UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF: Lance Bailey & Associates, Inc. Appellant Re: Global McKissack Partners, LLC Solicitation No. DOL051RP20038 Department of Labor Division of Contract Services Washington, DC 20210	Docket No. SIZ-2006-06-01-41 (PFR) SIZ-2006-04-24-29 Decided: July 13, 2006

APPEARANCES

Kenneth B. Weckstein, Esq., Epstein Becker & Green, P.C., Washington, D.C., for Lance Bailey & Associates.

Grace Bateman, Esq., and Z. Taylor Shultz, Esq., Seyfarth Shaw LLP, Washington, D.C., Counsel for Global McKissack Partners, LLC.

DECISION

PENDER, Administrative Judge:

Jurisdiction

This matter appeal arises from a May 24, 2006 Decision of the U.S. Small Business Administration Office of Hearings and Appeals ("this Office"). *See Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4788 (2006) ("*Lance Bailey Decision*"). On June 7, 2006, Global McKissack Partners LLC ("GMP") asked this Office to reconsider the *Lance Bailey Decision*. This Office decides size determination appeals, including Requests for Reconsideration, under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

Issue

Whether GMP made a clear showing of an error of fact or law material to the *Lance Bailey Decision*.

Background

On May 24, 2006, this Office issued the *Lance Bailey Decision.* That decision found GMP (a joint venture) was not entitled to an exception under 13 C.F.R. § 121.103(h)(3)(iii) because GMP did not meet the mandatory requirements of 13 C.F.R. § 124.513(c). More specifically, the *Lance Bailey Decision* found the Joint Venture Agreement ("JVA") between the mentor (McKissack & McKissack of Washington, Inc. ("M&M")) and the protégé (Global Commerce Solutions, Inc. ("Global")) that created GMP violated the requirements of 13 C.F.R. § 124.513(c) because it did not:

1. Designate a Global employee as Project Manager; or

2. Provide that Global would be the Managing Venture of the Joint Venture.

Thus, the JVA between M&M and Global creating GMP was not exempt from the normal affiliation rules of 13 C.F.R. § 121.103(h). Accordingly, since the aggregated revenues of M&M and Global exceeded the size standard, GMP is other than small.

The *Lance Bailey Decision* found that Lance Bailey & Associates ("LBA") had not abandoned its protest allegations. The decision also noted that because of Global's lack of relevant experience, it brought very little to the joint venture other than its 8(a) status. The decision further stated: "When this [its lack of relevant experience] is considered in light of the violation of 13 C.F.R. § 124.513(c)(2)'s requirement that the Project Manager be an employee of Global, there is no doubt that the JV should not have been approved for this procurement." *See Lance Bailey Decision,* at 10; 13 C.F.R. § 124.513(a)(2).

On June 7, 2006, GMP filed a timely Petition for Reconsideration. On June 12, 2006, this Office issued a Notice and Order that permitted any interested party to reply to GMP's petition by June 27, 2006. In turn, GMP was permitted until June 30, 2006, to file a response to any filing submitted by any interested party.

LBA filed a timely response to GMP on June 27, 2006. GMP timely responded to LBA's response on June 30, 2006.

Contentions of the Parties

A. GMP's Arguments

1. Abandonment

GMP presented three separate allegations of error in its Petition for Reconsideration. GMP's first allegation is that this Office did not have the right to consider whether the GMP JVA complied with SBA's regulations. Generally, GMP alleges SBA's regulation did not allow OHA to consider the JVA issue because LBA had abandoned it in its Appeal Petition and LBA had not even mentioned 13 C.F.R. § 124.513(c)(2) in its Appeal Petition. GMP argues LBA had made only a "passing hypothetical reference" to the issue in its protest and abandoned the issue in its appeal. GMP also alleges:

a. The JVA(s)[1] complied with 13 C.F.R. § 124.513(c)(2) and that it had proven this in its protest response;

b. OHA's contention that LBA had not abandoned its protest issue was without support;

c. It did not have an opportunity to address the matter in response to LBA's appeal; and

d. To the extent there was a question about the validity of the JVA, OHA should have remanded the matter to the Area Office for investigation and that failing to do so was arbitrary and capricious and an abuse of its discretion.

2. The JVA was Proper Under 13 C.F.R. § 124.513(c)(2)

GMP's second argument is that even if the issue of the JVA was properly before OHA, OHA made clear errors of fact or law in evaluating its validity. GMP first alleges that OHA made an error of fact in determining a Global employee would not be the Project Manager for the Department of Labor (DOL) contract. Essentially, GMP avers that since Mr. Craig Gardner would be an employee of Global in the future, a practice it alleges is typical, that is good enough. GMP also avers that OHA ignored the designation of Global as the Managing Partner in the JVA.

GMP argues that OHA's interpretation of 13 C.F.R. § 124.513(c)(2) to require the Project Manager to be a "current" employee of the protégé is wrong because it "contravenes the purpose

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[1] GMP submitted the JVA to the Area Office that is part of the Record. GMP attached another JVA to its Appeal Response, but did not move to admit it to the Record as required by 13 C.F.R. § 134.308(a)(2). Thus, only one JVA is part of the Record underlying the *Lance Bailey Decision*. *See Lance Bailey Decision*, at 9, n. 2.

and practice of SBA's Mentor Protégé Program, renders meaningless other language in the text, and introduces an inconsistency in the regulations." *See* GMP's Petition for Reconsideration, at 15. Specifically, GMP argues:

a. OHA's interpretation is inconsistent with the goals of the 8(a) Mentor-Protégé Program stated in 13 C.F.R. § 124.520, which is to enhance the capabilities of a protégé;

b. The word "designate" in 13 C.F.R. § 124.513(c)(2), means the person identified may not, in fact, presently hold the position; and

c. The position of Project Manager does not come into being until a contract has been awarded, so the term must necessarily anticipate a future act.

GMP also alleges that because Global owns the majority of GMP and its President is the Managing Director of GMP, that suffices to meet the requirement that the JVA designate the 8(a) participant be the managing venturer of the joint venture.

3. Estoppel

GMP's final assignment of error is to allege the SBA is estopped from holding GMP's JVA does not comply with 13 C.F.R. § 124.513(c)(2). GMP alleges the SBA directed it to use the JVA form it used, in lieu of its more detailed JVA. GMP avers the original JVA more specifically identified the Project Manager as a Global employee and Global as the managing venturer. Therefore, since SBA told GMP what form to use and it relied upon this direction, the SBA is estopped from saying the JVA does not conform with 13 C.F.R. § 124.513(c)(2).

B. LBA's Arguments

1. Abandonment

LBA's overarching argument is that GMP has failed to show that OHA based the *Lance Bailey Decision* upon a clear error of fact or law material to the decision. LBA specifically challenges GMP's argument that OHA had no jurisdiction to decide whether the JVA complied with 13 C.F.R. § 124.513(c)(2). LBA points out it premised its allegation that the JVA did not comply with 13 C.F.R. § 124.513(c)(2) on Global's lack of architect/engineering experience, which the Area Office acknowledged in its size determination.[2] LBA avers it preserved these arguments in its Appeal Petition, especially when it asserted in its Appeal Petition that there was no true mentor-protégé relationship between M&M and Global because M&M would never be able to mentor Global into becoming an architect/engineer concern.

LBA contends OHA recognized its position regarding Global's lack of

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[2] The Area Office also found: "For purposes of this procurement Global and M&M are in different industries." Size Determination No. 2-2006-30, at 10.

architect/engineering experience as being "inextricably" linked to its allegations that the JVA and/or the mentor-protégé arrangements were insufficient to overcome SBA's affiliation rules. LBA avers it specifically appealed the Area Office's determination that an approved JVA and/or mentor-protégé agreement automatically overcame SBA's affiliation rules. Moreover, LBA avers it:

a. Incorporated its original protest as Exhibit A to its appeal;

b. Consistently argued Global's lack of experience required a further look at the mentor-protégé arrangement and the JVA; and

c. Pointed out GMP is not and never was in a position to comply with the requirements of 13 C.F.R. § 124.513(c)(2).

LBA contends SBA's regulation do not require the parties to an appeal "provide pinpoint citations relevant to the substantive issues that they raise. That would elevate form over substance." *See* LBA Response in Opposition to Petition for Reconsideration, at 6. In short, LBA argues that unless it offered new arguments or abandoned its old contentions, OHA had the right to consider whether GMP complied with 13 C.F.R. § 124.513(c)(2).

2. Propriety of the Remand/Estoppel

LBA challenges the necessity for a remand by asserting that the Record was complete and that the earlier JVA could not be material to OHA's decision since it was new evidence under 13 C.F.R. § 134.308 [and GMP did not move to admit it].

LBA opposes GMP's estoppel argument (that it was induced to change its earlier JVA that is not part of the Record). LBA asserts the deficiencies identified in the JVA cannot be corrected by more detail, *i.e.*, "The deficiencies are inextricably linked to the proposed JV arrangement where the 8(a) concern brings nothing to the arrangement but its 8(a) status." LBA Response, at 7.

LBA explains the "first" JVA did not appoint a specific person as Project Manager, while the second JVA appointed M&M's Mr. Gardner to be Project Manager and indicated he would report to Ms. Sheryl Black. LBA asserts GMP misses the issue the JVA raises, which is that neither Global nor Ms. Black had the experience or skills needed to supervise Mr. Gardner. Rather, only M&M had the requisite skills and experience, as did members of the GMP Management Committee, three of which LBA contends were M&M employees.

LBA points out that no one who participated in the JVA approval process had the authority to waive SBA's regulations. Accordingly, GMP could not rely upon their conduct.

LBA asserts the foregoing means OHA was correct in not remanding the decision as it would serve no useful purpose given the fully developed Record.

3. GMP's Opportunity to Present Arguments

LBA asserts that regardless of GMP's assertion that it did not have an opportunity to make any arguments concerning 13 C.F.R. § 124.513(c)(2) in response to its appeal, it plainly had such notice and opportunity to respond to these arguments in responding to LBA's protest. Therefore, since the record was fully developed on that issue and because OHA had the right to find facts under 13 C.F.R. § 134.316(a), it was not necessary to remand the issue.

4. Clear Errors of Fact or Law Relevant to OHA's Decision

LBA asserts that OHA's finding that GMP's JVA "violates the spirit and intent of 13 C.F.R. § 124.513(a)(2)" is fully supported by the record. LBA also supports OHA's interpretation of 13 C.F.R. § 124.513(c)(2) that the Project Manager be a current employee of the protégé because not to do so would violate the spirit of the program and thus permit the protégé to bring nothing to the joint venture but its 8(a) status.

Discussion

A. Standard of Review

The standard of review for GMP's Petition for Reconsideration is whether it made a clear showing that this Office based its decision upon an error of fact or law material to that decision. 13 C.F.R. § 134.227(c). This means GMP must cause me to have a definite and firm conviction that I made an error of fact or law material to the *Lance Bailey Decision*. (*See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review.)

B. The Merits of the Petition

1. Introduction

One matter that neither party has raised is that a joint venture entered into through SBA's mentor-protégé process is an exception to its normal rules of affiliation. *See* 13 C.F.R. §§ 121.103(h)(3)(iii), 124.520(d)(4); *Size Appeal of Technical Support Services/Vanguard Resources Corporation*, SBA No. SIZ-4794 (2006) ("*Technical Services/Vanguard*"). Exceptions to affiliation must be narrowly construed. *Size Appeal of Precision Pine and Timber, Inc.*, SBA No. SIZ-3230 (1989). SBA's demonstrated intent to make the definition of affiliation very inclusive, *e.g., see* 13 C.F.R. § 121.103(a), (c) - (i), emphasizes the importance of this rule.

If SBA does not narrowly construe exceptions to affiliation, it runs the considerable risk of nullifying time proven and widely understood affiliation rules and of expanding the exception. Therefore, when SBA interprets and applies 13 C.F.R. § 124.513 and its provisions, it must apply the exception literally and narrowly so as to preclude situations where the 8(a) concern

brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status. *See* 13 C.F.R. § 124.513(a)(2). For the same reasons, when applying the mandated prerequisites for an approved joint venture agreement in 13 C.F.R. § 124.513(c), it is imperative SBA strictly and literally apply its requirements.

The key to the Size Determination underlying the *Lance Bailey Decision* is that the Area Office found there was an approved joint venture (without considering whether the joint venture complied with applicable regulations). A properly approved joint venture triggers 13 C.F.R. §§ 121.103(b)(6), (h)(3) and 124.520(d)(4). Thus, theoretically, any affiliation existing between M&M and Global because of the joint venture or their mentor-protégé relationship became irrelevant. *See Technical Services/Vanguard*, SBA No. SIZ-4794*; Size Appeal of American Security Programs*, SBA No. SIZ-4797 (2006). Plainly, if there were affiliation issues, they could only become relevant if this Office decided the JVA did not meet the requirements of 13 C.F.R. § 124.513(c)(2). Just as plainly, if the agreement did not meet the mandates of 13 C.F.R. § 124.513(c)(2) and the issue was properly before this Office, the very existence of the JVA means M&M and Global are affiliated under 13 C.F.R. § 121.103(h).

2. Abandonment Under 13 C.F.R. § 134.316

Pursuant to 13 C.F.R. § 134.316, OHA must limit the scope of its review to issues raised by the protestor in its size protest that have not been abandoned in its appeal petition. Therefore, appellants must base their appeals on an issue raised in their original protest. *Size Appeal of Keystone Ocean Services, Inc.*, SBA No. SIZ-4712 (2005). This is an understandable requirement. OHA would unreasonably delay the procurement process if it regularly remanded responsive and good faith size determinations back to Area Offices to make new size findings because an appellant had offered a "new and improved" theory during the appeal process of the challenged firm's alleged ineligibility.

SBA's size regulations define whether a business entity is small and thus eligible for various Government programs. 13 C.F.R. § 121.101. For procurements, area offices determine size because status as a small business is required or advantageous. 13 C.F.R. § 121.401. Offerors or bidders self-certify their size as of the date they submit their offer or bid. *See* 13 C.F.R. §§ 121.404(a) and 121.405. That certification is acceptable unless the contracting officer or SBA has credible information to question the concern's size. 13 C.F.R. § 121.405(b).

SBA's size regulations also give protestors/appellants, as interested parties, the right to challenge the size of awardees or successful offerors because they believe them to be other than small. 13 C.F.R. § 121.1001. From there, they are entitled to have SBA area offices make a reasoned and informed size determination based upon the record before them. 13 C.F.R. § 121.1002. If they are dissatisfied with that size determination, they are entitled to have this Office review the record and the size determination for clear errors of fact or law and issue SBA's final decision on the matter. *See* 13 C.F.R. §§ 121.1101, 134.314, 134.227.

The nature of the protest process is that the information available to the protestor/appellant is necessarily less than the information available to the area office and the protested concern due to the need to protect privacy and competitive information.[3] Simply put, unlike what would be true before a typical tribunal, the appellant does not know what evidence the Area Office used to decide its protest.

As explained, the purpose of SBA's protest and appeal regulations is for interested parties to help SBA ensure only qualified firms are eligible for Government procurements for which status is required or advantageous. This purpose and the information inequality means it is imperative that we be certain that abandonment has occurred before we find it. This means if an appellant reasserts or references a previous issue on appeal (even if the appellant does not discuss it as thoroughly as in the initial protest), this Office will not find abandonment. Alternatively, if an appellant appends its protest to the appeal petition and refers to it, we will not find abandonment of issues raised therein unless the appellant says it is abandoning that issue. Thus, I hold we will not find abandonment under 13 C.F.R. § 134.316(a) absent unequivocal proof of abandonment of an issue.

3. LBA Did Not Abandon its Claim that Appellant's JV Agreement Did Not Comply with 13 C.F.R. § 124.513(c)(2)

Appellant contends that LBA made only a "passing hypothetical reference" to the validity of Appellant's Joint Venture Agreement in its size protest and then abandoned the issue on appeal. LBA's protest alleged that "GM [sic] could not receive the award even if a mentor-protégé agreement did exist because the conditions in 13 C.F.R. § 124.513(c)(2) are not met." LBA Protest, at 8. While this allegation is not fully developed, it is not a passing hypothetical reference as it clearly references the applicable regulations regarding the required contents of a joint venture agreement. Given the aforementioned lack of information available to the protestor regarding the protested concern's JV agreements, a protest must only be sufficiently specific to provide *reasonable notice* as to the grounds upon which the protested concern's size is questioned. 13 C.F.R. § 121.1007(b). LBA's allegation in its Protest of a violation of 13 C.F.R. § 124.513(c)(2) was specific enough to put Appellant on notice as to one of the grounds upon which their size was questioned. Nothing prevented Appellant from fully responding to or addressing this issue in response to the LBA's Protest.

On appeal, LBA specifically preserved its arguments that the GMP JVA did not comply with SBA's requirements. In addition, rather than abandon the issues raised in its size protest, LBA attached its original protest to its Appeal Petition. LBA Appeal, at 7. These facts are distinguishable from the *Fort Carson* case cited by Appellant. *Size Appeal of Fort Carson Support Services*, SBA No. SIZ-4740 (2005). In *Fort Carson*, the appellant expressly abandoned the basis of its protest and pursued entirely new matters in its appeal to this Office. *Id.*

Here, LBA did not raise new matters in its Appeal but reiterated its original protest before

[3] Documents are frequently proprietary or if they involve offers, procurement sensitive.

the Area Office. While LBA did not thoroughly discuss the requirements of 13 C.F.R. § 124.513(c)(2), it did not clearly abandon the issue in its Appeal. Rather, it reasserted the crux of its original 13 C.F.R. § 124.513(c)(2) argument. That is, it premised its original protest allegation that the JVA did not (and could not) comply with 13 C.F.R. § 124.513(c)(2) on Global's lack of architect/engineering experience, which meant it could not designate an employee to be project manager. It is reasonable for LBA to aver it preserved its arguments on appeal, for it asserted in its Appeal Petition that there was no true mentor-protégé relationship between M&M and Global because M&M would never be able to mentor Global into becoming an architect/engineer concern because Global had no experience to mentor. Therefore, I agree with LBA that its position regarding Global's lack of architect/engineering experience is indistinguishable from its allegations that the JVA and/or the mentor-protégé arrangements were insufficient to overcome SBA's affiliation rules.

I also find that the Area Office's Size Determination necessarily contributed to any lack of specificity in LBA's Appeal Petition. If anything, LBA failed to thoroughly address the issue because the Area Office erred in failing to adequately discuss the issue of compliance with 13 C.F.R. § 124.513(c)(2)'s requirements for the JVA. Had the Area Office made a detailed finding on this issue and LBA did not contest it upon appeal, then a claim of abandonment would have more weight.

4. SBA Regulations Require the Project Manager of the JV to be an Employee of the 8(a) Participant

The SBA mentor-protégé regulations provide that in order to be approved as a joint venture, the joint venture agreement "must contain a provision…(2) designating an 8(a) Participant as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager…." 13 C.F.R. § 124.513(c)(2). In both versions of Appellant's JVA, Appellant designated Mr. Gardner, a current M&M employee (*Lance Bailey Decision*, Fact 10), as its Project Manager. While the JVA provided Global would employ Mr. Gardner, he was not an employee of Global at the time it submitted its offer or proposal, which is when SBA determines size status. 13 C.F.R. § 121.404(a).

GMP argues 13 C.F.R. § 124.513(c)(2) does not require Mr. Gardner be an employee of Global as of the time of its offer. Rather, it alleges that since he would eventually become an employee of Global (a typical practice), that is good enough under 13 C.F.R. § 124.513(c)(2) for GMP to nominate him as Project Manager. GMP also argues that the word "designate" means the project manager need not be a current or present employee.

One matter GMP ignores in advancing its interpretation of 13 C.F.R. § 124.513(c)(2) is that SBA determines size as of the date of the proposal (or other formal response to a solicitation). 13 C.F.R. § 121.404(a). Therefore, the most immediate limitation on 13 C.F.R. § 124.513(c)(2) is that the JVA must comply with its requirements when the concern certifies its size (the formal response to the solicitation). In other words, for an employee of Global to be "an employee," it must be an employee as of the date of its offer or proposal, which is when SBA

determines its size. This is because in order to be effective, the exception to affiliation must be true as of the date SBA determines the size of the protested concern.

GMP's interpretation of 13 C.F.R. § 124.513(c)(2) is also unreasonable because the plain language of the regulation uses the present tense. Specifically, it does not require the JVA designate "a future employee of the managing venturer" or "an individual that will become an employee of the managing venturer." Rather, the precise requirement is that the JV designate "an employee of the managing venturer as the project manager responsible for performance of the 8(a) contract." This language undoubtedly deals with the present. It is an inherent property of being "an employee" that a person be a current or present employee of the managing venture, not a future employee. Certainly, there is a big difference in being currently employed versus having an offer of future employment based upon GMP's speculative success in having DOL award it a contract.

GMP's interpretation would also expand the scope of the exception to affiliation and is thus incorrect as a matter of law. As discussed above, 13 C.F.R. § 124.513(c)(2) is an exception to the affiliation rules of 13 C.F.R. § 121.103. Therefore, expanding or relaxing mandatory JVA requirements is not acceptable, for exceptions are to be narrowly construed. *Size Appeal of Precision Pine and Timber, Inc.*, SBA No. SIZ-3230 (1989). GMP's interpretation would expand the exception by permitting 8(a) concerns to bring even fewer resources or expertise to the joint venture relationship beyond their 8(a) status, which 13 C.F.R. § 124.513(a)(2) specifically prohibits.

Under the facts of this case as established in the Record, it was wrong to approve the JVA between M&M and Global because it gives the appearance of permitting Global to traffic with its 8(a) status. Specifically, Global had no architect/engineer experience and thus brought little to its relationship with M&M but its 8(a) status. At the time of its offer, Global did not even have an employee capable of being the project manager for the DOL procurement and did not list architect/engineer services as a NAICS code applicable to it. Instead, GMP's proposal relied upon the qualifications of M&M to compete for the contract and placed emphasis upon the qualifications of Mr. Gardner as project manager.

GMP's argument that the interpretation 13 C.F.R. § 124.513(c)(2) in the *Lance Bailey Decision* is contrary to 13 C.F.R. § 124.520 is incorrect. The general purpose of the mentor-protégé program recited in 13 C.F.R. § 124.520 is to provide assistance to protégés and thereby enhance the capabilities of the protégé. Interpreting 13 C.F.R. § 124.513(c)(2) to require the employees of protégés to be project managers is not at variance with that goal. Rather, it is consistent with the important goal of narrowly construing exceptions to affiliation and in 13 C.F.R. § 124.513(a)(2)'s requirement that the 8(a) bring more to the procurement than its status, which for an approved JV is at least supplying the project manager. Certainly, there is nothing to prevent mentors from providing assistance to protégés as long as the 8(a) concern offers something of value beyond its status. Nor is there any requirement in 13 C.F.R. § 124.520 that the mentor-protégé program be used so that 8(a) protégés will be able to submit offers for procurements that are so beyond their ability that they cannot even provide a project manager.

Accordingly, I find that the interpretation of 13 C.F.R. § 124.513(c)(2) in the *Lance Bailey Decision* is consistent with 13 C.F.R. § 124.520.

I hold the plain meaning of 13 C.F.R. § 124.513(c)(2) is that the Project Manager must be a current or present employee of the protégé. To hold otherwise would render the requirement meaningless. Therefore, GMP's arguments, including the argument that the use of the word "designate" indicates a recognition that the person identified does not have to be a present employee of the 8(a) protégé concern, is without merit.

5. The Managing Venturer Requirement

The JVA in the Record does not designate Global as the managing venturer. (*Lance Bailey Decision*, Fact 9). Rather, it says Ms. Black will be the managing director of GMP.[4] This is not the same as designating the 8(a) concern as the managing venturer as mandated by 13 C.F.R. § 124.513(c)(2).

Since 13 C.F.R. § 124.513(c)(2)'s requirements define what is necessary to qualify a joint venture as an exception to SBA's affiliation requirements, I must narrowly construe the language of 13 C.F.R. § 124.513(c)(2). Therefore, I find that naming Ms. Black as managing director is not the equivalent of specifying that Global is the managing venturer. For example, Ms. Black could sell her interest in Global and Global would not have the right to manage GMP, for under the terms of the JVA, that position is personal to Ms. Black. Moreover, as LBA asserts, Ms. Black is not an architect/engineer and Global has no architect/engineer expertise. Thus, naming Ms. Black as managing director does not overcome the requirements stated in 13 C.F.R. § 124.513(a)(2) that Global bring something to the joint venture relationship other than its 8(a) status.

6. Remand is Discretionary

This Office has the discretion to remand a case to the SBA Area Office for further fact-finding and evaluation on specific issues. 13 C.F.R. § 134.229. However, I properly exercised my discretion in issuing my decision, instead of remanding the case, because further fact-finding would not cure the deficiency in the JVA. As discussed above, 13 C.F.R. § 124.513(c)(2) requires the Project Manager to be a current or present employee of the 8(a) participant firm and the JVA designated Mr. Gardner, M&M's employee, as the Project Manager. Therefore, further

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[4] The first JVA, which is not part of the *Lance Bailey Decision* Record, does say the managing venturer is Global.

fact-finding is not required because the JVA did not designate an employee of Global to be the Project Manager.[5]

7. Estoppel

The evidence GMP offers in support of its claim of estoppel is sparse, for it only consists of one JVA (that is not part of the Record behind the *Lance Bailey Decision*) and one declaration. Specifically, GMP provided a declaration by Mr. Harry Black that addressed the issue of why it altered the original JVA between M&M and Global. Mr. Black generally explained that the first GMP JVA contained everything required by the SBA template, but that "it provided additional information describing various aspects of the joint venture relationship between M&M and Global, which was neither required nor necessary." He further explained that he assisted GMP in preparing the second JVA (the JVA in the Record) that was limited only to the information contained in SBA's template. Mr. Black did not explain further what changes GMP made in the first JVA. Nor did he say GMP objected to the SBA's request or requested permission to submit additional information or provisions.

SBA may not be estopped from enforcing its regulations merely because it requested GMP use its form in lieu of its first JVA without a detailed explanation of the circumstances and harm allegedly resulting from that act. GMP failed to move to make the first JVA part of the Record underlying the *Lance Bailey Decision* (as required by 13 C.F.R. § 134.308(a)(2)). Thus, the first JVA is not part of the *Lance Bailey Decision* Record and is not properly before us now to consider or compare to the JVA that is before us. Moreover, Mr. Black declares the first JVA contained information that "was neither required nor necessary" without explaining the contents of that information or why it was not required or necessary. Consequently, GMP has not offered sufficient information to even meet the elements of equitable estoppel applicable to a private party, *e.g.*, it has not explained: (1) What facts SBA knew that were different from those known to GMP; (2) What specific changes GMP made; or (3) How SBA harmed GMP by requesting it use SBA's published format.

There is also nothing in the Record or in Mr. Black's Declaration to show SBA's request that GMP conform to a sample JVA was affirmative misconduct. Affirmative misconduct requires intentional behavior. This means the actor must know he is acting wrongfully. For example, there is no evidence showing SBA wrongfully forced GMP to use SBA's form over its objection or that any SBA employee acted in bad faith or in a way designed to harm GMP. Therefore, estoppel cannot lie, for unlike GMP suggests, affirmative misconduct is required before invoking equitable estoppel against the Government. *Zacharin v. United States*, 213 F.3d

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[5] GMP wisely does not assert the first JVA named a Global employee as Project Manager. Although not part of the Record underlying the *Lance Bailey Decision*, the April 15, 2005 JVA did not designate a project manager. Rather, the April 15, 2005 JVA says "Global shall appoint an individual to act as Program Manager . . . . " Therefore, it cannot be said this JVA "designates an employee" of the 8(a) concern as the project manager as required by 13 C.F.R. § 124.513(c)(2).

1366, 1371 (Fed. Cir. 2000); *see also Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003).

Regardless, GMP is still responsible for complying with the requirements of 13 C.F.R. § 124.513(c)(2). The SBA never represented, nor is there any suggestion that it represented, it was relieving GMP from compliance with applicable regulations. Moreover, there is no provision in the SBA's size regulations that would give any prospective offeror reason to believe the District Office had the authority to waive these regulations and therefore GMP had no right to rely upon the conduct at issue.

Even if GMP were correct in its estoppel argument, it would not afford it relief, for SBA's format suggestion ultimately only affected language in the first JVA concerning the issue of whether Global is the managing venturer. Neither JVA designated a Global employee to be project manager.[6] It is still a fatal violation that the Project Manager, Mr. Gardner, was an M&M employee and not a Global employee when GMP submitted its offer. It is irrelevant that he could have been fired or replaced, for he was not a Global employee when designated as Project Manager and as of the date SBA determined GMP's size.

Summary

Global's failure to designate one of its employees as Project Manager is a fatal violation of 13 C.F.R. § 124.513(c)(2). This failure alone is sufficient to support the *Lance Bailey Decision*. Remand under these circumstances would serve no useful purpose.

LBA did not abandon its protest argument that the JVA violated 13 C.F.R. § 124.513(c)(2). Given the purpose of SBA's size regulations and the nature of its protest process, I have held abandonment must be unequivocal. Therefore, because there is: (1) No unequivocal proof of abandonment; and (2) Reasonable support for the proposition that LBA did not abandon this argument, I hold the *Lance Bailey Decision* was correct not to find abandonment.

I also have found the Record demonstrates that Global brought very little to the joint venture relationship in terms of resources and expertise for the provision of architect/engineer services beyond its 8(a) status. A reading of its proposal makes it clear that the offer submitted to the DOL relied primarily upon the qualifications and expertise of M&M to qualify for award. Global's failure to provide a project manager accentuates how little it brought to the relationship and causes the JVA to violate the requirements of 13 C.F.R. § 124.513(a)(2).

Finally, estoppel is inappropriate under the facts of this case. First, estoppel against SBA requires affirmative misconduct and there is nothing in the Record to support that. Secondly, GMP has provided insufficient information to support its estoppel argument, even if it was not

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6 *See supra*, note.5.

required to prove affirmative misconduct. Finally, even if estoppel did lie, it does not reach the Project Manager issue, and thus, ultimately, it is irrelevant.

Conclusion

I have considered the Record and the Arguments of the Parties. I find GMP has not made a clear showing of an error of fact or law material to the *Lance Bailey Decision*. Accordingly, GMP's Petition for Reconsideration is DENIED.

THOMAS B. PENDER
Administrative Judge