

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

SIZE APPEAL OF:

The Povolny Group, Inc.,

Appellant

RE: AMCOR JV One, LLC

Appealed From
Size Determination No. 04-2024-037

SBA No. SIZ-6329

Decided: January 15, 2025

APPEARANCES

John M. Manfredonia, Esq., Manfredonia Law Offices, LLC, Cresskill, New Jersey, for The Povolny Group, Inc.

Peter B. Ford, Esq., Meghan F. Leemon, Esq., Emily A. Reid, Esq., PilieroMazza PLLC, Washington, D.C., for AMCOR JV One, LLC.

DECISION

I. Introduction and Jurisdiction

On October 4, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2024-037, dismissing a size protest filed by The Povolny Group, Inc. (Appellant) against AMCOR JV One, LLC (AMCOR JV). The Area Office found that the protest was nonspecific. On October 18, 2024, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in dismissing the protest, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is denied.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within 15 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

On August 7, 2024, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C77624R0091 for a construction project at the Olin E. Teague VA Medical Center in Temple, Texas. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$45 million average annual receipts. Offers were due September 10, 2024. On September 26, 2024, the CO announced that AMCOR JV had been selected for award.

B. Protest

On October 2, 2024, Appellant, an unsuccessful offeror, filed a protest with the CO challenging AMCOR JV's size. Appellant acknowledged that AMCOR JV is a joint venture between American First Contracting, Inc. (American First) and its SBA-approved mentor, Cornerstone Contracting, Inc. (Cornerstone), under SBA's All-Small Mentor-Protégé Program (ASMPP). (Protest at 2.) Furthermore, Appellant noted, American First is a certified SDVOSB. (*Id.*) Appellant alleged, however, that the joint venture, AMCOR JV, does not qualify as small, for two reasons. (*Id.* at 3.)

Appellant first contended that American First and Cornerstone are generally affiliated, based on the “longstanding inter-relationship and contract dependence” between the two companies. (*Id.* at 3.) In support, Appellant observed that SBA approved the Mentor-Protégé Agreement (MPA) on April 28, 2020. (*Id.* at 4.) Since then, American First and Cornerstone have established three joint ventures, which together have secured 32 contracts worth almost half a billion dollars. (*Id.*) Appellant offered a list of contracts awarded to the joint ventures and to American First individually. (*Id.* at 4-6.) In Appellant's view, the awards to American First alone represent “just a small fraction of the revenue American First would have received from the mentor protégé JVs with Cornerstone.” (*Id.* at 6.) Therefore, Appellant reasoned, American First is “contractually dependent on Cornerstone to sustain its business.” (*Id.*) Appellant continued:

Assuming American First received 40% of the revenue from the mentor protégé JVs, this amounts to \$184,345,812 (40% of \$460,864,530). The \$19,375,000 [of awards to American First directly] is a mere 10.5% of that. . . . If this does not establish general affiliation, it is hard to imagine what does.”

(*Id.*)

Appellant also alleged that Cornerstone, a large business, improperly controls AMCOR JV. (*Id.* at 6-7.) AMCOR JV is structured as a limited liability company (LLC) in the state of Illinois, and Illinois law provides that one or more managers of an LLC may be named in an operating agreement. (*Id.* at 7.) In the instant case, “[i]t is not known whether AMCOR JV has an operating agreement.” (*Id.*) However, Mr. Chris Blake, Cornerstone's President, is identified in

AMCOR JV's Articles of Organization as having “the authority of manager.” (*Id.*) As a result, Cornerstone and AMCOR JV are “affiliated,” because Cornerstone has “the absolute power” to control AMCOR JV. (*Id.* at 6-7.)

C. Size Determination

The CO forwarded Appellant's size protest to the Area Office for review. On October 4, 2024, the Area Office issued Size Determination No. 04-2024-037, dismissing the protest as nonspecific. (Size Determination at 1.)

The Area Office explained that, in assessing protest specificity, the Area Office must consider “(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds.” (*Id.* at 2, citing *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430, at 4 (2001); *Size Appeal of Alutiiq Int'l Sols., LLC*, SBA No. SIZ-5069, at 3 (2009); and *Size Appeal of NuGate Grp., LLC*, SBA No. SIZ-5821, at 2 (2017).)

Here, both of Appellant's protest allegations were insufficiently specific. Regarding Appellant's claim that American First and Cornerstone are generally affiliated notwithstanding their SBA-approved mentor-protégé relationship, the Area Office stated that it was unaware of any support for comparing the ratio of contracts awarded to mentor-protégé joint ventures to contracts awarded to the protégé in its individual capacity. (*Id.* at 3.) Among other issues, awards to joint ventures were not made to Cornerstone alone, and “therefore show[] no evidence of contractual dependence [on] Cornerstone outside of the joint venture[s].” (*Id.*) Furthermore, according to the protest itself, American First and Cornerstone have established only three joint ventures since approval of their MPA in 2020. (*Id.*) The Area Office found that three joint ventures over a four-year period, absent any other evidence of contractual dependence between the mentor and protégé outside of the joint ventures, “fails to demonstrate a ‘longstanding inter-relationship or contractual dependence between the same joint venture partners.’” (*Id.*, quoting 13 C.F.R. § 121.103(h).)

Turning to Appellant's contention that AMCOR JV is controlled by, and affiliated with, Cornerstone, Appellant's protest conceded that Appellant did not know whether AMCOR JV has an operating agreement. As a result, the protest offered “no evidence to support an allegation of control by one joint venture member over another joint venture member through the joint venture operating agreement.” (*Id.*) The Area Office concluded that this portion of the protest lacked the requisite factual support to be sufficiently specific. (*Id.*)

D. Appeal

On October 18, 2024, Appellant filed the instant appeal. Appellant insists that the Area Office erred in dismissing Appellant's size protest. (Appeal at 1.)

Appellant renews its contention that AMCOR JV does not qualify as small because American First and Cornerstone are generally affiliated due to “a longstanding inter-relationship or contractual dependence between the same joint venture partners.” (*Id.* at 4.) Additionally,

Appellant maintains, Cornerstone controls or has the power to control the joint venture. (*Id.* at 12.)

In support of its arguments, Appellant reiterates that AMCOR JV and two other joint ventures between American First and Cornerstone have collectively received 32 contracts worth almost half a billion dollars (\$460,864,530) over the past four years. (*Id.* at 6-7.) To Appellant, these facts show general affiliation, as “there is no reported OHA case on general affiliation that comes close to these many contracts.” (*Id.* at 8.)

In its protest, Appellant asserted that one way to evaluate contractual dependence is to examine the proportion of revenue protégé American First received from the joint ventures compared to what American First received through direct awards. (*Id.*) Here, during the time the joint ventures generated \$460,864,530, American First received contracts on its own totaling \$19,375,000. (*Id.*) Since the direct contract awards are a mere 10.5% of the approximate revenue American First may have generated via the joint ventures, it may be inferred that “American First has a contractual dependence on the joint ventures.” (*Id.* at 8-9.) Therefore, by dismissing the protest, the Area Office committed error of law. (*Id.* at 9.) Additionally, even though American First and Cornerstone appear to have complied with SBA joint venture regulations, a longstanding inter-relationship or contractual dependence may still exist. (*Id.*) The Area Office improperly dismissed the size protest without exploring whether general affiliation exists. (*Id.* at 9-10.)

Appellant complains that the Area Office engaged in a “hypothetical” by commenting in the size determination that “[i]t is likely that a joint venture member could theoretically have zero awards in its individual capacity and not be disqualified from receiving the exemption to general affiliation.” (*Id.* at 10, quoting Size Determination at 3.) Moreover, the Area Office's position is “contrary to 13 C.F.R. § 121.103(h).” (*Id.*) Appellant further argues that since general affiliation can be based on the number of joint ventures created by the same joint venture partners and the volume of business those joint ventures generate, the Area Office erred as a matter of law when stating that a determination of contractual dependence is limited to activities outside the joint ventures. (*Id.* at 11.) Additionally, the Area Office ignored “sufficient other evidence” in the protest, notably that the three joint ventures between American First and Cornerstone received 32 awards during a four-year period collectively totaling almost a half a billion dollars. (*Id.*) This fact, “coupled with the fact that American First received little contracts on its own during the same period,” should have provided sufficient grounds for the Area Office to investigate general affiliation. (*Id.* at 11-12.)

Appellant also renews its argument that Cornerstone is affiliated with AMCOR JV. (*Id.* at 12.) Appellant highlights that Paragraph 7 of AMCOR JV's Articles of Organization states that Messrs. Mark Roeckell (President of American First) and Blake (President of Cornerstone) both have “the authority of manager.” (*Id.*) Appellant acknowledges that it does not know whether AMCOR JV has an operating agreement. (*Id.*) However, AMCOR JV's Articles of Organization name Mr. Blake a manager without limitation to his control over AMCOR JV. (*Id.*) To Appellant, this evidence provides sufficient basis to assert affiliation based on control and common management pursuant to 13 C.F.R. § 121.103(e). (*Id.* at 13.) Furthermore, Appellant maintains, the Area Office failed to mention that the protest included a copy of AMCOR JV's

Articles of Organization as an attachment. (*Id.* at 13.) If there is no operating agreement, then Appellant urges that the Illinois Limited Liability Act's provisions governing the relationships among members, managers and the company should automatically apply. (*Id.* at 14.)

E. AMCOR JV's Response

On December 10, 2024, AMCOR JV responded to the appeal.¹ AMCOR JV contends that the appeal should be dismissed or denied because Appellant fails to persuasively show that the size determination is clearly erroneous. (Response at 1.)

AMCOR JV first states that Appellant has failed to demonstrate how its size protest was specific under SBA regulations. (*Id.*) In particular, the protest did not advance any valid reasons to find general affiliation between American First and Cornerstone, an SBA-approved mentor and protégé. (*Id.*) According to AMCOR JV, the only facts proffered by Appellant were that American First and Cornerstone “create[d] three (3) joint ventures under this MPA,” and a list of awards to the joint ventures, all of which occurred well after the MPA was approved. (*Id.* at 2-3.) These facts are unremarkable, as there is nothing improper about two companies establishing a mentor-protégé relationship, or about a mentor and protégé engaging in joint ventures. (*Id.* at 3.)

AMCOR JV believes that the fundamental flaw with Appellant's protest was that Appellant did not demonstrate how American First and Cornerstone forming joint ventures and receiving awards after their MPA was approved amounts to assistance outside the scope of the MPA. (*Id.*) Appellant thus did not identify any valid reason to find the two venturers generally affiliated, as Appellant at best pointed to assistance directly within the scope of an MPA. (*Id.*) Similarly, under OHA precedent, Cornerstone cannot be “affiliated” with AMCOR JV, a joint venture of which Cornerstone is a member; Appellant's argument for affiliation through common management by Mr. Blake is thus invalid and nonsensical. (*Id.*)

Lastly, AMCOR JV highlights that Appellant did not attempt to show that AMCOR JV is not compliant with applicable SBA joint venture regulations. (*Id.*) In fact, Appellant did not allege that AMCOR JV is in any way in violation of 13 C.F.R. § 128.402, but instead relied on general affiliation principles, which are not a valid basis for protest. (*Id.*) AMCOR JV considers Appellant's arguments speculative and amounting to nothing more than a request for the Area Office to investigate. As such, OHA should dismiss or deny Appellant's appeal.

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

¹ AMCOR JV initially moved to dismiss the appeal for lack of standing. OHA denied the motion by separate order dated December 3, 2024.

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

Appellant has not shown that the Area Office clearly erred in dismissing the size protest. Accordingly, this appeal must be denied.

SBA regulations require that a size protest must be specific so as to provide notice of the grounds upon which the protested concern's size is challenged. 13 C.F.R. § 121.1007(b). A bald allegation that the challenged concern is not small does not suffice. *Id.* With regard to an SBA-approved mentor and protégé, such as American First and Cornerstone, SBA regulations permit that a mentor and protégé may joint venture for an SDVOSB set-aside procurement, provided that the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and provided that the joint venture meets the requirements of 13 C.F.R. § 128.402(c) and (d). 13 C.F.R. § 121.103(h)(2)(ii). However, “[a]t some point,” a “longstanding inter-relationship or contractual dependence between the same joint venture partners” may lead to general affiliation between them. 13 C.F.R. § 121.103(h).

Here, Appellant's protest acknowledged that AMCOR JV is a joint venture between an SBA-approved mentor and protégé, and that American First, the protégé member of the joint venture, is a certified SDVOSB. Section II.B, *supra*. Additionally, Appellant did not allege that AMCOR JV is noncompliant with 13 C.F.R. § 128.402(c) and (d). *Id.* Instead, Appellant maintained that American First and Cornerstone are generally affiliated, due to the ratio between contracts awarded to three mentor-protégé ventures as compared with contracts awarded to American First in its individual capacity. *Id.*

The Area Office considered Appellant's allegation and reasonably concluded that it was nonspecific. SBA regulations make clear that a mentor is encouraged to provide business development assistance to its protégé, including “assistance in performing prime contracts with the Government through joint venture arrangements.” 13 C.F.R. § 125.9(a). Furthermore, an SBA-approved mentor and protégé cannot be affiliated with one another merely because “the protégé firm receives assistance from the mentor under the [MPA].” 13 C.F.R. § 121.103(b)(6). Accordingly, there is nothing inherently improper about American First and Cornerstone having established three successful joint ventures. As for the ratio between contracts awarded to the joint ventures and contracts awarded solely to American First, the Area Office properly found this line of argument not legally significant. Section II.C, *supra*. Since awards to the joint ventures were not made to Cornerstone alone, such awards “show[] no evidence of contractual dependence [on] Cornerstone outside of the joint venture[s].” *Id.* In short, then, Appellant's protest failed to offer any valid reason(s) to believe that American First and Cornerstone might be generally affiliated notwithstanding their status as an SBA-approved mentor and protégé. The Area Office therefore correctly dismissed this portion of the protest. OHA has held that, in order for a size protest to be deemed specific, it must “include specific allegations of fact which, if true, would render the concern other than small.” *Size Appeal of ACS Ventures, LLC*, SBA No. SIZ-6160, at 5 (2022).

Appellant's only remaining protest allegation was that AMCOR JV is “affiliated” with Cornerstone, a large business. Section II.B, *supra*. This allegation too was fundamentally flawed. AMCOR JV is a joint venture between Cornerstone and American First, and it well-settled that “[a] concern is not an affiliate of a joint venture of which it is member.” *Size Appeal of Zin Techs., Inc.*, SBA No. SIZ-6305, at 14 (2024); *see also* 87 Fed. Reg. 380, 381 (Jan. 5, 2022).

IV. Conclusion

Appellant has not demonstrated that the Area Office erred in dismissing Appellant's size protest. Instead, the Area Office correctly dismissed the protest, because Appellant failed to advance supporting facts which, if true, would render AMCOR JV other than small. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge