United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Optimal GEO, Inc., Appellant, Appealed From Size Determination No. 03-2021-63	SBA No. SIZ-6140 Decided: February 17, 2022

APPEARANCES

Suzanne Sumner, Esq., Brandon E. Dobyns, Esq., Taft, Stettinius & Hollister LLP, Dayton, Ohio, for Optimal GEO, Inc.

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DECISION[1]

I. Introduction and Jurisdiction

On September 24, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 03-2021-63 (Size Determination), finding Optimal GEO, Inc. (Appellant) other than small. On October 8, 2021, Appellant filed the instant appeal from that Size Determination. Appellant argues that the Size Determination is clearly erroneous and requests that OHA reverse it, and find Appellant is an eligible small business. For the reasons discussed *infra*, the appeal is DENIED, and the Size Determination is AFFIRMED.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the 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.

[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.

II. Background

A. Solicitation and Award

On February 4, 2020, the U.S. Geological Survey, Office of Acquisition and Grants, Denver Acquisition Branch issued a request for proposals (RFP) under Solicitation No. 140G02-20-R-0003, a multiple architect and engineering Indefinite Delivery Indefinite Quantity (IDIQ) contract to perform professional mapping services. As an architect and engineering procurement, the Solicitation was issued in two phases. The Contracting Officer (CO) designated this acquisition as a partial small business set-aside with four contracts to be awarded to small businesses. The CO assigned North American Industrial Classification System (NAICS) codes 541330, 541360 and 541370, all with a corresponding $16.5 million annual receipts size standard. Phase I proposals were due on May 5, 2020. (RFP Amendment No. 0005, at 1.) Phase II proposal responses were due on March 9, 2021. (A&E Synopsis, Amendment No. 0001, at 1.)

Appellant submitted an initial offer for Phase I on April 28, 2020, and for Phase II on March 5, 2021. (Appeal File (AF), Appellant's Proposals.) On August 18, 2021, the CO issued a notice that Appellant was selected for a small business award. On August 24, 2021, The Atlantic Group, LLC (Atlantic), an unsuccessful offeror, filed a timely size protest against Appellant.

B. Size Determination

On September 24, 2021, the Area Office issued the Size Determination finding Appellant other than small. The Area Office found Appellant was formerly known as Magnolia River Geospatial, Inc. (MRG), formed on October 28, 2005 in Delaware. As of the date for determining size, Appellant was 95% owned by Incrementa Geo, LLC (IG), formed on February 22, 2016, in Alabama, and 5% owned by [Individual 1]. IG is 85% owned by Incrementa Holdings, LLC (IH), formed on February 2, 2016, in Alabama, 8% owned by [Individual 2], and 7% owned by [Individual 3]. The Area Office further found [Individual 4], [Individual 5], [Individual 6], and [Individual 7], who each own 25% of IH, are the majority owners of IH. (Size Determination, at 6-7; AF, Appellant's Second Response to Protest, at 1-4.)

The Area Office found that Woolpert, Inc. (Woolpert) became Appellant's 100% owner on September 3, 2021. The Area Office then, determined that the first letter of intent between Appellant and Woolpert was in place after the date to determine size. Consequently, it concluded as of the date size is determined, Appellant and Woolpert were not affiliated under the present effect rule. (Size Determination, at 6-7, citing 13 C.F.R. § 121.103(d).)

Further, WMR-532 LLC (WMR), a joint venture formed in 2015 in Alabama, is owned 50% by Appellant and 50% by Woolpert. NAVGeo, LLC (NAVGeo), a joint venture formed in 2012, is owned one-third by Appellant, one-third by Woolpert, and one-third by Quantum Spatial. OGW LLC is a joint venture formed in 2019 and owned 51% by Appellant and 49% by Woolpert. Woolpert was formed on January 1, 1911, in Ohio. Its SAM profile lists it as other than small for the applicable NAICS codes. Woolpert Holdings, Inc. is Woolpert's immediate owner. (*Id.*, at 7)

The Area Office concluded Appellant was affiliated with both IG and IH, which Appellant conceded. The Area Office further concluded Appellant was not affiliated with any other firm based upon these affiliations. (*Id.*, at 8.) The Area Office, thus, rejected a number of Atlantic's allegations of affiliation against Appellant. (*Id.*, at 7-9.)

The Area Office noted Atlantic's allegation that Appellant and Woolpert had, through the WMR joint venture, been submitting bids together for a number of years, well beyond the two-year limit. (*Id.*, at 9.) In fact, Appellant acknowledged WMR received contract awards on March 29, 2016, June 12, 2017, and August 29, 2019, the third contract awarded outside the two-year window of the three-in-two rule under 13 C.F.R. § 121.103(h). (*Id.*, at 10-11.) The Area Office inquired as to the date of the initial offer, including price, of each contract, and confirmed that the third contract's offer, including price, was made on May 30, 2019 outside the two-year window. Upon examining whether Appellant and Woolpert were affiliated as of the date for determining size, the Area Office concluded the two firms were not affiliated under common ownership, as neither owned stock in the other, nor under the present effect rule, because the agreement to merge was reached after the date to determine size, nor is there common management, nor identity of interest, because Appellant is not dependent upon Woolpert for more than 70% of its receipts, nor under the newly organized concern rule because Appellant is not a new firm, nor under the totality of the circumstances. Accordingly, the Area Office found Appellant and Woolpert were not generally affiliated. (*Id.*, at 12.)

Nevertheless, because of the violation of the three-in-two rule, the Area Office concluded Appellant should not be charged with a proportionate share of WMR's receipts. Rather, because Appellant and Woolpert each have a 50% interest in WMR, and thus, both can be found to control it under 13 C.F.R. § 121.103(c)(2), Appellant is thus affiliated with WMR all of its receipts should be included in Appellant's receipts, under 13 C.F.R. § 121.104(d). (*Id.*)

The Area Office determined Appellant's size as of April 28, 2020, the date of its initial proposal submission. (*Id.*, at 13.) Appellant opted to determine its annual receipts using a five-year period of measurement and provided federal tax returns for the years 2016 through 2019. (*Id.*) To prevent double counting, the Area Office removed the joint venture transactions in Appellant's returns for the years in which the joint venture had a separate tax return in accordance with 13 C.F.R. § 121.104(a). (*Id.*)

Consequently, the Area Office determined Appellant's size based upon its annual receipts and those of its affiliates, IG, IH, and WMR, and its proportionate share of the receipts from the joint ventures NAVGeo and OGW, LLC, finding that Appellant was other than small. (*Id.*)

C. Appeal

On October 8, 2021, Appellant filed the instant appeal (Appeal). Appellant argues the Area Office erred in finding that the remedy for a violation of the three-in-two rule was to disregard WMR's joint venture's status and consider it a stand-alone entity and including all of its receipts with Appellant's in calculating Appellant's size. (Appeal at 2-3.)

Appellant does not deny that WMR violated the three-in-two rule. (*Id.*, at 6.) WMR was originally owned by Appellant, Woolpert, and Magnolia River Services, LLC (MRS), and is now owned 50% by Appellant and 50% by Woolpert. However, the orders awarded to WMR are not split 50/50 between Woolpert and Appellant. The great majority of WMR's work is subcontracted to Woolpert rather than Appellant. Appellant's proportionate share of WMR's receipts is [X]%. Appellant included this proportion to its annual receipts' calculation on its Form 355. (*Id.*)

First, Appellant asserts WMR received its first contract on March 29, 2016. WMR's second contract resulted from an offer made on March 27, 2017 and awarded on June 22, 2017. (*Id.*) Its third contract resulted from an offer made on May 30, 2019 and awarded on August 16, 2019. Here, Appellant argues that under SBA regulations, joint venturers are not generally affiliated, outside of instances where the joint venture itself is bidding on contracts. (*Id.*, citing 13 C.F.R. § 121.103(h).) Appellant notes that at the date to determine size, the regulation included the three-in-two rule. The rule provides that a specific joint venture entity may be awarded up to three contracts over a two-year period, starting from the date of the first award, without the joint venture partners being found affiliated for all purposes. The same joint venture partners may create additional joint ventures, and each joint venture may receive up to three awards over two years, without the venturers being found affiliated for all purposes. The joint venture partners do not become generally affiliated merely because they entered into a joint venture together, as long as they observe the three-in-two rule. (*Id.*, at 7, citing 13 C.F.R. § 121.103(h)).

Appellant maintains that a violation of the three-in-two rule does not mean that the joint venture partners will automatically be found affiliated. (*Id.*) Rather, it means that the relationship between the two firms is open to a general affiliation analysis. The fact that WMR received a third contract outside of the two-year window does not automatically lead to a finding of affiliation. (*Id.*, citing *Size Appeals of Safety & Ecology Corp.*, SBA No. SIZ-5177 (2010) and *Size Appeal of Magnum Opus Techs., Inc.*, SBA No. SIZ-5372 (2012).)

Therefore, Appellant argues the Area Office's treating WMR as Appellant's affiliate and counting all of its receipts when calculating Appellant's size, instead of a proportionate share of those receipts as required by 13 C.F.R. § 121.103(h)(5), was not the appropriate remedy for a violation of the three-in-two rule. (*Id.*, at 8.)

In Appellant's view, the remedy for a violation of the three-in-two rule is not to find affiliation between Appellant and WMR as a stand-alone entity, because the regulations do not provide for affiliation between a partner and the joint venture itself, only between partners, and a finding of affiliation requires the addition of a proportionate share of joint venture receipts, not aggregation of all receipts. (*Id.*, at 8-9, citing *Size Appeal of Excellus Sols., LLC*, SBA No. SIZ-5999 (2019).) Further, the remedy for a violation of the three-in-two rule is a general affiliation analysis between the joint venture partners. Because the Area Office conducted such analysis between Appellant and Woolpert and determined that they were not affiliated, the inquiry must end. Appellant argues SBA should not consider WMR's receipts outside their contribution to Appellant via the proportionate share owed to Appellant under the contractual relationship between Appellant and WMR. (*Id.*, at 9.)

Appellant also maintains that violations of the three-in-two rule are not fatal to a firm's status as a small business, particularly when the joint venture in question was not a party to the protested contract. (*Id.* at 9-10, citing *Magnum Opus Techs.*; *Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254 (2011).)

Similarly, Appellant argues that WMR's violation was not particularly egregious, because the third award was only 14 months after the conclusion of the two-year period. To apply a strict rule transforming WMR into an affiliated stand-alone entity is inequitable and defeats the Small Business Act's purpose to set aside contracts for small business. Thus, Appellant argues the Area Office erred in finding WMR affiliated with it, and the size determination should be reversed. (*Id.*, at 10.)

D. Response

On November 1, 2021, Atlantic responded to the Appeal. Atlantic maintains the Area Office did not err in finding Appellant affiliated with WMR. (Response, at 1.) Atlantic points out there is no dispute that WMR failed to comply with the three-in-two rule. The Area Office thus found that WMR is not considered a joint venture. (*Id.*, at 3-4; citing Size Determination, at 11.) WMR is only 50% owned by Appellant, and therefore, it is not a small business joint venture. (*Id.*, at 4, citing 13 C.F.R. § 125.8(b)(2)(iii).) Further, Woolpert is a large business, and is not in a mentor/protégé relationship with Appellant. Atlantic argues WMR is not in compliance with SBA's joint venture rules, and thus cannot claim an affiliation exception. (*Id.*) Because Appellant owns 50% of WMR, it has the power to control it, and is thus, affiliated. (*Id.*, at 4-5, citing 13 C.F.R. § 121.103(c)(1); *Size Appeal of Seaward Servs., Inc.*, SBA no. SIZ-5178 (2010).)

In addition, Atlantic argues that WMR's violation of the three-in-two rule automatically affiliates Appellant with its joint venture partner Woolpert, a large business. The regulation provides that a joint venture may not be awarded more than three contracts over a two-year period without the joint venture partners being deemed affiliated for all purposes. (*Id.*, at 5, citing 13 C.F.R. § 121.103(h)(1).) As for Appellant's reliance on *Safety and Ecology*, Atlantic contends that it is misplaced, because that case concerned a mentor-protégé joint venture, which WMR is not, and because the regulation has changed since then to impose general affiliation for all purposes for a violation of the three-in-two rule. (*Id.*, at 5-6, citing 76 Fed. Reg., 8221, 8251 (2011).)

Atlantic argues that OHA has held a violation of the three-in-two rule leads to a finding of general affiliation. (*Id.*, at 7; *see Size Appeal of Megen-AWA2, LLC*, SBA No. SIZ-5852 (2017).) In turn, Appellant's reliance on *Excellus Sols.* is misplaced, because the same case also holds that a violation of the three-in-two rule leads to a finding of general affiliation. (*Id.*)

Atlantic concludes that if the Area Office erred in treating WMR as a stand-alone entity, it was harmless error, and Appellant is either affiliated with WMR or with Woolpert, a large business, and is thus, other than small. (*Id.*, at 8, citing *Size Appeal of Lukos, LLC*. SBA No. SIZ-6047 (2020).)

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 that 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

The Area Office's conclusion that Appellant is other than small is based upon its finding that Appellant is affiliated with WMR because WMR violated the three-in-two rule.

> [A] specific joint venture entity may not be awarded more than three contracts in a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes. Once a joint venture receives one contract, SBA will determine compliance with the three awards in two years rule for future awards as of the date of the initial offer including price.

13 C.F.R. § 121.103(h)(2020)[2]

The example in the regulation makes clear that a joint venture cannot receive any additional contract awards arising more than two years after the date of its first contract award.

> *Example 2 to paragraph (h) introductory text*.
>
> Joint Venture XY receives a contract on December 19, year 1. It may receive two additional contracts through December 19, year 3. On August 6, year 2, XY receives a second contract. It receives no other contract awards through December 19, year 3 and has submitted no additional offers prior to December 19, year three. Because two years have passed since the date of the first contract award, after December 19, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Id.

[2] Appellant's size must be determined as of the date of its certification as small, as part of its initial bid or proposal. 13 C.F.R. § 121.404(f). Because that is April 28, 2020, the regulation in effect on that date will be used to determine size.

There is no dispute and Appellant concedes that WMR received its first award on March 29, 2016, and that its third contract resulted from an offer made on May 30, 2019, which was awarded on August 16, 2019. Section II.C, *supra*. Thus, there is no question that WMR violated the three-in-two rule. Appellant argues this should merely be the basis of an inquiry into whether it is affiliated with Woolpert, relying on OHA precedents, e.g., *Safety & Ecology* and *Magnum Opus Techs*. Since the Area Office conducted such an inquiry and found no other basis for affiliation, Appellant argues it should not be found affiliated with Woolpert on the basis of the two firms' participation in WMR.

The issue with Appellant's position is that it relies on OHA precedents decided under previous versions of the regulations, which makes them inapplicable to this case. In 2009, SBA proposed a revision to the regulation, which provided that the parties to a joint venture that violated the three-in-two rule were "affiliated for all purposes." 74 Fed. Reg. 55694, 55695, 55714 (Oct. 26, 2009). The final rule was published and took effect in 2011, providing that the parties to a joint venture that violated the rule were "affiliated for all purposes." 76 Fed. Reg. 8221, 8223, 8251 (Feb. 11, 2011). As the regulatory text example makes clear, *supra*, the two-year time limit on the joint venture is an important qualification for the joint venture as the limit on the number of contract awards the joint venture may receive. Once a particular joint venture either receives more than three awards or continues to receive awards more than two years after the date of the first award, the parties to the joint venture are considered affiliated for all purposes. Parties may create additional joint ventures, which may also receive no more than three awards in two years, and not be found generally affiliated. However, the regulation cautions parties that a longstanding relationship or contractual dependence could lead to a finding of general affiliation. 13 C.F.R. § 121.103(h). The emphasizes a finding of general affiliation between firms is the consequence of abusing the joint venture vehicle.

As for Appellant's argument that the Area Office erred in concluding a violation of the rule meant it should treat WMR as a stand-alone business entity, OHA held in *Excellus Sols*. that the consequence of finding the joint venture in violation of the rule is not that the joint venture is a stand-alone business entity, but that the partners to the venture were deemed affiliated for all purposes. *Excellus Sols.*, at 14. The Area Office, thus, erred in treating WMR as a stand-alone entity. However, I find such error is harmless.[3] While the appropriate finding was one of general affiliation between Appellant and Woolpert to the joint venture, Woolpert is an admitted large business, and this compels a conclusion that Appellant is other than small.

Appellant's reliance on *Magnum Opus Techs*. and *CJW Constr*. are misplaced since these cases dealt with 8(a) mentor-protégé firms under the previous regulation. Further, since those cases were decided, the phrase "without the partners to the joint venture being deemed affiliated for all purposes" was added to the regulation.

[3] An area office's error is harmless when rectifying the error would not have changed the result. *See Size Appeal of Lukos, LLC*, SBA No. SIZ-6047, at 17 (2020), citing *Size Appeal of Melton Sales & Service*, SBA No. SIZ-5893, at 14 (2018); *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017).

Accordingly, I conclude the Area Office did not err in finding Appellant other than small when there is a general affiliation between the partners, Appellant and Woolpert, to the joint venture, WMR, and Woolpert is an admitted large business, compelling the above conclusion that Appellant is other than small.

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 U. S. Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge