

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

IAP-Leopardo Construction, Inc.

Appellant

Appealed from  
Size Determination No. 4-2010-44

SBA No. SIZ-5127

Decided: April 27, 2010

APPEARANCE

Daniel J. Donohue, Esq., Husch Blackwell Sanders LLP, Washington, D.C., for Appellant.

DECISION

I. Introduction and Jurisdiction

On March 22, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area IV (Area Office), issued Size Determination No. 4-2010-44. The Area Office determined IAP-Leopardo Construction, Inc., (Appellant), was other than small for the size standard applicable to Solicitation No. W912LP-09-R-0004. For the reasons discussed below, the Size Determination is vacated and the Area Office is ordered to determine Appellant's size as of December 8, 2009 (for this procurement).

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.<sup>1</sup> Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Issue

Did the Area Office make a clear error of fact or law in investigating Appellant's size status as of the date Appellant submitted its Phase I offer on a design-build contract?

---

<sup>1</sup> The Record indicates Appellant received the Size Determination on March 1, 2010. Appellant filed its appeal on March 16, 2010.

### III. Background

#### A. Facts

On August 13, 2009, the United States Property and Fiscal Office for Iowa (USPFO) issued Solicitation No. W912LP-09-R-0004 as a Phase I Request for Proposal (RFP) for the design and construction of three Armed Forces Reserve Center (AFRC) complexes. The procurement used the two-phase design-build selection procedures authorized by FAR Subpart 36.3. One complex, the Muscatine AFRC, was set aside for small businesses. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, which has a corresponding \$33.5 million annual receipts size standard. Appellant submitted its offer, which did not include price, for the Phase I RFP on September 14, 2009.

On October 1, 2009, the USPFO issued Solicitation No. W912LP-10-R-0001 as the Phase II RFP for the Muscatine AFRC. Appellant submitted its offer for the Phase II RFP, which did include its price, on December 8, 2009.

On February 19, 2010, the CO issued notice that Appellant was the apparent successful offeror for the Muscatine AFRC. Far East Construction Corporation (FECC), one of the two other offerors on Phase II, received the CO's notice on February 22, 2010, by Federal Express delivery. On March 1, 2010, FECC filed a timely and specific size protest with the CO alleging Appellant was other than small because of affiliations with Leopardo Companies, Inc. (Leopardo), a large concern, and with other entities.

#### B. The Size Determination

On March 3, 2010, the CO forwarded the size protest to the Area Office. On March 4, 2010, the Area Office notified Appellant of the size protest and of the required submissions. On March 9, 2010, Appellant filed its response to the protest and the required documents to the Area Office. Over the next few days, Appellant answered several additional rounds of questions from the Area Office. Alleged affiliate Leopardo submitted its own documents directly to the Area Office.

On March 22, 2010, the Area Office issued Size Determination No. 4-2010-44 concluding Appellant is other than small as of its September 14, 2009 self-certification date. The Area Office determined Appellant was affiliated with: Innovative Architectural Planners, Inc. (IAPI), Appellant's majority owner; IAP-Brackett, JV, (another entity in which IAPI is the majority owner); and Leopardo, Appellant's minority owner. Although the Area Office found Appellant, by itself, does not exceed the size standard, the Area Office found that, when Appellant's receipts were combined with those of its three affiliates, Appellant does exceed the size standard.

### C. The Appeal Petition and Motions

On March 24, 2010, Appellant received the Size Determination. On April 8, 2010, Appellant filed its size appeal with OHA.

Appellant asserts the Area Office erred in concluding Appellant is affiliated with Leopardo under both the negative control and the totality of the circumstances grounds of affiliation. Appellant does not contest the Area Office's findings of affiliation with IAPI and Brackett and does not contest the Area Office's finding that Leopardo is other than small. However, with its appeal, Appellant also filed a motion to supplement the record and included the declaration of Thomas G. Banks, the President of both IAPI and Appellant, and additional documents.

On April 16, 2010, Appellant filed a motion to supplement the record, for summary decision, and for expedited review (the April 16, 2010 Motion). Attached to the April 16, 2010 Motion is a copy of OHA's "fax-back memo" wherein the CO noted that initial offers for the RFP were due on "8 Dec 09." Appellant asserts the Area Office erred in determining Appellant's size status as of September 14, 2009, the date Appellant had submitted its unpriced statement of qualifications, rather than on December 8, 2009, the date of Appellant's initial proposal that included price. Appellant asserts, had the Area Office used the correct date, the Area Office would have found Appellant to be an eligible small business.

On April 19, 2010, Appellant filed a motion to vacate Size Determination No. 4-2010-44, from which the instant appeal arose. Appellant asserts vacatur would render the instant appeal moot. Appellant attaches to its motion a copy of Size Determination No. 4-2010-52, issued by the Area Office on April 19, 2010.

In the attached Size Determination No. 4-2010-52, the Area Office first noted that its earlier determination of Appellant's size as of September 14, 2009, was erroneous and that the correct date for determining Appellant's size was December 8, 2009, the date Appellant submitted its priced offer. Next, the Area Office briefly discussed Appellant's "substantially revised Bylaws" which "have eliminated the provisions contained in the previous version that conferred negative control on Leopardo" and the shareholder resolution by which Appellant adopted the new Bylaws. The Area Office concluded that with IAPI and Brackett as its only affiliates, Appellant is a small business for NAICS code 236220.

### IV. Discussion

#### A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

### B. Standard of Review

OHA reviews a size determination to determine whether it is “based on clear error of fact or law.” 13 C.F.R. § 134.314. It is Appellant’s burden to prove the Area Office committed clear error. *Id.* A “clear error” means the position of the Area Office lacks reason or is contradicted by the evidence in the record. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). Consequently, under the clear error standard, I may overturn the size determination only if Appellant establishes the Area Office made key findings of law or fact that are mistaken.

### C. Analysis

The SBA determines the size status of a concern “as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price.” 13 C.F.R. § 121.404(a). In the case of a procurement using the two-phase design-build selection procedures authorized by FAR Subpart 36.3, size status is determined as of the date the concern submits its Phase II priced offer. *Size Appeal of Cox Construction Co.*, SBA No. SIZ-5070, at 6 (2009).

Here, Appellant submitted its priced offer on December 8, 2009. Therefore, the Area Office committed clear error in determining Appellant’s size as of its September 14, 2009 Phase I offer, which did not include price. Under these facts, I must VACATE the size determination and ORDER the Area Office to determine Appellant’s size as of December 8, 2009 for purposes of this RFP. In so ordering, I note that Size Determination No. 4-2010-52 stems from an April 13, 2010 request for recertification and thus cannot be used to replace the size determination that is the subject of this appeal for the RFP.

### III. Conclusion

Size Determination No. 4-2010-44 is VACATED. The Area Office shall issue another size determination determining Appellant’s size as of December 8, 2009.

This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

---

THOMAS B. PENDER  
Administrative Judge