United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Chenega Base and Logistics Services, LLC, Appellant, RE: DPG Services JV LLP Appealed From Size Determination No. 06-2024-046	SBA No. SIZ-6332 Decided: January 27, 2025

APPEARANCES

Mark G. Jackson, Esq., Stowell Holcomb, Esq., Jackson Holcomb LLP, Seattle, Washington, for Chenega Base and Logistics Services, LLC

Michael J. Schaengold, Esq., Timothy M. McLister, Esq., Greenberg Traurig, LLP, Washington, D.C., for DPG Services JV LLP

DECISION[1]

I. Introduction and Jurisdiction

On September 18, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2024-046, concluding that DPG Services JV LLP (DPG) is an eligible small business for the subject procurement. DPG is a joint venture between R.L. Hueston, LLC (RLH) and C. Martin Company, Inc. (CMC). The Area Office found that DPG was first awarded a contract more than two years prior to submission of its proposal for the subject procurement; as a result, RLH and CMC were not exempt from joint venture affiliation, but DPG nevertheless was eligible for award because the combined receipts of RLH and CMC do not exceed the applicable size standard.

On appeal, Chenega Base and Logistics Services, LLC (Appellant), which had previously protested DPG's size, contends that the size determination is clearly erroneous, and requests that

[1] This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed infra, the appeal is granted in part, and the matter is remanded to the Area Office for further review and investigation.

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 January 27, 2023, the U.S. Department of the Army (Army) issued Request for Proposals (RFP) No. W5128W23R0002 for base operations and maintenance services at Dugway Proving Ground, Utah. The Contracting Officer (CO) set aside the procurement entirely for 8(a) program participants, and assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of $47 million average annual receipts. (RFP at 75, 116.) The RFP stated that the Army planned to award a single, firm-fixed-price contract to the offeror whose proposal represented the best value to the Government. (*Id.* at 93, 139.)

DPG submitted its initial proposal, including price, on June 26, 2023. On August 20, 2024, the CO announced that DPG was the apparent awardee.

B. Protest

On August 26, 2024, Appellant, an unsuccessful offeror, filed a protest with the CO challenging DPG's size. The protest alleged that DPG is not eligible for award because it violates the two-year rule for joint ventures and does not comply with SBA requirements for 8(a) joint ventures set forth at 13 C.F.R. § 124.513. (Protest at 1.) Additionally, according to Appellant, final proposal revisions were due July 19, 2024, and RLH, the managing venturer of DPG, was no longer an 8(a) participant as of that date. (*Id.* at 2.)

Appellant highlighted that, under SBA regulations, a joint venture "may not be awarded contracts beyond a two-year period, starting from the date of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture." (*Id.*, quoting 13 C.F.R. § 121.103(h).) Here, Appellant alleged, DPG was first awarded a contract on February 1, 2019. (*Id.*) Since more than two years have passed since this award, DPG's joint venturers, RLH and CMC, are affiliated, and their receipts must be aggregated to determine whether DPG is small. (*Id.*, citing 13 C.F.R. § 121.103(h).) Appellant acknowledged that RLH and CMC individually appear to be small, but contended that together, and including their respective affiliates, they exceed the procurement's size standard. (*Id.* at 2-3.)

Appellant argued that DPG also could not be compliant with 13 C.F.R. § 124.513(c) and (d). (*Id.*) Pursuant to § 124.513(c), every joint venture agreement (JVA) for an 8(a) procurement

must describe all major equipment, facilities, and other resources to be contributed by each member of the joint venture. (*Id.*) This regulation further requires that the JVA identify the respective responsibilities of the members as to negotiation of the contract, source of labor, and contract performance. (*Id.*) Since DPG was created in 2017 for a different procurement, Appellant contended that DPG's JVA lacks the required specificity for the instant procurement. (*Id.*)

With respect to § 124.513(d), Appellant observed that the 8(a) participant(s) in the joint venture must perform at least 40% of the joint venture's substantive work. (*Id.*) Here, though, because RLH's construction bonding level is limited to $300,000 and RLH has only three employees, RLH cannot perform 40% or more of the approximately $69 million contract. (*Id.*) Furthermore, § 124.513(a)(2) provides that a joint venture will be found ineligible for a competitive 8(a) award if the "8(a) Participant brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status." (*Id.* at 4.) Appellant argued that this provision "perfectly describes RLH," which has few employees, limited corporate experience, and insufficient resources. (*Id.*)

C. Size Determination

On September 18, 2024, the Area Office issued Size Determination No. 06-2024-046, concluding that DPG is an eligible small business for the subject procurement. The Area Office agreed with Appellant that DPG exceeds the regulatory two-year lifespan for a joint venture, but concluded that DPG is nevertheless eligible for the award because the combined receipts of RLH and CMC do not exceed the applicable $47 million size standard. (Size Determination at 4-5.) The Area Office examined DPG's size as of June 26, 2023, the date of its initial offer including price. (*Id.* at 1, 5.)

The Area Office found that DPG is a joint venture [majority] owned by RLH and [XX]% owned by CMC. (*Id.* at 4.) DPG was first awarded a contract "back in 2019," so the Area Office reasoned that DPG's two-year limit for submitting new offers expired by the end of 2021. (*Id.*) RLH and CMC must therefore be considered affiliated. (*Id.*, citing 13 C.F.R. § 121.103(h).)

The Area Office explained that RLH is [majority] owned by Mr. Randall L. Hueston. (*Id.*) Mr. Hueston has no ownership or managerial interest in any other concern. (*Id.*) RLH is [majority] owner of another joint venture, [XXXXXXX]. (*Id.*) This latter joint venture, however, generated no income as of June 26, 2023. (*Id.* at 5.)

With regard to CMC, the Area Office determined that CMC is [majority] owned by Mrs. LC Martin and [XX]% owned by her husband, Mr. John C. Martin. (*Id.*) The Martins have no ownership or managerial interest in any other concern. (*Id.*) CMC also is not part of any other joint venture. (*Id.*)

Turning to the size calculation, the Area Office reviewed RLH's and CMC's tax filings for the fiscal years 2019 through 2022. (*Id.*) The Area Office found that RLH and CMC together qualify as small under the procurement's size standard of $47 million in average annual receipts. (*Id.*)

The Area Office noted that Appellant's protest had alleged that DPG's JVA did not meet the requirements of 13 C.F.R. § 124.513 as of July 19, 2024, the date of final proposal revisions. (*Id.*) The Area Office declined to explore this question, because the combined receipts of RLH and CMC still would not exceed the size standard as of July 19, 2024. (*Id.* at 5-6.)

D. Appeal

On October 3, 2024, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred by refusing to consider whether DPG complies with the 8(a) joint venture requirements set forth at 13 C.F.R. § 124.513. (Appeal at 2.)

Appellant complains that, after determining that DPG is in violation of the two-year rule for joint ventures, the Area Office affiliated DPG's members without further investigating whether DPG complies with 13 C.F.R. § 124.513. (*Id.*) Appellant posits that the Area Office may have assumed that noncompliance with the regulation would also result in the joint venturers being found affiliated. (*Id.*) In actuality, however, failure to comply with 13 C.F.R. § 124.513 renders DPG ineligible for the award. (*Id.*)

In support of its argument, Appellant highlights 13 C.F.R. § 121.103(h)(2)(i). The regulation states, in pertinent part, that:

> For a competitive 8(a) procurement, a joint venture between an 8(a) Participant and one or more other small business concerns (including two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter) must also meet the requirements of § 124.513(c) and (d) of this chapter as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding in order to be eligible for award.

(*Id.* at 2-3 (emphasis added by Appellant).) Furthermore, the text of § 124.513(c) itself indicates that the rule applies to "[e]very [JVA] to perform an 8(a) contract," and § 124.513(d) likewise pertains to "any 8(a) contract." (*Id.* at 3.) Nothing in these rules excuses an 8(a) joint venture from compliance with 13 C.F.R. § 124.513 simply because the joint venturers together are small. (*Id.*)

Based on the regulatory language, Appellant contends that compliance with § 124.513 is a precursor to eligibility for an 8(a) procurement. (*Id.*) The Area Office, on the other hand, incorrectly assumed that failure to comply with this regulation could only result in affiliation. (*Id.*) Appellant argues that the Area Office's reasoning is contrary to the purpose of 13 C.F.R. § 124.513. (*Id.* at 4.) This regulation does not relate to size, but rather addresses whether 8(a) participants control the joint venture and perform substantive work. (*Id.*) Appellant further distinguishes this regulation from 13 C.F.R. § 125.8, which applies to joint ventures generally, whereas 13 C.F.R. § 124.513 pertains particularly to 8(a) joint ventures. (*Id.* at 4-5.) These regulations differ since one relates to size and the other relates to status considerations. (*Id.* at 5.) Appellant asserts that its interpretation of separate requirements is fully consistent with the plain

reading of these regulations. (*Id.* at 6.) Any other interpretation, in Appellant's view, should be disfavored, as it would render 13 C.F.R. § 124.513(c) and (d) largely meaningless. (*Id.* at 7.)

Appellant points to OHA's decision in Size Appeal of SysCom, Inc., SBA No. SIZ-6195 (2023) in support of its position. (*Id.*) There, OHA explained that "a joint venture between an 8(a) participant and one or more other small businesses may compete for an 8(a) set-aside contract, provided that the joint venture complies with 13 C.F.R. § 124.513(c) and (d)." (*Id.*) Because an 8(a) participant was not the managing venturer in SysCom, thus violating 13 C.F.R. § 124.513(c), OHA held that the joint venture was ineligible for award. (*Id.*) OHA precedent thus "confirms that noncompliance with [§] 124.513(c) and (d) is disqualifying, even where both concerns are small." (*Id.* at 7.)

Lastly, Appellant argues that the Area Office should have examined whether DPG meets the addendum requirements of 13 C.F.R. § 124.513(e)(2). (*Id.* at 7-8.) This section states, in part, that "[w]here a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the [JVA] setting forth the performance requirements for each additional award (and provided any contract is awarded within two years of the first award as set forth in § 121.103(h))." (*Id.* at 8 (emphasis added by Appellant).) Although violation of the two-year rule established in 13 C.F.R. § 121.103(h) does result in affiliation between the venturers, Appellant contends that 13 C.F.R. § 124.513(e)(2) also requires compliance with the two-year rule as a condition for award of an 8(a) procurement. (*Id.*)

E. DPG's Response

On October 22, 2024, DPG responded to the appeal. DPG maintains that the Area Office properly concluded that there was no need to "validate" its JVA, given that the Area Office already had found RLH and CMC affiliated. (DPG Response at 1-2.)

DPG first claims that Appellant has abandoned its protest allegation that DPG exceeds the procurement's size standard. (*Id.* at 6.) After combining the receipts of RLH and CMC, the Area Office correctly found that they are below the $47 million size standard. (*Id.*) On appeal, Appellant does not dispute this finding. (*Id.* at 7.) As such, DPG argues, the Area Office's decision is final. (*Id.*) Likewise, DPG observes that Appellant's protest alleged violation of 13 C.F.R. § 124.513(a)(2) yet the appeal makes no mention of this issue. (*Id.*) DPG contends that Appellant also has abandoned its claim that RLH would bring little to the procurement apart from its 8(a) status. (*Id.*)

Turning to Appellant's arguments on appeal, DPG asserts that Appellant has not established that the Area Office committed any clear error of fact or law. (*Id.*) Appellant urges that the Area Office should have considered whether DPG's JVA complies with 13 C.F.R. § 124.513(c) and (d). (*Id.*) In DPG's view, however, SBA commentary in the Federal Register establishes that failure to comply with these provisions would merely result in affiliation between DPG's members — which the Area Office here had already found on alternate grounds. (*Id.*) More specifically, when implementing rule changes to the 8(a) program, SBA opined that "if the size of a joint venture claiming an exception to affiliation is protested, the requirements of

§ 124.513(c) and (d) must be met in order for the exception to affiliation to apply." (*Id.* at 8, quoting 76 Fed. Reg. 8,222, 8,224-25 (Feb. 11, 2011).) Appellant's contention that noncompliance with § 121.103(h) would result in ineligibility is thus inconsistent with SBA's expressed intention that any violation would result in affiliation between the venturers. (*Id.* at 8-9.) The Area Office appropriately did not analyze whether DPG's JVA comports with 13 C.F.R. § 124.513(c) and (d), because the Area Office already affiliated DPG's members. (*Id.* at 9.)

Similarly, Appellant is wrong that the Area Office erred by failing to consider whether DPG's JVA Addendum meets the requirements of 13 C.F.R. § 124.513(e)(2). (*Id.* at 10.) In a rule change consolidating the mentor-protégé programs, SBA commented that a "joint venture would lose its exclusion from affiliation" for failure to comply with the regulations. (*Id.* at 11, quoting 85 Fed. Reg. 66,146, 66,164 (Oct. 16, 2020).) Thus, as with 13 C.F.R. § 124.513(c) and (d), not adhering to the requirements of 13 C.F.R. § 124.513(e)(2) results in joint venturers becoming affiliated. (*Id.*) Since the Area Office affiliated DPG's members, and aggregated their receipts, the Area Office did not need to review DPG's compliance with 13 C.F.R. § 124.513(e)(2). (*Id.*)

F. Supplemental Appeal

On October 22, 2024, after reviewing the record under the terms of an OHA protective order, Appellant supplemented its appeal. Appellant renews its argument that DPG's JVA and Addendum do not comply with SBA requirements for 8(a) joint ventures. (Supp. Appeal at 2.)

Appellant observes, first, that DPG's Addendum, dated March 1, 2023, did not designate a named employee of RLH as the responsible manager for the procurement as required by 13 C.F.R. § 124.513(c)(2). (*Id.*) Rather, the Addendum stated that "[XXXXXXXXXXXXXX]" and that "[XXXXXXXXXXXXXX]." (*Id.*, quoting Addendum ¶ 2.0.)

Appellant next highlights that 13 C.F.R. § 124.513(c)(6) requires that a JVA "itemiz[e] 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, where practical." (*Id.* at 3.) DPG's Addendum, though, merely stated that "[XXXXXXXXXXXXXXXXXXXXXXXXXX]." (*Id.*, quoting Addendum ¶ 6.0.) Appellant contends that this vague recitation is insufficient to meet the requirements of 13 C.F.R. § 124.513(c)(6). (*Id.*, citing Size Appeal of IEI-Cityside, JV, SBA No. SIZ-5664 (2015).)

With regard to 13 C.F.R. § 124.513(c)(7), a JVA for an 8(a) procurement must detail the respective responsibilities of the joint venturers, 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, where practical." (*Id.* (emphasis added by Appellant).) DPG's Addendum stated in conclusory fashion that "[XXXXXXXXXXXXXXXXX]." (*Id.* at 3-4, quoting Addendum ¶ 7.0.c.) Because the Addendum fails to specify "ways" that RLH will perform at least 40% of the work, Appellant argues that DPG does not comply with § 124.513(c)(7). (*Id.* at 4.) Appellant further argues that it is implausible to believe that RLH could perform 40% or more of a contract valued at over $69 million, when RLH's average receipts over the preceding five years are approximately $2.6 million annually. (*Id.*)

G. Motion to Dismiss

On November 20, 2024, DPG moved to dismiss the supplemental appeal, or in the alternative, for leave to supplement its response. By Order dated December 11, 2024, OHA denied DPG's motion to dismiss but permitted DPG to respond to the merits of the supplemental appeal by December 20, 2024. (Order at 3.) OHA added that, except for good cause shown, the record would close on that date. (*Id.*)

H. DPG's Supplemental Response and Motion to Supplement the Record

On December 20, 2024, DPG responded to the Supplemental Appeal. DPG also moved to supplement the record with a more recent version of its JVA dated March 24, 2023 ("the 2023 JVA"). (Supp. Response at 1.) DPG states that its counsel did not become aware of the existence of the 2023 JVA until December 18, 2024. (*Id.*) DPG further argues that the 2023 JVA is not new evidence on appeal under 13 C.F.R. § 134.308, because the document previously was transmitted for SBA review, albeit not to the Area Office. (*Id.* at 2.)

DPG maintains that the 2023 JVA invalidates the bulk of Appellant's allegations. (*Id.* at 4-10.) Although DPG's Addendum left the Project Manager [XXXXXXXX], Article 15 of the 2023 JVA designated [XXXXXXX], an employee of RLH, as the Project Manager. (*Id.* at 5.) Thus, DPG complies with 13 C.F.R. § 124.513(c)(2). (*Id.*)

DPG next argues that Appellant fails to establish that DPG's JVA is noncompliant with 13 C.F.R. § 124.513(c)(6). (*Id.*) According to DPG, this regulation requires itemization only of "major" equipment, facilities, and other resources, and a detailed cost schedule "where practical." (*Id.* at 6.) OHA also has recognized that, for a procurement of services, omitting such information may be reasonable. (*Id.*, citing VSBC Protest of ThunderYard Liberty JV II, LLC, SBA No. VSBC-264-P (2024); Size Appeal of Global Dynamics, LLC, SBA No. SIZ-6012 (2019); and Size Appeal of Alpine/First Preston JV II, LLC, SBA No. SIZ-5822 (2017).) Since the instant procurement is for services, DPG asserts that its JVA need not have included an itemized list of the relevant equipment, facilities, and other resources. (*Id.* at 7.) Furthermore, OHA has held that solicitations which contain only a general description of a broad range of projects at various locations do not require JVAs with a comprehensive itemized list of equipment. (*Id.*, citing Size Appeal of Klutina River Contractors, SBA No. SIZ-6117 (2021).) Appellant concedes that the instant RFP calls for a broad range of services at several locations. (*Id.*) DPG therefore claims that it would have been impractical for DPG's JVA to have included an itemized list of relevant equipment, facilities, and other resources. (*Id.*)

Likewise, Appellant fails to demonstrate that DPG's JVA does not comport with 13 C.F.R. § 124.513(c)(7). (*Id.* at 8.) OHA precedent has established that a detailed description of responsibilities is not needed for solicitations lacking specific details of the type of work being procured. (*Id.*, citing Size Appeal of Spinnaker Joint Venture, LLC, SBA No. SIZ-5964 (2018).) Indeed, OHA has upheld a JVA which indicated simply that "the Responsible Manager has the primary responsibility for ensuring appropriate labor under the day-to-day management and administration of the contract and the parties to the joint venture will use their workforces." (*Id.*

at 8-9, citing VSBC Protest of Systematic Innovations, LLC, SBA No. VSBC-367-P (2024).) DPG explains that the Addendum to its original JVA provided RLH's employees with the right of first refusal and stated that RLH will maintain a labor pool. (*Id.* at 9.) The 2023 JVA designated the Project Manager, [XXXXXXX], as having the power to hire and fire employees of the joint venture. (*Id.*) Additionally, the 2023 JVA contemplated that "[XXXXXXXXXXXXXXXXXXX]." (*Id.*, citing 2023 JVA Article 16.) Since the instant RFP "lacked specificity," DPG maintains, "it was not practical for DPG to specify the ways in which RLH will ensure performance of its workshare." (*Id.*)

I. Appellant's Opposition and Proposed Reply

On January 6, 2025, Appellant opposed DPG's motion to introduce new evidence. In Appellant's view, OHA should not accept the 2023 JVA because the document could have been, but was not, submitted to the Area Office. (Opp. at 1, citing 13 C.F.R. § 134.308(a) and Size Appeal of Spinnaker Joint Venture, LLC, SBA No. SIZ-5964, at 8-9 (2018).) Appellant argues that the purported absence of a key employee at the time DPG was formulating its response to the appeal does not explain, or excuse, DPG's earlier failure to submit the 2023 JVA to the Area Office in response to the protest. (*Id.* at 2, citing Size Appeal of Accent Serv. Co., Inc., SBA No. SIZ-5237, at 4 (2011).)

Alternatively, Appellant requests leave to reply to the Supplemental Response. There is good cause to permit a reply, Appellant maintains, because DPG's Supplemental Response is based largely on new evidence — the 2023 JVA — not previously seen by Appellant or by the Area Office. (*Id.* at 3.) Appellant further notes that, given these circumstances, DPG indicates that it would not oppose a supplemental briefing by Appellant. (*Id.*)

In its proposed Reply, Appellant contends that, if OHA admits the 2023 JVA into the record, OHA should find that "DPG still failed to comply with the joint venture requirements in 13 C.F.R. § 124.513(c) and (d)." (Proposed Reply at 4.) DPG improperly conflates provisions from the original JVA, the Addendum, and the 2023 JVA, yet the 2023 JVA expressly stated that this latter document supersedes and replaces all prior agreements. (*Id.* at 4-5.) Moreover, in arguing that it was impractical for DPG to have included any detail in its various JVAs, DPG mischaracterizes the RFP and relies upon inapposite OHA precedent. (*Id.* at 4.) Unlike the OHA decisions referenced by DPG, "[t]he [RFP] here contemplated the award of a definite contract and clearly defined the scope of work and necessary equipment." (*Id.*)

Under OHA's rules of procedure, a reply to a response generally is not permitted unless OHA so directs. 13 C.F.R. §§ 134.206(e) and 134.309(d). Furthermore, OHA will not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct Appellant to reply, and the proposed Reply was filed after December 20, 2024, the date of the close of record. Although OHA will, in rare instances, grant a party leave to reply in order to address new issues raised for the first time in an opposing party's pleading, the proposed reply here is devoted to attacking the 2023 JVA, a document which is not part of the existing record. A detailed analysis of the 2023 JVA therefore is unnecessary for resolution of this appeal. For these reasons, Appellant's motion for leave to reply is DENIED and the proposed Reply is EXCLUDED from the record.

J. DPG's Motion for Leave to Reply to Appellant's Opposition

On January 21, 2025, DPG requested leave to reply to Appellant's Opposition to DPG's Motion to Supplement the Record. DPG renews its claim that the 2023 JVA is not new evidence, because DPG previously transmitted a copy of the document to SBA's Cleveland District Office in March 2023 and again in August 2024. (Reply to Opp. at 1-3.)

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

As the Area Office correctly determined, SBA regulations provide that "a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture." 13 C.F.R. § 121.103(h). Here, DPG, a joint venture between RLH and CMC, was awarded its first contract in 2019. Section II.C, supra. DPG submitted its initial proposal, including price, for the subject procurement on June 26, 2023. Section II.A, supra. As a result, because more than two years had elapsed since DPG's first contract award in 2019, the Area Office properly determined that RLH and CMC are affiliated for this procurement and that their receipts must be aggregated. Section II.C, supra.

The Area Office erred, however, by overlooking that the underlying procurement was set aside entirely for 8(a) program participants. In this situation, SBA regulations are clear that a joint venture "must also meet the requirements of § 124.513(c) and (d) of this chapter as of the date of the final proposal revision for negotiated acquisitions . . . in order to be eligible for award." 13 C.F.R. § 121.103(h)(2)(i). Based on this plain language, then, the Area Office should have examined whether DPG's JVA was compliant with 13 C.F.R. § 124.513(c) and (d), notwithstanding that RLH and CMC together do not exceed the applicable size standard.

In its Federal Register commentary accompanying 13 C.F.R. § 121.103(h)(2)(i), SBA explained its rationale for implementing this rule, as follows:

> [Unlike other SBA programs,] [t]here is no existing [status protest] process for an unsuccessful offeror, SBA, or a contracting officer to challenge whether a joint venture meets the formal requirements to receive and perform a competitive 8(a)

> contract. . . . In eliminating [the requirement that SBA] review and approve joint ventures formed to perform competitive 8(a) contracts, it was not SBA's intent to allow 8(a) contract benefits to flow to joint ventures that do not meet the applicable regulatory requirements. To the contrary, . . . SBA envisioned that the size protest process would work to ensure compliance with the formal 8(a) joint venture requirements. However, in the context of a joint venture between an 8(a) Participant and one or more other small business concerns, the current size protest procedures are not adequate. Under SBA's size regulations, a joint venture is small if each of the partners to the joint venture individually qualify as small. Thus, a joint venture that does not comply with the applicable requirements set forth in § 124.513(c) and (d) could still qualify as small even though the 8(a) partner to the joint venture was not the lead or controlling partner. This rule amends § 121.103(h)(1)(i) to implement SBA's intent that a joint venture must meet the requirements of § 124.513(c) and (d) in order to be eligible for a competitive 8(a) procurement and to make joint ventures in the 8(a) program consistent with those in [other SBA] programs.

86 Fed. Reg. 2,957, 2,958 (Jan. 14, 2021).[2] Accordingly, SBA anticipated the exact situation presented here: for the 8(a) program specifically, because there is no mechanism for a status protest to be filed challenging whether a joint venture meets the requirements at 13 C.F.R. § 124.513(c) and (d), such matters must, instead, be reviewed as part of the size protest process. To do otherwise might improperly "allow 8(a) contract benefits to flow to joint ventures that do not meet the applicable regulatory requirements." The Area Office, however, expressly declined to consider whether DPG's JVA met the requirements of 13 C.F.R. § 124.513(c) and (d) as of July 19, 2024, the date of final proposal revisions, even though the procurement was set aside for 8(a) program participants, and even though Appellant raised this issue in its size protest. Sections II.A — II.C, supra. This was clear error, and as a result, remand is warranted.

It is worth noting that Appellant's protest also questioned whether RLH, the managing venturer of DPG, was still an 8(a) participant at the time of final proposal revisions. Appellant alleged in particular that RLH appears to have exited the 8(a) program on June 23, 2024. Section II.B, supra. On remand, in assessing whether DPG's JVA complied with 13 C.F.R. § 124.513(c) and (d) as of the date of final proposal revisions, the Area Office should consider whether RLH remained an 8(a) program participant as of that date.

IV. Conclusion

Appellant has shown that the Area Office erred by declining to examine whether DPG's JVA was compliant with 13 C.F.R. § 124.513(c) and (d), as of the date of final proposal revisions. The appeal is GRANTED to that extent, and that question is REMANDED to the Area Office for further review and investigation. Size Determination No. 06-2024-046 is otherwise AFFIRMED. In light of this outcome, it is unnecessary to rule on DPG's motion to introduce the

[2] When originally adopted, the regulation in question was set forth at 13 C.F.R. § 121.103(h)(1)(i) (2021). Effective May 30, 2023, this section was redesignated 13 C.F.R. § 121.103(h)(2)(i). See 88 Fed. Reg. 26,164, 26,199 (Apr. 27, 2023).

2023 JVA as new evidence. E.g., Size Appeal of C2 Alaska, LLC, SBA No. SIZ-6149, at 13 (2022); Size Appeal of W&T Travel Servs., LLC, SBA No. SIZ-5721, at 18 (2016); Size Appeal of DefTec Corp., SBA No. SIZ-5540, at 9 (2014).

KENNETH M. HYDE
Administrative Judge