

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

SIZE APPEALS OF:

DSC-EMI Maintenance Solutions, LLC,
Native Energy and Technology, Inc.

Appellants,

Appealed From
Size Determination No. 3-2021-029

Solicitation No. 70B01C20R0000085
Department of Homeland Security

SBA No. SIZ-6096

Decided: May 5, 2021

APPEARANCES

Pamela J. Mazza, Esq., Meghan F. Leemon, Esq., Patrick T. Rothwell, Esq.,
PilieroMazza, PLLC, for DSC-EMI Maintenance Solutions, LLC

John C. Dulske, Esq., Bonnie Kirkland, Esq., Dykema Gossett, PLLC, for Native Energy
and Technology, Inc.

Sam Q. Le, Office of General Counsel, Small Business Administration

DECISION¹

I. Introduction and Jurisdiction

On February 2, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2021-029 (Size Determination) concerning Department of Homeland Security - Customs and Border Protection Solicitation No. 70B01C20R0000085. The Area Office found that DSC-EMI Maintenance Solutions, LLC (DSC-EMI) was an other than small business for the subject solicitation. DSC-EMI appeals that determination maintaining that the Size Determination is clearly erroneous. Native Energy and Technology, Inc. (NET), the original protestor, also appeals the Size Determination. I have consolidated the two appeals for adjudication.

¹ This decision was initially 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. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the 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. The Solicitation, Protest, and Size Determination

On December 18, 2019, the Department of Homeland Security — Customs and Border Protection (DHS-CBP) issued a solicitation for facility preventative maintenance services for the New Mexico and West Texas region. The Contracting Officer (CO) designated this acquisition as a 100% small business set-aside, and designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding \$41.5 million annual receipts size standard, as the appropriate code. The final due date for all offers was February 12, 2020.

The contract is for “labor, supervision, tools, materials, parts, equipment, transportation, licenses, permits, certifications and management necessary to provide for equipment and system maintenance and repairs at government facilities in the New Mexico-West Texas region.” (Solicitation, at 3.)

On February 12, 2020, DSC-EMI submitted an initial offer on the subject procurement, including price. On December 22, 2020, the CO notified the unsuccessful offerors that DSC-EMI was selected for award. On December 30, 2020, NET, an unsuccessful offeror, filed a timely size protest against DSC-EMI.

NET's protest alleged that DSC-EMI was other than small because first, Diversified Service Contracting, Inc. (DSC), the controlling joint venture partner in DSC-EMI, was owned and controlled by a married couple, [Individual 1] and [Individual 2], and therefore was affiliated with the entities DSC Holdings, LLC (DSCH), MDS Support Services, LLC (MDS), Tart Family Investments, LLC (TFI), and Chicora II, LLC (Chicora II) based on common management and identity of interest. (Protest, at 11-13.) Further, NET alleged that [[Individual 1] and [Individual 2] own stock directly or through their marriage in the entities DSC, DSCH, MDS, TFI, and Chicora II and the firms are thus affiliated with DSC-EMI based on common ownership. (*Id.*, at 14-15.) Third, NET asserted there is no mentor-protégé agreement between DSC and TechFlow, Inc. (TechFlow), and the joint venture agreement fails to meet the requirements at 13 C.F.R. §§ 125.8(b)-(c), resulting in affiliation between DSC and TechFlow. (*Id.*, at 14-15.)

NET further alleged TechFlow's position openings in El Paso are similar for positions required under the awarded contract, demonstrating DSC-EMI will rely on TechFlow to fill these key management positions and is unusually reliant on TechFlow, and its subsidiary EMI, as an ostensible subcontractor to perform all or substantial part of the primary and vital requirements. (*Id.*, at 15-16.) NET also argued DSC-EMI is affiliated with DSC, DSCH, MDS, TFI, Chicora II, TechFlow, and EMI based upon the totality of the circumstances, and thus based on Dun &

Bradstreet reports for EMI, TechFlow, and DSC, DSC-EMI exceeds the size standard for this procurement. (*Id.*, at 16-17.)

On January 21, 2021, DSC-EMI responded to the protest. First, the Response acknowledges DSC's affiliation with DSCH, TFI, and membership in the joint venture MDS. Further it acknowledged TFI receives investment income from Chicora II. (Protest Response, at 4-5.) DSC-EMI maintains that because DSC is small and DSC-EMI's Joint Venture Agreement (JVA) complies with the regulation EMI and its parent TechFlow are not affiliates with either DSC or DSC-EMI. (*Id.*, at 5-7.)

DSC-EMI further asserts the alleged advertisements NET mentions for positions with similar job descriptions do not show that TechFlow will be performing work under the contract to EMI, nor does a prime and subcontracting relationship exist between protégé and mentor, therefore there is no affiliation based on ostensible subcontracting. Further, DSC-EMI's size, which includes DSC, DSC's acknowledged affiliates, and DSC's proportionate share of joint venture receipts, is within the \$41.5 million size standard. (*Id.*, at 5-8.)

On February 2, 2021, the Area Office issued the Size Determination. DSC is a North Carolina corporation formed on December 20, 2004, [majority] owned by [Individual 1]. DSC is a provider of facilities maintenance services which includes ground maintenance and janitorial services. The Area Office found that DSC is affiliated with DSCH, MDS, and TFI, in addition to Chicora II being an investment of TFI, and including Chicora II's income from TFI in its calculation of DSC's size. (Size Determination, at 6-8.)

On February 21, 1997, TechFlow, Inc. (TechFlow) was organized in Nevada. On August 27, 2012, TechFlow Mission Support, LLC, dba EMI Services (EMI), an admitted large business, was organized, owned by TechFlow. On July 15, 2019, DSC and EMI entered into a Mentor-Protégé Agreement (MPA) under SBA's All Small Mentor Protégé Program. On September 18, 2019, SBA approved the MPA. On July 17, 2019, DSC and EMI executed the JVA. On July 25, 2019, DSC-EMI was organized as a North Carolina Limited Liability Company, an unpopulated joint venture between DSC (51% owner) and EMI (49% owner).

On January 24, 2020, DSC and EMI entered into a Memorandum of Agreement with respect to this solicitation, which the Area Office did not address in the Size Determination. DSC-EMI submitted its offer on February 12, 2020. Addendum 1 to the JVA was executed on June 23, 2020 and was not submitted with the initial proposal dated February 12, 2020. DSC-EMI submitted its final proposal revisions on December 6, 2020. The Area Office did not review the contents of Addendum 1 to the JVA to determine compliance with the regulations because it was not effective or part of the proposal as of the date size is determined. Further, the Area Office found an addendum must be in effect at the time of self-certification, citing *CVE Protest of Commonwealth Home Health Care, Inc.*, SBA No. CVE-116 (2019). (*Id.*)

The Area Office noted that a recent regulatory change allowing for a joint venture agreement's compliance to be determined as of the date of final proposal revision was effective November 16, 2020. The Area Office found that this regulatory change was not applicable here, because the effective date was prior to February 12, 2020, the date to determine size. (*Id.*, at 10.)

The Area Office then found that DSC-EMI met the first requirement for exemption from affiliation, because an SBA-approved mentor-protégé agreement was in place prior to the submission of this offer on the procurement. (*Id.*, at 9.)

The Area Office found DSC-EMI's JVA did not meet the requirements of the regulation for several reasons. First, the Area Office determined the JVA fails to specify the purpose of the joint venture and that it identifies a different procurement and does not mention this procurement, as required by 13 C.F.R. § 125.8(b)(2)(i). Second, the JVA fails because the individual Project Manager employee of DSC is not named in the document, even though they are named in the proposal, and the information was thus available. 13 C.F.R. § 125.8(b)(2)(ii). Third, the JVA fails to itemize the major equipment, facilities, and other resources to be furnished by each party. JVA Section 11.4 states that for each member of the joint venture equipment, additional facilities, and additional resources will be determined on a project-by-project basis. The JVA is not clear on the type and quantity of personnel, facilities, materials, parts, or other resources that will be used under this contract. While the initial proposal states the specific facilities and notes that DSC-EMI will provide the required materials to complete the maintenance and repair work under the contract as it becomes known, it does not specify the contributions of each member of the joint venture. The Area Office notes that while the information was available at the time, it was not included in the JVA. (*Id.*, at 11-13; citing 13 C.F.R. § 125.8(b)(2)(vi).)

Fourth, the JVA fails to specify the responsibilities of the parties. The JVA states who is responsible for contract negotiations and the responsibilities of each party to meet performance of work requirements. (*Id.*, at 11; citing JVA §§ 11.1; 11.5-11.6.) Additionally, JVA Exhibit A states the staffing plan percentages, and states which members are responsible for the Project Manager and three other key personnel positions, but it is not specific to additional key personnel or the type of staff each shall recruit. The initial proposal does provide a roster of key personnel; however, it is not apparent for most positions which member of the joint venture is providing the personnel. The Area Office notes that while the information was available at the time, it was not specific as to which member was responsible for the listed personnel, nor was it included in the JVA as required by the regulation. (*Id.*, at 11; citing 13 C.F.R. § 125.8(b)(2)(vii).)

Fifth, other than specifying the Project Manager will be a DSC employee, it does not identify which members will perform specific requirements. Therefore, the Area Office could not determine if DSC would perform the primary and vital requirements and more than administrative or ministerial work. Therefore, the JVA does not meet the requirement of 13 C.F.R. § 125.8(c)(2). (*Id.*, at 15.)

Sixth, the JVA says DSC will provide the Project Manager, at least ***% of the employees, perform at least ***% of the work, and provide at least ***% of materials, parts, and other resources. The JVA is not specific to this procurement and is silent on the work to be performed by DSC. It does not specify which members will perform specific requirements, nor does it provide a breakdown of the percentages of work each member of the joint venture will perform. Accordingly, the Area Office found the JVA did not meet the requirements of 13 C.F.R. § 125.8(c)(3). (*Id.*)

The Area Office found that DSC-EMI would not subcontract any portion of the contract, so there could be no ostensible subcontractor violation. Further, the Area Office found no basis for any affiliation of DSC-EMI with any concern under the totality of the circumstances. (*Id.*, at 15-16.). The Area Office found that DSC, together with all its affiliates, is small, but when aggregated with its joint venturer, EMI, DSC-EMI is other than small (*Id.*, at 17-18.)

B. The DSC-EMI Appeal

On February 18, 2021, DSC-EMI filed its appeal of the Size Determination. DSC-EMI argues first that the Area Office used the wrong date to determine its compliance with the joint venture agreement requirements. DSC-EMI argues that the appropriate date for determining compliance with the joint venture agreement requirements is the date of final proposal revisions. DSC-EMI points to SBA's proposed rule of November 9, 2019, stating that it has always been SBA policy to determine size with respect to joint venture requirements as of the date of final proposal revisions, citing 84 Fed. Reg. 60846, 60851 (Nov. 8, 2019). DSC-EMI maintains that because Addendum 1 was in effect at the time of final proposal revisions, the Area Office should have considered Addendum 1 and found DSC-EMI in compliance with the joint venture regulations. (DSC-EMI Appeal, at 9-10.)

DSC-EMI further states that 13 C.F.R. § 121.404(d), which went into effect on November 16, 2020, was not a rule change, but a clarification of existing policy that a challenged concern's compliance with the joint venture agreement regulations was to be determined as of final proposal revisions, citing 85 Fed. Reg. 66146, 66154 (Oct. 16, 2020). Such a clarification does not change the law, but restates what the law, according to the agency, has always been citing *Size Appeal of Digital Management, Inc.*, SBA No. SIZ-5709 (2016). (*Id.*, at 10-12.)

DSC-EMI maintains that, when Addendum 1 to its JVA is considered, the JVA complies with the regulations. It includes:

- (1) A provision setting forth the purpose of the joint venture in compliance with 13 C.F.R. § 125.8(b)(2)(i) ***;
- (2) A provision designating DSC (the small business) as the managing venturer of the joint venture and an employee of DSC (the small business) as the project manager responsible for performance of the contract in compliance with 13 C.F.R. § 125.8(b)(2)(ii) ***;
- (3) A provision stating that DSC (the small business) owns 51% of the joint venture entity in compliance with 13 C.F.R. § 125.8(b)(2)(iii) ***;
- (4) A provision stating that DSC (the small business) must receive profits from the joint venture commensurate with the work it performs in compliance with 13 C.F.R. § 125.8(b)(2)(iv) ***;

(5) A provision providing for the establishment and administration of a special bank account in the name of the joint venture in compliance with 13 C.F.R. § 125.8(b)(2)(v) ***;

(6) A provision itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture in compliance with 13 C.F.R. § 125.8(b)(2)(vi) ***;

(7) A provision specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance in compliance with 13 C.F.R. § 125.8(b)(2)(vii) ***;

(8) A provision obligating all parties to the joint venture to ensure performance of the contract and to complete performance despite the withdrawal of any member in compliance with 13 C.F.R. § 125.8(b)(2)(viii) ***;

(9) A provision designating that accounting and other administrative records relating to the joint venture be kept in the office of DSC (the small business managing venturer) in compliance with 13 C.F.R. § 125.8(b)(2)(ix) ***;

(10) A provision requiring the final original records be retained by DSC (the small business managing venturer) upon completion of the contract performed by the joint venture in compliance with 13 C.F.R. § 125.8(b)(2)(x) ***;

(11) A provision stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture in compliance with 13 C.F.R. § 125.8(b)(2)(xi) ***; and

(12) A provision stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract in compliance with 13 C.F.R. § 125.8(b)(2)(xii) ***.

(*Id.*, at 13-14.)

DSC-EMI thus argues it complies with the regulations, and the Area Office erred in finding it was not an eligible small business for this procurement.

C. The NET Appeal

Also, on February 18, 2021, NET filed its appeal of the Size Determination. NET asserts the Area Office erred in failing to properly consider its assertion that DSC was affiliated with TechFlow, because TechFlow is affiliated with EMI through stock ownership. Therefore, TechFlow is the real joint venture partner of DSC, but there is no mentor-protégé agreement,

because a firm may have only one mentor at a time. (NET Appeal, at 5-6.) NET argues that TechFlow is affiliated with DSC because it is EMI's parent, and thus has the ability to control DSC through the mentor-protégé agreement. Further, NET maintains TechFlow is evading the requirements of the mentor-protégé program by using subsidiaries to have more than one protégé, by having each subsidiary have a protégé. This allows TechFlow to evade the limitations of the program. NET argues it was clear error for the Area Office not to consider this issue. (*Id.*, at 7-9.)

D. Additional Pleadings

On February 22, 2021, DSC-EMI moved to dismiss NET's appeal. DSC-EMI argues that because the Area Office found DSC-EMI other than small, NET is not a party adversely affected by the Size Determination under 13 C.F.R. § 134.302(a) and thus has no standing. The Size Determination's finding is not adverse to NET, rather, it finds DSC-EMI other than small, a result in NET's favor. (DSC-EMI Motion to Dismiss, at 3-4.) DSC-EMI also argues that NET's appeal should be dismissed because it raises a new issue on appeal. NET's protest alleged DSC-EMI was affiliated with TechFlow, not that DSC was affiliated with TechFlow. (*Id.*, at 4-6.)

On March 8, 2021, NET responded to DSC-EMI's appeal. NET maintains that DSC-EMI's argument that compliance with the joint venture regulations must be considered as of the date of the final proposal revisions is belied by OHA's decisions in *Size Appeals of Precision Asset Management Corporation and Q Integrated Companies, LLC*, SBA No. SIZ-5781 (2016), *recons. denied*, SBA No. SIZ-5801 (2017) (PFR) and *Size Appeal of Kisan-Pike*, SBA No. SIZ-5618 (2014), which held that compliance with regulations must be determined as of the date of initial offer including price, the date size is determined. (NET Response to Appeal, at 2.) NET argues that SBA recognized that the regulation required a change in order to provide that compliance with joint venture agreement requirements would be determined as of the date of final proposal revisions. The Area Office correctly found that the November 16, 2020 revision of the regulation was a change, which could not be applied retroactively. (*Id.*)

On March 9, 2021, NET responded to the Motion to Dismiss. NET asserts it is adversely affected by the Size Determination, and thus has standing, because the Area Office failed to consider one of the grounds of its protest. Should OHA grant DSC-EMI's appeal on the issues presented there, NET would be adversely affected, and the remaining ground of its protest could not be considered if its appeal were dismissed. (NET Response, at 2-4.) NET further asserted it raised the issue of affiliation between DSC and TechFlow in its protest (*Id.*, at 14), and further that the Area Office considered the issue and rejected its argument. (*Id.*, at 1-2, 8-9.) Therefore, NET has not raised a new issue on appeal.

D. SBA's Response

On March 17, 2021, SBA responded to the appeals. SBA argues that exceptions to 13 C.F.R. § 121.404 apply as written at the date of the exception, not only at the date of the offer. Because the revised regulation was in effect at the time of DSC-EMI's final proposal revisions, the revised regulation should control. SBA points to *Size Appeal of Digital Management, Inc.*, SBA No. SIZ-5709 (2016), where OHA applied an amendment to the exceptions in 13 C.F.R. § 121.404 which became effective after the challenged concern's submission of its initial offer, but

before the triggering event specified in the exceptions. (SBA Response, at 5-6.) SBA also points to *Size Appeal of Total Systems Technologies Corporation*, SBA No. SIZ-5562 (2014), where OHA applied the version of the rule in effect at the time of the triggering event, not the version in effect at the time of contract offer. SBA maintains the analysis under § 121.404 requires SBA to assess when an event triggers an exception to § 121.404 and to apply the rule as written *at the time of the event*. (*Id.*, at 6.)

SBA argues that applying the regulation effective on November 16, 2020 here is not retroactive. A retroactive application looks to the past. Additionally, as this rule took effect before the final proposal revision, it thus should be applied to the later occurring fact. (*Id.*, at 7.) SBA further asserts applying the rule in this way is not arbitrary. SBA is concerned that a contrary interpretation could lead to fraud or abuse. A large business mentor could make changes during negotiations which would put it in control of performance. If SBA reviewed the JVA only as of the time of the offer, there would be no way to consider any changes in determining compliance with the joint venture requirements. (*Id.*, at 7-8; citing 85 Fed. Reg. 66146, 66153 (Oct. 16, 2020).)

The Agency further expressed its concern that the Area Office's interpretation of § 121.404 would have negative implications for SBA's ability to address long-standing criticisms of its goaling program. In the November 16th rule, SBA amended the regulation to provide that size for a task order on a small business set aside would be determined as of the date of offer on the order, not of offer on the underlying contract. SBA had been criticized for allowing agencies to receive credit towards their small business goals for awards made to firms that no longer qualify as small. Delaying the effect of SBA's changes to § 121.404 would undermine SBA's efforts to address these concerns. Long-term multiple-award contracts can span decades. If SBA were applying amendments to § 121.404 only if effective at date of offer on the contract, many long-term multiple-award contracts would be unaffected because their contract offers were due before November 16, 2020. Agencies will continue to place orders under these contracts for years. SBA intended that the Agency's changes to § 121.404 would take effect on November 16, 2020, but its full effect will be delayed by years if regulatory amendments only apply to later-submitted contract offers. This unsatisfactory result will unnecessarily prolong the implementation of SBA's regulatory scheme and invite continued criticism of SBA's goaling program. (*Id.*, at 8-10.)

SBA went on to concur with DSC-EMI that the November 16th rule was a clarification of existing policy, not a change in policy. As an expression of current policy, the clarification should have been applied to current cases. (*Id.*, at 10.)

E. NET's Supplemental Pleadings

On March 18, 2021, NET filed a Supplemental Response to the Appeal. NET argues that even if the Area Office were to consider Addendum 1, DSC-EMI's JVA failed to meet the regulatory requirements. The regulation requires the JVA include an itemization of all major equipment, facilities, and resources each party will furnish to the joint venture. Even with Addendum 1, DSC-EMI has failed to itemize the equipment it would use for this procurement.

The RFP states that part of the procurement is preventive maintenance on certain identified equipment. NET argues the RFP provides sufficient information to allow for a more precise allocation of the known responsibilities, including allocation of personnel and equipment, citing *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P and *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664. (Supplemental Appeal, at 3-4.) The JVA provides only general and conclusory language as to the provision of equipment, resources, and facilities to be furnished by the parties. It refers to “Exhibit A” for information on this issue, but Exhibit A gives no more detail. It merely provides that both members will provide their respective corporate headquarters as facilities for the contract and “others TBD.” There is no direct reference to equipment. Exhibit A provides that DSC will provide ***% of materials, parts, consumable, and PPE” and “other resources TBD” while EMI will provide ***% of materials, etc., “incumbent contract vehicles,” and “other resources TBD.” (*Id.*, at 4-5.) Addendum 1 refers to Exhibit A and B for “an itemized list of all major equipment, facilities and other resources, with a detailed schedule of costs or value of each, to be provided by” the venturers. (*Id.*, at 6; citing Addendum 1 at § 6.0.) There is no itemized list of equipment, or detailed schedule of costs or value for each. Merely the same general language as Exhibits A and B. Therefore, even had the Area Office considered Addendum 1, the conclusion would be that the JVA fails to comply with the regulation. (*Id.*, at 6-7.)

NET further maintains that the JVA fails to comply with 13 C.F.R. § 125.8(c). This regulation requires that the work to be performed by the joint venture partner must be more than administrative or ministerial and must be at constitute least 40% of the work to be performed. NET asserts the language in the JVA is not specific enough to determine if this requirement will be met. Even with Addendum 1 included, the JVA is not specific enough to support a conclusion it complies with the regulation. (*Id.*, at 7-10.)

On March 30, 2021, NET sought leave to reply to SBA's Response. NET points out that in its Response, SBA states that not applying the current regulation “has worrisome implications” but does not assert that the Size Determination is based upon a clear error of law. (NET Reply, at 2.) NET further maintains that the *Digital Management* and *Total Systems* cases are inapposite here. In those cases, OHA considered the impact of the regulations on post-offer events— meaning there was no argument over whether the offers were correct at the time of the original submission instead, OHA was considering whether later events affected an offer's eligibility at the time of the later event. NET points to *Size Appeal of Enhanced Vision Systems*, SBA No. SIZ-5978 (2018) for the proposition that a mid-procurement regulation change does not apply. Here, NET asserts that at the time DSC-EMI submitted its initial offer the JVA did not meet the requirements of the regulation, and therefore the exemptions to a finding of affiliation do not apply. DSC-EMI was ineligible at the time of award, and there was no post-proposal event which affected its eligibility. SBA is making a policy argument here, which is inapposite to the issue of whether the Area Office's determination was in clear error. (*Id.*, at 3-4.)

NET further asserts OHA has rejected the argument that post-submission modifications may be used to bring a joint venture agreement within the affiliation exception, citing *Size Appeal of Precision Asset Management Corporation, et al.*, SBA No. SIZ-5781 (2016) (“PAMC I”). NET maintains OHA reasserted this holding in response to an SBA petition for reconsideration in *Size Appeals of Precision Asset Management Corporation and Q Integrated*

Companies, LLC, SBA No. SIZ-5801 (2017) (“*PAMC I — PFR*”). The SBA regulations in effect on the date the solicitation is issued apply to any subsequent size determination citing *Size Appeal Alpine/First Preston JV II, LLC*, SBA No. 5822 (2017) (citing *Size Appeal of GASL, Inc.*, SBA No. SIZ-4191 (1996)). (*Id.*, at 5-6.)

III. Discussion

A. Standard of Review and Preliminary Issues

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).

DSC-EMI's Motion to Dismiss NET's Appeal is DENIED. NET is an interested party, because if the Size Determination is not affirmed, NET wishes to raise on appeal the issue of TechFlow's affiliation with DSC-EMI, which it did raise in its protest, which part of its protest the Area Office rejected. (Protest, at 14; Size Determination, at 8-9.)

NET's motion to reply to SBA's Response is GRANTED, because SBA raised issues not raised by the Size Determination, and NET is entitled to reply.

B. Analysis

EMI, a large firm, and DSC, a small firm, are operating under an SBA-approved mentor-protégé agreement under SBA's All Small Mentor Protégé Program, 13 C.F.R. § 125.9. DSC-EMI is a joint venture formed under that agreement, organized as an LLC, owned 51% by DSC, a small firm, and EMI, a large firm.

Two firms approved by SBA to a mentor and protégé under 13 C.F.R. § 125.9 may joint venture as a small business for any Federal prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of 13 C.F.R. § 125.8(b)-(c). 13 C.F.R. § 121.103(g)(3)(ii). The issue here is whether DSC-EMI meets the requirements. The Area Office concluded that it did not. DSC-EMI argues the Area Office erred because it determined its compliance with the joint venture regulation as the date of DSC-EMI's initial offer, including price. DSC-EMI argues that its compliance with the joint venture regulations should be determined as of the date of its final proposal revisions, which would require consideration of Addendum 1 to its JVA. SBA agrees, and, in essence, confesses error, but does not call for vacation of the Size Determination and a remand, as it usually does in such situations. *See, e.g., Size Appeal of Aquila Alliance, LLC*, SBA No. SIZ-6052 (2020). NET argues that even if DSC-EMI's compliance is considered as of the date of its final proposal revisions, it still has not complied with the regulations.

Before considering whether the Area Office erred in determining DSC-EMI's compliance as of the date of its initial offer including price, instead of the date of final proposal revisions. I must consider whether that would make a difference in determining whether the Area Office's determination is based on an error of fact or law. I conclude that it would not.

One of the provisions DSC-EMI must comply with is 13 C.F.R. § 125.8(b)(2)(vi), which requires that the JVA itemize:

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

The original JVA, dated July 24, 2019, addressed the issue of equipment and facilities by stating that each party would make cash contribution (\$ *** for DSC, \$ *** for EMI), would provide facilities, each member firm identifying *** location, and equipment and other resources as described in Exhibit A. (JVA, at ¶ 11.4, p. 23.) Exhibit A provides that DSC will contribute a Project Manager, a ***, “other key personnel” and *** % of contract staff and “materials, parts and consumables” and “other resources TBD.” EMI will contribute an ***, ***, ***% of contract staff and “materials, parts and consumables” and “other resources TBD,” “incumbent contract vehicles” and “other resources TBD.” (JVA, Ex. A.) Addendum 1 dated June 23, 2020, states that DSC will provide a Project Manager, a ***, and other key personnel as required. For facilities, it will provide its corporate headquarters and “others as required.” For other resources, DSC is to provide “approximately, but no less than, ***% of materials, parts, consumables, and PPE [. . .] other resources as required.” (Addendum 1, Ex. A.) EMI is to provide an ***, ***, *** and “other key personnel as required.” For facilities, EMI will provide its corporate headquarters., and other facilities as required. For other resources, EMI will provide approximately, but no greater than, ***% of materials, parts, consumables, and PPE, incumbent contract vehicles . . . other resources as required.” (Addendum 1, Ex. B.)

The Performance Work Statement (PWS) calls for the contractor to “develop and implement a Facility maintenance and repair program that covers all equipment listed in Attachment 1B. The Contractor shall plan, schedule and perform PM services on all equipment listed in Attachment 1B. [. . .] In addition to equipment inspections, cursory inspections of building systems will be conducted by the Contractor as part of PM requirement.” (PWS, ¶ C.1.3.3.3.) The contractor is to submit a detailed preventive maintenance schedule. “The schedule shall be for the entire contract period, identifying each piece of equipment to be maintained and the date on which PM work will occur. The PM schedule will be provided annually, and within fourteen (14) days of the state of a new option period. The PM schedule shall be organized by facility.” (PWS, ¶ C.1.3.3.3.1.) “A Preventive Maintenance Guide shall be prepared by the Contractor and is subject to approval by the Government. The Preventive

Maintenance Guide shall list each equipment type that requires maintenance and will identify the following information: frequency of service, maintenance task list, inspections, testing, material requirements, permitting and certification requirements, reporting and responsible party.” (PWS, ¶ C.1.3.3.3.2.) A review of Attachment 1B shows a detailed and specific listing of many types of equipment to be serviced, with their locations identified.

It is thus clear that the work required for significant part of the procurement was known in advance, the maintenance of equipment identified and in known locations. Therefore, while this is an ID/IQ contract, the locations to be serviced are known, and the nature of the work is known, and it was possible for DSC-EMI to identify the equipment necessary to perform the maintenance, and which firm would supply which items of this equipment, that is, a precise allocation of known responsibilities, including the allocation of personnel and equipment. The JVA failed to do this. There is no listing of the equipment to be used, as required by the regulation, and, given that the equipped to be serviced is identified, knowable at the time of proposal preparation. It is therefore a deficient JVA. *CVE Protest of KTS Solutions*, SBA No. CVE-146-P, at 11 (2020); *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664, at 11 (2015); *Size Appeal of Kisan-Pike*, SBA No. SIZ-5618, at 9-10 (2014). Further, the Project Manager is not identified, as required by 13 C.F.R. § 125.8(b)(2)(ii).

Accordingly, even if the Area Office made its Size Determination as of the date of DSC-EMI's final proposal revisions, and thus taken account of Addendum 1, the JVA would not comply with 13 C.F.R. §§ 125.8(b)(2)(ii),(iv), and therefore, DSC-EMI is not eligible for the exemption from affiliation afforded qualified joint ventures under 13 C.F.R. § 121.103(g)(3)(ii). The Area Office was thus not in error in finding that DSC-EMI was other than small.

NET's appeal is meritless. NET alleges DSC is affiliated with TechFlow because TechFlow is EMI's parent. There is no authority for this argument in regulation or case law. The Mentor/Protégé regulation provides that no determination of affiliation may be found between a protégé and mentor firm based solely upon the mentor/protégé agreement or any assistance provided under it. 13 C.F.R. § 125.9(d)(4). Here, the only connection shown between DSC and EMI is the mentor/protégé agreement, and the JVA. There is no connection between TechFlow and DSC except that TechFlow's affiliate EMI is DSC's mentor. Because no general finding of affiliation may be found due to mentor/protégé agreement, there is no basis for a finding of affiliation between a protégé and its mentor's parent. Accordingly, NET's argument is meritless.

IV. Conclusion

Appellant has failed to establish that the size determination is based upon any clear error of fact or law. Accordingly, I DENY the instant appeal, and I AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge