

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

SIZE APPEAL OF:

Kisan-Pike, A Joint Venture,

Appellant,

Appealed From  
Size Determination No. 01-SD-2014-44

SBA No. SIZ-5618

Decided: November 24, 2014

APPEARANCES

Lawrence M. Prosen, Esq., Daniel P. Broderick, Esq., Daniel F. Edwards, Esq., and Christian F. Henel, Esq., Thompson Hine LLP, Washington, D.C., for Appellant

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

Rita M. Burns, Contracting Officer, U.S. Army Corps of Engineers, Louisville, Kentucky

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 6, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-SD-2014-44, finding that Kisan-Pike, A Joint Venture (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant is a joint venture between Kisan Engineering Company, P.C. (Kisan), an 8(a) Business Development (BD) participant, and The Pike Company, Inc. (Pike), a large business that SBA approved as Kisan's mentor. The Area Office found that Kisan and Pike are affiliated for this procurement under 13 C.F.R. § 121.103(h)(2), as a result of their joint venture.

Appellant maintains that the size determination is flawed in several respects. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. No redactions were requested, and OHA now publishes the decision in its entirety.

SBA's Office of Hearings and Appeals (OHA) decides appeals of size determinations 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 January 7, 2014, the U.S. Army Corps of Engineers (Corps) issued Request for Proposals (RFP) No. W912QR-14-R-0018 for the design and construction of an Army Reserve Center (ARC) at Aberdeen Proving Grounds, Maryland. The procurement was conducted under the two-phase design-build procedures of Federal Acquisition Regulation (FAR) subpart 36.3. 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. Phase I proposals were due February 21, 2014. Appellant submitted a timely Phase I proposal, self-certifying as a small business, and was selected to submit a proposal for Phase II. On April 28, 2014, the CO issued Amendment 0004 to the RFP. Amendment 0004 identified five offerors eligible to submit a Phase II proposal and provided detailed technical specifications and drawings. Appellant submitted a timely Phase II proposal, which included price, on May 27, 2014.

On September 12, 2014, the CO announced that Appellant was the apparent awardee. Then, on September 17, 2014, the CO initiated a size protest against Appellant. The CO expressed concern that Appellant's joint venture agreement did not comply with 13 C.F.R. §§ 124.513(c)(6) and (7). As a result, Appellant might be ineligible for the mentor-protégé joint venture exception from affiliation. (Protest at 2-4.)

### B. Joint Venture Agreement

The joint venture agreement between Kisan and Pike was executed on May 7, 2014. The agreement states that Kisan owns 51% of Appellant and serves as Appellant's Managing Venturer. (Protest, Ex. 8, § 2.0.) Pike owns the remaining 49%. (*Id.*) The agreement continues:

#### **5.0 Major Equipment, facilities and other resources**

Upon award of the Contract, Kisan and Pike will provide equipment, facilities and other resources to the Joint Venture required to execute the contract.

#### **6.0 Contract Performance**

6.1 Negotiating the Contract: Vern Singh, President of the Managing Venturer, will be responsible for negotiating the original Contract, and any subsequent

negotiations. He will be supported by the Kisan-Pike team and an Executive of Pike.

6.2. Management of the Contract: Vern Singh will perform the day-to-day management and administration of the Contract. Both Kisan and Pike will have the right to visit the job-site(s) to evaluate contract performance.

6.3. Project Manager. An employee of the Managing Venturer will be assigned as the Project Manager and will be responsible for performance of the project, overseeing the jobsite, and reporting to and implementing the instructions of the Managing Venturer.

6.4. Source of Labor: The Kisan-Pike joint venture must perform at least the following percentage of work:

- a. Services (non-construction): 50% of the cost of the contract incurred for personnel with its own employees.
- b. General Construction: 15% of the cost of the contract incurred for personnel with its own employees (not including the cost of material).

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## **12.0 Performance of Work**

The Managing Venturer will perform, at a minimum, forty [percent] (40%) of the Joint Venture's work, consisting of management personnel and professional, technical, and support/trade staff. Partner Venturer, Pike, will perform at a maximum sixty [percent] (60%) of the Joint Venture's work, consisting of management personnel and professional, technical support/trade staff.

(*Id.*, §§ 5.0-6.4, 12.0.)

### **C. Size Determination**

On October 6, 2014, the Area Office issued Size Determination No. 01-SD-2014-44 concluding that Kisan and Pike are affiliated for the instant procurement. The Area Office found that Appellant is a joint venture between Kisan and Pike, and that Kisan and Pike are parties to an SBA-approved mentor-protégé agreement. (Size Determination at 2.) The Area Office determined Appellant's size as of February 21, 2014, the date of Appellant's Phase I proposal, pursuant to 13 C.F.R. § 121.404(f). (*Id.* at 3.)

The Area Office explained that SBA may find firms affiliated based on a joint venture relationship, unless an exception applies. One such exception refers to participants in an SBA approved mentor-protégé agreement. The exception reads:

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. 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.** In either case, after contract performance is complete, the 8(a) partner to the joint venture must submit a report to its servicing SBA district office explaining how the applicable performance of work requirements were met for the contract.

(*Id.* at 3, quoting 13 C.F.R. § 121.103(h)(3)(iii)) (emphasis added by the Area Office).

The Area Office noted its authority to review the terms of the joint venture agreement for procurements conducted outside of the 8(a) BD program. (*Id.* at 4, citing *Size Appeal of Drace Anderson Joint Venture*, SBA No. SIZ-5531 (2014).) It then considered whether Appellant complied with 13 C.F.R. § 124.513(c)(6) and (7). Under those regulations, a valid joint venture agreement must contain provisions:

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each; [and]

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section.

13 C.F.R. § 124.513(c). The Area Office found Appellant's joint venture agreement deficient with respect to both requirements. Rather than itemizing all major equipment and facilities, the agreement contained a single sentence stating, "Upon award of the Contract, Kisan and Pike will provide equipment, facilities and other resources to the Joint Venture required to execute the contract." (Size Determination at 4, quoting Agreement § 5.0.) Appellant argued that its agreement was sufficiently detailed because this is a design-build contract, and the Corps must approve the design before Appellant can confirm the construction plan. The Area Office rejected this explanation, however, observing that Appellant's Phase II proposal contained proposed design drawings and a detailed construction schedule. Therefore, while the design had not yet been approved, "the nature and the type of building construction are certain," and "it is very unlikely that [Appellant] has no idea how [it] will execute [its] proposal to complete the project." (*Id.* at 5.) Accordingly, Appellant's joint venture agreement does not comply with 13 C.F.R. § 124.513(c)(6).

The Area Office then turned to the requirement that the agreement specify the joint

venture partners' responsibilities regarding labor and contract negotiation and performance. On this point, the Area Office observed that the joint venture agreement merely confirmed that Appellant will perform at least 50% of the non-construction labor costs and at least 15% of the construction labor costs. (*Id.* at 6, citing Agreement § 6.4.) The Area Office found this language insufficient to meet the requirements of 13 C.F.R. § 124.513(c)(7). (*Id.*)

The Area Office also considered Appellant's compliance with 13 C.F.R. § 124.513(d), which requires that the 8(a) BD participant perform at least 40% of the work performed by the joint venture, and that this work consist of “more than administrative or ministerial functions.” Appellant did not meet this requirement, the Area Office reasoned, because the agreement made “broad” and “generic” representations that Kisan will perform at least 40% of the work “without any constructive plan to support [this] claim.” (*Id.*)

Because the joint venture agreement was deficient with respect to 13 C.F.R. § 124.513(c) and (d), the Area Office determined Appellant may not avail itself of the mentor-protégé affiliation exemption at 13 C.F.R. § 121.103(h)(3)(iii). Accordingly, Kisan and Pike are affiliated for this procurement due to their joint venture. Pike is a large business, so the combined average annual receipts of Kisan and Pike exceed the applicable size standard, and Appellant is not a small business for this procurement. (*Id.* at 7.)

#### D. Appeal Petition

On October 21, 2014, Appellant filed its appeal of the size determination with OHA. Appellant contends that the Area Office “acted irrationally, arbitrarily, and outside the scope of its proper review.” (Appeal at 11.) Consequently, the size determination should be reversed.

Appellant advances three principal arguments. First, Appellant argues, the size determination is clearly erroneous because Kisan and Pike are presumably unaffiliated as a result of their SBA-approved mentor-protégé agreement. Appellant highlights that 13 C.F.R. § 124.520(d)(4) prohibits a finding of affiliation based on assistance that a mentor provides its protégé under an approved mentor-protégé agreement. Only when such assistance exceeds the scope of the mentor-protégé agreement does affiliation arise. *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316 (2012). Appellant argues that the assistance that Pike provided Kisan is within the scope of their mentor-protégé agreement, so there is a presumption against affiliation. (Appeal at 7-8.)

Appellant's second argument is that the Area Office unreasonably penalized Appellant for providing an honest assessment of expected equipment needs and division of labor at the earliest stages of the design-build construction project. (*Id.* at 6.) Appellant complains that it repeatedly asked SBA personnel to review and comment on the joint venture agreement, but SBA declined to do so before an award was made. “Had [Appellant] been able to obtain SBA input, it could have addressed these concerns up front. Likewise, had SBA articulated its concerns initially to [Appellant] prior to a protest, then [Appellant] could have addressed these issues.” (*Id.* at 6, n.1.)

Third, Appellant contends, the Area Office should have evaluated the joint venture agreement based on the information available at the time Appellant submitted it. Appellant

asserts that the Area Office correctly determined Appellant's size as of the date Appellant certified as small in its Phase I proposal. The Area Office failed to consider, however, that “at the Phase I proposal stage of a design-build solicitation, at which no architectural, material, equipment or engineering details or even preliminary designs are known with any degree of specificity about the project, it is entirely infeasible for an offeror to make good faith determinations on the specific needs for equipment and managerial assignments.” (*Id.* at 8.) Indeed, Appellant did not even receive the Phase II documents for the project—which included detailed technical specifications and drawings—until April 28, 2014, when the Corps issued Amendment 0004 to the RFP. (*Id.* at 9.) Before then, it was impossible to provide a detailed description of the resources needed to complete the project, and Appellant “would have to be clairvoyant to determine that early in the design phase what each [joint venture] member would need to bring to the project.” (*Id.* at 4.) Even so, Appellant argues it cannot definitively determine what resources it will need until it is on site. (*Id.* at 9) Appellant represents that it will not be on site until it completes the design portion of the contract, which will take four to six months. These constraints, Appellant argues, also limit its ability to specify how it will meet the division of labor requirements in 13 C.F.R. § 124.513(c)(7) and the self-performance requirements in 13 C.F.R. § 124.513(d).

#### E. SBA Response

On November 6, 2014, SBA timely intervened<sup>2</sup> and responded to the appeal. SBA contends that the Area Office correctly determined that Appellant is not an eligible small business for the instant procurement.

SBA stresses that when concerns submit an offer on a particular procurement as joint venturers, they are affiliated with each other for purposes of that contract, unless an exception applies. 13 C.F.R. § 121.103(h)(2). Thus, a joint venture between a large and a small business, such as Appellant, is normally not eligible for a contract set aside for small businesses. (Response at 3.)

SBA rejects Appellant's argument that Kisan and Pike are presumed unaffiliated under 13 C.F.R. § 124.520(d)(4). That regulation, SBA asserts, concerns size determinations of the protégé itself, not size determinations of a joint venture between a mentor and a protégé, as is the case here. SBA argues that it would make no sense to apply a blanket presumption against affiliation in the case of a size determination of a mentor-protégé joint venture, because this would be inconsistent with the language of 13 C.F.R. § 121.103(h)(3)(iii). (*Id.* at 4.)

SBA maintains that the Area Office was correct to consider whether Appellant's joint venture agreement complied with 13 C.F.R. §§ 124.513(c) and (d). SBA notes that the applicable regulations were revised in 2011 to state that 13 C.F.R. §§ 124.513(c) and (d) apply to a joint venture attempting to avail itself of the mentor-protégé exception to affiliation for any procurement. 76 Fed. Reg. 8,222, 8,224 (Feb. 11, 2011).

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<sup>2</sup> “SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first.” 13 C.F.R. § 134.210(a).

Moreover, the Area Office correctly found that Appellant's joint venture agreement did not comport with 13 C.F.R. §§ 124.513(c)(6) and (7) and 124.513(d). SBA notes that the joint venture agreement does not itemize resources as required by § 124.513(c)(6) or specify the parties' responsibilities as required by § 124.513(c)(7), and Appellant makes no attempt to argue that its agreement does comply with these requirements. Further, the joint venture agreement “entirely flouts” the requirement in 13 C.F.R. § 124.513(d) that the protégé firm, Kisan, perform at least 40% of the joint venture's substantive work. SBA argues that these omissions are egregious because the purpose of these rules is to prevent large businesses from enjoying contracts intended for small businesses. By failing to delineate responsibilities, Appellant makes it possible for Pike to perform all or most of the contract. (Response at 4-5.)

SBA states that the Area Office mistakenly determined Appellant's size as of the date of Appellant's Phase I proposal. SBA explains that it is 13 C.F.R. § 121.404(a) that governs two-phase design-build procurements, such as found here. Under 13 C.F.R. § 121.404(a), size is determined as of the date Appellant submitted its Phase II proposal which included price (*i.e.*, May 27, 2014). *Size Appeal of FTSI-Phelps, JV*, SBA No. SIZ-5583, at 8 (2014). With its Phase II proposal, Appellant also submitted color renderings, design drawings, design narrative, and scheduling information. In addition, Appellant had already received detailed technical specifications and drawings as part of Amendment 0004 on April 28, 2014. Therefore, by the time Appellant executed its joint venture agreement on May 7, 2014, Appellant had all the information necessary to allocate responsibilities and itemize resources. (Response at 5-6.)

Further, SBA argues, it would be poor policy not to apply 13 C.F.R. §§ 124.513(c) and (d) in this case. To create an exception for joint venture agreements drafted before the offeror is certain of the procuring agency's requirements would be “unwise and unworkable” because there is often some degree of uncertainty. (*Id.* at 6.) Such an exception would also be at odds with OHA precedent, which indicates that joint venture rules should be applied “literally and narrowly so as to preclude situations where the 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status.” *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA No. SIZ-4799, at 6-7 (2006) (PFR). SBA argues that OHA should defer to SBA's interpretation of the joint venture rules, and asserts that “the Area Office's decision properly balances SBA's interest in encouraging the business development of 8(a) participants and, on the other hand, ensuring that large businesses do not receive small business contracts.” (Response at 6.)

#### F. CO's Response

On November 7, 2014, the CO responded to the appeal. The CO argues that the size determination is correct, so OHA should affirm it.

The CO challenges Appellant's argument that it could not comply with the requirements of 13 C.F.R. § 124.513(c)(6) and (7). The CO contends that this argument is baseless, for two reasons. First, Appellant executed its joint venture agreement on May 7, 2014, after the Corps had issued the Phase II technical specifications and drawings on April 28, 2014. (CO's Response at 3.) These specifications, the CO emphasizes, contained “over 2000 pages of technical standards and criteria, and numerous conceptual drawings on the site plan, the grading and

drainage plan, the utility plan, the landscape plan, and architectural and interior drawings for the first floor, the second floor, the Operational Maintenance Shop (OMS), and the Unheated Storage Building (UHS).” (*Id.*) Thus, Appellant had ample information to define the partners' respective responsibilities and to itemize equipment, facilities, and other resources.

The CO casts doubt on Appellant's representation that it could not determine what each joint venture partner would need to bring to the project. To the CO, this statement is not credible because Pike, the mentor firm, has vast construction experience with similar projects. (*Id.* at 3-4.)

### 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

The Area Office in this case found that Appellant is a joint venture between an SBA-approved mentor and protégé, and that Appellant is competing for a procurement outside of the 8(a) BD program. In this situation, SBA regulations stipulate that “the joint venture must meet the requirements of §§ 124.513(c) and (d) in order to receive the exception to affiliation” for mentor-protégé joint ventures. 13 C.F.R. § 121.103(h)(3)(iii); *see also* 13 C.F.R. § 124.520(d)(1)(ii) (“[i]n order to receive the exclusion from affiliation for both 8(a) and non-8(a) procurements, the joint venture must meet the requirements set forth in § 124.513(c).”).

The Area Office reviewed Appellant's joint venture agreement and found that it does not meet several of these criteria, and I agree that the record supports this determination. Under 13 C.F.R. § 124.513(c)(6), the joint venture agreement must itemize “all major equipment, facilities, and other resources” to be furnished by each of the joint venture partners. Appellant's joint venture agreement does not meet this requirement. It merely states, “Upon award of the Contract, Kisan and Pike will provide equipment, facilities and other resources to the Joint Venture required to execute the contract.” *See* Section II.B, *supra*. Such a broad statement lacks the specificity necessary to comply with 13 C.F.R. § 124.513(c)(6).

Similarly, under 13 C.F.R. § 124.513(c)(7), the joint venture agreement must specify the roles and responsibilities of the joint venture partners, including how the joint venture will comply with the requirement of 13 C.F.R. § 124.513(d) that the 8(a) BD participant perform at least 40% of the joint venture's work. Here again, Appellant's joint venture agreement falls short. Although the agreement indicates that Kisan's President, Mr. Singh, will negotiate the contract, it does not designate specific tasks or responsibilities to Kisan and Pike. *Cf.*, *Matter of KRR Partners Joint Venture*, SBA No. VET-239, at 5 (2013), *recons. denied*, SBA No. VET-241



(2013) (PFR) (joint venture agreement that did “not even attempt to describe the respective responsibilities of the joint venture partners” did not comply with SBA rules). Likewise, the agreement does not explain how Appellant will fulfill the performance of work requirements set out in 13 C.F.R. § 124.513(d). I therefore find no error in the Area Office's determination that Appellant's joint venture agreement does not meet the requirements of 13 C.F.R. §§ 124.513(c) and (d).

Significantly, Appellant does not argue that its joint venture agreement does comply with 13 C.F.R. §§ 124.513(c) and (d), nor does Appellant challenge the accuracy of the Area Office's analysis. Instead, Appellant argues that it is unfair and unrealistic to expect that a joint venture could provide the requisite levels of detail at the early stages of a design-build construction procurement. This argument fails for two reasons. First, as both SBA and the CO emphasize in their responses to the appeal, Appellant executed its joint venture agreement on May 7, 2014, after Appellant had already received the detailed Phase II technical specifications and drawings through Amendment 0004 on April 28, 2014. *See* Sections II.A and II.B, *supra*. Thus, the facts of this case do not support the conclusion that it would have been impossible for Appellant's joint venture agreement to include the information required by 13 C.F.R. §§ 124.513(c) and (d). Second, the applicable regulations do not authorize an exception for design-build procurements or other situations where a joint venture may have difficulty providing detailed information. Thus, Appellant in effect takes issue with the reasonableness of the underlying regulations. Such arguments should be directed to SBA policy officials, not to OHA. It is well-settled that OHA “has no authority to determine the validity of the size regulations and can entertain no challenge to them.” *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 9 (2012) (quoting *Size Appeal of Condor Reliability Servs., Inc.*, SBA No. SIZ-5116, at 6 (2010).)

Appellant also argues unconvincingly that mentors and protégés are presumably unaffiliated when there is an SBA-approved mentor-protégé agreement. The regulation Appellant relies upon, however, does not stand for the proposition Appellant advances. The regulations states, “No determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement.” 13 C.F.R. § 124.520(d)(4). Importantly, the regulation does not establish a presumption that a mentor and protégé are unaffiliated. Rather, it merely states that the mentor and protégé are not affiliated based on the mentor-protégé agreement itself. As a result, the regulation is inapposite to the facts of this case, because the Area Office did not find affiliation based on the mentor protégé agreement, but instead determined that the exception for mentor-protégé joint ventures is not available because Appellant's joint venture agreement does not meet the criteria set forth in 13 C.F.R. §§ 124.513(c) and (d).

#### IV. Conclusion

For the above reasons, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge