United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF: Insight Environmental Pacific, LLC, Appellant, Appealed From Size Determination Nos. 6-2016-042 and -043	SBA No. SIZ-5756 Decided: July 1, 2016

APPEARANCES

Richard B. Oliver, Esq., Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, California, for Appellant

Kevin P. Mullen, Esq., Rachael K. Plymale, Esq., Morrison & Foerster LLP, Washington, D.C., for CAPE Environmental Management, Inc.

DECISION[1]

I. Procedural History and Jurisdiction

These appeals arise from a pair of size determinations in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) concluded that Insight Environmental Pacific, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant contends that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeals are denied and the size determinations are affirmed.

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 appeals within fifteen days of receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Protests

On June 1, 2015, the U.S. Department of the Navy, Naval Facilities Engineering Command Pacific (NAVFAC Pacific), issued Request for Proposals (RFP) No. N62742-15-R-1807 for environmental remediation at contaminated sites. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562910, Environmental Remediation Services, with a corresponding size standard of 500 employees. Appellant self-certified as a small business with its initial offer on July 1, 2015.

On March 9, 2016, the CO announced that Appellant had been selected for award. On March 14, 2016, CAPE Environmental Management, Inc. (CAPE), a disappointed offeror, filed a size protest with the CO, alleging that Appellant exceeds the applicable size standard. CAPE maintained that Appellant is a joint venture, so the participants in the joint venture are affiliated. On March 15, 2016, AGVIC, LLC (AGVIC), another unsuccessful offeror, also protested Appellant's small business status. The CO forwarded the size protests to the Area Office for review.

B. Size Determinations

On April 25, 2016, the Area Office issued Size Determination Nos. 6-2016-042 and 6-2016-043 finding that Appellant is not a small business for the instant procurement.[2]

The Area Office explained that Appellant was established as a Limited Liability Company (LLC) on August 19, 2013. Appellant's majority owner is Insight Environmental, Engineering & Construction, Inc. (IEEC); the minority owner is Environmental Chemical Construction (ECC). The Area Office determined that although Appellant is structured as an LLC, "the relationship between IEEC and ECC is a joint venture." (Size Determination No. 6-2016-043, at 2.) A joint venture, the Area Office continued, "is defined as an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out specific business ventures for joint profit for which purpose they combine their efforts, property, money, skill, or knowledge." (*Id.*, citing 13 C.F.R. § 121.103(h).)

The Area Office reviewed Appellant's Operating Agreement, dated June 3, 2015, and identified several provisions suggesting that Appellant is a joint venture. As background, the Operating Agreement provides:

> WHEREAS, [NAVFAC Pacific] has issued a solicitation for the award of Small Business Environmental Remedial Action Contract for Sites in Hawaii,

[2] The Area Office issued two size determination documents, which are substantively identical. Size Determination No. 6-2016-042 was issued in response to AGVIC's protest, and Size Determination No. 6-2016-043 was issued in response to CAPE's protest.

> Guam and Other Areas within the Naval Facilities Engineering Command Pacific Area of Responsibility Solicitation No. N62742-15-R-1807, set-aside contract for a Small Business, using NAICS code 562910;
>
> WHEREAS, the Members hereto, having carefully assessed the unique capabilities and interests of one another, have concluded that it is in their mutual benefit and in the best interests of [Appellant] to prepare and submit a proposal for the Contract (the "Proposal") and, if awarded the Contract, to have [Appellant] perform specific task orders awarded by [NAVFAC Pacific] by the Members either collectively or individually for completion of the Project (each referred to as "Task Orders");
>
> WHEREAS, the Members wish to form [Appellant] to prepare (the Proposal, and if awarded the Contract work scope or to perform specific task orders awarded as required by [NAVFAC Pacific] for completion of the Project (each referred to as "Task Order");
>
> WHEREAS, [IEEC] is a small business entity and the majority and Managing Member of [Appellant], and ECC is the minority Member of [Appellant].

(*Id.* at 3, quoting Operating Agreement at 1.) The Operating Agreement further provides:

> Purpose. [Appellant is] established for the sole and limited purpose of: (i) preparing and submitting a cost and technical proposal to [NAVFAC Pacific] for the Contract; and (ii) if successful negotiating and executing a Contract with [NAVFAC Pacific] and (iii) performing the Work for the Project required by the Contract; and (iv) defining the rights, duties, responsibilities and obligations between the Members in connection with the performance of the Contract. The Members shall perform the Work as a single integrated project team responsible for the performance of all the Work.

(*Id.*, quoting Operating Agreement § 2.3.) In addition, it provides:

> Term. The term of [Appellant] began upon the filing of the Certificate of Formation with the Delaware Secretary of State and shall continue in existence (unless its existence is sooner terminated pursuant to Section 8 of the Agreement of pursuant to applicable law, including, without limitation by rejection under Bankruptcy Code 365) until the earlier of (i) any official announcement by [NAVFAC Pacific] to the effect that it will not accept [Appellant]'s proposal for the Contract, (ii) any official announcement by [NAVFAC Pacific] that no Task Order will be awarded for the Contract, (iii) the written agreement of the Members, or (iv) the expiration of the applicable contractual and statutory warranty periods, if any, following the completion of the individual Task Orders under the Contract.

(*Id.* at 4, quoting Operating Agreement § 2.4.)

The Area Office also found support for its conclusion that Appellant is a joint venture in its correspondence with Appellant. Appellant advised the Area Office that "[IEEC] and ECC will perform the task order work (Project Level) requirements of the Contract as presented. ... The Program manager ([IEEC]) employee), under the oversight of [Appellant's] Executive Committee, will monitor assign[ed] work assignments to ensure compliance with the [IEEC] ([XX]%) and ECC ([XX]%) work allocation splits." (*Id.*, quoting Letter from [XXXX] to J. Bagaason (April 18, 2016), at 3.)

The Area Office found further support for its conclusion in Appellant's proposal. In three instances, the proposal referred to Appellant as a joint venture. (Id.)

The Area Office then determined that, under SBA regulations, IEEC and ECC are affiliated for purposes of this procurement because they are submitting an offer on a federal procurement as a joint venture, and no exception to this general rule applies. (*Id.* at 4-5.) Appellant conceded that ECC is a large business. Accordingly, because IEEC and ECC are affiliated, Appellant is not an eligible small business for the subject procurement. (*Id.* at 5.)

C. Appeals

On May 3, 2016, Appellant appealed the size determinations to OHA.[3] Appellant argues that the size determinations are clearly erroneous, so OHA should reverse them.

Appellant contends that the Area Office incorrectly analyzed Appellant's size. Because Appellant is an LLC, the Area Office should have applied the corporate ownership rules in 13 C.F.R. § 121.103(c)(1). (Appeal at 7-8.) Treating Appellant instead as a joint venture, despite its status as an LLC and without citing any supporting regulation or case law, was arbitrary and at odds with the principle underlying the affiliation rules—common control. ECC, Appellant emphasizes, cannot control Appellant. (*Id.* at 8-9.)

Appellant next addresses the factors referenced by the Area Office in finding that Appellant is a joint venture. Appellant insists it did not describe itself as a joint venture in its proposal. Rather, the language cited by the Area Office was pre-printed by NAVFAC Pacific on the solicitation's spreadsheets and forms required for offerors' cost proposals. For example, Attachment J.1, which listed 44 labor categories for which an offeror was required to submit rates, instructed offerors, "A separate rate sheet shall be submitted by the prime, each [joint venture] member and all cost reimbursable subcontractors. Each member of the team shall provide rates for ALL of the labor categories. If the contractor/subcontractor does not currently employ the listed employee, a market rate shall be provided." (*Id.* at 11, quoting RFP Attach. J.1,

[3] Appellant filed two appeals, one for each size determination. Because the appeals concern the same procurement, raise the same issues, and the underlying size determinations are essentially identical, OHA consolidated the appeals. The appeals themselves are also nearly identical. Accordingly, hereinafter, the appeals are summarized only once and will be referred to collectively as the "Appeal".

at 2 n.3 (emphasis in original).) Another example is in Attachment J.1A, which is labeled "Direct Labor Rate Escalation Submission." It contains the same instructions as those in Attachment J.1. (*Id.* at 11-12.) Appellant explains that it followed these instructions and submitted separate J.1 and J.1A forms for IEEC and ECC. However, because offerors were required to utilize these forms, and because the instruction to submit separate forms applied to "each member of the team" and IEEC and ECC are members of Appellant, the submission of separate forms does not mean that Appellant thereby admitted to being a joint venture. (*Id.* at 10-11.)

The same is true on Attachments J.7 and J.7A, which Appellant completed separately for IEEC and ECC. The instructions on Attachment J.7, which is labeled "Cost Model Base Year," provide:

> Offeror shall utilize the indirect rate ceilings on Attachment JL.4 as their indirect rates. If an offeror (prime/JV, cost reimbursable subs) proposes multiple mark-up rates for other direct costs and subcontracts (e.g. G&A), the highest mark-up rate shall be utilized on the cost model worksheet (J. 7).
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> . . .
>
> This form shall be submitted by the prime, each member of a Joint Venture (JV) entity (see note below), each cost reimbursable subcontractor and (if necessary) each cost center that will be utilized in performance of the contract. If the JV entity has an established separate cost center with an adequate accounting system for a cost reimbursement contract, one form may be submitted for the JV entity.

(*Id.* at 12, quoting RFP Attach. J.7, at 3 n.7, n.12.) Appellant reiterates that these instructions are not limited to offerors that are joint ventures, and contends that by submitting separate J.7 forms for IEEC and ECC, Appellant did not indicate it is a joint venture. "This form was the required avenue for an offeror to provide a summary of its indirect cost rates and [Appellant] had no choice but to submit its billing rates on this form." (*Id.* at 13.)

Attachment J.7A, which is entitled Cost Model Summary Sheet, instructs, "THIS FORM IS TO BE COMPLETED BY PRIME CONTRACTOR/JV ONLY" (*Id*, quoting Attach. J.7A, at 1 (emphasis in original).) It also states, "If the prime contractor is a JV, the rate for the JV member with the highest ceiling rate will be used." (*Id.*, quoting Attach. J.7A n.3.) This language is likewise not limited to joint ventures, Appellant argues, so Appellant did not describe itself as a joint venture or admit to being one just because it provided each members' indirect cost rates. *(Id.)*

The only other instances of "joint venture" or "JV" in Appellant's proposal are in its past performance volume. However, these referred to other entities, not to Appellant. (*Id.*at 13-14.)

Appellant next addresses the work share listed in the Operating Agreement. Appellant explains that there is no guarantee ECC will actually receive [XX]% of the work. Instead, the allocation of work will be negotiated with *"primary consideration given to providing the best*

value to the Client." (*Id.* at 15, quoting Operating Agreement § 6.4 (emphasis added by Appellant).) ECC's [XX]% work share, then, "is only an objective, and that objective is subordinate to providing [NAVFAC Pacific] with the best value work assignments." (*Id.*)

As for the language in Appellant's Operating Agreement cited by the Area Office, Appellant contends these provisions merely indicate that IEEC and ECC will work together to compete for and perform the contract. It is the kind of language commonly used in teaming agreements, and it does not necessarily mean the firms are joint venturers or are otherwise affiliated. (*Id.* at 16, citing *Size Appeal of Fiore Indus., Inc.*, SBA No. SIZ-3401 (1991).)

D. CAPE's Response

On May 19, 2016, CAPE responded to the appeals. CAPE contends the Area Office properly determined that Appellant and ECC are affiliated, so OHA should deny the appeals.

CAPE argues that Appellant's Operating Agreement establishes that Appellant is a joint venture. In particular, Appellant is an association of two firms, IEEC and ECC, with the stated purpose of competing for and performing the instant procurement. (Response at 2-3.) The fact that Appellant is structured as an LLC does not change this analysis because SBA regulations permit that "a joint venture . . . may (but need not) be in the form of a separate legal entity." (*Id.* at 2 (quoting 13 C.F.R. § 121.103(h).) Further, finding affiliation with ECC is consistent with the underlying policy objectives behind SBA regulations. "To be eligible for the privileges and assistance that accompany status as 'small', a firm may not have unlimited access to another large business' resources as [IEEC] has." (*Id.* at 3.)

According to CAPE, Appellant's proposal "repeatedly suggest[s]" that Appellant is a joint venture. (*Id.* at 4.) The most telling instance, however, occurred when Appellant submitted two J.7A forms in response to the instruction that, "THIS FORM IS TO BE SUBMITTED BY PRIME CONTRACTOR/JV ENTITY ONLY" and "[i]f the prime contractor is a JV, the rate for the JV member with the highest ceiling will be used." (*Id.*, quoting RFP Attach. J.7A.) "[Appellant] admits it submitted two sets of rates — one for IEEC and one for ECC — in accordance with the instructions for joint ventures." (Id.)

CAPE next argues that, even if Appellant is not a joint venture, Appellant is affiliated with ECC under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant will perform none of the contract work itself, nor will it provide any of the personnel to perform the contract. Instead, its two members will split the work. ECC, then, will be performing [XX]% of the contract's primary and vital tasks. (*Id.* at 5, citing Operating Agreement § 6.4 and SBA Form 355 ¶ 27). ECC will also provide [XXXX]. (*Id.*) Appellant therefore would be unable to perform the contract without heavy reliance upon ECC. (*Id.* at 5-6.)

Appellant is also dependent upon ECC because its proposal relies heavily on ECC's corporate experience. CAPE asserts that the majority of Appellant's specialized recent project/contract experience is ECC's experience. (*Id.* at 6.) Nearly all of Appellant's workload experience refers to ECC's experience, and [XXXX] past performance references were

performed by ECC. (Id.) The proposal also highlights ECC's individual safety program and safety data. (*Id.* at 7.)

Several other factors indicate a violation of the ostensible subcontractor rule. First, ECC is the incumbent contractor and is not eligible to bid on the subject RFP because it exceeds the size standard. In addition, Appellant was reliant on ECC to draft the proposal. (*Id.* citing Operating Agreement § 3.8.) Third, ECC is entitled to [XX]% of all profits, rather than a pay-for-services arrangement that would be typical of a subcontract. (*Id.* citing Operating Agreement § 4.) These factors weigh in favor of finding that ECC is an ostensible subcontractor.

E. Reply

On June 1, 2016, Appellant replied to CAPE's response.[4] Appellant argues that the ostensible subcontractor issue is not properly before OHA, because CAPE's protest did not allege that Appellant's proposal violated the ostensible subcontractor rule, nor did the Area Office address this issue in the size determinations. Because the ostensible subcontractor rule is a new issue raised for the first time on appeal, OHA cannot consider it. (Reply at 2-4, citing 13 C.F.R. § 134.316(c).)

Procedural issues aside, the ostensible subcontractor rule does not apply to this case, Appellant maintains, because Appellant did not propose ECC as a subcontractor, and CAPE does not identify any subcontract between Appellant and ECC. (*Id.* at 5, citing *Size Appeal of Tiger Enters. Inc.*, SBA No. SIZ-4647, at 11 (2004).

CAPE's allegation also lacks merit because it "equates to little more than conclusory allegations without factual support." (Id.) Although CAPE contends that ECC will perform the contract's primary and vital requirements, CAPE does not attempt to explain what requirements ECC will perform. CAPE's assertion that Appellant is unduly reliant on ECC fails because IEEC and ECC each have the capability to perform all of the services being acquired. Further, there is no merit to the notion that ECC is an ostensible subcontractor merely because it will perform [XX]% of the work. In prior cases, OHA has found no violation of the ostensible subcontractor rule in situations where a prime contractor will subcontract a larger percentage of a contract to a subcontractor. (*Id.* at 6, citing *Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ- 5692 (2015) and *Size Appeal of Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277 (2011).)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellant must prove the size determinations are 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

[4] OHA granted Appellant leave to reply by Order dated May 24, 2016.

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. Discussion

Having reviewed the record and the arguments of the parties, I agree with the Area Office and CAPE that Appellant is a joint venture between IEEC and ECC. As a result, the appeals must be denied.

SBA regulations define a joint venture as follows:

> *Affiliation based on joint ventures*. A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.
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> . . .
>
> For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture must be in writing and must do business under its own name, and it may (but need not) be in the form of a separate legal entity, and if it is a separate legal entity it may (but need not) be populated (*i.e.*, have its own separate employees).

13 C.F.R. § 121.103(h).

Appellant falls squarely within this definition. Appellant's Operating Agreement makes plain that Appellant is a business association of two concerns, IEEC and ECC, created "for the sole and limited purpose" of competing for and performing the subject NAVFAC Pacific procurement. Section II.B, *supra*. The Operating Agreement further states that Appellant will cease to exist if Appellant is not awarded the contract, or if the contract expires. *Id.* It therefore is clear that Appellant is not a business operating on "a continuing or permanent basis for conducting business generally", but rather is a temporary association of concerns engaging in a limited-purpose business venture for joint profit. In addition, the Operating Agreement confirms that Appellant's members will combine their efforts and resources for purposes of the contract, and that IEEC and ECC would the share profits in the event that Appellant is awarded the contract. *Id.* Appellant therefore meets the regulatory definition of a joint venture, and the Area Office did not err in finding Appellant to be a joint venture.

The fact that Appellant is organized as an LLC does not alter this conclusion. The regulation specifically states that a joint venture may or may not be organized as a separate legal entity, and the regulatory history confirms that SBA anticipated that joint ventures could take the form of an LLC. 69 Fed. Reg. 29,192, 29,195 (May 21, 2004) ("SBA first notes that joint ventures are not limited to informal partnership structures. The final rule clarifies that joint

ventures may be in the form of a new legal entity (*e.g.*, a limited liability corporation .....”). Similarly, OHA has recognized that entities structured as LLCs may still be joint ventures with the joint venture partners affiliated. *See, e.g., Size Appeal of SIETech LLC, Joint Venture*, SBA No. SIZ-5667 (2015); *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532 (2014). Accordingly, the notion that Appellant cannot be a joint venture because it is an LLC is plainly contradicted by the regulation, the regulatory history, and OHA precedent.

Because the Area Office properly found that Appellant is a joint venture, the Area Office correctly found that IEEC and ECC are affiliated and aggregated their employees. 13 C.F.R. § 121.103(h)(2); *Size Appeal of Med. and Occupational Servs. Alliance*, SBA No. SIZ-4989, at 4 (2008) (“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.”). Appellant does not dispute that ECC is a large business. As a result, I find no error in the Area Office's conclusion that Appellant is other than small for this procurement.

I need not decide whether Appellant is in violation of the ostensible subcontractor rule, because as discussed *supra*, Appellant is not a small business. *Size Appeal of W. Harris, Gov't Servs. Contractor, Inc.*, SBA No. SIZ-5717, at 8 (2016) (declining to rule on issues that were “immaterial to the outcome of this case”); *Size Appeal of BR Constr. LLC*, SBA No. SIZ-5303, at 9 (2011).

IV. Conclusion

Appellant has not demonstrated that the size determinations are clearly erroneous. Accordingly, the appeals are DENIED, and the size determinations are AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge