

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

SIZE APPEAL OF:

Focus Revision Partners,

Appellant,

RE: NWI&T Atkins SB JV, LLC

Appealed From
Size Determination No. 06-2021-071

SBA No. SIZ-6188

Decided: January 31, 2023

APPEARANCES

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian. P. Patterson, Esq., Schoonover & Moriarty LLC, Olathe, Kansas, for Focus Revision Partners

Joshua A. Mullen, Esq., Julius H. Bodie, Esq., Womble Dickinson (US) LLP, Washington, D.C., for NWI&T Atkins SB JV, LLC

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION¹

I. Introduction

On October 20, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2021-071, concluding that NWI&T Atkins SB JV, LLC (NWI&T) is an eligible small business for the subject procurement. NWI&T is an unpopulated joint venture between North Wind Infrastructure and Technology, LLC a/k/a LBYD Federal, LLC (North Wind) and its SBA-approved mentor, Atkins North America, Inc. (Atkins).

On appeal, Focus Revision Partners (Appellant) maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted.

¹ This decision was originally issued under a protective order. After receiving and considering requests for redactions, OHA now issues this redacted decision for public release.

II. Background

A. Solicitation

On March 15, 2021, the Federal Emergency Management Agency (FEMA) issued Synopsis No. HSFE60-21-S-0002 for architect-engineer (A&E) services in support of FEMA's Risk Mapping, Assessment, and Planning program. The procurement was to be conducted pursuant to Federal Acquisition Regulation (FAR) subpart 36.6, and was set aside entirely for small businesses under North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding size standard of \$16.5 million average annual receipts. Phase I proposals were due on April 14, 2021 for offerors to provide their qualifications.

Following review of Phase I proposals, FEMA issued Request for Proposals (RFP) No. 70FA6021R00000002 on June 25, 2021. The RFP indicated that the contractor “shall support the nation-wide review and processing of Letter of Map Changes (LOMRs), Conditional Letter of Map Revisions (CLOMRs), Physical Map Revisions (PMRs) and support for the review of reimbursement requests for appeals that identify an error.” (RFP, Amendment 0001, Attach. A, at 2.) These services are referred to as “MT-2 support services.” (*Id.* at 1.) For key personnel, the prime contractor was instructed to propose a Program Director responsible for “[p]erform[ing] day-to-day management of overall contract support operations.” (*Id.* at 10.) If applicable, a copy of any joint venture agreement was to be provided as part of the Business Proposal. (RFP, Amendment 0001, at 93.)

B. Proposal

NWI&T submitted its initial proposal in response to the RFP on July 13, 2021. With its initial Business Proposal, NWI&T included a copy of its Joint Venture and Operating Agreement (hereafter, “the JVA”), effective March 1, 2018. (Initial Business Proposal, Attach. 5.)

In its initial Technical Proposal, NWI&T stated that “the MT-2 Program will be managed by Program Director Sarada Kalikivaya.” (Initial Tech. Proposal at 4.) Ms. Kalikivaya is an Atkins employee. (*Id.* at 3.) Mr. Eric Johnson was identified in the initial proposal as “Program Principal-in-Charge.” (*Id.* at 5.) According to an organizational chart included in the initial proposal, all contractor personnel, except Mr. Johnson, would be subordinate to Ms. Kilikivaya. (*Id.* at 5.)

C. Protest

On September 15, 2021, the Contracting Officer (CO) issued Appellant a pre-award notification letter “in accordance with [FAR] 15.503(a)(2).” (Letter from J. Morgan (Sept. 15, 2021), at 1.) The letter informed Appellant that FEMA planned to award the contract to NWI&T, and that FEMA therefore “will not consider subsequent revisions of your proposal.” (*Id.*)

On September 17, 2021, Appellant filed a size protest challenging NWI&T's size. Appellant acknowledged that NWI&T apparently is a joint venture between an SBA-approved mentor and protégé under SBA's All-Small Mentor-Protégé Program (ASMPP). (Protest at 1.) However, North Wind — the protégé — may have undergone a name change “and possible restructuring” without SBA's approval. (*Id.* at 5-7.) As a result, the Mentor-Protégé Agreement (MPA) between North Wind and Atkins may be invalid. (*Id.*)

Appellant further contended that NWI&T's JVA likely is deficient, thereby rendering NWI&T ineligible for the instant award. (*Id.* at 7-16.) Appellant maintained that Atkins, rather than North Wind, will supply the responsible manager for this procurement, in contravention of 13 C.F.R. § 125.8(b)(2)(ii)(B). (*Id.* at 8-10.) Specifically, “this position will likely be filled by Atkins incumbent program manager, [Ms.] Kalikivaya.” (*Id.* at 8.) NWI&T also cannot meet the performance work requirements at 13 C.F.R. § 125.8(c), because (1) there is a disparity of direct substantive experience between the joint venturers, which will ultimately require Atkins, a large business with significant relevant experience, to perform “most — if not all —” of the required work; and (2) due to North Wind's dearth of experience, “it is likely that Atkins will perform beyond 60% of [NWI&T's] work . . . or Atkins will perform the overwhelming majority of the substantive work itself.” (*Id.* at 11-12.) Appellant contended that North Wind brings little to NWI&T apart from its small business status. (*Id.* at 13.)

D. Protest Response

On September 27, 2021, NWI&T responded to the size protest. NWI&T, first, addressed Appellant's allegations pertaining to North Wind's name change. NWI&T asserted that North Wind “existed in its current form and has been under the same ownership and control since inception on January 5, 2016.” (Protest Response at 3.) Although North Wind is undergoing a name change “for rebranding purposes,” this change “does not create a new entity and does not change the MPA” because North Wind will continue to exist under the same Data Universal Numbering System (DUNS) number and Taxpayer Identification Number (TIN). (*Id.*)

Next, NWI&T disputed Appellant's allegations that its JVA is deficient. NWI&T stated that a North Wind employee, Mr. Johnson, will serve as NWI&T's “Principal-in-Charge and Responsible Manager over the entire contract.” (*Id.* at 6.) In its final Technical Proposal dated September 24, 2021, NWI&T amended its organizational chart to reflect that Ms. Kalikivaya will report to Mr. Johnson. (*Id.*) As a result, Mr. Johnson “will be the highest ranking official on the entire contract team.” (*Id.*) Mr. Johnson also is designated as the point of contact with FEMA for contract negotiations. (*Id.* at 7.) “Mr. Johnson's designation as the ‘Principal-in-Charge’ is significant under Idaho engineering law, which is the location of North Wind, because an engineer with ‘Responsible Charge’ has control and direction over all engineering work conducted.” (*Id.*, citing Idaho Code Ann. § 54-1202(15).) Mr. Johnson's resume also confirms that he has extensive experience relevant to the subject procurement. (*Id.* at 8.)

NWI&T highlighted that § 5.2 of its JVA states that the Responsible Manager will be an employee of North Wind. (*Id.*) Additionally, “once the requirements for the Contract under the Solicitation became more defined, an Addendum also was added to the [JVA] confirming Mr. Johnson's role as the Responsible Manager.” (*Id.*) The JVA also demonstrates that North Wind

will meet the performance of work requirements. (*Id.*) According to the JVA, the Managing Venturer, North Wind, will provide “overall executive oversight” and will have “overall responsibility for managing the Contract”; the Responsible Manager, an employee of North Wind, “will perform the day-to-day management and execution of the Contract”; and as Managing Venturer, North Wind “will perform a minimum of [XXXX] percent of the work for the sum of all Contracts performed under the Joint Venture, unless otherwise agreed to by the Members.” (*Id.* at 9, emphasis NWI&T's.) Contrary to Appellant's suggestions, North Wind does have “experience and expertise” relevant to the subject procurement. (*Id.*)

NWI&T then argued that the instant procurement is “highly indefinite in nature.” (*Id.*) In particular, “there is no definite number of cases that will be received and also no confirmation of the types of cases that will be received from different regions.” (*Id.* at 10.)

E. Joint Venture Agreement and Addendum

NWI&T's JVA, signed by representatives of North Wind and Atkins, became effective March 1, 2018. The JVA indicates that NWI&T is “an unpopulated joint venture” organized as a Delaware limited liability company (LLC). (JVA at 1.) NWI&T was created specifically to “compete for [XXXXXXXXXXXXXXXX],” a procurement conducted by the U.S. Army Corps of Engineers, but NWI&T also may choose to compete for other contracts. (*Id.*) “[T]he work, labor and materials necessary for the completion” of other contracts will “be described in future addendums to this Agreement.” (*Id.*) North Wind owns 51% of NWI&T, and Atkins the remaining 49%. (*Id.*, Exh. A.) The JVA identifies North Wind as the Managing Venturer and Atkins as the Partner Venturer. (JVA at 3.)

According to the JVA, NWI&T is governed by a Management Committee which has “the exclusive power and authority to manage business and affairs of [NWI&T], including in performing the Contract.” (*Id.* ¶¶ 5.1.1 and 5.1.2.) The Management Committee consists of five representatives (“Managers”), three of whom are selected by North Wind, and two by Atkins. (*Id.* ¶ 5.1.1.) Each Manager has one vote, and at least two Managers appointed by North Wind and at least one Manager appointed by Atkins are needed to establish a quorum. (*Id.* ¶¶ 5.1.1 and 5.1.4.)

The JVA stipulates that the Responsible Manager on a contract will be a North Wind employee. (*Id.* ¶ 5.2.1.) “The Responsible Manager is responsible for performance of the Contract, overseeing the job site, and reporting to and implementing the instructions of [North Wind],” as well as for day-to-day management and administration of the contract. (*Id.* ¶¶ 5.2.1 and 5.2.3.) “[A]t its discretion and with approval of the Management Committee,” Atkins may appoint a Deputy Manager “to assist the Responsible Manager in managing [NWI&T's] performance of its day-to-day responsibilities under the Contract.” (*Id.* ¶ 5.2.3.)

The JVA indicates that, as the Managing Venturer, North Wind will be “primarily responsible for the development of the proposal.” (*Id.* ¶ 11.1.) In the event that NWI&T's proposal is accepted, North Wind will “lead negotiations of the Contract, giving due consideration to any recommendations provided by Atkins.” The JVA further provides:

[North Wind] shall not change any of the terms or conditions of the portion of the proposal concerning Atkin[s]'s areas of work, including Atkin[s]'s proposed pricing to perform such areas of work, without Atkin[s]'s prior written agreement.

(*Id.*)

The JVA does not address the instant procurement, reiterating that “[t]he performance obligations under this Agreement are contingent upon award of one or more Contracts to be described in future addendums to this Agreement.” (*Id.* at 1.) Likewise, with regard to the “Major Equipment, Facilities, and Other Resources” that will be contributed by each joint venturer, the JVA states:

Upon award of a Contract, the Managing Venturer and the Partner Venturer will provide equipment, facilities, and other resources to the Joint Venture to perform the contract. The list of such items and the cost or value of such equipment, facilities, and other resources to be provided by the Managing Venturer and the Partner Venturer to the Joint Venture will be identified in an addendum to this Agreement.

(*Id.* ¶ 11.4.) The JVA adds that North Wind, the Managing Venturer, will make “an initial cash contribution of \$[XXXX]” and will provide equipment and facilities necessary “to perform the work in accordance with the scope of work that is subcontracted to them.” (*Id.* ¶ 11.4.1.) Atkins, the Partner Venturer, will provide “an initial cash contribution of \$[XXXX]” and needed equipment and facilities “to perform the work in accordance with the scope of work that is subcontracted to them.” (*Id.* ¶ 11.4.2.)

Regarding “Performance of Work,” the JVA states:

The Venturers agree and understand that, for any Contract performed by the Joint Venture, the Joint Venture must comply with the applicable limitations on subcontracting in 13 C.F.R. § 124.510. The Venturers further agree and understand that the Managing Venturer must perform on each Contract awarded to the Joint Venture the amount of work satisfying the regulatory minimums specified in Sections 124.510 and 125.6, and that such work performed by the Managing Venturer must be more than administrative or ministerial functions so that it gains substantive experience. Moreover, the Managing Venturer will perform a minimum of [XXXX] percent of the work for the sum of all Contracts performed under the Joint Venture, unless otherwise agreed to by the Members. The Venturers will meet on a quarterly basis after award of the Contract to ensure the Joint Venture and the Managing Venturer meet their work performance requirements.

(*Id.* ¶ 11.5.3.1.) The JVA contains similar instructions for “Source of Labor,” stating:

The Managing Venturer will submit a staffing plan outlining its method of maintaining a labor pool throughout the duration of the Contract performance. The number of and skills of the employees provided by each JV Member will be

determined by the requirements of individual task orders and the percentage of work requirements identified in Article 11.5.3.1 of this document. The Joint Venture will be staffed with existing employees of the Managing Venturer and the Partner Venturer and by new hires that will be made in accordance with the requirement under Executive Order 13495 to provide a right of first refusal to the incumbent contract personnel, as applicable. The Managing Venturer will also utilize existing labor markets to maintain the necessary staffing throughout the duration of the Contract performance. The Venturers recognize that the exact division of work as between themselves will be defined in the Joint Venture's response to the Solicitation and the resulting Contract. They, therefore, agree that the actual allocation of work and staffing between them will be consistent with their proposal and the provisions of SBA's regulations.

(*Id.* ¶ 11.5.1.) Regarding addendums to the JVA, the JVA states:

An addendum to this agreement will be prepared for each additional Contract that details the specific Contract tasks the Managing Venturer and Partner Venturer will perform, how the work performance requirements will be met, and the anticipated source of labor to meet Contract obligations.

(*Id.* ¶ 11.5.3.3.) The JVA stipulates that any such addendums require “the approval of each of the Members.” (*Id.* ¶ 5.3.)

Concerning amendments to the JVA, the JVA states:

If the Joint Venture pursues additional contracts, this Agreement will be amended setting forth the performance requirements on those additional contracts. All amendments to this Agreement shall be in writing and executed by both Venturers to this Agreement. To the extent required under SBA regulations and/or the Contract, any such amendments must also be submitted to and approved by SBA.

(*Id.* ¶ 12.6.) Finally, the JVA states, in part:

It is the intent and desire of the parties that this Agreement and any Addendum thereto comply with the rules, regulatory requirements and guidance governing the applicable SBA contracting program and any provisions of this Agreement or subsequent addendums to the joint venture that are in conflict with or are prohibited by said rules, regulations and guidance governing the contracting program shall be null and void ab initio or shall be interpreted in a manner that is in compliance with the SBA rules, regulations and/or guidance.

(*Id.* ¶ 12.8.)

The Area Office file also includes an Addendum to the JVA (the “JVA Addendum”) pertaining to the instant procurement. The JVA Addendum is unsigned by either of the joint

profit and loss statement, including a statement of final profit distribution, to the SBA no later than 90 days after completion of the Contract.

(b) In accordance with Section 11.8 of the [JVA], the Members further agree and acknowledge that the Members must describe to the SBA or other required persons how the Company and its Members are meeting or have met the applicable performance of work requirements for the Contract in accordance with the applicable SBA regulations. The Members, therefore, agree that they will cooperate to ensure that the following reports shall be completed and timely submitted as set forth below:

(i) North Wind must annually (not less than 45 days after each operating year of the Company or earlier if required) submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of North Wind and an authorized official of Atkins, explaining how the performance of work requirements are being met for the Contract being performed during the year; and

(ii) No later than 90 days after the completion of the Contract (or more frequently if required by the relevant contracting officer), North Wind must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of North Wind and an authorized official of Atkins, explaining how and certifying that the performance of work requirements were met for the Contract and further certifying that the Contract was performed in accordance with the provisions of this Agreement that are required by SBA's regulations.

(c) In addition to the foregoing reports, within 15 days of the end of the completion of each Fiscal Year and within 15 days of the end of the completion of each Contract, the Managing Venturer shall review the SBA regulations at 13 C.F.R. §§ 125.8, 125.9, and 124.513 to identify all reporting requirements provided for under those regulations at that time and shall ensure that the Company and its Members timely submit all reports required by those provisions. All Members agree to cooperate in the creation and completion of all such required reports.

(*Id.* at 3.)

F. CO's Chronology

In an e-mail to the Area Office, the CO offered the following timeline of events related to the solicitation and NWI&T's proposal:

- 3/15/2021: FAR 36.6 Public Announcement was made on beta.SAM.gov, which required submittal of any applicable joint venture agreements.
- 4/13/2021: [NWI&T] responded to the public announcement and provided an SF330, information regarding their qualifications, as well as their [JVA] marked effective 1 March 2018.

- 6/25/2021: The request for proposal (RFP) was issued to [NWI&T].
- 7/1/2021: FEMA issued an amendment to the RFP, prior to the proposal due date.
- 7/13/2021: [NWI&T] provided a timely response to the RFP, which include[d] the [JVA] marked effective 1 March 2018 as part of their business proposal.
- 7/28/2021: [NWI&T] provided a revised business proposal in response to negotiations, at the government's request. This business proposal included the [JVA] marked effective 1 March 2018.
- 8/13/2021: [NWI&T] provided a revised business proposal in response to negotiations, at the government's request. This business proposal included the [JVA] marked effective 1 March 2018.
- 8/24/2021: FEMA issued an amendment to the RFP, and requested response by 8/26/2021.
- 8/26/2021: [NWI&T] provided a timely response to the RFP amendment, which included a revised business proposal. This business proposal included the [JVA] marked effective 1 March 2018.
- 9/7/2021: FEMA requested the final proposal revision from [NWI&T].
- 9/10/2021: [NWI&T] provided a timely response to the government's request, which included a revised business proposal. This business proposal included the [JVA] marked effective 1 March 2018.
- 9/23/2021: FEMA requested a revised technical proposal (specifically the PWS, OCI plan and QASP) from [NWI&T]. This revision was necessary to capture changes not included in the final technical proposal revision submitted on 9/10/2021, and remove “track changes” and strike-through text so that the technical proposal could be incorporated into the final contract.
- 9/24/2021: [NWI&T] provided a revised technical proposal as requested. Additionally, [NWI&T] provided a revised business proposal, which included the [JVA] marked effective 1 March 2018, as well as an addendum titled “IDENTIFICATION OF SOLICITATION & CONTRACT; MAJOR EQUIPMENT, FACILITIES & OTHER RESOURCES FOR THAT CONTRACT; AND MAJOR STAFFING PLAN FOR THAT CONTRACT.”

Additional facts and supporting information:

- The RFP requested the contractor's response consist of two (2) parts:

- The technical proposal detailing the contractor's proposed technical approach in the Performance-based Work Statement (PWS) and Quality Assurance Surveillance Plan (QASP), as well as an OCI Mitigation Plan and other technical documentation.
- The business proposal, which contained the contractor's pricing information, representations and certifications, audit information, responsibility information, subcontractor documentation and joint venture agreement.
- . . . [I]t appears [NWI&T] submitted the same [JVA] on 4/13/2021, 7/13/2021, 7/28/2021, 8/13/2021, 8/26/2021 and 9/10/2021.
- In FEMA's request to [NWI&T] on 9/23/2021, we did not request a revised business proposal or [JVA].
- [NWI&T] submitted an unsolicited revision to the business proposal on 9/24/2021. This revision included the addendum to the [JVA] noted above.

(E-mail from J. Morgan to J. Nietes (Oct. 14, 2021).)

The CO also provided the Area Office a copy of his September 23, 2021 e-mail to NWI&T. The e-mail requests that NWI&T make “one final revision” to its technical proposal, as follows:

The OCI mitigation plan notification and resolution timeframes are too long, given that the program will need to identify which subcontractor will be working a case rather quickly after submittal. Please revise the OCI mitigation plan to include the COR and CO in the initial notification process. Additionally, please revise the plan to shorten the timeframe required for notification of the COR/CO to five (5) business days, rather than ten (10) business days. Finally, please revise the plan to shorten the timeframe for submission of the avoidance/mitigation/alternatives from within twenty (20) business days after CO/COR notification to within ten (10) business days of CO/COR notification.

Additionally, please remove all strike-through text and underlined/track changes markings from the final technical proposal, so that we have a clean document to incorporate into the final contract.

Request this revised technical proposal incorporating the changes above be submitted no later than 2:00pm Friday, September 24, 2021.

(E-mail from J. Morgan to K. Brown (Sept. 23, 2021) (emphasis in original).)

G. Size Determination No. 06-2021-071

On October 20, 2021, the Area Office issued Size Determination No. 06-2021-071, finding that NWI&T is a small business under the applicable size standard. (Size Determination at 21.) The Area Office identified July 13, 2021 as the relevant date to determine NWI&T's size. (*Id.* at 1, 21.) That was the date NWI&T self-certified as small in its initial proposal for the instant procurement. (*Id.* at 21.)

The Area Office, first, examined the ownership and management of NWI&T. NWI&T was formed on February 1, 2018, as a joint venture between North Wind and Atkins. (*Id.* at 5.) North Wind (the protégé member of the joint venture) owns 51% of NWI&T, and Atkins (the mentor) owns the remaining 49%. (*Id.*) “Certified into the 8(a) Business Development Program in December 2016, North Wind is owned by CIRC Development Corporation (CDC) d/b/a North Wind Group, a holding company.” (*Id.*) In turn, “CDC is wholly-owned by Cook Inlet Region, Inc. (CIRI), an Alaska Native Corporation (ANC).” (*Id.*) The Area Office found that CIRI and CDC control North Wind. (*Id.* at 6.) However, North Wind is not affiliated with these concerns due to the exception from affiliation at 13 C.F.R. § 121.103(b)(2). (*Id.*)

The Area Office found that North Wind and Atkins entered into an MPA, which was approved by the Director of the ASMPP on December 28, 2017. (*Id.* at 7.) The MPA “has never been amended or changed, and is still listed on the SBA's [ASMPP] MPA Approval List.” (*Id.*)

The Area Office then turned to Appellant's allegations regarding North Wind's name change. (*Id.*) The Area Office determined that a name change does not alter the parties participating in the ASMPP and does not affect the terms of the MPA. (*Id.* at 10.) The Area Office highlighted NWI&T's response to Appellant's size protest, which had explained that North Wind “is in the process of going through a full name change” for “rebranding purposes,” but that the name change “involves the same exact entity with the same corporate form that is under the same ownership and same control” with the same DUNS number and Employer Identification Number (EIN). (*Id.* at 7-8.) North Wind further asserted that, regardless of the lengthy name change process stemming from IRS approval delays, it “is still the same entity with the same DUNS number.” (*Id.* at 8.) Agreeing with NWI&T, the Area Office concluded that, pursuant to SBA's regulations, North Wind and Atkins may utilize the mentor-protégé exception to affiliation at 13 C.F.R. § 121.103(b)(6). (*Id.* at 8-10, citing *Size Appeal of Jackson and Tull*, SBA No. SIZ-5492 (2013).)

Next, the Area Office examined Appellant's allegations that NWI&T's JVA does not comply with SBA regulations. Because North Wind and Atkins are an SBA-approved mentor and protégé under the ASMPP, the applicable regulations are found at 13 C.F.R. § 125.8(b) and (c). (*Id.* at 10-11.) The Area Office found that the JVA Addendum “was contained in [NWI&T's] final proposal revision.” (*Id.* at 11.)

In satisfaction of § 125.8(b)(2)(ii), the JVA, as supplemented by the JVA Addendum, designates North Wind as the Managing Venturer, and Mr. Johnson, an employee of North Wind, as the Principal-in-Charge and Responsible Manager, ultimately responsible for contract performance. (*Id.* at 11-12.) The JVA states that North Wind and Atkins own 51% and 49%,

respectively, of NWI&T, in compliance with § 125.8(b)(2)(iii). (*Id.* at 13.) The JVA states that NWI&T will establish and maintain a “special bank account” where “[a]ll receipts of the joint venture will be deposited,” in satisfaction of the requirements of § 125.8(b)(2)(v). (*Id.* at 14.) “Sections 11.4.1 and 11.4.2. of the JVA confirm the requirements of the parties’ in relation to Major Equipment, Facilities, and Other Resources,” in compliance with § 125.8(b)(2)(vi), and the JVA Addendum and Cost Proposal Worksheet set forth such matters in “even more detail.” (*Id.* at 14-15.) In satisfaction of § 125.8(b)(2)(vii), during the proposal process, North Wind will be the primary point of contact with FEMA. (*Id.*) Mr. Johnson will be primarily responsible for contract negotiations. (*Id.* at 16.) North Wind and Atkins “agree that the actual allocation of work and staffing between them will be consistent with their proposal and the provisions of SBA’s regulations,” and Mr. Johnson will “ensure that North Wind, the protégé member of the joint venture, performs at least 40% of the work” of NWI&T. (*Id.* at 16-17.) In compliance with § 125.8(b)(2)(viii), the JVA obligates both North Wind and Atkins to ensure performance and to complete performance if the other joint venturer were to withdraw. (*Id.* at 17.) NWI&T’s accounting and administrative records will be kept in the offices of the Managing Venturer, North Wind, unless SBA grants permission to keep such records elsewhere, as required by § 125.8(b)(2)(ix). (*Id.*) Upon completion of the contract, the final original records will be retained by North Wind in compliance with § 125.8(b)(2)(x), and annual reports showing “how the performance of the work requirements are being met for the Contract being performed during the year” will be submitted to the CO and SBA in compliance with § 125.8(b)(2)(xi). (*Id.* at 17-18.) Pursuant to § 125.8(b)(2)(xii), a report will be submitted to the CO and SBA “no later than 90 days after the completion of the Contract” explaining how “the performance of the work requirements were met for the Contract and further certifying that the Contract was performed in accordance with the provisions of the [JVA].” (*Id.* at 18.)

With regard to the performance of work requirements at 13 C.F.R. § 125.8(c), the Area Office noted that the JVA states that NWI&T will “comply with applicable SBA mentor-protégé joint venture regulations related to workshare and the Limitations on Subcontracting Rule, 13 C.F.R. §§ 125.8(c) and 125.6.” (*Id.* at 19.) According to the JVA Addendum, the protégé member of the joint venture, North Wind, will perform at least 40% of the contract work. Further, the JVA Addendum provides that the work performed by North Wind will be more than administrative or ministerial. (*Id.*) The Area Office, therefore, concluded that NWI&T’s JVA, as supplemented by the JVA Addendum, satisfies all the requirements of 13 C.F.R. § 121.103(h) and 13 C.F.R. § 125.8(b) and (c). (*Id.* at 20). The Area Office further found meritless Appellant’s allegation that North Wind has little experience to bring to the joint venture, as North Wind and Atkins have an SBA-approved MPA, and FEMA has determined that NWI&T possesses the necessary qualifications. (*Id.* at 20-21.)

H. Appeal

On November 4, 2021, Appellant filed the instant appeal challenging Size Determination No. 06-2021-071. Appellant identifies two principal errors in the size determination that, it argues, warrant reversal or remand.

First, Appellant argues that the Area Office did not adequately consider whether North Wind has the experience required to perform at least 40% of the substantive work in accordance

with 13 C.F.R. § 125.8(c)(2), despite Appellant's protest allegations describing the reasons why North Wind lacks the necessary direct substantive experience. (Appeal at 7-10.) Additionally, the Area Office conflated North Wind's experience with that of its corporate family and/or its mentor, Atkins, in concluding that North Wind had the experience required. (*Id.* at 11-12.)

Next, Appellant renews its allegations that NWI&T's JVA likely is deficient. In particular, the JVA does not properly itemize all major equipment, facilities, and other resources, as required by 13 C.F.R. § 125.8(b)(2)(vi). (*Id.* at 13.) Appellant claims that through the RFP and Atkins's incumbent knowledge, NWI&T knew the requirements of the work, but the Area Office did not consider this and erroneously permitted the JVA “to merely say that the parties would provide the equipment and facilities needed to perform whatever work they are allocated.” (*Id.* at 14.) Appellant further maintains that NWI&T's JVA did not name an employee of North Wind (the protégé) who will be responsible for “controlling the day-to-day management and administration of the contractual performance of the joint venture,” as required by 13 C.F.R. § 125.8(b)(2)(ii)(A)-(B). (*Id.* at 15.) Appellant claims that the Area Office merely reviewed an organizational chart and concluded that a North Wind employee was identified as a responsible manager, but a closer review of the JVA would have shown that the person who would actually be responsible for performing the day-to-day contract management is an Atkins employee. (*Id.* at 15-16.) Thus, the Area Office clearly erred by “failing to make this connection.” (*Id.* at 16.)

Lastly, Appellant contends that the Area Office incorrectly concluded that North Wind's name change was not in violation of the SBA regulations, and erroneously focused on “whether it remained the same legal entity not whether the parties needed to notify the SBA in advance of this change.” (*Id.* at 6, 16.) Specifically, 13 C.F.R. § 125.9(e)(7) stipulates that “SBA must approve all changes to a mentor-protégé agreement *in advance*, and any change made to the agreement must be provided in writing.” (*Id.* at 16, emphasis added by Appellant.) The regulation “does not say that the parties should seek approval of change after they are updated in the System for Award Management.” (*Id.*)

I. Supplemental Appeal

On March 25, 2022, after its counsel reviewed the Area Office file under an OHA protective order, Appellant moved to supplement its appeal, raising “new issues first discovered” upon reviewing the file. (Supp. Appeal at 1.)

Appellant argues that the Area Office improperly considered the JVA Addendum, because NWI&T submitted the JVA Addendum two weeks after the final proposal revisions, the relevant date to determine size under 13 C.F.R. § 121.404(d). (*Id.* at 8-13.) The Area Office found NWI&T's JVA compliant with SBA regulations only because it reviewed the JVA in conjunction with the undated, unsigned, post-protest JVA Addendum, which “supposedly plugged [the JVA's] holes.” (*Id.* at 3, 9.) Appellant highlights that FEMA requested final proposal revisions on September 7, 2021, and NWI&T furnished a final revised business proposal and a final revised technical proposal on September 10, 2021. (*Id.* at 2.) Accordingly, the date of final proposal revisions was September 10, 2021. (*Id.* at 2.) Approximately two weeks later, the CO requested “minor revisions to the *technical proposal*.” (*Id.* at 3, emphasis Appellant's.) The CO did not, however, invite or permit “additional revisions to [NWI&T's]

business proposal.” (*Id.*) Referencing OHA precedent, Appellant highlights that “documents created after the final proposal may not be used to contradict an offeror’s actual proposal,” and that “once a firm has submitted its final bid or final proposal revision, any subsequent changes in approach would be irrelevant to assessing the challenged firm’s size.” (*Id.* at 9, quoting *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5392, at 8 (2012) and *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5699, at 8 (2015).)

While NWI&T may argue that the CO’s instruction to revise the technical proposal granted NWI&T leave to revise its business proposal as well, “[§] 121.404(d) means that SBA will consider the sufficiency of a [JVA] as of the date of a final proposal revision *that is submitted for purposes of an agency’s evaluation* — after-award proposal amendments [] are not considered.” (*Id.* at 11, emphasis Appellant’s.) NWI&T also may attempt to argue that, although unsigned, the JVA Addendum was created prior to September 10, 2021, but that NWI&T “simply overlooked its inclusion in the final proposal revision.” (*Id.* at 12.) The JVA Addendum, however, also is undated, and NWI&T repeatedly submitted the same JVA without the JVA Addendum during the entire proposal submission period. (*Id.*)

Appellant additionally argues that the Area Office could not reasonably have considered the JVA Addendum because the unsigned JVA Addendum did not actually modify the JVA. The terms of NWI&T’s JVA “only permitted amendments through a signed writing.” (*Id.* at 13-14.) Furthermore, even if it had been signed, the JVA Addendum “still did not cure all defects” in the JVA because (1) it did not itemize the major equipment, facilities and other resources to be contributed by the joint venturers, 13 C.F.R. § 125.8(b)(2)(vi); and (2) it did not break down how the joint venturers would source labor or perform the contract. (*Id.* at 14-15.)

Appellant reiterates that the Area Office clearly erred in finding the JVA compliant with SBA regulations because (1) the JVA itself was not specific to the instant contract; (2) the JVA Addendum was created after the date of final proposal revisions, and is unsigned; and (3) even with the JVA Addendum, the JVA still does not meet all regulatory requirements. (*Id.* at 4-8, 15-20.)

J. SBA’s Comments

On October 7, 2022, SBA submitted comments in response to the appeal. SBA contends that in merging the 8(a) Business Development (BD) mentor-protégé program with the ASMPP, “SBA chose[] to bifurcate the timing mechanism for determining size and determining compliance with joint venture agreement requirements.” (SBA Comments at 2.) In particular, although the general rule — that a concern’s size is determined as of the date of self-certification with initial offer, including price — remains unchanged, “SBA has clearly adopted a rule that [the] time period for analyzing the contents of [JVAs] is more flexible.” (*Id.*) SBA continues:

Given that SBA has changed the joint venture requirements to increasing rely on more specific information regarding procurements, it is not feasible to require firms in all circumstances to be unable to change and update their agreements as the procurements and the terms/scope/conditions of solicitations changes. Contracts and contracting are complicated, and SBA’s adoption of this

flexible approach [at 13 C.F.R. § 121.404(d)] is an attempt to have stricter rules for joint ventures, while still allowing flexibility for small businesses to adapt to new and changed circumstances that often occur during the procurement process.

(*Id.* at 2-3.)

In the instant case, SBA agrees with Appellant that NWI&T's JVA “at the time of [initial] offer is clearly deficient.” (*Id.* at 3.) NWI&T's JVA was not updated prior to issuance of the RFP, nor apparently did NWI&T update the JVA at any time before the size protest was filed. (*Id.*) SBA further agrees with Appellant that “a clearly unsolicited new [JVA] or addendum submitted by a firm after the CO has requested and received final proposals should not be permitted.” (*Id.*) Nonetheless, the record reflects that the CO here “reach[ed] out to [NWI&T] to modify their proposal in some way.” (*Id.*) SBA emphasizes that, under 13 C.F.R. § 121.404(d), it is appropriate “consider updates to [JVAs] up until the time of the **date of the final proposal revision**.” (*Id.*, emphasis SBA's.) According to SBA:

[T]his language [of 13 C.F.R. § 121.404(d)] is meant to give the power to the [CO] to determine when a proposal is final, and the flexibility to small businesses to modify their proposals per the terms set by the [CO]. It should be noted that [§ 121.404(d)] did not say, final proposal revision that asked for updated joint venture agreements, or final proposal agreements that require changes to technical proposal, etc.

(*Id.*) SBA maintains that, under 13 C.F.R. § 121.404(d), “changes to the contents of [a] [JVA] could be made after notification of award.” (*Id.*) In SBA's view, “if the [CO] is requesting changes/modifications/updates to the proposal,” the more flexible timetable of § 121.404(d) should be used when reviewing the contents of JVAs. (*Id.* at 4.)

On October 13, 2022, Appellant moved to leave to reply to SBA's comments, expressing concern about “the breadth of the ‘flexibility’ SBA urges in its comments,” which in Appellant's view would be “unworkable.” (Motion at 2.) NWI&T opposes Appellant's motion, or in the alternative requests leave to sur-reply. In OHA practice, a reply to another party's response is not ordinarily permitted, unless OHA directs otherwise. 13 C.F.R. § 134.309(d). Here, SBA's comments do not raise new substantive issues, nor did OHA direct Appellant or NWI&T to reply to SBA comments. Accordingly, I DENY Appellant's motion for leave to reply, and EXCLUDE Appellant's proposed reply and NWI&T's proposed sur-reply from the record.

K. NWI&T's Response

On October 7, 2022, NWI&T responded to the appeal and supplemental appeal, urging that OHA should deny them. NWI&T maintains that the size determination is factually and legally supported, and that Appellant has not identified clear errors of fact or law that would warrant reversal. (Response at 3.) The Area Office “properly concluded” that North Wind and Atkins have “a currently enforceable [MPA].” (*Id.* at 2.) The Area Office also “reasonably concluded” that NWI&T's JVA, supplemented by the JVA Addendum, “are enforceable and properly comply with SBA's regulations at 13 C.F.R. § 125.8(b)(2).” (*Id.*)

NWI&T, first, argues that North Wind's name change neither changed the entity/party nor the terms of the MPA. (*Id.* at 5.) Citing various case precedent, NWI&T asserts that “a mere change in a party's name does not result in a change to the underlying contract.” (*Id.*) The MPA between North Wind and Atkins “still exists” and both entities are “still obligated to perform it.” (*Id.* at 6.) As the MPA “has not been changed,” there is no requirement that SBA approve modifications to the MPA under 13 C.F.R. § 125.9(e)(7). (*Id.*)

NWI&T contends that questions of contractor responsibility, such as “past performance, experience, business systems, and certifications of small businesses seeking to perform a small business set-aside contract,” are generally reserved to the procuring agency, in this case FEMA, under 13 C.F.R. § 125.8(e). (*Id.*) Appellant improperly “relies on one sentence of commentary from the Federal Register, *which discusses* § 125.8(e)” in support of its allegation that North Wind has little experience to bring to the joint venture. (*Id.*, emphasis NWI&T's.) “[N]either § 125.8(e) nor any Federal Register commentary [] provide the SBA Area Office with any persuasive or mandatory authority to decide a size determination.” (*Id.* at 6-7.) The Area Office therefore properly rejected Appellant's claim that North Wind lacks relevant experience. Moreover, contrary to Appellant's unsupported contentions, the record “confirms” that North Wind has “sufficient experience” to perform the instant procurement. (*Id.* at 7.) Specifically, Mr. Johnson, the Principal-in-Charge and Responsible Manager, has “extensive” relevant experience required under the RFP. (*Id.* at 7-8.) The JVA, JVA Addendum, and NWI&T's proposal “all validate” that North Wind will perform “at least 40% of the *substantive work*” for the instant contract, as required by § 125.8(c)(2). (*Id.* at 8, emphasis NWI&T's.)

Next, NWI&T insists that the Area Office correctly treated September 24, 2021 as the date of final proposal revisions. (*Id.* at 9.) On September 23, 2021, the CO sent an e-mail to NWI&T, requesting a revised proposal to be submitted “no later than 2:00pm Friday, September 24, 2021.” (*Id.* at 9, internal quotations and citation omitted.) On September 24, 2021, NWI&T submitted its final proposal revision, consisting of a revised business proposal and revised technical proposal. (*Id.*) Thus, September 24, 2021 is the date “SBA must use when determining compliance with SBA's JV regulations[,] 13 C.F.R. § 121.404(d).” (*Id.*) Contrary to Appellant's suggestions, NWI&T's September 10, 2021 proposal “cannot be final if there were later revisions made to its technical and business proposals [], regardless of whether those revisions were ‘major’ or ‘minor’D”. (*Id.*, emphasis NWI&T's.) Likewise, Appellant's assertion that the regulations at 13 C.F.R. §§ 121.103(h)(1)(ii) and 121.404(d) “apply only to a proposal submitted for purposes of an agency's evaluation” is incorrect as “that limiting language does not appear” in the regulations. (*Id.* at 10.) Appellant's attempt to “create a ‘dichotomy’ between the technical and business proposals in this case, so that each proposal volume would have its own final proposal revision date” also is inconsistent with 13 C.F.R. §§ 121.103(h)(1)(ii) and 121.404(d). (*Id.*)

Appellant incorrectly argues that the JVA Addendum is invalid because it was unsigned. (*Id.* at 14.) Relying on *Matter of Seventh Dimension, LLC*, SBA No. VET-6057 (2020), NWI&T contends that “an unsigned addendum *is enforceable* when the addendum was created for the procurement in question, was incorporated by reference into the signed JVA, and was submitted with the proposal.” (*Id.*, emphasis NWI&T's.) The JVA Addendum meets the *Seventh*

Dimension criteria because (1) the JVA Addendum “clearly references the relevant procurement in question as it expressly identifies the Solicitation and describes the members' intended performance requirements for the contract”; (2) the JVA contemplates that an addendum to the JVA “will be prepared for each additional Contract”; and (3) the JVA Addendum was submitted with NWI&T's final proposal revision on September 24, 2021. (*Id.* at 14-15.) Contrary to Appellant's assertions, the JVA does require that an “addendum” must be signed by both joint venturers. (*Id.*) Rather, that requirement applies to an “amendment.” (*Id.*) Further, “the JVA Addendum, which is governed by Idaho law, does not require signatures when the parties show their mutual assent to the agreement in other ways.” (*Id.*) The JVA Addendum shows mutual assent because it was submitted as part of the final proposal revision, and it clearly indicates that the members “agreed” to its terms. (*Id.* at 16.)

NWI&T insists that the JVA, in conjunction with the JVA Addendum, satisfies the requirements of 13 C.F.R. § 125.8(b) and (c). Given that the underlying procurement is indefinite in nature, NWI&T “was not required” to address the contract-specific matters at § 125.8(b)(2) in the initial JVA. (*Id.* at 18-20.) Nevertheless, the JVA, on its own, provides “a sufficient description” of how North Wind and Atkins will furnish major equipment, facilities, and other resources “once a definite scope of work is publicly available.” (*Id.* at 20, citing §§ 11.4.1 and 11.4.2 of the JVA.) North Wind and Atkins also agreed that they would prepare a separate addendum providing greater detail on such matters, and did do so. (*Id.*) The JVA Addendum provides “even more detail” about the major equipment, facilities, and other resources, including a detailed list of anticipated ODCs that would be incurred. (*Id.* at 21.)

Similarly, the JVA complies with 13 C.F.R. §§ 125.8(b)(2)(vii) and 125.8(c). Given the indefinite nature of the contract, NWI&T highlights that its JVA need only include:

a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in [§ 125.8(c)] of this section, *or in the alternative*, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available.

(*Id.* at 22, quoting 13 C.F.R. § 125.8(b)(2)(vii), emphasis added by NWI&T.) The JVA provides that North Wind, as the Managing Venturer, will: “perform the major contract functions”; “provide overall executive oversight”; “have overall responsibility for managing the Contract to successful completion”; “perform a minimum of [XXXX] percent of the work”; and “perform on each Contract awarded to the Joint Venture the amount of work satisfying the regulatory minimum . . . and such work must be more than administrative or ministerial.” (*Id.* at 24-25.) The JVA Addendum clarifies that North Wind “will perform at least 40% of the substantive work of the JV” and that North Wind's employee, Mr. Johnson, will manage the contract. (*Id.*) The JVA is further in compliance with 13 C.F.R. § 125.8(b)(2)(ii) because it establishes that a North Wind employee will be the Responsible Manager, who has the “ultimate responsibility for the performance of the contract” awarded to NWI&T. (*Id.* at 27-28.) The JVA Addendum then specifically designates Mr. Johnson as the Principal-in-Charge and Responsible Manager “over

the entire contract.” (*Id.* at 28.) The JVA also complies with 13 C.F.R. § 125.8(b)(2)(xi)-(xii), and the JVA Addendum further supports the JVA's compliance. (*Id.* at 31.)

Lastly, NWI&T claims that the JVA is specific to the instant procurement because the JVA and JVA Addendum “identif[y] in detail how the parties intended to perform” the instant procurement. (*Id.* at 32-33.)

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

The Area Office determined, and no party disputes, that NWI&T is a joint venture between North Wind and Atkins, an SBA-approved mentor and protégé under the ASMPP.² The applicable SBA regulations make clear that an ASMPP mentor is encouraged to provide business development assistance to its protégé, which may include “assistance in performing prime contracts with the Government through joint venture arrangements.” 13 C.F.R. § 125.9(a). Further, although joint venturers normally are affiliated with one another for any contract performed by the joint venture, SBA regulations authorize an exception for mentor-protégé joint ventures:

A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for

² Although Appellant initially alleged that North Wind's name change may be in violation of 13 C.F.R. § 125.9(e)(7), Appellant does not revisit this contention in its supplemental appeal. Sections II.H and II.I, *supra*. Subsequently, on November 14, 2022, NWI&T filed a notice of supplemental authority/motion for OHA to consider supplemental authority. In its motion, NWI&T highlights that SBA's updated listing of active ASMPP participants “confirms” that the MPA approved by SBA on December 28, 2017 “remains in effect between protégé, LBYD Federal, LLC a/k/a [North Wind]” and Atkins, and was not terminated per 13 C.F.R. § 125.9(e)(7). (Motion at 1.) Appellant does not oppose NWI&T's motion. Under these circumstances, OHA finds that Appellant has abandoned the portion of its allegations pertaining to North Wind's change of name. Pursuant to 13 C.F.R. § 134.316(c), OHA will not adjudicate matters that “have been abandoned.”

which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor).

13 C.F.R. § 125.9(d)(1); *see also* § 121.103(h)(1)(ii). To qualify for the exception, the terms of the JVA must comply with § 125.8(b)(2) and (c). 13 C.F.R. §§ 121.103(h)(1)(ii) and 125.9(d)(1)(ii).

Here, the Area Office found that SBA formally approved the MPA between North Wind and Atkins on December 28, 2017, well before NWI&T submitted its proposal for the instant procurement. Section II.G, *supra*. As a result, North Wind and Atkins could properly joint venture for the instant procurement, provided that the protégé, North Wind, is a small business, and so long as NWI&T's JVA meets the requirements at § 125.8(b)(2) and (c). The Area Office determined that North Wind is small and that NWI&T's JVA does meet these conditions. Section II.G, *supra*. NWI&T thus was eligible for the exception to joint venture affiliation for an SBA-approved mentor and protégé. *Id.*

On appeal, Appellant argues that the Area Office erred in concluding that NWI&T's JVA is compliant with 13 C.F.R. § 125.8(b)(2) and (c). Sections II.H and II.I, *supra*. Appellant contends in particular that the Area Office improperly considered the JVA Addendum, a document that was never solicited by the procuring agency, and which NWI&T provided, for the first time, on September 24, 2021, after the award to NWI&T already had been announced. *Id.* Because I agree with Appellant that the Area Office erred by considering the JVA Addendum, this appeal must be granted.

As an initial matter, it is evident that, without the JVA Addendum, NWI&T's JVA does not contain sufficient detail to meet the regulatory requirements of 13 C.F.R. § 125.8(b)(2) and (c).³ Notably, the JVA was drafted in 2018, several years before the instant procurement was issued.⁴ Sections II.A and II.E, *supra*. Accordingly, although the JVA made references to a “Contract,” the contract in question was not the instant procurement but rather an unrelated procurement conducted by the U.S. Army Corps of Engineers. Section II.E, *supra*. Because the JVA contained no specific information pertaining to the instant procurement, it lacked the level of detail necessary to comply with 13 C.F.R. § 125.8(b)(2) and (c). The JVA did not, for example, designate “a named employee of the small business managing venturer” (*i.e.*, North Wind) to serve as the Responsible Manager, as required by 13 C.F.R. § 125.8(b)(2)(ii). *Id.* Nor did the JVA attempt to “[i]temiz[e] 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,

³ In its comments, SBA agrees with Appellant that NWI&T's JVA, without the JVA Addendum, is “clearly deficient” and does not meet the requirements of 13 C.F.R. § 125.8(b)(2) and (c). Section II.J, *supra*.

⁴ OHA has remarked that “[j]oint venture agreements, which are prepared prior to the issuance of the solicitation for which the joint venture is competing, often cannot meet the requirements of the regulation, and thus result in a finding that the joint venture has failed to comply with the regulation.” *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P, at 10 (2020).

where practical,” as contemplated by 13 C.F.R. § 125.8(b)(2)(vi). *Id.* Indeed, the joint venturers themselves recognized that, in order to meet SBA requirements, it would be necessary to create “future addendums to this Agreement” that would define “the work, labor and materials necessary for the completion” of those other, future contracts. *Id.* OHA has repeatedly held that, when a JVA fails to contain the requisite level of detail, a mentor-protégé joint venture cannot avail itself of the exception to affiliation. *Size Appeals of STAcqME, LLC*, SBA No. SIZ-5976, at 7 (2018); *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664 (2015), *aff’d sub. nom IEI-Cityside, JV v. United States*, 122 Fed. Cl. 750 (2015); *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014).

Given that NWI&T’s JVA does not, by itself, meet the requirements of 13 C.F.R. § 125.8(b)(2) and (c), this case ultimately turns upon whether the Area Office could appropriately consider the JVA Addendum, which purported to supplement the JVA with additional detail pertaining to the instant procurement. I must, however, agree with Appellant that the Area Office erred in considering the JVA Addendum, for several reasons.

First, the JVA Addendum was unsigned by either of the joint venturers, and thus does not constitute a valid “addendum” as defined by NWI&T’s JVA. According to the JVA, a proper addendum requires “the approval of each of the Members.” Section II.E, *supra*. Moreover, the JVA characterizes an addendum as a type of “amendment,” which must be “in writing and executed by both Venturers.” *Id.* The JVA thus states:

If the Joint Venture pursues additional contracts, this Agreement will be amended setting forth the performance requirements on those additional contracts. All amendments to this Agreement shall be in writing and executed by both Venturers to this Agreement. To the extent required under SBA regulations and/or the Contract, any such amendments must also be submitted to and approved by SBA.

Id. In the instant case, the JVA Addendum was not signed by North Wind or by Atkins, and thus is not a valid “addendum” or “amendment” under the terms of the JVA. In response to the appeal, NWI&T points to OHA’s decision in *Matter of Seventh Dimension, LLC*, SBA No. VET-6057 (2020) in arguing that an addendum to a JVA need not always be signed by the joint venturers. Section II.K, *supra*. The instant case, however, is readily distinguishable from *Seventh Dimension*, because OHA found that the *Seventh Dimension* JVA did not require that all addendums be signed, whereas NWI&T’s JVA plainly does contain such a requirement. Even if OHA were to construe an “addendum” as qualitatively different from an “amendment,” such that an addendum need only be approved by the joint venturers but not necessarily signed, the JVA Addendum here still appears to be invalid, because there is no indication that North Wind and Atkins did, in fact, jointly approve the JVA Addendum’s terms.

Second, even if the JVA Addendum had been signed and/or approved by the joint venturers, the JVA Addendum also should not have been considered because the JVA Addendum was created after the date of final proposal revisions, the relevant date for examining joint venture compliance pursuant to 13 C.F.R. § 121.404(d). According to the chronology the CO provided to the Area Office, “FEMA requested the final proposal revision from [NWI&T]”

on September 7, 2021, and NWI&T then submitted final technical and business proposals on September 10, 2021. Section II.F, *supra*. Accordingly, September 10, 2021 — the date of final proposal revisions — is the appropriate date for examining NWI&T's JVA under 13 C.F.R. § 121.404(d). The JVA Addendum, however, was not included with NWI&T's September 10, 2021 final proposal revisions. *Id.* Rather, NWI&T submitted the JVA Addendum, for the first time, on September 24, 2021, as part of an “unsolicited” revision to its business proposal. *Id.*

On appeal, NWI&T maintains that September 24, 2021, rather than September 10, 2021, should be considered the date of final proposal revisions, but these arguments are unpersuasive. As noted above, the CO states that he requested final proposal revisions on September 7, 2021, which NWI&T then submitted on September 10, 2021. Section II.F, *supra*. Furthermore, on September 15, 2021, the CO issued a pre-award notification to Appellant announcing the planned award to NWI&T. Section II.C, *supra*. Pursuant to FAR 15.503(a)(2), such a notification occurs “upon completion of negotiations,” and thus connotes that final proposal revisions must already have been received under FAR 15.307(b). It follows, then, that September 10, 2021 (*i.e.*, the last proposal revision prior to September 15, 2021, when the CO issued the pre-award notification) was the date of final proposal revisions. It also is worth noting that SBA's intent in promulgating 13 C.F.R. § 121.404(d) was to enable SBA to take into consideration proposal changes that may occur “during the negotiation process.” 85 Fed. Reg. 66,146, 66,153 (Oct. 16, 2020). To consider additional changes to a proposal, even after negotiations have concluded is, therefore, contrary to the intent of 13 C.F.R. § 121.404(d). Indeed, as Appellant correctly observes, permitting a challenged firm to amend its proposal after an award has been announced, and after a size protest has been filed, could essentially render SBA's size protest process a nullity, as a challenged firm always could submit an unsolicited “final proposal revision” in an effort to cure the defects alleged in a size protest.

Accordingly, pursuant to 13 C.F.R. § 121.404(d), the Area Office should have assessed whether NWI&T's JVA met the requirements of 13 C.F.R. § 125.8(b)(2) and (c) as of September 10, 2021, the date of final proposal revisions. As the JVA Addendum did not exist as of September 10, 2021, the JVA Addendum should have been disregarded. OHA has repeatedly held that documents created, or events transpiring, after the date to determine size are not relevant for purposes of assessing questions of size and affiliation. *E.g.*, *Size Appeal of Potomac River Group, LLC*, SBA No. SIZ-5689, at 4 (2015) (finding challenged firm's Third Amended and Restated Operating Agreement “completely irrelevant,” because that agreement was not in existence as of the date for determining size); *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646, at 11 (2015); *Size Appeal of Brown & Pipkins LLC*, SBA No. SIZ-5621, at 6 (2014); *Size Appeal of Alterity Mgmt. and Tech. Solutions, Inc.*, SBA No. SIZ-5514, at 7 (2013); *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010).

Lastly, even if the JVA Addendum had been signed, and had been in existence as of the date of final proposal revisions, NWI&T's JVA still would be deficient because the JVA, as supplemented by the JVA Addendum, does not contain sufficient detail to meet all the requirements of 13 C.F.R. § 125.8(b)(2) and (c). The JVA Addendum affirms that each venturer “will provide the needed equipment and facilities to perform the work that it conducts for [NWI&T],” but fails to “[i]temiz[e] 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,” as

required by 13 C.F.R. § 125.8(b)(2)(vi). Section II.E, *supra*. Similarly, the JVA Addendum does not explain how the joint venturers will source labor or will perform the contract, as required by 13 C.F.R. § 125.8(b)(2)(vii) and (c). Rather, the JVA Addendum merely indicates that North Wind's role “must be more than administrative or ministerial” and that Mr. Johnson will “ensure” that North Wind will perform “at least 40%” of the total work. *Id.* The JVA Addendum does not delineate the types, or percentage, of work or that each joint venturer will perform, nor identify labor categories each joint venturer will contribute in performing the instant contract. *Id.*

In response to the appeal, NWI&T argues that was not obligated to address contract-specific matters in detail, due to the indefinite nature of the underlying contract. Section II.K, *supra*. It is true that when an underlying procurement is indefinite in nature, SBA regulations are more lenient as to the level of detail expected within a JVA. The regulations thus state that:

(vi) . . . 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[.]

(vii) . . . 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 responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in [§ 125.8(c)], or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available[.]

13 C.F.R. § 125.8(b)(2)(vi) and (vii). Nevertheless, even for such indefinite contracts, at least “a general description” of the anticipated major equipment, facilities, and other resources to be furnished by each party, as well as “a general description” of the anticipated responsibilities of the parties, is still necessary. *Id.* The JVA Addendum does not provide even such general descriptions, and thus does not meet SBA regulatory requirements.

IV. Conclusion

NWI&T's JVA does not provide sufficient detail to meet the requirements of 13 C.F.R. § 125.8(b)(2) and (c). The appeal therefore is GRANTED and Size Determination No. 06-2021-

071 is REVERSED. NWI&T is not an eligible small business for the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge