

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

SIZE APPEALS OF:

STAcqMe, LLC,

Appellant,

Appealed From  
Size Determination Nos. 06-2018-081 and  
-082

SBA No. SIZ-5976

Decided: December 10, 2018

APPEARANCES

Brett W. Johnson, Esq., Snell & Wilmer L.L.P., Phoenix, Arizona, for Appellant

Rocky Blackwell, Chief Executive Officer, Advanced Concept Enterprises, Inc.,  
Shalimar, Florida

DECISION

I. Introduction and Jurisdiction

These consolidated appeals arise from two size determinations in which the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) determined that STAcqMe, LLC (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant's Joint Venture Agreement (JVA) does not meet SBA requirements. Appellant contends that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeals are denied and the size determinations are 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 timely filed the appeals within fifteen days of receiving the size determinations. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On June 22, 2018, the United States Air Force (Air Force), Air Mobility Command, issued Request for Proposals (RFP) No. FA4814-18-R-0006 for Squadron Operations Support at

MacDill Air Force Base, Florida. According to the RFP, the contractor will “provide in-garrison active squadrons with functional support for core squadron functions such as Scheduling, Mission Planning, Training, [Standard and Evaluation Support], and other required tasks.” (RFP, Attachment 1, at ¶ 2.0.) The RFP divided the required work into four task areas — Training Support; Scheduling and Mission Execution Support; Mission Planning Support; and Standardization and Evaluation Support — each comprised of various subtasks. (*Id.* at ¶¶ 4.1-4.4.) The RFP stated that the Air Force would provide office space, computer hardware and software, e-mail and network access, and “other standard office equipment necessary to support the Contractor.” (*Id.* at ¶ 6.0.)

The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industrial Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$15 million in average annual receipts. Proposals were due July 30, 2018.

On August 3, 2018, the CO announced that Appellant was the apparent awardee. Two unsuccessful offerors, Advanced Concepts Enterprises, Inc. (ACE) and Mainsail Group (Mainsail), filed timely size protests challenging Appellant's size. The CO forwarded the protests to the Area Office for review.

### B. Proposal

Appellant's proposal explained that Appellant is a joint venture between AcqMe, LLC (AcqMe) and Sonoran Technology and Professional Services, LLC (Sonoran). (Proposal, Vol. II, at 1.) AcqMe is an SDVO SBC, and Sonoran is AcqMe's SBA-approved mentor under SBA's All-Small Mentor-Protégé Program (ASMPP). (*Id.*, Vol. III, at 4.) The proposal stated that AcqMe's President, Mr. Matthew Merritt, will serve as Project Manager for the instant contract. (*Id.*, Vol. II at 12.)

The proposal outlined Appellant's approach for recruiting and staffing. (*Id.* at 17-18.) Four “sample resumes” were provided in the proposal, including one of a trainer currently employed by Sonoran. (*Id.* at 20.)

### C. JVA and Addendum

Appellant's JVA, dated April 24, 2017, stated that AcqMe and Sonoran own, respectively, 51% and 49% membership interests in Appellant. (JVA at 2.) AcqMe is the Managing Venturer, and Mr. Merritt is Project Manager. (*Id.*) The JVA explained that Appellant planned to compete for five contract awards, but the instant RFP was not among those five. (*Id.*) Under the heading “Responsibilities of the Venturers,” the JVA stated:

As previously mentioned, the Project Manager shall be responsible for contract negotiation, sourcing labor, contract performance, and compliance with performance of work requirements.

[AcqMe] shall perform at least 40% of the work, which must be more than administrative or ministerial in nature.

[Appellant] shall comply with the limitations on subcontracting set forth at 13 CFR 125.6, which generally means it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.

[AcqMe] and [Sonoran] shall execute all documents necessary to obligate themselves and to ensure performance of any awarded contract(s) and to complete performance despite the withdrawal of any party from the JV.

(*Id.* at 3.)

On August 16, 2018, AcqMe and Sonoran signed a one-page “Addendum to JV Agreement.” The Addendum set forth a new “Business Development List” of potential contract opportunities, one of which was the instant RFP. (Addendum at 1.) According to the Addendum, the instant RFP was “[a]dded to” the JVA effective June 22, 2018. (*Id.*) The Addendum did not otherwise alter the terms of the JVA. (*Id.*)

#### D. Size Determinations

On September 12, 2018, the Area Office issued Size Determination No. 06-2018-081 and Size Determination No. 06-2018-082, concluding that Appellant is not a small business for the subject procurement.<sup>1</sup>

The Area Office found that AcqMe and Sonoran are parties to an SBA-approved Mentor-Protégé Agreement, and that they therefore may joint venture for any Federal procurement in accordance with 13 C.F.R. § 121.103(h)(3)(ii), so long as the JVA meets the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), or § 127.506(c) and (d), and provided that the protégé (AcqMe) qualifies as small under the NAICS code assigned to the procurement. (Size Determination No. 06-2018-082, at 6.) The instant RFP was set aside for SDVO SBCs, so Appellant's JVA must comply with § 125.18(b)(2) and (3). (*Id.* at 7.)

The Area Office found that Appellant's JVA meets the requirements of § 125.18(b)(2)(i)-(vi) and (viii)-(xii). (*Id.* at 10-13, 20-21.) The JVA does not, however, comply with § 125.18(b)(2)(vii), which requires that the JVA contain a provision:

(vii) Specifying 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 SDVO small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (b)(3) of this section, where practical. If

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<sup>1</sup> The Area Office issued two separate size determinations, one pertaining to each of the size protests. Because the size determinations are substantively identical, citations will refer only to Size Determination No. 06-2018-082, which corresponds to the size protest filed by ACE.

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 SDVO 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[.]

(*Id.* at 8-9, quoting 13 C.F.R. § 125.18(b)(2)(vii).)

The Area Office found that Appellant's JVA is dated April 24, 2017, and thus was created well before the instant RFP was issued in June 2018. (*Id.* at 19-20.) Moreover, there is nothing in the JVA describing the respective responsibilities of AcqMe and Sonoran. (*Id.* at 20.) Nor is such information found in Appellant's proposal. (*Id.* at 22.) Although AcqMe and Sonoran prepared an Addendum to the JVA, the Addendum too is silent on this question. (*Id.* at 20.) Thus, “[t]he JVA is not procurement-specific [and] has not been edited to designate tasks or duties for the [performance] of the contract to [AcqMe] and [Sonoran]. No information as to the duties or responsibilities of each venture[r] is provided.” (*Id.*) The Area Office concluded that Appellant's JVA does not meet the requirement at § 125.18(b)(2)(vii). (*Id.*, citing *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014).)

The Area Office determined that Appellant's JVA also does not comply with § 125.18(b)(3). Because the “JVA does not delineate the work being performed by either [venturer],” the Area Office could not verify that Appellant will adhere to the limitation on subcontracting restrictions at 13 C.F.R. § 125.6. (*Id.* at 22.) Similarly, the Area Office could not ascertain whether AcqMe will perform at least 40% of the work on the contract, or whether AcqMe's role will consist of more than administrative or ministerial functions. (*Id.* at 25.) The Area Office reiterated that neither the JVA nor Appellant's proposal described the respective responsibilities of AcqMe and Sonoran. Appellant offered a “Work Assignment Memo” in an effort to address this issue, but the Area Office declined to consider this document because it was prepared on August 23, 2018, whereas Appellant's size must be determined as of the date of self-certification (*i.e.*, July 30, 2018). (*Id.* at 24.) “Given the lack of specifics [in] the JVA and the proposal, [the Area Office] cannot determine which entity is bringing the appropriate skills to the [SDVO SBC] set-aside procurement, apart from [AcqMe's] status as a service-disabled veteran-owned entity.” (*Id.*, citing *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4799 (2006).)

The Area Office concluded that Appellant's JVA does not fully comply with 13 C.F.R. § 125.18(b)(2) and (b)(3). Appellant therefore is not eligible for the exception to affiliation at 13 C.F.R. § 121.103(h)(3)(ii), and AcqMe and Sonoran are affiliated for the instant procurement. (*Id.* at 25-26.) Sonoran is not a small business, so Appellant is not a small business once Sonoran's receipts are combined with those of AcqMe. (*Id.* at 26.)

### E. Appeals

On September 24, 2018, Appellant timely appealed the size determinations to OHA.<sup>2</sup> Because the two appeals raise identical issues and pertain to the same procurement, OHA consolidated them.

Appellant contends that the Area Office “engaged in a form-over-substance analysis” in determining that Appellant is not small. (Appeal at 1.) In particular, the size determinations are flawed because 1) there is no dispute that the protégé firm, AcqMe, is a small business; 2) Appellant's JVA meets SBA requirements “by delineating work requirements according to the specific percentages required”; and 3) the Area Office's decisions “conflict[] with the purpose and plain language of SBA regulations, the totality of the circumstances, and the public policy purposes of the [ASMPP].” (*Id.* at 2.)

Appellant first argues that it should have qualified for the affiliation exception because Appellant's JVA is based on a sample JVA template developed by SBA. In fact, Appellant's JVA “mirrors the template provided by the SBA.” (*Id.* at 7, emphasis Appellant's.) Appellant highlights that its JVA stated that AcqMe “shall perform at least 40% of the work, which must be more than administrative or ministerial in nature.” (*Id.*, quoting JVA at 3.) The JVA also made clear Appellant will comply with the limitations on subcontracting set forth in 13 C.F.R. § 125.6. (*Id.*) These provisions are nearly identical to those found in the template. Appellant should not be penalized for having relied on governmental guidance. (*Id.*, citing *White v. Geithner*, 602 F. Supp.2d 35 (D.D.C. 2009).)

Next, Appellant contends that the instant case is distinguishable from *Kisan-Pike* and *Lance Bailey*, cases referenced by the Area Office. (*Id.* at 8.) In *Kisan-Pike*, the JVA was so vague that the large business mentor might have performed all, or nearly all, of the contract. (*Id.*) Such concerns are unwarranted here because “[i]f [AcqMe] were to fail to perform at least forty percent of the work as represented, [Appellant] would not only be in breach of contract, it would be additionally liable for making a false claim to the government.” (*Id.*) *Lance Bailey* is inapposite because Appellant's JVA “assign[ed] specific work percentages to each entity.” (*Id.* at 8-9.)

Appellant asserts that “the specter of liability under either breach of contract or the False Claims Act is sufficient to deter and remedy misrepresentations during the procurement process.” (*Id.* at 8.) In Appellant's view, “[a]dditional representations delineating further allocations of responsibility do nothing to change that fact,” so the Area Office should have concluded that “[Appellant's] affirmative representation that [AcqMe] would complete the requisite work provides the necessary assurance that [Appellant] would perform as obligated.” (*Id.* at 9.) Appellant also notes that, in response to the protests, Appellant provided the Area Office with further information concerning the expected division of work between AcqMe and Sonoran. (*Id.*)

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<sup>2</sup> Appellant filed two separate appeals, one pertaining to each of the size determinations. The appeals are substantively identical, so for convenience citations refer only to the appeal from Size Determination No. 06-2018-082.

Lastly, Appellant argues that the size determinations are contrary to underlying purpose of the ASMPP. (*Id.* at 9-10.) According to Appellant, “[t]he Area Office’s fixation on supposed technical failures ignores the reality of the arrangement in favor of overturning an appropriate award.” (*Id.* at 9, citing *Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5822 (2017).) Moreover, although the Area Office relied upon 13 C.F.R. § 125.18(b)(2)(vii) to find Appellant’s JVA defective, that regulation does not require the level of detail demanded by the Area Office. (*Id.* at 10.) Appellant maintains the Area Office should have focused on “whether the protégé firm will perform meaningful work under the JVA.” (*Id.*, citing *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016).) The Area Office clearly erred by imposing more burdensome requirements than the drafters of the rules intended. (*Id.*)

#### F. ACE's Response

On October 9, 2018, ACE responded to the appeals. ACE contends that Appellant has shown no error of fact or law in the size determinations. Therefore, the appeals should be denied. (Response at 1.)

ACE maintains that the Area Office correctly determined that Appellant’s JVA does not comply with 13 C.F.R. § 125.18(b)(2)(vii), and correctly relied upon OHA’s decision in *Kisan-Pike*. If anything, Appellant’s JVA is even more vague than the JVA found to be deficient in *Kisan-Pike*. (*Id.* at 2-3.) Likewise, in *Size Appeal of IEI-Cityside, JV*, SIZ-5664 (2015), OHA found affiliation between a mentor and protégé because the JVA did not adequately describe the responsibilities and performance work requirements of the joint venture partners. (*Id.* at 3.)

ACE disputes the notion that Appellant followed the guidance in the SBA template when drafting its JVA. ACE highlights that the template specifically warned that “Performance of work should be spelled out more specifically by task, to demonstrate that the small business in fact is doing more than mere ministerial or administrative functions.” (*Id.*, quoting Template at 2 n.2.)

ACE agrees with the Area Office that Appellant did not comply with 13 C.F.R. § 125.18(b)(3)(i), which requires that a JV adhere to limitations on subcontracting, and that Appellant did not comply with 13 C.F.R. § 125.18(b)(3)(ii), which requires that an SDVO SBC perform at least 40% of the JV’s work, and that such work be more than administrative and ministerial functions. (*Id.* at 3-4.) Because Appellant’s JVA failed to delineate what work would be performed by each joint venturer, the Area Office was unable to determine whether these requirements were met. (*Id.* at 4.)

ACE insists that regulations governing the ASMPP are intended to ensure that a mentor does not take advantage of its protégé. (*Id.*) Therefore, examining compliance with such regulations does not elevate form over substance. Finally, insofar as OHA considers the appeals meritorious, ACE urges OHA to remand the matter to the Area Office to consider whether AcqMe and Sonoran are affiliated on alternate grounds. (*Id.* at 4-5.)

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellant must prove the size determinations are based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Analysis

Under SBA regulations, parties to a joint venture normally are affiliated with one another for any contract performed by the joint venture. 13 C.F.R. § 121.103(h)(2). However, the regulations authorize an exception for joint ventures between an SBA-approved mentor and protégé under the ASMPP:

A protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor).

*Id.* § 125.9(d)(1). When, as here, a mentor-protégé joint venture is competing for a contract set aside for SDVO SBCs, the terms of the JVA must comply with § 125.18(b)(2) and (3) in order for the joint venture to utilize the exception to affiliation. *Id.* § 121.103(h)(3)(ii).

In the instant case, the Area Office correctly found that Appellant's JVA does not fully comply with § 125.18(b)(2) and (3). As the Area Office observed, Appellant's JVA was originally drafted in April 2017 — more than a year before the RFP was issued — and the JVA was not subsequently amended to address the RFP in any substantive detail. Sections II.A and II.C, *supra*. Logically, then, the JVA did not designate, and could not have designated, specific contractual tasks and responsibilities to AcqMe and Sonoran, nor did the JVA explain how Appellant will fulfill the performance of work requirements set out in § 125.18(b)(3). OHA has repeatedly held that, absent such information, a mentor-protégé joint venture cannot avail itself of the exception to affiliation. *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664 (2015), *aff'd sub. nom IEI-Cityside, JV v. United States*, 122 Fed. Cl. 750 (2015); *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014). Accordingly, the Area Office did not err in finding that Appellant is ineligible for the exception to affiliation at § 121.103(h)(3)(ii).

Appellant contends that it relied on an SBA template to prepare its JVA, and therefore should not be faulted for noncompliance with § 125.18(b)(2) and (3). This argument is unpersuasive for two reasons. First, Appellant has not established that it could properly rely upon informal guidance, such as the SBA template, in lieu of specific regulations and without seeking

further clarification. *E.g., Matter of KRR Partners Joint Venture*, SBA No. VET-239 (2013), *recons. denied*, SBA No. VET-241 (2013) (PFR). Second, even assuming that reliance on informal guidance was appropriate, the template directed that “[p]erformance of work should be spelled out specifically by task, to demonstrate that the small business is doing more than mere ministerial or administrative functions.” Section II.F, *supra*. Appellant therefore did not, in fact, strictly adhere to the SBA template in creating the JVA. As a result, the template cannot excuse Appellant's failure to comply with § 125.18(b)(2) and (3).

Appellant also maintains that the Area Office expected an unreasonable level of detail in the JVA, and that the regulatory requirement that a JVA comply with § 125.18(b)(2) and (3) is inconsistent with the underlying purposes of the ASMPP. These arguments too are meritless. As the Area Office emphasized in the size determinations, Appellant's JVA was completely silent as to the respective contractual roles and responsibilities of AcqMe and Sonoran. Section II.D, *supra*. I therefore see no basis to conclude that the Area Office was overly demanding in its review. Any complaint about the SBA regulations themselves is beyond the scope of OHA's review, and should instead be directed to SBA policy officials. It is well-settled that OHA has no authority to determine the propriety of the regulations themselves. *E.g., Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556, at 7 (2014).

#### IV. Conclusion

For the above reasons, the appeals are DENIED and the size determinations are AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge