

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

SIZE APPEAL OF:

Lynxnet, LLC

Appellant,

RE: Defense Systems and Solutions

Appealed From

Size Determination No. 6-2018-071

SBA No. SIZ-5971

Decided: November 7, 2018

APPEARANCES

Scott E. Pickens, Esq., Matthew J. Michaels, Esq., Barnes & Thornburg LLP,
Washington, D.C., for Lynxnet, LLC

Damien C. Specht, Esq., James A. Tucker, Esq., R. Locke Bell, Esq., Morrison &
Foerster LLP, Washington, D.C., for Defense Systems and Solutions

DECISION¹

I. Introduction and Jurisdiction

On July 31, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area VI (Area Office) issued Size Determination No. 6-2018-071 concluding that Defense Systems and Solutions 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.

¹ I originally issued this Decision under a Protective Order. The parties had no requested redactions. Therefore, I now issue the entire Decision for public release.

II. Background

A. Solicitation and Protest

On March 22, 2017, the Department of the Army, Army Contracting Command — Redstone, at Redstone Arsenal, Alabama (Army), issued Request for Proposals (RFP) No. W58RGZ-17-R-0001 for labor, materials, and facilities to assist the Aviation and Missile Research, Development, and Engineering Center (AMRDEC) Prototype Integration Facility (PIF). The procurement is a competitive 8(a) set-aside, and classified under North American Industry Classification System (NAICS) code 336413, Other Aircraft Parts and Auxiliary Equipment Manufacturing, with a corresponding 1,250 employee size standard.

This RFP is designated as PIF-3, a follow-on to PIF-2, in which the incumbent is Redstone Defense Systems (Redstone), a joint venture between Yulista Aviation, Inc. (YAI) and Science and Engineering Services, LLC (SES). Prior to PIF-2, the prime contractor on PIF-1 was Joint Venture Yulista/SES, a joint venture between Yulista Management Services, Inc. (YMS) and SES.

On May 2, 2017, Defense Systems and Solutions (DSS), an SBA-approved 8(a) joint venture between 8(a) Participant, Yulista Integrated Solutions, LLC (YIS) and SES, submitted its initial offer including price. Final proposal revisions were due on April 12, 2018. (RFP Amendment 6.) On May 22, 2018, the Contracting Officer (CO) awarded the PIF-3 contract to DSS and notified Lynxnet, LLC (Lynxnet), the unsuccessful offeror, of the award. Lynxnet filed a timely size protest with the CO on May 30, 2018. The CO forwarded the protest to the Area Office for a size determination.

Lynxnet made several allegations that DSS is not an eligible small business for the PIF-3 contract. First, Lynxnet claimed, DSS is not small because SES is not small as of the May 2, 2017 initial offer date. (Protest at 3.) On that date, SES's profile on the System for Award Management (SAM) shows SBA notified SAM that it had previously found SES other than small for the same NAICS code and size standard as for the subject RFP. (*Id.* at 3-5 and Attachment 3 (SAM profile for SES dated April 5, 2017).)

Second, Lynxnet argued, DSS does not qualify as a small business nonmanufacturer because SES exceeds the 500 employee size standard for nonmanufacturers, again based on its SAM profile as of May 2, 2017. (*Id.* at 5.) That profile shows SES as other than small for some NAICS codes having the 500 employee size standard. (*Id.*)

Third, Lynxnet claimed, DDS is affiliated with Redstone based on the totality of the circumstances, and their combined employees exceeds the 1,250 size standard. (*Id.* at 5.) This allegation is based on the fact that YIS, YAI, and YMS all have the same parent company, Calista Corporation (Calista), an Alaska Native Corporation (ANC). (*Id.* at 6.) Also, Lynxnet alleges, managing member YIS is likely to be unduly dependent on YAI's facilities, personnel, and past performance. Thus, DDS should not receive the exception to affiliation for ANC companies. (*Id.*)

Fourth, Lynxnet contended that SES is generally affiliated with YIS, YAI, and YMS based on SES's prior joint ventures with YMS and YAI on the PIF-1 and PIF-2 contracts, and its prospective work with YIS on PIF-3. (*Id.* at 6-7.) This longstanding inter-relationship and undue reliance creates affiliation, and the combined employees exceeds the 500 employee size standard.

Fifth, Lynxnet argued that YIS is ineligible for the PIF-3 contract because it operates in the same primary NAICS code as YAI contrary to 8(a) program regulations. (*Id.* at 7-9.)

B. The Size Determination

On July 31, 2018, the Area Office issued its size determination finding DSS is an eligible small business.

The Area Office found that Appellant's protest improperly questioned YIS's eligibility for the 8(a) program, as well as its ability to receive 8(a) contracts designated under NAICS code 336413. Matters of 8(a) eligibility fall outside the scope of a size determination. (Size Determination at 6, citing 13 C.F.R. § 124.517(a).)

The Area Office further noted that a joint venture of an 8(a) participant and one or more other concerns may submit an offer on a competitive 8(a) procurement as long as each firm is small under the size standard corresponding to the NAICS code designated for the procurement. (Size Determination at 6, citing 13 C.F.R. § 124.513(b)(1).) The Area Office then proceeded to examine the size of SES and YIS.

The Area Office found no record that SES had ever been subject to an adverse size determination that would prevent SES from self-certifying. The information on SAM appeared to be inadvertently included on the site. (*Id.* at 7.)

The Area Office further determined that DSS, through its two venturers, would qualify as the manufacturer of the items being acquired under PIF-3, and therefore would not be subject to the 500-employee nonmanufacturing size standard. (*Id.* at 7.) The Area Office noted that the RFP describes the work as centering around the requirement to fabricate and deliver integrated hardware solutions for aviation systems, and for missile and other systems. (*Id.* at 8.) The contractor will fabricate and assemble hardware and software into an end item in order to prove out design concepts and support the development of rapid response hardware solutions. The contractor is to acquire parts and materials necessary to fabricate the solutions, and maintain inventory control of them. (*Id.* at 8, citing RFP at 2 and Statement of Work at 21.)

The Area Office found that under the joint venture agreement and DSS's submissions to the Area Office, DSS itself will manufacture the required items, with YIS performing 90% of the labor and 37% of purchasing, while SES will perform all subcontracting administrative functions and 63% of required purchasing. (*Id.* at 9, citing Email, L. Bell to M. Guerzon, July 25, 2018.) "Purchasing activities" refers to the purchase of raw materials necessary for manufacturing. (*Id.*) DSS explained its sample orders are the best evidence of anticipated work, because PIF-3's manufacturing requirements will vary with each task order. (*Id.*) DSS included cost breakouts for the sample orders with its email. (*Id.*; see Sample Order 1, Manufacture of Composite Racks;

Sample Order 2, Remote Control System Manufacturing; Sample Order 3, Test Rack and Sensor Harness Procurement and Fabrication.)

The Area Office examined DSS's sample orders and concluded DSS, through YIS and SES, would perform 85% of manufacturing of composite racks and 100% of manufacturing of remote control systems, test racks, and sensor harnesses. (Size Determination, at 9.) DSS further stated YIS will perform 90% of the joint venture's manufacturing requirements and will provide a Manufacturing Director with each order. (*Id.*, see Email, L. Bell to M. Guerzon, July 25, 2018.) The Area Office also referred to DSS's summary of tasks, which shows that YIS will lead primary product realization efforts, including program management, quality and cost control, property and configuration management and manufacturing. SES will provide administrative support. (*Id.*) Further, DSS's submission established manufacturing experience for YIS, which has been providing manufacturing services to YAI under PIF-2. (*Id.*) The Area Office thus concluded that YIS and SES will perform the primary activities in acquiring and transforming parts and components into the required end item. Therefore, DSS is the manufacturer and subject to the 1,250 employee size standard for NAICS code 336413, and not the 500 employee nonmanufacturer size standard. (*Id.* at 9.)

The Area Office then considered whether DSS is affiliated with Redstone. DSS is an SBA-approved joint venture between YIS, an 8(a) Participant, and SES, with YIS the majority owner and managing member. Redstone is an SBA-approved joint venture of YAI and SES. YIS and YAI are both wholly-owned subsidiaries of Yulista Holdings, LLC which, in turn, is wholly-owned by Calista, an ANC. PIF-3 is an 8(a) contract and, therefore, there can be no finding of affiliation between YIS, YAI, or any concern owned by them unless SBA has determined that one or more of the concerns has obtained a substantial unfair competitive advantage in the industry. Thus, the Area Office concluded, DSS and Redstone are not affiliated. (*Id.* at 10-11, citing 13 C.F.R. § 124.109(c)(2)(iii).)

The Area Office then noted that each of YIS, YAI, and YMS has entered into one joint venture with SES, and that none of these joint ventures has performed more than three contracts. There is no evidence to suggest economic dependence between SES and YIS, YAI and YMS, or the reverse. Accordingly, SES is not generally affiliated with YIS, YAI or YMS based upon their joint ventures. (*Id.* at 11-12, citing 13 C.F.R. § 121.103(h)(2).)

The Area Office then examined the size of SES and YIS. YIS is within the 1,250 employee size standard. SES is a wholly-owned subsidiary of SES Holding Co., Inc. (SHC), which is 34.4% owned by Hyo Sang Lee, President of both SES and SHC, and 40.5% owned by Arnold H. Lee. The remainder owned by a trust and 11 individuals. Arnold Lee is SHC's Secretary, and also the President and minority shareholder of MassTech, Inc. (MTI). SES identified Long Term Capital, LLC (LTC) as an affiliate with no employees. The Area Office then concluded that SES is affiliated with MTI, LTC, and SHC, and that their combined number of employees is within the 1,250 employee size standard. (*Id.* at 13-15.)

Accordingly, the Area Office determined that DSS, as a joint venture between an 8(a) Participant and another concern, both of which are small businesses, is itself an eligible small business. (*Id.* at 15-16.)

C. The Appeal

On August 15, 2018, Appellant filed the instant appeal. Appellant argues the Area Office made three errors in its size determination.

First, Appellant alleges the Area Office failed to evaluate misrepresentations concerning size made by entities and individuals affiliated with SES. Appellant admits in a footnote that it had no knowledge that MTI or Arnold Lee were involved with SES before reading the size determination. Appellant now seeks to submit new evidence, at Attachments 2 and 3, about a settlement between MTI and the United States concerning allegations of false representations of size. (Appeal at 5-6 & n.1.)

Second, Appellant argues the Area Office erred in disregarding an official Government record. At the time of proposal submission SES's SAM registration indicated SBA had made a formal determination that SES was other than small under NAICS code 336413. Appellant asserts SES certified three times the registration entries were accurate representations. Appellant argues the Area Office should not have accepted DSS's argument the SAM record was a mistake, but should have conducted further research to resolve the discrepancy. (*Id.* at 7-9.) Appellant includes, at Attachment 4, the April 5, 2017 SAM profile it had submitted with its protest, and two other SAM profiles, dated May 16, 2016, and November 1, 2016.

Third, Appellant argues the Area Office erred in not using the 500 employee nonmanufacturer size standard. DSS is an unpopulated joint venture, and thus cannot perform manufacturing itself. Therefore, it can only resell items produced by other companies, YIS and SES. (*Id.* at 10). Appellant maintains the Area Office erred in ascribing to DSS the qualifications of the separate venturers, because DSS itself must qualify as the manufacturer. (*Id.* at 11.) Further, the Area Office should have determined whether YIS and SES individually qualified as a manufacturer or nonmanufacturer. (*Id.* at 12.) The Area Office also erred in failing to consider all parts of the nonmanufacturer rule, including whether DSS would manufacture the end items with its own facilities, as required by 13 C.F.R. § 121.406(b)(2). (*Id.* at 13, citing *Size Appeals of Proactive Technologies, Inc. and CymSTAR Services, LLC*, SBA No. SIZ-5772 (2016); *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5632 (2015).)

D. Appellant's Supplemental Appeal

On August 31, 2018, after reviewing file materials under the terms of a protective order, Appellant filed a motion to supplement its appeal, along with the proposed Supplemental Appeal.

First, Appellant asserts OHA should draw an adverse inference that DSS is other than small or remand for a new investigation because DSS provided misleading or incomplete information to the Area Office. Appellant argues that SES's Form 355 had incomplete information on other companies owned by Hyo Sang Lee and Russell Chunn (a minority shareholder in DSS and MTI), which SES only corrected in response to Area Office inquiries. (Supplemental Appeal at 3.) Appellant further alleges Mr. Chunn has ownership of at least 7

other companies, based on Appellant's August 25, 2018 search of Alabama Secretary of State records, and includes 15 pages of Alabama records as Attachment 10 to establish this ownership. (*Id.*) Appellant points to information DSS submitted in response to Area Office inquiries that a "Soo Lee" owns 41% of MTI, raising questions of family affiliation with this individual, even though SES had responded "no" to Question 21 of Form 355 regarding family ownership. (*Id.* at 4.) Appellant alleges this information, together with the information regarding the MTI settlement, reveal SES as "intentionally deceptive". (*Id.* at 4.)

Second, Appellant asserts DSS admits SES is not the manufacturer. Appellant argues that SES does not qualify as the manufacturer because it will perform only from 0 to 5% of the manufacturing under the sample task order. Further, Appellant argues a concern's size must be determined as of the date of its final proposal revisions. Here, DSS's final proposal submission date is April 12, 2018, but SES provided its average number of employees from May 1, 2016 to April 30, 2017. Appellant argues OHA should remand the case to determine SES's employee counts for the 12-month period prior to final proposal revisions. (*Id.* at 5-6.)

Appellant further argues the Area Office erred in concluding SES's SAM registration of April 5, 2017 is outdated and has been corrected. Appellant maintains the SAM record in effect at the time of final proposal revisions still showed SBA had determined SES is not small for NAICS code 336413. (*Id.* at 6-7.)

Appellant argues the Area Office file contains no record of any independent review by the Area Office that SES has not been subject to an adverse size determination, and concludes the Area Office relied on DSS's assertions. Appellant asserts this reliance was error. (*Id.* at 7-8.)

Finally, Appellant argues that joint venture DSS is in violation of the requirement that it manufacture end items in its own facilities, because the proposal states that YAI, another concern, will own or lease 16 out of 23 manufacturing facilities required to produce the end items. (*Id.* at 8-9.) Appellant requests that OHA either conclude that DSS is not an eligible small business or, alternatively, remand the case for further review. (*Id.* at 9.)

E. DSS's Response

On August 31, 2018, DSS responded to the appeal. DSS argues, first, Appellant improperly seeks to supplement the record with new evidence without having filed a motion establishing good cause for its submission. (*Id.* at 6-7.) Second, in bringing the issue of MTI's settlement before OHA, Appellant improperly seeks review by OHA of a substantive issue that was not before the Area Office. (DSS Response at 5-7.)

Further, DSS argues Appellant improperly seeks OHA review of allegations of non-responsibility. Appellant's allegations of the impact and consequences of alleged misrepresentations by SES affiliates are plainly allegations of nonresponsibility. Responsibility issues are not within the jurisdiction of the size determination process, but are determined by the contracting officer. Finally, the settlement Appellant references expressly states MTI, Arnold Lee, and Richard Lee deny the allegations of misrepresentations. (*Id.* at 8-9.)

DSS asserts the Area Office did not err in finding the notation of an adverse size determination in SES's SAM entry was incorrect. The Area Office is not required to treat information in SAM profiles as dispositive evidence. (*Id.* at 10-11, citing *Size Appeal of The Frontline Group*, SBA No. SIZ-5860 (2017).)

DSS maintains the Area Office correctly found DSS small under the solicitation's 1,250-employee size standard. The Area Office was correct to impute the capabilities of DSS's joint venture partners to DSS. DSS is an unpopulated joint venture. SBA regulations require a joint venture to be unpopulated to qualify for the relevant exceptions to affiliation. (*Id.* at 12, citing 13 C.F.R. § 121.103(h).) DSS argues the joint venture regulations clearly contemplate the imputation of joint venture partners' performance to the joint venture itself. Appellant's theory that work performed by joint venture partners does not count as work performed by the venture itself would render the regulations a nullity, because an unpopulated joint venture cannot perform any work itself. (*Id.* at 12-14.)

DSS further argues the Area Office correctly applied the 1,250-employee size standard to DSS, SES and YIS. The regulation requires joint venture partners be small under the size standard corresponding to the NAICS code assigned to the procurement. (*Id.* at 15, citing 13 C.F.R. 124.513(b)(1).) Here, that is the 1,250-employee size standard, and SES and YIS are both within that standard. Further, if the regulation means that the size standard as determined after the application of the nonmanufacturer rule analysis, then that analysis is conducted at the offeror level, and DSS is the offeror. Because the joint venturers manufacturing capabilities are attributed to DSS, then DSS is the manufacturer, and the 1,250-employee size standard applies. The Area Office performed this analysis. (*Id.* at 15-16.)

DSS argues the Area Office did not err by not detailing whether DSS will manufacture the end items with its own facilities. The joint venture agreement clearly specified the manufacturing facilities YIS will contribute to contract performance. Further, DSS's Response to the Size Protest stated YIS will perform 90% of the manufacturing requirements and provide a Manufacturing Director, as noted by the Area Office. DSS points out that Appellant does not allege that DSS will not manufacture the end items. (*Id.* at 16-18.) Further, DSS argues that any argument regarding DSS's, SES's, or YIS's manufacturing facilities is absent from the size protest and cannot be raised for the first time on appeal. It is not clear error for an Area Office to not address a substantive issue that was not raised in the size protest. (*Id.* at 19, citing *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330 (2012).)

On September 5, 2018, DSS filed its objection to supplemental appeal.

On September 12, 2018, Lynxnet filed a motion to correct supplemental appeal along with the correction.

On September 13, 2018, DSS responded to the supplemental appeal. DSS asserts Appellant fails to identify any material information omitted from the record before the Area Office. Appellant cannot identify a material fact the Area Office failed to consider. SES identified all ownership interests of its principals in its Form 355 and its follow-up correspondence with the Area Office. Further, DSS asserts Mr. Chunn has divested his interest in

the additional companies Appellant identifies, except for one which has no employees. Further, because the Area Office found that Mr. Chunn's interests in SHC did not amount to control, these other interests are irrelevant. (Response to Supplement Appeal at 1-3.)

DSS argues its initial failure to list MTI as an affiliate was due to the fact the protest did not allege MTI as an affiliate. (*Id.* at 4.) DSS also dismisses Appellant's argument that SES must meet the 500 employee size standard because it will not be performing a significant portion of the manufacturing. The relevant issue is whether DSS is a manufacturer based upon the performance of both of its member entities. The regulation does not address the portion of the manufacturing which must be performed by each member of the joint venture. (*Id.* at 5-6.)

DSS also asserts the Area Office is not bound by the SAM registration, and that the Area Office stated in the size determination that SBA has no record of any adverse size determination on SES. (*Id.* at 6.)

Finally, DSS argues there is no requirement it own or lease all the manufacturing facilities it uses. DSS points to its proposal, which states YIS and YAI have entered into a transition agreement through which DSS will take possession of YAI's leased facilities, with the leases transferring to YIS. DSS argues there is no requirement that it own or lease the facilities, as long as it has possession of them. (*Id.* at 7-8, citing *Size Appeal of Mistral, Inc.*, SBA No. SIZ-5877 (2018).)

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 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).

Here, Appellant attaches to its Appeal Petition new evidence in the form of the May 16, 2016, and November 1, 2016 SAM profiles in Attachment 4, and new evidence concerning a settlement between the Government and MTI, one of DSS's affiliates, in Attachments 2 and 3. Appellant additionally attaches to its Supplemental Appeal 15 pages of information on firms in which Mr. Chunn allegedly owns an interest at Attachment 10. Appellant failed to file a motion arguing good cause exists to admit this new evidence with both submissions. Further, all of this evidence was available at the time of protest, and could have been submitted then. Appellant claims the Area Office was in error in not considering this evidence, but Appellant failed to submit it at the protest stage. Finally, the evidence is irrelevant to the size issues on appeal. The two new SAM profiles are old and outdated. Upon review of the Settlement Agreement, I note that MTI admits no wrongdoing or liability. A settlement which admits no liability has no probative value, and neither does a list of companies which no longer have any connection to the challenged concern. Accordingly, all of Appellant's proffered new evidence is EXCLUDED, as are all arguments Appellant bases upon them.

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

I have excluded Appellant's argument based upon its submission of MTI's settlement agreement. Appellant's argument regarding SES's SAM registration is not only meritless, it is risible. Appellant argues that because SES's SAM registration included a notation that the firm had been found other than small by SBA, that the Area Office should have relied upon that to find SES was other than small. OHA has held that while information in a concern's SAM registration may be grounds for a protest, it is not dispositive evidence. *Size Appeal of The Frontline Group*, SBA No. SIZ-5860, at 6 (2017). Here, the Area Office did precisely what it should have done. It inquired into SBA's own records and determined that SBA has no record that SES had ever been the subject of an adverse size determination. Size Determination at 7. The Area Office properly disregarded the SAM registration after determining it was clearly incorrect. Appellant would have OHA accept an incorrect record of a size determination in preference to SBA's actual records. This argument is without support in regulation, case law, or common sense.

Appellant argues that the Area Office erred in finding DSS is the manufacturer of the items to be produced. DSS is a joint venture between YIS, an 8(a) Participant and SES. A joint venture of and 8(a) Participant and another firm may submit an offer as a small business for a competitive 8(a) procurement as long as each firm is small for the size standard corresponding to the NAICS code for the procurement. 13 C.F.R. § 124.513(b)(1). However, if the procurement is for the supply of manufactured products, the offeror must be either the manufacturer of the end item being procured, or comply with the requirements of the nonmanufacturer rule. 13 C.F.R. § 121.406(a). If a firm is found to be a nonmanufacturer, the applicable size standard is 500

employees, rather than that corresponding to the solicitation's NAICS code. 13 C.F.R. § 121.406(b)(1)(i).

Appellant argues that DSS cannot be the manufacturer here, because it is unpopulated and has no employees of its own. The work will be performed by YIS and SES. In essence, Appellant argues that the work performed by the joint venturers cannot be imputed to the joint venture. Again, I find Appellant's argument to be meritless.

All joint ventures must be unpopulated to qualify for the relevant exceptions to affiliation. 13 C.F.R. § 121.103(h). Further, the 8(a) joint venture regulations clearly contemplate that the performance by the joint venture partners will [be] the performance of the joint venture. “The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.” 13 C.F.R. § 124.513(d)(2). The regulations governing mentor-protégé joint ventures also provide that the small business partner must perform “at least 40% of the work performed by the joint venture.” 13 C.F.R. § 125.8(c)(1). The regulations clearly contemplate that a joint venture will perform a contract through the work performed by its constituent joint venture partners. Indeed, an unpopulated joint venture could perform in no other way, and it is only unpopulated joint ventures which qualify to the exemptions to affiliation. Appellant's theory would result in no small business joint venture being able to qualify as a manufacturer. There is no support for this theory either in the regulations or in OHA's case law. The Area Office was not in error in determining DSS's manufacturing status based upon the work to be performed by SES and YIS.

The Area Office also did not err in finding that the manufacturing of the end items here would be performed by DSS's joint venture partners. In response to the Area Office's queries, DSS pointed out that under the Sample Orders in its proposal, YIS would perform 90% of the manufacturing effort for Sample Order 1, 100% of the manufacturing effort for Sample Order 2, and in Sample Order 3, which called for two items, 96% and 100% of the manufacturing effort. *See* II. B, *supra*.

Appellant does not address the Area Office's finding that the DSS joint venture partners will perform the manufacturing of the end items, except for one point. The rule requires that a manufacturer must perform the manufacturing “with its own facilities.” 13 C.F.R. § 121.406(b)(2). Appellant argues that DSS will be using YAI's facilities, not its own. This is because YIS and YAI have entered into a Cooperative Transition Agreement, through which DSS will take possession of YAI's leased facilities. DSS submitted this Cooperative Transition Agreement with its proposal, and explained that this describes its possession of facilities. DSS Proposal, Vol. II, § 7.1.1; Vol. III, App'x. B; DSS Response to Area Office, June 11, 2018, at 8, 12. Therefore, DSS will be using YAI facilities on a contractual basis. Appellant argues that this does not meet the requirement that a manufacturer perform the work with “its own facilities”. However, OHA has already addressed this issue:

I conclude there is no basis for holding that the phrase in the regulation “its own facilities” requires a contractor to outright own in fee simple absolute the facilities that it will use to manufacture the product to be sold to the procuring agency. Businesses frequently rent or lease facilities in order to manufacture

products. The facility used by a business is usually owned by another entity, even if the realty-owning entity has the same owners as the operating company. I conclude that, in the absence of a requirement in the solicitation, the phrase “its own facilities” in the regulation **means that the contractor need only occupy and control the facilities**, if not as an owner, then as a lessor or tenant. Thus, the fact the . . . facility will be leased has no bearing on the adequacy of the contractor's manufacturing facilities.

Size Appeal of Mistral, Inc., SBA No. SIZ-5877, at 12 (2018) (emphasis added).

Here, it is clear that under the Cooperative Transition Agreement, DSS will occupy and control the facilities it will be using to fabricate the end items it will produce under the RFP. Accordingly, Appellant's argument on this point is meritless.

Appellant points to two OHA decisions to support its argument that the Area Office failed to properly analyze whether DSS is the manufacturer, but these decisions are inapposite here. In *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5632 (2015) and *Size Appeals of Proactive Technologies, Inc. and CymSTAR Services, LLC*, SBA No. SIZ-5772 (2016), OHA found error in size determinations which failed to properly analyze whether the challenged concern was the manufacturer of the end items in question under the rule, and remanded both cases for proper analysis. Here, however, Appellant failed to allege at the Protest stage that DSS would not perform the contract using its own facilities, but that affiliation should be imputed because DSS's manufacturing facilities are historically shared among YIS's sister ANC subsidiaries. However, here the record clearly establishes DSS will manufacture the end items in its own facilities. While the Area Office did not address this issue in the size determination, Appellant did not raise it in its Protest, and because the record clearly establishes DSS will be using facilities it occupies and controls, if the Area Office erred at all, it was harmless error. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5728, at 5-9 (2016) (PFR).

Finally, Appellant argues the Area Office did not properly calculate DSS's size. The Area Office obtained employee counts from SES and YIS for the period from May, 2016 to May, 2017, and concluded that both firms meet the 1,250 employee size standard for NAICS code 336413. I find that, on my review, the record reflects that the Area Office's calculations were accurate. The Area Office calculated DSS's size as of May 2, 2017, the date of its self-certification as part of its initial offer, including price. 13 C.F.R. § 121.404(a). Appellant argues, however that the Area Office had to determine DSS's size as of April 12, 2018, because this was the date for submission of final proposal revisions. RFP Amendment 6. The regulation provides that size status for purpose of compliance with the nonmanufacturer rule at 13 C.F.R. § 121.406(b)(1) is determined as of the date of final proposal revisions. 13 C.F.R. § 121.404(d). (“13 C.F.R. § 121.404(d) requires the Area Office to determine size as of the final proposal revision (only with regard to the nonmanufacturer and subcontractor issues)” *Size Appeal of Dynalantic Corp.*, SBA No. SIZ-5125, at 10 (2010).) However, the Area Office did not review DSS's status as a nonmanufacturer under 13 C.F.R. § 121.406(b)(1) because it had already found DSS to be the manufacturer of the end items under 13 C.F.R. § 121.406(b)(2). Accordingly, the Area Office correctly determined DSS's size as of the date of its self-certification, submitted with its initial offer, including price.

Appellant's contentions are all meritless. Appellant has failed to establish any error in the size determination.

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