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SBA Office of Hearings & Appeals
Selected Size Decisions: 2008

Size Appeal of DCS Night Vision JV, LLC, SBA No. SIZ-4997 (2008).
-Mentor-Protégé Agreements: Failure of SBA to Renew
-MPA Joint Ventures: Invalid if MPA has expired.

Appellant's approved Mentor-Protégé Agreement expired on November 15, 2007 (Fact 10). It is undisputed, that for whatever reason, SBA had not renewed Appellant's Mentor-Protégé Agreement as of November 26, 2007, the date Appellant submitted its initial offer, including price (Facts 2 and 11). Accordingly, Appellant was not eligible for the exception to affiliation detailed in 13 C.F.R. § 121.103(h)(3)(iii).

Size Appeal of Channel Logistics, LLC, SBA No. SIZ-5019
-Effect of amendment to solicitation on size certification
-Size determined by completed fiscal years

A firm's size is determined as of the date of its submission of its initial offer, including price. 13 C.F.R. § 121.404(a). If a solicitation is amended so that initial offers are no longer responsive to the solicitation, a firm's size is determined as of the date of its submission of a responsive offer, including price, to the modified solicitation. *Id.* The Area Office may have erred here, in that the date as of which InScope's size should have been determined might well have been July 30, 2008, rather than January 7, 2008.

However, such an error would have been harmless. A firm's receipts are defined as its "total income" plus "cost of goods sold" as those terms are defined and reported on its Federal tax returns. 13 C.F.R. § 121.104(a). A firm's annual receipts are determined by taking the average of its receipts for its most recently completed three fiscal years. 13 C.F.R. § 121.104(c)(1).

Size Appeal of Medical and Occupational Services Alliance, SBA No. SIZ-4989 (2008)
-Mentor-Protege Agreements: Approval must pre-date offer
-Self-Certification: Minor amendments do not require new self-certifications

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.

….

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).

Size Appeal of EA Engineering, Science, and Technology, Inc., SBA No. SIZ-4973
- Affiliation: Negative Control
- Supermajority Provisions allowed for investment-related decisions

The critical part of the Stockholder Agreement is as follows:

Voting and Board Composition

8.1 Action Requiring Stockholder Approval.

8.1.1. Super-Majority Voting. Except upon the affirmative vote of Stockholders holding at least sixty-seven percent (67%) of the issued and outstanding Shares, [Appellant] shall not take any of the following actions:

8.1.1.1. amend, repeal or change, directly or indirectly, any of the provisions of [Appellant's] Certificate of Incorporation, as amended (the "Charter"), or the Bylaws of [Appellant], as amended (the "Bylaws");

8.1.1.2. issue additional shares of capital stock of [Appellant]; or

8.1.1.3. enter into any business substantially different from the business engaged in by the Company as of the date of this Agreement.

….

The supermajority provisions here cannot affect Appellant's operations. Rather, these supermajority provisions are crafted to protect LBG's investment and not to interfere with the ESOP block's operation of Appellant. Given the limited purpose of the supermajority provisions in this instance and the absolute right of the ESOP block to otherwise control Appellant, I cannot find they create the kind of negative control anticipated by 13 C.F.R. § 121.103(a)(3).

I conclude the Record does not contain enough indicia of negative control to support the Area Office's finding of affiliation. Instead, I find there is no material impediment to the ESOP block's ability to control Appellant's operations or to conduct Appellant's business as it chooses. Instead, there is only a well-defined ability to limit the ESOP block's power for three defined extraordinary events (Fact 9). Moreover, I agree with Appellant's assertion that if I were to affirm the Area Office's determination of affiliation through negative control in this instance, I would be creating a *de facto* prohibition upon supermajority voting requirements, regardless of the degree of control they entail. This prohibition would create a chilling effect on a small concern's access to capital.

Size Appeal SES-TECH Global Solutions, SBA No. SIZ-4951
- Non 8a Mentor-Protégé Joint Ventures are not reviewed under 8a rules.
- Non 8a joint ventures only subject to size rules

(The Joint Agreement also stated the parties will attempt to split the contract work 15% for SES (8a Protégé) and 85% for TTE (large business Mentor).

….

Here, Appellant is a joint venture seeking to compete for a small business set-aside, not an 8(a) procurement…. The 8(a) program is a unique government contracting program with unique features. OHA has consistently held that the 8(a) regulations do not apply to a procurement that is not within the 8(a) program. The 8(a) program's regulations apply to a size determination or size appeal only when the procurement is an 8(a) procurement.

The regulation clearly permits an 8(a) mentor and protégé firm to joint venture for any government procurement, with the only conditions being that the protégé firm qualifies as small under the applicable NAICS code for the procurement, and that for 8(a) sole source procurements, the protégé has not reached the dollar limit of 13 C.F.R. § 124.519. 13 C.F.R. § 121.103(h)(3)(iii).

The Area Office further erred in attempting to import the principles of the ostensible subcontractor rule into the analysis of the joint venture. The ostensible subcontractor rule is used to determine whether two firms are actually in a contractor/subcontractor relationship or are in fact engaged in a joint venture. Here, the joint venture is a given….The Area Office may not use an ostensible subcontractor analysis to review an 8(a) mentor-protégé joint venture.

Size Appeal of White Hawk/Todd, A Joint Venture, SBA No. SIZ-4950 (2008)
- No Protest of Mentor-Protégé Approval

Whether a protégé firm meets the requirements of 13 C.F.R. § 124.520(c) or a mentor firm meets the requirements of 13 C.F.R. § 124.520(b) is a determination vested solely with the SBA's Director, Office of Business Development (D/BD). 13 C.F.R. § 124.520(e)(2). The regulations do not authorize the area offices to play a role in the approval or review of mentor-protégé agreements. 13 C.F.R. § 124.520.

Size Appeal of David Boland, Inc., SBA No. SIZ-4965 (2008)
- Affiliation from long-term partnering

Further, for over 15 years Arviso has been partnered with Okland in AOJV. This has been a long-term relationship, producing in recent years over 40% of Arviso's revenue. This longstanding relationship renders Arviso dependent upon this relationship with Okland for a substantial portion of its income, no business could tolerate the jeopardization of 44% of its revenue.[2] Arviso's dependence on AOJV for such a large proportion of its income makes Arviso dependent on this joint venture with Okland. This dependence gives rise to affiliation on the basis of a continuing contractual relationship. 13 C.F.R. § 121.103(a)(2). Further, Arviso and Okland now have an identity of interest in their long-term partnership in AOJV. 13 C.F.R. § 121.103(f). OHA has held this type of long-term participation in a joint venture by a challenged firm with another firm to mandate a finding of affiliation with the second firm on the basis of contractual relationships and identity of interest.

Size Appeal of Vortec Development, Inc., SBA No. SIZ-4866 (2007)
-Affiliation under newly-organized concern rule

Under the newly organized concern rule, two firms are affiliated when (1) former officers, directors, principal stockholders, or key employees of one firm organize a new firm; (2) these

individuals serve as the new firm's officers, directors, principal stockholders, or key employees; (3) the new firm is in the same or a related industry or field of operation; and (4) the one concern is furnishing or will furnish to the new concern contracts, financial or technical assistance, bid or performance bond indemnification, or other facilities. 13 C.F.R. § 121.103(g). There is no requirement that the concerns share employees, only that former key employees of the large concern are now key employees of the small concern.