Cite as: *Size Appeals of Kentucky Bldg. Maintenance, Inc and NMI Alaska, Inc.*, SBA No. SIZ-6001 (2019)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF: Kentucky Building Maintenance, Inc., and NMI Alaska, Inc., Appellants, RE: TFOM HHS Group JV, Appealed From Size Determination Nos. 05-2019-002 and 05-2019-004	SBA No. SIZ-6001 Decided: May 1, 2019

APPEARANCES

Daniel F. Edwards, Esq., Stephen P. Withee, Esq., Zackary Stillings, Esq., Frost Brown Todd, LLC, Columbus, Ohio, for Kentucky Building Maintenance, Inc.

Isaias Alba, Esq., Michelle E. Litteken, Esq., Emily J. Rouleau, Esq., Samuel S. Finnerty, Esq., PilieroMazza PLLC, Washington, D.C., for NMI Alaska, Inc.

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DECISION[1]

I. Introduction and Jurisdiction

On November 16, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office), issued Size Determination Nos. 05-2019-002 and 05-2019-004, concluding that TFOM HHS Group JV (TFOM JV) is an eligible small business for the procurement at issue.

[1] I originally issued this Decision under a Protective Order. After receiving and considering one or more timely requests for redactions, I now issue this redacted Decision.

Appellants contend the size determinations are clearly erroneous, and request that SBA's Office of Hearings and Appeals (OHA) reverse the size determinations and find that TFOM JV is not an eligible small business for this procurement. For the reasons discussed *infra*, I affirm the size determinations and deny the appeals.

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. Appellants filed the instant appeal within fifteen days of receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On February 21, 2017, the Department of the Air Force, Air Force Installation Contracting Agency, JBSA-Lackland, TX (Air Force) issued Request for Proposals No. FA8052-17-R-0003 (RFP) for Healthcare Aseptic Management Services (HAMS) II. The Contracting Officer (CO) set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 561720, Janitorial Services, with a corresponding $18 million annual receipts size standard. TFOM JV, a joint venture between TFOM Corporation (TFOM Corp.), an 8(a) concern, and Hospital Housekeeping Systems, LLC (HHS), a large business, submitted its initial offer including price on April 24, 2017. On September 26, 2018, the Air Force informed unsuccessful offerors that the apparent successful offeror for the Southwest Region was TFOM JV.

On October 2, 2018, NMI Alaska, Inc. (NMI), filed a size protest against TFOM JV, alleging TFOM JV was other than small. NMI asserted TFOM JV is ineligible for two reasons. First, TFOM Corp. is a large business, with revenues in excess of the size standard, because it is affiliated with the JDDA Group of companies. NMI argues this alone makes TFOM JV ineligible, citing 13 C.F.R. § 125.9(c)(1). NMI argues TFOM Corp. must qualify as a small business for TFOM JV to be eligible. NMI identified several firms it alleged were affiliates of TFOM Corp., which would render it other than small. Second, NMI argues TFOM JV is ineligible because the entity has been dissolved and the mentor-protégé agreement terminated. (NMI Protest at 1-3.)

Also, on October 2, 2018, Kentucky Building Maintenance, Inc. (KBM), filed a size protest against TFOM JV, alleging TFOM JV is other than small. KBM asserted TFOM JV is ineligible because TFOM Corp. and HHS are affiliated, and because HHS is a large business, TFOM is thus other than small. (KBM Protest at 3.) KBM argues TFOM does not qualify for any exception to the general rule that parties to joint venture are affiliated. While a joint venture may submit an offer as a small business for a federal procurement if both firms are small, HHS is not small, and so TFOM JV does not qualify. Further, while two firms in a joint venture may submit an offer as a small business if both firms are part of an approved SBA mentor-protégé relationship, there is no approved mentor-protégé agreement between TFOM Corp. and HHS. (*Id.*)

The CO forwarded both protests to the Area Office for a size determination.

On October 12, 2018, TFOM JV filed a consolidated response to both protests. TFOM JV explained that it is a joint venture between TFOM Corp. (an SBA-certified 8(a) Business Development Program participant specializing in janitorial services) and HHS (a large business providing hospital housekeeping and associated janitorial services). (TFOM Protest Response at 2.)

B. Mentor-Protégé Agreement, Joint Venture Agreement and Addendum

On March 20, 2015, TFOM Corp. and HHS executed a Mentor-Protégé Agreement (MPA) and submitted it to SBA. (MPA, Ex. A to TFOM Protest Response.) On June 23, 2015, SBA approved the MPA. The MPA designated HHS as the mentor, and TFOM Corp. as the protégé. The MPA stated TFOM Corp. and HHS anticipated entering into joint venture arrangements to compete for and perform government contracts. (*Id.* at 1, 4 ¶ 3(d).) The MPA contemplates that [xxx]. (*Id.* at 2-4, ¶¶ 2-3.) [xxx].

The MPA provided that either party could voluntarily terminate the MPA at will, provided it gave the other party and SBA at least 30 days written notice. (*Id.* at 5, ¶ 7(i).) Additionally, the MPA specified that termination "would not impair the obligations of the Mentor to perform its contractual obligations pursuant to government prime contracts being performed with the Protégé" nor "impair the obligations of the Protégé to perform its contractual obligations under any current contract or subcontracts between the Mentor and Protégé." (MPA at 5, ¶ 8.) Further, "termination of the Agreement does not impact contractual Agreements undertaken during the active stages of the Mentor/Protégé relationship. Therefore, contractual obligations must be satisfied in accordance with terms and conditions set forth in the contract." (*Id.*, MPA at 5, ¶ 7(iv).).

On March 22, 2017, TFOM Corp. and HHS executed the joint venture agreement (JVA) creating TFOM JV. The JVA stated the parties sought to pursue, among other opportunities, the instant procurement. The JVA's purpose is for the Parties to offer the Government the best combination of performance, cost, and delivery for the instant procurement. (Ex. G to Protest Response, JVA, ¶ 1, citing 13 C.F.R. § 124.513(c)(1).) It designated TFOM Corp. as Managing Venturer, and Mr. Christopher as the Project Manager. (*Id.* at ¶ 2, citing 13 C.F.R. § 124.513(c)(2).)

TFOM Corp. will own 51% of the Joint Venture; HHS will own 49%. TFOM Corp. shall receive "at least 51%" of the net profit earned "but in no case shall receive less of the net profit than commensurate with the work performed by TFOM [Corp.]" (*Id.* at ¶ 3, citing 13 C.F.R. § 124.513(c)(3).) TFOM will perform at least 40% of the work. (*Id.* at 6, 7, 11.) The net operating income and loss shall be allocated between the parties in proportion to their performance of the work. (*Id.* at ¶ 4, citing 13 C.F.R. § 124.513(c)(4).) The Joint Venture will have a special bank account requiring the signature of all parties. (*Id.* at ¶ 5 citing 13 C.F.R. § 124.513(c)(5).)

The JVA's other provisions went on to address the other requirements of 13 C.F.R. § 124.513(c). I will discuss in detail those provisions that are at issue in this appeal.

The itemization of resources required by 13 C.F.R. § 124.513(c)(6) is included in an Addendum, referenced at ¶ 6, listing in detail the supplies, facilities, equipment and chemicals TFOM Corp. will lease from HHS, and the resources HHS will provide for itself. (*Id.* at 8-10.)

For Contract Oversight the JVA provides:

> TFOM [Corp.] will be responsible for the following items. **TFOM HHS Group, JV** will designate specific employees to fulfill the following items: Any designation of managing partner employees will be subject to approval.
>
> a) Negotiation of contract
>
> b) Administration of day-to-day issues arising under the contract to ensure contract performance
>
> c) Representation of the Joint Venture Entity in its dealing with the U.S. Government in all matter relating to the contract, represented by **TFOM HHS Group, JV**
>
> d) Maintenance of Joint Venture Entity's financial and other administrative records
>
> e) Retention of the final original records upon completion of performance of the contract
>
> f) Reporting the Joint Venture Entity's financial affairs to the organizers
>
> g) Coordination of the response to inquiries from and audits performed by the U.S. Government
>
> h) Prepare submission of the quarterly financial statements
>
> i) Preparation and submission of the project-end financial statements and sate [sic] of final profit distribution, and
>
> j) Provide an adequate supply of labor to perform the contract: provide [sic] however, the Joint Venture will collectively have the duty and obligation to designate specific employees of their respective corporations who will assist the Managing Venturer in fulfilling its responsibilities under the contract. These employees may be employees on a full or part time basis, as necessary, to perform the contract. Also, the Joint Venture Entity, subject to the regulations of SBA, may enter into subcontracts with qualified individuals or entity to obtain adequate sources of labor and materials necessary to perform the contract.

> As Managing Venturer, TFOM [Corp.] is primarily responsible for contract oversight. The Project Manager (Terry L. Christopher) will be responsible for day-to-day management and administration of the Contract. Each Joint Venturer will have the right to visit the Contract site to evaluate Contract performance.

(*Id.* at ¶ 7, citing 13 C.F.R. 124.513(c)(7).)

> *4 TFOM JV will allow for a blended pool of labor employees of both parties. As the Managing Venturer, TFOM [Corp.] will have the first right to refuse employment during the performance phase of the Contract. TFOM [Corp.] and HHS will ensure that **TFOM HHS Group, JV** and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in 13 C.F.R. § 125.8(c).
>
> *4 The work performed by TFOM [Corp] will be more than administrative or ministerial functions so that it gains substantive experience. The amount of work done by the TFOM [Corp.] and HHS will be aggregated, and the work done by the small business protégé partner (TFOM [Corp.]) must be at least 40% of the total done by the Joint Venture. All work done by the mentor (HHS) and any of its affiliates at any subcontracting tier will be counted.

(*Id.*, at ¶ 8, citing 13 C.F.R. § 124.513(c)(8).)

The JVA further provides that if HHS seeks to perform additional work, this work will generally be performed through the joint venture, which would require TFOM Corp. to do additional work to meet the 40% requirement. (*Id.*, at p.7.)

The Addendum to the JVA identified work to be performed by TFOM Corp., as at least 40% of all non-personal services for all management, labor, supervision transportation, equipment and materials to provide complete medical housekeeping services for medical, dental, veterinary and other patient care facilities for HAMS II. TFOM Corp. will provide [xxx]. HHS will provide [xxx]. TFOM Corp.'s tasks will include [xxx]. HHS will perform services [xxx]. (*Id.* at p. 11.)

HHS will also perform at least 40% of non-personal services for all management, labor supervision transportation, equipment and materials to provide complete medical housekeeping services for medical, dental, veterinary and other patient care facilities for HAMS II. HHS will also provide [xxx]. (*Id.* at pp. 11-12.)

On February 21, 2017, the Air Force issued the instant solicitation. On April 24, 2017, TFOM JV submitted its proposal.

C. Protest Response

On March 26, 2018, about a year after TFOM JV's submission of its initial offer, HHS sent notice to TFOM Corp. and SBA stating its intent to voluntarily dissolve the MPA. (*Id.*,

Letter, J. Terry to E. Spencer, March 26, 2018, Ex. H to Protest Response.) The letter stated that TFOM JV would remain intact. HHS stated its intent to maintain the joint venture until any awards were made on any outstanding solicitations where TFOM JV has submitted an offer. The letter identified three such solicitations, one of which was the instant solicitation. (*Id.*)

TFOM JV submitted a sworn declaration from Terry L. Christopher, stating he was President and sole shareholder of TFOM Corp., that TFOM Corp. was not affiliated with Tfom Hbs Facility Group, and that in 2011, JDDA Facility Group was renamed TFOM Corp. (Protest Response, Ex. I.) TFOM Corp. submitted an SBA Form 355, also stating Mr. Christopher is President and 100% shareholder, and that TFOM Corp. has no affiliates. (Protest Response, Ex. K.)

TFOM JV maintains that it was eligible to submit an offer on this procurement because at the time it submitted its initial offer, including price, it was an SBA-approved mentor-protégé joint venture, its SBA-approved MPA was in place, its JVA complied with the requirements, and the protégé (TFOM Corp.) was a small business under the solicitation's size standard. TFOM JV further asserted it was not affiliated with any of the affiliates alleged in the protest. (*Id.* at 3-4.)

D. The Size Determination

On November 16, 2018, the Area Office issued Size Determination No. 05-2019-002, in response to NMI's protest, and Size Determination No. 05-2019-004, in response to KBM's protest, both finding TFOM JV to be an eligible small business. The two size determinations are virtually identical.

The Area Office determined TFOM JV's size as of April 24, 2017, the date it self-certified as small with the submission of its initial offer, including price. The Area Office further found that TFOM JV, its MPA, and its JVA were all in compliance with the applicable regulations as of that date. The Area Office further reasoned that there is no regulation which requires a finding that an 8(a) Mentor/Protégé Joint Venture is ineligible for award if a joint venture member withdraws from the MPA after the date for determining size but prior to award, provided the parties intend to meet their joint venture obligations incurred prior to withdrawal. Accordingly, the Area Office found that TFOM JV would be considered a small business as long as TFOM Corp. qualified as small for the procurement. (Size Determination at 3.)

The Area Office found that TFOM Corp. was formerly named the JDDA Facility Group, Inc. On March 23, 2011, its name was changed. Mr. Terry Christopher is TFOM Corp.'s President and sole shareholder. He is not an owner, manager, partner, officer, director or shareholder in any other business. He submitted a signed declaration that TFOM Corp. has no affiliates. (*Id.* at 2.) After reviewing TFOM Corp.'s tax returns, the Area Office determined that it is a small business. Therefore, because TFOM Corp. is small for the instant procurement, TFOM JV qualifies as small. (*Id.* at 5.)

E. KBM's Appeal and Supplemental Appeal

On November 30, 2018, KBM filed its size appeal with OHA, alleging the Area Office erred in finding TFOM JV an eligible small business. KBM asserts the Area Office erred in applying the mentor-protégé exception to TFOM JV because TFOM Corp. is a former protégé of HHS (emphasis in original). KBM asserts HHS entered a new, replacement mentor-protégé agreement with MGMA Consulting Corporation (MGMA) on March 13, 2018. This new agreement was arranged before that date and approved by SBA 13 days before HHS gave notice to terminate the MPA with TFOM Corp. (KBM Appeal at 3.) HHA cannot have both TFOM Corp. and MGMA as protégés because a mentor cannot simultaneously have two protégés with the same NAICS code. (*Id.*, citing 13 C.F.R. § 124.520(b)(2) and 81 Fed. Reg. 48558, 48563 (July 25, 2016).)

KBM argues that TFOM JV should not be protected from a finding of affiliation because HHS jettisoned and replaced it as a protégé. The voluntary termination of the MPA before contract award forfeited the mentor-protégé exception for the joint venture. Only previous awarded contracts may continue to receive the benefit from a terminated mentor-protégé agreement. (*Id.* at 4, citing 13 C.F.R. § 124.520(d)(iii).) This logic holds in other instances, where a concern which has completed its term in the 8(a) BD program may be awarded an 8(a) contract after graduation, provided it was eligible for award on the initial date specified for the receipt of offers and it still continues to meet all applicable eligibility criteria. (*Id.*, citing 13 C.F.R. § 124.507(d).)

KBM further argues a party cannot benefit from that which it has affirmatively waived. (*Id.* citing *Davis Sewing Mach, Co. of Del. v. U.S.*, 60 Ct.Cl. 201, 218 (Ct. Cl. 1925).) KBM also points to the law that when a limited liability company voluntarily dissolves, it cannot enter into new business, but may only assert those rights necessary to liquidate its business. (*Id.*, citing, among others, *Sienna Court Condominium Assoc. v. Champion Aluminum Corp.*, 75 N.E.3d 260, 280-281 (Ill. Ct. App 2017).) Further, a bidder may not take active steps which render it ineligible for award and at the same time maintain a bid protest. (*Id.* citing *Lionhart Grp., Ltd. — Request for Reconsideration*, B-232731.2, 88-2 CPD ¶ 445).)

KBM maintains the facts here are distinct from OHA cases regarding the necessity for the mentor-protégé agreement to exist as of the date of the initial offer. Here, the MPA has been terminated and replaced, and can no longer serve as grounds for applying the affiliation exception. (*Id.* at 5.) In *Size Appeal of DCS Night Vision JV, LC*, SBA No. SIZ-4997 (2008) required a joint venture agreement be dated before the submission of an initial offer. But this analysis presupposes the mentor-protégé agreement would not be affirmatively terminated and replaced. KBM argues *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715 (2016) is distinct from this case because the mentor-protégé agreement was not in place at the time of submission of the challenged concern's offer.

KBM argues that where an entity has affirmatively terminated an agreement it should be estopped from asserting it as protection against a finding of affiliation. (*Id.*, citing *USA Petroleum Corp. v. U.S.*, 821 F.2d 622, 625 (Fed. Cir. 1987).) TFOM Corp. and HHS terminated their MPA before the Air Force announced any award, and so applying the mentor-protégé

exception would be contrary to the overt action to terminate the agreement. (*Id.*)

KBM emphasizes that the purpose of the mentor-protégé program is to create a specific and narrow program where small business can work with large businesses to gain experience and grow, not to create a path for large businesses to obtain small business contracts. KBM asserts that SBA should not allow large business to enjoy an affiliation exception while ostensibly assisting duplicative competing firms. (*Id.* at 5-6, citing 13 C.F.R. § 124.520(a) and *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532 (2014).)

On December 21, 2018, after examining the record under the terms of the Protective Order, KBM filed a Supplemental Appeal. KBM argues that the MPA expired June 22, 2016, and there is no evidence that SBA extended it beyond that date. Therefore, there was no MPA in effect at the time of TFOM JV's submission of its proposal, and TFOM JV is not entitled to the mentor-protégé exception. (KBM Supplemental Appeal at 2-3.) While changes to SBA's regulations have eliminated the annual requirement for re-approval of mentor-protégé agreements, these were not in effect on June 22, 2016, and thus these changes do not resuscitate an expired mentor-protégé agreement. (*Id.* at 3, citing 13 C.F.R. § 124.520(e)(5) and 81 Fed. Reg. 48585 (July 25, 2016).) The regulation in effect when TFOM JV submitted its proposal required SBA to approve the MPA or it would automatically expire. The MPA expired because this was not done. Therefore, TFOM JV is not an eligible small business. (*Id.* at 4.)

KBM notes a reference in OHA cases to a "change in policy memorandum." (*Id.* at 3, citing *Size Appeal of Quadrant Training Solutions, LLC*, SBA No. SIZ-5811 (2017).) KBM asserts that no policy change can supersede a properly enacted prior existing federal regulation. (*Id.*) KBM asserts the regulation then in effect required SBA to review and approve all mentor protégé agreements or they will automatically expire. SBA was required to accomplish this policy change by rulemaking and could not accomplish this by memorandum. (*Id.* at 4, citing *Size Appeal of Defense Supply Service*, SBA No. SIZ-3435 (1991) and *Size Appeal of Precision Pine and Timber, Inc.*, SBA No. SIZ-3222 (1989).)

F. NMI's Appeal and Supplemental Appeal

On December 3, 2018, NMI filed a size appeal with OHA, alleging the Area Office erred in finding TFOM JV an eligible small business.

NMI asserts first that the Area Office erred when it failed to investigate the allegations of affiliation NMI presented in its protest with respect to TFOM JV's affiliation with the JDDA group of companies. NMI asserts it provided clear evidence to support its allegations, and the Area Office was required to analyze its claims of affiliation. The size determination contains no such analysis, and this is grounds to overturn the size determination. (NMI Appeal at 4-6.)

NMI asserts the Area Office's determination that TFOM Corp. was solely owned by Mr. Christopher is belied by the website evidence NMI submitted. This says the JDDA group of companies is a privately held firm in Houston, TX founded by Jason Yoo, its CEO. This strongly suggest common ownership affiliation. (*Id.* at 6-7.)

NMI argues the Area Office further erred when it failed to consider whether TFOM Corp. was affiliated with JDDA based upon common management. The JDDA Group companies appear to be managed by Jason Yoo and Daniel Yoo. Further, TFOM Corp. and the JDDA companies share a CFO, Hang Youk. The Area Office did not address common management, and this was clear error. (*Id.* at 7-8.)

NMI further asserts the Area Office erred in failing to consider identity of interest affiliation between TFOM Corp. and the JDDA Group. (*Id.* at 8.) The JDDA group of companies operates as one company, with a common facility. There is a "strong potential" that they share employees and other resources. NMI is certain there is a "blurring of the lines" between the JDDA concerns, including TFOM Corp. The size determination must be vacated because the Area Office failed to consider this issue. (*Id.* at 9.) NMI maintains that even if TFOM Corp. failed to provide information regarding its alleged affiliate, the Area Office was still obligated to investigate NMI's allegations. The Area Office erred by simply relying upon the information TFOM JV provided. If there is a conflict between a document in existence before the protest and a document created in response to the protest, the former is entitled to greater weight. (*Id.* at 9-10, citing *Size Appeal of PRO SERVS-Teltara Joint Venture, LLC*, SBA No. SIZ-5115 (2010) and *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009).) At a minimum, the case must be remanded for a proper calculation of TFOM Corp.'s size.

On December 19, 2018, after examining the record under the terms of a Protective Order, NMI filed a Supplemental Appeal.

In its Supplemental Appeal, NMI argues TFOM JV's JVA does not meet the regulatory requirements. First, the regulation requires that a joint venture agreement must include a provision that states the 8(a) participant must receive profits from the joint venture commensurate with the work performed by the 8(a) participant. (NMI Supplemental Appeal at 3, citing 13 C.F.R. § 124.513(c)(4).) However, the JVA states TFOM Corp. will receive at least 51% of the profit, but in no case less of the profit than commensurate with the work TFOM Corp. performs. The JVA notes that TFOM Corp. has a 51% ownership interest and that it will perform at least 40% of the work performed by TFOM JV. Nowhere does the JVA state that TFOM Corp. will perform 51% of the work. The JVA thus states that TFOM Corp. will receive profits commensurate with its ownership interest, not work performed. The JVA thus does not comply with the regulation. (*Id.* at 3-4, citing *Size Appeal of STAcqMe, LLC*, SBA No. SIZ-5976 (2018).) While another provision of the JVA provides that the net operating income and loss shall be allocated between the parties in proportion to their performance of the work, NMI argues SBA may not presume that TFOM JV will comply with the distribution of profits as required, because the JVA does not ensure that TFOM Corp. will receive profits commensurate with the work performed. (*Id.*, citing *ASIRtek Fed. Svcs., LLC*, SBA No. VET-269 (2018).)

NMI further argues that the JVA fails to comply with the regulation because it does not state how the parties to TFOM JV will meet the performance of work requirements at 13 C.F.R. § 124.513(c)(7). (*Id.* at 4-5, citing *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014).)

Further, NMI maintains that, under the JVA, TFOM Corp. is not in control of the joint venture, as required by the regulations. The JVA provides the designation of the managing partner employees "will be subject to approval" which NMI argues means both partners will determine the labor required to perform the contract. (*Id.* at 5-6.) This language suggests the partner venturer may exercise control over the personnel. (*Id.* at 6, citing *Matter of ASIRtek Federal Svcs., LLC*, SBA No. VET-269 (2018).) NMI further states TFOM JV should not be permitted to respond to its Supplemental Appeal because it should have raised these issues in its response to the protest. (*Id.*)

Finally, NMI argues that HHS and TFOM Corp. should be found affiliated because HHS is providing assistance to TFOM Corp. that is outside the scope of the MPA. The MPA provides for HHA to assist TFOM Corp. with business development assistance, loans, counseling, technical training assistance, and training, business tools, and experience. The JVA calls for HHS to lease equipment, facilities, chemicals and supplies to the joint venture. This is assistance beyond the scope of the MPA, and should lead to a finding of affiliation, because the mentor-protégé exception applies only to assistance provided pursuant to the MPA. *Id.* at 7-9, citing *Size Appeal of Technical Support Svcs.*, SBA No. SIZ-4751 (2006)

In addition, NMI moved to strike new evidence TFOM JV submitted with its Response to the Appeal. (*see infra.*) NMI argues this evidence is an affidavit which pertains to matter Appellant knew or should have known were under review by the Area Office, and therefore should be excluded. (NMI Motion to Strike, citing *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014).)

G. TFOM JV's Response to KBM's Appeal and Supplemental Appeal

On December 28, 2018, TFOM JV filed a response to KBM's Appeal. TFOM JV argues that SBA's regulations explicitly provide that an offeror's size is to be determined on the date that offeror submits its initial proposal, including price. TFOM JV submitted its proposal, including price, on April 24, 2017. Therefore, TFOM JV's size should be determined as of that date. (TFOM Response, 12/28 at 5-6, citing 13 C.F.R. § 121.404(a).)

TFOM JV argues that a joint venture between an 8(a) protégé and its mentor is exempt from the general rule that deems joint venturers as affiliates, if the joint venture meets certain requirements. These requirements include: 1) the joint venturers must be in an SBA-approved mentor-protégé relationship; 2) the joint venture agreement must comply with the content requirements of 13 C.F.R. § 124.513(c); and the protégé must be small under the applicable size standard. As of April 24, 2017, TFOM JV complied with each requirement. (*Id.* at 6-7, citing 13 C.F.R. § 121.103(h)(iii).)

TFOM JV maintains that HHS's decision to terminate the MPA nearly a year after the date for determining size is irrelevant here. A concern's size is determined as of the date of its initial offer and is frozen for the duration of the contract. Events occurring after the date for determining size are irrelevant for size determination purposes. (*Id.* at 7-8, citing, *Size Appeal of Precision Asset Mgmt. Corp.*, SBA No. SIZ-5781 (2016).) SBA has no authority to consider

subsequent events. (*Id.*, citing *Size Appeal of Acepex Mgmt. Corp.*, SBA No. SIZ-4361 (1999). The rule still applies when the business acquires an affiliate after the date for determining size. (*Id.*, citing *Size Appeal of Potomac River Group, LLC*, SBA No. SIZ-5844 (2017).)

TFOM JV further maintains the cases KBM attempts to distinguish clearly hold that only events preceding the date for determining size are relevant to the determination. In *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997 (2008) a firm was not eligible when its mentor-protégé agreement expired before the date for determining size. In *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715 (2016), OHA held that events occurring after the date to determine size were irrelevant. (*Id.*)

TFOM JV thus argues that KBM's theories as to waiver and estoppel are inapposite; subsequent changes that might affect affiliation cannot waive or estop TFOM JV from relying on SBA's regulations. (*Id.* at 8-9.)

On January 24, 2019, TFOM JV filed a response to KBM's Supplemental Appeal, together with a Motion to Admit New Evidence. The new evidence TFOM JV seeks to admit are two documents. One is a letter dated March 14, 2016, from TFOM JV to SBA, requesting SBA's approval of the MPA for another year. The second document is a memorandum dated March 15, 2016 from SBA's Associate Administrator for Business Development to all SBA 8(a) Mentor Protégé Program Participants, amending all mentor-protégé agreements to delete the language providing that the agreements will expire after one year, and to add language that all such agreements shall not expire unless SBA explicitly rescinds its approval in writing.

TFOM JV argues KBM's Supplemental Appeal asks OHA to go beyond its jurisdiction and review the approval process of mentor-protégé agreements. Neither the Area Office nor OHA has that jurisdiction to do this. (TFOM JV Response to KBM Supplemental Appeal at 4, citing *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997 (2008).) Further, KBM is impermissibly raising a new issue on appeal. (*Id.* at 4-5, citing 13 C.F.R. § 134.316(c).)

TFOM JV further asserts SBA's March 15, 2016 memo effectively approved its MPA, and thus an SBA-approved MPA was in effect as of the date of its submission of its initial offer, including price. (*Id.* at 6-7.) TFOM JV argues that while the regulation requires SBA to annually review a mentor-protégé relationship, it does not require the issuance of written approvals. (*Id.* at 7, citing 13 C.F.R. § 124.520(c)(4) (version in effect prior to August 23, 2016).) SBA made a minor modification to the process without changing law or policy, and thus this action did not require notice and comment rulemaking. (*Id.* at 8, citing 5 U.S.C. § 553(b)(3)(A).)

TFOM JV argues KBM's cited cases do not support its argument. In *Size Appeal of Defense Supply Service*, SBA No. SIZ-3435 (1991), OHA found it was error to rely on a memo which changed the date for determining size. In *Size Appeal of Precision Pine*, SBA No. SIZ-3222 (1989), OHA held an SBA area office could not interpret regulations in manner which changes SBA policy. These cases hold that SBA cannot enact substantive alterations to its regulations outside the rulemaking process. SBA did not do that here; rather, it changed a practice not embodied in regulation or affecting rights and obligations, to better serve its

customers. (*Id.* at 8-9.) KBM's position would punish TFOM JV for SBA's administrative decision and render all existing mentor protégé agreements void. (*Id.* at 10.)

H. TFOM JV's Response to NMI's Appeal and Supplemental Appeal

On December 19, 2018, TFOM JV responded to NMI's appeal, together with a Motion for New Evidence. TFOM Submits a Supplemental Declaration from Mr. Christopher in response to allegations NMI made in its appeal. NMI, relying upon an outdated website, alleges connections between TFOM and the JDDA Group. Mr. Christopher's Supplemental Declaration is not new evidence, but supplemental evidence in response to allegations raised in NMI's appeal. The Supplemental Declaration disposes of NMI's sole basis of appeal.

In his Supplemental Declaration, Mr. Christopher states he is TFOM Corp.'s President and sole shareholder. In 2009, the company was named JDDA Facility Group and Mr. Jason Yoo was its 49% shareholder. The JDDA Group website was developed in 2009 to assist with business development of JDDA Facility Group, subcontracting with the JDDA Group of Companies. In 2010, Mr. Christopher acquired Mr. Yoo's 49% stake, and the company ceased its relationship with the JDDA Group. Mr. Yoo has had no ownership interest or role in TFOM since 2010. In 2011, the company changed its name to TFOM Corp. JDDA's website has not been updated since 2009 and is no longer accurate. Mr. Christopher has no ownership or management interest in the JDDA companies, or any other companies. TFOM and the JDDA companies have no relationship. (Christopher Supplemental Declaration, 12/19/18.)

In its Response, TFOM JV states that it sought business opportunities with JDDA Group in 2009, and JDDA Group included it on a website created at that time. (TFOM JV Response to NMI, 12/19/2018, at 2.) In 2010, Mr. Christopher acquired Mr. Yoo's 49% interest, and terminated his business relationship with Mr. Yoo. (*Id.*)

TFOM JV asserts the size determination correctly concluded TFOM Corp. is not affiliated with any entity. TFOM JV argues the Area Office did not err in relying on TFOM JV's Form 355 and Mr. Christopher's Declaration to find TFOM not affiliated with any entity. (*Id.* at 6-7.) Further, Mr. Christopher certified to the truthfulness of the submissions under penalty of perjury. (*Id.*) The Area Office properly considered TFOM JV's response to the allegations and presented evidence it has no affiliates. (*Id.*)

Further, TFOM JV maintains the Area Office was not required to undertake any investigation beyond reviewing the documents submitted. The Area Office reviewed the documents submitted, TFOM JV's Form 355, its organizational documents, its financial information, and this was a sufficient investigation. (*Id.* at 8-9, citing *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803 (2017).)

On January 29, 2018, TFOM JV responded to NMI's Supplemental Appeal. First, TFOM JV argues NMI's Supplemental Appeal is untimely. An appeal must contain a full and specific statement as to why the size determination is alleged to be in error. NMI's original, timely appeal raised only the issue of TFOM Corp.'s size and eligibility, arguing the Area Office erred in its analysis of TFOM's supposed affiliation with the JDDA Companies. The appeal stated: “This

appeal is limited to the Area Office's determination with respect to TFOM's size and eligibility." (TFOM JV Response to NMI Supplemental Appeal at 1-2.)

NMI was undoubtedly aware of the need to appeal any Area Office finding related to the MPA and JVA at the time it filed its initial appeal. NMI could have raised these issues in its initial appeal, because the Area Office discussed them, and NMI could have preserved the issue by raising them in its initial appeal. TFOM JV maintains NMI should not be permitted to raise them now. (*Id.* at 3-4.)

TFOM JV disputes NMI's argument the MPA is insufficient because it did not authorize HHS to lease equipment, facilities chemicals and supplies to TFOM Corp. in the JVA. (TFOM JV Response to NMI Supplemental Appeal at 2.) OHA lacks jurisdiction to review the validity of mentor-protégé agreements. (*Id.* at 2-3, citing *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997 (2008).)

TFOM JV asserts NMI has not identified any basis for finding error in TFOM JV's organization. HHS is not providing support beyond that contemplated by the MPA, and it is providing exactly the support joint venture members are expected to provide. The MPA states in multiple places that the parties will enter into joint venture agreements to bid for and perform federal contracts. (*Id.* at 3-4, citing 13 C.F.R. § 124.520(e)(1)(i-iii).) A joint venture agreement must itemize all major equipment and other resources to be furnished by each party, not a mentor-protégé agreement. Mentor-protégé agreements have a broad purpose and should not have to identify each task the parties are to perform in each joint venture. They should not be tied to specific procurements. (*Id.* at 4-5.)

TFOM JV further asserts the JVA complies with the relevant SBA regulations. The Area Office made this finding, and NMI has not established that it erred. (*Id.* at 6.)

TFOM JV asserts the JVA complied with 13 C.F.R. § 124.513(c)(4) because it ensured TFOM Corp. owned at least 51% of the venture, would receive profits commensurate with the work performed, and would perform at least 40% of the work. The JVA provides that TFOM Corp. must receive profits commensurate with the work it performs, and that it will receive at least 51% of the profit. (*Id.* at 6-7, citing JVA, ¶¶ 3-4.) While the JVA does not state TFOM Corp. will perform at least 51% of the work, the regulation does not require this. The JVA must be read in its entirety. The JVA indicates that TFOM Corp. will perform at least 51% of the work. Because the 40% performance of the work requirement is a floor, not a ceiling, the JVA allows TFOM Corp. to perform 51% of the work. (*Id.* at 8.)

TFOM JV further asserts the JVA meets the requirement in 13 C.F.R. § 124.513(c)(7) that it include a provision that specifies the responsibilities of the parties. The JVA provides detailed information on these responsibilities at ¶¶ 7-9, and the Addendum. NMI argues the JVA did not include the ways the parties will ensure TFOM Corp. will ensure the parties meet the performance requirement. TFOM Corp.'s tasks will include [xxx]. HHS will perform [xxx]. The JVA also provides information on how TFOM Corp. will meet the requirements. As managing venturer, TFOM Corp. will control the functional labor split between the contractors to assure compliance with work share requirements. TFOM Corp. will provide an adequate supply of labor

to perform the contract and has the first right to refuse employment during the performance phase to ensure it maintains an appropriate work share. TFOM Corp. will control where labor comes from and has the first right to refuse employment to ensure it maintains an appropriate work share. TFOM has explicit authority to staff any additional labor required to perform the contract. (*Id.* at 8-9)

Further, the JVA provides that if HHS seeks to perform additional work, this work must be done through the joint venture, which would require TFOM Corp. to do additional work to meet the 40% requirement. The JVA is unlike the deficient agreements in *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014) and *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664 (2015). (*Id.* at 10-11.)

TFOM JV also asserts the JVA complies with 13 C.F.R. § 124.513(c)(2) to designate the 8(a) participant as the managing venturer and one of its employees as Project Manager. The JVA designates TFOM Corp. as managing venturer and Mr. Christopher as Project Manager. (*Id.* at 11, citing JVA, ¶ 2.) TFOM JV notes that NMI argues this is insufficient, arguing HHS has the ability to control the joint venture, citing *Matter of ASIRtek Federal Services, LLC*, SBA No. VET-269 (2018). However, TFOM JV argues NMI misreads *ASIRtek* where OHA did not rule on this issue, but merely found that the allegation was enough to survive dismissal. (*Id.* at 12.) The JVA itemizes TFOM Corp. responsibilities, including contract negotiation, communication with the Government, administration of day-to-day issues, coordination and maintenance of finances and records, and other contract oversight and administrative duties. (*Id.* at 12, citing JVA ¶ 7.)

TFOM JV maintains that when NMI asserts the JVA fails to meet the regulatory requirements because both parties to the joint venture will determine the labor necessary to perform the contract, it is in error. TFOM Corp. will be primarily responsible for determining the necessary labor. Even if HHS has a say in labor designation, it is not improper, and not prohibited by the regulation. (*Id.* at 12-13.)

I. SBA's Comments

On February 25, 2019, OHA directed the SBA Office of General Counsel to comment on KBM's argument that where a mentor-protégé agreement is dissolved prior to award, a joint venture resulting from the mentor-protégé agreement should not be protected from a finding of affiliation.

On March 7, 2019, SBA's Office of General Counsel (SBA OGC) submitted its comments. SBA notes that SBA's regulations require that SBA determine the size of a concern as of the date that it submits its initial offer, including price. (SBA Comment at 2, citing 13 C.F.R. § 121.404(a).) While there are exceptions to this rule, none are applicable here. (*Id.*, citing 13 C.F.R. § 121.404(d).) Events taking place after the submission of an offer do not affect an affiliation determination. (*Id.*, citing *Size Appeals of Precision Asset Mgmt. Corp. et al*, SBA No. SIZ-5801 (2017) (PFR).)

SBA OGC thus argues that affiliation analysis does not consider the fact that participants in a joint venture terminated their mentor-protégé agreement nearly a year after their submission of the joint venture's offer. SBA may take the termination into account in determining the mentor's eligibility to participate in future mentor-protégé agreements, and if there are problems in contract performance, whether to refer the joint venture participants to the contracting officer for noncompliance or to a suspension and debarment official. (*Id.* at 2-3.)

SBA OGC asserts the joint venture entity must still be in place to receive award, and the parties must abide by the JVA during contract performance, including the requirements that the small business perform at least 40% of the work and that the joint venture submit quarterly reports on performance and a project end statement to SBA. SBA OGC cautions that violation of the joint venture requirements may result in program remedies or referral for debarment. (*Id.* at 3.)

III. Analysis

A. Timeliness, New Evidence, and Standard of Review

Appellant filed its appeal within fifteen days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

Evidence not previously presented to the Area Office will not be considered unless the Administrative Judge orders its submission, or a motion is filed establishing good cause for its submission. 13 C.F.R. § 134.308(a). Here, TFOM JV's Motion for New Evidence seeks to submit an SBA Memorandum on the administration of the Mentor-Protégé Program upon which the Area Office doubtless relied but did not include in the record. It is appropriate to include it here for a fuller explanation of the Agency's actions. TFOM JV also seeks to submit evidence to respond to allegations made in the appeal. I find it appropriate for the development of the record for this evidence to be included. Accordingly, I GRANT TFOM JV's Motion for Submission of New Evidence.

Similarly, in response to NMI's motion to exclude TFOM JV's Response to NMI's Supplemental Appeal, I find that NMI is raising new issues beyond those raised in its protest or appeal, and I therefore GRANT TFOM JV's Motion to Respond to NMI's Supplemental Appeal.

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; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the size determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction 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

The threshold question here is whether TFOM JV is an eligible 8(a) mentor-protégé joint venture for purposes of this RFP, even though HHS terminated the MPA after TFOM JV's submission of its offer, but prior to award.

Ordinarily, the parties to a joint venture submitting offers for a particular procurement are affiliated with regard to the performance of that contract. 13 C.F.R. § 121.103(h)(2). Two firms in an SBA-approved 8(a) Mentor-Protégé relationship may joint venture as a small business for any Federal procurement, provided the Protégé qualifies as a small business for the NAICS code applicable to the procurement. 13 C.F.R. § 121.103(h)(3)(iii). If the procurement is not an 8(a) procurement, and the size status of the concern is protested, the joint venture must meet the requirements of 13 C.F.R. § 124.513(c) & (d) in order to receive the exemption from affiliation. *Id.* These regulations detail the provisions which a joint venture agreement must include in order to receive the exemption from affiliation.

SBA determines the size status of a concern as of the date it submits its self-certification as small as part of its initial offer, including price. 13 C.F.R. § 121.404(a).[2] TFOM JV submitted its initial offer, including price, for this procurement on April 24, 2017. On that date, TFOM Corp. and HHS were in an SBA-approved Mentor-Protégé relationship. On March 26, 2018, HHS terminated the Mentor-Protégé relationship. However, its termination letter stated that TFOM JV would remain intact. HHS stated its intent to maintain the joint venture until any awards were made on any outstanding solicitations where TFOM JV has submitted an offer. The letter identified three such solicitations, one of which was the instant solicitation. On September 26, 2018, the Air Force identified TFOM JV as the apparent successful offeror.

KBM maintains that TFOM JV should not be protected from a finding of affiliation because HHS terminated the MPA and created a new mentor-protégé agreement with a new protégé. However, KBM's arguments all ignore the basic principle that a concern's size is determined as of the date of its initial offer. OHA has applied this rule on many occasions. *See, e.g., Size Appeal of Precision Asset Mgmt. et al*, SBA No. SIZ-5801 (2017) (PFR), and cases cited therein. These include the cases KBM attempts to rely on. In *Size Appeal of North Star Magnus Pacific Joint Venture*, SBA No. SIZ-5715 (2016), OHA held that the size of the joint venture was to be determined as of the date of the concern's initial offer. At that time, there was no SBA approved mentor protégé agreement in place, and so the joint venture did not qualify for the exception. The fact that SBA later approved the mentor-protégé agreement was irrelevant, because this happened after the date for determining size. In *Size Appeal of DCS Night Vision JV, LLC*, SBA No. SIZ-4997 (2008), a firm was not eligible when its mentor-protégé agreement expired before the date for determining size. Again, actions taken after the date for determining size were irrelevant.

SBA made it very clear in its comments in the *Federal Register* that the rule applies to Mentor-Protégé joint ventures:

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[2] There are exceptions to this general rule, but they are not applicable here.

> Under SBA's size regulations, size is determined at a fixed point in time (*i.e.*, as of the date of the initial offer, including price). *See* 13 CFR § 121.504. If the entity submitting an offer is small as of that date, it will qualify as small for the procurement even if it grows to be other than small at the date of award. If the entity submitting an offer does not qualify as small as of the date it submits its initial offer, it cannot later come into compliance and qualify as small for that procurement. Thus, in order for a joint venture to be eligible as a small business, it must be small at the time it submits its offer including price. It seems obvious to SBA that if SBA has not yet approved a mentor/protégé agreement, a joint venture between proposed protégé and mentor firms is not entitled to receive the benefits of the 8(a) mentor/protégé program, including the exclusion from affiliation.

76 Fed. Reg. 8222, 8246 (Feb. 11, 2011).

It is thus clear that the Area Office acted in accordance with the regulation and longstanding precedent, in determining TFOM JV's size as of the date it submitted its initial offer, including price. As of that date, there was an SBA approved mentor-protégé agreement in place between TFOM Corp. and HHS, and a joint venture agreement in place creating TFOM JV. The Area Office did not err in using that date to determine TFOM JV's size.

Further, I find KBM's argument that no MPA was in effect at the time TFOM JV submitted its initial proposal to be meritless. SBA approved the MPA on June 23, 2015 for a one-year term. In 2016, the regulation provided:

> SBA will review the mentor/protégé relationship annually to determine whether to approve its continuation for another year.

13 C.F.R. § 124.520(e)(4) (2016).

On March 15, 2016, three months prior to the expiration of the MPA's one-year term, SBA's Office of Business Development issued a memorandum titled "Amendment to the MP [Mentor/Protégé] Approval Letter (effectively immediately)." The memorandum stated that mentor/protégé agreements will be amended by deleting language that the agreements "shall expire after one year from the approval date" and by substituting language that "Approved 8(a) Mentor Protégé agreements do not expire until rescinded in writing. . . . MP Agreements will be reviewed each year as part of the Annual Review to determine continuance, and unless rescinded in writing at that time, will automatically renew without additional written notice of continuation or extension to remain in good standing." SBA subsequently updated its SOP and regulation to fully implement this policy change. *Size Appeal of Quadrant Training Solutions, LLC*, SBA No. SIZ-5811, at 7-8 (2017).

Accordingly, there was no written approval of an extension of the MPA, because SBA had ceased to issue such written approvals and, though SBA continued to review mentor protégé agreements, SBA would act in writing only to rescind those it found to be defective. No written approval was issued for any mentor protégé agreement. KBM's argument that SBA was in

violation of the Administrative Procedure Act is meritless. The regulation did not require that SBA's annual approvals be made in writing. SBA acted within its discretion in not requiring that the annual approvals be in writing, while still requiring annual reviews as mandated by the regulation.[3] KBM's arguments based on estoppel and waiver are inapposite. The regulation clearly establishes that the MPA and JVA were in effect on the date to determine size. General principles of law do not supersede SBA's more specific size regulations. *Size Appeal of SIGA Technologies, Inc.*, SBA No. SIZ-5201, at 9 (2011). The Area Office made no error in finding the MPA was still in effect as of the date to determine size.

NMI's arguments in its initial appeal are utterly meritless. NMI argues that TFOM Corp. is affiliated with the JDDA Group of companies, based upon an outdated web site. TFOM Corp.'s Form 355 and Mr. Christopher's declarations establish that, while in 2009 Mr. Yoo of the JDDA companies held a 49% interest in TFOM Corp., Mr. Christopher had purchased Mr. Yoo's interest and ended the connection with the JDDA companies. The Area Office reviewed TFOM Corp's Form 355, its organizational documents, its financial information, and Mr. Christopher's declaration. The Area Office properly gave greater weight to signed, specific, sworn, factual evidence than to NMI's allegations. *Size Appeal of National Security Assoc., Inc.*, SBA No. SIZ-5907, at 9 (2018). The Area Office was not obligated to investigate further when it had sufficient evidence to draw the conclusion it reached. *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803, at 11-12 (2017). The evidence submitted establishes that Mr. Christopher is TFOM Corp.'s sole owner and President, that he holds no interest in any other companies, and that TFOM Corp. has no affiliates. The cases NMI relies upon to support its contention the Area Office erred here are inapposite. In *Size Appeal of PRO SERVS-Teltara Joint Venture, LLC*, SBA No. SIZ-5115 (2010), the Area Office failed to explore or act upon the challenged concern's failure to provide requested information. In *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009), the Area Office relied upon the challenged concern's proposal, rather than its explanations to the Area Office in response to the protest. The proposal was the best evidence for an ostensible subcontractor case. Here, the Area Office relied on the best evidence for affiliation, the challenged concern's own corporate documents and Form 355. Accordingly, I conclude the Area Office did not err in determining that TFOM Corp. is a small business, with no affiliates.

In turning to NMI's Supplemental Appeal, I reject TFOM JV's characterization of it as untimely. The size determination discussed, as it must, the existence of the MPA and the adequacy of the JVA. OHA has held that issues raised in the size determination may be raised by an appellant on appeal, even if that appellant did not raise those issues in its protest. *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, at 8-9 (2018)

In its Supplemental Appeal, NMI argues TFOM Corp. and HHS should be found affiliated because HHS is providing assistance outside the scope of the MPA. I find this argument without merit. While the MPA calls for HHS to assist TFOM Corp. with [xxx], it also calls for HHS to enter into joint venture agreements with TFOM Corp. to compete for and perform federal government contracts. The MPA thus clearly contemplated that HHS and TFOM

[3] SBA may have had in mind the problems involved with late approvals, as in *DCS Night Vision*.

Corp. would be working together on certain government contracts. The assistance HHS will provide TFOM Corp. is in furtherance of the joint venture's performance of the contract and is the type of assistance necessary for the custodial contracts that both HHS and TFOM Corp. customarily perform (i.e., supplies and equipment for a custodial contract). Therefore, the assistance is well within the scope of the assistance contemplated by the MPA.[4]

NMI also argues that under the JVA, TFOM Corp. is not in control of the contract, and that it fails to state how the parties will meet the work requirements. I find this argument meritless. First, the JVA clearly identifies TFOM Corp. as the Managing Venturer, and Mr. Christopher as the Project Manager, as required by 13 C.F.R. § 124.513(c)(2). JVA at ¶ 7.

The regulation requires that the JVA specify the parties' responsibilities with regard to negotiation of the contract, source of labor, and contract performance, including the ways the partners will meet the performance of work requirements. 13 C.F.R. § 124.513(c)(7).

Here, the JVA sets out the distinct tasks each venturer will perform, identifying the type of rooms each venturer will clean. The JVA states "TFOM [Corp.] will be responsible for the following items:" and lists a large number of management tasks, including negotiation of the contract, administration of day-to-day issues of contract performance, handling of records and reports, dealing with the Government, and providing an "adequate supply of labor to perform the contract," with the joint venture itself having the duty to designate specific employees of each corporation to perform the work. TFOM Corp. will control the functional labor split and has the right of first refusal for employment to ensure it maintains its appropriate share of the work.

NMI's reliance on *Matter of ASIRtek Federal Svcs., LLC*, SBA No. VET-269 (2018) is misplaced, because there the joint venture agreement was executed before the issuance the subject solicitation, and thus lacked the detail required. Here, the requirements are known, and the duties of each joint venturer are spelled out in some detail. The types of rooms in the facilities each firm will be responsible for are detailed, TFOM Corp.'s management responsibilities are set out, and the equipment and resources to be furnished are detailed in the JVA. *See* II B, *supra*.

TFOM is thus primarily responsible for determining the necessary labor for performing the contract. NMI points out the JVA includes the statement that "any designation of managing partner employees will be subject to approval" arguing it gives HHS control. However, the phrase does not mention HHS. This ambiguous phrase does not give HHS the power to contradict the clear authority the JVA gives TFOM Corp. to manage the contract, nor does it vary the clear delineation of responsibilities the JVA lays out between the two venturers. The Area Office did not err in finding that the JVA met the requirements of 13 C.F.R. § 124.513(c)(7).[5]

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[4] I am not reviewing the validity of the MPA here, but whether the assistance given under the JVA is within its scope. *Size Appeal of DCS Night Vision, JV*, SBA No. SIZ-4997 (2008).

[5] TFOM JV's comment that "even if" HHS has a say in the designation of labor this is not improper supports the finding that the term is ambiguous, and does not explicitly give HHS the power to approve the designation of personnel, in contrast to the explicit designation of TFOM

Finally, there is the question of the distribution of profits. TFOM Corp. owns 51% of TFOM JV, in accordance with 13 C.F.R. § 124.513(c)(3). TFOM JV's operating income and loss is to be allocated between the parties in proportion to their performance of the work, in accordance with 13 C.F.R. § 124.513(c)(4). TFOM Corp. is to perform at least 40% of the work, in accordance with 13 C.F.R. § 124.513(d)(2). TFOM Corp. is also to receive at least 51% of net profit earned, but in no case less of the net profit than is commensurate with the work TFOM Corp. performs. NMI argues that these provisions are in conflict, that TFOM Corp. is to receive profits commensurate with ownership, not with the proportion of work performed. NMI argues the JVA is actually too generous to the 8(a) protégé, permitting it to receive a greater percentage of the profit than the work performed, and thus violates the regulation.

NMI maintains SBA may not presume TFOM Corp. will comply with the distribution of profit as required by the regulation, because the JVA does not ensure a division of profits in accordance with the regulation, citing *Matter of ASIRtek Federal Svcs., LLC*, SBA No. VET-269 (2018). However, in *ASIRtek*, the agreement in question did not explicitly state that the veteran-owned firm would receive 51% of the profit (a requirement in the Service-Disabled Veteran-Owned Small Business Concern program) and thus did not comply with the applicable regulation on its face. Here, as noted above, the JVA carefully meets all the regulatory requirements for provisions on the distribution of profits. If TFOM Corp. performs 51% or more of the work, it will receive profits commensurate with its proportion of the work, and it will have performed more than 40% of the work. If TFOM were to receive 51% of the profits while performing less than 51% of the work, that would violate ¶ 4 of the JVA, requiring that profits be distributed in proportion to a party's performance of the work. While I may not presume a concern will comply with the regulations when the text of its documents does not, I also should not speculate that a concern will operate contrary to the text of its own organizing documents. I must read the JVA in harmony with all of its provisions. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 180-182 (2012). Read that way, the JVA requires that TFOM Corp. must perform at least 51% of the work (a figure in excess of 40%) and that both parties will receive a share of profit commensurate with the work performed. This meets the regulatory requirements. Accordingly, NMI's contention the JVA does not met the regulatory requirements for profit distribution is meritless.

In conclusion I find that the Appellants have failed to identify clear error in the size determinations, and I must deny the appeals and affirm the size determinations.

Corp. as the Managing Venturer, with the power to designate personnel for performance of the contract.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the 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