

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

SIZE APPEAL OF:

Alpine/First Preston JV II, LLC,

Appellant,

Appealed From  
Size Determination No. 05-2017-015

SBA No. SIZ-5822

Decided: April 6, 2017

APPEARANCES

J. Alex Ward, Esq., Damien C. Specht, Esq., James A. Tucker, Esq., Morrison & Foerster, LLP, Washington, D.C., for Alpine/First Preston JV II, LLC.

Meagan K. Guerzon, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On February 3, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2017-015, concluding that Alpine/First Preston JV II, LLC (Appellant) is not an eligible small business for the subject procurement. On appeal, Appellant contends that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is GRANTED.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant timely filed the instant appeal on February 21, 2017. Accordingly, this matter is properly before OHA for decision.

---

<sup>1</sup> I originally issued this Decision under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the Decision, Appellant informed me it had no requested redactions. Therefore, I now issue the entire Decision for public release.

## II. Background

### A. The 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 (ID/IQ) contracts in twelve geographic areas of the United States including Area 3A (Illinois). (RFP § L.1.) Each contract would have a base performance period of approximately eight months, and four one-year options. (*Id.* § B.3.)

The Contracting Officer (CO) set aside nine of the geographic areas including Area 3A for small businesses, and assigned North American Industry Classification System (NAICS) code 531210, Offices of Real Estate Agents and Brokers, with a corresponding \$7 million annual receipts size standard. (*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. Appellant submitted its initial offer which included price on September 23, 2014.

### B. Joint Venture Agreement

On May 14, 2012, SBA certified Alpine Companies, Inc. (ACI) as a participant in SBA's 8(a) Business Development (BD) program. On June 26, 2012, ACI entered into a mentor-protégé agreement with First Preston I, L.P. (FPI), an undisputed large concern. SBA approved the mentor-protégé agreement on August 15, 2012 and each year thereafter, under 13 C.F.R. § 124.520.

On August 1, 2014, ACI and FPI entered into a Joint Venture Agreement (JVA) to create Appellant and to compete for and perform on the instant procurement. The JVA provides:

[Appellant] will enter into agreements with HomeTelos, LP, which is an affiliate of First Preston, for access to online management tools to manage the Contracts requirements. (JVA, ¶ 2.2)

The Parties shall itemize all equipment, facilities and assets to be furnished under each of the Contracts with an accompanied schedule of provenance and cost/value for each item. (JVA, ¶ 3.5)

First Preston currently possesses established electronic accounting and administrative systems well suited for the Project and will make those available for use by the Project Manager and Alpine. (JVA, ¶ 3.8)

On March 4, 2015, ACI and FPI executed Amendment 1 of the JVA.

---

<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.

On September 24, 2015, one year after Appellant had submitted its initial offer including price, ACI and FPI executed Amendment No. 2 of the JVA. Amendment No. 2 elaborated upon the respective roles and responsibilities of ACI and FPI. It amended ¶ 3.5 by adding the following sentence: “A list of proposed equipment, facilities and hardware that may be acquired by the JV for Contract performance is enclosed as Appendix I.” (JVA Amend. 2, at 3.) Appendix I lists the leased facilities, IT infrastructure, equipment, and office furniture each party to the joint venture would provide on award of contract(s).

### C. Prior Proceedings

On February 3, 2016, after the original awardee for Area 3A was determined to be ineligible, HUD announced that Appellant would be awarded the contract for Area 3A. An unsuccessful offeror, ARNC/Bridge Consulting, LLC, timely protested Appellant's size.

On March 8, 2016, the Area Office issued Size Determination No. 05-2016-023 concluding that Appellant is not an eligible small business because Appellant's JVA does not meet all of the requirements of 13 C.F.R. § 124.513(c) and (d). On March 23, 2016, Appellant appealed the size determination to OHA. SBA moved to remand the case to the Area Office for a new size determination, and on April 20, 2016, OHA granted the motion, vacated Size Determination No. 05-2016-023, and remanded the matter to the Area Office. *Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5727 (2016), *recons. denied*, SBA No. SIZ-5735 (2016) (PFR).

On June 3, 2016, the Area Office issued Size Determination No. 05-2016-031 finding that Appellant is a small business for the subject procurement. Precision Asset Management Corporation and Q Integrated Companies, LLC, appealed that size determination to OHA. On September 29, 2016, OHA granted that appeal. OHA held that the date as of which Appellant's size must be determined was September 23, 2014, the date it submitted its size certification with its initial offer including price. Therefore, the revisions to Appellant's JVA made in Amendment No. 2 of September 24, 2015, could not be considered in determining whether the JVA complies with the regulations. Accordingly, OHA remanded the matter to the Area Office for a new size determination, to determine whether Appellant's JVA was compliant with 13 C.F.R. § 124.513(c) & (d). *Size Appeals of Precision Asset Management Corporation and Q Integrated Companies, LLC*, SBA No. SIZ-5781 (2016), *recons. denied*, SBA No. SIZ-5801 (2017) (PFR).

### D. Size Determination No. 05-2017-015

On February 3, 2017, the Area Office issued Size Determination No. 05-2017-015 (Size Determination), finding Appellant is not an eligible small business for this procurement. The Area Office noted that SBA's regulations provide for an exemption from a finding of affiliation for joint ventures when the parties to the joint venture have an 8(a) mentor-protégé agreement approved by SBA, if the joint venture meets the requirements of 13 C.F.R. § 124.513(c) & (d). (Size Determination at 4-5, citing 13 C.F.R. § 121.103(h)(3)(iii).)

The Area Office found that Appellant's JVA, as it stood on September 23, 2014, did not meet all of the regulatory requirements. It did not contain an itemization (defined as to list

separately) of the major equipment, facilities, or resources to be furnished by each party to the joint venture, with a detailed schedule of the cost or value of each, as required by 13 C.F.R. § 124.513(c)(6). (*Id.* at 8.)

The Area Office acknowledged Appellant's Proposal included some mentions of the systems to be provided by the parties. Section 3.8 refers to FPI's "electronic accounting and administrative systems" to be used by both firms; and Section 2.2 indicates other management tools to manage the contract's requirements will be provided by Home Telos, LP, an FPI affiliate. However, neither the Proposal nor the JVA includes a schedule of costs or value of these resources, or any mention of facilities to be utilized. (*Id.*)

The Area Office also acknowledged Appellant's argument that its offer was structured to cover several of HUD's Areas; and until Appellant knew whether and what awards it would receive, it could not know precisely what staff, offices or equipment it would require. Nevertheless, the regulation requires that the JVA should have itemized the required resources and included a cost/value schedule. Appellant could have broken out the itemization and costs by Area. It is unrealistic to believe that potential offices, staff and resources would not have been thought out in the proposal because the initial offers included a price. The Area Office accepted Appellant's explanation that no major equipment was required, but then the JVA should have contained an explanation that no major equipment was required. The Area Office further found Appellant's argument it had to know for which Areas it received an award before it could specify its equipment and resources meritless because Amendment No. 2 lists all the required resources with costs, and it was executed prior to the date of award. (*Id.* at 8-9.)

Further, the Area Office rejected Appellant's argument that Appellant's Proposal and Operating Agreement should be considered to satisfy the regulatory requirements, because the regulation requires that the JVA must contain the information. (*Id.* at 9.) The Area Office noted four other deficiencies, relating to § 124.513(c)(2), (c)(9), (c)(11), and (c)(12) in the original JVA that were corrected by Amendment 2. (*Id.* at 10-11.)

The Area Office relied on *Size Appeal of IEI-Cityside, LLC*, SBA No. SIZ-5664 (2015) as controlling here. (*Id.* at 9.) That case involved another HUD procurement for services for HUD-owned real property. OHA held that joint venture was not in compliance with 13 C.F.R. § 124.513(c) & (d) because it contained general statements and lacked the specificity required by the regulation. The offeror failed to itemize the facilities and equipment required for the contract. OHA rejected that appellant's argument that it would have been impossible to itemize the equipment in detail due to the undefined nature of an ID/IQ contract. There is no exception to the rule for joint ventures which may have difficulty providing detailed information. Further, the Area Office concluded the word "major" in 13 C.F.R. § 124.513(c)(6) refers only to "equipment" and so all facilities and other resources to be used in the joint venture are to be itemized with costs outlined. (*Id.* at 9, n.14.)

The Area Office noted that Amendment No. 2 corrected the deficiencies in the JVA. It included a list of equipment and resources, and also corrected the four other deficiencies. However, OHA has held that Amendment No. 2 may not be considered here. (*Id.* at 10-11, referring to *Size Appeals of Precision Asset Management Corporation and Q Integrated*

*Companies, LLC*, SBA No. SIZ-5781 (2016).) The Area Office further discussed four alleged deficiencies in the JVA which Amendment No. 2 corrected. However, it is not clear from the Size Determination whether the Area Office based its determination the JVA was not compliant with 13 C.F.R. § 124.513 in part on these four other deficiencies.

The Area Office concluded Appellant's joint venture did not meet the regulatory criteria for an exemption from affiliation for the joint venture. The Area Office then calculated Appellant's size by adding the annual receipts of both concerns, and concluded Appellant was other than small for this procurement. (*Id.* at 11.)

#### E. Appeal

On February 21, 2017, Appellant filed the instant appeal. Appellant notes, with some frustration, that this is third time this matter has come before OHA.<sup>3</sup> Appellant further notes the Area Office has issued three size determinations, finding Appellant did not comply, did comply, and finally did not comply with the regulation. Appellant maintains the instant size determination “rests on a handful of factually inaccurate and legally erroneous quibbles with the details” of Appellant's original JVA. (Appeal at 1-2.)

Appellant maintains that the core question here is whether ACI controls and benefits from the joint venture. Appellant maintains that it does. ACI is Appellant's managing partner, majority owner, controlling member and managing venturer. ACI provides Appellant's project manager and president, has authority over the proposals, and performs the core aspects of the contract. Appellant argues these are the hallmarks of a legitimate joint venture accomplishing the mentor-protégé program goals. (*Id.* at 7.)

Appellant argues the Area Office focused on one minor item, whether Appellant listed its major facilities and resources in its JVA. Appellant argues that the Area Office was incorrect to find non-compliance, but even if it were correct, this “nitpicking and formulaic thinking runs contrary to the core purpose of the mentor-protégé program”. (*Id.* at 8.) Appellant points to *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016), as an example of how this type of case should be considered. There, OHA gave short shrift to the challenged concern's failure to identify equipment and resources, and concentrated on whether the 8(a) concern was performing meaningful work under the applicable joint venture agreement. (*Id.* at 8.) Here, ACI is performing the core property marketing work and is controlling Appellant. This fact is more important than any technical issues. (*Id.*)

Appellant contends its JVA did not fail to itemize major equipment, facilities and resources. It is not practical to provide an itemization nearly two and a half years before a contract is awarded, and none of the equipment, facilities and resources required were major. The Area Office conceded in a footnote that no major equipment was required, but said that to be in full compliance the JVA should have stated that no major equipment was required. However, nothing in the regulation requires such a statement. (*Id.* at 9.)

---

<sup>3</sup> If anything, Appellant understates the matter. Counting Petitions for Reconsideration, this is the fifth time this matter has come before OHA.

Appellant maintains that because the instant contract is an ID/IQ procurement, where each proposal covered multiple geographical jurisdictions, it was impractical to itemize the major equipment, facilities, and other resources to be furnished, together with a detailed schedule of cost or value. (*Id.*) Appellant points to a recent revision to 13 C.F.R. § 124.513(c)(6) which, while issued after HUD issued the instant solicitation, expressly provided that the revision was not a change in the requirements but an attempt to clarify the existing regulations. (*Id.* at 9-10, citing 81 Fed. Reg. 48558 (July 25, 2016).) The revised regulation provided that the itemization of major equipment was to be included in the agreement “where practical.” If the contract is indefinite in nature, the agreement may include a general description without a detailed schedule of the major equipment facilities or other resources. (*Id.* at 10, citing 81 Fed. Reg. at 48583.) Thus, Appellant reasons, joint venture agreements have never been required to itemize equipment and resources where, as here, specific contract requirements are yet to be determined or such itemization is otherwise impractical. (*Id.* at 9-10.) Appellant argues this a clarification of the previous regulation, and thus is applicable here. (*Id.* at 10.)

Further, even absent the clarification to the regulation noted above, the regulation does not require that every facility, resource or item be identified, only the major items. This contract is for professional services, using information technology systems provided by HUD. As a result, there are no major facilities or resources to be provided. (*Id.* at 11.) Further, the Area Office erred in taking the position that the adjective “major” in the regulation applies only to equipment, but not to facilities and resources. Appellant maintains this reading violates basic rules of English syntax, and the adjective “major” applies to all three items in the regulation. Under the Area Office's reading, every joint venture agreement would have to itemize every \$2 box of paper clips or \$100 software license. (*Id.* at 12-13.) In support, Appellant cites *Washington Education Ass'n v. National Right to Work Legal Defense Foundation, Inc.*, 1987 Fed. App'x. 681, 682 (9th Cir. 2006).

Appellant takes issue with the Area Office's reliance on *Size Appeal of IEI-Cityside, LLC*, SBA No. SIZ-5664 (2015) as controlling here. There, OHA held that the equipment, facilities and resources to be provided under a real estate contract were important enough to require itemization in the joint venture agreement. Appellant argues that the contract in that case was a Field Service Management (FSM) contract, which is very different from the Asset Management (AM) contract at issue here. An FSM contractor is responsible for the physical well-being of the HUD properties, including inspection and maintenance. An FSM contract therefore requires more equipment, facilities and resources than an AM contract, and so *IEI-Cityside* is not apposite here. Further, in that case there were many more significant deficiencies in the agreement than the Area Office has found here. (*Id.* at 13-14.)

Appellant maintains its JVA actually went beyond the regulatory requirements when it mandated that the parties were to itemize all equipment, facilities, and assets to be furnished under each contract with a schedule with the cost/value of each item. (*Id.* at 14, citing JVA at 5.) Further, this itemization reflects that only minor tangible resources are required for this contract. Appellant further maintains the amendments to its JVA, which the Area Office treated as admission of non-compliance, are conservative revisions which exceed the level of detail required by the regulations. The Area Office was aware of the minimal physical resources

Appellant was bringing to this contract. Appellant's real resource for this contract is the expertise of its key personnel. Because the JVA itemized Appellant's most important resources by enumerating the tasks each venturer's staff would perform, Appellant's JVA did comply with 13 C.F.R. § 124.513(c)(6). (*Id.* at 15-16.)

Appellant then notes that, after finding Appellant had failed to comply with 13 C.F.R. § 124.513(c)(6), the Area Office mentioned four other JVA deficiencies which Amendment 2 corrected. Appellant maintains that none of these deficiencies appears to form the basis for the Size Determination. Rather, the Area Office's discussion of these deficiencies appears to be dicta which OHA should ignore. (*Id.* at 16.)<sup>4</sup>

Appellant reasserts the argument it made unsuccessfully in *Size Appeals of Precision Asset Management Corporation and Q Integrated Companies, LLC*, SBA No. SIZ-5781 (2016), and rejected by the Area Office, that SBA's failure to consider Amendment 2 is clear legal error, because SBA will not review an 8(a) mentor-protégé joint venture agreement until award. (*Id.* at 16.) Further, even if Amendment 2 is not considered, none of the other deficiencies the Area Office noted supports a finding that Appellant's JVA does not comply with the regulation. (*Id.* at 17.)

Appellant attaches to the appeal a letter from its President, April Cooper. Ms. Cooper discusses her experience in leading her company, and the difficulty the litigation over the size determinations have caused her and her company.

#### F. SBA's Comments

On February 23, 2017, I issued a Request for Agency Comments, requesting SBA to address “each of the issues Appellant raises in its appeal.” I also permitted Appellant to reply to the Comments. On March 10, 2017, SBA filed its Comments.

SBA maintains Appellant's JVA failed to meet all the requirements of 13 C.F.R. § 124.513(c)(6). SBA maintains the regulation requires joint venture agreements to itemize all major equipment, facilities, and other resources, and to provide a detailed schedule of the cost or value of each. An itemization to be provided in the future is insufficient to satisfy the requirement. (SBA Comments at 4, citing *Size Appeal of IEI Cityside, JV*, SBA No. SIZ-5664 (2015).)

Appellant's JVA does not have such an itemization, and lacks even the “general description” required in the recently clarified regulation. If the indefinite nature of the work made it impractical to provide a general description of major resources, Appellant could have specified how the parties would furnish such resources when the definite scope of work becomes available, as the recently clarified regulation provides. Appellant failed to do this. (*Id.*)

---

<sup>4</sup> Appellant also took issue with these “deficiencies” as based on legal and factual errors. (Appeal at 17-22.)

SBA disputes Appellant's argument that due to the indefinite nature of the procurement, it was impractical to itemize resources. Appellant had priced its proposal and could reasonably provide a general statement of its major resources or specified how the parties would furnish them once the scope of work was known. SBA notes Appellant admits in its appeal it anticipated a need to provide office space for 24 to 25 employees, but after learning the scope of its award is providing office space for 12 employees. SBA maintains it was reasonable for the Area Office to consider this much office space to be a major facility. (*Id.* at 5.)

SBA rejects Appellant's argument that the cost of the facility is minor in comparison to overall contract value. SBA maintains it is nonsensical to determine whether resources are major based on a comparison to the anticipated award for the procurement. SBA argues that if Appellant received an award under the simplified acquisition threshold, Appellant would have to admit the facility is major because it would be a larger proportion of contract value. Appellant points out that other awardees from the same solicitation were able to list their resources in a manner that satisfied the regulatory requirements. (*Id.*, citing *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016).)

SBA asserts Appellant failed to meet the requirement that its JVA contain at least a general statement of its major equipment, facilities and resources. Nor did the JVA contain a specification of how the parties would supply such resources once the scope of work becomes known. (*Id.* at 4.)

SBA argues that OHA's decisions in *Size Appeals of Precision Asset Management Corporation and Q Integrated Companies, LLC*, SBA No. SIZ-5781 (2016), *recons. denied*, SBA No. SIZ-5801 (2017) (PFR) were wrongly decided and should be reversed. SBA agrees with Appellant that the date for determining compliance with 13 C.F.R. § 124.513(c) and (d) should be as of the date of award rather than the date of initial offer. Thus, were OHA to adopt this approach here, SBA could consider Amendment 2, and Appellant's JVA would be in full compliance with the regulation. (*Id.* at 6-7.)

SBA did not address or mention in any way the four additional “deficiencies” the Area Office noted in the Size Determination, and Appellant brought up on appeal.

#### G. Appellant's Reply to SBA Comments

Appellant filed its Reply to SBA's Comments on March 15, 2017. Appellant asserts that the Area Office made errors of both law and fact in its size determination. The Area Office made legal error in analyzing the proposal as of the date of initial offer, including price instead of the date of contract award. As of the contract award, the JVA contained the revisions made in Amendment 2. Appellant notes that once OHA had issued the *IEI-Cityside* decision, Appellant amended the JVA to comply with SBA's requirements.

Moving to the heart of the major facilities issue, Appellant asserts (1) that its leased office space did not need to be itemized because it is not a “major facility”; and (2) that its leased office space did not need to be itemized irrespective of whether it was a “major facility” because the space was being leased by the JV itself, not by any party to the JV. As for the first argument,



Appellant contends SBA “implicitly conceded that the Area Office used the wrong standard.” (Reply at 5, citing SBA Comments at 5.)

Second, Appellant argues that the regulation requires the itemization only of major facilities “furnished by each party to the joint venture.” (Reply at 6, quoting 13 C.F.R. § 124.513(c)(6).) Here, the office space and other major resources will be furnished not by any party to the joint venture, but by the joint venture itself. (Reply at 6, citing Amendment 2.) Appellant distinguishes itself, a populated joint venture, from the joint ventures in *IEI-Cityside* and *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016), which were unpopulated joint ventures and thus dependent upon their members for major facilities. Therefore, *IEI-Cityside* and *Sage* are inapposite to Appellant's JVA.

Appellant points out that SBA's Comments did not address the four “additional” deficiencies despite Appellant's having raised them in its appeal. Thus, Appellant concludes that these other issues were not the basis of the size determination, and that SBA does not dispute they are erroneous. (Reply at 3, n.2.) Appellant also makes policy arguments and replies to those made in SBA's Comments.

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Analysis

The general rule is that concerns submitting offers as joint venturers are affiliated with regard to performance of that contract. 13 C.F.R. § 121.103(h)(2).<sup>5</sup> There are exceptions to this rule. *Id.* Two firms in an SBA-approved mentor-protégé relationship under the 8(a) program may joint venture as a small business for any Federal contract, provided the protégé qualifies as small under the applicable size standard, and, for purposes of 8(a) sole source requirements, has not reached the dollar limit in 13 C.F.R. § 124.519. 13 C.F.R. § 121.103(h)(3)(iii). If the procurement is to be awarded other than through the 8(a) program (as the instant procurement is), and if the joint venture's size status is protested, the joint venture agreement must meet all the requirements of 13 C.F.R. § 124.513(c) and (d) in order to receive the exemption from affiliation. *Id.*

---

<sup>5</sup> The solicitation was issued on July 25, 2014, so the size determination regulations in effect on that date apply to this case. *Size Appeal of GASL, Inc.*, SBA No. SIZ-4191 (1996).

Here, the Area Office concluded that Appellant's JVA failed to meet all the requirements of 13 C.F.R. § 124.513(c) and (d) and, therefore, that Appellant was not entitled to the exemption from affiliation. Appellant maintains the Area Office clearly erred in this conclusion.

The requirement at issue is 13 C.F.R. § 124.513(c)(6), requiring the joint venture agreement to contain a provision "[i]temizing 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. . . ."

The Area Office concluded that the JVA's provisions at ¶¶ 2.2, 3.5 and 3.8 were an inadequate listing of major equipment, facilities, and other resources. The Area Office's conclusion was based, in part, on its finding that the adjective "major" in the regulation applies only to "equipment". This was a misreading of the regulation. An adjective at the beginning of a series such as this modifies each of the following nouns in the series. Thus, the regulation clearly means for "major" to modify "facilities, and other resources" as well as "equipment". OHA has held that the word "major" in this regulation applies to all three nouns in the series. *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783, at 26 (2016). This holding is consistent with the rule of English syntax that an initial modifier will govern each of the following nouns unless another adjective appears. *Wash. Educ. Ass'n v. Nat'l Right to Work Legal Def. Found., Inc.*, 1987 Fed. App'x. 681, 682 (9th Cir. 2006). In statutory construction, this is known as the "series qualifier canon." Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* 144-51 (2012). Accordingly, I find it was clear error for the Area Office to find that the regulation required Appellant's JVA to list all facilities and resources to be used on this contract, rather than merely the major ones.

The question then becomes, was there any major equipment, facilities, or other resources to list? As Appellant points out, in *Size Appeal of IEI Cityside, JV*, SBA No. SIZ-5664 (2015), the listing was found inadequate, but that procurement differed importantly from the one at issue here. That procurement required inspection, preservation, maintenance, and property management services. (*IEI Cityside* at 3.) The contractor in that case was responsible for inspecting and preserving and maintaining the properties covered by the contract, as well as preparing them for sale. (*Id.*) *IEI Cityside* thus concerned an FSM contract which actually did require major equipment and other resources.

By contrast, the procurement here requires the professional services of management and resale of real property, using information technology systems provided by HUD. (RFP, § 3.1.) It is a services contract. OHA has already held that it does not require the listing of major equipment, such as a construction contract would. *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783, at 26 (2016). Therefore, I conclude Appellant's performance of this contract does not require major equipment, facilities, or other resources. (This is confirmed by Appellant's Amendment No. 2, which lists merely routine office space and equipment.) Because the contract does not require major equipment, facilities, or other resources, Appellant was not required to list them in its JVA.<sup>6</sup>

---

<sup>6</sup> It is worth noting that the Area Office reached the same conclusion, that no major equipment was required by the contract and, therefore, none needed to be listed in the JVA, in its

The Area Office's determination that if no major equipment, facilities, or other resources were required the JVA should have stated that fact is not supported by the regulation. The regulation contains no such requirement.

The size determination did mention four other “deficiencies” in the JVA which were corrected by Amendment No. 2. As Appellant notes, it is not clear whether the Area Office based the size determination in part on these “deficiencies.” My February 23, 2017 Order requesting Agency comments directed SBA to address “each of the issues Appellant raises in its appeal”. The comments of Agency counsel failed to address any of these four alleged “deficiencies” and focused solely on the issue of whether Appellant had complied with 13 C.F.R. § 124.513(c)(6). Accordingly, I will take this failure as the Agency's concession that the four “deficiencies” are not part of the basis for the Size Determination, which rests solely on Appellant's alleged noncompliance with 13 C.F.R. § 124.513(c)(6).

Accordingly, I conclude that the Area Office's finding that Appellant had failed to comply with § 124.513(c)(6) is based upon clear error, because Appellant had no major equipment, facilities, or other resources to list in its JVA. Accordingly, Appellant's JVA does comply with the regulation, and Appellant is an eligible small business for this procurement.<sup>7</sup>

#### IV. Conclusion

For the above reasons, the appeal is GRANTED. Appellant Alpine/First Preston II JV, LLC, is an eligible small business for the subject procurement.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge

---

first size determination on Appellant in connection with this procurement. Size Determination No. 05-2016-023, at 4-5.

<sup>7</sup> Because I am basing this decision on Appellant's compliance with § 124.513(c)(6), I need not address the arguments that OHA's decisions in *Size Appeals of Precision Asset Management Corporation and Q Integrated Companies, LLC*, SBA No. SIZ-5781 (2016), *recons. denied*, SBA No. SIZ-5801 (2017) (PFR) were in error and should be reversed.