United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Daniels Building Company, Inc., Appellant, RE: CAVU-Roncelli Construction JV-10 LLC Appealed From Size Determination No. 04-2023-019	SBA No. SIZ-6250 Decided: October 18, 2023

APPEARANCES

Marcus R. Sanborn, Esq., Blevins Sanborn Jezdimir Zack PLC. Detroit, Michigan, for Appellant

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DECISION

I. Introduction and Jurisdiction

On July 10, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2023-019, dismissing a protest filed by Daniels Building Company, Inc. (Appellant) against CAVU-Roncelli Construction JV-10 LLC (CAVU). The Area Office found that the protest was not specific. On July 25, 2023, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in dismissing the protest, and requests that SBA's Office of Hearings and Appeal (OHA) remand the matter for a new size determination. 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 instant appeal within 15 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On April 6, 2023, the U.S. Department of Veterans Affairs (VA) issued Invitation for Bids (IFB) No. 36C25023B0027 for a construction project at the LTC Charles S. Kettles VA Medical Center in Ann Arbor, Michigan. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $45 million average annual receipts. (IFB at 1.) Appellant and CAVU submitted timely bids. On June 6, 2023, bids were opened and the CO identified CAVU as the low bidder and apparent awardee.

B. Protest

On June 12, 2023, Appellant filed a protest with the CO challenging CAVU's size. In its protest, Appellant acknowledged that CAVU is a joint venture between CAVU Consulting, LLC (CCL) and its SBA-approved mentor, Roncelli, Inc. (Roncelli). (Protest at 1.) Appellant alleged, however, that CCL and Roncelli "have not fulfilled their obligations as Mentor and Protégé and have no intention or ability to fulfill those requirements on the project at issue." (*Id.* at 2.) Appellant asserted that "Roncelli is not a small business and therefore would be ineligible for small business set-aside projects" such as the instant procurement. (*Id.*) The mentor-protégé relationship here is "solely a means for Roncelli to perform projects for which it would otherwise not qualify." (*Id.*) Appellant highlighted that CCL's website describes the mentor-protégé arrangement as enabling CCL to "offer construction services as [an SDVOSB] with the full resources, capability and bonding of a much larger firm." (*Id.*)

Appellant maintained that a mentor-protégé relationship "must be more than a means for large companies to bid contracts set aside for small businesses." (*Id.*) After summarizing SBA requirements for a proper mentor-protégé joint venture, Appellant predicted that CAVU "fails to satisfy all of the above criteria and has no intention or ability to satisfy them on this project." (*Id.* at 2-3.)

Appellant concluded CAVU is not an eligible joint venture because the mentor-protégé relationship is "merely a pretext allowing Roncelli to compete for jobs for which it would otherwise not qualify, while failing to meet the letter and spirit of the mentor-protégé program." (*Id.* at 6.) Accordingly, Appellant urged, CCL and Roncelli "must be treated as affiliated and ineligible for small business set-aside projects, including the solicitation at issue." (*Id.*)

C. Size Determination

The CO forwarded Appellant's protest to the Area Office for review. On July 10, 2023, the Area Office issued Size Determination No. 04-2023-019, dismissing Appellant's protest as nonspecific. (Size Determination, at 1-3.)

The Area Office found that Appellant's allegations were speculative and that no direct evidence was provided to suggest that CCL and Roncelli are not in compliance with mentor-protégé requirements. (*Id.* at 2.) Citing OHA case precedent, the Area Office explained:

> [OHA] has held that "[i]f an area office finds a protest is non-specific, it must dismiss the protest." 13 C.F.R. § 121.1007(c). In the past, OHA has stated that, in reviewing non-specific protests, it will consider "(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds." *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430, at 6 (2001); *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009); *Size Appeal of NuGate Group, LLC*, SBA No. SIZ-5821, at 2 (2017).

(*Id.*) Here, Appellant's allegations were wholly speculative, and amounted to a charge that SBA should not have approved a Mentor-Protégé Agreement (MPA) in the first instance, or that the MPA itself was improper. (*Id.* at 2-3.) OHA has previously recognized, however, that challenges to an MPA "are not valid grounds for a size protest, as SBA regulations prohibit any finding of affiliation or control based on [an MPA]." (*Id.* at 3, quoting *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 11 (2018) and citing 13 C.F.R. §§ 125.9(d)(4) and 121.103(b)(6).) The Area Office added that Appellant's allegations pertaining to supposed motivations for entering into an MPA are beyond the scope of the Area Office's review. (*Id.*)

D. Appeal

On July 25, 2023, Appellant filed the instant appeal. Appellant argues that the Area Office's analysis was clearly erroneous. (Appeal at 4.) In particular, the Area Office ignored Appellant's claims and the evidence presented. Furthermore, the Area Office mischaracterized Appellant's protest as attacking SBA's decision to approve an MPA between CCL and Roncelli. (*Id.* at 2). Appellant claims that "even where protesters have challenged the granting of the mentor-protégé arrangement, the matters were decided on the merits after production of relevant documents." (*Id.*) As such, OHA should remand the protest to the Area Office for a proper size determination. (*Id.*)

Appellant argues that the Area Office should have explored Appellant's allegations that CAVU lacked the intent or the ability to fulfill its obligations on the project. In its protest, Appellant summarized SBA's requirements for mentor-protégé joint ventures, such as the requirement to designate an employee of the protégé as Responsible Manager, the requirement that the protégé perform at least 40% of the work, and the requirement that the protégé's role consist of more than administrative or ministerial functions. (*Id.* at 4.) As evidence that CAVU will not adhere to such requirements, Appellant observed that CCL is headquartered in the state of Virginia; that CCL lacks its own facilities in Michigan where the instant contract is to be performed; and that some individuals who may perform work for the joint venture are current or former Roncelli employees. (*Id.* at 6.)

Appellant argues that the Area Office incorrectly characterized Appellant's protest as attacking SBA's approval of the MPA. (*Id.* at 7.) Appellant did not state that the MPA should not have been approved, nor argue that the MPA was deficient. Furthermore, the OHA decisions referenced by the Area Office in asserting that mentor-protégé issues are not properly raised in a size protest were not dismissals, but rather decisions on the merits following a thorough size investigation. (*Id.*) Appellant argues that the Area Office should have required CAVU to produce relevant documents, such as a completed SBA Form 355, as well as copies of its bid, its joint venture agreement, the MPA, and federal income tax returns. (*Id.*)

E. CAVU's Response

On August 10, 2023, CAVU responded to the appeal. CAVU argues that OHA should dismiss or deny the appeal, because Appellant has shown no clear error of law or fact in the Area Office's decision. (Appeal at 1.) CAVU rejects the notion that any of Appellant's allegations were sufficiently specific. (*Id.*) In particular, although Appellant repeatedly asserted that CAVU does not intend to adhere to mentor-protégé requirements in performing the instant IFB, these claims were entirely unsupported and speculative. CAVU points to *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330 (2012), where OHA affirmed the dismissal of a size protest as insufficiently specific because the protester advanced only unsupported allegations. (*Id.* at 3.) CAVU highlights that SBA regulations require some supported basis for a protest allegation, and Appellant here did not articulate, with any support, why it believed that CAVU was non-compliant with the applicable joint venture regulations. Rather, Appellant's protest was comprised of bare, unsupported assertions and allegations. (*Id.* at 2-3.) According to CAVU:

> SBA's regulations provide that an "allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific" but that an "allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific." 13 C.F.R. § 121.1007(c). Here, all of [Appellant's] allegations fall into the first example — it has alleged that [CAVU] does not comply with the joint venture requirements but does not point to any publication or similar evidence as to why. Rather, [Appellant's] arguments pertain to matters that are outside the scope of the Area Office's jurisdiction and are speculative and amount to nothing more than a request for SBA to investigate. If OHA were to permit these types of allegations to be deemed sufficiently specific, this would set an unthinkable precedent for future size protests if all a company has to allege is that believes that a joint venture fails to comply with the applicable regulations, without explaining how and with supporting documentation.

(*Id.* at 3.)

CAVU further observes that Appellant merely assumed in its protest that Roncelli is "not a small business," which appears to have been Appellant's basis for arguing that the joint venture is not small. Appellant offered no evidence to support this claim, however, and Appellant's

protest thus falls squarely within Example 1 under 13 C.F.R. § 121.1007(c), that an "allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific." (*Id.* at 4.) CAVU cites two OHA cases in support of its position: *Size Appeal of ACS Ventures, LLC*, SBA No. SIZ-6160, at 5 (2022) (explaining that a "mere allegation of affiliation without information that the affiliation would render the concern other than small . . . is insufficiently specific."); and *Size Appeal of NuGate Group, LLC*, SBA No. SIZ-5821 (2017) (affirming dismissal of a size protest where protestor stated that awardee exceeds the size standard based on FPDS data yet failed to include such data). (*Id.*)

CAVU insists that Appellant has failed to prove, by a preponderance of the evidence, that the Area Office erred in dismissing Appellant's protest as nonspecific. Likewise, the Area Office properly rejected Appellant's allegations concerning the mentor-protégé relationship between CCL and Roncelli. (*Id.* at 3.) OHA has held that allegations that SBA should not have approved an MPA, or that an approved MPA is improper, are "not valid grounds for a size protest." (*Id.* at 3, quoting *Size Appeal of Sevenson Envtl. Servs., Inc.*, SBA No. SIZ-6087, at 10 (2021).) Nor is there anything inherently "improper about two companies coming together to form a mentor-protégé joint venture relationship. To the contrary, it is encouraged." (*Id.*, citing 13 C.F.R. § 125.9(d).)

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

SBA regulations require that a size protest must be specific, so as to provide reasonable notice of the grounds upon which the protested concern's size is challenged. 13 C.F.R. § 121.1007(b). A mere allegation that the challenged concern is not small does not suffice. *Id.* The regulations set forth the following examples of specific and nonspecific protests:

> *Example 1*: An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific.
>
> *Example 2*: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

> *Example 3*: An allegation that concern X is affiliated with concern Y without setting forth any basis for the allegation is non-specific.
>
> *Example* 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.
>
> *Example* 5: An allegation that concern X has revenues in excess of $5 million (where $5 million is the applicable size standard) without setting forth a basis for the allegation is non-specific.
>
> *Example* 6: An allegation that concern X exceeds the size standard (where the applicable size standard is $5 million) because it received Government contracts in excess of $5 million last year is sufficiently specific.

13 C.F.R. § 121.1007(c).

Based on the examples, it is clear that a proper size protest must not merely assert that the challenged concern is not small, but rather must include specific supporting facts which, if true, would render the concern other than small. Similarly, as in Example 3, a mere allegation of affiliation, without any supporting basis or rationale, is insufficiently specific.

In the instant case, Appellant's protest asserted that CCL and Roncelli "have not fulfilled their obligations as Mentor and Protégé and have no intention or ability to fulfill those requirements on the project at issue." Section II.B, *supra*. These allegations, however, were vague and speculative, as Appellant offered no direct evidence, beyond bald assertion, to support its claims. As Appellant itself acknowledged, CCL and Roncelli are an SBA-approved mentor and protégé. Sections II.B and II.C, *supra*. Insofar as Appellant sought to question whether SBA should have approved the mentor-protégé arrangement in the first instance, or whether the approved MPA was proper, such allegations "are not valid grounds for a size protest, as SBA regulations prohibit any finding of affiliation or control based on [an MPA]." *Size Appeal of Sevenson Envtl. Servs., Inc.*, SBA No. SIZ-6087, at 10 (2021) (quoting *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 11 (2018) and citing 13 C.F.R. §§ 121.103(b)(6) and 125.9(d)(4)).

SBA regulations likewise expressly permit an approved mentor and protégé to joint venture for small business opportunities, so long as the protégé qualifies as small, and so long as the joint venturers establish a joint venture agreement (JVA) containing certain required provisions. 13 C.F.R. §§ 121.103(h)(2)(ii) and 125.9(d)(1). Here, though, Appellant's protest did not dispute that CCL is small, and did not clearly articulate any grounds to conclude that the joint venture, CAVU, otherwise is non-compliant with joint venture rules. Section II.B, *supra*. While Appellant suggested that CCL may not have its own office in the state of Michigan, and that current and/or former Roncelli employees may perform work for the joint venture, these allegations lacked specific supporting facts, and even if true, would not establish that CAVU is non-compliant with SBA joint venture rules. Furthermore, as CAVU observes in its response to the appeal, Appellant provided no reason to believe that the combined receipts of CCL and

Roncelli would exceed the $45 million size standard applicable to this procurement. Sections II.B and II.E, *supra*. Fundamentally, then, Appellant's protest allegations were analogous to Example 1 set forth in 13 C.F.R. § 121.1007(c): "An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific." As a result, the Area Office correctly dismissed the protest. *See, e.g., Size Appeal of Wilson Walton Int'l, Inc.*, SBA No. SIZ-6031, at 2 (2019) (size protest was properly dismissed as nonspecific when the protestor "provided no evidence or reason to believe that the combined size of [the challenged concern] and [its] alleged affiliates exceeds the applicable size standard").

IV. Conclusion

Appellant has not shown that the Area Office erred in dismissing Appellant's protest as nonspecific. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge