United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Medical and Occupational Services Alliance Appellant Appealed from Size Determination Nos. 2-2008-79 & 80	SBA No. SIZ-4989 Decided: August 27, 2008

APPEARANCES

Gilbert J. Ginsburg, Esq., for Medical and Occupational Services Alliance

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors, PC for Absolute Arora Joint Venture, LLC

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

On August 10, 2007, the Department of Health and Human Services (DHHS) issued Solicitation No. FOHS 2007 REGBC for occupational health services personnel at various locations in the United States. The Contracting Officer (CO) designated this as a competitive

8(a) procurement, and assigned it North American Industry Classification System (NAICS) code 621999, All Other Miscellaneous Ambulatory Health Care Services, with a corresponding $9 million annual receipts size standard. Offers were due on October 19, 2007.

On April 14, 2008, the CO published the names of the apparent successful offerors. Among these was Medical and Occupational Services Alliance (Appellant). On April 18th, the CO received two protests alleging Appellant was other than small. The CO forwarded the protests to the Small Business Administration (SBA) Office of Government Contracting - Area 2, in Philadelphia, Pennsylvania (Area Office). On June 19, 2008, the Area Office issued the size determination finding Appellant other than small.

A. The Size Determination

Appellant is a joint venture between Federal Staffing Resources, LLC (FSR) and STG International, Inc. (STG). Appellant is a limited liability company. FSR, an 8(a) participant firm, is the 51% member. STG, a large business, is the 49% member. The joint venture agreement designates Ms. Tracy Balazs, FSR's President and sole shareholder, as manager of the venture.

Appellant stated it is an SBA approved 8(a) mentor-protégé joint venture. Appellant submitted its mentor-protégé agreement to SBA for approval on October 3, 2007. SBA did not approve Appellant's mentor-protégé agreement until December 10, 2007. Appellant submitted its offer for this procurement on October 19, 2007. Appellant's proposed joint venture agreement was approved on February 28, 2008.

Appellant asserts that Amendment No. 3 to the solicitation, issued on January 14, 2008, significantly changed the requirements of the solicitation so that initial offers were no longer responsive. Appellant responded to Amendment No. 3 on January 25, 2008.

Appellant further argued to the Area Office that there was no regulation which prohibited approval of mentor-protégé agreements after submission of offers and prior to award. Further, Appellant argued that since joint venture agreements only require SBA approval prior to award, the same should be true of mentor-protégé agreements.

The Area Office found that Amendment No. 3 merely changed some of the locations for points of service and the health care personnel required at those locations. The amendment did not change any performance or technical requirements. There was no evidence of DHHS taking corrective action resulting from an inadequate solicitation. Amendment No. 3 was only issued to offerors in the competitive range. Thus, the amendment was in the nature of a Final Proposal Revision and not an indication that initial offers were no longer responsive. The Area Office thus concluded that Appellant's size must be determined as of October 19, 2007, the date of the initial offer including price.

The Area Office then noted that this is not an ostensible subcontractor case, because Appellant is organized as a joint venture. The Area Office stated that it must review the mentor-protégé and joint venture agreements to determine whether they complied with the regulations.

The Area Office found no authority authorizing the mere submission of a mentor-protégé agreement at the time of the offer in order to take advantage of the mentor-protégé joint venture exception. The Area Office found that because Appellant did not have an approved mentor-protégé agreement in place at the time of its submission of its offer, it was not eligible for treatment as a mentor-protégé joint venture. Accordingly, Appellant must be treated as a joint venture, with both firms aggregated to determine size. The Area Office thus concluded Appellant was other than small.

B. The Appeal

Appellant received the size determination on June 25, 2008. On July 7, 2008, Appellant filed the instant appeal.

Appellant argues there is no requirement that the mentor-protégé agreement be approved prior to submission of the initial offer, that the only requirement is that SBA approve the joint venture agreement prior to award.

Further, Appellant argues that Amendment No. 3 to the solicitation rendered the initial proposals no longer responsive to the solicitation, and that therefore, its size should not be determined as of the date of its submission of its initial offer. Rather, size should be determined as of January 25, 2008, the date of Appellant's submission in response to Amendment No. 3. Further, because SBA had approved Appellant's mentor-protégé agreement prior to January 25th, Appellant was in an approved mentor-protégé relationship at the time that size should be determined. Therefore, Appellant should be found an eligible small business under the mentor-protégé exception.

Appellant argues that Amendment No. 3 made material changes to the solicitation. Appellant asserts that an offer must be in compliance with every term of the solicitation and include a price for every item in order to be considered responsive. Appellant further argues Amendment No. 3 changes the locations where services are to be provided, and the types of personnel and estimated level of effort required at each location. The amendment thus deals with the types and locations of services which DHHS requires, and the rates that would be charged. This was a significant and material part of the solicitation. The solicitation warned that proposals must complete these pricing tables in order to be considered acceptable. Amendment No. 3 added and deleted locations of service and labor categories, and changed the estimated hours for many labor categories. This increased the level of effort in Region B by approximately 3,000 hours per year and decreased the level of effort in Region C by approximately 13,000 hours per year. Therefore, Appellant argues, proposals based on the original pricing tables were no longer responsive to DHHS's requirements.

Appellant asserts that under SBA's regulations, when an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer including price, to the modified solicitation. 13 C.F.R. § 121.404(a). Accordingly Appellant's size should be determined as of January 25th, the date it submitted its response to Amendment No. 3.

C. Arora's Response

On July 22, 2008, Absolute Arora Joint Venture, LLC (Arora) filed a response to the appeal. Arora argues that the regulations require that a mentor-protégé agreement be approved prior to the submission of an offer by a mentor-protégé joint venture.

Arora further asserts that the CO described Amendment No. 3 as "[A] minor amendment, only making final updates to the pricing tables, so it is only distributed to Offerors within the competitive range." Arora thus argues that this minor amendment did not render the initial offers nonresponsive. Arora argues that the concept of nonresponsiveness relates to sealed biding, not negotiated procurements. Further, the history of the regulation indicates that it only applies to cases where the solicitation has radically changed, which is not the case here. While there is change of 3,000 hours and 13,000 hours in two regions, these are changes from over 500,000 hours in the first case, and over 770,000 hours in the second. Thus, no recertification was required.

On July 24, 2008, Appellant filed a reply to Arora's response. However, this reply was filed without leave after the close of record, and a reply to a response is not permitted unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Accordingly, Appellant's reply was not considered.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction 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. The Merits

The general rule is that firms submitting offers on a particular procurement as joint venturers are affiliates with regard to that contract, and they will be aggregated for the purpose of determining size for that procurement. 13 C.F.R. § 121.103(h)(2); *Size Appeal of SES-TECH Global Solutions*, SBA No. SIZ-4951, at 4 (2008) (*SES-TECH*). However, certain joint ventures are excepted from this finding of affiliation. One exception covers firms which are approved as mentor and protégé under 13 C.F.R. § 124.520. 13 C.F.R. § 121.103(h)(3)(iii). The purpose of the program is to encourage mentor firms to provide various forms of assistance to firms which are participants in SBA's 8(a) program. 13 C.F.R. § 124.520(a); *SES-TECH* at 4. Two firms

approved by SBA to be a mentor and protégé may form a joint venture for any Federal Government procurement. 13 C.F.R. § 121.103(h)(3)(iii); *SES-TECH* at 4. The joint venture becomes exempt from the normal rules of affiliation. 13 C.F.R. § 121.103(b)(6), (h)(3)(iii); *SES-TECH* at 4.

Here, Appellant is a joint venture between an 8(a) firm and a large firm, and seeks to take advantage of the mentor-protégé exception. However, SBA did not approve the mentor-protégé relationship until December 10, 2007. Appellant submitted its initial offer, including price, on October 19, 2007, nearly two months earlier. Size is determined as of the date of a firm's submission of its self-certification as small with its initial offer, including price. 13 C.F.R. § 121.404(a). At that time, Appellant's mentor-protégé agreement had not been approved, and thus the mentor-protégé relationship did not yet exist.

The regulation provides for the award of 8(a) contracts to joint ventures between "a protégé firm and its approved mentor." 13 C.F.R. § 124.513(b)(3). The regulation also provides that "Two Firms approved by SBA to be a mentor and protégé … may joint venture for any Federal Government procurement …" 13 C.F.R. § 121.103(h)(3)(iii). The use of the word "approved", in the past tense, establishes that the mentor-protégé relationship must be in existence and already approved by SBA for the joint venture to take advantage of the mentor-protégé exception to the affiliation rules.

The regulation thus clearly establishes that, in order for two firms to take advantage of the mentor-protégé joint venture exception, there must first be a mentor-protégé relationship approved by SBA. The joint venture exception from the size regulations must be construed in the light of the requirement of those regulations that size must be determined as of the date of the challenged firm's submission of its initial offer, including price. Appellant's reference to the regulation which provides that a joint venture agreement need not be approved until time of award (13 C.F.R. § 124.513(e)) refers to a specific exception from the rule that size is determined as of the date of the initial offer. There is no similar rule for the approval of the mentor-protégé agreements. Rather it is SBA's approval of the mentor-protégé agreement which creates the relationship which makes the joint venture eligible for the exception. Accordingly, I hold that in order for a joint venture to be eligible for the mentor-protégé exception to the joint venture rule in a particular procurement, SBA must have approved the mentor-protégé agreement prior to the joint venture's submission of its self-certification as small together with its initial offer, including price.

Appellant's alternative argument is based upon another provision of the regulation, which provides that when an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, including price, to the modified solicitation. 13 C.F.R. § 121.404(a) (second sentence). Appellant argues that the modification of Amendment No. 3 rendered all existing offers nonresponsive, and therefore recertifications should have been required. By the time of Amendment No. 3, SBA had approved Appellant's mentor-protégé agreement. Appellant points to OHA's decision in *Size Appeal of Continental Staffing, Inc.*, SBA No. SIZ-4808 (2006) as supporting its position.

While *Continental Staffing* established the principle that OHA would decide on its own whether a modification rendered initial offers nonresponsive, it does not here mandate a decision for the Appellant. The issue is whether Amendment No. 3 rendered the initial offers nonresponsive. The regulatory history of 13 C.F.R. § 121.404(a) makes clear that this provision takes effect "If a solicitation changes drastically so that a previous offer would no longer be responsive, it is in effect a new solicitation. As such, a firm must certify its status as a small business with respect to the new solicitation." 67 Fed. Reg. 70339, 70343 (November 22, 2002) (preamble to proposed rule, then at § 121.404(a)(4) in the proposed rule).

While the CO's characterization is not determinative, it is worth noting that the CO not only did not call for new certifications, but actually characterized the amendment as minor, and issued it only to those offerors in the competitive range. In *Continental Staffing*, there had indeed been drastic changes in the solicitation. Here, Amendment No. 3 changes a few of the many pricing tables in the solicitation. It changes some of the locations for points of service in the solicitation. As Arora points out in its response, the changes affect a small fraction of the level of effort for this solicitation, and can in no way be considered drastic. The purpose of the solicitation and the scope of work remain the same. Thus, I find that Amendment No. 3 did not render the initial offers nonresponsive, and there was no need for recertification by the offerors upon its issuance.

Because no recertification was required, Appellant's effective self-certification date remains October 19, 2007, which was seven weeks prior to SBA's approval of the mentor-protégé agreement on December 10, 2007. Thus, because Appellant self-certified as a small business before its mentor-protégé agreement was approved, Appellant may not avail itself of the mentor-protégé joint venture exception for this contract. The general rule, that firms submitting offers on a particular procurement as joint venturers are affiliates and will be aggregated in determining size for that procurement, therefore must apply. 13 C.F.R. § 121.103(h)(2).

Accordingly, I find that the Area Office properly determined Appellant is other than small, as a joint venture ineligible for the mentor-protégé exception because SBA had not approved its mentor-protégé agreement prior to its submission of its initial offer, including price. Accordingly, I affirm the Area Office's size determination.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

CHRISTOPHER HOLLEMAN
Administrative Judge