United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: American Construction Co., Inc., Appellant, RE: R. E. Staite Engineering, Inc. Appealed From Size Determination No. 06-2012-125	SBA No. SIZ-5420 Decided: November 19, 2012

APPEARANCE

Steven P. Brannon, President, American Construction Co., Inc., Tacoma, Washington

DECISION

I. Introduction and Jurisdiction

This is a protestor's appeal of a size determination pertaining to R.E. Staite Engineering, Inc. (RES). On September 26, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination 6-2012-125, finding that RES is a small business under the size standard associated with Solicitation No. W912P7-12-B-0001. American Construction Co., Inc. (Appellant), which had previously protested RES's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied, and the size determination is 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 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. Background

A. Solicitation and Protest

On July 16, 2012, the U.S. Army Corps of Engineers issued Solicitation No. W912P7-12-B-0001 (IFB) seeking a contractor to perform dredging of sediment from the Richmond Inner

Harbor Channel in Contra Costa County, California. The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction. NAICS code 237990 ordinarily is associated with a size standard of $33.5 million average annual receipts, but the IFB indicated that the work fit within the exception for Dredging and Surface Cleanup Activities, which utilizes a size standard of $20 million in average annual receipts. To qualify as a small business for procurements under this exception, "a firm must perform at least 40% of the volume dredged with its own equipment or equipment owned by another small dredging concern." 13 C.F.R. § 121.201, n.2.

On August 22, 2012, RES submitted its bid, self-certifying as a small business. That same day, the CO announced that RES was the apparent awardee. Appellant filed a timely protest of RES's size, alleging that RES will use barges belonging to Dutra Dredging (Dutra), a large business, to perform the contract.[1] (Protest at 1.)

B. RES Response

On September 7, 2012, RES responded to the protest. In its response, RES explained that its bid "include[d] the use of company owned dredge barge the DB Palomar." (Response at 1.) RES represented that it has owned the DB Palomar since 1998. RES asserted that the DB Palomar's dredging capacity is 150,000 cubic yards per month, and that the DB Palomar could complete at least 40% of the dredging work on the subject procurement. RES further argued that it is ""irrelevant" whether RES will lease barges from Dutra, because the 40% requirement applies only to excavating equipment. (*Id.* at 2.) RES stated that the DB Palomar was located near San Diego, California, and would be towed to the Richmond Inner Harbor Channel for performance of the contract.

C. Size Determination

On September 26, 2012, the Area Office issued its size determination finding that RES is an eligible small business. In reaching this conclusion, the Area Office determined that the combined average annual receipts of RES and its affiliates did not exceed the $20 million size standard, and that RES would utilize its own equipment to meet the 40 percent requirement set forth at 13 C.F.R. § 121.201, n.2.

The Area Office found that Mr. Raymond Carpenter is the president and sole owner of RES and therefore has the power to control it. 13 C.F.R. § 121.103(c)(1). His sister, Ms. Katha Carpenter, is RES's vice president. The Area Office explained that the Carpenters' family relationship creates a rebuttable presumption that their business interests are substantially identical and should be aggregated. The Area Office determined, however, that the Carpenters' joint involvement with RES precludes them from rebutting the presumption. The Area Office then aggregated Raymond and Katha Carpenters' interests with those of Mr. Chad Carpenter, the

[1] Appellant also asserted that RES lacks the capability to complete the project within the required time frame. Because this allegation did not pertain to RES's size, the Area Office declined to explore it. (Size Determination at 1.)

son of Raymond Carpenter, because all three individuals have ownership interests in San Diego International Terminals, Inc. (SDIT). Together the Carpenters own 85% of SDIT.

The Area Office next explained that Raymond Carpenter also owns 100% of C-Ray, Inc. (C-Ray), Vinland Ranch, and Lemon Farm Paurna Valley (LFPV), as well as 50% of Fifth Avenue Landing, LLC (FAL).[2] Katha Carpenter also owns 100% of KSC Foundations, Inc. (KSC). Upon aggregating the Carpenters' business interests, the Area Office found that RES is affiliated with SDIT, C-Ray, Vinland Ranch, LFPV, FAL, and KSC. *Id.* § 121.103(e).

The Area Office determined that RES would perform at least 40% of the instant procurement with its own equipment or the equipment of another small dredging concern. In reaching this conclusion, the Area Office noted that RES's bid and its protest response reference the DB Palomar. The Area Office found "no indication that the equipment to be used by [RES] is connected to Dutra Dredging or any other dredging company." (Size Determination at 3.)

The Area Office examined the tax returns of RES and its affiliates for fiscal years 2011, 2010, and 2009, and determined that RES was small for the instant procurement.

D. Appeal Petition

On October 9, 2012, Appellant filed the instant appeal of the size determination. Appellant contends that the size determination is clearly erroneous and should be reversed.

Appellant's primary contention is that the Area Office misinterpreted the 40 percent rule set forth at 13 C.F.R. § 121.201, n.2. Appellant argues that, for purposes of the rule, the term "equipment" includes both excavating equipment and all other machinery (such as barges to transport excavated sediment to the disposal site) that is necessary to perform the dredging. Appellant asserts that RES violates the 40 percent rule because RES will rent barges from Dutra.

Appellant contends the regulatory history supports a broader interpretation of 13 C.F.R. § 121.201, n.2. Appellant points out that, before 1996, the rule stated, "To be considered small, a firm must perform the dredging of at least 40 percent of the yardage with its own dredging equipment or with equipment owned by another small dredging concern." (Appeal at 8, quoting predecessor regulation.) By contrast, the regulation now reads, "To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern." 13 C.F.R. § 121.201, n.2. Appellant emphasizes that, in revising the regulation, SBA removed the word "dredging" where it previously modified the word "equipment." Therefore, asserts Appellant, SBA intended to broaden the scope of the term "equipment" so as to include all machinery necessary to perform the dredging. "It is not just the excavating equipment (the dredge), but all equipment that is employed (both dredge and barge) in performing the dredging which must be included when applying the 40% rule." (Appeal at 8.)

[2] The remaining 50% of FAL is owned by Mr. Art Engle, who is not related to the Carpenter family. (Size Determination at 2.)

In the instant case, Appellant insists that barges are needed to move sediment from the dredge site to the disposal site, and that barges must therefore be considered equipment essential to the contract. Appellant argues further that even if RES were to utilize its own excavating equipment, the volume RES dredges with that equipment should not count toward the 40% requirement if RES places the dredged volume on Dutra's barges. (*Id.*)

Appellant goes on to argue that OHA's decision in *Size Appeal of Brusco Tug & Barge*, SBA No. SIZ-3692 (1992) supports the appeal. In that case, OHA determined that the challenged firm did not comply with the 40% requirement - even though the challenged firm would perform more than 40% of the dollar value of the contract - because the challenged firm would provide only towing and tugboats, whereas a large business subcontractor would provide "all operating equipment for the required dredging." *Brusco*, SBA No. SIZ-3692, at 7. Appellant maintains that *Brusco* supports the notion that barges are considered ""equipment" for purposes of 13 C.F.R. § 121.201, n.2. (Appeal at 7.)

Appellant also argues the Area Office factually erred in finding no indication that the equipment to be used by RES is connected to Dutra. Appellant contends that the Area Office had access to RES's Dredging Plant and Equipment Schedule (an attachment to RES's bid), which listed "the dump barges DS-5, DS-6, and WF-9, along with clamshell dredge DB Paula Lee," as available equipment. (*Id.* at 4.) Appellant asserts that it is well-known in the industry that Dutra owns the DS-5, DS-6, WF-9, and DB Paula Lee. Appellant goes on to argue that, according to the Schedule, RES cannot perform the contract while still abiding by the 40 percent rule.

Lastly, Appellant contends RES and Dutra are affiliated because Dutra's leasing of equipment to RES allows Dutra to control RES. Appellant argues that, because Dutra owns the majority of the equipment RES plans to use, Dutra "is in a position to dictate extremely one-sided terms ...." (*Id.* at 5.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant 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. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant's primary contention is that the Area Office misinterpreted the "40 percent

rule" set forth at 13 C.F.R. § 121.201, n.2.[3] Specifically, Appellant maintains that the 40 percent rule should apply not merely to the excavating equipment (the dredge), but also to other equipment involved in the dredging process, such as barges to transport the excavated sediment from the dredge site to the disposal site. In support of its argument, Appellant relies upon the regulatory history of the 40 percent rule and OHA's *Brusco* decision. As discussed below, Appellant's arguments are not meritorious. I rather find no reversible error in the size determination.

Appellant first observes that, in 1996, SBA altered the phrasing of the 40 percent rule, so that the rule now refers to "equipment" rather than "dredging equipment." Appellant maintains that SBA intended to broaden the meaning of the term "equipment" to include all machinery necessary to perform the dredging.

A review of the regulatory history of the 40 percent rule undermines Appellant's contention. The 1996 amendment to the 40 percent rule occurred in the context of President Clinton's Government-wide regulatory reform initiative. 61 Fed. Reg. 3280 (Jan. 31, 1996). When proposing the revision, SBA explained:

> On March 4, 1995, President Clinton issued a Memorandum to federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule would amend SBA's regulations governing its size program .... It is designed to streamline the size standards operation by simplifying and clarifying existing regulatory language and by eliminating unnecessary, irrelevant, or obsolete provisions. SBA examined the purpose of each section of the existing regulation in developing this

[3] . SBA recently invited public comments as to whether the 40 percent rule should be modified or rescinded. 77 Fed. Reg. 42,197 (July 18, 2012). SBA explained that the rule originally was intended to ensure that small dredging firms receive a significant portion of dredging projects that are set aside for small businesses. The rule has been criticized by some small dredging firms, however, on grounds that "they should be able to lease equipment from any size firm as long as employees from the small firm perform the work on the contract." *Id.* at 42,208. SBA requested comments to address:

> (1) Whether there continues to be a need to retain the current 40 percent equipment requirement; (2) whether the 40 percent equipment requirement should be revised, and if so, the rationale for an alternative percentage; and (3) whether a different and more verifiable requirement based on an alternative measure (such as value of contract or personnel involved) may achieve the same objective of ensuring that small businesses perform significant and meaningful work on Dredging contracts.

Id. Comments were due September 17, 2012. As of the date of this decision, SBA has not yet promulgated a final rule addressing the issue.

> proposal. Where appropriate, it eliminated, consolidated, or rewrote sections for ease of use and clarity. . . .
> SBA has attempted to rewrite [13 C.F.R.] Part 121 in plain English in order to make the regulations more readable and less confusing.

60 Fed. Reg. 57,982, 57,983 (Nov. 24, 1995). The proposed rule went on to state that SBA had identified eight significant changes in the proposed amendments. *Id.* The revised phrasing of the 40 percent rule was not among those eight significant changes. Instead, SBA remarked that it was proposing the 40 percent rule be "clarified to indicate that the 40 percent requirement in the footnote applies to government procurement only." *Id.* at 57,986-87.

Accordingly, although Appellant is correct that the text of the 40 percent rule was revised in 1996, I cannot conclude that SBA thereby intended to broaden the scope of the rule. Rather, it appears that the change in the wording of the 40 percent rule was cosmetic, and SBA did not envision any substantive change to the rule. It follows that the reference to "equipment" in 13 C.F.R. § 121.201, n.2 means "dredging equipment," as was expressly stated prior to 1996 in the earlier iteration of the 40 percent rule.

Appellant's argument that *Brusco* supports its position is also unavailing. In *Brusco*, the small business prime contractor provided no dredging equipment of its own; rather, it was towing the dredging equipment of its large business subcontractor to the work site. OHA explained that:

> The towing and tending tugs provided by the [prime contractor] are auxiliary equipment to be utilized in support of the dredging operation. These tug support services, such as towing barges carrying the dredged yardage between the dredging site and the dump site, do not constitute 'dredging of at least 40 percent of the yardage,' as contemplated by the regulations.

Brusco, SBA No. SIZ-3692, at 7. Thus, *Brusco* indicates that the 40 percent rule applies to equipment involved in the act of excavation. The rule does not extend to "auxiliary equipment" that is performing other functions, such as the transportation of excavated sediment from the dredge site to the disposal site.

Appellant also argues that the Area Office erred in finding "no indication" of Dutra's involvement in the subject procurement. Appellant asserts that it is common knowledge within the industry that Dutra owns the DS-5, DS-6, WF-9, and DB Paula Lee, equipment that RES listed in its bid as available for the project. RES's bid, however, does not expressly identify Dutra as the owner of this equipment, and Appellant offers no specific evidence to establish that the equipment is Dutra's. Moreover, even assuming that some of the equipment involved in contract performance may be Dutra's, it does not follow that RES would have violated the 40 percent rule. As discussed above, the rule requires that 40 percent of the equipment involved in the act of excavation be that of a small business. Here, the Area Office determined that RES owns, and plans to use for this contract, the DB Palomar, a dredge capable of performing 40 percent of the excavation. (Size Determination at 3.) The 40 percent rule does not apply to barges that transport excavated sediment to the disposal site, so it is immaterial whether those barges are owned by

Dutra.

Appellant lastly argues that RES and Dutra are affiliated because RES will rent substantial quantities of equipment from Dutra, potentially placing RES in a position "subservient" to Dutra. (Appeal at 6.) This argument, however, is advanced for the first time on appeal, and therefore is not properly before OHA. Pursuant to 13 C.F.R. § 134.316(c), OHA "will not decide substantive issues raised for the first time on appeal." *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012); *Size Appeal of David Boland, Inc.*, SBA No. SIZ-5189, at 4 (2011). Furthermore, SBA regulations provide that affiliation exists when "one [concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a). Appellant has not persuasively explained how RES's rental of Dutra equipment, on a single contract, might give Dutra the "power to control" RES.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge