

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

SIZE APPEAL OF:

Spinnaker Joint Venture, LLC,

Appellant,

RE: Xebec

Appealed From  
Size Determination No. 3-2018-059

SBA No. SIZ-5964

Decided: October 11, 2018

APPEARANCES

John M. Manfredonia, Esq., Manfredonia Law Offices, LLC, Cresskill, New Jersey, for Spinnaker JV, LLC

Aron C. Beezley, Esq., Sarah Osborne, Esq., Bradley Arant Boult Cummings LLP, Washington, DC, for Xebec

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On July 20, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area III (Area Office) issued Size Determination No. 3-2018-059 concluding that Xebec is an eligible small business under the size standard associated with the subject procurement. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. 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 filed the instant appeal within fifteen days after 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.

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<sup>1</sup> I originally issued this Decision under a Protective Order. After receiving and considering one timely request for redactions, I now issue this redacted Decision

## II. Background

### A. Solicitation and Protest

On August 27, 2017, the Department of the Navy, Naval Air Warfare Center, in Orlando, Florida (Navy), issued Request for Proposals (RFP) No. N61340-17-R-0042 for Training Systems Contract (TSC) IV, which is a Multiple Award Contract (MAC) (Indefinite Delivery/Indefinite Quantity (ID/IQ)) for various training devices. The procurement includes a group of small business reserve awards classified under North American Industry Classification System (NAICS) code 333318, Other Commercial and Service Industry Machinery Manufacturing, which has a corresponding 1,000-employee size standard. The Navy may use this contract to procure a broad range of training products within the scope of the contract. The task orders may include new training systems, modifications and upgrades to existing training systems, complementary Instructional Systems Development, and complementary Training Systems Support. Initial offers were due on October 27, 2017.

The solicitation includes a Statement of Work (SOW) describing the tasks to be performed. The goal is to acquire training and simulation products and systems. The Navy wishes to procure the hardware, software and physical infrastructure that will comprise new training systems, and modify existing training systems. Examples of training systems are Operator and Procedure Trainers, Operational Flight and Weapons Systems Trainers, Tactical Team Trainers, Mission and Tactics Trainers, and Maintenance Trainers. (SOW at 1-2.)

The Navy will issue task orders of two types. One will use the SOW approach, where the objective is clearly defined. The other will use a Statement of Objectives (SOO), which will describe the Navy's basic objective for which the contractor may propose innovative approaches. (SOW at 2.)

On May 30, 2018, unsuccessful offerors were notified that Xebec was among the small business awardees, and on July 27, 2018, awards were made. On June 6, 2018, Spinnaker Joint Venture (Appellant) filed a size protest with the CO alleging Xebec is not an eligible small business for this award. Appellant alleged Xebec is a joint venture between Pinnacle Solutions, Inc. (Pinnacle) and Canadian Aviation Electronics (CAE) a large business, and therefore not eligible. Appellant further alleged Pinnacle and CAE were affiliated under the ostensible subcontractor rule. Appellant stated that if there was an approved mentor protégé agreement CAE should not hold one of the five remaining awards, and Appellant would challenge the award if it did.<sup>2</sup> The CO referred the protest to the Area Office.

On June 21st, the Area Office notified Xebec of the protest, and on July 2nd Xebec submitted its response to the protest and requested documents. On July 12th, Xebec submitted additional documents and, over the next few days, responded to additional questions.

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<sup>2</sup> The Area Office did not address this allegation because it is not within the purview of the size protest program. (Size Determination at 1-2.)

Xebec is a joint venture between Pinnacle and CAE USA, Inc. (CAE USA). On October 18, 2017, the SBA Director of the All Small Mentor-Protégé Program (ASMPP) had approved the Mentor-Protégé Agreement (MPA) between Pinnacle and CAE USA. The MPA provides:

[xxx]

(MPA at 1.) CAE USA performs under NAICS code 333318 “with a history of providing training products and services to military and civil customers.” (*Id.*)

On October 25, 2017, Pinnacle and CAE USA executed a Joint Venture Agreement (JV Agreement) creating Xebec as a joint venture to pursue the instant RFP. The JV Agreement provides that the members would be Pinnacle and CAE USA, with Pinnacle the Managing Member. (JV Agreement at 2.) [xxx] (*Id.* at 3.) One of Pinnacle's employees will be Project Manager, and one of CAE USA's will be Deputy Project Manager. (*Id.* at 4.)

Article VI of the JV Agreement is titled “SBA Requirements”, and is intended to comply with SBA's joint venture regulations. It includes the following provisions:

**6.6. Major Equipment, Facilities and Other Resources.** In accordance with 13 C.F.R. § 125.8(b)(2)(vi) and § 125.18(b)(2)(vi), [xxx]

(JV Agreement ¶ 6.6.)

**6.8. Source of Labor and Contract Performance.** In accordance with 13 C.F.R. § 125.8(b)(2)(vii) and § 125.18(b)(2)(vii), the [xxx]

(JV Agreement ¶ 6.8.) The attached Exhibit A states:

It is anticipated that Pinnacle will perform the following tasks for the Joint Venture: [xxx]

It is anticipated that CAE will perform the following tasks for the Joint Venture: [xxx]

(JV Agreement, Exh. A.)

**6.14. Performance of Work.** In accordance with 13 C.F.R. § 125.8(c) and § 125.18(b)(3), [xxx]

(JV Agreement ¶ 6.14.)

Xebec's Proposal identifies Pinnacle's past performance on two training contracts. Pinnacle has performed [xxx] and [xxx]. (Proposal Vol. 3.) The Proposal also includes past performance experience for CAE USA on three contracts. Xebec's Price Matrix states: “[xxx.]” (Proposal Vol. 4.)

Xebec submitted with its response to the protest a general description of Pinnacle's experience. In it, Pinnacle stated it has delivered products and services such as Operational Flight Trainers, Weapons System Trainers, and Maintenance Training Devices, together with training device modifications and upgrades, desktop, and procedural trainers and courseware development. (Description of Services at 1.) Pinnacle's onsite support services include program management and control, simulator instructor/operators instructor pilots, maintenance test pilots and subject matter experts. (*Id.*) Pinnacle has developed and supported training devices for aircrews, crews, and maintenance, and has provided instruction on a wide array of advanced aviation platforms. (*Id.*)

Pinnacle identified a number of functions it will specifically perform for the contract. These include [xxx] (*Id.* at 2.)

As managing member, Pinnacle will [xxx] (*Id.* at 2-3.) Pinnacle identifies the past performance examples included in Xebec's Proposal, and describes [xxx] other procurements on which it served as prime or subcontractor, all involving training support. (*Id.* at 9-14.)

#### B. The Size Determination

On July 20, 2018, the Area Office issued its size determination finding Xebec an eligible small business. The Area Office found that Xebec is a joint venture between Pinnacle, a Serviced-Disabled Veteran-Owned Small Business and CAE USA, and that SBA had approved the Mentor-Protégé Agreement between the two concerns. (Size Determination at 5.) The Area Office reviewed Xebec's JV Agreement dated October 25, 2017. It identifies Xebec as [xxx]. Pinnacle is the Managing Member and [Person #1], a Pinnacle employee, is the [xxx]. (Size Determination at 5.)

The Area Office found Pinnacle is owned [xxx]% by [Person #2], and [xxx]% by an Employee Stock Ownership Plan (ESOP). The individual employees are beneficiaries and no employee owns more than 1%. The Trustee of the ESOP is [Person #3], who is no relation to [Person #2]. [Person #2] is the only member of the Board of Directors and sole corporate officer. He is also owner of [Concern #1], and [Concern #2]. The Area Office concluded Pinnacle is affiliated with these two concerns based upon common ownership. (*Id.*)

The Area Office further found CAE, Inc., is a publicly traded company based in Canada with over 1,000 employees. CAE USA, of Tampa, Florida, is a subsidiary of CAE, Inc. CAE USA's primary business activities are listed as NAICS codes 333318 and 611512 (Flight Training). (*Id.* at 6.)

Turning to the JV Agreement, the Area Office noted that two firms approved by SBA as mentor and protégé may form a joint venture for any Federal procurement, and are exempt from the normal rules of affiliation if certain conditions are met, one of which is that the protégé must be small. Here, SBA had approved the Pinnacle/CAE USA Mentor-Protégé Agreement on October 18, 2017, prior to Xebec's submission of its initial offer, including price, on October 27, 2017. According to the Mentor-Protégé Agreement, it was approved under Pinnacle's secondary NAICS code because Pinnacle is other than small under its primary NAICS code (541330,

Engineering Services, with a corresponding \$15 million annual receipts size standard). (*Id.* at 6-7.)

The Area Office further noted that, if a procurement is awarded outside the 8(a) program, SBA need not approve the joint venture prior to award. However, if the joint venture's size status is protested, the requirements of 13 C.F.R. §§ 124.513(c) & (d) will apply. (*Id.* at 7.) Xebec has designated [Person #1], one of Pinnacle's employees, to manage the contract. A general description of the equipment, facilities and other resources is provided in Xebec's JV Agreement. [xxx] The Area Office notes the Proposal is more detailed in that it states that Pinnacle has past performance experience in program management and control, has developed and supported aircrew training devices and crew training devices, and has the experience and expertise in the required performance areas. The Proposal submits Pinnacle's relevant past performance. Because this is a multiple award contract, the exact nature of the task orders and work to be performed are unknown at this time. (*Id.*)

The Area Office further noted Pinnacle is the managing member [xxx]. The Area Office relied upon an SBA Office of General Counsel opinion that stated the proportion of joint venture receipts is the same percentage as the performance of work percentage provided for in the JV Agreement. In this case, Pinnacle will perform [xxx]% of the work, and CAE USA [xxx]%. (*Id.*)

The Area Office concluded that the JV Agreement complies with the requirements of 13 C.F.R. §§ 125.8(b) & (c), and therefore the exemption from affiliation for an approved mentor-protégé relationship under 13 C.F.R. § 121.103(h)(3)(ii) applies. Pinnacle, together with its two affiliates, is small for the NAICS code assigned to this procurement and, therefore, Xebec is small for this procurement. (*Id.* at 8.)

### C. The Appeal

On July 25, 2018, Appellant filed the instant appeal. Appellant argues, first, that Xebec does not comply with 13 C.F.R. § 125.8(b)(2)(vi), which requires a provision setting forth the anticipated major equipment, facilities, and other resources to be provided by each party. The solicitation's SOW identifies multiple tasks to be performed on a delivery or task order basis, including new training systems, upgrades to existing training systems, complementary Instructional Systems Development and complementary Training Systems Support. The contractor will provide on a delivery order basis maintenance and support services for training systems, personnel with specialized knowledge of training systems, program management engineering manufacturing and clerical support, integrated product teams to implement and maintain an Information Processes and Technology (integrated product team) (IPT) structure for the duration of the contract, inspection and testing facilities, design and development of security architecture, and design and development of new training systems. (Appeal at 9-10, citing SOW ¶¶ 1-15.)

Appellant maintains the publicly available SOW sufficiently describes the scope of work to allow the JV Agreement to itemize the anticipated major equipment, facilities and other resources. However, the size determination merely states the agreement provides that Pinnacle will provide [xxx], with no mention of who is to provide testing equipment and facilities,

training systems and other hard assets required. (*Id.* at 10.) The JV Agreement fails to specify how the additional equipment will be obtained. The broad statements the Area Office refers to give no guidance how Xebec will determine which member will provide which resources once a task order is issued. (*Id.*)

Appellant further maintains the Area Office erred in looking outside the JV Agreement to the Proposal to determine Xebec's compliance with the regulation. Also, Pinnacle's past performance does not speak to what resources it will provide for the performance of this procurement. (*Id.* at 11.)

Appellant further argues Xebec's JV Agreement does not comply with 13 C.F.R. § 125.8(b)(2)(vii), which requires a provision regarding the source of labor and contract performance. The SOW requires skilled labor to perform the required tasks. The size determination does not discuss how the JV Agreement meets this requirement. (*Id.* at 11-12.)

Appellant asserts Xebec's JV Agreement fails to comply with 13 C.F.R. § 125.8(c). Pinnacle does not have the experience to perform at least 40% of the work beyond administrative functions. Pinnacle will perform mere administrative functions on this contract. Appellant maintains that Pinnacle cannot meet the past performance requirements of the solicitation, based upon the descriptions of its experience on its website. (*Id.* at 12-15.)

Finally Appellant argues the Xebec joint venture is outside the scope of the approved Mentor-Protégé Agreement. Appellant argues parties to an approved Mentor-Protégé Agreement may only pursue contract opportunities corresponding to the NAICS code included in the agreement. If Pinnacle's secondary NAICS code is not 333318, this solicitation is outside the scope of the approved Mentor-Protégé Agreement, and the exemption to affiliation does not apply. (*Id.* at 15-16.)

#### D. Appellant's Supplemental Appeal

On August 9, 2018, after reviewing file materials under the terms of a protective order, Appellant filed motions to supplement its appeal and for the admission of new evidence, along with the proposed Supplemental Appeal and new evidence. After reviewing the JV Agreement, Appellant renews its argument that Xebec does not comply with 13 C.F.R. § 125.8(b)(2)(vi). Appellant describes Pinnacle and CAE USA's contributions as essentially the same, providing office space and computers to work on task orders. The JV Agreement should have more details as to location of office space and how much would be provided by each member. It says nothing about each member's contribution to major equipment, and this contract will require major facilities. The JV Agreement pays lip service to the regulation, but provides no details on how the parties will contribute major resources once a task order is issued. (Supplemental Appeal, at 5-6.)

Appellant argues the JV Agreement fails to meet the regulatory requirement that it specify how the parties will furnish resources once the scope of work is publicly available. Appellant renews its argument the Area Office should not have looked to the Proposal for

determining compliance with the regulation. Further, the Proposal does not indicate what resources the parties will provide. (*Id.* at 6-7.)

Appellant renews its argument the JV Agreement does not comply with 13 C.F.R. § 125.8(b)(2)(vii) because it does not provide a general description of the anticipated responsibilities of each party as to contract performance. It does not specify how the parties will decide who provides labor for which tasks once a task order is issued. Appellant maintains it is possible to provide a general description of the anticipated responsibilities of each party. (*Id.* at 8-9.)

Appellant renews its argument the JV Agreement fails to comply with 13 C.F.R. § 125.8(c). The JV Agreement only describes administrative functions, and does not discuss any technical work Pinnacle might perform. The size determination refers to Pinnacle's past performance, but does not describe the type of tasks Pinnacle will perform. The JV Agreement makes no effort to ensure Pinnacle will perform more than administrative tasks. (*Id.* at 9-10.)

Also on August 9th, Appellant moved to admit as new evidence two exhibits it had attached to its appeal. Exhibit 3 is material from Pinnacle's website, showing various contracts. Exhibit 4 is a single page from a U.S. Navy website showing the "Top 10 Companies" on the predecessor contract, TSC III. Appellant offers Exhibit 4 to show that the mentor, CAE, has received "the lion's share of work" on that contract. (Motion at 1.)

#### E. Xebec's Response

On August 10, 2018, Pinnacle responded to the appeal on behalf of Xebec. Pinnacle first argues the appeal should be summarily dismissed because it is not based upon the grounds of Appellant's protest, and therefore is raising new issues on appeal, contrary to OHA regulations. (Xebec Response at 3-5.) Pinnacle further argues Appellant seeks to improperly introduce new evidence on appeal, and this evidence should be excluded. (*Id.* at 5-6)

Pinnacle further opposes Appellant's Motion to Supplement its appeal. The issues Appellant raises are materially different from those raised in Appellant's protest, and thus they are new issues on appeal, and Appellant may not raise them at this point. (*Id.* at 7-8.)

Pinnacle asserts the JV Agreement fully complies with 13 C.F.R. § 125.8(b)(2)(vi). The JV Agreement provides generally what equipment, facilities and other resources each member will provide, and acknowledges that the members will determine what additional equipment and resources each will furnish once the scope of work for each task order is publicly available. The regulation only requires a general description of anticipated major equipment, and allows parties to a joint venture to specify this information once a definite scope of work is publicly available. (*Id.* at 8-9.)

Pinnacle further asserts the JV Agreement fully complies with 13 C.F.R. § 125.8(b)(2)(vii). Pinnacle maintains the regulation explicitly states that a joint venture agreement need only describe the anticipated responsibilities of the parties if the contract is indefinite in nature. Section 6.8 of the JV Agreement sets forth the type of tasks each member is expected to

perform, and notes that specific responsibilities will be determined once a scope of work is issued for any task or delivery order. (*Id.* at 9-10.)

Pinnacle maintains the JV Agreement fully complies with 13 C.F.R. § 125.8(c). Pinnacle characterizes Appellant's assertion Pinnacle does not have the experience to perform 40% of the work as a “wild accusation”. Pinnacle points out that § 125.8(c) refers to “Performance of Work”, and § 125.8(b) refers to the contents of the joint venture agreement. Therefore, the information on performance of work need not be in the JV Agreement. Pinnacle points to a description of past services it has provided which it submitted to the Area Office in response to the protest, describing non-administrative work it has performed in the past. Pinnacle asserts Appellant's contention the JV Agreement should have included detailed information about the type of tasks Pinnacle will perform is in error because this is a multiple award contract and the task orders and work to be performed are unknown at this time. (*Id.* at 10-12.)

#### F. Appellant's Reply

On August 13, 2018, Appellant filed a motion to reply to Pinnacle's response on Xebec's behalf and also filed the proposed reply. Appellant addresses Pinnacle's contention that its appeal should be dismissed because it raises issues not raised in Appellant's size protest. Appellant maintains arguments before OHA are not new if they are raised in the size determination, and an appellant may raise on appeal an issue discussed in the size determination, even if the issue had not been raised in the protest.

### III. Discussion

#### A. Preliminary Matters

Appellant filed this appeal within 15 days of its receipt of the size determination. Therefore, the appeal is timely. 13 C.F.R. § 134.304(a).

OHA routinely permits a party to supplement its pleadings after its attorney has viewed file material for the first time under the terms of an OHA protective order. *E.g., Size Appeal of GiaCare and MedTrust, JV, LLC*, SBA No. SIZ-5690, at 7 (2015). Appellant's motion to supplement its appeal, therefore, is GRANTED.

OHA's regulations do not permit a reply to a response unless the Judge directs otherwise. 13 C.F.R. § 134.309(d). Here, Appellant filed a Motion to Reply, and its proposed Reply addresses an issue raised in the Xebec's Response, the Motion to Dismiss. The proposed Reply does not otherwise enlarge the issues here. *See Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5881 (2018). Therefore, I ADMIT Appellant's Reply into the record.

Xebec's Motion to Dismiss is based on its assertion Appellant raises new issues on appeal that it had not presented in its protest. Appellant, in its Reply, notes these issues were raised in the size determination and, thus, may be argued on appeal. I agree with Appellant. OHA's regulations provide, “The Judge will not decide substantive issues raised for the first time on appeal.” 13 C.F.R. § 134.316(c). However, as OHA has held, “[i]t is settled law . . . that a

protester ‘has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest.’” *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721 (2016). Here, the Area Office considered specific issues of whether Xebec's JV Agreement complies with SBA regulations. Therefore, even though Appellant did not raise the specific issues in the protest, Appellant may now argue that the Area Office erred in making its findings. Accordingly, I DENY Xebec's Motion to Dismiss.

OHA's review is based on 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). 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).

Appellant's two exhibits consist of material from public internet sites, and Appellant's August 9, 2018 Motion does not explain why Appellant could not have submitted those exhibits with its protest. They are new evidence that was not before the Area Office at the time of its determination, and Appellant has not established good cause for why Appellant had not submitted it earlier. Therefore, Exhibits 3 and 4 are EXCLUDED.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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

After reviewing the Area Office file and the arguments of the parties, I conclude that the Area Office properly found Pinnacle is not affiliated with its large mentor and joint venture partner CAE and, therefore, that their joint venture Xebec is an eligible small business for the subject procurement. Accordingly, I deny the appeal and affirm the size determination.

Pinnacle and CAE are protégé and mentor, respectively, under an SBA-approved Mentor-Protégé Agreement (MPA) pursuant to 13 C.F.R. § 125.9 and, thus, are not affiliated with each other solely because Pinnacle receives assistance from CAE. 13 C.F.R. § 121.103(b)(6). Pinnacle and CAE have submitted an offer on the subject procurement as joint venturers and thus must qualify for an exception under 13 C.F.R. § 121.103(h)(3) or SBA will find them affiliated for the subject procurement. 13 C.F.R. §§ 121.103(h)(2), 125.8(a). The exception applicable here provides:

Two firms approved by SBA to be a mentor and protégé under [§ 125.9] may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small . . . , and the joint venture meets the requirements of [this chapter].

13 C.F.R. § 121.103(h)(3)(ii). Section 125.9, in turn, requires, “In order to receive the exclusion from affiliation, the joint venture must meet the requirements set forth in § 125.8(b)(2), (c), and (d).” 13 C.F.R. § 125.9(d)(ii). Here, Appellant argues on appeal that the joint venture, Xebec, does not comply with three of these requirements.

§ 125.8(b)(2)(vi)

The first requirement with which, Appellant argues, Xebec is not in compliance is that the joint venture agreement contain a provision:

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, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available[.]

13 C.F.R. § 125.8(b)(2)(vi).

This new rule, issued in 2016, differs from the prior rule that applied to 8(a) joint ventures. *See* 13 C.F.R. § 124.513(c)(6) (2016). The prior rule, containing only the first 28 words of the current rule, had no provision for MACs, ID/IQ contracts, or any other contract opportunity where the Government's actual requirements are to be set out in task or delivery orders rather than included in the solicitation for the basic contract. The current rule, on the other hand, sets out that where the work is indefinite, the joint venture agreement may provide either a general description of major equipment, facilities, and other resources each member will provide, or describe how the members will furnish resources once a definite scope of work is known.<sup>3</sup>

Here, the RFP is for an ID/IQ contract and it identifies many types of tasks to be performed on a delivery or task order basis, including work on new training systems, upgrades to existing training systems, complementary Instructional Systems Development, and complementary Training Systems Support. Orders may be placed on many types of military training systems, including Operator and Procedure Trainers, Operational Flight and Weapons

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<sup>3</sup> *See also Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5822 (2017). There, OHA found compliant the portion of the joint venture agreement specifying very little major equipment, facilities, and other resources where the RFP was for an ID/IQ contract mainly requiring professional services, with the Government providing the IT system.

Systems Trainers, Tactical Team Trainers, Mission and Tactics Trainers, and Maintenance Trainers. The RFP does not specify any particular training system it covers, but only lists the broad categories of training systems that may become the subject of an order from the Navy.

The JV Agreement here provides that Pinnacle will provide [xxx], including hardware and software, and office space for personnel performing task orders. JV Agreement ¶ 6.6, *supra*. Further, CAE will provide computer systems for monitoring and management, including hardware and software, and office space for performing task orders. *Id.* The JV Agreement acknowledges the indefiniteness of the RFP and states that once the scope of work for an order is known, the members will determine the additional equipment, facilities and other resources each will furnish. *Id.*

In its appeal and supplemental appeal, Appellant contends that the JV Agreement does not satisfy § 125.8(b)(2)(vi) and that the SOW did sufficiently describe the scope of work to allow Xebec to itemize the anticipated major equipment, facilities and other resources needed, and to show how these will be obtained. Further, Appellant asserts Pinnacle's and CAE USA's listed contributions are essentially the same — office space and computers — and that the JV Agreement should have more detail as to location and amount of office space to be provided by each member.

Pinnacle asserts the JV Agreement is compliant with 13 C.F.R. § 125.8(b)(2)(vi) in that it provides generally what equipment, facilities and other resources each member will provide, and acknowledges that the members will determine what additional equipment and resources each will furnish once the scope of work for each task order becomes available.

I agree with Pinnacle. The RFP provides no detail on what equipment, facilities, or other resources are required of the contractor, let alone which training systems the contractor will be working on. Under these circumstances, the JV Agreement provides about as much detail as could be provided at this stage of the procurement. The Area Office properly concluded the JV Agreement complies with this requirement.

§ 125.8(b)(2)(vii)

The second requirement with which, Appellant argues, Xebec is not in compliance is that the joint venture agreement contain a provision:

[s]pecifying 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 small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint

venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available. . . .

13 C.F.R. § 125.8(b)(2)(vii).

This rule, like 13 C.F.R. § 125.8(b)(2)(vi), was issued in 2016, and differs from the prior rule that applied to 8(a) joint ventures in the same way, in that it makes provision for ID/IQ contracts where the Government's actual requirements are not known at the time of proposal but are to be set out later in task or delivery orders. *See* 13 C.F.R. § 124.513(c)(7) (2016).

The JV Agreement here provides that each member will perform with employees from its respective organization, approved subcontractors, and new recruits, and it places responsibility for meeting the performance of work requirements on the Project Manager (who is Pinnacle's employee). JV Agreement ¶ 6.8, *supra*. Exhibit A lists the general types of tasks each member will perform. *Id.* The JV Agreement acknowledges the indefiniteness of the RFP and states that once the scope of work for an order is known, the members will determine specific responsibilities. *Id.*

In its appeal and supplemental appeal, Appellant argues Xebec's JV Agreement does not satisfy § 125.8(b)(2)(vii) because it contains no general description of the anticipated responsibilities each member will have or how they will decide who provides labor for which tasks once a task order is issued. Appellant maintains it is possible to provide a general description of each member's anticipated responsibilities. In its response, Pinnacle asserts the JV Agreement does satisfy the regulatory requirement given the RFP's indefinite nature.

I agree with Pinnacle because, again, the RFP provides no detail on exactly what type of work will be required, and on which training system. Under these circumstances, the JV Agreement provides about as much detail as could be provided given the lack of substantive information in the RFP. The Area Office properly concluded the JV Agreement complies with this requirement.

13 C.F.R. § 125.8(c)

The third joint venture requirement with which, Appellant argues, Xebec is not in compliance is the requirement that:

(1) For any contract set aside or reserved for small business that is to be performed by a joint venture between a small business protégé and its SBA-approved mentor authorized by § 125.9, the joint venture must perform the applicable percentage of work required by § 125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(2) The work performed by the small business partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(3) The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

13 C.F.R. § 125.8(c).

Xebec's JV Agreement contains statements that Pinnacle will perform no less than [xxx]% of the work performed by joint venture members on any small business set-aside, and that Pinnacle's work “will be more than administrative or ministerial functions but will be substantive and material in nature.” JV Agreement ¶ 6.14, *supra*. Xebec's Proposal states its [xxx]. Proposal Vol. 4, *supra*.

On appeal, Appellant asserts Xebec fails to comply with 13 C.F.R. § 125.8(c) because Pinnacle lacks the experience to perform at least 40% of the work on this contract beyond administrative functions. Instead, it will perform mere administrative functions. Appeal, *supra*. Further, Appellant argues, the JV Agreement only describes administrative functions, and does not discuss any technical work Pinnacle might perform. Supplemental Appeal, *supra*. In response, Pinnacle maintains Xebec fully complies with 13 C.F.R. § 125.8(c), calling Appellant's assertion that Pinnacle lacks the experience to perform 40% of the work a “wild accusation”. Response, *supra*.

I agree with Pinnacle that Xebex is as much in compliance with 13 C.F.R. § 125.8(c) as is possible at this stage of the procurement. The Area Office file contains substantial evidence in support of Pinnacle's position. The MPA states that Pinnacle provides services under NAICS code 333318 to the U.S. Army, and that Pinnacle's technical capabilities include Program Management, Quality, System Engineering, Software Design and Development, Test, Integration, Acceptance and Delivery, Product Logistics Support, Cybersecurity and Interactive Multi-Media Development. Section II.A, *supra*. The Proposal identifies Pinnacle's past performance on two other training contracts, one for [xxx], and the other for [xxx]. *Id.* The JV Agreement states Pinnacle will perform [xxx]% of the work, and the Price Proposal is based on [xxx]. *Id.* It is hard to imagine what other possible indicia of compliance with this rule could exist, when the specific tasks are, as here, unknown to the offeror.

#### Secondary NAICS code

Appellant's final argument on appeal that Xebec is ineligible for a joint venture exception to affiliation because the MPA was approved under Pinnacle's secondary NAICS code, which might not be 333318. The regulation applicable to protégés provides:

In order to initially qualify as a protégé firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

(i) A firm may self-certify that it qualifies as small for its primary or identified secondary NAICS code.

(ii) Where a firm is other than small for the size standard corresponding to its primary NAICS code and seeks to qualify as a small business protégé in a secondary NAICS code, the firm must demonstrate how the mentor-protégé relationship is a logical business progression for the firm and will further develop or expand current capabilities. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the firm has no prior experience.

13 C.F.R. § 125.9(c)(1). The SBA initially proposed a rule requiring a protégé to qualify as a small business under its primary NAICS code. 80 Fed. Reg. 6618, 6637 (Feb. 5, 2015). However, after considering several comments, SBA adopted the above text in its final rule. 81 Fed. Reg. 48558, 48587 (July 25, 2016). In the preamble, SBA discussed the change extensively and determined that permitting a protégé to certify as small under a secondary NAICS code in which it has some experience would further develop that protégé's expertise and enhance its ability to perform similar contracts independently in the future. 81 Fed. Reg. 48558, 48564 (July 25, 2016) (preamble to final rule).

Here, Xebec's MPA clearly sets out that Pinnacle's secondary NAICS code is 333318, and that Pinnacle has experience providing services in this NAICS code to [xxx]. MPA at 1. Therefore, I must reject Appellant's final argument and conclude that the subject RFP is not outside the scope of Xebec's MPA.

The Area Office properly concluded that Xebec's JV Agreement is in compliance with the requirements of 13 C.F.R. §§ 125.8(b) & (c) and thus, that the exemption from joint venture affiliation under 13 C.F.R. § 121.103(h)(3)(ii) is available to Xebec. Pinnacle, thus, is not affiliated with its large mentor CAE USA. Further, the subject procurement, which is classified under NAICS code 333318, is not outside the scope of Xebec's MPA, in which the secondary NAICS code is also 333318. Pinnacle, combined with its two affiliates [Concern #1] and [Concern #2], is small under the 1,000-employee size standard applicable to this procurement and, therefore, Xebec is an eligible small business for this procurement.

#### IV. Conclusion

Appellant has not met its burden of proving that the Area Office committed clear errors of fact or law based upon the record before it. Accordingly, this 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).

CHRISTOPHER HOLLEMAN  
Administrative Judge