

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

**FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Sage Acquisitions, LLC,

Appellant,

Appealed From  
Size Determination Nos. 3-2016-036 and  
-69

SBA No. SIZ-5783

Decided: October 5, 2016

APPEARANCES

David S. Cohen, Esq., Laurel A. Hockey, Esq., Cohen Mohr LLP, Washington, D.C., for REO Solutions, LLC

Richard W. Oehler, Esq., Perkins Coie LLP, Seattle, Washington, for Appellant, Sage Acquisitions, LLC.

Rosamond Xiang, Esq., Jonathan English, Esq., for U.S. Department of Housing and Urban Development

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

This appeal involves size protests originally filed by ARNC/Bridge Consulting (ARNC) and REO Solutions, LLC (REO) against Sage Acquisitions, LLC (Appellant). Appellant contends that Size Determinations Nos. 3-2016-036 and 3-2016-069, issued by the Small Business Administration (SBA) Area III Office of Government Contracting (Area Office) are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) either reverse

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<sup>1</sup> 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.

the Area Office's finding, or in the alternative, find that a previous size determination concluding Appellant is a small business concern was the SBA's final decision. For the reasons discussed *infra*, the appeals are denied, and the size determinations are 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 fifteen days of receiving Size Determination Nos. 3-2016-036 and -69, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. RFP

On July 25, 2014, the U.S. Department of Housing and Urban Development (HUD) issued Request for Proposals (RFP) No. DU204SA-13-R-0005 for the management and marketing of HUD-owned properties.<sup>2</sup> The RFP contemplated the award of Indefinite Delivery-Indefinite Quantity (IDIQ) contracts in twelve geographic areas of the United States: 3A (Illinois); 4A (Indiana and Kentucky); 5A (North Carolina and South Carolina); 6A (Alabama, Mississippi, and Tennessee); 7A (Georgia); 8A (Florida, Puerto Rico, and US Virgin Islands); 1D (Colorado, New Mexico, North Texas, and Utah); 2D (Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and South Texas); 1P (Michigan); 3P (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont); 4P (Ohio); and 5P (Delaware, Maryland, Pennsylvania, Virginia, District of Columbia, and West Virginia). (RFP § L.1.) Each contract would have a base performance period of approximately eight months, and four one-year options. (*Id.* § B.3.) Award would be made to one responsible offeror per contract area, for a total of twelve (12) individual awards. (*Id.* § M.1.2.)

The RFP indicated that offerors could choose to compete for multiple geographic areas, but that each offeror could submit only one proposal. “[Offerors] proposing multiple contract areas must submit a single proposal, as specified in Section L. If an Offeror proposes multiple contract areas, each area will be evaluated based on its own merit.” (*Id.* § B.4.) The RFP reiterated that “**Offerors must submit one proposal covering all contract areas they intend to propose.**” (*Id.* § L.6, emphasis in original.)

The RFP stated that price would be evaluated separately for each geographic area proposed:

The Offeror shall provide pricing data for all Contract Line Item Numbers (CLINs) identified in the Pricing Spreadsheet. . . . Offerors that provide partial or incomplete pricing for one or more contract areas may be excluded from further consideration for those areas. The Government will separately evaluate the Offeror's total price for each contract area, to include the base performance period and all options, using price analysis techniques.

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<sup>2</sup> On September 4, 2015, HUD issued Amendment 000011, which included a conformed copy of the RFP. All references herein to the RFP refer to the conformed copy.

(*Id.* § L.7.) In addition, the RFP advised offerors that past performance would be evaluated separately by geographic area, and that the relevance of past performance could vary by area. For example, the RFP defined the threshold for “very relevant” past performance differently, depending upon the geographic area:

**Very Relevant:** Past/Present Performance efforts involving Asset Manager Service on minimum of number properties monthly and such efforts included essentially the same scope, magnitude of work and complexities that this solicitation requires. Very relevant efforts must have included the following:  
Numbers below: (= or >)

**Area 3A: 265 properties, Area 1D: 380 properties**  
**Area 4A: 300 properties, Area 2D: 750 properties**  
**Area 5A: 280 properties, Area 1P: 355 properties**  
**Area 6A: 490 properties, Area 3P: 290 properties**  
**Area 7A: 300 properties, Area 4P: 445 properties**  
**Area 8A: 510 properties, Area 5P: 530 properties**

(*Id.* § M.2.C, emphasis in original.)

The Contracting Officer (CO) set aside nine of the geographic areas (Areas 3A, 6A, 7A, 8A, 1D, 1P, 3P, 4P and 5P) for small businesses, and assigned North American Industry Classification System (NAICS) code 531210, Offices of Real Estate Agents and Brokers, with a corresponding size standard of \$7 million in annual receipts. (*Id.* §§ L.5, K.3.) SBA increased the size standard for NAICS code 531210 to \$7.5 million, and the CO amended the RFP to adopt the higher size standard.<sup>3</sup>

#### B. Prior Proceedings

In September 2015, HUD awarded Appellant contracts for Areas 1D, 3P, 4A, 4P, 5P, 7A, and 8A. In October 2015, several unsuccessful offerors, including REO, protested Appellant's size in conjunction with the awards of Areas 1D and 4P, which were set aside for small businesses. The protesters contended that Appellant is not a small business because Appellant, a joint venture between Raine & Company, LLC (Raine) and PEMCO Limited (PEMCO), exceeds the size standard due to Raine's affiliation with PEMCO.

On November 4, 2015, the Area Office issued Size Determination Nos. 3-2016-010, -011, -012, -013 concluding that Sage is a small business for the procurement. The Area Office found that Sage's joint venture agreement meets the requirements of 13 C.F.R. § 124.513(c) and (d). (Size Determination Nos. 3-2016-010, -011, -012, -013, at 7.) As a result, Raine and

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<sup>3</sup> The CO explained that, “although the Solicitation was issued with the \$7M size standard under the corresponding NAICS 531210, . . . an interim rule was effective on July 14, 2014 [increasing the size standard] to \$7.5M.” (RFP, Answers to Questions, Amendment 0011, at 8.) Therefore, “Offerors in the competitive range shall reaffirm their business size under the 7.5M standard as of July 25, 2014.” (*Id.*)

PEMCO are not affiliated because they qualify for the exception to affiliation for mentor-protégé joint ventures at 13 C.F.R. § 121.103(h)(3)(iii). (*Id.*) Neither REO nor any other protester appealed Size Determination Nos. 3-2016-010, -011, -012, -013 to OHA.

On March 30, 2016, the Area Office issued Size Determination No. 3-2016-044, dismissing REO's size protest against Appellant regarding the award of Area 1P. The Area Office reasoned that the issues raised in REO's protest had already been rejected in a prior size determination involving the same parties and the same procurement. On April 6, 2016, REO filed an appeal with OHA, arguing the Area Office had erred in dismissing its protest against Appellant regarding the award of Area 1P. On June 15, 2016, OHA issued its decision, wherein the appeal was granted and the matter was remanded back to the Area Office for further review. *Size Appeal of REO Solutions, LLC*, SBA No. SIZ-5751 (2016) (*REO I*). OHA stated that “Area 1P was awarded to Sage more than three months after Size Determination Nos. 3-2016-010, -011, -012, -013, so the Area Office clearly erred in dismissing Appellant's protest pertaining to Area 1P on grounds that the matter was already decided in the prior size determination.” (*Id.* at 12.)

On June 24, 2016, Appellant timely filed a Petition for Reconsideration (PFR) of *REO I*. Sage asserted *REO I* conflicts with previous OHA rulings on the matter and contravenes the doctrines of law of the case and issue preclusion. Appellant further argued *REO I* violates SBA policy on handling size protests, permits continuous litigation of the same issues, and wastes resources.

On September 6, 2016, OHA denied the PFR. *Size Appeal of REO Solutions, LLC*, SBA No. SIZ-5774 (2016) (PFR) (*REO II*). OHA held that Appellant's subsequent appeal of Size Determination No. 03-2016-069 rendered the case moot.

### C. Joint Venture Agreement

I must note that OHA has previously analyzed the Joint Venture Agreement (JVA) between Raine and PEMCO in *REO I* and stated its findings. The Joint Venture Agreement was adopted September 22, 2014, and is applicable to the awards both for Area 1P and 3P. I hereby adopt those previous findings, which are as follows:

Raine is a participant in SBA's 8(a) Business Development (BD) program, and PEMCO is its SBA-approved mentor.

On September 22, 2014, Raine and PEMCO entered into a joint venture agreement for the purpose of creating Sage, an unpopulated joint venture, to compete for and perform the instant procurement. (Agreement at 1.) Raine and PEMCO stipulated “that Raine shall be the managing member and shall own 51% of [Sage]; and that PEMCO shall own 49% of [Sage].” (*Id.* at 2.) Further, “Raine, the 8(a) Managing Venturer, must perform at least 40% of the aggregate work performed by [Sage]” and “PEMCO, the non-8(a) Partner Venturer[,] will perform no more than 60%.” (*Id.*) The joint venture agreement stated that “Raine is responsible for any and all final negotiations in procuring the Contract and any

subsequent contracts.” (*Id.* at 3.) In addition, “[XXX].” (*Id.* at 6.)

Schedule A provided [XXXXXXXXXXXXXXXXXXXXX].” (*Id.*, Schedule A.) Schedule A continued:

[XXXXX]

(*Id.*)

The joint venture agreement also contained a staffing plan, to “ensure the successful execution of the work flows.” (*Id.* at 6.) The staffing plan estimated “[t]he total number of professionals necessary to accomplish requirements” for each proposed geographic area, “divided into seven major operational departments.” (*Id.* Schedule B, Exhibit A.) Those seven major operational departments were: Key Personnel, Pre-Marketing, Asset Management, Closing Department, Compliance, Customer Service, and Accounting. (*Id.*) A second exhibit offered a breakdown of Raine and PEMCO's respective responsibilities. (*Id.* Schedule B, Exhibit B.) Each responsibility was assigned a percentage of the total work:

<b>Exhibit B</b>	<b>Raine &amp; Company</b>	<b>PEMCO LIMITED</b>
[XXXX]		[X]%
[XXXX]		[X]%
[XXXX]		[X]%
[XXXX]		[X]%
[XXXX]		[X]%
[XXXX]		[X]%
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[XXXX]	[X]%	[X]%
[XXXX]	[X]%	[X]%
<b>Total</b>	<b>40%</b>	<b>60%</b>

*Size Appeal of REO Solutions, LLC*, SBA No. SIZ-5751, at 5 (2016).

The JVA contains other noteworthy provisions under the description of the duties of the Managing Venturer:

Raine is responsible for any and all final negotiations in procuring the Contract and any subsequent contracts. Selection of XXXX shall be agreed upon by both Parties of the Joint Venture, but shall be subject to final approval of Raine. Raine and PEMCO are responsible for providing XXXX for the purposes of completing the Contract. It is understood, that as the Mentor, PEMCO may assist Raine in all of the above as long as the assistance is within the constraints of the SBA rules governing Mentor-Protege relationships.

JVA, § II.B.2.

Machelle Redmond, an employee of the Managing Venturer, is the Project Manager of this Joint Venture. She is responsible for the performance of the Contract, and reporting and implementing the instructions of the Managing Venturer.

JVA, § II.B3.

Raine shall be the Managing Venturer and the Project Manager shall be an employee of the Managing Venturer.

JVA, § II.B.5

The JVA provides the Co-Venturers will select representatives:

Kim Shannon, an employee of PEMCO, and Machelle Redmond, an employee of Raine, hereinafter “JV Representatives,” are appointed to facilitate the handling of all matters and questions in connection with the performance of the Contract by the Joint Venture, with full and complete authority to act on behalf of the relevant Co-Venturer in relation to any matters or things in connection with, arising out of, or relative to the Joint Venture and in relation to any matters or things involving the performance of the Contract.

JVA, § III.

The JVA provides for the actions of the representatives:

The duties and obligations of the Managing Venturer and Project Manager are set out in Section II(B) herein. In addition, JV Representatives, or the duly authorized replacement representatives, shall meet from time to time, as required, to act on necessary matters pertaining to the Contract. Raine is the Managing Venturer and retains overall responsibility for management of the Joint Venture.

All decisions, commitments, agreements, undertakings, understandings, or other matters pertaining to the performance of the Contract shall be XXXX. . . .

JVA, § IV.

Raine will be the Managing Venturer of this Joint Venture. The general supervision and management of the work called for by the Contract shall be subject to the control of Raine who shall initially be the representative of the Parties in negotiating the Contract with the government, and shall make sure that the Contract performance is compliant and complete.

JVA, § V.A.

The Contract Manager, an employee of Raine & Company, will assure that the Joint Venture is meeting all contract requirements.

JVA, Schedule A, at 1.

D. Size Determination No. 3-2016-036

On February 16, 2016, the Area Office received a size protest filed by ARNC against the award to Appellant of the contract for Area 3P. On March 8, 2016, the Area Office issued Size Determination No. 3-2016-036 finding Appellant other than small for the award of the contract for Area 3P. On March 28, 2016, the Area Office rescinded the size determination and dismissed the protest. The Area Office did so after initially concluding that Size Determination Nos. 3-2016-010, 011, 012 and 013 had found Appellant small for the instant procurement. However, after OHA issued *REO I*, holding that the award for each area constituted a separate contract, and that a determination of whether Appellant met the size standard for each particular contract/geographic area requires a specific review for each area, the Area Office withdrew the rescission and reinstated Size Determination No. 3-2016-036 on June 24, 2016.

Specifically, the Area Office found that the JVA between Raine and PEMCO fails to meet SBA's regulatory criteria for a joint venture between an 8(a) protégé firm and its mentor.

The Area Office found that Raine is 100% owned by Ms. Machele Redmond, who also is the sole owner of Redmond Real Estate Institute, Inc. (RRI), Redmond Law Group (RLG) and Redmond Law. (Size Determination, at 4.) The Area Office then concluded that Raine is affiliated with Redmond Law, RRI and RLG based on common management and ownership interest. Conversely, PEMCO, an acknowledged large business, is 100% owned by Mr. John H. Yamamoto. Mr. Yamamoto's daughter, Kimiko Yamamoto, is PEMCO's President and Board Member. Due to their familial relationship, the Area Office determined that combined, Mr. Yamamoto and his daughter have the power to control PEMCO. (*Id.*)

The Area Office noted that the date to determine size is September 23, 2014, the date Appellant submitted its initial offer, including price. Additionally, a joint venture between an 8(a) company and its mentor must still be in compliance of SBA regulations stating that a joint

venture cannot be awarded more than three contracts in any two year period. The Area Office found that as of the date to determine size, Appellant had not received more than three contracts in a two year period. A joint venture must also meet the requirements set forth by 13 C.F.R. § 124.513(c) and (d) in order to be exempt from a finding of affiliation. (*Id.* at 5; citing 13 C.F.R. § 121.103(h)(3)(iii).)

After reviewing the JVA, the Area Office found it provided that Raine will perform 40% of the aggregate work, while PEMCO will be responsible for the remaining 60%. Ms. Redmond was identified as the Project Manager, yet the Area Office noted the JVA states that any decision, commitment, agreement, undertaking, understanding, or any other matter that relates to the performance associated with the instant procurement would be “addressed” by Appellant's Management Committee before any response is given to the agency. The members of the Management Committee are not identified, and the Area Office could not conclude Ms. Redmond had the power to control Appellant. (*Id.* at 6.) Based on this finding, the Area Office concluded that Ms. Redmond's role as Project Manager would be limited, and the day-to-day business activity of Appellant will be controlled by the Management Committee, in violation of 13 C.F.R. § 124.513(c)(2).

Further, Ms. Kim Shannon, a PEMCO employee, was appointed, together with Ms. Redmond, to handle all matters arising out of the performance of the instant procurement. The Area Office found this arrangement shows Raine is not in control of the joint venture, as required by SBA regulation. (*Id.* at 6-7.) The selection of any XXXX must also be decided upon by both Raine and PEMCO before Raine gives the final approval; this selection shows PEMCO can exercise negative control over the joint venture, giving PEMCO further control over the joint venture. (*Id.* at 7.)

Next, the Area Office observes that 13 C.F.R. § 124.513(c)(6) requires the JVA to itemize all major equipment, facilities, and other resources that each party will provide, with an accompanying detailed schedule of cost or value of each. Schedule A of the JVA is the Work Flow Plan for the instant procurement, while Schedule B consist of the total number of professionals needed for the performance of the contract and the percentage of work of the joint venture. (*Id.*) However, neither Schedule A nor B was part of the proposal, as confirmed by the CO. Appellant explained they might have been omitted as error, yet the Area Office found that because they were not part of the proposal, they cannot be considered in determining size. (*Id.*; citing *Size Appeal of KVA Electric, Inc.*, SBA No. SIZ-5045 (2009).)

The Area Office states Volume 2 of the proposal contains the work flow plan, which fails to specify which party is responsible for which tasks. Therefore, no detailed breakdown of the parties' work responsibilities was part of the proposal submitted to HUD, and thus the JVA fails to show which party will perform which tasks. The CO reported to the Area Office that they had checked the proposals and there was no Schedule A or B included. (*Id.*; citing email of February 24, 2016.)

The Area Office adds that even if Schedule A had been part of the proposal submitted, the work of the 8(a) member must be more than administrative or ministerial, which is not the case at hand. The work to be performed by Raine here seems to consist of XXXX. (*Id.*)



The Area Office notes the regulation requires that for an unpopulated joint venture, where both the 8(a) and non-8(a) partners are technically subcontractors, the 8(a) partner must perform at least 40% of the work. 13 C.F.R. § 124.513(d)(2)(i). The JVA provides that Raine will perform no less than 40% of the aggregated work. However, Schedule B of the JVA (omitted from the original proposal), is also found in the proposal at Volume 2, as Exhibit A, page 14. This is a staffing plan depicting numbers for each proposed area. It does not provide the details required to determine how many people are performing each duty. There are no specifics on how Raine will perform 40% of all work, and it is difficult to determine whether Raine will actually perform 40% of the work. Staffing numbers submitted after the date for determining size do not agree with the workflow analysis in Volume 2 (i.e., Step 1C in Volume 2 is not included in Schedule A), and in any event, should not be considered. (*Id.* at 8.)

The Area Office found Appellant did not provide the details necessary to ascertain what duties, facilities and other resources are to be furnished by each party to the joint venture. The JVA states Raine and PEMCO are responsible for providing XXXX for the purpose of performing the contract. However, this broad statement without specifics is not sufficient to comply with the requirements of the regulation. (*Id.*; citing JVA at § B, ¶ 2.)

The Area Office thus concluded Appellant's joint venture agreement does not meet the requirements of the regulation, and thus Appellant is not eligible for the exception to affiliation only afforded to 8(a) mentor protégé joint ventures controlled by 8(a) concerns. Accordingly to determine Appellant's size the Area Office aggregated the receipts of Raine, its affiliates, and PEMCO, an admittedly large concern, and concluded Appellant was other than small for the award for Area 3P.

#### E. Size Determination No. 3-2016-069

On June 15, 2016, OHA remanded the case of REO's size protest of Appellant's award of the Area 1P contract in *REO I*. On July 6, 2016, the Area Office issued Size Determination No. 3-2016-069, finding Appellant is not a small business for the Area 1P contract. Specifically, the Area Office found that the JVA between Raine and PEMCO fails to meet SBA regulation criteria.

Once again, the Area Office found that Raine is 100% owned by Ms. Machel Redmond, who also is the sole owner of RRI, RLG, and Redmond Law, LLC. (Size Determination, at 5.) The Area Office then concluded that Raine is affiliated with Redmond Law, RRI and RLG based on common management and ownership interest. Conversely, PEMCO, an acknowledged large business, is 100% owned by Mr. John H. Yamamoto. Mr. Yamamoto's daughter, Kimiko Yamamoto is PEMCO's President and Board Member. Due to their familial relationship, the Area Office determined that combined, Mr. Yamamoto and his daughter have the power to control PEMCO. (*Id.* at 6.)

The Area Office again noted that the date to determine size is September 23, 2014, the date Appellant submitted its initial offer, including price. Additionally, a joint venture between an 8(a) company and its mentor must still be in compliance of SBA regulations stating that a

joint venture cannot be awarded more than three contracts in any two year period. The Area Office found that as of the date to determine size, Appellant had not received more than three contracts in a two year period. A joint venture must also meet the requirements set forth by 13 C.F.R. § 124.513(c) and (d) in order to be exempt from a finding of affiliation. (*Id.* at 6-7; citing 13 C.F.R. § 121.103(h)(3)(iii).)

After reviewing the JVA, the Area Office found it provided that Raine will perform 40% of the aggregate work, while PEMCO will be responsible for the remaining 60%. Ms. Redmond was identified as the Project Manager, yet the Area Office noted the JVA states that any decision, commitment, agreement, undertaking, understanding, or any other matter that relates to the performance associated with the instant procurement would be “addressed” by Appellant's Management Committee before any response is given to the agency. (*Id.* at 8.) Based on this finding, the Area Office concluded that Ms. Redmond's role as Project Manager would be limited, and the day-to-day business activity of Appellant will be controlled by the Management Committee, in violation of 13 C.F.R. § 124.513(c)(2). The members of the Management Committee are not identified, and the Area Office could not conclude Ms. Redmond had the power to control Appellant. In response to Appellant's argument that the Management Committee's role is not to exercise control over Appellant, the Area Office stated the terms in the JVA “are so vague that it could mean any number of things, including that the Management Committee will make decisions on issues that are required to be brought before it. If Ms. Redmond has the power to control the JVA then there would not be a need to form a management committee to discuss how the managing venturer would proceed in Sage's performance of the contract.” (*Id.* at 8-9.)

Further, Ms. Kim Shannon, a PEMCO employee, was appointed, together with Ms. Redmond, to handle all matters and questions arising out of the performance of the instant procurement. The Area Office found this arrangement shows Raine is not in control of the joint venture, as required by SBA regulation. (*Id.* at 9.) The selection of XXXX must also be decided upon by both Raine and PEMCO before Raine gives the final approval; this selection shows PEMCO can XXXX, giving PEMCO further control over the joint venture. (*Id.* at 9.)

Next, the Area Office observes that 13 C.F.R. § 124.513(c)(6) requires the JVA to itemize all major equipment, facilities, and other resources that each party will provide, with an accompanying detailed schedule of cost or value of each. The JVA provides in § IX, Performance of Work (B) that the Managing Venturer (Raine) will XXXX on the Work Flow Plan, attached as Schedule A, and the Partner Venturer (PEMCO) will XXXX. Schedule B is two pages, the total number of professionals needed for each proposed contract area (included in the proposal, Volume 2, Ex. A, p. 14). The second page is the joint venture percentage of work and was not part of the proposal. (*Id.* at 9.)

However, neither Schedule A nor B was part of the proposal, as confirmed by the CO. Appellant explained they might have been omitted as error, yet the Area Office found that as they were not part of the proposal, they cannot be considered in determining size. (*Id.* at 10; citing *Size Appeal of KVA Electric, Inc.*, SBA No. SIZ-5045 (2009).)

The Area Office states Volume 2 of the proposal contains the work flow plan, which fails to specify which party is responsible for which tasks. Therefore, no detailed breakdown of the parties' work responsibilities was part of the proposal submitted to HUD, and thus the JVA fails to show which party will perform which tasks. The Area Office notes Appellant says it submitted Schedules A and B to the Atlanta District Office, however, they were submitted after proposal submission. In any event, they were not submitted to HUD with the proposal. (*Id.*)

The Area Office adds that even if Schedule A had been part of the proposal submitted, the work of the 8(a) member must be more than administrative or ministerial, which is not the case at hand. The solicitation seeks marketing and sales service, with the Asset Manager position having the more significant responsibilities relating to the Solicitation's requirements. (*Id.* at 10-11.) The Area Office thus determined that Schedule A, which contains XXXX, assigns PEMCO as the party responsible for these duties, with Raine responsible for XXXX. (*Id.*) Under 13 C.F.R. § 124.513(d)(1), the work done by the 8(a) member must be more than administrative or ministerial. However, the Area Office found that Raine is responsible for duties that it already has experience in, whereas PEMCO will perform the asset manager and marketing personnel duties, which are the primary functions of the solicitation. (*Id.* at 12.)

In addition, the Area Office found that Schedule B, even though omitted from the proposal, lists Ms. Redmond as the Contract Manager, yet the Project Manager, a PEMCO employee, is in charge of the day-to-day duties of contract operation even though the Project Manager reports to the Contract Manager. The Project Manager, Contract Manager and Quality Control Manager are the three key employees; the first is a Raine employee, the second two are PEMCO employees. Besides the Contract Manager and one other employee in the Accounting section, Raine will only provide employees for the Closing and Compliance Department while PEMCO is responsible for the Pre-Marketing Team, Asset Management Team, and Customer Service. Further, Raine will provide eight employees for Area 1P and PEMCO will provide nine. (*Id.* at 13.)

According to the Area Office, the JVA's language is vague enough that it fails to specify which member will be responsible for providing bonding and financial and technical resources in order to perform the contract in accordance to 13 C.F.R. § 124.513(c). The JVA also fails to stipulate the "specificity of the resources needed to perform this contract for [A]rea 1P", including a detailed schedule of cost or value that each venturer is responsible for. (*Id.* at 14.) The JVA is also at odds with the proposal as it relates to the location in which Raine states it will perform its duties, as the proposal states that the locations in which the work will be performed belong to PEMCO and the JVA stated that Raine will perform its obligations at Raine's offices. (*Id.*; citing proposal § K.6 (p. 148 of 180 or p. 21 attached to September 23, 2014 letter.))

The Area Office concluded that the JVA does not meet the requirements set forth by 13 C.F.R. § 124.513(c) & (d). Raine, as the 8(a) partner, does not have the power to control the joint venture, thus Appellant cannot avail itself of the exception to affiliation afforded to 8(a) joint ventures.

## F. Appeal

On July 5, 2016, Appellant filed its appeal of Size Determination No. 03-2016-036, arguing the Area Office erred in finding Appellant not small and requesting OHA reverse the decision. (Appeal No. 1.)

On July 21, 2016, Appellant also filed its appeal of Size Determination No. 03-2016-069, arguing the Area Office erred in finding Appellant not small and requesting OHA reverse the decision. (Appeal No. 2.) Appellant's arguments are essentially the same in each case.

Appellant argues that OHA's decision in *Size Appeal of ARNC/Bridge Consulting, LLC*, SBA No. SIZ-5736 (2016) controls the review of any size protest for Area 1P. Appellant states that decision “did not address as a separate issue whether [Appellant] qualified as a small business for Area 3P and left undisturbed the November 2015 size determination that [Appellant] was small for the HUD procurement.” (Appeal No. 2, at 6.) Based on this reasoning, Appellant argues that because REO filed a size protest that resulted in the November 2015 decision by the Area Office that Appellant was small for the HUD procurement, which refers to the same small business representation made by Appellant, REO's second size protest for Area 1P should be dismissed. (*Id.*; citing *Size Appeal of Elite Protective Services*, SBA No. SIZ-3200 (1989); *Size Appeal of Rite-Way Services of San Antonio, Inc.*, SBA No. SIZ-3536 (1991).)

Further, the June 24th reconsideration of ARNC's protest on a *de novo* basis disregards the finality mandated by 13 C.F.R. § 134.227(b)(3), as it contravenes the law of the case doctrine, which provides that when OHA decides upon a rule of law, that decision should govern in subsequent stages in the same case. (Appeal No. 1, at 7; citing *Size Appeal of Chu & Gassman*, SBA No. SIZ-5344 (2012).) Appellant contends the FAR allows for a protest of a small business' size representation only for a specific offer, and there can be only one protest of a bidder's size per procurement. (Appeal No. 2 at 7; citing FAR 19.302(a)(2).) SBA regulations further provide there can only be size protests “in connection with a particular procurement, sale or order.” 13 C.F.R. § 121.1001(a). Here, REO's protest is in response to Appellant's single offer for the HUD procurement, and the circumstances regarding the protest are the same as those from the size protest filed by REO in October 2015 and dismissed by the Area Office in November 2015, which REO never appealed. Allowing REO to file another protest regarding the same procurement would violate SBA regulations as the November 2015 size determination was the final agency decision because REO never appealed it. (*Id.* at 8; citing 13 C.F.R. § 121.1101(a).)

Appellant also contends OHA erred in holding the November 2015 determination as the final decision only with regard to the areas being protested at that time. Appellant argues the November 2015 determination and SBA's March 2016 determination dealt with the same factual circumstances. By allowing ARNC another opportunity to protest, SBA undermines its own regulatory scheme. (Appeal No. 1, at 8-9.)

Next, Appellant contends that under SBA affiliation rules, Appellant falls under certain exceptions that qualify it as a small business concern. Considering the two requirements for a mentor/protégé exception, the protégé must be small and the JVA must meet the requirements of

13 C.F.R. § 124.513(c) and (d), the record shows Appellant meets them both. First, Raine and its affiliates, except for PEMCO, are under the applicable size standard. Second, the JVA satisfies all the requirements found in § 124.513(c) and (d). Appellant argues the JVA: (1) sets forth the purpose of the joint venture, which is to bid on the HUD procurement; (2) designates Raine as the Managing Venturer and assigned a Raine employee as Project Manager; (3) establishes that Raine owns 51% of the joint venture; (4) specifies the profits of the JVA will be allocated according to the work performed by its members; (5) established a special bank account to manage all needs of the joint venture and HUD procurement and each member is a signatory; (6) holds that the equipment needed for the HUD procurement, which is for the offeror to provide offices, conference rooms and information technology systems, will be provided by Raine and PEMCO. Specifically, both Raine and PEMCO will provide office facilities, and PEMCO itself will provide asset management software; (7) accounts for the performance of work requirements for each member, with Raine responsible for contract management and administration, as well as 40% of the work performed under the HUD procurement; (8) obligates both Raine and PEMCO to performing the contract, even if one party withdraws from the joint venture; (9) designates all accounting and administrative records relating to the joint venture will remain in Raine's offices; (10) requires that Raine retain all original records after completion of the HUD procurement; (11) requires Raine to prepare quarterly financial statements showing contract receipts and expenditures; and (12) assigns Raine responsibility for project-end profit and loss statements that must be submitted to SBA. (Appeal No. 1 at 9-12; Appeal No. 2 at 9-11.)

Appellant disputes the findings of the Area Office as it relates to § 124.513(d), arguing that the JVA stipulates Raine will perform at least 40% of the work under the HUD procurement, with Schedule A of the JVA providing a detailed breakdown of the tasks Raine and PEMCO will perform. (Appeal No. 1 at 12; Appeal; No. 2 at 11.)

Further, Appellant maintains that, contrary to the Area Office's findings, Raine is the Managing Venturer of the joint venture and therefore controls the joint venture. Disputing the Area Office's determination that the Management Committee exercises control over the joint venture, Appellant asserts the Area Office erroneously interpreted the Management Committee's role to make determinations, as their only role is to “address” any issues but that the Managing Venturer is responsible for responding to HUD. Appellant argues that “address” should not read as synonymous with “decide”, or “exercise control”. (Appeal No. 1 at 12-13; Appeal No. 2 at 11-12.)

Appellant argues that given PEMCO's 49% ownership of the joint venture, communication between Raine and PEMCO is imperative for a good working relationship and improves the purpose behind the mentor/protégé relationship. The use of the term “address” in the JVA does not mean the Management Committee makes any final determinations, and any response to HUD is at the discretion of Raine, while possibly considering any comments by the Management Committee, but not beholden to them. (Appeal No. 1 at 13; Appeal No. 2 at 12-13.) The surrounding provisions also attest to Raine's role as the concern responsible for overall contract management and supervision, thus undercutting the Area Office's finding that the word “address” is a vague term disputing whether Raine has control over the joint venture. Appellant adds SBA's mentor/protégé regulations encourage mentors to provide a myriad of assistance to the protégé, further challenging the Area Office's assertions. Appellant argues the word

“address” must be given its plain meaning, that the Management committee will provide guidance to the Managing Venturer, not control. (Appeal No. 1 at 13; Appeal No. 2 at 13.)

The Area Office's finding that Raine and PEMCO employees can act on behalf of the joint venture is also erroneous. Appellant argues that the JVA simply authorizes Raine employees to speak on behalf of Raine and a designated PEMCO employee can speak on behalf of PEMCO, but Raine remains the Managing Venturer with Ms. Redmond having sole authority to speak on behalf of Appellant. (Appeal No. 1 at 14; Appeal No. 2 at 14.) Additionally, the fact that Ms. Shannon, a PEMCO employee, contributed to the drafting of Appellant's proposal mischaracterizes the proposal drafting process, as Ms. Redmond signed the proposal cover letter and participated in proposal preparation. Appellant also disputes the assertion by the Area Office that PEMCO is the experienced asset manager listed in the proposal as providing the seven asset management tasks, as Sage is the aforementioned asset manager and will be responsible for asset management tasks alongside PEMCO. (Appeal No. 2 at 14.)

Appellant argues the Area Office misread § II.B.2 of the JVA, which provides selection of material, supplier and subcontractors will be agreed upon by both parties, but shall be subject to Raine's final approval. Appellant maintains this merely provides for discussion by both members, and does not give PEMCO control. (Appeal No. 1 at 14; Appeal No. 2 at 14.)

Regarding PEMCO's control over any approval for subcontractors, Appellant argues that Raine can go forward with the final decision and continuing work, thus PEMCO has no power to control the joint venture. Appellant further notes that a fair reading of the JVA will find that each member is responsible for bonding, technical, and financial resources based on the ownership percentage of each member. Finally, Appellant points out the JVA provides that any assistance provided by PEMCO must be within the SBA rules governing mentor/protégé relationships, per the JVA. (Appeal No. 1 at 14-15; Appeal No. 2 at 14-15.)

Next, Appellant argues the JVA satisfies any performance of work requirements. Despite the Area Office's contentions that Schedules A and B were not part of the proposal, Appellant states they were drafted as part of the JVA and should be considered. Section XI of the JVA references Schedule A and both Schedule A and B were submitted to SBA prior to the submission of the HUD proposal. The proposal contains the same information as found in Schedules A and B, yet the proposal did not differentiate between Raine and PEMCO because the solicitation prohibited the use of names of the JVA members in the Technical Proposal. The proposal contains XX Work Steps to be performed. (Appeal No. 1 at 15-16; Appeal No. 2 at 15.) Schedules A and B provide a breakdown of contract tasks and show that Raine is responsible for 40% of the work that Appellant will perform. Contrary to the Area Office findings, Raine will also provide the two key positions of Project Manager and Contract Manager, while PEMCO will provide only one key position, Quality Control Manager. (*Id.* at 16.)

Appellant contends the Area Office erred when it determined Raine would only be responsible for ministerial or clerical tasks. Tasks Raine is responsible for are reflected in Schedule A and other documents, which Appellant provided to the Area Office per a request by the SBA in November 2015, yet the Area Office failed to consider in issuing the instant size determination. Beyond contract review and execution, Appellant states Raine will provide

“XXXX.” (Appeal No. 1 at 16-17; Appeal No. 2 at 16-17.) Raine will also oversee XXXX. Thus, the work provided by Raine is specialized and unique, rendering moot the Area Office's claims that Raine will perform ministerial work. The work done by Raine will further the solicitation's five primary objectives by reviewing contracts to minimize holding times, accounting for closing proceeds, and together with PEMCO contributing to home sales that lead to owner-occupant opportunities. (*Id.*)

Appellant further maintains the JVA does itemize the major equipment, facilities and other resources required, despite the size determination's finding to the contrary. Each firm will furnish offices, and PEMCO will provide asset management software. (Appeal No. 1 at 17; Appeal No. 2 at 18.)

In explaining the solicitation's requirements, Appellant states that HUD seeks Asset Managers, not all three Management and Marketing services, which includes, in addition to Asset Managers, Field Service Managers and Mortgage Compliance Managers. The services provide by Field Service Managers and Mortgage Compliance Managers are not sought in this particular procurement. Contrary to the Area Office's determination, Raine will gain substantive experience by being exposed to asset management services in numerous states and managing a larger territory than it is used to. (Appeal No. 2 at 18.) The Area Office's finding regarding the place of work performance is also misplaced. At the time in question, Raine's offices were experiencing a buildout, thus it needed at temporary address until completion. The proposal also includes an office in Philadelphia as that is the location of the Philadelphia Homeownership Center, which services the Michigan market, location of Area 1P. (*Id.* at 19.)

Appellant also challenges the Area Office's failure to consider the information it provided in November 2015 when the same issue, the validity of the JVA to meet SBA regulations for exception to affiliation, was considered. Appellant contends the Area Office did not consider any of this information which was available to it previously. Included in this information was Schedules A and B, which were not created after Appellant's size was protested. Appellant explains that SBA routinely considered information that was not part of a proposal, such as SBA Form 355 (citing 13 C.F.R. § 121.1009(b)), and thus Schedules A and B should be included in any affiliation analysis. Particularly, Schedule B contains a detailed staffing plan and performance management structure with the percentage of work by each joint venture member. (*Id.* at 20.)

Lastly, there is no major equipment needed to be purchased as each joint venture member will provide existing office space. Thus, despite the Area Office's reasoning, there is no need to estimate the value of the resources needed for the performance of the solicitation. (*Id.* at 21.)

Appellant maintains the JVA fully complies with OHA case law and regulatory standards. It created the schedules and submitted them to SBA prior to submitting its proposal and the JVA satisfies the requirements of 13 C.F.R. § 124.513. (Appeal No. 1 at 18-21.)

### G. REO's Response

On August 9, 2016, REO filed its response to the appeal. REO states that Appellant raises the same issues already considered and rejected in *Size Appeal of REO Solutions, LLC*, SIZ-5751 (2016), and the subsequent PFR of that decision. Therefore, REO choose to refer to OHA's decision in *REO Solutions, LLC*, SIZ-5751 (2016) and REO's arguments in its rebuttal to the PFR.

Regarding Appellant's JVA, REO contends that previous OHA decisions have found that an agreement establishing a joint venture must strictly adhere to SBA regulations found at 13 C.F.R. § 124.513(c) & (d). (REO's Response, at 1; citing *Size Appeal of IEI Cityside JV*, SBA No. SIZ-5664 (2015); and *Size Appeal of Kisan-Pike, a Joint Venture*, SBA No. SIZ-5618 (2014).)

### H. HUD's Response

On July 22, 2016, HUD filed a response to Appeal No. 1. On August 9, 2016, HUD filed a response to Appeal No. 2. The two pleadings make essentially the same argument. In both pleadings HUD argues, in support of Appellant, that the Area Office should not have issued the instant size determinations because the November 2015 size determination precluded any further examination of Appellant's size.

HUD argues that law of the case doctrine requires that a rule of law, when decided by a court, “continues to govern the same issues in subsequent stages of the same case.” This is meant to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing suit. Such a ruling takes on the force of a mandate when it applies to decisions of an appellate court remanding the case to a lower court for further proceedings. (HUD Response, at 6; citing *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5344 (2012).) (Citations are to the August 9th Response.)

HUD argues the previous size determination finding Appellant a small business concern bars the issuance of the size determination in question, even if it is based on a different geographical area. Under the law of the case doctrine, the rule of law continues to control the same issues, even in subsequent stages of the same case. (*Id.*) HUD contends that despite OHA's decision in *REO I*, the Area Office should not have issued the instant size determinations because at the time of their issuance a PFR was pending before OHA. HUD maintains that the rescission by the Area Office regarding the awards of the contracts for Areas 1P and 3P is controlling here because it involves the same procurement, despite OHA's finding to the contrary. Therefore, the instant size determination “represents a clear error because it in effect has conducted yet another size determination on a ‘*de novo* basis’ when lacking authority to do so, and plainly ignored the precedents binding on the Area Office.” (*Id.* at 8.)

Further, HUD argues that in *Size Appeal of Q Integrated Cos., LLC*, SBA No. SIZ-5743 (2016), and *Size Appeal of ARNC /Bridge Consulting, LLC*, SBA No. SIZ-5736 (2016) OHA affirmed that the November 2015 size determination found Appellant to be small ‘for this procurement’, meaning that any subsequent protest against Appellant should have been



dismissed because regardless of *REO I*, any award for any geographical area is not an individual contract, and OHA's decision in *Q Integrated Cos., LLC*, SBA No. SIZ-5743 (2016) has precedential effect. (*Id.*)

Next, HUD contends that even if *REO I* was valid, issue preclusion prevents the Area Office from issuing the instant size determinations on Areas 1P and 3P. Issue preclusion applies when: (1) The issue to be decided is identical to the one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to final judgment in the first action; (4) plaintiff had a full and fair opportunity to litigate the issue on first action. (*Id.* at 9; citing *Size Appeal of BR Construction*, SBA No. SIZ-5327 (2012).)

The November 2015 size determination analyzed the same issues, specifically whether Appellant's JVA met SBA regulations. Hence, the protestors have previously had 'a full and fair opportunity to litigate the issue', and should not have another opportunity based on the doctrine of issue preclusion. (*Id.* at 9.) In *REO I*, OHA proposed that any further review would have to be area-specific, if there were actual differences between them. The November 2015 size determination found Appellant's JVA met SBA regulations, which are requirements regarding corporate organization in nature, and would not be specific to any geographical area for the instant procurement. The size determinations at issue here at no point identified any of the issues covered to be specific to Area 1P or Area 3P. (*Id.*)

HUD argues that SBA regulations only allow for one size determination to be performed on the awardee of a procurement, as multiple size determinations on one entity are to be avoided, because they might lead to inconsistent determinations for the same procurement. A size protest pertains to a specific procurement, and that procurement in turn may have multiple contracts. Here, the instant procurement "provided for awards of multiple contracts under a single procurement, with a single solicitation, a single size certification, a single NAICS code, a single PWS, the same CLINs, the same period of performance, and a single set of evaluation criteria." (*Id.* at 10.) Therefore, allowing size protests for all contracts in a multiple award procurement would conflict with 13 C.F.R. § 121.1009(g), because the regulations prevent a concern who has been found other than small from receiving an award for a procurement under the same size standard. The same would then apply to an awardee that has been previously found to be small under the same procurement. (*Id.* at 10-11.)

FAR 2.101's definition of procurement allows for multiple contracts to be awarded as a result of a single procurement. Here, there is only one procurement for Asset Management Services, one solicitation, and one final proposal from each offeror. Given that SBA regulations state that a size protest must be connected to a procurement, and not an individual contract pertaining to that procurement, "only one size determination is permitted per awardee for the same procurement." (*Id.* at 12; citing 13 C.F.R. § 121.1007(a); 121.1009(h).) Again, this then prohibits the reopening of the November 2015 size determination finding Appellant to be small, and any size determination for only Area 1P or 3P is not valid. Similar to OHA's decision in *Size Appeal of Department of the Air Force*, SBA No. SIZ-4732 (2005), the solicitation here is a single procurement under SBA regulations because it has well-defined tasks, the same work with the same-priced CLINs apply to all areas, with one small business size certification required for

all the areas that have been set-aside for small businesses, and the same evaluation factors for award. (*Id.* at 14.)

Also of note is the fact that the Area Office's size determination fails to distinguish between the terms procurement and contract for this solicitation. In some instances it indicates that there are separate contracts for each Area that belong under one procurement and in others that there are multiple procurements under the instant solicitation. This failure by the Area Office has led to multiple reviews of the same size determination, contrary to SBA regulations. (*Id.*)

HUD further states the size determination erroneously found the contracts for Area 1P and Area 3P to each be a particular procurement. The size determination failed to highlight any difference between the Area 1P and 3P requirements from other areas; and it could not prove that Appellant's staffing levels would trigger differing size determinations per Area awarded. The contracts awarded for Areas 1P and 3P were issued from the same solicitation as Area 1D, 4P, 5P, 4A, 7A and 8A. The size status was based on the same due date for submission of proposals, whether the award was in September 2015 or February 2016. In the interim, HUD did not amend the solicitation, request proposal revisions, require recertification of size, or solicit new proposals. (*Id.* at 15; citing *Size Appeal of Pacific Power, LLC*, SBA No. SIZ-5572 (2014).) Consequently, the Area Office misapplied and over-interpreted OHA's findings in *REO I*, given that OHA simply suggested staffing levels might be different in the JVA based on the different geographic areas. The time lag in the re-award to Areas 1P and 3P do not justify the interpretation of the existence of a new procurement.

HUD asserts the size determinations should be vacated for clear errors of fact. First, the Area Office failed to demonstrate the contracts at issue were "particular procurements", when the Solicitation as a whole represents one procurement, each geographic area is not its own procurement. (*Id.* at 15.) Second, the size determinations appear to assume that because Areas 1P and 3P represent different contracts, the work will be different from the other areas, however, the work to be performed for each area is the same, merely in different geographic areas. (*Id.* at 16.) Third, the size determinations erred in their findings regarding the interplay between the JVA and the Solicitation. In *REO I*, OHA found the JVA might result in variations in staffing among the contracts. Without further analysis, the Area Office turned this into a blanket fact. The Area Office did not suggest any way in which staffing variations could make Appellant other than small for Areas 1P or 3P. The size determinations did not identify any issues under the JVA as area-specific. (*Id.*)

In sum, the Area Office simply took that as fact and failed to provide any analysis highlighting the differences in staffing levels between Area 1P and Area 3P and other areas Appellant was the awardee. (*Id.* at 16.) As a matter of fact, the staffing levels for Area 1P and 3P are the same as for Area 4A, in which the Area Office found Appellant, and its JVA, met regulatory requirements to be found small. HUD maintains that finding Appellant other than small for Areas 1P and 3P based on staffing levels would be unreasonable as the Area Office had previously found them small for another identical geographic area. (*Id.* at 17.)

### I. Supplemental Appeal

On July 22, 2016, Appellant filed a Supplemental Appeal in Appeal No. 1. Appellant restated its argument that the regulatory scheme forecloses multiple, untimely protests of the same HUD procurements. Appellant asserts there can be only one protest of a bidder's size per procurement and that a single procurement may include multiple contracts. (Supplemental appeal at 4, citing *Size Appeal of Hardie's Fruit & Vegetable Co.*, SBA No. SIZ-5347 (2012).) SBA should have only addressed the size question once (in November 2015) and thus the size determination should be reversed. (*Id.* at 5.)

Appellant further reiterates its argument that Raine controls Appellant. The term “address” in the JVA merely means “to direct the efforts or attention of oneself” or “to deal with”, meaning Appellant's Management Committee will provide guidance to Raine, but that Raine will make decisions. (*Id.* at 6.) Section II.B.2 provides that selection of material, suppliers and subcontractor will be agreed by both parties, but Raine has final approval. Again, this means PEMCO may advise, but it is Raine which has the final say, even if PEMCO withholds approval. (*Id.* at 7.)

Appellant further argues the JVA satisfies the performance of work requirements. Raine's work is not merely ministerial or clerical. Schedules A and B fully explain the work to be performed. Raine will assess properties where contracts require extension, analyze whether a buyer has the ability to close the transaction in a timely manner, perform the execution of the deeds as HUD's agent, and review the closing packages. This is critical work in contract performance and disposing of the homes. (*Id.* at 8.) The objectives of the contract are (1) accurately valuing properties (2) achieving highest net sales return (3) minimizing holding time (4) creating owner-occupant opportunities and (5) timely accounting for and delivering closing proceeds. (*Id.* at 8; citing RFP at 15-16.) Raine's conduct of contract review, due diligence and title defect resolution minimizes holding time (3), accounts for closing proceeds (5), and its efforts, combined with PEMCO, create owner-occupant opportunities (4). In turn, PEMCO assists with property valuation and broker oversight (1 and 2). Raine will therefore play a meaningful role in 3 of 5 primary objectives. (*Id.*)

The Area Office referred in the March 8th decision to this procurement as one for “field services”. In fact, it is for Asset Manager services. (*Id.*) Here, Raine will be performing more than ministerial functions so that it might gain substantive experience and improve its ability to compete successfully for contracts. (*Id.* at 9; citing 13 C.F.R. § 124.513(d)(1) & 124.520(a).)

### 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

Before getting to the merits of the case at hand, I must first dismiss Appellant and HUD's claim that any review of Appellant's JVA in connection to the award of Areas 1P and 3P must be dismissed because the November 15 size determination was SBA's final decision regarding Appellant's JVA. Contrary to these assertions, this issue has already been decided by OHA in *Size Appeal of REO Solutions, LLC*, SIZ-5751 (2016) (*REO I*) and *Size Appeal of REO Solutions, LLC*, SIZ-5774 (2016) (PFR) (*REO II*). Appellant, once again, tries to argue against SBA's decision in *REO Solutions, LLC*, SIZ-5751 (2016), which OHA reconsidered in *Size Appeal of REO Solutions, LLC*, SIZ-5774 (2016) (PFR) and ultimately decided against Appellant as moot. OHA further stated:

It is worth noting that, even if the instant petition were not moot, Sage has not established clear error in *REO I*. As REO correctly observes in its response to the PFR, OHA's May 2016 decisions dealt only with the narrow procedural question of whether the Area Office could appropriately rescind a size determination while an appeal was pending. Neither of the May decisions addressed the issue in *REO I* of whether the underlying size protest was properly dismissed. Thus, there is no inconsistency between *REO I* and the May decisions and no basis exists for OHA to grant the instant PFR. 13 C.F.R. § 134.227(c).

*REO II*, at 3.

Accordingly, *Size Appeal of Q Integrated Cos., LLC*, SBA No. SIZ-5743 (2016), and *Size Appeal of ARNC/Bridge Consulting, LLC*, SBA No. SIZ-5736 (2016) were not substantive determinations on the merits that Appellant was small for this procurement, but merely that the Area Office's rescission of the earlier size determination was permissible.

HUD attempts to argue that the November 2015 size determination, which was never appealed to OHA, stands as the final word on Sage's size for all awards arising out of this solicitation, and that both size determinations in question here should not have been issued. However, a size determination which was not appealed to OHA has no precedential value. *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 6 (2009).

Appellant and HUD further attempt to argue that SBA may make only one size determination on a concern for each procurement for which the firm has submitted an offer. The authorities cited do not support this argument. A size protest must relate to particular procurement and be specific. 13 C.F.R. § 121.1007. However, SBA's regulations do not provide that there may be only one size determination for each solicitation. Despite HUD's argument, 13 C.F.R. § 121.1009(g) does not state this. The regulation does prevent a concern which has been found other than small from receiving an award under the same size standard. However, some size determinations, as here, are contract-specific. This is true of size determinations regarding joint ventures. Two firms in an ostensible subcontracting relationship may be found to be joint

venturers, and affiliated only for the contract on which they made an offer together. 13 C.F.R. § 121.103(h)(4). Here, there is the question of whether a joint venture between an 8(a) Protégé firm and its Mentor qualifies for the exception from affiliation provided by the regulations. 13 C.F.R. § 121.103(h)(3)(iii). Whether the exception applies is specific to each contract awarded, because it will depend upon whether the mentor-protégé relationship between the two concerns and the joint venture agreement for the particular contract meet the requirements of the regulation. (*Id.*; 13 C.F.R. § 124.513(c) &(d).)

Accordingly, whether a particular joint venture arrangement in pursuit of a particular contract meets the requirements of the regulation is a question specific to each contract. Therefore, that fact that there is one overall solicitation here does not mean that there may be only one size determination. As noted above, there are slightly different requirements for each area, with a different number of properties to be serviced for each area. The proposal has different number of employees for each area. Therefore, I cannot say that one size determination performed on the basis of one contract award would be definitive for Appellant for every award made under the subject solicitation. While Appellant made only one offer, there was the potential for differences for the contract for each area in which Appellant sought an award. I therefore conclude that the Area Office did not err in performing two size determinations on Appellant for the awards made for Areas 1P and 3P. The issues here are contract-specific issues, and it was therefore appropriate to conduct a size determination on Appellant for each contract award. HUD's argument that issue preclusion applies here is inapposite, because this requires the issues to be identical in both cases, and this is not the case here. *Size Appeal of BR Construction*, SBA No. SIZ-5327 (2012).

Turning to the size determinations at issue, the question is, did the Area Office properly review Appellant's JVA, common to both awards, when it concluded the JVA failed to meet the regulatory requirements of 13 C.F.R. § 124.513(c) and (d). The Area Office found that Raine was not in control of the joint venture because the Management Committee, which was not defined, must "address" any decision, commitment, agreement, undertaking or understanding, before the joint venture would respond to the agency, and would thus limit the Project Manager's role. The Management Committee's role, the Area Office reasoned, is too vague, which could mean it has the power to make decisions on matters brought before it. Further, the appointment of Ms. Shannon as a PEMCO representative shows Raine is not in control of the joint venture. The Area Office concluded PEMCO can exercise negative control over Appellant.

The applicable regulation states:

Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.520, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating an 8(a) Participant as the managing venturer of the joint venture. In an unpopulated joint venture or a joint venture populated only with administrative personnel, the joint venture must designate an employee of the 8(a) managing venturer as the project manager responsible for performance of

the contract. In a joint venture populated with individuals intended to perform any contracts awarded to the joint venture, the joint venture must otherwise demonstrate that performance of the contract is controlled by the 8(a) managing venturer;

(3) Stating that with respect to a separate legal entity joint venture the 8(a) Participant(s) must own at least 51% of the joint venture entity;

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or in the case of a populated separate legal entity joint venture commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section.

(8) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the 8(a) Participant managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring the final original records be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) Performance of work.

(1) For any 8(a) contract, including those between mentors and protégés authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510. For an unpopulated joint venture or a joint venture populated only with one or more administrative personnel, the 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture. The work performed by 8(a) partners to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience. For a joint venture populated with individuals intended to perform contracts awarded to the joint venture, each 8(a) Participant to the joint venture must demonstrate what it will gain from performance of the contract and how such performance will assist in its business development.

(2) \*\*\*

(i) In an unpopulated joint venture, where both the 8(a) and non-8(a) partners are technically subcontractors, the amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

13 C.F.R. § 124.513(c) and (d).

I find the Area Office partially erred in its review of the JVA. The JVA provides explicitly that Raine is to be the Managing Venturer and Ms. Redmond, Raine's principal, the Project Manager. As such, Raine is responsible for contract performance, and the joint venture must implement the instructions of Raine, the Managing Member. This is explicitly stated more than once in the JVA. The Area Office read the provision "Selection of material, suppliers, and subcontractors shall be agreed upon by both Parties of the Joint Venture, but shall be subject to final approval of Raine." as giving PEMCO negative control. I disagree. The sentence clearly provides that Raine will have final approval on these matters, and is thus the ultimate decision-maker on these issues. This provision ensures that PEMCO has input into the decisions made, but final approval rests with Raine. The provision does not give PEMCO veto power; therefore no negative control can be exercised.

Similarly, Ms. Shannon's appointment as a JV Representative gives PEMCO a voice in Appellant's management, but nothing in the description of the position gives her the ability to block any action by Ms. Redmond, or to take any unilateral action in managing the company. There are references to a Management Committee, whose composition and duties the Area

Office properly described as vague. Specifically, its states that “[a]ll decisions, commitments, agreements, undertakings, understandings, or other matters pertaining to the performance of the Contract shall be XXXX.” (JVA, § IV.) The Area Office took this provision to mean that the Management Committee had the power to control on these issues. I find the Area Office erred in doing so. The JVA merely provides the Management Committee will “address” issues of contract performance, before the Managing Venturer makes the response to HUD. Appellant is correct that the plain meaning of “address” merely means the issues will be discussed. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006) (error to imply any meaning beyond the plain meaning to words in a document.) The mere fact that the Committee will address such issues does not mean that Appellant's day-to-day management will rest with it, as the Area Office found. Nothing in the JVA detracts from the explicit grants of authority to the Managing Venturer and its Project Manager to manage Appellant and Appellant's performance of the contract. Again, the JVA provides that PEMCO will be able to voice its opinions on management questions that arise, but it does not give PEMCO veto power over the decisions that will ultimately be made by Raine, the Managing Venturer. Thus, I conclude that the Area Office erred in finding the JVA was in violation of 13 C.F.R. § 124.513(c)(2).

Regarding the Schedules attached to the JVA, the size determinations treat them in an inconsistent manner; stating that they should not be considered because they were not included in the proposal, then finds portions of them in the proposal, and discusses them in making the determination. Further, OHA already found the Schedules to be part of the JVA in *REO I*, *supra*. The Schedules were clearly created with the JVA, and meant to be part of it. The Area Office relies on *Size Appeal of KVA Electric, Inc.*, SBA No. SIZ-5045 (2009) in support of its decision not to consider the Schedules. However, in *KVA*, OHA found it was error for the Area Office to consider submissions prepared after the offer in question, which directly contradicted the information contained in the proposal itself. Here, there is merely the question of including material which was clearly prepared with the JVA, referenced in the JVA (§ XI), intended to be included in the proposal, consistent with the proposal that was submitted to SBA with the JVA, and which OHA has already held to be part of the JVA. Accordingly, I reaffirm the holding in *REO I* that Schedules A and B are part of Appellant's JVA of September 22, 2014, common to the award for both the contracts for Area 1P and Area 3P. The Area Office erred in not considering that OHA had found the Schedules included in the JVA in *REO I*.

Next, when a mentor-protégé joint venture is competing for a procurement outside the 8(a) BD program, SBA regulations stipulate that the joint venture must comply with 13 C.F.R. §§ 124.513(c) and (d) in order to receive the exception to affiliation for mentor-protégé joint ventures. 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(1)(ii). Here, Appellant is a mentor-protégé joint venture competing for a non-8(a) procurement. After reviewing Appellant's JVA, the Area Office found that the JVA failed to meet the requirements of 13 C.F.R. § 124.513(c)(2), (6), (7), and (d)(1)-(2). As discussed *supra*, I have already concluded that the Area Office erred in finding the JVA did not meet the requirements of § 124.513(c)(2). Thus, the issue remains as to whether the JVA also meets the requirements of § 124.513(c)(6)-(7), and (d)(1)-(2).

Under 13 C.F.R. § 124.513(c)(6), the joint venture agreement must itemize “all major equipment, facilities, and other resources” to be furnished by each of the joint venture partners. Appellant's joint venture agreement meets this requirement. The JVA makes clear that Raine and



PEMCO will be furnishing their own offices in service of the contract requirements. Additionally, the JVA states that PEMCO will furnish the XXXX to be utilized. Once again, Appellant is accurate when it argues that SBA regulation only requires the JVA to list the “major” equipment, facilities and resources. This type of contract does not require the listing of equipment that say, a construction contract would. For the work required here, XXXX is undeniably major equipment, and one that is considered and addressed in the JVA. Similarly, the JVA acknowledges that both Raine and PEMCO will perform their duties in XXXX. Therefore, the JVA meets the requirements found in § 124.513(c)(6).

Regarding § 124.513(c)(7), the regulation requires the JVA to “[s]pecify[] the responsibilities of the parties with regard to . . . contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section.” 13 C.F.R. § 124.513(c)(7). Here, as Appellant correctly pointed out, Schedule A and B of the JVA do indeed specify the tasks each member is responsible for as it relates to contract performance. Specifically, the Work Flow Plan attached to Schedule A details the contract performance in XX steps and assigns each member specific responsibilities. The first XX steps of contract performance, and the initial stages of the XX step, are assigned to PEMCO. The remainder of the XX step is assigned to Raine, as are steps XX through XX in their entirety. Hence, § 124.513(c)(7) is clearly met.

Next, the applicable regulation requires that the JVA explain how Appellant will fulfill the performance of work requirements set out in 13 C.F.R. § 124.513(d). OHA has previously stated, in analyzing the requirements of § 124.513(d), that a JVA must “designate specific tasks or responsibilities” for each joint venture member. *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618, at 9 (2014). Further, 13 C.F.R. § 124.513(d)(2) requires that “[i]n an unpopulated joint venture, where both the 8(a) and non-8(a) partners are technically subcontractors, the amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners.” The Area Office found that the JVA did not meet this requirement because Raine is only providing the Contract Manager, one employee in the Accounting section, and the employees in the Closing and Compliance Department, which accounts for only the closing duties subject to the instant solicitation. Therefore, the amount of work performed by Raine does not rise to 40% of the total work sought, and Schedule B fails to detail the schedule of cost that each task represents. (Size Determination No. -069, at 13.) I disagree.

Schedule B unquestionably delineates the areas in which Raine will be performing the requisite 40% of the total work. *See* Section II.C, *supra*. Schedule B specifies XX areas that Raine will be performing in, with an added area, XXXX, in which the work load will be shared with PEMCO. This schedule shows that 40% of the work will be done by Raine, with specific tasks designated to Raine. Appellant is correct when it argued that “Schedules A and B contain a detailed breakdown of the Contract tasks to be performed, assign each task to Raine or to PEMCO, and provide the percentage of the overall work to be performed by Raine and PEMCO. These Schedules explain and support that Raine will be responsible for 40% of the work that Sage will perform.” (Appeal No. 2, at 16.) In addition, the JVA, contrary to the size

determination, stipulates that the Project Manager will be Ms. Redmond, and the unnamed Contract Manager will be a Raine employee. (JVA, § II.B.3; Schedule A at 1.)

However, the JVA must further show that “[t]he work performed by 8(a) partners to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.” 13 C.F.R. § 124.513(d)(1). Here, the Area Office found that § 124.513(d)(1) was not met because the “work performed by [Raine] seems to consist of issuing automated emails and updating the computer screens”, while carrying out work that Raine has admittedly had previous experience in performing, such as closing activities. (Size Determination No. -69, at 10.) The Area Office determined that the duties thus performed by Raine are not more than administrative or ministerial, and Raine is not gaining any substantive experience, as its tasks in performing this contract are in the field they have previous experience in.

The purpose of this contract is to obtain marketing and sales services for the HUD-owned properties. The contractor is to market and sell the HUD-owned properties in each designated geographic area. The contract objectives are: (1) Properties are accurately and competitively valued; (2) Sales achieve the highest net return; (3) Holding time is minimized; (4) Sales create owner-occupant opportunities; and (5) Closing proceeds are properly accounted for and timely delivered. RFP, at 15-6. The functions Raine will perform here consist of managing the closing process. Raine will not perform any of the marketing of the properties. Objectives (1) through (4) are achieved through PEMCO's work in marketing and selling the properties. Raine's only function is to oversee the closing process. Typically, the substantive legal work involving a closing is prepared by the lender's counsel, and the proposal does not contradict this practice. There is nothing in the JVA or proposal which provides that this will be different here.

Raine will oversee the XXXX, but it will have no part in the important tasks of providing the XXXX. *Supra*, Section II.C. The RFP provides that the contractor here will oversee the closing process, but not perform the key work of document preparation. The contractor will review the documents provided by the buyer's closing agent in order to ensure that the closing instruction were properly followed. Raine, assigned to perform XXXX, which is largely administrative and ministerial work. RFP, at 66-71. Therefore, as the Area Office noted, Raine's work will be largely XXXX. This will support objective (5), but again, Raine will largely be performing the ministerial portion of this tasks, as the substantive work of document preparation will be performed by others. As Appellant's own Work Flow Plan specifies, Raine's work will encompass XXXX. To consider this more than administrative or ministerial work would be a falsehood. Accordingly, I conclude the Area Office was not in error in finding that the functions Raine will perform under the JVA are merely administrative and ministerial functions, and therefore Appellant's JVA fails to meet the regulatory requirements. Consequently, Appellant is not entitled to the exemption from joint venture affiliation permitted 8(a) Mentor-Protégé joint ventures, and thus the Area Office did not err in finding it other than small. This decision applies both to Area 1P and Area 3P, because the same JVA applies to both awards.

IV. Conclusion

For the above reasons, the appeals are DENIED and the size determinations are AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge