

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

SIZE APPEAL OF:

KTS Solutions, Inc.,

Appellant,

RE: 28 Trans, LLC

Appealed From
Size Determination No. 03-2020-024
Solicitation No. 36C24819R0207
U.S. Department of Veterans Affairs

SBA No. SIZ-6049

Decided: February 28, 2020

APPEARANCES

Sarah Schauerte Reida, Esq., Legal Meets Practical, LLC, Naperville, Illinois, for
Appellant

Thomas L. Walker, Esq., Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta,
Georgia, for 28 Trans, LLC

DECISION¹

I. Introduction and Jurisdiction

On January 31, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2020-024 finding that 28 Trans, LLC (28 Trans), a mentor-protégé joint venture, is a small business under the \$16.5 million annual receipts size standard. Protestor, KTS Solutions, Inc. (Appellant), maintains 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 size determination is remanded for further consideration, consistent with OHA's recent decision in *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P (2020).

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

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 of 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.

II. Background

A. Solicitation and Protest

On October 18, 2019, the Department of Veterans Affairs (VA) Regional Procurement Office — East, issued Request for Proposal (RFP) No. 36C24819R0207 of all non-emergency special mode transportation (SMT) services as an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract. The Contracting Officer (CO) set the procurement aside entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and assigned North American Industry Classification System (NAICS) code 485991, Special Needs Transportation, with a corresponding \$16.5 million annual receipts size standard. The contractor is to provide all transport vehicles, personnel, management, and anything else necessary to successfully furnish non-emergency SMT services in a 13-county area in Florida and Georgia for one base year, plus four option years. Services are to be provided on an as-needed basis. Initial proposals were due on November 8, 2019.

On November 4, 2019, the CO issued Amendment 0001 with responses to vendor questions, a revised price and cost schedule, and a removal of an outdated clause. The amendment extended the deadline to November 12, 2019. On November 6, 2019, the CO issued Amendment 0002 to further respond to all vendor questions and without a deadline extension. Subsequently, the CO revised the final proposal deadline to December 2, 2019.

On November 7, 2019, 28 Trans submitted its initial proposal, including price. On December 1, 2019, 28 Trans submitted its final proposal revision. On December 26, 2019, the CO notified unsuccessful offerors, including Appellant, that Navarre Corporation and 28 Trans were the apparent successful offerors.

On January 3, 2020, the Area Office received Appellant's protest, alleging that 28 Trans, a joint venture between Owl, Inc. (Owl) and Red Kite, LLC (Red Kite), is not a small business because Red Kite cannot demonstrate it can perform 40% of the work in accordance with the performance requirements of 13 C.F.R. § 125.18(b)(3), which results in affiliation between the joint venturers.

B. Mentor-Protégé Agreement (MPA)

The MPA explains that the Protégé, Red Kite, will be “specializing in providing [SMT] for special needs passengers, including stretcher, wheelchair, and other ambulatory beneficiaries of the Veterans Administration” under the NAICS code 488999, All Other Support Activities for Transportation. (MPA, at 1.) Red Kite requests Owl's mentoring assistance in five areas: Management and Technical Assistance; Financial Assistance; Contracting; Business Development Assistance; and General and/or Administrative Assistance. (*Id.*, at 1-2, 5-6.)

C. Joint Venture Agreement and Operating Agreement

On March 21, 2019, 28 Trans executed a Joint Venture Agreement (JVA) between Red Kite and Owl. The JVA states that 28 Trans is an LLC, in which Red Kite owns 51% of 28 Trans and Owl owns the remaining 49%. (*Id.*, at 2, ¶ 1.) Red Kite is the Managing Member of the joint venture, and Owl is a Member. (*Id.*, at 1.)

According to the JVA, the purpose of the joint venture is to bid on, obtain, and perform contracts to provide services. (*Id.*, at 2, ¶ 2.) Here, “services” is defined as “non-emergency transportation for special needs passengers, including stretcher, wheelchair, and other ambulatory beneficiaries of the Veterans Administration and other local government entities.” (*Id.*, at 1.)

The JVA designates Red Kite as the Managing Member, responsible for daily operations of the joint venture. (*Id.*, at 2, ¶ 4.) Alessandro Janitschek, Red Kite's 100% owner, is the Project Manager for any contracts obtained by the joint venture, is to be employed by the joint venture, and is to “devote sufficient time and attention to the joint venture to successfully manage the joint venture's business.” (*Id.*) Red Kite is entitled to be paid a fee as compensation for the Project Manager's services, commensurate with market rates. (*Id.*) In turn, Dr. Laster B. Walker, President of Owl, will be regularly available for consultation with the Managing Member. These will include discussions with, but not limited to, the Project Manager. (*Id.*) The Managing Member will have final decision-making authority on all operational issues. (*Id.*)

Each of the Members of the joint venture will receive a percentage of profits from the joint venture equal to the percentage of work performed by each Member. (*Id.*, ¶ 7.)

The JVA provides for the establishment and maintenance of a bank account in the name of the joint venture. (*Id.*, ¶ 8.) This account requires the signature of both Members for written checks and withdrawals made. (*Id.*) All monies received by the joint venture for services performed are to be deposited into the joint venture bank account and all expenses incurred by the joint venture are to be paid from such bank account. (*Id.*)

The JVA provides that the joint venture is to purchase the major equipment necessary to perform the contract, identified as vehicles, primarily vans modified to accommodate wheelchairs and stretchers, and also other major equipment necessary for the joint venture to perform under the contracts it obtains when such contracts are obtained. (*Id.*, ¶ 9.) The joint venture is to provide a detailed schedule of the vehicles or the cost or value thereof when it obtains specific contracts. (*Id.*) The joint venture will purchase such equipment with loans obtained from third party financial institutions, which will be guaranteed by both the Members, the Project Manager, and Dr. Walker, individually, as may be required by the lending institution. (*Id.*) All vehicles, equipment, and other assets purchased by the joint venture are to be owned by the joint venture. (*Id.*)

The JVA provides that the joint venture's administrative functions will be performed from offices leased by Owl in Orlando, Florida. (*Id.*, ¶ 10.) Owl is to charge the joint venture

\$500.00 a month for use of such facilities. (*Id.*) As the joint venture obtains contracts to provide services, it will lease real property to house its operations in cities where the services are to be provided. (*Id.*)

To specify the responsibilities of each Member, the JVA states “the manner in which the joint venture will perform under contracts it obtains will be determined by the requirements of the contracts the joint venture obtains.” (*Id.*, ¶ 6.) However, Dr. Walker and the Managing Member will conduct bids and negotiate contracts. (*Id.*) The JVA further states that before the awarding of any contract to the joint venture, Owl employees will assist with administrative functions. (*Id.*) Once the joint venture obtains contracts, 28 Trans will hire its own administrative staff. (*Id.*) The JVA further notes that “Notwithstanding anything else stated in this paragraph, at all times, employees of the Managing Member will be responsible for performing no less than 40% of the non-administrative services to be performed on each contract obtained by the joint venture and no less than 40% of the total work performed by the joint venture.” (*Id.*)

Under the JVA, 28 Trans' management lies with a management committee consisting of the Project Manager, Dr. Walker, and others as the Members may agree, provided that neither Dr. Walker nor any other person who may become part of the management committee shall have voting rights, and the Managing Member, by and through the Project Manager, shall have final decision-making authority on all management issues. (*Id.*, ¶ 5.)

The JVA includes provisions to dissolve the joint venture. (*Id.*, ¶ 15.) If either Member decides to terminate the MPA, each of them agrees that they will remain individually responsible for completing any contract to which the joint venture is party, and to otherwise fulfill any other obligations the joint venture has undertaken. (*Id.*, ¶ 16.) The JVA does not allow the assignment, sale, or transfer of a Member's membership interest without the consent of the other Member. (*Id.*, ¶ 17.) The JVA may not be modified except in writing, signed by both Members. (*Id.*, ¶ 23.)

All original accounting and other administrative records pertaining to the joint venture are to be retained by the Managing Member on its computer systems and where applicable, in its office; Owl is to have access to and/or copies of all such records upon request. (*Id.*, ¶ 18.)

The joint venture will submit quarterly financial statements to the SBA, the VA, and any other government agency as may be required by the terms of any contracts the joint venture may obtain. (*Id.*, ¶ 20.) The reports will be submitted no later than 45 days after the end of each operating quarter of the joint venture. (*Id.*)

Furthermore, the JVA states that for each contract for services obtained and performed by the joint venture, the joint venture will submit a profit and loss statement, including a statement of final profit distribution, to the SBA, the VA, and any other government agency as may be required by the terms of any contracts the joint venture may obtain. (*Id.*, ¶ 21.) The statements will be submitted no later than 90 days after the completion of the contract. (*Id.*)

The JVA recites that both Members are participants in the SBA Mentor-Protégé program and the VA Mentor-Protégé program. (*Id.*, ¶ 11.)

In addition to the JVA, the joint venture executed two operating agreements, the first on March 21, 2019. (OA, at 1.) The operating agreement contained requirements as to the Members' contributions, compensation and disbursement, and distributions, *inter alia*. (*Id.*, 1-4.) The agreement identified the company's agent as the Managing Member, by and through its principal, Alessandro Janitschek, who has the sole authority to bind the joint venture on all matters. (*Id.*, ¶ 4.) The authority of the Managing Member includes the authority to take all lawful actions, provided, however, that the Managing Member must at all times operate in good faith. (*Id.*)

On June 3, 2019, the Members executed an amended operating agreement, indicating that the number of Members that constitutes a quorum for the transaction of business is one, provided that the Managing Member must be present for there to be a quorum at any meeting, and the Managing Member has the final decision-making authority on all management issues, *inter alia*. (AOA, ¶ 5.)

D. Size Determination

On January 31, 2020, the Area Office determined that 28 Trans is a small business under the \$16.5 million size standard. Specifically, the Area Office reviewed the JVA for 28 Trans and found the concern is in compliance with the requirements of 13 C.F.R. § 125.18(b)(2) and (3). (Size Determination, at 7.)

The Area Office found that Red Kite, the protégé joint venturer, is a small business for the size standard of the corresponding NAICS code. The MPA between Red Kite and Owl was approved by the SBA on December 14, 2018, in accordance with 13 C.F.R. § 125.9, which creates an exclusion from affiliation in the performance of government contracts. (*Id.*, at 6.) 28 Trans submitted its offer in response to the RFP, including price, on October 28, 2019, which is the date for determining size.

The Area Office describes that, pursuant to 13 C.F.R. § 125.18(b)(2), the JVA must contain statements addressing twelve provisions related to the general administration and operation of the joint venture, including the “designation of an employee of the protégé managing venture as the project manager responsible for performance of the contract.” (*Id.*, at 6-7.) Mr. Alessandro Janitschek is the project manager and is also the managing member with 51% ownership of the concern. The principal place of business is the protégé's address. (*Id.*, at 7.) Lastly, Red Kite will perform a minimum of 40% of the work, as stated in the JVA.

Red Kite, the joint venture partner is small for the \$16.5 million size standard and the joint venture partners are exempt from affiliation for this procurement. Thus, the Area Office determined 28 Trans is a small business in compliance with 13 C.F.R. § 121.103(h)(3)(iii).

E. Appeal

On February 10, 2020, Appellant filed the instant appeal. Appellant argues the Area Office erred by providing no analysis as to how 28 Trans established that Red Kite, the small business partner to the joint venture, would perform 40% of the work, and instead relied on a conclusory statement that the concern would do so in its JVA. (Appeal, at 7.) Appellant also

contends, the Area Office failed to acknowledge that the JVA precedes the issuance of the RFP by six months, and therefore, could not have provided sufficient detail regarding the work to be performed by each joint venturer to comply with 13 C.F.R. § 125.18(b)(2).

F. Appeal Response

On February 13, 2020, 28 Trans responded to the appeal. 28 Trans requests the appeal be dismissed because (1) Red Kite, the small business partner has already been found to be a small business under the applicable size standard; (2) the JVA addresses the 12 provisions relating to the general administration and operation of the joint venture, as required by 13 C.F.R. § 125.18(b)(2); and (3) 28 Trans can demonstrate, based on its start-up plan, that Red Kite will perform 40% of the non-administrative services required by the RFP.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is 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

On December 31, 2019, Appellant also protested the SDVOSB status of 28 Trans in connection with this procurement. In order to be found an eligible SDVOSB, a joint venture, between an SDVOSB protégé and its SBA-approved mentor, must meet the requirements of 13 C.F.R. § 125.18(b)(2). These are the same requirements a joint venture between an SDVOSB protégé and its mentor must meet to earn the exclusion from a finding of affiliation under 13 C.F.R. § 121.103(h)(3)(ii).

On February 20, 2020, OHA issued *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P (2020), finding that 28 Trans' JVA failed to meet the requirements of 13 C.F.R. § 125.18(b)(2)(vi) and (vii). In the decision, OHA found that the JVA did not (1) itemize the equipment to be used in the performance of the contract; (2) specify the responsibilities of the parties with respect to negotiation of the contract, source of labor, and contract performance; and (3) indicate the tasks that each member of the joint venture would perform on the contract, or which employees of each member would perform the functions. Therefore, OHA found that 28 Trans' JVA also failed to meet the requirements of the regulation which would exclude it from a finding of affiliation between Red Kite and Owl under 13 C.F.R. § 121.103(h)(3)(ii). Thus, I must conclude that the Area Office erred in its analysis of the JVA.

Therefore, I must remand this decision for a new size determination consistent with the previously adjudicated decision regarding the compliance of 28 Trans' JVA with the regulations.

C. Remand

On remand, the Area Office must issue a new size determination consistent with OHA's decision in *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P (2020), which has been included as an addendum to this decision.

IV. Conclusion

Appellant has established that the size determination is clearly erroneous. Accordingly, I GRANT the instant appeal, and I REMAND to the Area Office for further determination.

CHRISTOPHER HOLLEMAN
Administrative Judge