United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Optimal GEO, Inc.,	SBA No. SIZ-6141
Appellant,	Decided: February 17, 2022
Appealed From Size Determination No. 03-2021-64	

APPEARANCES

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

DECISION[1]

I. Introduction and Jurisdiction

On September 30, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 03-2021-64 (Size Determination), finding Optimal GEO, Inc. (Appellant) other than small. On October 15, 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 December 17, 2020, the Naval Facilities Engineering Command Southeast (NAVFAC-SE) issued Solicitation No. N69450-20-R-0128, for architect and engineer services for Geographic Information Systems and Professional Surveying and Mapping within the NAVFAC-SE Geographic area of responsibility. The Contracting Officer (CO) set the procurement aside entirely for small business and designated North American Industrial Classification System (NAICS) codes 541370, Surveying and Mapping (except Geophysical) Services, with a corresponding $16.5 million annual receipts size standard, as the appropriate code.

Because of the nature of this procurement, the Solicitation was issued in two phases. The CO issued Phase I, with initial offers due on January 26, 2021, and Phase II offers due on August 25, 2021. On January 22, 2021, Appellant submitted its initial offer, including its certification that it was a small business. Subsequently, on August 25, 2021, Appellant also submitted its Phase II offer, including price. On August 31, 2021, the CO notified the unsuccessful offerors that Appellant was selected for award. On September 8, 2021, KFS, LLC, (KFS) an unsuccessful offer, filed a timely size protest.

B. Size Determination

On September 30, 2021, the Area Office issued the Size Determination finding Appellant other than small.

First, the Area Office found Appellant was formerly known as Magnolia River Geospatial, Inc. (MRG), formed on October 28, 2005, in Delaware. (Size Determination, at 5.) As of the date for determining size, Appellant was 95% owned by Incrementa Geo, LLC (IG) and 5% owned by [Individual 1].

IG was formed on February 22, 2016, in Alabama, and 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]. Because [Individual 4], [Individual 5], [Individual 6], and [Individual 7], each owned 25% of IH, and are the majority owners of IH, the Area Office found they have the power to control IG based upon stock ownership. (*Id.*)

WMR-532 LLC (WMR), a joint venture formed in 2015, in Alabama, is owned 50% by Appellant and 50% by Woolpert, Inc. (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, and its SAM profile lists it as other than small for the applicable NAICS codes. Woolpert Holdings, Inc. is Woolpert's immediate owner. (*Id.*, at 6.)

The Area Office concluded that Appellant was affiliated with both, IG and IH, which Appellant conceded. As for KFS's allegations of affiliation to other firms, the Area Office concluded that Appellant was not affiliated to those. (*Id.*, at 6-8.)

In response to the protest, Appellant indicated that Woolpert became its 100% owner on September 3, 2021. (*Id.*, at 6.) The Area Office examined Appellant's purchase agreement with Woolpert and the letters of intent. First, it noted the first letter of intent was in place on December 23, 2020, prior to the date to determine size, which was January 26, 2021. Then, it noted that based on declarations by the negotiators of the merger, J. Scott Smith, an employee of Appellant, and Scott Caltran, Woolpert's CEO, the first letter of intent expired without coming to an agreement. (*Id.*, at 6-7.) A second letter of intent was executed on July 12, 2021, and Woolpert provided a draft stock purchase agreement at that time. (*Id.*, at 7.)

Further, the Area Office noted the letters of intent described themselves as non-binding, and both, Mr. Smith and Mr. Caltran, described them as such. (*Id.*) However, the first letter of intent of December 23, 2020, made four provisions binding, which included termination of any other negotiations to give Woolpert 90 days for its due diligence review. The letter provided, "The satisfactory completion of due diligence, documentation and financing are the only conditions necessary for [Woolpert] to close the deal promptly." (*Id.*) The letter further provided that Appellant and Woolpert would negotiate in good faith toward a contract and the letter would only terminate if the parties reached an agreement or at the end of 90 days, whichever came first. Negotiations could be concluded either by merger or the expiration of the letter on March 23, 2021. It included priced financial considerations and [XXXXXXXXXX]. As an agreement could not be reached, the parties allowed the letter to expire. (*Id.*)

Appellant resumed discussions with Woolpert in June 2021. The second letter of intent, executed by Appellant on July 12, 2021, included an adjustment to financial considerations and provided [XXXXXXXXX]. (*Id.*, at 8.) It mentioned the provisions of a Stock Purchase Agreement, [XXX] and noting that the only remaining steps were to satisfactorily complete the transactions document and regulatory filings prior to completing the transaction. (*Id.*) Termination of the agreement could only occur if a definitive transaction agreement was in place or at the end of the exclusivity period. Within a week, the parties executed a Stock Purchase Agreement, with the transaction finalized on September 3, 2021. (*Id.*)

Thus, the Area Office concluded, both letters of intent were agreements in principle. The first stated it is a best and final offer and was "Accepted and Agreed to on December 23, 2020." (*Id.*) It required satisfactory completion of a due diligence review, documentation, and financing. The second letter required satisfactory completion of transaction documentation and regulatory filings. While the first letter was allowed to expire, Appellant returned to Woolpert in June 2021, which set in motion the second letter of intent. (*Id.*)

Additionally, both letters of intent were specific offers, subject to specific terms to finalize the agreement, and included limitations that kept the offer open until an agreement was reached or was left to expire. Both were more than agreements to open negotiations at some unspecified later date. Neither of them was speculative nor based upon guesses. (*Id.*, at 8 citing 13 C.F.R. § 121.103(d)(2)&(3).) Under the first letter, Woolpert was prepared to come to an

agreement pending only “due diligence, documentation and financing.” The second was similar, with changes in pricing and equity interests due to information received during Woolpert's due diligence and additional documentation, Appellant provided in June 2021. The Area Office, thus, concluded the two letters of intent were agreements in principle and would have present effect. Consequently, Appellant and Woolpert were found to be affiliated based upon the present effect of their agreements to merge as of December 23, 2020.

With respect to the first letter of intent, the Area Office found that because it was an agreement in principle executed on December 23, 2020, within 180 days of Appellant's offer for this procurement on January 22, 2021, Appellant is not eligible to receive this award. (*Id.*, at 8-9, citing 13 C.F.R. § 121.404(g)(2)(iii).)

Conversely, the Area Office found WMR had violated the rule on joint ventures at 13 C.F.R. § 121.103(h), because after receiving its first contract award on March 29, 2016, it submitted an offer for its second contract award on March 27, 2017, and submitted an offeror for its third contract award on May 30, 2019, which was awarded on August 16, 2019. Thus, WMR received an award after the two-year window violating the regulation, *supra*. The Area Office concluded, WMR must be treated as a stand-alone entity, and because Appellant owned 50% of WMR, Appellant must be held to have the power to control it, and thus, be affiliated with it. (*Id.*, at 10.) Accordingly, the Area Office counted all of WMR's receipts in determining Appellant's size, not merely Appellant's proportionate share. (*Id.*, at 10-11, citing 13 C.F.R. § 121.103(c)(1).)

To determine size, the Area Office performed two calculations. First, the Area Office found Appellant affiliated with Woolpert, WMR, IG, and IH. Then, it included in its calculations of Appellant's receipts its proportionate share from its joint ventures, NAVGeo and OGW, LLC and concluded Appellant was other than small. The Area Office also performed a calculation of Appellant's size excluding Woolpert but including all of WMR's receipts because of Appellant's affiliation with WMR as its 50% owner. (*Id.*., at 12.)

C. Appeal

On October 15, 2021, Appellant filed the instant appeal. (Appeal.) Appellant argues the Area Office erred in finding that the remedy for a violation of the unlimited-in-two rule was to disregard WMR's joint venture's status and consider it a stand-alone entity and include all of its receipts with Appellant's in calculating Appellant's size. (*Id.*, at 2-3.)

Appellant argues that all that existed between Appellant and Woolpert until August of 2021 at the earliest, was an agreement to open or continue negotiations. The letters of intent were subject to conditions precedent and were not binding on the parties so as to create an enforceable agreement. Therefore, Appellant and Woolpert are not affiliated. (*Id.*, at 7.)

In late 2020, Appellant and Wolpert began discussions, and the first letter of intent was executed on December 23, 2020. The first letter of intent included a purchase price of [XXXXXXXXXXXXXXXXXXXXXXXXXXX]. The letter contemplated a 90-day due diligence period and was to automatically terminate at the end of this period unless a definitive agreement was reached earlier. Woolpert developed concerns with Appellant's financial

performance during the due diligence period. The letter expired without a definitive agreement. Here, Appellant argues the letter became legally unenforceable and should not have been given present effect. (*Id.*, at 7-8.)

Next, Appellant asserts that later in 2021, the parties renewed discussions. The second letter of intent had very different terms. The price was [XXXXXXXXXXXXXXXXXXXXXXX]. The parties did not consider this second letter to be a binding agreement. Appellant discussed the negotiations as they evolved, with significant changes to the transaction being negotiated. The Stock Purchase Agreement was significantly changed, dealing with rights of Appellant's employees, and the parties had to negotiate [XXXXXXXXXXXXXXXX]. The letter was not an agreement in principle, but an agreement to open or continue negotiations. Both letters were subject to conditions precedent, which were "incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law." Therefore, they could not be given present effect. (*Id.*, at 10-11, citing 13 C.F.R. § 121.103(d)(3).).

Further, Appellant maintains there was no agreement in principle within 180 days of its self-certification, because the second letter does not qualify as an agreement in principle. The second letter is significantly different from the first letter, and significant, material terms of the merger were negotiated through July and August of 2021, leading up to the September closing. Here, Appellant argues that a break in negotiations means there is no agreement in principle. (*Id.*, at 12, citing *Size Appeal of Enhanced Vision Sys., Inc.*, SBA No. SIZ-5978 (2018) and *Size Appeal of Telecomm. Support Servs., Inc.*, SBA No. SIZ-5953 (2018).)

In turn, Appellant argues the Area Office "cherry-picked" the applicable regulation, stating the letters were not impossible or unlikely, speculative, or based on guesses, and thus were agreements in principle, when the full text of the regulation also included subject to conditions, unenforceable under state or Federal law, as these letters of intent were. (*Id.*, at 13.) Appellant further points out OHA held that when a letter of intent was non-binding, the specified price was subject to extensive due diligence, and the facts showed the parties were actively negotiating an acquisition, there was not an agreement in principle. (*Id.*, at 14, citing *Telecomm. Support Servs*.) The fact that the parties reached agreement does not mean there was an agreement in principle at the time that either letter of intent was signed. (*Id.*, at 17 citing *Size Appeal of The W.I.N.N. Group, Inc.*, SBA No. SIZ-5360 (2012).) Appellant maintains that neither the first nor the second letter of intent established an agreement in principle, because significant, material terms were negotiated through July and August, and continued up to and including on the closing date of the acquisition on September 3, 2021. (*Id.* at 17.)

Thus, the Area Office erred in applying the "unlimited in two" rule to WMR, because the rule was only promulgated in 2020, and it was not made retroactive. (*Id.* at 19, citing 85 Fed. Reg. 66146, 66148-49 (Oct. 16, 2020).) Appellant claims, neither the "unlimited in two" or the three-in-two rule, are applicable here. While Appellant concedes that it has violated the rule, it argues that the remedy for such violation is for the Area Office to undertake a general affiliation analysis. The Area Office undertook a general affiliation analysis and concluded Appellant and Woolpert were not affiliated under common management, identity of interest or the newly organized concern rule. (*Id.*, at 20-21, 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).

However, the Area Office erred in concluding that WMR should not be treated as a joint venture, but as a stand-alone entity with which Appellant was affiliated. A violation of the unlimited in two rule is not a basis for treating WMR as a stand-alone entity, rather a basis for conducting a determination whether there is general affiliation between the joint venture partners. (*Id.*, at 22-23, citing *Size Appeal of Excellus Sols., LLC*, SBA No. SIZ-5999 (2019).)

Lastly, Appellant argues that WMR, while not a mentor-protégé joint venture, still allowed it to benefit from having a large business joint venture partner. Woolpert purchased equipment, incurred other large costs, and handled administrative tasks for WMR. The violation of the rule was not egregious, being only one contract fourteen months after the end of the regulatory period. Appellant asserts it would be inequitable to impose a finding of affiliation on the two firms for this reason. (*Id.*, at 24, citing *Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254 (2011).)

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).

Appellant's size must be determined as of the date it certified itself as small, as part of its initial bid or proposal. 13 C.F.R. § 121.404(f). Here, that was January 22, 2021. Accordingly, the regulations in effect on that date will be utilized to determine Appellant's size.

B. Analysis

The Area Office's finding that Appellant is affiliated with Woolpert and thus, other than small is based upon three findings. First, its finding that Appellant is affiliated with Woolpert under the present effect rule, because its first letter of intent with Woolpert constituted an agreement in principle. Second, its finding that Appellant is affiliated with Woolpert, because the second letter of intent with Woolpert was executed within 180 days of its offer on the subject procurement. Third, its finding that Appellant is affiliated with WMR, because of the violation of the unlimited in two rule. Under any one of these reasons, Appellant would be found other than small. Section II.B, *supra*.

First, Appellant's argument that the unlimited in two rule does not apply to Appellant because when the rule was promulgated, it did not state that it applied to existing joint ventures, citing 85 Fed. Reg. 66146, 66148-49 (Oct. 16, 2020), is erroneous. Appellant's size must be determined as of January 22, 2021, pursuant to 13 C.F.R. § 121.404(f), and therefore, the regulations in effect as of that date must be used to determine size. *Size Appeal of FTSI-PHELPS JV*, SBA No. SIZ-5583, at 7 (2014).

The applicable and current rule states:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in or carry out business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity may not be awarded contracts beyond 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 the joint venture. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An induvial joint venture be awarded one or more contracts after that two-year period as long as it suits an offer including price prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award.

13 C.F.R. § 121.103(h).

There is, thus, a significant change in the language of the regulation. The consequence of breaking the rule by continuing to seek and receive contract awards after the expiration of the two-year period is not "being deemed affiliated for all purposes" as was the case for the previous rule. *See* 13 C.F.R. § 121.103(h) (2020); *Size Appeal of Optimal Geo, Inc.*, SBA No. SIZ-6140 (2022) (*Optimal Geo I*). Rather, the joint venture partners are now "deemed affiliated for the joint venture."

Second, Appellant concedes WMR received its first award on March 29, 2016, and its third contract resulted from an offer made on May 30, 2019, which was awarded on August 16, 2019. Section II.C, *supra*. There is no question WMR submitted an offer more than two years after it received its first award, and this violated the rule.

Appellant's contention that this should merely be the basis of an inquiry into whether it is affiliated with Woolpert, relying on cases such as *Safety & Ecology* and *Magnum Opus Techs.*, is also erroneous. While the Area Office conducted such an inquiry and found no other basis for affiliation, Appellant's reasoning that it should not be found affiliated with Woolpert on the basis of the two firms' participation in WMR, is flawed. As discussed in *Optimal Geo I*, the regulation has changed since *Safety & Ecology* and *Magnum Opus Techs*. were decided. In 2009, SBA proposed a revision to the regulation, which provided that the parties to a joint venture which violated the three-in-two rule were "affiliated for all purposes." 74 Fed. Reg. 55694, 55695, 255714 (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). In 2020, SBA amended the regulation once again to read as quoted above. 85 Fed. Reg. 66146, 66148-49 (Oct. 16, 2020). However, in the current regulation,

the consequence of breaching the two-year time limit is that the joint venture partners are "deemed affiliated for the joint venture."

In reviewing earlier versions of 13 C.F.R. § 121.103(h), the U.S. Court of Federal Claims held that "[b]y defining and setting forth the requirements of a joint venture 'for the purposes of this provision,' SBA refined the meaning of "joint venture' as it applies to Paragraph (h) and its subparagraphs. . . . Thus, any use of the term 'joint venture' within Paragraph (h) and its subparagraphs must refer *only* to a joint venture that meets the definition and requirements of Paragraph (h)." *Swift & Staley, Inc. v. United States*, Fed. Cl. No. 21-1279, slip op. at 6 (Aug. 27, 2021). The Court held that any joint venture that did not meet the requirements of the regulation was excluded from the definition of a joint venture, and thus, a partner which was a challenged concern is not required to "include in its receipts its proportionate share of joint venture receipts," as required for joint ventures under Subparagraph (h)(5). *Id.*, at 7. A firm which no longer meets the requirements of joint venture under the regulation must then be treated as a separate business entity. *Id.*, at 7-9; *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125, at 11 (2021) (Remand). SBA must then conduct a standard affiliation analysis between the separate entity and the challenged concern, to see if they are affiliated. *Swift & Staley* (Remand), at 12-14.

Here, while SBA amended the regulation, Subparagraph (h) still defines a joint venture and lays out the characteristics that a joint venture must meet if it is to be treated as such for purposes of determining size. Clearly, an essential characteristic is the two-year term. A joint venture may not submit offers after two years from the date of its first award. WMR did so, and accordingly, does not meet the standards of a joint venture under the regulation.

Accordingly, I hold the Area Office did not err when it concluded that WMR's violation of the regulation rendered it a stand-alone entity whose affiliation relationship with Appellant must be evaluated for purposes of determining Appellant's size according to the rules on affiliation. Appellant and Woolpert each own 50% of WMR. Thus, Appellant must be held to have the power to control, and thus, be affiliated with WMR. 13 C.F.R. § 121.103(c)(1); *Size Appeal of Tesecon, Inc.*, SBA No. SIZ-5985, at 7 (2019). Because Appellant is affiliated with WMR, it is therefore other than small. Appellant attempts to argue the violation of the rule, here, is not "egregious" and therefore, it should be ignored but can point to no authority in support of such a position. Because Appellant is other than small based upon its affiliations with WMR, I need not consider whether it is affiliated with Woolpert.

I conclude Appellant has failed to establish that the size determination is based upon error of fact or law. Accordingly, I must deny this appeal and affirm the size determination.

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