

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

FOR PUBLIC RELEASE

SIZE APPEAL OF:

Precision Asset Management Corporation
and Q Integrated Companies, LLC,

Appellants,

RE: Alpine/First Preston JV II, LLC

Petition for Reconsideration of SBA No.
SIZ-5781

SBA No. SIZ-5801

Decided: January 3, 2017

ORDER DENYING PETITION FOR RECONSIDERATION¹

I. Background

A. Prior Proceedings

On October 18, 2016, the U.S. Small Business Administration (Petitioner) filed the instant Petition for Reconsideration (PFR) of the SBA Office of Hearings and Appeals (OHA) decision in *Size Appeal of Precision Asset Management Corporation, et al.*, SBA No. SIZ-5781 (2016) (“*PAMC I*”). In the decision, OHA held that it was improper for the SBA Office of Government Contracting — Area V (Area Office) to have considered changes to a mentor-protégé joint venture agreement that occurred more than a year after the date to determine size. OHA also rejected Petitioner's contention that the timing requirements of 13 C.F.R. § 124.513(e)(1) apply to mentor-protégé joint ventures competing for non-8(a) procurements, finding that “although § 121.103(h)(3)(iii) states that ‘the provisions of §§ 124.513(c) and (d) will apply’ to mentor-protégé joint ventures competing for non-8(a) procurements, there is no

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions if desired. After reviewing the decision, the parties informed OHA that there were no requested redactions. Therefore, OHA now issues the entire decision for public release.

comparable language stating that § 124.513(e)(1) also will apply.” *PAMC I*, SBA No. SIZ-5781, at 8.

B. The PFR

Petitioner argues that OHA unreasonably interpreted 13 C.F.R. § 121.103(h)(3)(iii) and erroneously found that the challenged concern, Alpine/First Preston JV II, LLC (Alpine), must comply with SBA's joint venture rules as of the date of self-certification. Petitioner urges that “[m]entor-protégé joint ventures such as Alpine should be permitted to amend their joint venture agreements after offer but before award, and have SBA consider those amendments during its approval process.” (PFR, at 1.) Petitioner highlights that when a mentor-protégé joint venture competes for a non-8(a) set-aside, “SBA need not approve the joint venture prior to award”. (*Id.*, quoting § 121.103(h)(3)(iii).) The instant procurement was not an 8(a) set-aside, so the Area Office correctly assessed Alpine's joint venture agreement as it existed on the date of award, February 1, 2016. (*Id.* at 1-2.)

Petitioner maintains that OHA erred in applying 13 C.F.R. § 121.404(a) in *PAMC I*. Petitioner asserts that § 121.404(a) “does not apply to joint venture agreement review” because the size of the parties to the joint venture is not in dispute. (*Id.* at 2.) Rather, the issue is whether those parties may avail themselves of an exception to affiliation. Petitioner adds that, in *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014), an area office examined a mentor-protégé joint venture agreement prepared after the date of initial offers, and OHA affirmed this approach during the subsequent size appeal. (*Id.* at 3.)

Next, Petitioner explains that, for 8(a) procurements, SBA regulations permit a joint venture agreement to be amended or corrected at any time prior to contract award. (*Id.*, citing 13 C.F.R. § 124.513(e)(1) and (e)(2).) The process is similar for non-8(a) procurements, Petitioner states, except that SBA will examine the joint venture agreement at the time of protest if an award has not yet occurred. Thus, for non-8(a) procurements, “SBA considers the joint venture agreement — as amended — at the date of award or date of protest, whichever is earlier.” (*Id.*)

Petitioner argues that it is sound policy to allow a joint venture agreement to be amended after the date of initial offer, for several reasons. (*Id.* at 4-5.) First, a joint venture may not have a written joint venture agreement at the time of its initial offer, and such a joint venture would be “ineligible from the outset.” (*Id.* at 4.) Second, there may be a long delay between initial offer and award, and the joint venture agreement could be amended during this interval to introduce new deficiencies. As a result, “[p]otentially, OHA's interpretation [in *PAMC I*] would have SBA approve of a joint venture agreement that, after amendments, would be non-compliant.” (*Id.*)

Third, in Petitioner's view, the *PAMC I* decision “likely applies to 8(a) awards,” and would be inconsistent with SBA practice, as SBA currently advises 8(a) firms on how to draft joint venture agreements prior to award. (*Id.*) Applying *PAMC I* to 8(a) procurements would therefore prevent 8(a) participants from benefiting from SBA's advice. (*Id.*)

Fourth, SBA's new “All Small” mentor-protégé program requires joint venture members to certify, prior to beginning contract performance, that they have entered into a compliant joint

venture agreement and will perform the contract in accordance with that agreement. (*Id.* at 4-5, citing 13 C.F.R. § 125.8(d).) The *PAMC I* decision may confuse these joint venturers, since size would be determined as of an earlier date than the new certification. (*Id.* at 5.)

Lastly, the *PAMC I* decision harms SBA program participants, because it “locks the parties to the joint venture into their agreement at offer and would eliminate their ability to correct deficiencies in the agreement.” (*Id.* at 2.) According to Petitioner, “[w]hether the joint venture has met the requirements at time of offer is inconsequential to SBA's interests, provided that the joint venture complies at and after award.” (*Id.* at 5.)

C. Alpine's Response

On November 3, 2016, Alpine responded to the PFR. Alpine supports the PFR, and maintains that *PAMC I* is premised on an unreasonable reading of 13 C.F.R. § 121.103(h)(3)(iii).

Alpine contends that § 121.103(h)(3)(iii) states that SBA will not review a mentor-protégé joint venture agreement until award. In Alpine's view, SBA regulations do not support the conclusion that a joint venture agreement must be “in perfect order” at the time of self-certification. (Alpine Response, at 1-2.) Alpine also observes that, under *PAMC I*, a mentor and protégé could execute a proper joint venture agreement at the time of initial proposals, but later amend their agreement in a way that contravenes SBA regulations, an outcome that would be “undesirable as a matter of policy.” (*Id.* at 2.)

Accompanying its response, Alpine attached a letter from the President and CEO of Alpine Companies, Inc., the protégé member of Alpine.

D. Precision Asset Management Corporation's Response

On November 3, 2016, Precision Asset Management Corporation (PAMC), one of the original appellants, responded to the PFR. PAMC argues that Petitioner has not identified any error of fact or law in OHA's decision, as is necessary to prevail on a PFR. Instead, Petitioner “engages in a purely policy debate to the effect that it would serve SBA's interests if the size of a mentor protégé joint venture were to be determined as of the time award is made.” (PAMC Response, at 2.) Therefore, OHA should deny the PFR.

PAMC maintains that, under 13 C.F.R. § 121.404(a), size is determined as of the date of initial offers including price, and OHA has applied this rule to joint ventures on numerous occasions. (*Id.* at 3-4, citing *Size Appeal of ST Net Apptis Small Business 8(a) JV*, SBA No. SIZ-4811 (2006); *Size Appeal of Innovative Resources*, SBA No. SIZ-5238 (2011); *Size Appeal of VMD-MT Security LLC*, SBA No. SIZ-5380 (2012); *Size Appeal of HBC Management Services*, SBA No. SIZ-5686 (2015); *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997 (2008); and *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646 (2015).) The PFR does not attempt to distinguish the instant appeal from these prior decisions, such that OHA could justifiably depart from this precedent.

Next, PAMC contends that the arguments raised in the PFR were thoroughly considered and rejected in *PAMC I*. Specifically, PAMC maintains, Petitioner argues in the PFR that reviewing a mentor-protégé joint venture agreement as of the date of self-certification contravenes 13 C.F.R. § 121.103(h)(3)(iii), and that the timing requirements applicable to 8(a) procurements also apply to non-8(a) procurements, which are the same contentions Petitioner unsuccessfully made in response to the original appeal. (*Id.* at 4-5.) While Petitioner may disagree with OHA's decision, mere disagreement is not valid grounds for a PFR. (*Id.* at 5, citing *Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5735, at 2 (2016) (PFR).)

PAMC asserts that Petitioner's arguments, if accepted by OHA, would violate the Administrative Procedure Act, because Petitioner seeks to create a *de facto* new regulation for mentor-protégé joint ventures without engaging in the legally-required notice and comment process. (*Id.* at 6-7.) In PAMC's view, “[i]t is improper for the SBA to impose a new regulation — or rewrite an existing regulation — by fiat in the guise of a size determination appeal.” (*Id.* at 13.)

PAMC attacks Petitioner's reliance on *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014). PAMC observes that *Kisan-Pike* involved a two-phase design-build procurement, under which price was not submitted until the Phase II proposal. The challenged firm was found to be other than small because its joint venture agreement was defective as of the date of its Phase II proposal. (*Id.* at 8.) Contrary to Petitioner's argument, “OHA most definitely did not ‘sanction’ any practice of determining size based on events that occur after initial proposals, including price, are submitted.” (*Id.* at 9.) PAMC also disputes the policy arguments raised in the PFR. PAMC complains that not all offerors on a procurement are mentor-protégé joint ventures, and that it would be unfair if ordinary small businesses were held to 13 C.F.R. § 121.404(a) while “mentor-protégé joint ventures would have the latitude to decide, at their convenience apparently, when they would actually comply with their self-certification.” (*Id.* at 10.) In addition, the approach Petitioner advocates would be contrary to SBA's stated objective of having a single uniform date to determine size that applies to all offerors on a given procurement. (*Id.* at 13-15.) Petitioner's claim that mentor-protégé joint ventures could introduce new defects into their joint venture agreements after initial proposals but before award is speculative, PAMC asserts, and Petitioner has not, in any event, explained why existing safeguards relating to fraud and false certification are insufficient to address this risk. (*Id.* at 10.) PAMC challenges Petitioner's assertion that *PAMC I* might have adverse consequences for 8(a) procurements. According to PAMC, the *PAMC I* decision “relates to a non-8(a) procurement and clearly distinguishes between the review required for an 8(a) procurement and for a non-8(a) procurement.” (*Id.* at 11.) Lastly, SBA's new “All Small” mentor-protégé program is not relevant to the instant dispute as this program only came into existence in August 2016. (*Id.*) Moreover, PAMC argues, *PAMC I* “simply extended the long line of precedent, discussed above, holding that size is determined as of the date of initial offers, including price.” (*Id.*) Insofar as Petitioner is concerned about inconsistency between the “All Small” mentor-protégé regulations and § 121.404(a) or OHA case law, Petitioner had ample opportunity to address such issues in the new regulations. (*Id.* at 12.)

On November 4, 2016, PAMC moved to strike the letter attached to Alpine's response. PAMC contends that the letter is new evidence and that Alpine has not established good cause to

supplement the record. Further, Alpine did not file the requisite motion to admit new evidence, and OHA has held that such an omission may be “fatal” to an attempt at introducing new evidence. *E.g.*, *Size Appeal of Quigg Bros., Inc.*, SBA No. SIZ-5786, at 8 (2016). Alpine did not respond to PAMC's motion. Accordingly, PAMC's motion is granted and the letter is excluded from the record.

II. Discussion

A. Jurisdiction and Standard of Review

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. Petitioner filed its PFR within twenty days of service of *PAMC I*, so the PFR is timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a PFR upon a “clear showing of an error of fact or law material to the decision.” 13 C.F.R. § 134.227(c). This is a rigorous standard. *Size Appeal of BryMak & Assocs., Inc.*, SBA No. SIZ-5789, at 3 (2016) (PFR). A PFR must be based upon manifest error of law or mistake of fact, and is not intended to provide an additional opportunity for an unsuccessful party to argue its case before OHA. *Size Appeal of MCH Corp.*, SBA No. SIZ-5635, at 6 (2015) (PFR); *Size Appeal of Brown & Pipkins, LLC*, SBA No. SIZ-5642, at 4 (2015) (PFR).

B. Analysis

Petitioner's principal argument here is that, from a policy standpoint, a determination of whether a mentor-protégé joint venture complies with SBA regulations should be made as of the date of award, or the date of a size protest, whichever is earlier. PAMC counters with various policy arguments of its own, insisting that there should be one uniform date to determine size that applies to all offerors on a given procurement. I find it unnecessary to resolve this policy debate, because Petitioner has offered no legal authority to deviate from the general rule, set forth at 13 C.F.R. § 121.404(a) and reiterated in numerous OHA case decisions, that the size of a concern is determined as of the date of initial offers including price. Petitioner calls attention to language in § 121.103(h)(3)(iii) which provides that, when a mentor-protégé joint venture competes for a non-8(a) procurement, “SBA need not approve the joint venture prior to award”. According to the SBA commentary that accompanied the final rule, though, this statement merely indicates that “SBA does not approve joint venture agreements for procurements outside the 8(a) program”. 76 Fed. Reg. 8,222, 8,224 (Feb. 11, 2011). Thus, the language cited by Petitioner clarifies that the mentor-protégé joint venture approval process for 8(a) procurements does not apply to non-8(a) procurements, but does not establish a different date for examining the size of a mentor-protégé joint venture. Accordingly, I perceive no conflict between § 121.404(a) and § 121.103(h)(3)(iii). Petitioner also contends that § 121.404(a) is not applicable here, because the regulation pertains to questions of size rather than affiliation. This argument, though, is at odds with the plain language of § 121.404(a), as the regulation stipulates that SBA will examine “the size status of a concern, including its affiliates” as of the date of self-certification. In addition, OHA has recognized on numerous occasions that issues of affiliation, including whether a joint venture is eligible for the mentor-protégé exception to affiliation, are

examined as of the date of initial offer including price. *E.g.*, *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715, at 8-9 (2016) (joint venturers were affiliated because mentor-protégé agreement had lapsed as of the date of self-certification); *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532 (2014); *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 10-11 (2013) (“because size is determined as of the self-certification date, a size determination must determine affiliation—in this case, economic dependence—as of that date.”). The notion that § 121.404(a) is not applicable to joint venture affiliation issues is, therefore, meritless.

Petitioner also contends that OHA's decision in *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014) supports the PFR. As PAMC observes, however, SBA itself argued in *Kisan-Pike* that a mentor-protégé joint venture was required to comply with SBA regulations as of the date of initial offer including price. *Kisan-Pike*, SBA No. SIZ-5618, at 7. SBA further argued, citing OHA precedent, that the exception to affiliation for mentor- protégé joint ventures must be strictly construed. *Id.* at 8. OHA agreed with SBA, and affirmed an area office's determination that the challenged firm did not have a proper joint venture agreement in place as of the date to determine size. *Id.* at 9-10. Contrary to Petitioner's suggestions, then, *Kisan-Pike* does not support the proposition that SBA will consider amendments to a mentor-protégé joint venture agreement that occur after the date of initial offers including price.

III. Conclusion

OHA may grant a PFR upon a “clear showing of an error of fact or law material to the decision.” 13 C.F.R. § 134.227(c). Here, although Petitioner disagrees with OHA's decision, Petitioner has not established that significant findings of fact or conclusions of law are erroneous. I therefore DENY the PFR and AFFIRM the decision in *Size Appeal of Precision Asset Management Corporation, et al.*, SBA No. SIZ-5781 (2016).

KENNETH M. HYDE
Administrative Judge