United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Quality Services International, LLC, Appellant, RE: SDS Joint Venture Appealed From Size Determination No. 6-2014-097	SBA No. SIZ-5599 Decided: September 25, 2014

APPEARANCES

Adam K. Lasky, Alix K. Schroeder, Oles Morrison Rinker & Baker, LLP, Seattle, Washington, for Appellant

Benjamin N. Thompson, Jennifer M. Miller, Wyrick Robbins Yates & Ponton LLP, Raleigh, North Carolina, for SDA Joint Venture

DECISION

I. Introduction and Jurisdiction

This appeal arises from a size determination in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) concluded that SDS Joint Venture (SDS) is an eligible small business for the subject procurement. 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. The record reflects the Area Office issued the size determination July 2, 2014. Quality Services International, LLC (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 January 6, 2014, the U.S. General Services Administration (GSA), Public Building Services, issued solicitation number GS-07P-13-JU-D-0070 (solicitation). The Contracting Officer (CO) issued the solicitation as a negotiated procurement set aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industry Classification System code 561210, Facilities Support Services, with a corresponding $35.5 million annual receipts size standard. Proposals were received on February 10, 2014. On May 27, 2014, the CO provided unsuccessful offerors pre-award notice that SDS was the apparent successful offeror.

On May 30, 2014, Appellant, an unsuccessful offeror, filed a size protest with the CO. Appellant alleged SDS partner Dae Sung LLC (DS) is large for this procurement. Appellant indicated DS is a member of the Mandaree Enterprises, LLC (ME), a family of companies owned by Three Affiliated Tribes. Appellant stated that DS is affiliated with ME and Three Affiliated Tribes through ownership and the combined annual revenue of the companies far exceeds the size standard for the procurement. Therefore, Appellant alleged SDS is large based on DS's affiliations and SDS is ineligible for award.

Appellant also alleged SDS is not a certified SDVO SBC in accordance with U.S. Veteran's Administration procedures. The allegations regarding service-disabled veteran-owned small business status were forwarded to the SBA SDVO SBC program office. 13 C.F.R. § 125.25(a).

B. Size Determination

On July 2, 2014, the Area Office issued Size Determination No. 6-2014-097 finding SDS is a small business for the instant solicitation. The Area Office explained SDS is a joint venture with two members, Siege Enterprises, LLC (SE), the majority member, and DS.

The Area Office explained James Kralic has majority ownership and control of SE. Size Determination at 2. The Area Office noted LB&B and ME have minority ownership in SE but do not have a controlling interest in SE and therefore there is no affiliation with SE. *Id*.

The Area Office found DS is owned entirely by ME which in turn is owned by Three Affiliated Tribes, an Indian Tribe located on the Fort Berthold Reservation, North Dakota. *Id*. At 3. The Area Office indicated Three Affiliated Tribes has the power to control DS, but there is no affiliation between DS and Three Affiliated Tribes or between DS and ME because of the exception for a business owned and controlled by an Indian tribe. *Id*. (citing 13 C.F.R. § 121.103(b)(2)(i)).

The Area Office noted DS holds majority ownership interests in multiple joint ventures with other entities. *Id*. Specifically, the Area Office found DS has formed eight separate joint ventures with LB&B from March 2010 through January 2014 and collectively been awarded

fifteen contracts from these joint ventures. *Id*. at 4. The Area Office explained, under 13 C.F.R. § 121.103(h), members of an SBA-approved joint venture may be considered generally affiliated if they have a longstanding relationship or there is contractual dependence between the joint venture partners. *Id*. The Area Office recognized the number of joint ventures and contract awards between DS and LB&B is significant, but determined they were not sufficient to find general affiliation. *Id*. The Area Office explained the proportionate share of joint venture receipts is included in a concern's receipts for size purposes. *Id*. The Area Office noted DS also created multiple joint ventures with Far East Construction, but there were no bases for affiliation. *Id*.

Relying on 13 C.F.R. § 121.103(h)(3), the Area Office considered each of the joint venture members' size separately. *Id*. The Area Office determined the size of SE and DS as of February 10, 2014, the date SDS self-certified as a small business concern. *Id*. Based on a review of SE's 2011, 2012, and 2013 tax returns, SE's average annual receipts fall below the applicable size standard of $35.5 million. *Id*. at 5. The Area Office also reviewed DS's tax returns for 2011, 2012, and 2013 and found DS's annual receipts fall below the size standard of $35.5 million. *Id*. Because SE and DS individually fall below the size standard and they are not affiliated with each other, the Area Office determined SDS is small for the size standard. *Id*. The Area Office also noted that collectively the annual receipts of SE and DS are under the $35.5 million size standard.

C. The Appeal

On July 17, 2014, Appellant filed this appeal. Appellant argues that the Area Office failed to consider whether SDS, DS, and SE were affiliated with LB&B, a large business. Appellant alleges the Area Office failed to analyze all the relevant facts and therefore failed to support the legal and regulatory basis for the size determination. Appellant argues the Area Office failed to analyze "whether DS and LB&B were generally affiliated on the basis of the cumulative effect of the multiple joint ventures between LB&B and DS and other ties between those two companies" and failed to consider affiliation between SDS and LB&B based on the newly organized concern rule. Appeal at 2-3, 6-12.

Appellant argues the Area Office erred in including only a summary conclusion that DS and LB&B are not affiliated and not addressing the evidence in the record demonstrating ties between the two companies beyond their joint ventures. Appellant requests OHA remand the matter to the Area Office with instructions to provide the basis for its conclusion regarding potential affiliation between DS and LB&B. Appellant argues, "An adequate size determination is a condition precedent for an OHA review." Appeal at 6 (citing *Size Appeal of TRC Computer Services, Inc*., SBA No. SIZ-5231 (2011) and *Size Appeal of TRC Computer Services, Inc*., SBA No. SIZ-4588 (2001)). Appellant asserts, "Remand is also necessary where the size determination ignores evidence in the record or consists merely of summary conclusions." Appeal at 7 (citing *Size Appeal of Webco, Inc*., SBA No. SIZ-4336 (1998)).

Appellant concedes that an 8(a) business development participant with an SBA-approved mentor/protégé agreement is not affiliated with a mentor solely based on assistance from the mentor under the agreement. Appeal at 7 (citing 13 C.F.R. § 121.103(b)(6)). But, Appellant notes, in accordance with regulation, a longstanding relationship " 'could lead to finding of

general affiliation, even in the 8(a) mentor/protégé joint venture context.' " Appeal at 7 (quoting 76 Fed. Reg. 8223 (2011) and citing *Size Appeal of Safety and Ecology Corp*., SBA No. SIZ- 5177 (2010) and *Size Appeal of Beltsville Industries Group, Inc.— Desbuild Inc. Joint Venture Inc*., SBA No. SIZ-5157 (2010)). Appellant points out the Area Office recognized the possibility of affiliation, even between a mentor and protégé. Appeal at 8 (citing the Size Determination at 3). Appellant notes the size determination indicates DS and LB&B "formed at least eight separate joint ventures from March 2010 through January 2014, which had collectively been awarded fifteen contracts," but then, Appellant argues, the Area Office summarily concludes DS and LB&B are not generally affiliated, without explanation in the size determination. Appeal at Appellant argues the Area Office failed to consider significant facts, such as: the receipts from the contracts awarded to the joint ventures in relation to DS's total receipts; whether the joint ventures were awarded more than three contracts within two years; or the relationship between DS's parent, ME, and LB&B as co-owners of SE, the other partner in the SDS joint venture. Appeal at 8-9. The Appellant asserts the size determination must be remanded for further consideration because the Area Office failed to account for all the evidence or sufficiently explain why DS and LB&B are not generally affiliated. *Id*. at 9.

Appellant also argues the Area Office failed to consider whether SE and LB&B were affiliated under the newly organized concern rule. Appellant asserts when an "area office's investigation raises a question of affiliation within the ambit of the original protest (even if the basis for affiliation was not specifically raised in the protest), the area office is obligated to further investigate, consider and address that issue." Appeal at 10 (citing *Size Appeal of Mark Dunning Indus., Inc*., SBA No. SIZ-4284 (2011)). Appellant asserts the record demonstrates: LB&B is the incumbent contractor and ineligible to compete for the SDVOSBC set-aside; SDS is majority owned and managed by SE, which is partly owned by LB&B; SE, which previously had not been awarded a federal contract, was sold in October 2012 to its current ownership group, including LB&B and became an SDVOSBC; and SDS was formed on February 4, 2014 for the purpose of submitting a proposal for this procurement. Appeal at 10-11. Based on these facts, Appellant argues SDS constitutes a newly organized concern under 13 C.F.R. § 134.103(g). Appeal at 11 (citing *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775 (2006)). Appellant asserts the Area Office erred in not investigating whether SDS was affiliated with LB&B under the newly organized concern and determining if any of LB&B's principal employees serve as principal employees for SDS or SE. Appeal at 11. Appellant argues the Area Office should have also considered if LB&B provides SDS or SE with contracts, financial or technical assistance, indemnification, or facilities. *Id*.

D. SDS Response

On August 4, 2014, SDS responded to the appeal. SDS cites 13 C.F.R. § 134.314 and argues Appellant has failed to meet its burden to demonstrate the size determination was based on a "clear error of fact or law." Response at 4 quoting 13 C.F.R. § 134.314. SDS asserts Appellant's arguments are procedural. *Id*. SDS states Appellant complains the Area Office did not sufficiently address potential affiliation between DS and LB&B and failed to consider whether SE and LB&B were affiliated under the newly organized concern rule. *Id*. at 4-7. SDS notes that Appellant's size protest did not raise issues of a potential affiliation between DS and LB&B or between SE and LB&B. *Id*. at 4.

SDS argues Appellant cites inapplicable OHA precedent. SDS explains the *Size Appeal of Innovative Resources, LLC*, SBA No. SIZ-5231 (2011), cited by Appellant, was remanded because the size determination did not clearly identify which regulations applied and were analyzed by the area office and there were inconsistencies in the information relied upon by the area office. Response at 4-5. Similarly, SDS states Appellant relies on the *Size Appeal of TRC Computer Services, Inc*., SBA No. SIZ-4458 (2001), which was remanded because there was no discussion of the facts. *Id*. at 5. SDS asserts the Area Office's size determination of SDS included a thorough discussion of the law considered in analyzing potential affiliation between DS and LB&B based on prior joint ventures. *Id*. (citing Size Determination at 3).

SDS emphasizes Appellant's only size protest allegation was that DS was affiliated with ME. *Id*. at 6. SDS argues the Area Office thoroughly addressed that concern and Appellant does not claim the Area Office's response to the size protest allegation was deficient. *Id*. SDS asserts the remand issued in *Innovative Resources* explicitly states it was only for the Area Office to better explain the law relied upon and "'not to address allegations which were not raised in the initial protest."' *Id*. (quoting *Innovative Resources*, SBA No. SIZ-5231). Likewise, SDS argues this case should not be remanded to address allegations not raised in the size protest. *Id*. at 6-7. SDS asserts the Area Office addressed Appellant's size protest and "'it was not the responsibility of the Area Office to investigate all of [the protested concern's] possible affiliations."' Response at 8 (citing *Size Appeal of Perry Management* SBA No. SIZ-5100 (2009)). Moreover, SDS states Appellant has not identified any elements of the newly organized concern rule, 13 C.F.R. § 121.103(g), as present here.

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

In seeking to overturn and remand the size determination, Appellant advances two principal arguments. First, Appellant maintains that the Area Office failed to adequately address whether LB&B and DS are generally affiliated, pursuant to 13 C.F.R. § 121.103(b)(6), due to the cumulative effect of the multiple joint ventures and other ties between the companies. Appellant's second argument is the Area Office erred by failing to consider whether SE and LB&B were affiliated under the newly organized concern rule. As discussed below, Appellant has not established clear error in the size determination and may not raise new issues for the first time on appeal. As a result, the appeal is denied and the size determination is affirmed.

1. General Affiliation

Appellant's first argument stems from DS's eight separate joint ventures with LB&B, which resulted in a total of fifteen contracts. Size Determination at 3. In the size determination, the Area Office explained general affiliation could be found between members of a joint venture if the relationship is longstanding or if there is contractual dependence between the partners. *See* II.B. The size determination explicitly states an 8(a) BD program participant in an SBA approved mentor-protégé relationship, like DS and LB&B, are not exempt. Size Determination at 3.

In this case, the Area Office determined "the number of joint ventures and contract awards between DS and LB&B is significant but considering the totality of the facts, is not considered sufficient to find general affiliation between them at this time," although the Area Office did include the proportionate share of joint venture receipts in DS's receipts for size purposes. *Id*. at 4.

Unlike the cases cited by Appellant, *Size Appeal of Innovative Resources, LLC,* SBA No. SIZ-5231 (2011) and *Size Appeal of TRC Computer Services, Inc*., SBA No. SIZ-4458 (2001), the Area Office set forth the facts, including: DS and LB&B's SBA approved mentor-protégé agreement, the number of joint ventures, the number of contracts awarded, and the time period of the relationship. *Id*. at 3-4. The Area Office also provided citation to the governing regulations and a relevant section of the Federal Register. *Id.* The Area Office clearly identified the law and applied it to the facts of this case. Appellant disagrees with the outcome and is challenging the sufficiency of the Area Office's approach. However, the size determination demonstrates the Area Office analyzed relevant law and facts in reaching its conclusion.

Appellant has the burden of proof to establish that it was clear error for the Area Office to determine the number of joint ventures between DS and LB&B does not support a finding of general affiliation between the firms. However, Appellant cannot point to any OHA case that mandates such a conclusion. Further, Appellant cannot establish that the firms have become contractually dependent upon each other due to the joint ventures. The Area Office reviewed the joint ventures between DS and LB&B, considered the record, and concluded that the ties between the firms did not rise to the level of general affiliation either because of a longstanding relationship or contractual dependence. 13 C.F.R. § 121.103(h). The Area Office exercised its judgment on this issue, and Appellant offers nothing but inapposite cases and mere disagreement with the result to contest it. This cannot establish clear error, either of fact or law. 13 C.F.R. § 134.314.

2. Newly Organized Concern

In its appeal, Appellant argues for the first time that the Area Office failed to consider affiliation between SDS and LB&B based on the newly organized concern rule. *See* II.C. I find Appellant's argument unavailing.

Under OHA's rules of practice, OHA will not consider new issues introduced for the first

time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012). Appellant protested DS's potential affiliation with ME and Three Affiliated Tribes. *See* II.A. Appellant's size protest raised no concerns with potential affiliation between LB&B and SDS or SE. OHA has held that an area office cannot have "erred" by failing to address arguments that were never presented in the first instance. *E.g.*, Size Appeal of EASTCO Building Svcs., *Inc.*, SBA No. SIZ-5437, at 7 (2013) (recognizing that a challenged firm "may not now argue on appeal what it should have argued to the Area Office"); *Size Appeal of J.M. Waller Assocs., Inc.*, SBA No. SIZ-5108, at 4 n.1 (2010) (denying appeal because the challenged firm "seeks to charge the Area Office with error for not considering an argument [the challenged firm] never made and that was not apparent from the face of the documentation [the challenged firm] presented.").[1]

IV. Conclusion

Appellant has not met its burden and demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

[1] However, even if considered, Appellant's allegations regarding failure to address affiliation under the newly organized concern are unfounded. Appellant asserts the Area Office's investigation revealed facts, that were not known to Appellant, that indicate the possibility that SDS and SE may be affiliated with LB&B under the newly organized concern rule. Appeal at 12. Appellant's allegation of potential violation of the newly organized rule concern does not identify any "former officers, directors, principal stockholders, managing members, or key employees" of LB&B who organized SDS or SE and now serve SDS or SE as "officers, directors, principal stockholders, managing members, or key employees" and furnish SDS or SE "with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities." 13 C.F.R. § 121.103(g) (explaining affiliation under the newly organized concern rule). Appellant's assertion the Area Office was "obligated to investigate, consider, and address" whether affiliation existed based on the newly organized concern rule is meritless. Appeal at 10. Appellant's suggestion of infringement of the newly organized concern rule because LB&B is an ineligible incumbent with ownership interest in SE, one of the joint venture partners, and SE had not received any federal contracts before LB&B invested in SE in 2012, is a misapplication of the regulatory requirements of the rule.