

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

SIZE APPEAL OF:

WISS Joint Venture,

Appellant,

Appealed From
Size Determination No. 4-2016-018

SBA No. SIZ-5729

Decided: April 18, 2016

APPEARANCES

Benjamin N. Thompson, Esq., Jenna C. Borders, Esq., Wyrick Robbins Yates & Ponton, LLP, Raleigh, North Carolina, for Appellant

Daniel R. Deschnow, Vice-President, Aero Simulation, Inc., Tampa, Florida

Laura M. Foster, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION

I. Procedural History and Jurisdiction

On January 12, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2016-018, concluding that WISS Joint Venture (Appellant) is not an eligible small business for the procurement at issue. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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 received the size determination on January 15, 2016, and filed the instant appeal within fifteen days thereafter, 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 March 6, 2015, the U.S Department of the Air Force issued Request for Proposals (RFP) No. FA8621-15-R-6315 for ground-based training system contractor logistics support. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541511, Custom Computer Programming Services, with a corresponding size standard of \$27.5 million annual receipts. Appellant self-certified as a small business with its initial offer on April 15, 2015.

On December 4, 2015, the CO announced that Appellant had been selected for award. On December 9, 2015, Aero Simulation, Inc. (Aero), a disappointed offeror, filed a size protest with the CO, alleging that Appellant exceeds the applicable size standard due to affiliation between Dae Sung, LLC (Dae Sung) and LB&B Associates, Inc. (LB&B), the two joint venture partners that comprise Appellant. Additionally, Aero alleged, LB&B is not a small business. The CO forwarded the size protest to the Area Office for review.

B. Size Determination

On January 12, 2016, the Area Office issued Size Determination No. 4-2016-018 finding that Appellant is not a small business for the instant procurement.

The Area Office explained that Appellant is a joint venture between Dae Sung and LB&B. (Size Determination, at 2.) Under SBA regulations, the participants in a joint venture are affiliated with one another for purposes of that contract, unless an exception applies. (*Id.*, citing 13 C.F.R. § 121.103(h)(2).) The Area Office considered whether Appellant qualifies for any such exception. The Area Office found that Dae Sung and LB&B are parties to a mentor- protégé agreement, which was approved by SBA's Associate Administrator for Business Development (AA/BD) on August 25, 2009. (*Id.* at 3.) The mentor-protégé agreement was in effect for one year and was renewed in subsequent years, but neither Appellant nor SBA's Illinois District Office could “provide any evidence that SBA issued any approval for August 2014 - August 2015”, the time period during which Appellant submitted its proposal for this procurement. (*Id.*) The Area Office noted that the files of the Illinois District Office contained “each renewal for the five years from 2010 through 2014 as well as for 2016” but that “[t]here is no evidence [that] approval was given for 2014 - 2015.” (*Id.*) Because Appellant could not establish that its mentor-protégé agreement was still in effect at the time of proposal submission, Appellant did not qualify for the exception to affiliation for mentor-protégé joint ventures, and Dae Sung and LB&B are affiliated for the instant procurement. (*Id.*)

The Area Office rejected Appellant's arguments that Appellant had timely requested renewal of its mentor-protégé agreement for 2014 - 2015, and that Appellant had reasonably assumed that the renewal would be processed without incident. The Area Office found that, according to SBA policy, the outcome of a mentor-protégé agreement renewal request will be

provided in writing. (*Id.*) Further, for years other than 2014 - 2015, the Illinois District Office did send “a formal written notification to [Appellant] that its request had been approved.” (*Id.*)

Appellant conceded that LB&B is a large business. As a result, Dae Sung and LB&B together exceed the \$27.5 million size standard, and Appellant is not a small business for the instant procurement. (*Id.* at 4.)

C. Appeal

On February 1, 2016, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in finding that Appellant does not qualify for the exception to affiliation for mentor-protégé joint ventures.

Appellant contends that the Area Office incorrectly determined that Appellant failed to submit evidence of an SBA-approved mentor-protégé agreement between Dae Sung and LB&B for the period from August 2014 - August 2015. Appellant highlights that the Illinois District Office annually reviewed Dae Sung's ongoing participation in the 8(a) BD program. According to Appellant, “this review and approval process [of the mentor-protégé agreement] is part of the annual review by the District Office of the protégé's participation in the 8(a) BD program.” (Appeal, at 7.)

Appellant asserts that, during Dae Sung's annual 8(a) BD program review, Dae Sung disclosed that it continued to be in a mentor-protégé relationship with LB&B. Dae Sung submitted a mentor-protégé worksheet, which, Appellant asserts, “is designed to fulfill the requirements of [13 C.F.R. 124.520(g)] and to assist the SBA in evaluating the mentor-protégé relationship.” (*Id.* at 8.) Therefore, Appellant reasons, through Dae Sung's annual review, Appellant also met the requirement of 13 C.F.R. § 124.520(e)(4) that SBA annually review the mentor-protégé relationship. (*Id.* at 9.)

Appellant adds that, in a meeting with a Business Development Specialist (BDS) of the Illinois District Office, the BDS reviewed Dae Sung's materials for its 8(a) BD program annual review and did not voice any concerns regarding the mentor-protégé agreement between Dae Sung and LB&B. (*Id.* at 10.) Subsequent email communication between the BDS and Dae Sung shows that the mentor-protégé relationship was discussed, and that the BDS was aware of the benefits Dae Sung had enjoyed through it. All of the information needed to complete the review contemplated by 13 C.F.R. § 124.520(e)(4) had been made available to the Illinois District Office by June 2014. (*Id.* at 11-12.)

Next, Appellant contends that neither the regulations or SBA's Standard Operating Procedure (SOP) require a separate approval of a mentor-protégé agreement by the servicing district office. Although the SOP states that participants should be notified of the outcome of a renewal of a mentor-protégé agreement, this requirement was satisfied when SBA performed the annual 8(a) program review of Dae Sung. (*Id.* at 12.) Once again, Appellant argues, these events contradict the Area Office's finding that no evidence exists of an SBA-approved mentor- protégé agreement between Dae Sung and LB&B for the period from August 2014 - August 2015.

Appellant contends that Dae Sung and LB&B engaged in another joint venture, known as DL LSS Joint Venture (DL). DL was awarded Order No. W52P1J-13-G-0020 in October 2014. In order for such an award to have been proper, Appellant reasons, Dae Sung and LB&B must have had an SBA-approved mentor-protégé agreement as of October 2014, the same timeframe that is at issue here. (*Id.* at 13.) Appellant argues this furthers its position that evidence of the existence of an SBA-approved mentor-protégé agreement was available to the Area Office.

Appellant concludes that it proceeded as if the mentor-protégé agreement had been renewed for 2014 - 2015 because it had received no notification to the contrary and because the award to DL suggests that SBA recognized the mentor-protégé agreement between Dae Sung and LB&B. (*Id.* at 14-15.) Appellant argues that a valid and effective mentor-protégé agreement between Dae Sung and LB&B existed for the period August 2014 - August 2015.

D. New Evidence

Accompanying the appeal, Appellant moved to supplement the record with new evidence. Specifically, Appellant seeks to introduce: (i) Dae Sung's 8(a) Annual Update submitted to the Illinois District Office in June 2014; (ii) communications between the BDS and Dae Sung regarding Dae Sung's 8(a) annual review; (iii) documents showing the Illinois District Office's approval of other joint ventures between Dae Sung and LB&B for purposes of bidding on 8(a) contracts, particularly the award of Order No. W52P1J-13-G-0020 in October 2014; (iv) the Illinois District Office's approval of an amendment to a joint venture agreement pertaining to DL PI Joint Venture; (v) Dae Sung's 8(a) annual update submitted in July 2015; SBA's approval of Dae Sung's 8(a) annual review of 2015; and (vii) declarations from various Dae Sung employees regarding SBA's review and approval of Dae Sung's 8(a) participation and its relationship with LB&B. (Motion, at 4.) Appellant argues that this evidence, to the extent it is not already included in the record, should be admitted because it relates to issues discussed in the size determination. According to Appellant, the new evidence establishes that an analysis of Dae Sung's 8(a) participation, which included review of its mentor-protégé relationship, was conducted by the Illinois District Office. Appellant maintains that it did not submit the evidence to the Area Office during the size review, because the Area Office "made no mention of any concerns related to the required reports or the District Office's analysis." (*Id.* at 5.)

E. Aero's Response

On February 25, 2016, Aero responded to the appeal. Aero contends the Area Office correctly found Appellant ineligible for the procurement at issue. Therefore, OHA should affirm the size determination.

Aero argues that the only issue here is whether the Illinois District Office approved an extension of Appellant's mentor-protégé agreement for the period August 2014 - August 2015. (Aero's Response, at 3.) Notwithstanding Appellant's purported communications with the Illinois District Office, Appellant has not shown that a mentor-protégé agreement between Dae Sung and LB&B was ever approved. Appellant's claim that the award of Order No. W52P1J-13-G-0020 is evidence of the existence of an approved mentor-protégé agreement lacks merit as the order fails to indicate whether the procuring agency considered the existence of an approved

mentor-protégé agreement, and it is unclear when the joint venture certified as a small business concern for this order. (*Id.* at 4.) In Aero's view, the lack of a written approval as required by 13 C.F.R. § 124.520(e)(4) is fatal to Appellant's appeal.

With its response to the appeal, Aero also opposed Appellant's motion to supplement the record. Aero argues that OHA should deny Appellant's motion because Appellant failed to show any reason why it could not have submitted the new evidence to the Area Office. (*Id.*, at 2.) Aero contends Appellant had been made aware that the Illinois District Office could not produce documentation of an extension to the mentor-protégé agreement covering August 2014 - August 2015. Additionally, the declarations by Dae Sung employees should be denied as they are “self-serving after-the-fact declarations.” (*Id.*)

F. SBA's Response

On April 8, 2016, SBA responded to the appeal. SBA highlights that the Illinois District Office “reviewed the mentor-protégé relationship between the parties annually and issued letters explicitly approving continuation of the mentor-protégé agreement in 2009, 2010, 2011, 2012, 2013, and 2015.” (SBA Response at 2.) However, neither Appellant nor the Illinois District Office has come forward with an annual mentor-protégé approval letter for the period covering August 2014 - August 2015. Therefore, the Area Office correctly determined that Appellant cannot utilize the exception to affiliation for mentor-protégé joint ventures. (*Id.* at 3.)

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. 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). OHA “will not accept new evidence when the

proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

Here, Appellant has not established good cause for the admission of new evidence. As Aero observes, Appellant was well aware that the Area Office was examining whether there had been a renewal of the mentor-protégé agreement between Dae Sung and LB&B for the period between August 2014 - August 2015. Appellant was further aware that Illinois District Office had no record of any such extension. Accordingly, Appellant could have timely submitted all of the new evidence it attempts to introduce here to the Area Office during the size review. OHA has consistently held it will not accept new evidence when the material in question was available during the course of the size investigation but not submitted to the Area Office. *E.g.*, *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 10 (2015). Appellant's motion to supplement the record is therefore DENIED.

C. Discussion

The instant case is highly analogous to OHA's decision in *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715 (2016). In *North Star*, the challenged firm was a joint venture between an 8(a) protégé and its mentor. The two firms executed a mentor-protégé agreement, which was approved by the AA/BD on July 5, 2014, and which expired one year after approval unless the servicing district office approved an extension. *North Star*, SBA No. SIZ-5715, at 2-3. The challenged firm failed to obtain such an extension before the one-year anniversary of the agreement, and submitted its proposal on July 17, 2015, after the mentor-protégé agreement had lapsed. On these facts, OHA found that the challenged firm could not avail itself of the mentor-protégé exception to affiliation, 13 C.F.R. § 121.103(h)(3)(iii), because the challenged firm did not have an SBA-approved mentor-protégé agreement in place as of the date to determine size (*i.e.*, the date of proposal submission). *Id.* at 8. “On the date [the challenged firm] submitted its offer, SBA had not yet approved the [mentor-protégé] agreement for another year, as required by [13 C.F.R. § 124.520(e)(4)]. This regulation provides, contra [the challenged firm's] argument, that SBA's approval of the agreement expires after one year, unless renewed.” *Id.* at 9.

In reaching its *North Star* decision, OHA was unmoved by the fact that the district office eventually did approve an extension of the mentor-protégé agreement. This extension was irrelevant, OHA found, because it did not occur until October 30, 2015, well after the proposal was submitted. *Id.* at 8-9. OHA also rejected the challenged firm's contention that the mentor-protégé agreement had, in effect, been extended when the district office conducted its annual review of the protégé's continuing participation in the 8(a) program. *Id.*

Similarly, in the instant case, Appellant is a joint venture between Dae Sung, an 8(a) participant, and its mentor, LB&B. Appellant submitted its proposal for the procurement on April 15, 2015, but neither Appellant nor the Illinois District Office could produce documentation that the mentor protégé agreement had been renewed as of that date. Rather, pursuant to 13 C.F.R. § 124.520(e)(4), it appears that the mentor-protégé agreement had expired at the time Appellant submitted its proposal. Without a proper mentor-protégé agreement in place, Appellant cannot utilize the exception to affiliation for mentor-protégé joint ventures at 13

C.F.R. § 121.103(h)(3)(iii). *North Star*, SBA No. SIZ-5715, at 9; *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997, at 8 (2008) (“[t]he exception created by 13 C.F.R. § 121.103(h)(3)(iii) presupposes the existence of a mentor-protégé agreement approved by the SBA.”). Accordingly, the Area Office did not err in concluding that Dae Sung and LB&B are affiliated for purposes of the instant contract under 13 C.F.R. § 121.103(h)(2).

Appellant puts forth several arguments in an effort to overturn the size determination, but none of these arguments is persuasive. Appellant's suggestion that the Illinois District Office essentially approved an extension of the mentor-protégé agreement when it conducted Dae Sung's annual 8(a) program review is meritless, and OHA rejected substantially similar arguments in *North Star*. Likewise, the mere fact that the Illinois District Office had all of the information it needed to authorize an extension of the mentor-protégé agreement under 13 C.F.R. § 124.520(e)(4) does not establish that such an extension actually occurred. Appellant's argument with regard to Order No. W52P1J-13-G-0020 was not presented to the Area Office, and consequently is not supported by any evidence in the record. In any event, as Aero observed in response to the appeal, it is not evident that Dae Sung and LB&B were required to self-certify as a small business for Order No. W52P1J-13-G-0020 between August 2014 - August 2015. Therefore, Order No. W52P1J-13-G-0020 is not necessarily inconsistent with a lapse of mentor-protégé agreement during this interval.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge