

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

SIZE APPEAL OF:

North Wind Site Services, LLC,

Appellant,

RE: R8I Cabrera Remediation &  
Construction, LLC

Appealed From  
Size Determination No. 05-2019-003

SBA No. SIZ-5988

Decided: March 7, 2019

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Ian P. Patterson, Esq., Shane J. McCall, Esq., Koprince Law LLC, Lawrence, Kansas, for the Appellant

Stephen P. Ramaley, Esq., Alfred M. Wurglitz, Esq., C. Peter Dungan, Esq., Christopher S. Denny, Esq., Miles & Stockbridge P.C., Washington, D.C., for R8I Cabrera Remediation & Construction, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On November 8, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting Area V (Area Office) issued Size Determination No. 05-2019-003 concluding that R8I Cabrera Remediation & Construction, LLC (R8I) is a small business under the size standard associated with the subject procurement. R8I is a joint venture between Marketing Data Solutions, LLC d/b/a Region 8 International (MDS) and its SBA-approved mentor, Cabrera Services, Inc. (Cabrera). North Wind Site Services, LLC (Appellant), which had previously protested R8I's size, maintains that the size determination is clearly erroneous, and

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now issues the entire decision for public release.

requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for further review. For the reasons discussed *infra*, the appeal is denied and the size determination is 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 after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation and Protest

On May 18, 2018, the U.S. Army Corps of Engineers issued Request for Proposals (RFP) No. W912P9-18-R-0019 for the remediation of contaminated soil and structures at the Iowa Army Ammunition Plant. The Contracting Officer (CO) set aside the procurement entirely for participants in SBA's 8(a) Business Development (BD) program, and assigned North American Industry Classification System (NAICS) code 562910, Remediation Services. NAICS code 562910 ordinarily is associated with a size standard of \$20.5 million average annual receipts, but the RFP indicated that this procurement fits within the exception for Environmental Remediation Services, which carries a 750-employee size standard. Proposals were due July 3, 2018. On September 21, 2018, the CO announced that R8I was the apparent awardee.

On September 28, 2018, Appellant, a disappointed offeror, filed a size protest against R8I with the CO. The protest alleged that R8I “is a prime/subcontractor team between [MDS] and [Cabrera].” (Protest at 1.) Appellant contended that MDS, as the prime contractor of the team, “is simply too reliant on its non-8(a) subcontractor,” in contravention of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (*Id.*) Alternatively, even if R8I is a joint venture, R8I is ineligible for award because Cabrera is not small. (*Id.*)

### B. Size Determination

On November 8, 2018, the Area Office issued Size Determination No. 05-2019-003, concluding that R8I is a small business.

The Area Office explained that R8I is a joint venture between MDS and Cabrera. MDS is a participant in the 8(a) BD program, and Cabrera is MDS's SBA-approved mentor. (Size Determination at 2.) Due to the mentor-protégé arrangement, R8I may compete as a small business if certain conditions are met. (*Id.* at 3, citing 13 C.F.R. § 121.103(h)(3)(iii).) The Area Office found that R8I meets each of these conditions. First, SBA approved the mentor-protégé agreement on May 17, 2018, before R8I submitted its proposal for the instant procurement. (*Id.*) Second, the protégé, MDS, was admitted to the 8(a) BD program on November 4, 2016, and still participates in the program. (*Id.*) Third, MDS has fewer than 750 employees and no affiliates. (*Id.* at 4.) MDS therefore is a small business under the size standard associated with this procurement. (*Id.*) Fourth, the responsible SBA District Office approved R8I's joint venture agreement on November 6, 2018. (*Id.*)

The Area Office found that R8I's joint venture agreement need not have been approved before R8I submitted its proposal for this procurement. Rather, “[t]he 8(a) regulations indicate that the Joint Venture Agreement for an 8(a) contract has to be approved by SBA prior to award of the contract.” (*Id.*, citing 13 C.F.R. § 124.513(e)(1).) The Area Office added that, because the District Office had already approved the joint venture agreement, it was unnecessary for the Area Office to reexamine the agreement for compliance. (*Id.*, citing *Size Appeal of Trident3, LLC*, SBA No. SIZ-5315 (2012).)

### C. Appeal

On November 20, 2018, Appellant filed the instant appeal. Appellant contends that the Area Office erred by not referring concerns over R8I's 8(a) BD status to SBA's Office of Business Development. (Appeal at 1.)

Appellant highlights that its protest “asked the SBA to investigate R8I for compliance with the 8(a) Program regulations, based on specific concerns about R8I's noncompliance.” (*Id.* at 2.) The Area Office should have referred concerns about R8I's 8(a) eligibility to the Office of Business Development. (*Id.* at 5, citing *Size Appeal of Carntribe-Clement 8AJV #1, LLC*, SBA No. SIZ-5357 (2012).) Instead, however, the Area Office relied on the District Office's approval of the joint venture agreement without analyzing the issues raised in the protest, and thus “turned a blind eye to the contents of the joint venture agreement.” (*Id.*)

Next, Appellant observes that a recent report by SBA's Office of Inspector General (OIG) identified deficiencies in the operation of the 8(a) BD program. The OIG found that 8(a) firms and joint ventures were not properly investigated to appropriately determine their eligibility. This report, Appellant urges, “should cause OHA to reexamine its concern that encouraging an Area Office to take a look at 8(a) joint ventures will result in conflicting determinations from different parts of SBA, one from Business Development and one from an Area Office.” (*Id.* at 6-7.) Appellant suggests that OHA instead “endorse a protocol” whereby an area office “scans” an 8(a) joint venture agreement and relays concerns to the Office of Business Development. (*Id.* at 7.) In Appellant's view, such an approach would not be contrary to any SBA regulations. (*Id.*)

Appellant alternatively requests that OHA modify its precedent stemming from *Size Appeal of Trident3, LLC*, SBA No. SIZ-5315 (2012), in which OHA held that an area office lacks authority to review the substantive terms of an 8(a) mentor-protégé joint venture agreement. Appellant argues that such precedent undercuts SBA's joint venture regulations, because “an otherwise ineligible company might be found to qualify — a clear size concern.” (*Id.* at 8.) Appellant requests that OHA revise its holding to “require the Area Office to refer an 8(a) joint venture agreement to the Office of Business Development for review as part of a size protest.” (*Id.*, emphasis Appellant's.)

Appellant argues that, because the Area Office ignored Appellant's concerns over R8I's joint venture agreement, OHA should “remand this matter to the Area Office so that it can then be referred to the Office of Business Development for further investigation.” (*Id.*) Specifically, the Area Office failed to consider whether MDS brings anything beyond its 8(a) status to the effort. (*Id.* at 9.) Further, the Area Office did not address whether MDS will supply any of the

equipment, facilities, or resources needed for the joint venture to perform the contract. (*Id.*) In addition, because MDS appears to be a small IT services firm with no experience in performing Federal contracts, MDS likely relied on Cabrera's experience and capabilities to win, and to perform, the instant contract. (*Id.* at 10.)

#### D. R8I's Response

On December 18, 2018, R8I responded to the appeal. R8I argues that Appellant has shown no error of fact or law in the size determination. Therefore, the appeal should be denied.

R8I contends that the Area Office correctly recognized that R8I, an 8(a) mentor-protégé joint venture, is exempt from affiliation under 13 C.F.R. § 121.103(h)(3)(iii). (Response at 4.) R8I points out that in *Trident3*, OHA held that an area office is precluded from reviewing the substance of an 8(a) mentor-protégé joint venture agreement once the agreement has been approved by an SBA District Office. (*Id.* at 4-5, citing *Trident3*, SBA No. SIZ-5315, at 11.) Likewise, 13 C.F.R. § 124.517(a) stipulates that the eligibility of an 8(a) participant cannot be challenged by another participant. The Area Office committed no error in following the requirements of §§ 121.103(h)(3)(iii) and 124.517(a).

Next, R8I disputes Appellant's interpretation of *Carntribe-Clement*. According to R8I, *Carntribe-Clement* does not state “that when an Area Office considers a size protest or otherwise harbors concerns about an 8(a) participant's eligibility, it must refer the matter to the SBA Office of Business Development.” (*Id.* at 5, emphasis R8I's.) On the contrary, the decision indicates that an area office has the discretion to refer 8(a) eligibility concerns to the Office of Business Development. OHA explained in *Carntribe-Clement* that because an SBA area office lacks the authority to review 8(a) eligibility questions, such matters should have been directed to the Office of Business Development. (*Id.* at 6.) Conversely, in the instant case, the record shows that the Area Office had no particular concerns about R8I's joint venture agreement. Therefore, the Area Office's decision to take no further action was proper.

R8I observes that 13 C.F.R. § 124.517(e) permits, but does not require, a person who wishes to raise 8(a) eligibility concerns to direct those concerns to the Office of Business Development. Appellant's request that OHA re-interpret *Trident3* to mandate such a referral would improperly alter the regulation without the required public notice and comment. In R8I's view, “holding that an area office must refer concerns to the [Office of Business Development] would be in clear conflict with the language of [§ 124.517(e)], which expressly provides unqualified discretion to individuals regarding whether to refer such concerns to that Office.” (*Id.*)

Next, R8I claims that the OIG report referenced by Appellant has no bearing on whether the Area Office committed a clear error of fact or law in this case. Nor did the report recommend that area offices be given a greater role in oversight of the 8(a) program. (*Id.* at 7.)

R8I maintains that Appellant's request that its concerns be relayed to the Office of Business Development is now moot. According to R8I, the Area Office did forward a copy of the size protest to the Colorado District Office, and thus, by extension, to the Office of Business

Development. (*Id.* at 7.) The Office of Business Development's inaction after receiving the protest is not grounds for sustaining the appeal.

Lastly, R8I insists that, even if the Area Office had reviewed the substance of R8I's joint venture agreement, the Area Office would have found that the agreement meets all the requirements of 13 C.F.R. § 124.513. R8I asserts that, contrary to Appellant's suggestions, MDS was formed in 2012 and entered the 8(a) BD program in 2016, and thus is not an unproven concern. (*Id.*) Prior Federal experience was not required for the instant procurement, but MDS nevertheless does have experience performing work similar to that sought here. (*Id.*) MDS's owner also has experience in environmental remediation and other related work. (*Id.* at 8.) R8I disputes Appellant's claims that MDS will not provide equipment, facilities, and resources, and that MDS must rely on Cabrera for project management. (*Id.*)

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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

I agree with R8I that the Area Office committed no error in its review. As a result, this appeal must be denied.

Under SBA regulations, the parties to a joint venture normally are affiliated with one another for any contract performed by the joint venture. 13 C.F.R. § 121.103(h)(2). The regulations authorize an exception, however, for joint ventures between an 8(a) BD participant and its SBA-approved mentor. Specifically:

Two firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement .... If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513.

13 C.F.R. § 121.103(h)(3)(iii). Here, the instant procurement was conducted through the 8(a) BD program. Section II.A, *supra*. The Area Office verified that: (1) MDS and Cabrera are an SBA-approved mentor and protégé; (2) the protégé, MDS, is an 8(a) BD participant; (3) MDS is small under the size standard associated with this procurement; and (4) prior to contract award, R8I's joint venture agreement was approved by SBA's Colorado District Office, acting on behalf of the

Office of Business Development. Section II.B, *supra*. Thus, R8I meets the requirements to qualify for the exception to affiliation at 13 C.F.R. § 121.103(h)(3)(iii). *Id.* Citing OHA's decision in *Size Appeal of Trident3, LLC*, SBA No. SIZ-5315 (2012), the Area Office also explained that, once the servicing SBA District Office has approved an 8(a) mentor-protégé joint venture agreement, it is unnecessary and improper for an area office to conduct a separate review of that agreement. *Id.*

On appeal, Appellant contends that the Area Office should have referred the protest allegations to SBA's Office of Business Development, based on OHA's decision in *Size Appeal of Carntribe-Clement 8AJV #1, LLC*, SBA No. SIZ-5357 (2012). This argument is meritless. In *Carntribe-Clement*, OHA found that an area office had impermissibly examined whether a mentor-protégé joint venture agreement met 8(a) eligibility requirements set forth in 13 C.F.R. Part 124. *Carntribe-Clement*, SBA No. SIZ-5357, at 12-14. OHA remarked that, instead of having conducted its own 8(a) eligibility review, “[if] the Area Office harbored doubts about an 8(a) BD participant's [eligibility], the Area Office should have directed the matter to the Office of Business Development pursuant to 13 C.F.R. § 124.517(e).” *Id.* at 13. The referenced regulation in turn permits that “[a]nyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to [the Office of Business Development].” 13 C.F.R. § 124.517(e). Read in context, then, *Carntribe-Clement* merely indicates that, although an area office lacks authority to conduct its own 8(a) eligibility review, an area office may, in its discretion, relay 8(a) eligibility concerns to the Office of Business Development. OHA's discussion does not connote that every protest allegation must be referred.

Appellant also requests that OHA re-interpret its decision in *Trident3* so as to require that an area office forward all 8(a) eligibility allegations to the Office of Business Development. Such an approach would be sound policy, Appellant maintains, because it would reduce the likelihood of ineligible concerns receiving awards, while also eliminating the possibility of different SBA offices issuing contradictory decisions, the scenario which arose in *Trident3*. I agree with R8I that Appellant's proposal would require a regulatory change, because the underlying rule, 13 C.F.R. § 124.517(e), permits, but does not require, interested persons to submit 8(a) eligibility concerns to the Office of Business Development. Accordingly, OHA cannot implement Appellant's proposal through case law. Appellant's public policy arguments are beyond OHA's jurisdiction, and must instead be directed to SBA policy officials. It is well-settled that OHA has no authority to determine the propriety of the regulations themselves. *E.g.*, *Size Appeals of GTA Containers, Inc. and MPC Containment Systems, LLC*, SBA No. SIZ-5760, at 7 (2016); *Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556, at 7 (2014).

#### IV. Conclusion

Appellant has not proven that the size determination is clearly erroneous. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge