United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Saint George Industries, LLC Appellant, Appealed From Size Determination No. 3-2012-116	SBA No. SIZ-5440 Decided: January 30, 2013

APPEARANCES

Patrick A. Stallings, President, Saint George Industries, LLC, Hialeah, Florida, for Appellant

Marc Lamer, Esq., Kostos and Lamer, P.C., Philadelphia, Pennsylvania, for Short Bark Industries, Inc.

Laura M. Foster, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION[1]

I. Introduction and Jurisdiction

On October 3, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2012-116 finding that Saint George Industries, LLC (Appellant) is not a small business under the size standard associated with Solicitation No. W91CRB-12-R-0050. The Area Office determined Appellant was other than small due to affiliation with Point Blank Enterprises, Inc. (PBEI) under the newly organized concern rule, 13 C.F.R. § 121.103(g), and the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

Appellant maintains that the size determination is clearly erroneous, and requests that

[1] This decision was initially issued on January 18, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one request for redactions and considered that request in redacting the decision. OHA now publishes a redacted version of the decision for public release.

SBA's Office of Hearings and Appeals (OHA) reverse, and determine that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted, and the size determination is remanded to the Area Office for further review and investigation.

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 18, 2012, the U.S. Department of the Army (Army) issued Solicitation No. W91CRB-12-R-0050 (RFP) for the purchase of concealable body armor (CBA) vests. The vests consist of a cloth carrier and flexible ballistic inserts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 315999, Other Apparel Accessories and Other Apparel Manufacturing, with a corresponding size standard of 500 employees. Offers were due August 7, 2012. Appellant and Short Bark Industries, Inc. (SBII) submitted timely proposals. There were no proposal revisions.

On September 12, 2012, SBII received notice that Appellant was an apparent awardee. That same day, SBII submitted a size protest alleging Appellant was not an eligible small business due to affiliation with Point Blank Body Armor (Point Blank) under the newly organized concern rule. SBII alleged specifically that Appellant is a new concern founded by Mr. Patrick Stallings, a former employee of Point Blank. According to SBII, when Mr. Stallings left his position at Point Blank, the company provided him a "commitment of work" that enabled him to secure financing. (Protest at 2.) SBII asserted that Point Blank alone exceeds the 500-employee size standard, and that Point Blank also is affiliated with other concerns, including Protective Armor Corporation of America (PACA) and Sun Capital Partners (Sun). SBII's protest did not allege any violation of the ostensible subcontractor rule or the nonmanufacturer rule, 13 C.F.R. § 121.406.

B. Appellant's Response to the Protest

The Area Office instructed Appellant to address its compliance with the newly organized concern rule and the ostensible subcontractor rule. On September 24, 2012, Appellant submitted its response. Appellant stated that Mr. Stallings is a retired Army Colonel and a service-disabled veteran. Upon retiring from the Army in July 2007, Mr. Stallings joined Point Blank Solutions, Inc. (PBSI), a public company, where he ran Operations from October 2008 to October 2009. He then worked in Product Development until May 2010, when he became executive vice president for DoD Business Operations. In that position, he managed military sales, business development, and government programs and contracts. (Response at 2.)

Appellant explained that PBSI filed for Chapter 11 bankruptcy, and that Sun purchased

PBSI's assets on October 27, 2011. Sun then created a new company, Point Blank Enterprises, Inc. (PBEI), on November 1, 2011, to hold the PBSI assets purchased by Sun. At this time, Mr. Stallings began work at PBEI. In mid-December 2011, Mr. Stallings was notified that he "was being involuntarily terminated as part of [Sun's] reorganization plan." (*Id.*) He left PBEI on January 31, 2012. Appellant maintained that Mr. Stallings was not a key employee at PBEI during the 90 days he worked there. According to Appellant, Mr. Stallings "exercised no critical influence or substantive control over the operations or management of [PBEI]." (*Id.*)

Appellant also discussed its business relationship with PBEI. Appellant explained that PBEI is a body armor manufacturing company, whereas Appellant is not. Rather, Appellant characterized itself as a "cut and sew" company which "produces a variety of cloth carriers for body armor ballistic protection packages." *(Id.* at 1.) Appellant stated that, in choosing to compete for the instant procurement, Appellant had no alternative but "to go to actual Body Armor companies to buy ballistic panels to meet the solicitation's requirements." (*Id.*) Appellant noted in an addendum to the SB A Form 355 that it has been supplying body armor carriers as a subcontractor to PBEI since June 2012.

The Area Office requested detailed descriptions of the labor costs involved in manufacturing the vests for the subject procurement. In response, Appellant provided a document entitled "Production Cost Share Matrix," which showed Appellant responsible for [XX]% of total labor time. The matrix listed estimated time per activity but omitted their corresponding costs.

C. Proposal, Teaming Agreement, and Statement of Work

The record includes a teaming agreement between Appellant and PBEI dated July 11, 2012. According to the agreement, Appellant and PBEI will collaborate to ""[***]." (Teaming Agreement at 1.) Specifically, Appellant agreed to:

· Produce body armor carriers and components for PBEI;
· [***
· ***
· ***]; and
· Establish operations in a Historically Underutilized Business (HUB) Zone.

(*Id.* at 1-2.)

Under the teaming agreement, PBEI will:

· Subcontract $[***] per month to Appellant "to the greatest extent possible";
· Provide Appellant with required patterns, training, and work instructions in a timely manner;
· Designate Appellant as a "PBEI distributor"; and
· [***].

(*Id.*) The teaming agreement describes PBEI as "a large business body armor manufacturer." (*Id.* at 1.)

Appellant and PBEI also prepared a Statement of Work (SOW) for the performance of the subject procurement. The SOW states that PBEI will produce ballistic panels for the concealable vests, sell Appellant the materials necessary to produce the carriers, and provide Appellant with patterns, templates, and training. Appellant will assemble and ship the vests.

The RFP instructed offerors to describe their relevant past performance. In Appellant's proposal, the only past performance information submitted was for work performed by PBEI.

D. Size Determination

On October 3, 2012, the Area Office issued its size determination finding that Appellant is affiliated with PBEI. Upon aggregating Appellant's employees with those of PBEI, the Area Office determined that Appellant exceeds the applicable size standard.

The Area Office first explained that Mr. Stallings is Appellant's president and 90% owner. Mr. Stallings's wife owns the remaining 10% of the company. The Area Office concluded that Mr. Stallings has the power to control Appellant based on stock ownership. 13 C.F.R. § 121.103(c)(1).

The Area Office then considered whether Appellant and PBEI are affiliated under the newly organized concern rule. The Area Office began by quoting the text of the rule:

> Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(Size Determination at 3 (quoting 13 C.F.R. § 121.103(g)).) The Area Office stated that Mr. Stallings was formerly a key employee at Point Blank, which later became PBEI. Further, the teaming agreement between Appellant and PBEI shows significant assistance from PBEI to Appellant. Appellant is a new company that has been in business only since May 2012. The Area Office concluded that Appellant and PBEI are affiliated under the newly organized concern rule.

The Area Office also determined that Appellant and PBEI are affiliated under the ostensible subcontractor rule. Specifically, the Area Office found that Appellant would be unusually reliant upon PBEI to perform the contract, and that PBEI would perform the contract's

primary and vital requirements. The Area Office found that "the complete end item consists of a vest carrier and flexible ballistic inserts." (Size Determination at 5.) Although Appellant itself would produce the vest carriers, Appellant is reliant upon PBEI for the necessary patterns, templates, training, and materials. Further, PBEI is producing the flexible ballistic inserts, without which "the end item is not complete; therefore, PBEI is performing primary and vital requirements of the contract." (*Id.*) The Area Office noted that the only past performance discussed in Appellant's proposal was for work performed by PBEI, and that Appellant did not provide the requested breakdown of labor costs to the Area Office. The Area Office did not address Appellant's compliance with the nonmanufacturer rule.

On October 4, 2012, upon receipt of the size determination, the Army terminated Appellant's contract for convenience. (Email from Carol Tyree, Contracting Officer, to OHA (Oct. 23, 2012).)

E. Appeal

On October 17, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant challenges the Area Office's finding that Mr. Stallings was employed by Point Blank from June 2007 to October 2011. Rather, argues Appellant, it was PBSI that employed Mr. Stallings during this interval, and Mr. Stallings's resume reflects this fact. Appellant contends that it has no agreements or business with PBSI, nor was PBSI a participant in this procurement. PBSI "exists currently under Chapter 11 protection of the U.S. Bankruptcy code." (Appeal at 1.)

Appellant then contests the Area Office's suggestion that Mr. Stallings was an officer of PBSI or PBEI. Appellant contends that Mr. Stallings was never elected by the board of directors, a prerequisite for becoming an officer at both companies. (*Id.*)

Next, Appellant contends that the Area Office failed to recognize the distinction between PBSI and PBEI. Appellant emphasizes that PBSI is in bankruptcy and does not conduct business with Appellant, whereas PBEI was newly created by Sun in November 2011. Appellant argues there "is a clear and legal line of fracture" between PBSI and PBEI. (*Id.* at 3-4.) Further, Mr. Stallings was not a key employee of PBEI, as he was employed there only for three months, before being discharged involuntarily.

Appellant argues the teaming agreement was signed six months after Mr. Stallings's departure from PBEI. Appellant contends this time gap also demonstrates clear fracture. (*Id.* at 5.)

Appellant goes on to argue that it was not allowed to clarify its "Production Cost Share Matrix," which, in Appellant's view, contributed to the Area Office's determination that Appellant violated the ostensible subcontractor rule. Appellant contends that the Area Office had sufficient information to infer that Appellant would perform the majority of the labor costs because labor hours directly correspond to labor costs. (*Id.* at 6.)

Next, Appellant argues that the finding that PBEI is performing the contract's primary and vital requirements is based on an "unnecessarily broad" interpretation of the ostensible subcontractor rule, which would preclude a small business manufacturer from ever using a large business as a supplier. Appellant insists that, in this case, only a large business could have provided the flexible ballistic inserts. In addition, the RFP required the use of a specific ballistics package, unless the Army otherwise authorized. (*Id.* at 2.)

Appellant complains that, as a result of the flawed size determination, the Army terminated Appellant's contract for convenience. (*Id.* at 8.) Although "[t] he loss of this Government body armor contract is already a reality and cannot be undone," Appellant requests that, if OHA affirms the size determination, OHA limit its ruling to the instant procurement and to NAICS code 315999, so that Appellant may continue to pursue other Government procurement opportunities. (*Id.* at 8-9.)

F. SBII's Motion to Supplement the Record

On October 26, 2012, SBII moved to introduce new evidence. Specifically, SBII seeks to admit a copy of Appellant's Articles of Organization and information from Appellant's and PBEI's websites. SBII contends this information demonstrates that Appellant was founded in January 2012, and that Appellant originally utilized the same address as PBEI. (Motion at 2.) SBII argues there is good cause to admit this evidence because the Area Office apparently did not consider it. On October 31, 2012, Appellant filed a statement responding to SBII's motion. Appellant maintains that the new evidence does not demonstrate that Appellant is affiliated with PBEI.

G. SBII's Response to the Appeal

On November 2, 2012, SBII responded to the appeal. SBII emphasizes that Appellant was formed in January 2012, "either while Mr. Stallings was still employed by PBEI or within days after his employment ceased." (SBII Response at 1.) SBII also disputes Appellant's contention that PBSI and PBEI are different entities. According to SBII:

> The appeal asserts that PBSI remains in existence "under Chapter 11 protection of the US Bankruptcy Code." However, PBEI acquired the assets of PBSI through the bankruptcy proceeding. Searching the web for [PBSI] takes the searcher to PBEI's web site.

(*Id.* at 2.) SBII does not address Appellant's arguments pertaining to the ostensible subcontractor rule.

H. SBA Comments

On November 5, 2012, OHA requested that SBA address whether the Area Office should have examined Appellant's compliance with the nonmanufacturer rule instead of, or in addition to, the ostensible subcontractor rule. Ordinarily, the nonmanufacturer rule will apply to

procurements—such as the one at issue here—which were assigned a manufacturing or supply NAICS code. 13 C.F.R. § 121.406(b)(3); 76 Fed. Reg. 8222, 8225 (Feb. 21, 2011).

On November 15, 2012, SBA submitted its comments. SBA asserts that it was unnecessary for the Area Office to have considered whether Appellant's proposal complied with the ostensible subcontractor rule, because it is plain that the proposal does not comply with the nonmanufacturer rule. SBA states that, to qualify as a small business for a procurement with a manufacturing NAICS code, a concern either must be the manufacturer of the end item or meet one of the nonmanufacturer exceptions. 13 C.F.R. § 121.406(a). In SBA's view, PBEI is the manufacturer of the vests in the instant case. There can be only one manufacturer of an end item, so Appellant is not the manufacturer. Further, Appellant cannot meet any of the exceptions in the nonmanufacturer rule because PBEI, the manufacturer, is a large business. Accordingly, because Appellant is not the manufacturer and does not qualify for any of the exceptions in the nonmanufacturer rule, Appellant is not an eligible small business for the instant procurement. *Id.* § 121.406(a). SBA concludes that the Area Office need not have analyzed affiliation under the ostensible subcontractor rule.

I. SBII's Comments

On November 23, 2012, SBII submitted comments on the issue raised by OHA. SBII contends that the text of the ostensible subcontractor rule does not limit the rule's applicability only to procurements assigned a services or construction NAICS code. Furthermore, OHA has, in some prior cases, applied the ostensible subcontractor rule to procurements with a manufacturing NAICS code. *E.g., Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012).

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

The Area Office in this case determined that Appellant is affiliated with PBEI based on the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and the newly organized concern rule, 13 C.F.R. § 121.103(g). As discussed below, however, both aspects of this determination are flawed. As a result, I find it appropriate to remand this case for further review and investigation.

1. Ostensible Subcontractor Rule

The ostensible subcontractor rule is a contract-specific issue, which is rendered moot by cancellation or termination of the underlying procurement. *E.g.*, *Size Appeal of Assessment and Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 4 (2012). Here, both Appellant and the Army have notified OHA that Appellant's contract was terminated for convenience in early October 2012. *See* Sections II.D and II.E, *supra*. There is no possibility that Appellant will be awarded a new contract for this acquisition. As a result, it is now immaterial whether Appellant's proposal would have contravened the ostensible subcontractor rule. Even assuming that Appellant's proposal did violate the rule, this would merely affect Appellant's eligibility for the instant procurement, and Appellant is no longer under consideration for the procurement in any event. I find, therefore, that the ostensible subcontractor rule cannot establish affiliation between Appellant and PBEI, because the issue is contract-specific and the underlying contract is now defunct.

In response to OHA's inquiry, the parties also debate whether the Area Office should have analyzed Appellant's proposal under the nonmanufacturer rule instead of, or in addition to, the ostensible subcontractor rule. SBII asserts that the two rules may apply simultaneously to the same manufacturing procurement, whereas SBA argues that the Area Office need not have reached the ostensible subcontractor rule, because Appellant's proposal clearly contravenes the nonmanufacturer rule. I find it unnecessary to resolve these issues here. The Area Office did not address Appellant's compliance with the nonmanufacturer rule, so OHA could not properly conclude, for the first time on appeal, that Appellant's proposal violated that rule. 13 C.F.R. § 134.316(c). Moreover, the nonmanufacturer rule, like the ostensible subcontractor rule, is a contract-specific matter, which is now moot in light of the Army's decision to terminate Appellant's contract. Because Appellant is no longer being considered for award, no purpose is served by considering whether Appellant's proposal would have violated the nonmanufacturer rule or the ostensible subcontractor rule.

2. Newly Organized Concern Rule

The Area Office also found Appellant and PBEI to be generally affiliated based on the newly organized concern rule, 13 C.F.R. § 121.103(g). The rule consists of four required elements:

> (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise.

Size Appeal of Rio Vista Mgmt., LLC, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010).

In this case, I must agree with Appellant that the Area Office's analysis of the newly organized concern rule was flawed, or at least incomplete. In particular, it is not clear that the first element of the above test is met. Appellant contends that its founder, Mr. Stallings, was never an officer of PBEI, and could not exercise critical influence or substantive control of that company. Appellant's argument is plausible, particularly given that Mr. Stallings worked at PBEI for only 90 days, and was then involuntarily dismissed. The Area Office apparently reasoned that Mr. Stallings could be considered an officer or key employee of PBEI because he held such positions at PBSI, which subsequently "became PBEI." (Size Determination at 4.) Beyond simply reciting Mr. Stallings's job titles, however, the size determination reflects no substantive analysis of whether Mr. Stallings was ever an officer or key employee of PBSI. *Cf., Size Appeal of Willow Envtl., Inc.*, SBA No. SIZ-5403, at 6-7 (2012) (notwithstanding her job title, former Government Services Manager was not an officer or key employee, since actual authority rested with higher-level officials). Nor is it evident that PBSI and PBEI can reasonably be treated as a unified entity for purposes of the newly organized concern rule. Appellant asserts that PBSI and PBEI are legally separate and distinct companies because, after PBSI filed for bankruptcy in late 2011, Sun purchased PBSI's assets and established PBEI. PBSI reportedly still exists (albeit in bankruptcy), and Appellant has business dealings only with PBEI, but not PBSI. The Area Office did not address the extent to which PBEI and PBSI share similar ownership or management. Thus, even assuming that Mr. Stallings was a former officer or key employee at PBSI, it does not necessarily follow that his role at PBSI can be imputed to PBEI. In short, the record does not demonstrate that the Area Office fully explored whether Mr. Stallings was an officer or key employee of PBEI. As a result, I am remanding this issue for further review and investigation.

3. Remand

On remand, the Area Office should consider whether Mr. Stallings was an officer or key employee of PBEI. If Mr. Stallings was in fact an officer or key employee of PBEI, the Area Office should also determine whether the other elements of the newly organized concern rule are met. As discussed in Section III.B.1., *supra*, it is no longer relevant to consider whether Appellant and PBEI are affiliated for purposes of the instant procurement.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further determination. Because I am remanding this case for further review and investigation, it is unnecessary to rule upon SBII's motion to introduce new evidence on appeal. *Size Appeal of Hardie's Fruit & Vegetable Co. South, LP*, SBA No. SIZ-5347, at 15 (2012); *Size Appeal of Mark Dunning Indus., Inc.*, SBA No. SIZ-5284, at 12 n.6 (2011).

KENNETH M. HYDE
Administrative Judge