

SIZE APPEAL OF: GOEL SERVICES, INC. AND GRUNLEY/GOEL JOINT VENTURE D LLC, APPELLANTS SBA No. SIZ-5320, 2013

2012 WL 10129378
March 22, 2012

SBA No. SIZ-5320, 2013 (S.B.A.), 2012 WL 10129378

Small Business Administration (S.B.A.)

Office of Hearings and Appeals
[Size Appeal]

*1 SIZE APPEAL OF: GOEL SERVICES, INC. AND GRUNLEY/GOEL JOINT VENTURE D LLC, APPELLANTS

*1
SBA No. SIZ-5320

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Appealed from Size Determination No. 2-2011-152
*1 March 22, 2012

Appearances

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- *1 Silver Spring, Maryland
- *1 For Goel Services, Inc.
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- *1 For Grunley/Goel Joint Venture D LLC

DECISION¹

I. Introduction and Jurisdiction

*1 On October 25, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-152 finding that Goel Services, Inc. (Goel) is not a small business under the size standard associated with Solicitation No. W912DR-11-R-0017 (RFP). The Area Office further determined that joint ventures to which Goel is a party, including Grunley/Goel Joint Venture D LLC (Grunley/Goel JV), likewise do not qualify as small businesses for procurements at the same or lower size standard. Goel and Grunley/Goel JV (Appellants) contend that the size determination is clearly erroneous and should be overturned. For the reasons discussed below, the appeal is granted and the size determination is reversed.

*1 SBA's Office of Hearings and Appeals (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. Appellants filed the instant appeal within fifteen 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. Issue

*1 Whether the Area Office made a clear error of law or fact in assessing the size of Goel, the 8(a) Business Development (BD) protégé member of an SBA-approved mentor-protégé joint venture, for a competitive 8(a) BD procurement? 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

*1 On July 8, 2011, the Department of the Army, Corps of Engineers Baltimore District (Army) awarded Grunley/Goel JV a contract arising from the RFP. The RFP was a competitive 8(a) BD set aside for construction of an auditorium and training center at Fort Dietrick, Maryland. The RFP was assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$33.5 million average annual receipts.

*1 On July 15, 2011, the Army received a post-award size protest from Vigil Contracting/Harkins Joint Venture, LLC (Vigil/Harkins JV), a disappointed offeror. Vigil/Harkins JV alleged that Goel is not an eligible 8(a) concern due to general affiliation with Grunley Construction Company, Inc. (Grunley), Goel's mentor under an SBA-approved mentor-protégé agreement. (Protest at 2.) Vigil/Harkins JV asserted that Goel and Grunley have had an ongoing relationship since at least 2005, have entered into 21 joint ventures together, and have been awarded at least 14 contracts, from which the firms have derived approximately \$100 million in contract revenues. (*Id.*) Vigil/Harkins JV alleged that these recurrent joint ventures and contracts, as well as Goel's purported reliance on Grunley's assistance, warranted a finding of

affiliation between Goel and Grunley, despite their mentor-protégé relationship. Vigil/Hawkins JV stated:

***2** Clearly, the protection against affiliation [between a mentor and protégé], which is a staple to the SBA's 8(a) mentor-protégé program, was never intended to sanction a six-year relationship where over 20 separate legal entities have been formed, allowing for a large contractor to receive 8(a) and small business contracts. For these reasons, we submit that the SBA should find Goel and Grunley to be affiliated such that neither Goel nor the joint ventures are small.

***2** (*Id.* at 3.) The protest did not assert that Goel alone would not qualify as a small business irrespective of any affiliation with Grunley.

***2** On September 16, 2011, Appellants responded to the protest. Appellants maintained that Goel and Grunley are not generally affiliated, that the firms operate in different industries, and that they share no common management, ownership, facilities, employees, or equipment. (Response at 2, 8-9) Further, because Goel and Grunley are parties to an SBA-approved mentor-protégé agreement, “[a]ny assistance Grunley provides to Goel Services under the 8(a) Mentor-Protégé Agreement, including the formation of multiple joint ventures to compete for contracts, cannot be used as a basis for a finding of affiliation between Goel Services and Grunley.” (*Id.* at 4, citing *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010).) Appellants also disputed the factual accuracy of the protest, contending that Grunley and Goel have formed only seven mentor-protégé joint ventures together, and that those joint ventures have been awarded a total of ten contracts. (*Id.* at 10.)

B. Size Determination

***2** On October 25, 2011, the Area Office issued its size determination. The Area Office did not address the protest allegation that Goel and Grunley are generally affiliated, but instead concluded that Goel itself is not a small business.

***2** The Area Office indicated that Appellants' response to the protest included an affidavit from Goel's president and owner, Mr. Piyush J. Goel. Mr. Goel's affidavit stated that God's revenues, including receipts received through seven joint ventures over the last three completed fiscal years, averaged less than \$33.5 million. The Area Office observed, however, that the calculations in Mr. Goel's affidavit relied on Goel's financial statements, which utilize a “percentage-of-completion” accounting method and differ substantially from Goel's tax returns. The Area Office emphasized that SBA uses tax returns to calculate average annual receipts for size purposes. The Area Office stated that the 2008 and 2010 revenues reported on Goel's financial statements are about a third less than its tax receipts, and that Goel's 2009 financial statements are about half of its tax return receipts. (Size Determination at 3.) Based on Goel's 2008, 2009, and 2010 tax returns and the tax returns submitted for the seven joint ventures in which Goel is the controlling partner, the Area Office determined that Goel exceeds the \$33.5 million size standard.

***3** The Area Office indicated that, in order for Grunley/Goel JV to qualify for award of a competitive 8(a) BD procurement, Goel must qualify as a small business under the \$33.5 million size standard. (*Id.* at 4-5, citing 13 C.F.R. § 124.513(b).) The Area Office stated that 13 C.F.R. § 121.104 governs how SBA calculates annual receipts to determine if a firm is small under a receipts-based size standard. The Area Office also noted that under 13 C.F.R. § 121.103(h)(5), a concern that holds interests in joint ventures is attributed a share of the joint ventures' receipts proportional to the concern's ownership interest. Based on these regulations and OHA's decision in *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR), the Area Office concluded that Goel's annual receipts, including its proportionate share of receipts from Goel's joint ventures with Grunley, exceed the \$33.5 million size standard, and that Goel is not a small business for the NAICS code assigned to the RFP.

C. Appeal Petition and Response to Order

***3** On November 10, 2011, Appellants filed their appeal petition with OHA. Appellants maintain that the size determination is clearly erroneous and should be overturned.

***3** Appellants assert that the size determination undermines SBA's approvals of the joint ventures and the mentor/protégé relationship. Appellants state that, following initial approval of the mentor protégé agreement by SBA in 2005, Goel has submitted an annual business plan updating SBA on its mentor protégé relationship with Grunley, including the contracts awarded to the SBA-approved joint ventures. Appellants assert that they have relied on SBA's approvals of the joint ventures for contract awards and continuation of the mentor/protégé relationship. Appellants argue that the size determination “undercut those approvals” to create an after-the-fact affiliation between Goel and the Grunley/Goel joint ventures. (Appeal at 4, quoting *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 at 27 (2010).) Appellants state that the size determination penalizes Goel for successfully using the 8(a) BD program and approved mentor/protégé relationship to strengthen its economic viability. Appellants further contend that based upon the size determination, an SBA-approved 8(a) mentor/protégé joint venture would be ineligible to receive an 8(a) BD multiple-award set-aside contract without the 8(a) BD protégé exceeding the applicable size standard, which Appellants maintain is contrary to provisions in the Small Business Jobs Act of 2010 authorizing award of task orders to small business concerns on contracts with multiple awards. (*Id.* at 4-5.)

***4** Appellants assert that the Area Office erroneously used 13 C.F.R. § 121.103(h)(5), which covers affiliation, to calculate Goel's receipts. Appellants argue that 13 C.F.R. § 121.103(h)(5) does not apply to the calculation of receipts for an 8(a) BD firm in an SBA-approved 8(a) BD mentor/protégé joint venture. Appellants maintain that 13 C.F.R. § 121.103(h)(3)(ii) permits an SBA-approved 8(a) mentor/protégé joint venture to submit an offer on an 8(a) BD procurement “without regard to affiliation under paragraph (h) of this section.” (Appeal at 5, quoting 13 C.F.R. § 121.103(h)(3)(H).) Appellants assert that 13 C.F.R. § 121.104 provides a clear standard for the calculation of annual receipts and does not require a protégé to include its proportionate share of receipts from its SBA-approved 8(a) BD mentor/protégé joint venture.

***4** Appellants further complain that “[t]he Area Office's calculation of receipts is based upon incorrect amounts from Goel Services' tax returns and fails to exclude proceeds from transactions between Goel Services and the Grunley/Goel joint ventures under Title 13 C.F.R. 121.104(a).” (Appeal at 6.) Appellants assert the Area Office used incorrect amounts from Goel's tax returns for the cost of goods sold for 2008 and 2009 and for total income for 2009. Appellants also contend that, if it was proper for the Area Office to include a proportionate

share of Grunley/Goel joint ventures in its calculation of receipts, then the proceeds from the transactions between Goel and the Grunley/Goel joint ventures should have been excluded under 13 C.F.R. § 121.104(a) to avoid double-counting.

*4 Appellants request that OHA reverse the size determination, or remand the matter to the Area Office for a proper calculation of Goel's receipts.

*4 On January 23, 2012. Appellants responded to an inquiry from OHA regarding whether Appellants secured prior SBA approval for the joint venture for this particular RFP. Appellants stated that the RFP was issued on February 23, 2011, and that regulations applicable at that time required that "SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture." 13 C.F.R. § 124.513(e) (2010). Appellants state that SBA did approve the joint venture in July 2009. Appellants assert that the current version of the regulation, which requires "an addendum to the joint venture agreement, setting forth the performance requirements on [a] second or third contract." 13 C.F.R. § 124.513(e)(2) (2011). is not applicable because the RFP was issued prior to the effective date of the revised regulations.²

*5 Vigil Harkins JV, the original protestor, did not respond to the appeal.

IV. Discussion

A. Standard of Review

*5 Appellants have the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellants must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *She Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

*5 The fundamental issue presented in this case is whether the Area Office erred in examining the size of Goel, given that the contract awardee was not Goel itself but was rather an 8(a) mentor-protégé joint venture which had already been deemed eligible by SBA's Office of Business Development.

*5 OHA has recognized that a firm's compliance with 8(a) mentor-protégé requirements lies solely within the purview of the Office of Business Development; that area offices have no authority to approve or review 8(a) mentor-protégé agreements; and that a firm's eligibility to receive 8(a) contracts may not be challenged outside the Office of Business Development. *She Appeal of Trident, LLC*, SBA No. SIZ-5315 (2012); *She Appeal of CJW Constr., Inc.*, SBA No SIZ-5254 (2011); *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950 (2008), *recons. denied*, SBA No. SIZ-4968 (2008). Similarly, SBA regulation indicates that "[t]he eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest." 13 C.F.R. § 124.517(a). The regulation directs anyone with concerns about the eligibility of a participant in the 8(a) program to submit such information to SBA by following the process used for eligibility reviews. 13 C.F.R. § 124.517(e). It is worth noting in this regard that the Office of Business Development reviews a protégé's size to determine eligibility for the mentor-protégé program, 13 C.F.R. § 124.520(c), and in approving a joint venture, 13 C.F.R. § 124.513(b). Logically, then, by approving the 8(a) mentor-protégé agreement and joint ventures, the Office of Business Development has already determined the protégé firm to be a small business. Applying these provisions, OHA has reasoned that, when the apparent successful offeror is an 8(a) mentor-protégé joint venture which has already been vetted by the Office of Business Development in accordance with SBA regulations, there is no regulatory mechanism for an area office to again review the size of the protégé firm at the point of contract award. *Trident, LLC*, SBA No. SIZ-5315, at 15. Nor would any useful purpose be served by having multiple offices within SBA conduct repetitious (and potentially conflicting) reviews, particularly given that the size of the protégé member of an 8(a) mentor-protégé joint venture is a matter closely associated with 8(a) eligibility, and is thus beyond the scope of an area office's review.

*6 In this case, despite the fact the apparent awardee was Grunley/Goel JV, an SBA-approved 8(a) mentor-protégé joint venture, the Area Office's size determination focused on the size of Goel, the 8(a) protégé.³ Because Goel itself was not the awardee, a direct challenge to Goel's size is not authorized under 13 C.F.R. § 124.517. Moreover, the record establishes that the Office of Business Development approved the 8(a) mentor-protégé agreement between Goel and Grunley in 2005, and approved the Grunley/Goel JV agreement in 2009. The Area Office's determination that Goel is not a small business undermines and contradicts these eligibility approvals by the Office of Business Development. As explained above, an area office cannot review the Office of Business Development's approval of the joint venture. Accordingly, I conclude that the Area Office erred in conducting a review of Goel's size at the time of contract award. Once the Office of Business Development has approved an 8(a) mentor-protégé joint venture, an area office lacks authority to reexamine the size of the protégé firm.

*6 The remaining issue is whether the Area Office should have further investigated Vigil/Harkins JV's protest allegation that Goel and Grunley are affiliated through contractual and economic ties, notwithstanding their mentor-protégé relationship. I find no reversible error in this respect.

*6 OHA recently addressed this issue in *Size Appeal of Alutiiq Diversified Services, LLC*, SBA No. SIZ-5318 (2012). In *Alutiiq Diversified*, a protestor challenged an SBA-approved 8(a) mentor-protégé joint venture, claiming that the mentor and protégé were generally affiliated because they had previously formed several other joint ventures with one another. The Area Office found no general affiliation, and the protestor appealed. OHA observed that the appeal 'rests entirely on [the] argument that the Area Office erred in not considering whether the cumulative effect of the multiple joint ventures between [the mentor and protégé] rose to the level of general affiliation.' *Alutiiq Diversified*, SBA No. SIZ-5318, at 6. OHA then proceeded to deny the appeal, explaining that "[once] SBA had examined and approved the relationship between a concern and its mentor an area office should not reach behind those approvals to examine a relationship which had already been

examined and approved by SBA.” *Alutiiq Diversified*, SBA No. SIZ-5318, at 6.

*6 Similarly, in this case, there is no dispute that Grunley/Goel JV is an 8(a) mentor-protégé joint venture which was approved by SBA in accordance with applicable regulations. As OHA emphasized in *Alutiiq Diversified*, an area office should not “reach behind” such approvals to conduct its own assessment of the joint venture’s eligibility. Further, it is well-established that direct business assistance within the scope of an 8(a) mentor-protégé relationship, including the formation of joint ventures to compete for and perform contracts, is not a proper basis to find affiliation between a mentor and protégé. *See Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 23-24 (2010). Rather, in order to find affiliation between a mentor and a protégé, an area office must find “assistance above and beyond such direct business assistance, such as a mentor sharing with its protégé a location and employees or a protégé selling to its mentor the majority of its stock.” *Id.* at 24; see also 13 C.F.R. §§ 121.103(b)(6), 124.520(d)(4).

*7 Vigil/Harkins JV’s protest alleged only that Goel and Grunley are affiliated through contractual and economic ties. The protest did not assert, nor is there any indication in the record, that Grunley provided Goel other assistance beyond the scope of the mentor-protégé agreement. Appellants emphasized in response to the protest that Grunley and Goel operate in different industries, and share no common management, ownership, facilities, employees, or equipment. I thus find that the Area Office reasonably did not further explore the protest allegation.

V. Conclusion

*7 Appellants have demonstrated that the size determination is clearly erroneous. The Area Office erred in examining the size of Goel, which was not the apparent successful offeror, and in finding Grunley/Goel JV to be ineligible despite the Office of Business Development’s prior approval of the joint venture. For these reasons, the appeal is GRANTED, and the size determination is REVERSED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

*7 Kenneth M. Hyde

*7 Administrative Judge

Footnotes

- 1 This decision was initially issued with a restrictive legend to protect confidential business or financial information. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.
- 2 On February 11, 2011, 13 C.F.R. § 121.103(h)(3)(iii) was revised to state that “[i]f the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513.” However, the revised language is applicable “to all solicitations issued and all certifications to size made after March 14, 2011.” 76 Fed. Reg. 8222 (Feb. 11, 2011). The instant RFP was issued on February 23, 2011, before the revisions took effect.
- 3 It appears that the Area Office based its size determination on different grounds than were raised in the underlying protest. The protest asserted that Goel and Grunley were affiliated with one another through long-standing contractual and economic ties, notwithstanding their mentor-protégé relationship. Appellants’ response to the protest likewise focused on refuting this allegation. The size determination, however, did not address this issue, but instead found that Goel itself did not qualify as a small business, irrespective of any affiliation with Grunley. OHA has recognized that, when a size determination addresses fundamentally different issues than were raised in a protest, “an area office must provide notice to the protested concern of any change in focus and request a response.” *Size Appeal of Alutiiq Int’l Solutions, LLC*. SBA No. SIZ-5069, at 4 (2009). Here, it is unclear from the record whether Appellants understood that the review would focus exclusively on whether Goel alone qualified as a small business, and whether Appellants had a fair opportunity to respond to such concerns. Several of the arguments now raised on appeal such as whether the Area Office used correct data from Goel’s tax returns, or whether the calculations ought to have been adjusted to avoid double-counting presumably would have been addressed during the course of the review had Appellants been aware that Goel’s size was the primary focus of attention. It is unnecessary to resolve this issue, however, because I find that the Area Office erred in examining the size of Goel in the first instance.

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