

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

SIZE APPEAL OF:

LS3, LLC,

Appellant,

Appealed From
Size Determination Nos. 06-2023-020,
06-2023-021

SBA No. SIZ-6239

Decided: August 18, 2023

APPEARANCES

Craig A. Holman, Esq., Thomas Pettit, Esq., Arnold & Porter Kaye Scholer LLP,
Washington, D.C., for Appellant

Ambika J. Briggs, Esq., William L. Walsh, Esq., Andrea Marafatsos, Esq., Tysons,
Virginia, for New Directions Technologies, Inc.

ORDER DIMISSING APPEAL¹

I. Introduction and Jurisdiction

On May 8, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area VI (Area Office) issued Size Determination Nos. 6-2023-020 and 6-2023-021, concluding that LS3, LLC (Appellant) is not a small business for the subject procurement. On appeal, Appellant contends that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is DISMISSED as MOOT.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeals within 15 days after receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, these matters are 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 for Appellant an opportunity to file a request for redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release

II. Background

A. Solicitation and Protest

On May 6, 2022, the U.S. Department of the Navy, Navy Air Warfare Center Weapons Division (Navy) in China Lake, California, issued Solicitation No. N6893620R0120 for the procurement of engineering services. The Solicitation was set aside for Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and North American Industry Classification System (NAICS) Code 541330, Engineering Services, Military and Aerospace Equipment and Military Weapons, with a corresponding \$41.5 million annual receipts size standard, was designated as the appropriate code. On June 3, 2022, the CO extended the proposal deadline to June 16, 2022. Appellant, New Directions Technologies, Inc. (NDTI), and Synectic Solutions, Inc. (SCI) timely submitted their proposals.

On March 28, 2023, the Navy issued a notice that Appellant was the apparent successful offeror. On April 2, 2023, SCI filed a size protest, alleging that Appellant was other than small and was not eligible for this procurement. On April 4, 2023, NDTI filed a combined size and SDVOSB Protest, claiming that Appellant was other than small and was not an eligible SDVOSB for this procurement.

B. Area Office Size Determinations

On May 8, 2023, the Area Office issued Size Determinations Nos. 06-2023-20 and 06-2023-21, finding Appellant was other than small for this procurement.²

The record showed that LS3 is a mentor-protégé joint venture (JV) between Lukayva, Inc. (Lukayva) the protégé SDVOSB firm, and Systems Applications and Technologies, Inc. (SATI), the mentor firm. Lukayva's sole shareholder and CEO, Wade VanDerWerff is also LS3's General Manager and Manager/Member, and is employed by SATI. LS3's Joint Venture Agreement (JVA) was executed June 1, 2021. It identifies Lukayva as an SDVOSB and designates Lukayva as the Managing Venturer. SATI is the other venturer. SBA approved a Mentor Protégé agreement between the firms. The JVA sets forth the purpose of the JV, to bid upon the Solicitation issued by the Naval Air Warfare Center. It designates Mr. VanDerWerff, an employee of the Managing Venturer, as the Project Manager. He is responsible for performance of the contract and implementing the instructions of the Project Manager. It designates a bank account for the LS3 at Chase Bank, all receipts to be deposited in the account, and all expenses to be paid from it. It describes the equipment to be provided by each Venturer. The personnel each venturer will provide is also identified. The Project Manager is responsible for negotiating the contract and subsequent negotiations.

LS3 Joint Venture Operating Agreement (JVOA) is also dated June 1, 2021. It is between Lukayva, an SDVOSB and small business, and SATI, its Mentor. It identifies this procurement as the objective of the JV. It provides that the business affairs of LS3 will be managed by the

² The two size determinations are essentially identical, and therefore, I will address it as one.

Management Committee, except for those matters expressly specified by the Agreement to be managed by the Managing Member or subject to the unanimous approval of the Members. Lukayva is the Managing Member. (JVOA, at 3.) The Management Committee consists of three Managers appointed pursuant to Section 5.1 (*Id.*), but Section 5.1 of the JVOA specifically states it has four members, two from each firm, each with one vote. (*Id.*, § 5.1.) The Management Committee has “exclusive power and authority to manage the business and affairs of the Company.” (*Id.*, § 5.1.2.) A simple majority vote is required to approve any matter before the Committee. (*Id.*, §§ 5.1.5, 5.4.2.)

The Managing Member is to appoint one of its employees to act as Project Manager. The Project Manager shall, subject to the direction and control of the Management Committee, carry out the policy decisions of the Management Committee. (*Id.*, §§ 5.2.1, 5.2.2.) Certain actions require the unanimous approval of the Members. Any withdrawal from the bank account requires the approval of both Members. (*Id.*, § 9.1.1.)

The Area Office reviewed the various allegations of affiliation made against Appellant and concluded that all were without merit. The Area Office then turned to Appellant's JVA. Under 13 C.F.R. § 121.103(h)(1)(ii), two entities with an approved SBA mentor/protégé relationship may submit an offer as a joint venture if the protégé meets the size standard on the procurement and the JVA meets certain requirements under 13 C.F.R. § 125.18(b)(2) & (3) as of the date of final proposal revisions. In reviewing the JVA, the Area Office concluded that Appellant met all the requirements except for 13 C.F.R. § 125.18(b)(2)(ii). The Area Office noted that Mr. VanDerWerff, Lukayva's principal, will be LS3's Responsible Manager, and is also a SATI employee, and has been since 2016. He will not leave SATI and will remain employed by SATI throughout contract performance and will also be employed at Lukayva. SBA regulations give importance to a JV's protégé member bearing ultimate responsibility for the contract. In selecting a Responsible Manager whose allegiances and commitments are divided between the two JV partners, the Area Office found that Appellant failed to establish a clear line of separation between the protégé and mentor. Further, Appellant's Responsible Manager, who would be responsible for day-to-day management and administration of the contractual performance of the JV, would be performing on behalf of both firms. The Area Office thus found that Appellant could not provide assurances that the protégé would be in charge of contract performance, and that Appellant's JVA was not in compliance with 13 C.F.R. § 125.18(b)(2)(ii) and thereby was not an eligible small business concern for this procurement. (Size Determinations, at 14-15.)

C. Appeal

On May 23, 2023, Appellant filed the instant appeal from both size determinations. Appellant first argues the Area Office lacked jurisdiction to conduct a size determination here. The Area Office found Appellant other than small because it failed to meet all the requirements for an SDVOSB joint venture under 13 C.F.R. § 125.18. Appellant argues that only OHA may assess an SDVOSB joint venture agreement's compliance with 13 C.F.R. § 125.18 in the context of an SDVOSB protest. (Appeal, at 3, 11-12, citing 13 C.F.R. §§ 134.1003(d), 134.1004(b)(2)-(3).)

Further, Appellant argues the Area Office's conclusion that Mr. VanDerWerff cannot serve as Responsible Manager because he is an employee of both Lukayva and SATI is based on error of law and fact. Particularly, the Area Office's finding misapplied the applicable regulation and contravenes the facts before the Area Office. Appellant explains that SBA must apply 13 C.F.R. § 125.18(b)(2)(ii) as written. In Relying on *Def. Integrated Solutions, LLC v. United States*, No. 23-64C, 2023 WL 2783270 at *12 (2023), the U.S. Court of Federal claims (COFC) found as related to SBA JV rules that “[w]hen the text is unambiguous, the court need only read and apply the plain language of the regulation.”) Here, the AO did not identify any specific portion of a regulation which Mr. VanDerWerff’s dual employment violated. To the contrary, the AO's decision establishes that LS3 satisfies the plain language of the rule, notwithstanding the AO's factual error discussed below. (*Id.*, at 3, citing 13 C.F.R. § 125.18(b)(2)(ii).) Appellant notes the Area Office recognized Mr. VanDerWerff was Lukayva's sole owner and qualified as Appellant's Responsible Manager but failed to apply the regulation's “plain language.” Instead, the Area Office relied upon how it had traditionally applied the SBA's regulations. Appellant maintains it complied with the regulation because Mr. VanDerWerff was and always had been a Lukayva employee. (*Id.*, at 3-4.)

Relying upon Mr. VanDerWerff's Declaration submitted in response to the protests, Appellant emphasizes that Mr. VanDerWerff was a SATI employee and sole owner of Lukayva, but he had no ownership interest in SATI, is not related to SATI's owners and managers, and his intention is to resign from SATI upon the award of the instant contract and the favorable resolution of any protests resulting from it. (*Id.*, at 4-6.) Appellant points out that the regulation does not require the Responsible Manager be an employee of the SDVOSB Venturer if there is a letter of intent committing to employment with the SDVOSB. Appellant argues that Mr. VanDerWerff's present and continuing employment with Lukayva more than complies with the regulation. (*Id.*, at 13.) Further, while Appellant's JVA uses the term “Project Manager” rather than “Responsible Manager,” the difference in terminology is irrelevant when the duties of the positions align with the requirements of the regulation. (*Id.*, at 14, citing 85 Fed. Reg. 66,146, 66,167 (Oct. 16, 2020).) Mr. VanDerWerff cannot “become” an employee of Lukayva because he already is one. Though he is a SATI employee, the Area Office's assumption that he would remain one throughout contract performance was an error of fact, contradicted by his Declaration. Thus, the Area Office abused its authority by ignoring Mr. VanDerWerff's Declaration and relying on its own speculation. (*Id.*, at 16-18.)

D. NDTI's Response

On June 8, 2023, NDTI responded to the appeal. NDTI first argues that the Area Office has jurisdiction to review Appellant's JVA to determine whether it complied with 13 C.F.R. § 125.18(b)(2). The Area Office has jurisdiction over size protests under 13 C.F.R. § 121.1002 and the size regulation provides that an SDVOSB joint venture is considered small if it meets the requirements of 13 C.F.R. § 125.18(b)(2). The Area Office thus has the jurisdiction to determine whether Appellant is small, including whether its joint venture agreement complies with the requirements at 13 C.F.R. § 125.18(b)(2). (NDTI Response, at 4-5, citing 13 C.F.R. § 121.103(h)(2)(ii).)

Appellant's JVA is noncompliant with 13 C.F.R. § 125.18 because Mr. VanDerWerff is both the Responsible Manager and a SATI employee. Particularly, 13 C.F.R. § 125.18(b)(2)(ii)(B) provides that the Responsible Manager cannot be employed by the mentor and become an employee of the SDVOSB for purposes of performance under the JV. (*Id.*, at 6-7.) Appellant's proposed arrangement, where the Responsible Manager continues to be employed by the mentor firm while also being employed by the protégé, is not permitted by the regulation. NDTI argues the Responsible Manager cannot be an employee of the mentor and become an employee of the protégé. (*Id.*, at 9.)

Further, NDTI adds that any error by the Area Office finding Mr. VanDerWerff would work for both firms was harmless, because Mr. VanDerWerff is an employee of SATI who will leave to become a full-time employee of Lukayva and Responsible Manager, and the regulation does not permit this. (*Id.*, at 12.)

E. Concurrent Proceeding³

On August 9, 2023, OHA issued the *VSBC Protest of New Directions Technology, Inc.*, SBA No. VSBC-299-P (2023), concluding that Appellant's JVOA and JVA do not comply with the regulation at 13 C.F.R. § 125.18(b)(2)(ii), in that the non-SDV venturer has negative control over the management of the firm, and accordingly, LS3 is not an eligible SDVOSB joint venture for this instant procurement. *New Directions Technology*, at 11.

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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The appeal was filed and served within 15 days after Appellant received the size determinations. Thus, the appeal is timely for this procurement. 13 C.F.R. § 134.304(a).

Notwithstanding the timeliness of the appeal, the threshold issue is whether OHA lacks jurisdiction because the appeal now is moot following OHA's holding in its concurrent case. Section II.E, *supra*. Among the elements of jurisdiction is whether a live case or controversy exists; if not, the appeal must be dismissed as moot. *Size Appeal of Daniels Building Co., Inc.*,

³ On April 4, 2023, NDTI filed a combined size and SDVOSB status protest with the CO. Together with SCI's size protest, NDTI's size protest was referred to the Area Office, raising the same issues as the SDVSBO status protest.

SBA No. SIZ-6118 (2021); *Size Appeal of Resource Applications, Inc.*, SBA No. SIZ-4252 (1996).

In *New Directions Technology, supra*, OHA adjudicated the SDVOSB status protest involving the same Solicitation No. N6893620R0120, the same challenged concern, Appellant, and the same issues, i.e., Appellant's JV. After reviewing Appellant's JVA and JVOA, OHA concluded that Appellant was not an eligible SDVOSB joint venture for this instant procurement, because it failed to comply with 13 C.F.R. § 125.18(b)(2)(ii) when SATI had negative control over its Management Committee, and therefore Lukayva, the named Managing Venturer, did not control the day-to-day management and administration of contract performance. *Id.*, at 10-11.

Accordingly, Appellant's JV has already been found ineligible for the subject procurement, failing to comply with 13 C.F.R. § 125.18(b)(2)(ii), the same regulatory provision at issue here. Moreover, the issue here is specific to this JV and this solicitation, and it does not affect the eligibility of Lukayva as an SDVOSB. Therefore, the instant size appeal is moot. Consequently, OHA cannot adjudicate matters that have become moot. 13 C.F.R. § 134.316(c); *Daniels Building Co., Inc., supra*. Further, “[t]he fact that a live controversy existed on the filing date of a size appeal does not save it from subsequently becoming moot.” *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4468, at 3 (2002).

I must therefore DISMISS this appeal as MOOT.

III. Conclusion

I herewith DISMISS this size appeal as MOOT. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge