Cite as: *Size Appeal of DynaLantic Corporation,* SBA No. SIZ-5125 (2010)

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United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
DynaLantic Corporation	SBA No. SIZ-5125
Appellant	Decided: April 22, 2010
RE: Fidelity Technologies Corporation	
Solicitation No. W900KK-09-R-0042 United States Army Orlando, FL	

DECISION

I. Introduction & Jurisdiction

On February 26, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination Nos. 2-2010-24 & 25 (Size Determination) finding Fidelity Technologies Corporation (Fidelity) to be a small business. The Area Office determined DynaLantic Corporation's (Appellant) protest of Fidelity's size lacked merit. For the reasons discussed below, the Size Determination is vacated and remanded.

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. Appellant filed the instant appeal within fifteen days of receiving the Size Determination.[1] Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Issues

Did the Area Office determine Fidelity's size on the correct date? 13 C.F.R. § 121.404.

Did the Area Office make a clear error when it found no violation of the nonmanufacturer rule by Fidelity? 13 C.F.R. § 121.406.

[1] The Record indicates Appellant received the Size Determination on March 1, 2010. Appellant filed its appeal on March 16, 2010.

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Did the Area Office make a clear error in calculating Fidelity's employees? 13 C.F.R. § 121.106(a).

Did the Area Office make a clear error when it found no identity of interest affiliation between Fidelity, [JKL], and [MNO]? 13 C.F.R. § 121.103(f).

Does OHA decide Limitation of Subcontracting issues?

Did the Area Office fail to identify an obvious affiliation issue?

III. Background

A. Facts

1. On May 7, 2009, the Contracting Officer (CO) for the U.S. Department the Army, PEO STRI Acquisition Center (Army) issued Solicitation No. W900KK-09-R-0042 (RFP), seeking a commercial off-the-shelf (COTS) MI-17 counter terrorism (CT) flight training device (FTD) for the Iraq Flight Simulator Program (COTS MI-17 CT FTD). The Record indicates the complete COTS MI-17 CT FTD is not available on a COTS basis in the United States (or anywhere else) because of the CT requirement. The Record also indicates no one manufactures the main COTS MI-17 FTD in the United States.[2] Per the RFP, the only substantive difference between the COTS MI-17 FTD and what the successful offeror would have to provide is the CT capability.

2. The RFP was a total small business set-aside, and the CO designated North American Industry Classification System (NAICS) code 333319, Other Commercial and Service Industry Machinery Manufacturing, with a corresponding size standard of 500 employees.

3. Initial offers were due on June 12, 2009. Thereafter, the CO twice requested that offerors extend the validity date of their proposals.

4. Fidelity's proposal provides:

a. It will team or partner with [ABC, a foreign company], as the primary subcontractor source for the commercial MI-17 FTD. (Proposal, Vol. I, at 1.) In other words, Fidelity will buy the basic MI-17 FTD from [ABC]. (Proposal, Vol. I, at 2.) [ABC] has the experience and relevant past performance relative to the design, development, fabrication, installation, and support of MI-17 FTDs (including spares for this effort). [ABC] has manufactured and delivered MI-17 FTDs to a wide range of customers and possesses the flight performance data necessary to replicate MI-17 flight and instrument performance envelopes. (Proposal, Vol. I, at 1.) Fidelity will ship the completed MI-17 CT FTD from the United States to [ABC (in a foreign country)] for final testing, systems validation, customer inspection and

[2] This suggests the contract vehicle and requirements are at variance with the facts. However, whether the RFP should have been a FAR 12 vehicle is not within our purview.

acceptance before delivery to Iraq. (Proposal, Vol. III, at 44.)

b. Due to the export controlled nature of the ARINC Preliminary Design Review Data for the CT capability, it will hire [DEF Company] as an additional subcontractor. [DEF] is an experienced helicopter simulator manufacturer and has the ability to fabricate the cockpit modifications from the ARINC data. (Proposal, Vol. I, at 1.)

c. The combination of Fidelity and [ABC] is a low risk solution to the RFP. Fidelity possesses both the expertise relative to the management and technical schedule performance on U.S. Army contracts along with the expertise in training system development and training system database modification and updates. [ABC] possesses a commercially-accepted and marketed MI-17 FTD with a good record of success. In addition, [ABC] knows the MI-17 helicopter. (Proposal, Vol. I, at 1.)

d. Fidelity will manage the contract and provide oversight to [ABC] to ensure the modifications necessary to bring the commercial product up to the CT configuration required by the Army are executed and documented. (Proposal, Vol. I, at 2.)

5. On November 20, 2009, the CO awarded the contract to Fidelity.

6. On November 24, 2009, Appellant filed a protest of Fidelity's size with the CO. Appellant provided supplemental information on November 30, 2009, December 2, 2009, and December 11, 2009. A second size protest was filed by RAD Engineering and Design, Inc. (RAD), which was consolidated for decision with Appellant's protest.

7. On December 7, 2009, the Area Office informed Fidelity of Appellant's protest and furnished a copy of the protest to Fidelity. On December 16, 2009, the Area Office forwarded the RAD protest and Appellant's supplemental information to Fidelity. On December 22, 2009, Fidelity responded to the protest and provided the documentation requested by the Area Office, including a completed SBA Form 355.

8. [Owner 1] founded Fidelity and was at one time its CEO. In 2004, he sold [XX]% of his interest in Fidelity to [GHI Company]. According to Fidelity's Form 355, [Owner 2], [Owner 3], and [Owner 4], [Owner 1's] sons, each own [XX]% of [GHI]. Each of these three are directors of Fidelity, and [Owner 2] and [Owner 3] are also officers (President and Vice President/Treasurer, respectively), along with [XXXXXXXX] (Secretary). Fidelity is an experienced manufacturer of simulators and operates a plant in Pennsylvania.

9. [Owner 1] also owns [JKL Company] and [MNO Company]. Although Appellant raised the issue of Fidelity's possible affiliation with these concerns, details concerning their ownership and affiliation are not apparent in the Record.

10. In response to Appellant's protest, Fidelity contended the COTS MI-17 FTD that it will buy from a foreign manufacturer constitutes [XX]% of the cost of its effort, the center console

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[XX]%, and that its CT conversion costs [XX]%.[3] Fidelity explains that much of its CT conversion costs will be generated by the integration of software it will develop. That is, Fidelity claims it will develop application software code and integrate huge quantities of data (some government furnished, some COTS, and some that is proprietary to ARINC). Next , Fidelity will perform necessary pre-integration software validation and debugging. Fidelity will supply its own engineering, software development, and integration expertise. Fidelity will accomplish all of the work, except installation, acceptance testing, and warranty services, in Pennsylvania. Fidelity's subcontractor, [ABC], will conduct final testing, systems validation, customer inspection, and acceptance in [a foreign country].

B. The Size Determination

On February 26, 2010, the Area Office issued its Size Determination finding Fidelity to be a small business for the applicable size standard. The Area Office began with a recitation of the facts and evidence. The Area Office went on to determine that, contrary to Appellant's assertions, Fidelity's average number of employees did not exceed 500 over the twelve months preceding the Size Determination, Fidelity is not affiliated with [JKL] or [MNO]through an identity of interest, and Fidelity is in compliance with the nonmanufacturer rule.

The Area Office first rejected Appellant's argument that the date on which to determine size is January 15, 2010. The Area Office explained 13 C.F.R. § 121.404(a) provides that size must be determined as of the date the concern submits its self-certification as part of its initial offer including price. Here, the date of initial offers was June 12, 2009. 13 C.F.R. § 121.404(a) also provides that when an agency modifies a solicitation so that offers become nonresponsive, a concern must recertify at the time it submits a new, responsive offer. Thus, Appellant argued that here, Fidelity's size should be determined as of the most recent date the CO requested that offerors extend the date of validity of their proposals. The Area Office found that the CO had merely requested confirmation from offerors that their proposals were still valid because the time period for validity under the solicitation had expired. The CO did not issue any modifications or change the solicitation so that offers became nonresponsive. Thus, the Area Office concluded the correct date to determine size was the date of Fidelity's initial offer including price: June 12, 2009. (Size Determination 5.)

The Area Office next addressed Appellant's assertion that Fidelity has in excess of 500 employees. 13 C.F.R. § 121.106(b)(1) provides that the average number of employees is to be determined by the "numbers of employees for each of the pay periods for the preceding completed 12 calendar months." The Area Office explained that all employees, including part-time and temporary, are included in this calculation. 13 C.F.R. § 121.106(b)(2); *Size Appeal of Keystone Ocean Servs., Inc.*, SBA No. SIZ-4712 (2005); *Size Appeal of Orange Cove-Sanger Citrus Assoc.*, SBA No. SIZ-4377 (1999). The Area Office found that for certain payroll periods within the preceding twelve months, Fidelity did have more than 500 employees. Nevertheless, the Area Office also found that the average number of all employees over the preceding twelve

[3] These were the figures calculated by the Area Office based on the information submitted by Fidelity.

months was less than 500. (Size Determination 6-7.)

The Area Office then discussed the alleged identity of interest between Fidelity and [JKL] and [MNO], drawing on its initial findings of fact. [Owner 1] founded Fidelity and was at one time its CEO. In 2004, he sold [XX]% of his interest in Fidelity to [GHI]. His three sons, [Owner 2], [Owner 3], and [Owner 4], each own [XX]% of [GHI]. Each of these three are directors of Fidelity, and [Owner 2] and [Owner 3] are also officers. [Owner 1] has had no affiliation with Fidelity since 2004, but now owns and controls both [JKL] and [MNO]. [JKL] provides personal safety monitoring devices and services, and [MNO] is a restaurant and banquet facility. (Size Determination 2-3, 7.)

The Area Office noted that the identity of interest regulation creates a rebuttable presumption that family members share an identity of interest. This presumption may be rebutted by showing a clear fracture between the firms at issue—*i.e.*, that the family members are estranged or that there is a lack of close involvement in business matters. *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295 (1998); *Size Appeal of Maria Elena Torano & Assocs.*, SBA No. SIZ-4010 (1995); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984). The Area Office determined that Fidelity, [JKL], and [MNO] are in different lines of business and do not share owners, officers, directors, or employees. There is no evidence that the firms share equipment or facilities or that they subcontract work to each other. The only evidence of a contractual relationship is an arms-length lease between Fidelity and [JKL]. Based on this evidence, the Area Office concluded that Fidelity established a clear fracture between Fidelity, [JKL], and [MNO], and the firms are not affiliated. (Size Determination 8.)

Finally, the Area Office rejects Appellant's contention that Fidelity is not in compliance with the nonmanufacturer rule (13 C.F.R. § 121.406(b)), instead concluding that Fidelity is the manufacturer of the end item being produced. The nonmanufacturer rule mandates that if a firm is not the manufacturer of the end item being produced, it is only eligible to provide that item if it meets certain criteria—*i.e.*, it does not exceed 500 employees, it is primarily engaged in wholesale or retail trade and normally sells the item needed, and it will supply the end item of a small business manufacturer. The Area Office explained that the challenge in this case is that the solicitation called for a commercial off-the-shelf item (COTS MI-17 FTD), which should be ready for use and available to the public, but the solicitation also called for modifications to that COTS item (COTS MI-17 CT FTD). (Size Determination 8-12.)

The Area Office set forth the process by which Fidelity would transform the COTS MI-17 FTD into a COTS MI-17 CT FTD: Fidelity obtains the COTS MI-17 FTD from a foreign firm; Fidelity obtains a new CT center console from a small business manufacturer and installs it in the COTS MI-17 FTD; Fidelity installs the visual system; Fidelity obtains the technical data package; and Fidelity installs the software and integrates the system. In light of this process, the Area Office stated that it gave extensive consideration to whether the COTS MI-17 FTD is a component of the end item. *See Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723 (2005); *Size Appeal of Nordic Sensor Techs., Inc.*, SBA No. SIZ-4373; *Size Appeal of Pileco, Inc.*, SBA No. SIZ-3686 (1992). The Area Office explained that if the COTS MI-17

FTD is considered a component, Fidelity would be the manufacturer of the end item. (Size Determination 12-13.)

The Area Office noted that it does not have a complete breakdown of parts and labor costs. It is clear, however [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXX]. Despite the fact that Fidelity is [XXXXXXXXXXXXXXXXXXX] the Area Office determined that "the portion it is providing is the most valued to the Army." Relying on *Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447 (2001), the Area Office concludes that Fidelity is the manufacturer of the end item because it is providing the portion of the manufacturing process that is most valuable to the Army—*i.e.*, the work that actually transforms the COTS MI-17 FTD into a COTS MI-17 CT FTD. Accordingly, the COTS MI-17 FTD is a component of the end item, Fidelity is the manufacturer of the end item, and the nonmanufacturer rule does not apply here. (Size Determination 13.)

Because Fidelity's average number of employees did not exceed 500 over the twelve months preceding the Size Determination, because Fidelity does not share an identity of interest with [JKL] or [MNO], and because Fidelity is the manufacturer of the end item sought under the solicitation, the Area Office concluded that Fidelity is small for this procurement.

C. The Appeal

On March 16, 2010, Appellant filed its Appeal Petition with OHA. Appellant first argues that the date on which Fidelity's size should have been determined was October 27, 2009. Although initial proposals were due June 12, 2009, the RFP indicated that proposals were only valid for 180 days. Because that period expired before the CO had evaluated the proposals and chosen an awardee, the CO twice requested that offerors extend the validity dates of their proposals. The most recent extension of validity request was made on October 27, 2009. Appellant argues that the request for extension of validity was a "fundamental change to the solicitation" under 13 C.F.R. § 121.404(a). Appellant contends that when a firm agrees to a request to extend validity, it resubmits its proposal on new terms. Appellant states that "pricing is based upon the time of performance of the effort. The costs of labor material, subcontracts and every element of the proposal depend upon the time for performance." Therefore, Appellant argues, extending the date of proposals is an essential modification to the RFP requiring recertification. Appellant cites *Size Appeal of Channel Logistics, LLC*, SIZ-5019 (2008) and *Size Appeal of STG International*, SIZ-4808 (2006) for support. (Appeal Petition 3-4.)

Appellant next alleges the Area Office erred in determining there is no identity of interest between Fidelity and [JKL]. Appellant's primary contention is that [JKL] did not "spring anew" independent from Fidelity. Instead, Appellant contends [JKL'S] personal monitoring and services business was formerly a branch of Fidelity, namely Fidelity TeleAlarm, LLC (TeleAlarm). Appellant explains that TeleAlarm and its related companies manufactured and distributed medical monitoring devices and services. (Appellant offers documentary evidence in support of its argument.) Subsequently, in 2007, TeleAlarm acquired [JKL] and changed its name. Appellant also alleges TeleAlarm was part of Fidelity beyond 2004 when [Owner 1] sold

his interest in Fidelity to [GHI]. Appellant asserts [JKL] was created under the Fidelity umbrella, and this type of immediate family ownership structure is precisely what the identity of interest rule is meant to prevent. (Appeal Petition 5-6.)

Appellant goes on to dispute the Area Office's finding that Fidelity is the manufacturer of the COTS MI-17 CT FTD. Appellant points out that the Statement of Work in the RFP indicates that the COTS MI-17 FTD must be delivered with "little or no design changes." (RFP Statement of Work.) Appellant claims Fidelity is providing neither the COTS MI-17 FTD nor the CT center console module, the only required addition to the COTS MI-17 FTD. "[Fidelity]'s sole role in the manufacturing process was integrating these 2 items wholly manufactured by other concerns." (Appeal Petition 6-7.)

Appellant also challenges the Area Office's determination that the COTS MI-17 FTD is a component of the end product. Appellant explains that the COTS MI-17 FTD is already a fully functioning flight training device and that the counter-terrorism version of the COTS MI-17 FTD requires the additional center console. Thus, Appellant concludes "[t]he center console is a component of the entire device; the MI-17 FTD is not a component of the center console." (Appeal Petition 7.)

Furthermore, Appellant claims the Area Office erroneously adopted Fidelity's claim that the integration of the CT center console into the COTS MI-17 FTD represents the most important work required under the solicitation. Appellant asserts this is "blatant error" that "stands the whole premise of the 'Commercial' procurement on its head." Appellant notes the solicitation requires only limited modification of the MI-17 FTD—the CT center console is added to a fully functioning FTD—and that the FAR defines a commercial product as one with only minor modifications to meet government needs. Accordingly, Appellant argues, "by the very terms of the Solicitation and the FAR the center console was 'minor' relative to the essential and intact nature of the COTS MI-17 FTD." The Army is attempting to procure a flight training device, and the COTS MI-17 is a flight training device. The integration of the center console is merely a minor modification. Thus, upon review of the RFP and the FAR, one cannot conclude that Fidelity's integration of the center console is the work most valuable to the Army. Appellant also argues the Area Office's reliance on the *Nordic Sensor Technologies, Inc.* and *Virtual Media Integration* cases is misplaced because those cases are factually dissimilar to the instant case. Appellant concludes the Area Office's finding that Fidelity will perform the most important work required by the RFP is baseless. (Appeal Petition 7-9.)

Appellant then alleges Fidelity has violated the limitation on subcontracting clause (13 C.F.R. § 125.6(a)(2)), which requires that, for small business set-aside procurements, the prime contractor must perform at least 50% of the cost of manufacturing the product. Appellant notes the Area Office did not directly address this issue, but did indicate that Fidelity would contribute only [XX]% of the cost. Appellant concludes this strongly suggests noncompliance with the limitation on subcontracting clause. (Appeal Petition 9-10.)

Finally, Appellant challenges the Area Office's conclusion that Fidelity's average number of employees over the twelve months prior to the Size Determination does not exceed

500. Appellant explains that it does not have access to the Record to verify these numbers, but given that the Size Determination indicates Fidelity admitted having over 600 employees at times during the relevant period, the conclusion is suspicious. Appellant requests that OHA carefully review the payroll records of Fidelity, [JKL], and any other affiliates to ensure the accuracy of this conclusion. Appellant also requests that OHA reverse or remand the Size Determination. (Appeal Petition 10-11.)

D. Fidelity's Response

On April 2, 2010, Fidelity filed its Response to the Appeal Petition. Fidelity argues the Appellant's two principal contentions—(1) Fidelity exceeds the size standard and (2) Fidelity's approach to fulfilling the solicitation requirements violates SBA regulations—have already been properly decided. Fidelity contends the Area Office correctly determined that it is a small business, and OHA should deny Appellant's appeal. (Response 1-2.)

First, Fidelity addresses Appellant's arguments regarding its size. With regard to Appellant's assertion that Fidelity's number of employees exceeds the size standard, Fidelity argues Appellant's claims are mere speculation. Appellant only claims that the fluctuation in employee numbers is unusual, but offers no evidence that the Area Office erred in its calculations. Fidelity also rejects the assertion that its size should have been determined as of the date it agreed to extend the validity of its proposal. Instead, Fidelity urges OHA to affirm the Size Determination's finding that size was to be determined as of the date of initial offers because the validity request did not change the scope of the solicitation so as to make the initial offers nonresponsive. Additionally, Fidelity asserts the Area Office properly decided the issue of affiliation with [JKL] and [MNO] because there is a clear fracture between the entities. Fidelity contends Appellant does nothing more in its Appeal Petition than reiterate the factual contentions previously rejected by the Area Office. (Response 2-3.)

Second, Fidelity rejects Appellant's challenge to its approach to the solicitation—acquisition of a COTS simulator with modifications to meet the Army's needs. Fidelity asserts Appellant merely argues in favor of its own approach—acquisition of a data package and manufacture of the simulator. However, Fidelity points out that both "[t]he [CO], the SBA, and the GAO all endorsed Fidelity's approach as both technically superior and legally proper." Fidelity contends the Area Office accurately determined that Fidelity is the manufacturer of the end item in this case. Furthermore, "dressing up the same arguments as a challenge to Fidelity's compliance with the Limitation upon Subcontracting clause" is not effective. The clause provides that the primary contractor must perform at least 50% of the cost of manufacturing and supplies, not including the cost of materials. Because the fully-configured simulator is the end product here, the COTS MI-17 FTD is a material that should not be considered in the cost computation. For these reasons, Fidelity requests that OHA deny the appeal and affirm the Size Determination. (Response 3-4.)

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IV. Analysis

A. Standard of Review

The standard of review for this appeal is whether the Area Office based the Size Determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the Record to determine whether the Area Office made a patent error of fact or law based on the Record before it. Consequently, I may not disturb the Area Office's size determination unless I have a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. Merits

1. The Correct Date to Determine Size

The Area Office found that June 12, 2009, was the correct date to determine Fidelity's size pursuant to 13 C.F.R. § 121.404(a). Appellant now alleges, pursuant to 13 C.F.R. § 121.404(a), the correct date to determine size is October 27, 2009. I have determined that the Area Office correctly used June 12, 2009, as the date to determine size for the purpose of the identity of interest and employee size standard analyses. I have also determined that the complexity of this case requires the application of another regulation (13 C.F.R. § 121.404(d)) in calculating the date to determine size with regard to the remaining issues. Because I am remanding this case, I will lay out each standard in some detail.

The Area Office found offers under the RFP were due on June 12, 2009, in accordance with Amendment 0001 to the RFP.[4] Appellant indicates that the CO twice requested that offerors extend the validity date of their proposals. Appellant contends this extension was a "fundamental change to the solicitation" under 13 C.F.R. § 121.404(a), and cites *Size Appeal of Channel Logistics, LLC*, SBA No. SIZ-5019 (2008), and *Size Appeal of Continental Staffing, Inc.*, SBA No. SIZ-4808 (2006), to support its position.

Appellant's reliance is misplaced. First, the *Channel Logistics* case is inapplicable to this matter. It is a very short denial of an appeal in which the appellant claimed the Area Office used the wrong date to determine size because an amendment dictated that "offers submitted prior to

[4] The Record is insufficient to determine when Fidelity actually submitted its proposal. The proposal itself is dated May 28, 2009, but there is no accompanying Form 1442 indicating when the proposal was finally submitted. I find that even if the proposal was submitted on May 28, 2009, the Area Office's use of June 12, 2009, as the date to determine size was harmless error. Appellant argues the use of a later date may have rendered Fidelity other than small under the applicable size standard. There is no contention that use of a date two weeks prior to the date actually used would alter the conclusion reached by the Area Office.

the extended due date were not eligible for consideration." OHA agreed with the appellant, but denied the appeal because the error was harmless. Here, there was no such amendment and no such proclamation that previous offers would become nonresponsive. Second, *Continental Staffing* is irrelevant because the facts are entirely dissimilar to the facts at hand.[5] In *Continental Staffing*, (1) the Navy CO admitted the offers were no longer responsive; (2) the CO issued substantive changes to the RFP and solicited revised proposals; and (3) the relevant offeror revised 172 of the 254 CLINs and increased its offer by more than $ 2 million. These are clearly fundamental changes to the solicitation.

In contrast to these cases, I find the CO's request to offerors to extend the validity date of their proposals was not a fundamental change to the RFP, and it did not render proposals nonresponsive. Even though the CO did ask the offerors to extend the expiration date of their proposals, the CO did not amend the RFP or otherwise change the scope of the RFP. Thus, no offeror needed to re-price its offer or otherwise change the terms of the offer to continue to be responsive to the RFP after June 12, 2009. Hence, consistent with13 C.F.R. § 121.404(a), there is no need for any offeror under the RFP to recertify its size after June 12, 2009, and June 12, 2009, remains the correct date for the Area Office to determine Fidelity's size with regard to the issues of identity of interest and average employee calculation.

With regard to the nonmanufacturer rule and the ostensible subcontractor rule (*see infra* Part IV.B.6), 13 C.F.R. § 121.404(d) controls when size should be determined. 13 C.F.R. § 121.404(d) provides that size must be determined "as of the date of the final proposal revision." Thus, in order to determine the date on which size should be determined for the nonmanufacturer and ostensible subcontractor issues, the Area Office must first determine the date of "final proposal revision." Obviously, § 121.404(d) offers a much different standard than that applied by § 121.404(a). Whereas § 121.404(a) by default determines size as of the earliest date possible (initial offers), § 121.404(d) seemingly aims to use the latest date possible by indicating that the date of the most recent "proposal revision"—a very broad term—should be used to determine size.

Because 13 C.F.R. § 121.404(d) requires the Area Office to determine size as of the final proposal revision (only with regard to the nonmanufacturer and ostensible subcontractor issues), on remand the Area Office must fix with certainty, based upon reliable documentary evidence, when Appellant last revised its proposal. To accomplish this, the Area Office should expand the Record to include Fidelity's entire proposal, including the cost volume and any revisions subsequent to the initial proposal. The Area Office should also address the documentation in the Record regarding the manner in which the CO requested that offerors extend the validity date of their proposals and how Fidelity responded to those requests.[6] This additional documentation

[5] Appellant incorrectly cited the appeal as *Size Appeal of STG International*, SIZ-4808 (2006). Although the appeal involved STG, the Appellant was Continental Staffing, Inc.

[6] The Record includes: (1) a letter dated October 6, 2009, in which the CO requests that Fidelity extend its proposal's validity date to October 31, 2009; (2) an email dated October 7, 2009, from Ms. Sandi Noll, apparently an employee of Fidelity, to the Contract Specialist

should enable the Area Office to finally determine whether Fidelity's extension of the expiration date of its offer is a proposal revision.

2. The Nonmanufacturer Rule

In order to qualify as a small business for a manufacturing set-aside contract, an offeror must either be the manufacturer of the end item or meet the requirements of the nonmanufacturer rule. 13 C.F.R. § 121.406(a). Here, the Area Office concluded Fidelity is the end-item manufacturer, so it did not apply the nonmanufacturer rule. Appellant disputes this conclusion.

Pursuant to 13 C.F.R. § 121.406(a)(1), the Area Office first determined that the MI-17 CT FTD provided by Fidelity is an end item that Fidelity will manufacture it in the United States. When determining whether a concern is the manufacturer of the end item an area office must, per 13 C.F.R. § 121.406(b)(2)(i)(A), (B), and (C), evaluate: (1) the proportion of the total value in the end item added by the efforts of the concern; (2) the importance of the elements added by the concern to the function of the end item, regardless of their relative value; and (3) the concern's technical capabilities, such as its plant, facilities and equipment, etc.

Within its analysis of whether Fidelity is the end-item manufacturer of the MI-17 CT FTD, the Area Office explicitly states: "It is noted that the Area Office was only provided estimated costs for each segment of the assembly process. A complete formal breakdown was not provided that listed parts and labor at each manufacturing process." Consistent with this statement, Fidelity's cost proposal is not in the Record. Therefore, it would have been impossible for the Area Office to properly evaluate "the proportion of the total value in the end item added by the efforts of the concern," as required by the regulation. Nonetheless, the Area Office determined that the COTS MI-17 FTD constitutes approximately [XX]% of the end-item cost, the center console constitutes approximately [XX]% of the cost, and Fidelity is contributing approximately [XX]% of the cost. It is not entirely clear from the Record how the Area Office calculated these figures. In any case, it is clear that the only way to appropriately assess the proportion of the total value in the end item added by Fidelity is by evaluating Fidelity's cost proposal, which is not in the Record.

Furthermore, I find the Size Determination lacks adequate explanation as to what manufacturing work will be performed by Fidelity. According to Fidelity's proposal, Fidelity will:

(1) Buy, from a foreign manufacturer, a COTS MI-17 FTD, which makes up at least [XX]% of the cost of the final MI-17 CT FTD according to Fidelity (Facts 1, 4, and 10.); and

(2) Buy, from [DEF], a new center console and then take the simulator, remove the

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confirming Fidelity's extension of its proposal; (3) a letter dated October 27, 2009, in which the CO requests that Fidelity extend its proposal's validity date to January 15, 2010; and (4) an email dated October 28, 2009, from Ms. Noll to the Contract Specialist confirming Fidelity's extension of its proposal.

existing console, install the new console, integrate the software it will develop, integrate the database it will receive, and debug and validate the software and data (Facts 4 and 10). At this point, what had been a MI-17 FTD will become a MI-17 CT FTD; and

(3) Ship the MI-17 CT FTD to [ABC, in a foreign country] where [ABC] will conduct final testing and systems validation before delivery to Iraq.

From this, it is clear that [ABC] is manufacturing the MI-17 FTD and that [DEF] is manufacturing the CT center console. It is unclear what Fidelity will manufacture. I understand that Fidelity is adapting the existing MI-17 FTD to contain the Army's CT requirement. I understand that the Area Office found the value of Fidelity's effort in integrating the CT center console into the existing MI-17 FTD would be significant and transformative. That is, the end item (the MI-17 CT FTD) would be different from what currently exists. Nonetheless, it appears the MI-17 FTD is still the focus, both from a cost and a functional standpoint, of what Fidelity proposed.

Because the Area Office failed to properly analyze the value of Fidelity's contribution to the end-item and failed to adequately explain what Fidelity will manufacture, I must remand this issue for further consideration. Upon remand, the Area Office must obtain Fidelity's cost proposal to accurately evaluate the proportion of the total value in the end item added by Fidelity and the importance of the elements added by Fidelity to the function of the end item.

3. Employee Count

NAICS code 333319, Other Commercial and Service Industry Machinery Manufacturing, utilizes a size standard of 500 employees. 13 C.F.R. § 121.201. In calculating a concern's number of employees, SBA takes the average number of employees the firm has employed for each of the pay periods during the preceding twelve calendar months. 13 C.F.R. § 121.106(b)(1). As per 13 C.F.R. § 121.106(a), SBA includes *all* individuals—whether employed on a full-time, part-time, or other basis—when determining a concern's number of employees. Here, the date of initial offers was June 12, 2009. Accordingly, as discussed above, the Area Office properly determined Fidelity's size as of June 12, 2009, and calculated Fidelity's employee count from the twelve months preceding that date.

The Record of this case contains Fidelity's bi-weekly payroll summaries for the twelve months preceding June 12, 2009. In addition, Fidelity prepared a summary of its "Active Employee Count" for each two week pay period, added these numbers together, and derived an average employee count of [XXX] employees for the twelve months preceding June 12, 2009.

Unfortunately, there is nothing in the Size Determination analyzing Fidelity's methodology for counting its employees by pay period. In each payroll summary there are employee counts for "All Employees," "Active Employees," "New Hires," and "Changes." Fidelity used only the "Active Employees" to determine the average employee count. There is no explanation in the Size Determination or the Record indicating why the Area Office accepted

Fidelity's Active Employee Count as correct.

The absence of discussion on this point is significant and clearly erroneous. Because 13 C.F.R. § 121.106(a) requires the Area Office to count all employees when calculating a firm's average employees, the Area Office should have explained why it used the "Active Employee" count rather than the "All Employee" count from Fidelity's payroll summaries. Attached to Fidelity's response to the protest is a declaration of [Owner 2], Fidelity's President. The declaration indicates that "All Employees" represents "'all employees employed by Fidelity during the twelve month calendar year. . . . [A]ll employees is the total of active employees actually working for Fidelity and former employees that left the company during the calendar year." Because the Area Office did not explain its reasoning for accepting Fidelity's numbers, I can only guess that the Area Office accepted this justification. A guess that the Area Office relied upon a self-serving declaration is an insufficient basis upon which to affirm the Area Office's findings on this issue.

Furthermore, there are irregularities in Fidelity's numbers that the Area Office failed to address. For example, on June 8, 2008, Fidelity's payroll shows [XXX] Active Employees and [XXX] All Employees, with three new hires. On August 3, 2008, Fidelity lists [XXX] Active Employees and [XXX] All Employees, with [XXX] New Hires. Yet, on August 17, 2008, Fidelity's payroll shows [XXX] Active Employees and [XXX] All Employees and still only shows [XXX] New Hires. These entries are disconcerting. It seems inexplicable (on several levels) that Fidelity can add [XXX] Active Employees in two weeks, yet only employ [XXX] New Hires. Instead, it seems possible that Fidelity had already employed many new workers before that payroll date, perhaps using some type of stand-by system. In any case, it is clear the Area Office did not thoroughly investigate the numbers offered by Fidelity. These numbers create an ambiguity that I cannot resolve and that could lead to the conclusion that Fidelity exceeds the size standard.

Based upon the foregoing, I have no choice but to remand the Size Determination to the Area Office so it may resolve the serious questions I have raised concerning how the Area Office counted Fidelity's employees. On remand, the Area Office must determine precisely how many people Fidelity employed, when it employed them, and whether basing its calculation upon the "Active Employees" count is in compliance with 13 C.F.R. § 121.106(a)'s requirement of counting all employees.

4. Identity of Interest

The Area Office found clear fracture between Fidelity, [JKL], and [MNO]. Unfortunately, there is virtually no discussion of this issue in the Size Determination. The Area Office's findings on this issue are conclusory in nature. The Area Office determined that the firms do not share owners, officers, directors, or employees, but offered no evidence to support this conclusion. The only evidence in the Record supporting these assertions is the declaration of [Owner 2], Fidelity's President. The Record does not reflect any attempt by the Area Office to obtain the stock ownership ledgers or corporate documents of [JKL] or [MNO]. The Area Office determined there is no evidence of subcontracting between the firms, but the Record does not

reflect any attempt by the Area Office to ascertain the existence of possible subcontracting. The Area Office merely stated that a clear fracture exists without supporting its conclusion. This is insufficient and constitutes clear error.

Appellant raised the issue of a potential identity of interest between Fidelity and [JKL] in its December 11, 2009, protest supplement to the Area Office. (Fact 7.) In its Appeal, Appellant expands upon the argument it raised in its December 11, 2009, letter to the Area Office and presents evidence not in the Record. The evidence Appellant provided with its appeal arguably supports the proposition that [JKL] was still a part of Fidelity until recently. If this evidence does establish what Appellant suggests it does, it would be probative (and probably compelling) evidence of a lack of clear fracture between Fidelity's ownership and [Owner 1]. Absent a lack of clear fracture, [JKL's] and [MNO's] employees must be counted with Fidelity's.

Normally, I would not permit supplementation of the Record without a motion. *See* 13 C.F.R. § 134.308. However, (1) the evidence presented by Appellant has the potential to be compelling and lead to other relevant evidence; and (2) Appellant already raised the issue with the Area Office and thus its admission will not expand the issues before me. In addition, and perhaps more importantly, I have already: (1) determined to remand this matter on other grounds; and (2) found clear error concerning this issue. Hence, I will, upon my own initiative, consider the documents submitted by Appellant with its appeal and find them to be part of the Record.

Accordingly, I must remand this issue to the Area Office as well. On remand, the Area Office should fully investigate Fidelity's possible affiliation with [MNO] and especially with [JKL]. The Area Office should require Fidelity to specifically and completely address the matters raised by Appellant, including the documents Appellant has provided with its Appeal. In addition, the Area Office should obtain from Fidelity all corporate governance documents affecting [JKL] and any of its corporate predecessors, with particular attention to *how* and *when* [JKL] became separated or disassociated from Fidelity.

5. Limitation on Subcontracting

Appellant alleges the Area Office should have considered whether Fidelity is in compliance with the Limitation on Subcontracting Clause set forth at 13 C.F.R. § 125.6(a). However, "[c]ompliance will be considered an element of responsibility and not a component of size eligibility." 13 C.F.R. § 125.6(f). Thus, OHA has no jurisdiction to consider the matter.

6. Other Issues

Based upon the excerpts from Fidelity's proposal in the Record and Fidelity's Response to Appellant's protest, I find it was clear error for the Area Office not to address a possible violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). The facts that indicate a possible violation include, for example:

(1) Fidelity refers to [ABC] as its teammate and emphasizes [ABC's] capability and

simulator expertise throughout its proposal (Fact 4.a);

(2) [ABC] is providing at least 50% of the value of the contract (Fact 10);

(3) [ABC] is providing the MI-17 FTD, which is the primary and vital requirement to the provision of the MI-17 CT FTD (Fact 4); and

(4) [ABC] is going to conduct final testing, systems validation, customer inspection and acceptance of the MI-17 CT FTD before delivery to Iraq (Facts 4.a, 10).

OHA judges do not normally raise issues *sua sponte*. However, the circumstances and posture of this appeal are unique. For example, the Area Office will already be obtaining the information it needs to decide the ostensible subcontractor issue in order to decide the other issues on remand. Perhaps more importantly, the goal of a small business set-aside is to benefit a U.S. small business, not a large manufacturer in [a foreign country]. Upon remand, the Area Office should investigate whether Fidelity violated the ostensible subcontractor rule.

V. Conclusion

Upon consideration of the Record, the Appeal Petition, and Fidelity's Response, I hold the Area Office committed numerous errors. Accordingly, the Size Determination is VACATED and the case is REMANDED for further consideration consistent with this decision.

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THOMAS B. PENDER
Administrative Judge