

A Cautionary Tale for Small and Large Businesses in a Mentor-Protégé Relationship: Size Appeal Of Kisan-Pike

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On November 24, 2014 the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) found that a mentor-protégé joint venture agreement between Kisan Engineering Company P.C. (“Kisan”), a small 8(a) business, and The Pike Company Inc. (“Pike”), its large business mentor, caused the joint venture to lose its status as a small business. As a result, the joint venture was not qualified to receive a contract award on a procurement reserved for small businesses. OHA disqualified the mentor-protégé joint venture despite the fact that the SBA had approved the Kisan-Pike mentor-protégé agreement, through which Pike was to mentor Kisan.

This decision serves to remind small and large businesses engaging in mentor-protégé relationships that the approval of a mentor-protégé agreement by the SBA does not create a safety net for the mentor-protégé joint venture formed to submit qualifying small business bids and proposals. The joint venture agreement itself must meet the separate requirements of 13 C.F.R. §§124.513(c) and (d), with specificity.

In a design-build construction procurement set aside entirely for small businesses, Kisan-Pike, the mentor-protégé joint venture, certified that it was a small business in its proposal and was selected for award. The contracting officer soon initiated a size protest against Kisan-Pike out of concern that Kisan-Pike’s joint venture agreement did not comply with SBA regulations §§124.513(c) and (d), which define mandatory requirements for mentor-protégé joint ventures that may perform set aside contracts as a small business. Mentor-protégé joint ventures that do not comply with these regulations are disqualified, typically because the small business protégé is found to be affiliated (directly or indirectly controlled)¹ with the large business, and like Kisan-Pike here the joint venture is ineligible for award.

¹ See §121.103(a)

The SBA Area Office found Kisan and Pike to be affiliated despite their SBA-approved mentor-protégé agreement.² The Area Office explained that there is generally a presumption that companies engaged in joint ventures are affiliated with one another.³ This presumption is overcome by mentor-protégé joint ventures only when the joint venture agreement complies with the applicable regulations, §§124.513(c) and (d) (the “JV Requirements”), or, in the case of 8(a) procurements, where the joint venture agreement has been pre-approved for such compliance by the SBA. The Area Office determined that the Kisan-Pike joint venture agreement failed to meet these requirements and the joint venture was disqualified from award on the ground that the two companies were affiliated.

The JV Requirements are very specific, and the joint venture agreement must be equally specific. First, the joint venture agreement must itemize all major equipment, facilities, and other resources to be furnished by each party to the joint venture, and provide a detailed schedule of cost or value of each.⁴ Second, the joint venture agreement must specify the responsibilities of the parties with regard to the negotiation of the contract, the source of labor, and contract performance.⁵ Finally, the agreement must specify how any 8(a) partner(s) to the joint venture will perform at least 40 percent of the work, and ensure that such work will consist of more than administrative and ministerial functions.⁶

The Kisan-Pike joint venture agreement failed to meet these requirements. First, the agreement contained only a single sentence addressing the resources to be provided by each party. The agreement provided only that “upon award of the Contract, Kisan and Pike will provide equipment, facilities and other resources to the Joint Venture required to execute the contract.”⁷ Kisan-Pike argued that because of the procurement was for a design-build contract, it was not possible for Kisan-Pike to provide any more specificity. The Area Office rejected this argument, pointing to the more detailed drawings and specifications found in Kisan-Pike’s proposal. The agreement also failed to specify the allocation of contract work between the parties specifically. The joint venture agreement provided only that the joint venture would provide at least 50 percent of the non-construction work and 15 percent of the construction labor costs. The Area Office found this to be insufficient. Finally, the Area Office found that the joint venture agreement failed to specify how the 8(a) partner would perform at least 40 percent of the contract work because it made only “broad” and “generic” statements on this point, and failed to present a “constructive plan”.

On appeal, OHA affirmed all the findings of the Area Office.⁸ OHA found that the Area Office’s determination was proper because it did not find affiliation based on the existence of the mentor-protégé joint venture agreement itself, but rather because the joint venture did not overcome the presumption that joint venture partners are affiliated. The joint venture agreement, itself, did not comply with the mandatory requirements of the applicable regulations.

The OHA decision is significant, in part because of its clarity. This decision leaves no doubt that mentor-protégé joint venture agreements, on their face, must strictly comply with the requirements of 13 C.F.R. §124.513(c) when the joint venture is pursuing any contract as a small business, and that strict compliance with 13 C.F.R. §124.513 (d) is also required when the protégé is an 8(a) company. To determine this compliance, it must be expected that both the Area Office and OHA will undertake a substantive analysis, even reviewing, as here, the joint venture’s competitive proposal to determine whether it could have



² See *Kisan-Pike, A Joint Venture*, Size Determination No. 01-SD-2014-44, at 2.

³ See §121.103(h).

⁴ §124.513(c)(6).

⁵ §124.513(c)(7).

⁶ §124.513(d).

⁷ See Size Determination at 4, quoting Agreement § 5.0.

⁸ See Size Appeal at 8.

included more detail in its joint venture agreement. Finally, as OHA succinctly explains, the regulations are clear that the existence of an SBA-approved mentor-protégé agreement is not sufficient to defeat a finding of affiliation if the joint venture agreement does not also fully comply with applicable regulations.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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