

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

**DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Quadrant Training Solutions, LLC,

Appellant,

RE: Field Training Support Services Joint  
Venture

Appealed From  
Size Determination No. 4-2016-038

SBA No. SIZ-5768

Decided: August 3, 2016

APPEARANCES

Alfred M. Wurglitz, Esq., Daniel S. Koch, Esq., Stephen P. Ramaley, Esq., Michael E. Samuels, Esq., Miles & Stockbridge P.C., Rockville, Maryland, for Appellant

Benjamin N. Thompson, Esq., Jenna C. Borders, Esq., Wyrick Robbins Yates & Ponton, LLP, Raleigh, North Carolina, for Field Training Support Services Joint Venture

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On June 9, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2016-038, concluding that Field Training Support Services Joint Venture (FTSS) is an eligible small business for the procurement at issue. Quadrant Training Solutions, LLC (Appellant), which had previously protested FTSS's size, contends that the size determination is clearly erroneous, and requests that

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<sup>1</sup> This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA offered the parties the opportunity to propose redactions to the decision. Each party indicated that it did not wish to propose redactions to the decision. OHA now issues the decision for public release.

SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation and Protest

On June 3, 2015, the U.S Department of the Navy issued Request for Proposals (RFP) No. N61340-15-R-0052 for field training system support services. The RFP contemplated “two separate competitions which will result in a Multiple Award Contract (MAC) with two separate lots.” (RFP § B.) Lot 1 was competed under full and open competition. Lot 2 was set aside for small businesses. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541330, Engineering Services. NAICS code 541330 ordinarily is associated with a size standard of \$15 million, but the RFP indicated that the work fit within the exception for Military and Aerospace Equipment and Military Weapons, which utilizes a size standard of \$38.5 million average annual receipts. FTSS self-certified as a small business with its initial offer on August 4, 2015. Appellant also submitted a timely initial offer.

On April 28, 2016, the CO announced that FTSS and Appellant were two of four apparent successful offerors. On May 5, 2016, Appellant filed a size protest with the CO, alleging that FTSS 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 FTSS. The CO forwarded the size protest to the Area Office for review.

### B. Size Determination

On June 9, 2016, the Area Office issued Size Determination No. 4-2016-038 finding that FTSS is a small business for the instant procurement. The Area Office explained that Appellant is a joint venture between LB&B, a large business, and Dae Sung, a participant in SBA's 8(a) Business Development (BD) Program. (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).) One such exception is for joint venturers with a valid mentor-protégé agreement in place as of the date for determining size. (*Id.* at 2-3, citing 13 C.F.R. § 121.103(h)(3).)

The Area Office determined that Dae Sung and LB&B are parties to a mentor-protégé agreement, which initially was approved by SBA's Associate Administrator for Business Development on August 25, 2009. The Area Office also determined that this approval was in effect as of August 4, 2015, the date that FTSS self-certified as a small business on the instant procurement. In reaching this conclusion, the Area Office noted that although SBA district offices have made a practice of re-approving mentor-protégé agreements on the anniversary date

of the initial approval, this practice is not required by SBA regulations or policy. (*Id.* at 3-4 fn.7, citing *Size Appeal of North Star Magnus Pac. Joint Venture*, SBA No. SIZ-5715 (2016).) The Area Office explained, “[a] participant's next Annual Review following the initial approval of the mentor/protégé agreement necessarily includes a consideration of the mentor/protégé relationship; a separate review devoted solely to that agreement and relationship is unnecessary.” (*Id.* at 4.) In this case, the Area Office asserted that “[t]he [Illinois] District Office files make clear that mentor/protégé related issues were specifically considered in each Annual Review [of Dae Sung].” (*Id.* at 4-5.) Accordingly, Dae Sung and LB&B's mentor-protégé agreement was in effect as of August 4, 2015, and Dae Sung and LB&B are not affiliated for purposes of the instant procurement.

The Area Office calculated Dae Sung's size based on its financial statements. Dae Sung's annual receipts, the Area Office found, do not exceed the size standard.

### C. Appeal

On June 15, 2016, Appellant filed the instant appeal. Appellant maintains that the Area Office committed clear errors of law, so OHA should reverse the size determination.

Appellant argues there was not a valid mentor-protégé agreement in place when FTSS self-certified as a small business because SBA's approval of the mentor-protégé agreement between Dae Sung and LB&B had lapsed. (Appeal at 3, citing 13 C.F.R. § 124.520(e)(4).) As support for this argument, Appellant draws attention to OHA's decision in *Size Appeal of WISS Joint Venture*, SBA No. SIZ-5729 (2016), *recons. denied*, SBA No. SIZ-5755 (2016) (PFR). *WISS Joint Venture* involved a different joint venture between Dae Sung and LB&B, but the same mentor-protégé agreement at issue here. In that case, the Area Office determined, and OHA agreed, that neither the joint venture nor the Illinois District Office could “provide any evidence that SBA issued any approval [of the mentor-protégé agreement] for August 2014-August 2015”, the time period during which the joint venture had submitted its proposal. *WISS Joint Venture*, SBA No. SIZ-5729, at 2 (quoting Size Determination No. 4-2016-018, at 3). OHA also rejected the joint venture's argument that the Illinois District Office had essentially approved an extension of the mentor-protégé agreement when it conducted Dae Sung's annual 8(a) program review. *Id.* at 7. Appellant contends that *WISS Joint Venture* controls this case because the operative facts are identical. (Appeal at 6.)

Appellant further argues that it is sound policy for SBA to require that mentor-protégé agreements be approved on an annual basis. “[R]equiring affirmative approval for continuation of mentor-protégé agreements for another year allows SBA the opportunity to review . . . business integrity issues and closely assess the continuing fitness of mentors.” (*Id.* at 7.)

### D. FTSS's Response

On June 30, 2016, FTSS responded to the appeal. FTSS contends that the Area Office correctly found FTSS to be an eligible small business, so OHA should affirm the size determination.

FTSS maintains that the Area Office correctly interpreted SBA regulations and policy as well as OHA precedent in determining that re-approvals of mentor-protégé agreements occur during the protégé's annual review. The regulations and policy state that SBA will review the protégé's report on the mentor-protégé relationship as part of its annual review of the protégé's business plan. (Response at 4-6, citing 13 C.F.R. § 124.520(g)(4) and SOP 80 05 3, ¶ 15.)

OHA precedent does not compel a different understanding, FTSS contends. *North Star*, a case OHA cited in deciding *WISS Joint Venture*, does not hold that the annual approval of a mentor-protégé agreement cannot coincide with the protégé's annual review. Further, *North Star* was decided on specific facts not present here. First, the mentor-protégé agreement at issue in *North Star* was in its first year of existence and subject to its first ever renewal. Next, according to the approval letter, the mentor-protégé agreement in *North Star* was subject to a specific expiration date. Third, given that the alleged approval in *North Star* took place after the date for determining size, even if approval had occurred during the annual review, it would not have resulted in the renewal being effective for the procurement at issue. (*Id.* at 9.)

FTSS argues that the Area Office's prior size determination, No. 4-2016-018, and OHA's decision in *WISS Joint Venture* also are not controlling here because the instant size determination is based on new arguments and new evidence, and “an area office is not bound by its findings in a prior size determination.” (*Id.* at 12, quoting *Size Appeal of Navarro Research and Eng'g, Inc.*, SBA No. SIZ-5473, at 3 (2013).) FTSS explains that it submitted evidence to the Area Office showing that (1) Dae Sung submitted information to the Illinois District Office pertaining to its mentor-protégé relationship as part of the annual review; (2) Dae Sung met with an SBA business development specialist (BDS) to complete the annual review; (3) Dae Sung submitted a hard copy of its annual review recertification materials to the BDS; (4) the mentor-protégé relationship was reviewed by the BDS; and (5) the Dae Sung and LB&B mentor-protégé agreement was renewed for the period of August 2014 — August 2015. FTSS also submitted affidavits from Dae Sung personnel regarding Dae Sung's dealings with the Illinois District Office. Because the Area Office and OHA did not previously have the opportunity to examine this new evidence, the prior decisions do not control the outcome of this appeal.

FTSS then addresses Appellant's policy argument. FTSS agrees that such approvals of mentor-protégé agreements should take place annually, and contends that such approvals may take place as part of the protégé's annual review.

#### E. Appeal Supplement

On July 19, 2016, after reviewing the Area Office file under the terms of a protective order, Appellant supplemented its appeal. According to Appellant, the record clearly undermines FTSS's claims that (1) a mentor-protégé agreement need not be approved outside of the protégé's annual review and that (2) the mentor-protégé agreement between Dae Sung and LB&B was actually re-approved for the relevant period.

Appellant notes that the original mentor-protégé agreement between Dae Sung and LB&B, approved on August 25, 2009, stated that “[t]his Agreement shall expire after one year, unless SBA approves an extension.” (Supp. Appeal at 1, quoting Email from D. Pellico to M.

Cho (Aug. 25, 2009).) This language put Dae Sung and LB&B on notice that they were required to seek annual affirmative approval of their mentor-protégé agreement. In fact, Dae Sung and LB&B did just that during the years that followed. For instance, the record confirms that Dae Sung and LB&B requested re-approval of the mentor-protégé agreement on August 19, 2013, which the Illinois District Office granted for the period of August 20, 2013 to August 20, 2014. (*Id.* at 2, citing Letter from R. Steiner to C. O'Berry (Aug. 19, 2013).) The record contains another letter from the Illinois District Director indicating that Dae Sung and LB&B had again requested re-approval of their mentor-protégé agreement on May 20, 2015. (*Id.*) The Illinois District Director responded that "SBA has no objections to extending the Mentor Protégé Agreement for another year (August 20, 2015 through August 20, 2016)." (*Id.*, quoting Letter from R. Steiner to C. O'Berry (Oct. 15, 2015).) Conspicuously absent from the record, Appellant observes, are letters requesting or approving an extension of the mentor-protégé agreement for the period of August 20, 2014 through August 20, 2015. Appellant highlights that "both Dae Sung/LB&B and the SBA Illinois District Office knew about and used a formal, affirmative renewal process for mentor-protégé agreements and, for whatever reasons, did not renew Dae Sung/LB&B's mentor-protégé agreement for the period in question (August 20, 2014 — August 20, 2015) which covers the proposal submission date for the subject RFP." (*Id.*)

Appellant posits that FTSS misled the Area Office into believing that Dae Sung and LB&B had an approved mentor-protégé agreement in place for 2014 — 2015 with two documents. The first is a letter from Dae Sung dated July 11, 2014, in which Dae Sung asserted that "[t]he Mentor-Protégé Agreement between LB&B Associates Inc (Mentor) and Dae Sung, LLC (Protégé) has been renewed by mutual concurrence of both parties." (*Id.* at 3, quoting Letter from C. O'Berry to D. Pellico (July 11, 2014).) In its response to the protest, FTSS represented to the Area Office that this letter "confirm[s] that Dae Sung and LB&B's Mentor- Protégé Agreement ha[d] been renewed by for the period between August 19, 2014 and August 20, 2015." (Protest Response at 9-10.) This letter does not pass muster, Appellant maintains, because the mentor-protégé agreement must be renewed by SBA, not by the parties to the agreement. (*Id.*)

The second document that improperly influenced the Area Office's decision was a memorandum from Ms. Jackqueline Robinson-Burnette, Associate Administrator for 8(a) Business Development. This memorandum, dated March 15, 2016, amends mentor-protégé agreements "[e]ffective immediately." (*Id.*, quoting Memorandum at 1.) According to Appellant, FTSS misconstrued the memorandum as "clarify[ing] the initial mentor/protégé approval letter received by 8(a) firms to confirm that the mentor-protégé relationship is automatically renewed unless rescinded in writing." (*Id.*, quoting Protest Response at 13.) What the memorandum really says is that, beginning March 15, 2016, the language in mentor-protégé agreements will be changed from affirmative approval to automatic approval. If anything, the memorandum "hurts rather than helps FTSS" because it "proves that up until March 15, 2016, mentor-protégé agreements required affirmative SBA renewal approval each year, or else they expired." (*Id.* at 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

I agree with Appellant that the instant size determination is clearly erroneous. It is therefore reversed.

FTSS argues that the Area Office was correct to depart from Size Determination No. 4-2016-018 and OHA's decision in *Size Appeal of WISS Joint Venture*, SBA No. SIZ-5729 (2016), *recons. denied*, SBA No. SIZ-5755 (2016) (PFR), because FTSS submitted new evidence establishing that there was an approved mentor-protégé agreement in place as of the date FTSS submitted its offer for the subject procurement. Based on this new evidence, the Area Office concluded that since “mentor/protégé related issues were specifically considered in each Annual Review”, the Illinois District Office necessarily approved the mentor-protégé agreement during Dae Sung's annual review in June 2014. Section II.B, *supra*.

This reasoning is flawed for several reasons. First, it does not follow that, because the Illinois District Office “specifically considered” the mentor-protégé relationship, the Illinois District Office must have approved the mentor-protégé agreement for another year. As OHA remarked in *WISS Joint Venture*, “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.” *WISS Joint Venture*, SBA No. SIZ-5729, at 7. Moreover, FTSS and the Area Office fail to address or explain the Area Office's prior factual finding that “the files of the Illinois District Office contained ‘each renewal [of the mentor-protégé agreement between Dae Sung and LB&B] 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.* at 2 (quoting Size Determination No. 4-2016-018, at 3). The absence of any formal written notification letter for 2014 — 2015 is strong evidence that the mentor-protégé agreement was not in fact renewed for that year, particularly given that such notifications do exist for all other years, both before and after 2014 — 2015.

In addition, the new evidence that FTSS provided to the Area Office seemingly undermines the notion that an approval took place during Dae Sung's annual review in June 2014. In a letter dated July 11, 2014, with a subject line reading “Mentor-Protégé Agreement Renewal”, Dae Sung's President informed the BDS that Dae Sung and LB&B had decided to renew their mentor-protégé agreement for the period August 19, 2014 to August 20, 2015. Section II.E, *supra*. This letter does not support the conclusion that the Illinois District Office

had already re-approved the mentor-protégé agreement during the annual review. On the contrary, it suggests that no such approval had taken place because Dae Sung and LB&B themselves did not agree to extend the mentor-protégé agreement until after Dae Sung's annual review. Further, the July 11, 2014 letter made no mention of any approval having been granted by the Illinois District Office.

In sum, the Area Office's determination that approval of the mentor-protégé agreement occurred during Dae Sung's annual review is not supported by the evidence in the record. Accordingly, this finding is reversed. FTSS is not eligible for the mentor-protégé exception to affiliation, and its joint venture partners therefore are affiliated for purposes of this procurement. *See, e.g., Size Appeal of North Star Magnus Pac. Joint Venture*, SBA No. SIZ-5715 (2016); *Size Appeal of WISS Joint Venture*, SBA No. SIZ-5729 (2016), *recons. denied*, SBA No. SIZ-5755 (2016) (PFR). Because LB&B is a large business, FTSS is ineligible for the instant procurement.

#### IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge