Cite as: *Matter of eKCG, LLC*, SBA No. VET-255 (2016)

United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

IN THE MATTER OF: eKCG, LLC, Appellant, Solicitation No. DJD-15-R-0004	SBA No. VET-255 Decided: April 6, 2016

APPEARANCES

John E. Jensen, Esq., Selena M. Brady, Esq., Pillsbury Winthrop Shaw Pittman, LLP, McLean, Virginia, for Appellant

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

DECISION[1]

I. Introduction and Jurisdiction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) concluding that eKCG, LLC (Appellant) is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). Appellant maintains that the determination is erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied and the D/GC's determination is affirmed.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

OHA decides appeals of SDVO SBC status determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq*., and 13 C.F.R. parts 125 and 134. Appellant filed the appeal within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On April 16, 2015, the U.S. Department of Justice, Drug Enforcement Administration issued Request for Proposals (RFP) No. DJD-15-R-0004 for information security services. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs, and assigned North American Industry Classification System (NAICS) code 541519, Other Computer Related Services, with a corresponding size standard of $27.5 million average annual receipts. Proposals were due June 4, 2015. Appellant submitted a timely proposal, self-certifying as an SDVO SBC.

On November 2, 2015, the CO announced that Appellant had been selected for award. On November 6, 2015, AlphaSix Corporation (AlphaSix), a disappointed offeror, filed a protest with the CO challenging Appellant's status as an SDVO SBC. AlphaSix alleged that Appellant is in violation of Federal Acquisition Regulation (FAR) clause 52.219-27 and 13 C.F.R. § 125.15(b), which require that each party to an SDVO joint venture be small under the applicable size standard. (Protest File (PF), tab 6, at 00495.) Specifically, AlphaSix contended that Appellant is a joint venture between Espire Services, LLC (Espire) and Knowledge Consulting Group, Inc. (KCG), and that KCG is "an acknowledged large business" exceeding the $27.5 million size standard. (*Id*.) Concurrent with its status protest, AlphaSix also lodged a size protest against Appellant, which was processed separately from the status protest. (*Id*. at 00498.)

On December 7, 2015, Appellant responded to the status protest. Appellant maintained that Espire and KCG are parties to an SBA-approved mentor-protégé agreement, and that mentor-protégé joint ventures are eligible to bid on any set-aside procurement. (PF, tab 3, at 00033.) According to Appellant, the only prerequisite for a mentor-protégé joint venture to be eligible to bid on an SDVO SBC set-aside is that the protégé concern must qualify as an SDVO SBC. Espire is an SDVO SBC as well as an 8(a) Business Development (BD) participant, Appellant argued, so that requirement is met here. (*Id*. at 00034.) Appellant further contended that AlphaSix's protest should be dismissed because AlphaSix failed to raise any valid grounds for a status protest. (*Id*. at 00037.)

B. Joint Venture Agreement

Espire and KCG initially executed a joint venture agreement on March 4, 2014, and subsequently amended their agreement to pertain to the instant procurement. (PF, tab 3, at 00480.) The agreement identifies Espire as the Managing Venturer, in charge of managing and controlling the operations of the joint venture, and KCG as the Partner Venturer. (*Id*. at 00475-76.) The joint venture agreement contains the following additional provisions pertinent to this appeal:

> 3.1 Project Manager Nathan L. Hibler, an employee of [Espire], is the Project Manager of this Joint Venture.
>
> . . .
>
> 5.0 Ownership Interest The Managing Venturer, [Espire], has an ownership interest of 51% in the "Joint Venture", the Partner Venturer, [KCG] has an ownership interest of 49% in the "Joint Venture".
>
> 6.0 Net Profit/Losses The net operating income and net operating loss of the Joint Venture shall be allocated between and shared by the Venturers commensurate to the work performed.
>
> . . .
>
> 15.1 Performance of Work ... The Managing Venture will perform, at least forty percent (40%) of the work performed by the Joint Venture.

(*Id*. at 00476, 00478.)

C. D/GC Determination

On February 3, 2016, the D/GC issued his determination concluding that Appellant is not an eligible SDVO SBC.

The D/GC first explained that Appellant is a joint venture between Espire and KCG. (Determination, at 1.) The D/GC found that Espire is 100% owned and controlled by Mr. Nathan L. Hibler, a veteran with a service-connected disability. (*Id*. at 3.) Therefore, Espire is an eligible SDVO SBC.

The D/GC next determined that Appellant fails to meet three of the regulatory requirements for SDVO joint ventures found at 13 C.F.R. § 125.15(b). SBA regulations provide that, in the case of a joint venture vying for an SDVO SBC set-aside, an SDVO SBC must be the managing venturer and an employee of the SDVO SBC must serve as project manager. Here, the joint venture agreement creating Appellant stated that Espire is the managing venturer, and indicated that Mr. Hibler would serve as project manager. However, upon reviewing Appellant's proposal for the instant procurement, the D/GC found that Appellant identified [XXXX] as the project manager. (*Id*. at 4.) [XXXX]'s resume stated that, at the time of proposal submission, he was an employee of the U.S. Department of Homeland Security and a former employee of KCG. (*Id*.) The D/GC concluded, based on these facts, that the project manager was not an Espire employee, so Appellant did not comply with 13 C.F.R. § 125.15(b)(2)(ii).

The D/GC determined that Appellant's joint venture agreement also did not establish that at least 51% of net profits would be distributed to Espire, the SDVO SBC member of the joint venture, as required by 13 C.F.R. § 125.15(b)(2)(iii). Upon reviewing the terms of Appellant's joint venture agreement, the D/GC found that it guarantees Espire only 40% of the work

performed, and only 40% of the net profits, thereby failing to meet the minimum threshold for profit distribution. (*Id*. at 5.)

Lastly, the D/GC noted that a joint venture may perform a contract set aside for SDVO SBCs if all participating concerns are small businesses under the size standard associated with the procurement. (*Id*. at 5-6, citing 13 C.F.R. § 125.15(b).) Here, the D/GC determined, KCG is a large business, so Appellant fails this requirement. The D/GC rejected the notion that Appellant's status as an SBA-approved mentor-protégé joint venture excuses Appellant from complying with § 125.15(b). The D/GC asserted that SBA has never granted this type of exception to the SDVO eligibility requirements. Further, although an SBA-approved mentor and protégé typically are exempt from affiliation for size purposes, "[t]his is not a size protest, and affiliation is not an issue." (*Id*. at 6.) Therefore, the D/GC concluded, Appellant does not meet the SDVO SBC eligibility requirements in order to participate in the instant procurement.

D. Appeal

On February 18, 2016, Appellant filed its appeal with OHA. Appellant argues that the D/GC's determination is erroneous because Espire is an 8(a) BD participant as well as an SDVO SBC, and KCG is Espire's mentor under an SBA-approved mentor-protégé arrangement. Therefore, Appellant reasons, Espire and KCG are eligible to compete for all set-aside procurements, including SBVO SBC set-asides. According to Appellant, "the D/GC incorrectly rejected [Appellant's] position that SBA-approved mentor-protégé pairs are permitted to use their mentor-protégé status ... as a basis to joint venture for [SDVO SBC] set-asides or for other types of non-8(a) set-aside procurements." (Appeal at 2.)

Appellant renews its contention that AlphaSix's protest should have been dismissed because the protest failed to raise a proper claim permitted by SBA's regulations. In particular, 13 C.F.R. § 125.26 states that a protester may bring a protest "based on service-connected disability, permanent and severe disability, or veteran status" or "based on ownership and control." AlphaSix's protest did not fall into any of these categories, Appellant argues, because AlphaSix made no allegations about Mr. Hibler's service-connected disability eligibility, Mr. Hibler's ownership or control of Espire, or Espire's control of the joint venture. (*Id*. at 7-8, citing *Matter of Castle-Rose, Inc*., SBA No. VET-180 (2010).)

Next, Appellant argues that, according to 13 C.F.R. §§ 121.103(h) and 124.520(d), a mentor and protégé may joint venture as a small business for any procurement as long as the protégé firm qualifies as a small business under the size standard assigned to the procurement. Despite the D/GC's finding that the regulations only create an exception to affiliation and are not applicable to SDVO status determinations, Appellant emphasizes that the language in the regulations refers to the eligibility of a mentor-protégé joint venture to pursue any set-aside contract. (*Id*. at 10.) Therefore, "[t]he language does not merely waive affiliation." (*Id*.)

Appellant maintains that the D/GC's interpretation bars mentor-protégé joint ventures from participating in any SDVO SBC set-aside procurement unless the mentor is also a small business. (*Id*. at 11.) Although SBA has enacted specific rules for SDVO joint ventures, these rules "should be construed as providing additional authority for joint venture eligibility" and

"should not be construed as eviscerating the mentor-protégé joint venture eligibility rules." (*Id*. at 12, emphasis in original.) Appellant maintains that SBA's commentary in the *Federal Register* confirms SBA's intent to allow mentor-protégé joint ventures to participate in any set-aside procurement. (*Id*. at 12-13, citing 76 Fed. Reg. 8222, 8225 (Feb. 2, 2011).) Appellant further asserts that the OHA decisions referenced by AlphaSix in its protest, *Matter of Construction Engineering Services, LLC*, SBA No. VET-213 (2011) and *Matter of Mission Essentials, LLC*, SBA No. VET-222 (2011), are inapposite because these cases did not involve a mentor-protégé joint venture's eligibility to compete for an SDVO SBC set-aside. (*Id*. at 14-15.)

Appellant disputes the D/GC's determination that Appellant fails to meet the project manager requirement found at 13 C.F.R. § 125.15(b)(2)(ii). Appellant explains that it met the requirement found in the 8(a) regulations at 13 C.F.R. § 124.513(c) by designating Mr. Hibler as project manager. (*Id*. at 16.) Appellant highlights that the regulations do not stipulate that the proposal must identify a project manager from the protégé or SDVO SBC member of the joint venture. (*Id*. at 17.) The D/GC also erred in finding that Appellant does not comply with the profit distribution regulations. Appellant argues its profit distribution meets the requirements set forth in the mentor-protégé joint venture regulations at 13 C.F.R. § 124.513(c) and (d). (*Id*., n.7.)

E. SBA's Response

On March 7, 2016, SBA responded to the appeal. SBA maintains that the D/GC's determination is correct and should be affirmed.

SBA contends that accepting Appellant's argument that only issues specifically discussed in 13 C.F.R. § 125.26 may be protested would contravene the purpose of the protest process, which is to ensure that firms seeking to receive benefits from SBA programs are eligible to receive those benefits. (SBA Response, at 3.) Further, because § 125.26 is silent with respect to protests against SDVO joint ventures, adopting Appellant's argument "would make it impossible for SBA to determine if any joint venture was meeting the requirements of the program." (*Id*. at 4.)

SBA asserts that the D/GC correctly found that Appellant's project manager is not an employee of Espire, the SDVO SBC member of the joint venture. SBA notes that in the past, OHA has recognized that the project manager identified in the joint venture agreement must not only hold the title of project manager, but must also substantively manage the contract. (*Id*. at 5, citing *Matter of HANA-JV*, SBA No. VET-227 (2012).) Here, Appellant's joint venture agreement stated that Mr. Hibler would serve as project manager, yet Appellant's proposal identified [XXXX], who is not an Espire employee, as the project manager. This clearly contravenes SBA regulations, as an employee of the SDVO SBC must in actuality be the project manager. (*Id*. at 6.)

SBA contends that, contrary to Appellant's arguments, Appellant was required to comply with SDVO program regulations in order to compete for an SDVO set-aside aside, notwithstanding that Appellant is a joint venture between an SBA-approved mentor and protégé. SBA asserts that "mentor protégé joint ventures must independently satisfy the requirements of the program that the set-aside is meant to benefit, unless a specific and express waiver of those

provisions is granted." (*Id*. at 8.) According to SBA, Appellant takes the view that mentor-protégé joint ventures may freely bid on any type of set-aside without having to comply with program-specific regulations. Such an outcome would be improper, SBA maintains, as "[i]t was never SBA's intent to invalidate the requirements of its other programs in the case of 8(a) BD mentor protégé joint ventures." (*Id*. at 11.)

Regarding the issue of profit distribution, SBA asserts that Appellant's joint venture agreement meets 8(a) program requirements but does not meet SDVO program requirements. Because the joint venture agreement states that Espire will perform at least 40% of the work, and that Espire will receive a corresponding share of net profits, the agreement does not comply with 13 C.F.R. § 125.15(b)(2)(iii), which requires the SDVO SBC member of the joint venture to receive at least 51% of net profits. (*Id*. at 12.)

Lastly, SBA argues that the requirement found at 13 C.F.R. § 125.15(b) is separate from the requirements of part 121, and contrary to Appellant's suggestions, does not prohibit joint ventures from competing for SDVO set-asides. The purpose of the rule is "to ensure that SDVO SBC's do not have to compete against joint ventures that include a large business for SDVO SBC set-asides." (*Id*. at 13.) SBA reiterates that 8(a) program regulations do not supersede those of the SDVO SBC program for procurements which are set aside for SDVO SBCs. Appellant is not an eligible SDVO SBC because it is in violation of several SDVO program- specific regulations.

F. AlphaSix's Response

On March 7, 2016, AlphaSix responded to the appeal. AlphaSix maintains that Appellant fails to meet at least three of the eligibility criteria that apply to SDVO joint ventures. Therefore, OHA should uphold the D/GC's determination and deny the appeal.

AlphaSix argues that, contrary to Appellant's assertions, the protest did meet the specificity requirements. AlphaSix states that Appellant essentially argues that, under 13 C.F.R. § 125.26, unless the protester is challenging a veteran's disability status, or the veteran's ownership and control of the apparent awardee, the protest must be dismissed. (AlphaSix Response, at 7.) Appellant is incorrect, AlphaSix argues, because § 125.26 "imposes a heightened pleading standard [for certain types of allegations], but does not otherwise limit SBA's statutory authority to decide a concern's SDVO SBC status." (*Id*. at 6-7.) Here, AlphaSix's protest challenged Appellant's eligibility based on 13 C.F.R. § 125.15, which sets forth the requirements for SDVO joint ventures. The protest alleged that KCG is not a small business, and "attached credible supporting evidence showing that KCG is other than small under the NAICS code assigned to this procurement." (*Id*. at 8-9.) Thus, AlphaSix raised proper SDVO status allegations. AlphaSix argues that Appellant's reliance on *Matter of Castle-Rose, Inc*., SBA No. VET-180 (2010) is also misplaced. The protester in *Castle-Rose* made only extremely vague allegations, and OHA concluded that the D/GC had correctly dismissed the protest for lack of specificity. AlphaSix highlights that, in reaching this decision, "OHA did not construe 13 C.F.R. § 125.26 as limiting the types of protests the D/GC had jurisdiction to decide." (*Id*. at 8.)

Next, AlphaSix contends that the D/GC did not err in finding that a joint venture competing for an SDVO set-aside must meet the requirements at 13 C.F.R. § 125.15(b).

AlphaSix asserts that Appellant fails to cite any case law to support its "radical" and "unprecedented" contention that § 125.15(b) is inapplicable to a mentor-protégé joint venture operating within the SDVO program. (*Id*. at 4, 9.) Further, AlphaSix continues, the U.S. Government Accountability Office (GAO) has addressed this issue in a bid protest decision. In *Enola-Caddell JV*, B-292387.2, B-292387.4, Sept. 12, 2003, 2003 CPD ¶ 168, the GAO agreed with SBA that the exemption from affiliation afforded mentor-protégé joint ventures does not negate the additional joint venture requirements imposed by other SBA programs. (*Id*. at 9-10.)

AlphaSix observes that, although SBA's proposed new universal mentor-protégé program may, in the future, exempt mentor-protégé joint ventures from having to meet diverse joint venture requirements among the various SBA programs, this rule "is not here yet, and there is nothing in the regulations in force today to suggest that the D/GC clearly erred" in finding Appellant non-compliant with § 125.15(b). (*Id*. at 10, citing 80 Fed. Reg. 6617, 6623 (Feb. 5, 2015).)

III. Discussion

A. Jurisdiction and Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. OHA reviews the D/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the D/GC's determination only if Appellant proves that the D/GC made a patent error based on the record before him.

B. Analysis

1. Protest

Appellant first argues that AlphaSix's protest should have been dismissed because the protest failed to raise a claim cognizable under SBA regulations. Appellant points in particular to 13 C.F.R. § 125.26, entitled "What are the grounds for filing an SDVO SBC protest?". Appellant highlights that the regulation indicates that a protester may bring an SDVO status protest "based on service-connected disability, permanent and severe disability, or veteran status" or "based on ownership and control." 13 C.F.R. § 125.26. AlphaSix's protest did not fall within these categories, Appellant asserts, because AlphaSix's protest did not challenge Mr. Hibler's service-connected disability eligibility, Mr. Hibler's ownership or control of Espire, or Espire's control of Appellant. Rather, AlphaSix complained about the structure of the Appellant's joint venture, alleging that KCG is not a small business. Section II.A, *supra*. Because AlphaSix did not raise an issue recognized under § 125.26, Appellant reasons, the D/GC should have dismissed the protest.

I find no merit to this argument. As AlphaSix correctly observes in its response to the appeal, the Small Business Act grants SBA authority to review "any challenge to the eligibility

of a small business concern to receive assistance" under the SDVO SBC program, as well as authority to verify the "accuracy of any certification made or information provided to the [SBA]." 15 U.S.C. §§ 637(m)(5) and 657f(d). Thus, when a protest challenges a concern's certification as an SDVO SBC, the SBA, acting through the D/GC, has authority to review that protest and issue a determination. The notion that SDVO status protests are not confined only to issues specifically identified in § 125.26 is also supported by the FAR version of the SDVO protest rule, which broadly permits that a protester "may protest the apparently successful offeror's [SDVO SBC] status" but contains no other restrictive language comparable to § 125.26. FAR 19.307.

In light of SBA's statutory authority to decide SDVO SBC status protests, I agree with AlphaSix and SBA that § 125.26 merely instructs that certain types of protest issues must be supported by specific allegations and credible evidence, but that § 125.26 does not restrict SDVO status protests only to those particular issues. Accordingly, because AlphaSix's protest questioned whether Appellant is a valid SDVO joint venture eligible for the instant procurement, and whether Appellant had properly self-certified as an SDVO SBC, the D/GC did not err in declining to dismiss the protest under § 125.26.

It is worth noting that OHA has repeatedly addressed protest allegations similar to those raised here by AlphaSix, and has never held that such matters are beyond the scope of the SDVO protest process. Thus, OHA case law implicitly confirms that SDVO status protests are not limited only to those issues specifically discussed in § 125.26. In *Matter of Veterans Contractors Group JV, LLC*, SBA No. VET-233 (2013), for example, the protest alleged that one of the joint venture participants was "a very large concern", in contravention of SDVO joint venture rules. *Veterans Contractors Group JV*, SBA No. VET-233, at 2. OHA agreed that the protest was correctly dismissed as insufficiently specific, because the protester did not offer any specific facts or evidence of ineligibility. Notably, though, OHA did not conclude that the protest allegation itself was improper under § 125.26. In *Matter of Mission Essentials, LLC*, SBA No. VET-222 (2011), OHA overturned a decision to dismiss an SDVO status protest, finding that "[the] protest raised a specific issue as to [the challenged firm's] SDVO SBC status . . . , that is, whether [the challenged firm] complied with the joint venture regulation at 13 C.F.R. § 125.15(b)." *Mission Essentials*, SBA No. VET-222, at 5. Again, OHA did not construe § 125.26 as prohibiting the protester from challenging the eligibility of an SDVO joint venture. In *Matter of Construction Engineering Services, LLC*, SBA No. VET-213 (2011), OHA noted that the underlying protest "questioned whether the joint venture agreement submitted by [the challenged firm] meets the requirements of 13 C.F.R. § 125.15." *Construction Engineering*, SBA No. VET-213, at 1. OHA granted the appeal on its merits and remanded the matter with instructions to "determine whether the joint venture meets the requirements of 13 C.F.R. § 125.15(b)." *Id*., at 11. Once again, then, OHA did not find that such a protest allegation was improper under § 125.26.

Lastly, contrary to Appellant's suggestions, OHA's decision in *Matter of Castle-Rose, Inc*., SBA No. VET-180 (2010) does not require a different result. In *Castle-Rose*, a protest was dismissed for lack of specificity and OHA affirmed that dismissal on appeal, noting that the protest lacked the requisite detail required by § 125.26. Thus, *Castle-Rose* did not address, or

resolve, the question of whether an SDVO status protest could properly raise issues beyond those discussed in § 125.26.

2. The Merits

Next, and at the heart of the issues presented in this appeal, is whether the existing 8(a) mentor-protégé agreement between Espire and KCG excuses Appellant from complying with SDVO program-specific requirements, particularly 13 C.F.R. § 125.15(b). I agree with the D/GC, SBA, and AlphaSix that, having chosen to compete for an SDVO SBC set aside, Appellant was required to adhere to the regulations governing that program. Because Appellant did not do so, Appellant is not an eligible SDVO SBC for the instant procurement.

In support of its appeal, Appellant relies primarily upon SBA regulations at 13 C.F.R. §§ 121.103(h) and 124.520(d). Section 121.103(h) pertinently states as follows:

> (h) *Affiliation based on joint ventures.*
>
> . . .
>
> (2) Except as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.
>
> (3) *Exception to affiliation for certain joint ventures.*
>
> . . .
>
> (iii) Two firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement. . . . If the procurement is to be awarded other than through the 8(a) BD program (*e.g.*, small business set aside, HUBZone set aside), SBA need not approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§ 124.513(c) and (d) apply. This means that the joint venture must meet the requirements of §§ 124.513(c) and (d) in order to receive the exception to affiliation authorized by this paragraph.

13 C.F.R. § 121.103(h). The regulation at § 124.520(d) states:

> *Benefits*. (1) A mentor and a protégé may joint venture as a small business for any government prime contract or subcontract . . . provided the protégé qualifies as small for the procurement. . . .

> (i) SBA must approve the mentor/protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.
>
> (ii) In order to receive the exclusion from affiliation for both 8(a) and non-8(a) procurements, the joint venture must meet the requirements set forth in § 124.513(c).

Id. § 124.520(d).

Although Appellant emphasizes that both §§ 121.103(h) and 124.520(d) state that a mentor and protégé "may joint venture as a small business for any Federal government prime contract or subcontract", a close reading of the rules demonstrates that the regulations grant mentor-protégé joint ventures an exception to affiliation for size purposes, but do not indicate that a mentor and protégé also are exempt from other program-specific requirements. Thus, § 121.103(h), which is entitled "Affiliation based on joint ventures", makes clear that parties to a joint venture ordinarily are affiliated with one another with regard to performance of that contract. *Id*. § 121.103(h)(2). The regulation proceeds to identify three "[e]xception[s] to affiliation", one of which pertains to mentor-protégé joint ventures. *Id*. § 121.103(h)(3)(iii). Accordingly, when § 121.103(h) states that a mentor and protégé "may joint venture as a small business for any Federal government prime contract or subcontract", this remark occurs in the context of an exception to affiliation, and merely affirms that a mentor and a protégé normally are not considered affiliates for size purposes. This conclusion is bolstered by the final sentence of § 121.103(h)(3)(iii), which outlines requirements that a mentor-protégé joint venture must meet "in order to receive the exception to affiliation authorized by this paragraph." *Id*. Likewise, § 124.520(d) twice indicates that parties to a mentor-protégé joint venture may be entitled to an "exclusion from affiliation" and reiterates that the mentor and protégé may compete "as a small business" under certain conditions. Crucially, then, neither § 121.103(h) nor § 124.520(d) states that mentor-protégé joint ventures are exempt from program-specific requirements if the mentor and protégé choose to compete for procurements under such programs. Similarly, there is no indication in the SDVO joint venture regulation itself — or in the corresponding regulations pertaining to HUBZone joint ventures and WOSB joint ventures — that the rules are not applicable to mentor-protégé joint ventures. *Id*. §§ 125.15(b), 126.616, and 127.506. I therefore find no basis to conclude that a mentor and protégé are excused from program-specific regulations, in addition to enjoying an exception from affiliation. Although SBA did waive affiliation for participants in the mentor-protégé program, I agree with the D/GC, SBA, and AlphaSix that SBA did not also waive other program-specific eligibility requirements.

SBA's *Federal Register* commentary accompanying the final versions of §§ 121.103(h) and 124.520(d) confirms that SBA only intended to exempt mentor-protégé joint ventures from affiliation. In a discussion entitled "Exclusion From Affiliation for Mentor/Protégé Joint Ventures", SBA explained that "[r]eceiving an exclusion from affiliation for any non-8(a) contract is a substantial benefit that only SBA-approved mentor/protégé relationships can receive." 76 Fed. Reg. 8222, 8224-25 (Feb. 11, 2011). SBA also stated that it had considered whether it should "allow the exclusion to affiliation for mentor/protégé joint ventures on non-8(a) contracts, or whether the exclusion to affiliation should apply only to 8(a) contracts", and

had determined that the exclusion should apply to non-8(a) contracts as well. Again, then, while SBA repeatedly states that parties to a mentor-protégé joint venture are exempt from affiliation, there is no indication in this commentary that SBA intended to exempt mentor-protégé joint ventures from program-specific requirements if the mentor and protégé choose to compete for such procurements.

Having concluded that Appellant was required to comply with SDVO program regulations, including § 125.15(b) pertaining to SDVO joint ventures, it is clear that Appellant failed to do so here. SDVO regulations state that "[a]n SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract." 13 C.F.R. § 125.15(b). Further, "[a] joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract. . . ."*Id*. § (b)(1)(i). Thus, under § 125.15(b), all parties to an SDVO joint venture must be small businesses. In the instant case, there is no dispute that KCG is a large business under the size standard applicable to the subject procurement. Therefore, the D/GC correctly found that Appellant did not comply with § 125.15(b). As discussed above, the fact that Espire and KCG are mentor and protégé does not alter this result because the exceptions created for mentor-protégé joint ventures are for size and affiliation purposes, and do not excuse a mentor-protégé joint venture from complying with program-specific regulations.

SDVO program regulations further require that an SDVO joint venture designate an employee of the SDVO SBC as "the project manager responsible for performance of the SDVO contract." 13 C.F.R. § 125.15(b)(2)(ii). Here, the D/GC found that although Appellant's joint venture agreement stated that Mr. Hibler, an Espire employee, would be project manager, Appellant's proposal instead identified a different individual, [XXXX], who is not an employee of Espire, as project manager. Thus, an employee of Espire, the SDVO SBC, would not serve as project manager. Appellant counters that § 125.15(b)(2)(ii) only states that the joint venture agreement — but not the actual proposal — identify an SDVO SBC employee as project manager. This argument is meritless. As OHA has previously explained, § 125.15(b)(2)(ii) requires that "[a] representative of the SDVO SBC should not only have the title of 'project manager,' but also should substantively manage each phase of contract performance." *Matter of HANA-JV*, SBA No. VET-227, at 8 (2012). Given the conflict between Appellant's joint venture agreement and Appellant's proposal, the D/GC could reasonably find that Mr. Hibler would not substantively manage the contract, notwithstanding that he was named as project manager in the joint venture agreement.

Lastly, just as SDVO program regulations require that the project manager be an employee of the SDVO SBC, the regulations further require that the joint venture agreement must stipulate that at least 51% of net profits will be distributed to the SDVO SBC. 13 C.F.R. § 125.15(b)(2)(iii). Appellant's joint venture agreement plainly fails to meet this requirement as Espire, the SDVO SBC, is guaranteed only 40% of the work performed by the joint venture, and profits are allocated "commensurate to the work performed." Section II.B, *supra*. Appellant argues, in a footnote, that 8(a) regulations should apply to mentor-protégé joint ventures bidding on an SDVO SBC set-aside. (Appeal, at 17, n.7.) Once again, this argument fails. By choosing to

compete for an SDVO SBC set-aside, Appellant was required to comply with SDVO program regulations.

In conclusion, I find no merit to Appellant's argument that an 8(a) mentor-protégé joint venture is exempt from the program-specific requirements for SDVO joint ventures. Although §§ 121.103(h) and 124.520(d) provide an exemption to affiliation for mentor-protégé joint ventures, the regulations do not overrule or supersede the requirements for joint ventures competing for SDVO SBC set-asides. Here, the D/GC correctly determined that Appellant does not meet several SDVO program-specific requirements, and as such, Appellant is not an eligible SDVO SBC for the procurement at issue.

IV. Conclusion

For the above reasons, I DENY the appeal and AFFIRM the D/GC's determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge