United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Colt-Sunbelt Rentals JV, LLC, Appellant, Appealed From Size Determination No. 3-2024-005	SBA No. SIZ-6288 Decided: April 16, 2024

APPEARANCES

C. Kelly Kroll, Esq., Kelly A. Carlson, Esq., Morris, Manning & Martin LLP, Washington, D.C., for Appellant

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., Timothy J. Laughlin, Esq., Schoonover & Moriarty LLC, Olathe, Kansas, or Critical Contingency Solutions, LLC

DECISION[1]

I. Introduction and Jurisdiction

This appeal arises from a size determination in which the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) determined that Colt-Sunbelt Rentals JV, LLC (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant's Joint Venture Agreement (JVA) was deficient. On appeal, Appellant contends 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 denied.

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 timely filed the appeal within 15 days of receiving the size determination. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

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

II. Background

A. Solicitation and Protest

On October 28, 2022, the U.S. Army Mission and Installation Contracting Command (Army) issued Request for Proposals (RFP) No. W9124E23R0001, seeking a contractor to provide temporary housing and sanitation facilities in support of training operations. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, which at that time had a corresponding size standard of $35 million average annual receipts.

The RFP contemplated the award of a single, indefinite-delivery/indefinite-quantity (ID/IQ) contract with a 60-month ordering period. (RFP[2] at 5, 33, 71-72, 112.) Specific work would be defined in task orders issued after award of the base contract. (*Id.* at 68.) According to the RFP's Performance Work Statement (PWS), the contractor will "furnish[] all labor, materials, equipment, and services incidental to the set-up, operations, and removal of life support structures and services at Fort Polk, LA and other locations," to support special training exercises conducted by the Army's Joint Readiness Training Center (JRTC). (*Id.* at 5.) Appellant submitted its initial proposal, including price, on January 25, 2023, and final proposal revisions on September 7, 2023. (CO's Memorandum at 2.)

On December 1, 2023, the CO announced that Appellant was the apparent awardee. (*Id.*) On December 7, 2023, Critical Contingency Solutions, LLC (CCS), an unsuccessful offeror, filed a size protest with the CO, contending that Appellant is not small. In its protest, CCS observed that Appellant is a joint venture between Colt Rentals LLC (Colt) and Sunbelt Rentals, Inc. (Sunbelt), a large business. (Protest at 1.) There is no record, however, that Colt and Sunbelt are an SBA-approved mentor and protégé under the All-Small Mentor-Protégé Program (ASMPP). (*Id.* at 1-2.) As a result, the joint venture cannot be small. (*Id.* at 4.) The CO forwarded CCS's protest to the Area Office for review.

On December 21, 2023, Appellant responded to the protest, and submitted various supporting documentation, including a completed SBA Form 355; Appellant's Joint Venture Agreement (JVA) dated November 11, 2022; and a Mentor-Protégé Agreement (MPA) between Colt and Sunbelt, dated August 23, 2023. Appellant explained that SBA originally approved an MPA between protégé Paulin Photography, LLC (Paulin) and mentor Mahaffey Tent & Awning Co., Inc. (Mahaffey) in February 2021. (Protest Response at 2.) Subsequently, Paulin changed its name to Colt, and Sunbelt acquired Mahaffey. (*Id.*) Although SBA approved these changes, SBA neglected to timely update its list of approved mentors and protégés. (*Id.*) Contrary to the premise of the protest, then, "[t]here is an SBA-approved MPA in place between Colt and Sunbelt and thus [Appellant] qualifies as a small business under the Contract." (*Id.* at 3.)

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[2] In January 2023, the Army issued a conformed version of the RFP through Amendment 0009. Citations in this decision are to the conformed RFP.

B. Proposal

Appellant's proposal explained that Colt and Sunbelt formed Appellant, a joint venture, [XXXXXXXXXXX]. (Proposal, Vol. II, at 1.) Sunbelt is Colt's SBA-approved mentor under the ASMPP. (*Id.*) The proposal stated that [XXXX], an employee of Colt, will serve as "Contract Manager." (*Id.*) In this capacity, [XXXX] "[XXXXXXXXXXXXXXXXX]." (*Id.*) [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]

With regard to the respective responsibilities of Colt and Sunbelt in performing the contract, the proposal stated:

> [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX].

(Proposal, Vol. I, at 1.)

The proposal explained that:

> [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX].

(Proposal, Vol. II, at 1.)

"[XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXX]." (*Id.*)

C. JVA

Appellant's JVA, dated November 11, 2022, indicates that Colt owns [a majority] of Appellant, and Sunbelt the remaining [XX]%. (JVA at 1.) Colt is the Managing Venturer. (*Id.*) Under a section entitled "Management of the Joint Venture," the JVA stated:

> For any Contract awarded to the Joint Venture, an employee of [Colt] will be the responsible manager responsible for the ultimate performance of the Contract (the "Responsible Manager") by the Joint Venture. For each Contract awarded to the Joint Venture, [Sunbelt] will designate an employee as its authorized representative for performance of the Contract (the "Assistant Manager"). The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the Joint Venture.

(*Id.*)

The JVA stated that Colt and Sunbelt would enter into an addendum to the JVA for each procurement, describing their respective responsibilities. Specifically:

> Prior to submitting a proposal in response to any RFP, [Colt], on behalf of [Appellant] shall prepare a proposed addendum to this Agreement (each, a "Contract Addendum") for review and joint approval by the parties more particularly describing the Contract and setting forth the responsibilities of the parties, the roles of any third parties, sources of labor, and contract performance for the applicable Contract. If the Prime Contract is awarded to [Appellant], the parties will enter into the Contract Addendum and attach it to this Agreement as an amendment to this Agreement. Each Contract Addendum shall be incorporated by reference into this Agreement.

(*Id.* at 2.)

At the end of the JVA is unsigned "sample" addendum entitled "FT. POLK CONTRACT ADDENDUM." (*Id.* at 9-10.) The sample addendum includes headings for "Itemization of Equipment" and "Responsibilities of the Parties and Division of Work," but no substantive information is provided. (*Id.*)

During the course of the size investigation, the Area Office asked Appellant for a copy of any addendums to the JVA pertaining to the instant procurement. (E-mail from G. Heard to [XXXX] (Dec. 27, 2023).) In response, Appellant submitted a "revised Fort Polk Contract Addendum" (hereafter, the "Revised Addendum"), explaining that "[t]he addendum in the [JVA] was a placeholder until formal award was made." (E-mail from [XXXX] to G. Heard (Jan. 3, 2024).) The Revised Addendum is not signed by representatives of either joint venturer, and is not dated. The Revised Addendum indicates that Colt will provide the "Project Manager" and Sunbelt the "Site Manager," but does not identify by name the individuals who will fill these roles. (Revised Addendum at 2.) The Revised Addendum further states that the division of labor between Colt and Sunbelt "is further delineated in accordance with" a spreadsheet that accompanied Appellant's proposal. (*Id.*)

D. Size Determination

On January 4, 2024, the Area Office issued Size Determination No. 3-2024-005, concluding that Appellant is not a small business for the subject procurement. The Area Office found that Appellant's JVA was deficient, because Appellant did not name a Responsible Manager in the JVA, as required by 13 C.F.R. § 125.8(b)(2)(ii). (Size Determination at 8.)

The Area Office first explained that Colt and Sunbelt are an SBA-approved mentor and protégé, and therefore may joint venture for any Federal procurement in accordance with 13 C.F.R. § 121.103(h)(2)(ii), so long as the JVA meets the requirements of § 125.8(b)(2) and (c), and provided that the protégé (Colt) qualifies as small under the NAICS code assigned to the procurement. (*Id.* at 6.)

The Area Office reviewed Appellant's JVA and found that it meets most of the requirements of 13 C.F.R. § 125.8(b)(2). (*Id.* at 6-12.) Although Appellant's original JVA, dated November 11, 2022, lacked specific information about the instant procurement, during the course of the size review, Appellant submitted the Revised Addendum, which contained

additional detail. (*Id.* at 6.) The Revised Addendum is unsigned and undated. (*Id.*) Even with the Revised Addendum, however, Appellant's JVA does not comply with § 125.8(b)(2)(ii), which requires that every JVA must contain a provision:

> Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").

(*Id.* at 7, quoting 13 C.F.R. § 125.8(b)(2)(ii).) The regulations further specify that:

> The individual identified as the Responsible Manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture.

(*Id.*, quoting 13 C.F.R. § 125.8(b)(2)(ii)(B).)

Here, Appellant's JVA designates Colt as the Managing Venturer of Appellant. (*Id.* at 8.) The JVA further provides that a Colt employee will serve as the Responsible Manager. (*Id.*) "However, the JVA does not name the employee designated as the Responsible Manager." (*Id.*) As a result, the JVA does not comply with 13 C.F.R. § 125.8(b)(2)(ii). (*Id.* at 8, 12.)

E. Appeal

On January 19, 2024, Appellant timely appealed the size determination to OHA. Appellant contends that the Area Office committed two principal errors: (i) contrary to the size determination, Appellant's JVA meets SBA requirements because it did "name[] a Colt employee as the Responsible Manager"; and (ii) the Area Office denied Appellant proper due process. (Appeal at 5, 11).

Appellant argues, first, that the JVA meets SBA requirements because it, in effect, did name [XXXX], a Colt employee, as the Responsible Manager. (*Id.* at 5.) Appellant contends that, although the Area Office relied upon the Revised Addendum that Appellant provided on January 3, 2024 in concluding that Appellant's JVA satisfied requirements such as 13 C.F.R. § 125.8(b)(2)(vi) and (viii), the Area Office arbitrarily disregarded the same document in finding that the JVA failed to name a Colt employee as the Responsible Manager. (*Id.* at 6-7.)

Appellant asserts that, taken together, the JVA and Revised Addendum "(1) noted that Colt would provide the Program Manager for the Ft. Johnson Contract, and (2) made specific reference to [Appellant's] proposal for the instant procurement which in turn specifically named [XXXX] as the Program Manager/Contract Manager and Authorized Negotiator in at least three instances." (*Id.* at 7.) The proposal was "provided to the Area Office on December 22, 2023 with

[Appellant's] original response to the size protest but w[as] seemingly not taken into consideration." (*Id.*) The Area Office had ample information to "discern that [XXXX] was not just Contract/Project Manager and Authorized Negotiator in name, but that he truly was positioned to serve effectively and substantively in these roles given the reporting structure of [Appellant's] management team and [XXXX's] duties and tasks as Project Manager." (*Id.* at 8.)

Next, Appellant complains that the Area Office should have understood that [XXXX] was the Responsible Manager. According to Appellant, a review of Appellant's proposal reveals that [XXXX] "was named as [Appellant's] Contract Manager on pages 11 and 30 of the Technical Proposal highlighting the JV's management team and leadership from protégé Colt . . . and as an Authorized Negotiator and Project Manager in the Executive Summary at page 22." (*Id.*) Further, "the Management Approach illustrated in the JV Staff Organization Chart on page 13 of the Technical Proposal shows that Sunbelt employees . . . and Site Managers (TBD) report to or liaise with Colt's [XXXX] (Contract Manager). The specifics of these reporting relationships are further described and corroborated throughout the Technical Proposal [and] [XXXX's] authority is made clear . . . ." (*Id.* at 8-9.)

Appellant asserts that "the proposal materials further describe how [XXXX's] role as Contract Manager interfaces with the government contract points of contact, solidifying that [the joint venturers] intended for [XXXX] to serve as the main Fort Johnson Contract point of contact not only as to [Appellant's] internal functions, but also as to its dealings with the government under the Solicitation work." (*Id.* at 9.) Appellant concludes:

> As clearly spelled out, [XXXX] "is the primary point of contact (POC) for the [CO] and is authorized to execute contracts on behalf of [Appellant]. He will receive the Task Order (TO) from the Contracting Officer's Representative (COR) and is responsible for providing sufficient material and labor to meet the needs of the Government. He is accessible to the [CO] and the COR 24/7 . . . . It is also axiomatic that [XXXX] is the [CO's] and COR's counterpart per [Appellant's] proposal as his proposed interactions and points of collaboration with the [CO] and COR are documented in various locations. See Technical Proposal at 16 ("[XXXXXXXXXXXX XXXXXXXXXX]"); Technical Proposal at 16 (after generating the cost estimates from the task order, "[XXXXXXXXXXXXXXXXX XXXXXXXXX]").
>
> Not only does [XXXX] have the authority required to successfully perform the Fort Johnson Contract work, but he also has touchpoints throughout the solution delivery process from beginning ([XXXXXXXXXXXXX]) to end ([XXXXXXXXXX]) to ensure contract success. [XXXX] is tasked with tangible duties in his role as Project Manager. For example, he "[XXXXXX XXXXXXXXXXXXXXXXXXXXXX]."

(*Id.* at 9-10, internal citations omitted.)

Appellant posits that the Area Office must have "either overlooked or disregarded the [Revised] Addendum which makes clear that at the time the proposal for the Solicitation was

submitted, the [joint venturers] had affirmatively agreed and identified [XXXX], a Colt employee, as the Project/Contract Manager with ultimate responsibility for the performance of the Fort Johnson Contract." (*Id.* at 10.) Furthermore, the Area Office's "reliance on the [Revised] Addendum to validate two of the twelve JVA content criteria but to then simultaneously disregard the same Addendum and its specific reference to the proposal validating the named Project Manager is inequitable." (*Id.* at 10-11.)

Appellant additionally argues that the instant case is distinguishable from prior OHA decisions finding that JVAs fatally failed to designate a named individual as Responsible Manager. Here, Appellant (1) produced documentation that made clear that the Responsible Manager for this effort would be a Colt employee; and (2) specifically identified a particular Colt employee, [XXXX], as Program Manager/Contract Manager in its proposal.

Next, Appellant argues that the Area Office deprived Appellant of due process. Appellant asserts that, after reviewing CCS's size protest, the Area Office contacted [Appellant] for additional information, including any addendums to the JVA that had not already been provided. (*Id.* at 11-12.) The Area Office, though, did not clearly inform [Appellant] that it "would be examining affiliation based on the JVA as opposed to affiliation for lack of an approved MPA as alleged by CCS." (*Id.* at 12.) In particular, the Area Office failed to inform [Appellant] that the Area Office had "switched its focus to the Project Manager issue." (*Id.*) Consequently, Appellant "was never provided with an opportunity to respond in a meaningful and informed way. OHA has long held that although SBA area offices are empowered to explore new issues beyond those set forth in a size protest, due process requires that the challenged concern be given notice of the new issues and an opportunity to respond." (*Id.*) Appellant claims that "had [Appellant] been provided notice that the Area Office's focus had changed, [Appellant] could have highlighted the proposal documents in the possession of the Area Office naming [XXXX] as the cognizant Program Manager." (*Id.*) Given proper notice, Appellant could have "provided adequate assurances that the protégé, Colt, would be in charge of contract performance." (*Id.*)

Appellant asserts that the Area Office's "failure to provide [Appellant] with this opportunity deprived it not only of its due process rights but resulted in an arbitrary outcome that ignores both the facts and the intent of the [joint venturers]." (*Id.* at 13.) The outcome is "particularly unjust as CCS's size protest would have never been filed had [SBA's] MPA Approval List been updated in a timely fashion rather than more than a year after the substitution was approved." (*Id.*)

F. CCS's Response

On February 5, 2024, CCS intervened and responded to the appeal. CCS maintains that the Area Office correctly concluded that Appellant does not qualify for the exception to joint venture affiliation. Furthermore, Appellant has shown no clear error of fact or law in the size determination. The appeal therefore should be denied. (CCS Response at 1.)

CCS asserts that the appeal essentially "asks [OHA] to turn back the clock to help [Appellant] correct its legally insufficient [JVA]." (*Id.*) These efforts should fail:

> [Appellant] admits that the Area Office's factual finding — that the [JVA] was missing one of the regulatory requirements — is correct but suggests that had the Area Office reviewed ancillary documents beyond the [JVA] it would have been able to piece together the missing requirement. It also suggests that it had no idea the Area Office would review its [JVA] against the regulatory requirements and that had it known so it would have directed the Area Office to where it could find the missing information.
>
> Both these arguments have the same fatal flaw: on the date that [Appellant] submitted its proposal for this work, its [JVA] was noncompliant. In fact, the "addendum" the joint venture submitted, and that the Area Office used to establish some of the requirements, was not executed nor dated. There is no curing such deficiencies after the fact. Thus, [Appellant] was not entitled to the special privileges of a compliant mentor-protégé [JVA]. No amount of non- [JVA] documentation or argument from counsel can cure this shortcoming. Thus, there is no clear error in [the size determination].

(*Id.* at 1-2.)

CCS argues that the Area Office had no obligation to review documentation other than the JVA in an effort to glean who the Responsible Manager might be. (*Id.* at 2.) The appeal suggests that the Area Office should have "scoured [Appellant's] proposal for evidence that it did name a responsible manager, cross walking the proposal's description of the contract manager/project manager's duties with the requirements of 13 C.F.R. § 125.8(b)(2)(ii)." (*Id.* at 7.) Thus, in Appellant's view, the Area Office "had only to read pages 11, 12, 17, 18-19, 22, and 30 of the Technical Proposal to see that [XXXX] was named the 'JV Contract Manager', 'Authorized Negotiator', and 'Project Manager' with important performance tasks." (*Id.*, citing Appeal at 7, 10.) Appellant's line of argument, though, ignores that Appellant was responsible for convincing the Area Office that Appellant is a small business. (*Id.*)

In terms of Appellant's claim that it was denied due process because it was not specifically alerted of a change in focus from the legality of the MPA to the legality of the JVA, CCS argues that Appellant did in fact receive appropriate notice:

> The Area Office *did* provide due process to [Appellant] and if there was any error it was harmless. On December 27, [2023,] the [] Area Office asked [Appellant] for a copy of the joint venture addendum. [Appellant's] response came in January 3 [2024]. It said, 'The [Revised Addendum] is attached. The addendum in the previous agreement was a placeholder until formal award was made. I have also included a spreadsheet that was submitted with the proposal that also outlines JV roles based on the quantity estimates.' Thus, [Appellant] provided a response to the Area Office's change in focus. [Appellant's] argument that it had no idea the Area Office was reviewing its addendum for sufficiency is uncompelling. It is not that the Area Office did not give [Appellant] a chance to respond. It did. [Appellant] just did not believe the addendum was important—as also supported by the fact that the text of the [JVA] envisions adopting an addendum only after award. JVA § 5(g).

> The fault, therefore, is squarely [Appellant's] for not understanding the nature of this document.

(*Id.* at 8-9 (internal citations omitted).)

Moreover, CCS contends, even if the Area Office had not specifically requested the Revised Addendum and thereby given Appellant notice that the document would be reviewed, Appellant should have known the Area Office would indeed consider the JVA's compliance with applicable regulations:

> The protest alleged that there was no [MPA] in place and therefore the joint venture was not eligible. Thus, the eligibility of the joint venture was the issue — obviously. The sufficiency of the [JVA] is such a fundamental matter when a joint venture is protested that the Area Office did not need to ask for [Appellant's] response to the issue. Further, SBA's regulations specifically say that a size determination may "be based on grounds not raised in the protest or request for size determination. SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties." 13 C.F.R. § 121.1009(b). [Appellant] is presumed to be familiar with these regulations.
>
> Besides if this was an error by the Area Office it was a harmless one. OHA has recognized that the harmless error rule applied by civil courts also applies to administrative adjudicatory bodies. Said OHA, the "federal harmless error statute instructs courts to review cases for errors of law without regard to errors that do not affect the parties' substantial rights." This prevents appellate courts from becoming 'impregnable citadels of technicality'." An area office's error is harmless 'when rectifying the error would not have changed the result.'

(*Id.* at 9-10 (internal citations omitted).)

In CCS's view, "the harmlessness of this error is belied by the requested remedy." (*Id.* at 10.) A remand to the Area Office "would simply give [Appellant] the opportunity to make the same arguments there it has made here: that it can cure this deficiency after the fact. Just as they could not prevail here, they could not prevail there. Rectifying the error would not change the result. The [JVA] was defective. No amount of attorney argument can change that simple fact." (*Id.*)

CCS reiterates its position that Appellant's JVA was clearly non-compliant. In fact, the JVA was "worse than the Area Office found because [the Revised Addendum] was unsigned and undated meaning it should not have been relied on at all. The contents of an ancillary document cannot change that." (*Id.*) Similarly, whether or not the Area Office "told [Appellant] it had changed its focus from the protest to the sufficiency of the [JVA] and asked for its response, the deficiency of the [JVA] cannot now be cured." (*Id.*) Because additional discussion of such matters would not have altered the outcome of the case, any error was harmless. (*Id.*)

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 instant case is highly analogous to OHA's decision in *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188 (2023). In *Focus Revision*, the challenged concern was a joint venture between an SBA-approved mentor and protégé. *Focus Revision*, SBA No. SIZ-6188, at 19. The joint venturers entered into a JVA, but that original JVA contained no details pertaining to the particular procurement in question, and therefore was deficient. *Id.* at 20. OHA noted that, among other defects, the JVA did not "designate 'a named employee of the small business managing venturer' [] to serve as the Responsible Manager, as required by 13 C.F.R. § 125.8(b)(2)(ii)." *Id.* After the submission of final proposal revisions, the joint venturers created an "addendum" to their original JVA, which included procurement-specific information. *Id.* The addendum, though, "was unsigned by either of the joint venturers" and therefore did not constitute a valid addendum. *Id.* at 21. Furthermore, because the addendum "did not exist" as of the relevant date for determining size (*i.e.*, the date of final proposal revisions), the addendum could not properly be utilized in assessing the joint venture's compliance with 13 C.F.R. § 125.8(b)(2) and (c). *Id.* at 22. OHA additionally found that, even if the addendum had been signed, and even if it had been in existence as of the date of final proposal revisions, the JVA as supplemented by the addendum still did not contain all of the detail necessary to meet the requirements of 13 C.F.R. § 125.8(b)(2) and (c). *Id.* at 23.

Here, like in *Focus Revision*, Appellant's JVA, standing alone, plainly does not meet the requirements of 13 C.F.R. § 125.8(b)(2) and (c). Indeed, Appellant's joint venturers themselves recognized that, in order to satisfy SBA regulatory requirements, it would be necessary to prepare an addendum to the JVA that would define "the responsibilities of the parties, the roles of any third parties, sources of labor, and contract performance for the applicable Contract." Section II.C, *supra*. During the course of the size investigation, the Area Office requested, and Appellant produced, the Revised Addendum, which does contain certain contract-specific details. *Id.* Like the addendum at issue in *Focus Revision*, however, the Revised Addendum is unsigned, and Appellant's JVA stipulated that a proper addendum must be signed and incorporated "as an amendment" into the JVA. *Id.* Accordingly, because the Revised Addendum was not signed by Colt and Sunbelt, nor incorporated into the JVA through an amendment, it is not a valid "addendum" under the terms of Appellant's JVA.

Like in *Focus Revision*, there also is no indication that the Revised Addendum was in effect prior to the date of final proposal revisions. In fact, Appellant's JVA's seemingly indicates

that the joint venturers intended to "enter into" any addendum only after proposal submission, "[i]f the Prime Contract is awarded to [Appellant]." Section II.C, *supra*. Lastly, as the Area Office recognized, and again like the circumstances seen in *Focus Revision*, Appellant's JVA remains deficient even if the Revised Addendum could appropriately be considered. This is true because neither Appellant's JVA nor the Revised Addendum designates a named Colt employee as the Responsible Manager with ultimate responsibility for performance of the contract, as is required by 13 C.F.R. § 125.8(b)(2)(ii). Section II.C, *supra*.

On appeal, Appellant argues that the Area Office could have ascertained, based on a review of Appellant's proposal, that Appellant intended that [XXXX] would be the Responsible Manager. Section II.E, *supra*. This argument, however, is unpersuasive, for two principal reasons. First, as discussed above, Appellant's JVA actually was far more flawed than the Area Office realized. Insofar as the Revised Addendum was not a valid addendum, and was not in effect as of the date of final proposal revisions, the Revised Addendum should have been disregarded altogether in assessing Appellant's compliance with 13 C.F.R. § 125.8(b)(2) and (c). *Focus Revision*, SBA No. SIZ-6188, at 21-22. Had the Area Office done so, the Area Office would have found Appellant's JVA non-complaint in several additional respects, not merely with regard to the Responsible Manager. Second, the applicable regulation stipulates that a named employee of the managing venturer must be "designat[ed]" as the Responsible Manager in the JVA itself. 13 C.F.R. § 125.8(b)(2)(ii). OHA has interpreted such language to mean that "designation in a different document, which is not part of the joint venture agreement, is [] not sufficient." *Matter of HANA-JV*, SBA No. VET-227, at 5 (2012). Here, there is no dispute that neither Appellant's JVA nor the Revised Addendum designated [XXXX], or any named Colt employee, as the Responsible Manager. Section II.C, *supra*. Even if the Area Office might have understood from Appellant's proposal that [XXXX's] role would be that of the Responsible Manager, then, the Area Office did not err in finding that this information was improperly omitted from the JVA.

Lastly, Appellant's claim that it was denied due process is also unavailing. OHA has recognized that "before finding a concern other than small on grounds not found in a protest, an area office must provide notice to the protested concern of any change in focus and request a response." *Size Appeal of Alutiiq Int'l Sols., LLC*, SBA No. SIZ-5069, at 3 (2009); *see also Size Appeal of C2 Alaska, LLC*, SBA No. SIZ-6149, at 10-11 (2022). In the instant case, though, Appellant has not established that any such change of focus occurred. CCS's initial protest questioned whether Appellant was a valid joint venture, and Appellant thus knew, or should have known, that its status as a joint venture would be under review. Section II.A, *supra*.

Furthermore, Appellant evidently understood that its JVA would be relevant to this inquiry, as Appellant offered a copy of its JVA in response to the initial protest, apparently without any specific request from the Area Office. *Id.* During the course of the size investigation, the Area Office asked Appellant to produce any addendums to the JVA pertaining to the instant procurement, and Appellant complied, submitting the Revised Addendum. Section II.C, *supra*. Given this record, then, I see no basis to conclude that the Area Office changed the focus of its review. Rather, the Area Office remained focused on the central issue raised in CCS's protest (*i.e.*, whether Appellant was a valid joint venture), and Appellant had fair opportunity to submit evidence and argument on this question.

IV. Conclusion

Appellant has not shown reversible error in the size determination. Accordingly, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge