

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

SIZE APPEAL OF:

Kako'o Spectrum Healthcare Solutions,
LLC,
Appellant,

Appealed From
Size Determination No. 06-2024-025

SBA No. SIZ-6293

Decided: June 25, 2024

APPEARANCES

Amy L. O'Sullivan, Esq., Zachary H. Schroeder, Esq., Crowell & Moring LLP,
Washington, D.C., for Kako'o Spectrum Healthcare Solutions, LLC

Joseph G. Lukowski, President, Laredo Technical Services, Inc., San Antonio, Texas

DECISION¹

I. Introduction and Jurisdiction

On March 25, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2024-025, concluding that Kako'o Spectrum Healthcare Solutions, LLC (Appellant) is not an eligible small business for the subject procurement. Appellant is a joint venture between Kako'o Services, LLC (KS) and its SBA-approved mentor, Spectrum Healthcare Resources, Inc. (SHR). The Area Office found that Appellant's joint venture agreement (JVA) was deficient. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand or reverse. For the reasons discussed *infra*, the appeal is granted in part, and the matter is remanded to the Area Office for a new size determination.

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.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

II. Background

A. The Solicitation

On August 5, 2022, the United States Marine Corps (USMC) issued Request for Proposals (RFP) No. M0026422R0008 for “on-site Certified Athletic Trainer and Strength and Conditioning Specialist services.” (RFP at 11.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621340, Offices of Physical, Occupational and Speech Therapists and Audiologists, which at that time had a corresponding size standard of \$11 million average annual receipts.²

Appellant submitted its initial offer including price on October 3, 2022. On February 26, 2024, the CO announced that Appellant was the apparent awardee.

B. Protest and Area Office Proceedings

On February 27, 2024, Laredo Technical Services, Inc. (Laredo), an unsuccessful offeror, filed a protest with the CO challenging Appellant's size. The protest alleged that KS, the protégé member of Appellant, is affiliated with four concerns — Management Support, Inc.; Gusman Corp.; PYK Industries, Inc.; and PYK Group, LLC — through common management. (Protest 1-3, citing 13 C.F.R. § 121.103(e).) More specifically, Laredo contended, KS's three corporate officers also serve as “officers, owners, members, presidents, treasure[r]s, secretaries, and/or directors” of the other concerns. (*Id.* at 1, 3.) Furthermore, although KS itself is a subsidiary of the Ho'omaka Foundation, a Native Hawaiian Organization (NHO), the alleged affiliates are not associated with any NHO. (*Id.* at 3.) The CO forwarded Laredo's protest to the Area Office for review.

On March 7, 2024, Appellant responded to the protest, and submitted various supporting documentation. Appellant averred that the protest should be dismissed or denied for three principal reasons. First, KS is majority-owned and controlled by an NHO, not by the individual corporate officers named in Laredo's protest. (Protest Response at 4-5.) Second, even assuming, *arguendo*, that KS is affiliated with the four concerns identified in the protest, the issue is irrelevant because the combined receipts of KS and these concerns would not exceed the applicable size standard. (*Id.* at 6.) Lastly, Laredo's protest amounts to a challenge against KS's status in the 8(a) program, in contravention of 13 C.F.R. § 124.517(a). (*Id.* at 7.)

² The RFP incorrectly stated that the applicable size standard was \$8 million. (RFP at 1.) However, effective May 2, 2022, SBA increased the size standard for NAICS code 621340 from \$8 million to \$11 million. 87 Fed. Reg. 18,646, 18,649 (Mar. 31, 2022). According to SBA regulations, “the size standard in effect on the date the solicitation is issued” is controlling. 13 C.F.R. § 121.402(a).

C. JVA and Amendments

Appellant's JVA, dated June 1, 2020, indicates that KS owns 51% of Appellant, and SHR the remaining 49%. (JVA at 4.) During the course of the size review, Appellant produced three amendments to the original JVA.

D. Size Determination

On March 25, 2024, the Area Office issued Size Determination No. 06-2024-025, concluding that Appellant is not an eligible small business for the subject procurement. The Area Office found that Appellant's size must be assessed as of October 3, 2022, the date Appellant submitted its initial offer for the subject procurement. (Size Determination at 2.)

The Area Office preliminarily noted that although KS is a participant in the 8(a) program, the instant procurement was not an 8(a) set-aside, but rather a small business set-aside. (*Id.* at 8.) As such, “[the Area Office] must determine the size of KS, validate the existence of a valid mentor-protégé agreement (MPA) under 13 C.F.R. § 125.9, and validate [the JVA's] compliance under the requirements of 13 C.F.R. § 125.8(b) and (c).” (*Id.*)

The Area Office found that KS is majority-owned and controlled by an NHO, the Ho'omaka Foundation (formerly known as the Native Hawaiian Legal Defense & Education Fund). (*Id.* at 9.) KS is not affiliated with the NHO, or with other concerns owned and controlled by the same NHO, due to the exception to affiliation at 13 C.F.R. § 121.103(b)(2)(i) and (ii). (*Id.*) Mr. Paul Komeiji, the sole manager of KS, also maintains “controlling ownership and management positions” at PYK Industries Inc. and PYK Group, LLC. (*Id.*) Because KS is controlled by its NHO parent, though, KS is not affiliated with these concerns based on common management. (*Id.* at 10.)

Next, the Area Office found that KS and SHR are an SBA-approved mentor and protégé. (*Id.* at 11.) An MPA was in place on June 1, 2020, the date the joint venture was established, and on October 3, 2022, the date Appellant submitted its initial offer including price for the instant procurement. (*Id.*) Based on review of tax records, the Area Office determined that KS's receipts do not exceed the applicable \$11 million size standard. (*Id.* at 10.)

The Area Office turned to an analysis of whether Appellant's JVA meets the requirements of 13 C.F.R. § 125.8(b) and (c). (*Id.* at 11-19.) The Area Office found that the JVA meets many, but not all, of the requirements. (*Id.*) Because the JVA is deficient, KS and SHR cannot utilize exception to affiliation for mentor-protégé joint ventures at 13 C.F.R. § 121.103(h)(2)(ii), and therefore are affiliated. (*Id.* at 19.)

E. OHA Proceedings

Appellant timely appealed Size Determination No. 06-2024-025 to OHA. On June 11, 2024, while the appeal was pending, Appellant informed OHA that, on May 8, 2024, USMC “opened discussions” with Appellant and requested that Appellant submit final proposal revisions by May 23, 2024. (Motion at 3.) Separately, on May 16, 2024, KS and SHR amended

the JVA. (*Id.*) Appellant offers copies of the request for final proposal revisions, dated May 8, 2024, and Appellant's "Amended and Restated Joint Venture Operating Agreement." (*Id.*, Exhs. 1-2.)

On June 13, 2024, OHA invited the parties to submit comments as to whether this matter should be remanded to the Area Office for a new size determination. OHA explained that, under OHA precedent, OHA will remand for a new size determination if an area office conducts its review without having access to the correct version of essential documents. (OHA's Order at 1, citing *Size Appeal of GaN Corp.*, SBA No. SIZ-5658 (2015); *Size Appeal of IAP World Servs., Inc.*, SBA No. SIZ-5480 (2013); and *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125 (2010).)

On June 19, 2024, Laredo submitted comments in response to OHA's Order. Laredo states that, because its protest did not challenge Appellant's compliance with JVA requirements, OHA should continue to adjudicate the appeal and address Laredo's protest allegations that KS is affiliated with four other concerns through common management. (Laredo's Comments at 1-2.)

On June 20, 2024, Appellant submitted comments in response to OHA's Order. Appellant maintains that, because the Area Office did not review Appellant's revised JVA, which was executed prior to the date of the final proposal revisions but after issuance of Size Determination No. 06-2024-025, remand is proper. (Appellant's Comments at 1.)

III. Discussion

I find it appropriate to remand this case for further review. A principal problem here is that the Area Office based its decision on the version of Appellant's JVA in effect on October 3, 2022, the date Appellant submitted its initial offer including price for the subject procurement. Sections II.A and II.D, *supra*. While this appeal was pending, however, and several weeks after Size Determination No. 06-2024-025 was issued, the procuring agency reopened the procurement and invited Appellant to submit final proposal revisions by May 23, 2024. Section II.E, *supra*. Separately, on May 16, 2024, Appellant's joint venturers, KS and SHR, executed a new version of the JVA. *Id.*

Pursuant to 13 C.F.R. § 121.404(d), a concern's compliance with the JVA requirements of 13 C.F.R. § 125.8(b) and (c) must be assessed as of the date of final proposal revisions. Accordingly, because the Area Office assessed Appellant's compliance with 13 C.F.R. § 125.8(b) and (c) as of the wrong date, and because the Area Office was unable to review the latest version of Appellant's JVA which did not exist at the time Size Determination No. 06-2024-025 was issued, remand is warranted. It is well-settled that OHA itself lacks authority to issue size determinations. 13 C.F.R. § 121.1002; *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5747, at 3 (2016). As a result, if an area office conducts its review without having access to the correct version of essential documents, OHA will remand the matter to the area office for a new size determination. *Size Appeal of GaN Corp.*, SBA No. SIZ-5658 (2015); *Size Appeal of IAP World Servs., Inc.*, SBA No. SIZ-5480 (2013); *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125 (2010).

Laredo opposes remand, and urges that OHA should instead proceed to adjudicate the size appeal. Section II.E, *supra*. By regulation, though, OHA cannot adjudicate substantive matters which have “become moot.” 13 C.F.R. § 134.316(c). Here, Appellant was found to be ineligible for award based solely on deficiencies in its original JVA, and that question is now moot due to the creation of a new JVA prior to the date of final proposal revisions. Sections II.D and II.E, *supra*. Laredo is not, in any event, prejudiced by remand, because once the Area Office issues a new size determination, Laredo will have the opportunity to appeal any adverse determination to OHA. *E.g., Matter of Williams Bldg. Co.*, SBA No. VET-262, at 4 (2017) (explaining that “remanding the case is not prejudicial to any party”).

IV. Conclusion

Appellant has shown that the Area Office did not review the correct version of Appellant's JVA, and the appeal is GRANTED to that extent. Size Determination No. 06-2024-025 is VACATED, and the matter is REMANDED to the Area Office for a new size determination.

KENNETH M. HYDE
Administrative Judge