule. One such exception is afforded to joint ventures formed by 8(a) BD program mentor and protégé firms:

> 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. If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513.

13 C.F.R. § 121.103(h)(3)(iii). Therefore, to qualify for this exception, joint venturers must be approved as mentor and protégé firms under 13 C.F.R. § 124.520. This approval process requires the participating firms to enter into a written mentor-protégé agreement "setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs." *Id.* § 124.520(e)(1). The regulations are clear that "SBA must approve the mentor/protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation." *Id.* § 124.520(d)(i). The regulations also make plain that "[t]he written agreement must be approved by the AA/BD." *Id.* § 124.520(e)(2).

In this case, the record is clear that the AA/BD did not approve Appellant's mentor-protégé agreement until June 19, two days after Appellant submitted its offer. Size, however, is determined as of the date the concern submits its initial offer including price. 13 C.F.R. § 121.404(a). As SBA emphasized in the regulatory history, "if SBA has not yet approved the mentor/protégé agreement, a joint venture between proposed protégé and mentor firms is not entitled to receive the benefits of the mentor/protégé program, including the exclusion from affiliation." 76 Fed. Reg. 8222, 8246 (Feb. 11, 2011). Therefore, because SBA had not approved the mentor-protégé agreement as of June 17, the date Appellant submitted its initial offer including price, Appellant was not eligible for the mentor-protégé affiliation exception.

The BOS's statement to Mr. Arevalo does not change this fact, because it is the AA/BD, not the BOS, who has the authority to approve mentor-protégé agreements. 13 C.F.R. § 124.520(e)(2); SOP 80 05 3, at 187 ("Only the AA/BD may make a final decision to approve a Mentor/Protégé Agreement.) Once "the AA/BD approves the agreement, the Office of Management and Technical Assistance will notify the Mentor and Protégé as well as the District Office." *Id.* In this regard, it is crucial to note that the District Office may disapprove or recommend approval, but it does not have the authority to approve mentor-protégé agreements. *See id.* Further, contrary to Appellant's argument that the BOS has authority to notify firms of AA/BD approval, it is the Office of Management and Technical Assistance, not the District Office, that is charged with notifying the mentor and protégé of the AA/BD's approval. Therefore, by submitting an offer as a mentor-protégé based on the BOS's statement, and without having notice of the AA/BD's approval from the Office of Management and Technical Assistance, Appellant assumed the risk that the mentor-protégé agreement had not actually been approved. *See In the Matter of Curtoom Constr.*, SBA No. 540, at 12-13 (1996) ("Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his

authority.") Appellant, therefore, may not prevail based on its reliance on the incorrect statement from the BOS.

Appellant's argument that SBA should be estopped from applying its regulations surrounding the mentor-protégé exception to affiliation fails because it is incomplete. Equitable estoppel against the Government requires a showing of affirmative misconduct, and "affirmative misconduct requires intentional behavior," meaning "the actor must know he is acting wrongfully." *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA No. SIZ-4799, at 12 (2006). Indeed, Appellant faces a high burden and must cite clear and convincing evidence of proving personal animus, prejudice, or other irregular conduct. *Size Appeal of Doyon Props., Inc.*, SBA No. SIZ-4838, at 14 (2007); *Faison Office Prods., LLC,* SBA No. SIZ-4834, at 13 (2007). On this point, it is significant that Appellant does not argue—and the record contains no evidence—that SBA actors intentionally misled Appellant or acted in bad faith. Thus, Appellant falls far short of its evidentiary burden.

If not estoppel, Appellant urges OHA to rely on equitable principles of fairness to find an earlier date of approval for the mentor-protégé agreement. As precedent, Appellant cites OHA decisions where OHA granted exception to the filing deadline after SBA's Disaster Assistance Office erroneously informed the appellants of the filing deadline. *Size Appeal of Cabrini Med. Ctr.*, SBA No. SIZ-4610 (2004); *Size Appeal of Browning Constr. Co.*, SBA No. SIZ-4523 (2002). Those cited cases, however, represent a very narrow exception. There, SBA had explicitly given erroneous instructions, in writing, to the appellants on the procedures for filing their appeals. Were OHA to refuse to hear those appeals, the parties would have been denied their right to due process of law. Such facts are not present here, and Appellant cannot point to any denial of due process or lack of opportunity to be heard similar to that of the appellants in *Cabrini Medical* or *Browning Construction*. Thus, those cases are inapposite to this appeal.

Appellant's arguments that the Area Office decided an unspecific protest and lacked jurisdiction to issue the size determination are also unpersuasive. On the first point, I find the protest was sufficiently specific. To be specific, a protest must give reasonable notice as to the size protest grounds and give some factual basis for the allegations. 13 C.F.R. § 121.1007(b). It is important to distinguish specificity from accuracy, however, because "there is no requirement that a protest be accurate." *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828, at 7 (2006). Accurate protests are not required because much of the information necessary to prove a size protest is not publicly available. *Jupiter Corp.*, SBA No. SIZ-5110, at 5 (2010) (PFR). Here, ITA alleged that Appellant's mentor-protégé agreement was not approved prior to Appellant's submission of its proposal, and ITA included supporting evidence from Lukos's and VATC's websites. Appellant was on notice, therefore, that the date of approval on its mentor-protégé agreement was under investigation. By focusing on the relevance of the website printouts, Appellant's arguments may shed light on the accuracy of the protest; however, they fail to demonstrate a lack of specificity.

Appellant's argument that the Area Office lacked jurisdiction to decide the size protest lacks merit. Appellant argues that by determining that the mentor-protégé agreement was not approved until after Appellant submitted its offer, the Area Office second guessed the District Office's approval of the joint venture. This argument fails because it relies on the faulty premise

that "the District Office necessarily concluded that the mentor-protégé agreement was effective as of the date of Appellant's offer or that Appellant otherwise qualified as small." As SBA has stated: "Size benefits for purposes of joint ventures are a benefit of engaging in a mentor/protégé agreement, not the reason for the relationship." 74 Fed. Reg. 55694, 55709 (Oct. 28, 2009). Accordingly, "mentor/protégé agreements should not be specifically connected with procurements." *Id.* Thus, because SBA does not evaluate mentor-protégé agreements in connection with procurements, it is incorrect to assert that the District Office concluded that the mentor-protégé agreement was effective as of Appellant's offer.

IV. Conclusion

The Area Office found that Appellant is not a small business, and Appellant has shown no error in the determination. I therefore 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