

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

SIZE APPEAL OF:

Pacific Power, LLC,

Appellant,

Appealed From

Size Determination No. 3-2014-026

SBA No. SIZ-5572

Decided: June 24, 2014

APPEARANCES

Richard B. Oliver, Esq., J. Matthew Carter, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for Appellant

Tonju L. Butler, Contracting Officer, Kathryn R. Sommerkamp, Esq., U.S. Army Engineering and Support Center, Huntsville, Alabama

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On March 13, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2014-026 concluding that Pacific Power, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains that the Area Office made a clear error of law by applying the wrong size standard. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

The Office of Hearings and Appeals (OHA) decides appeals of size determinations 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 this 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.

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<sup>1</sup> Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

## II. Background

### A. Solicitation and Certificate of Competency

On July 30, 2012, the U.S. Army Engineering and Support Center (Army) issued Request for Proposals (RFP) No. W912DY-11-R-0036 seeking contractors to provide locally-generated renewable and alternative energy at military installations. According to the RFP, the Army planned to award multiple indefinite delivery/indefinite quantity (ID/IQ) contracts. Although the RFP was unrestricted, certain task orders would be reserved for small businesses. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 221119, Other Electric Power Generation. At the time the RFP was issued, the size standard for this NAICS code stated that “[a] firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.” 13 C.F.R. § 121.201 n.1 (2012). The CO did not subsequently amend the RFP to change the NAICS code or size standard.

After receipt of proposals, the Army determined that Appellant was non-responsible and requested that SBA perform a Certificate of Competency (COC) review. Appellant submitted its application for the COC on January 29, 2014. On January 31, 2014, the Area Office notified Appellant that a size determination would be conducted in conjunction with the COC.

### B. Size Determination

On March 13, 2014, the Area Office issued Size Determination No. 3-2014-026 concluding that Appellant is not a small business. The Area Office stated that Appellant's size is measured as of January 29, 2014, the date of the COC application. (Size Determination at 1, 8.)

With regard to the applicable NAICS code and size standard, the Area Office explained that, after the RFP was issued, a new version of the *NAICS Manual* was promulgated, and Other Electric Power Generation was assigned to NAICS code 221118. (*Id.* at 2.) In addition, effective January 22, 2014, SBA changed the size standard for NAICS code 221118 to 250 employees, and eliminated the requirement that a concern and its affiliates be primarily engaged in electrical power generation, transmission, and/or distribution. (*Id.*) The CO, however, did not amend the RFP to change the NAICS code or size standard. As a result, “[s]ince the [CO] did not amend the solicitation to replace NAICS code 221119, NAICS code 221119, Other Electric Power Generation, with a size standard of 4 million megawatt hours, applies to this size determination.” (*Id.*) The Area Office further noted that an unclear, incomplete, or missing NAICS code or size standard may be clarified, completed or supplied by the Area Office during a size review. In this case, though, the assigned NAICS code and size standard were proper at the time the RFP was issued, so the Area Office “does not need to clarify, complete or supply the NAICS code.” (*Id.*)

The Area Office found that neither Appellant nor its affiliates is primarily engaged in the generation, transmission, or distribution of electric energy, as required by 13 C.F.R. § 121.201 n.1 (2012). (*Id.* at 7-8.) Appellant was founded two weeks prior to the proposal

deadline, and “was formed solely to provide a proposal for the instant procurement,” and thus has not been primarily engaged in the generation, transmission and/or distribution of energy. (*Id.* at 7.) In addition, Appellant conceded that neither Appellant nor its various affiliates had “any revenues derived from the generation of electricity in 2013.” (*Id.* at 7-8, quoting letter of Feb. 27, 2014.)

The Area Office concluded that Appellant does not qualify as a small business under 13 C.F.R. § 121.201 n.1 (2012) because Appellant and its affiliates had no generation, transmission, or distribution of electric energy for sale in the preceding year.

### C. Appeal

On March 27, 2014, Appellant filed its appeal of the size determination with OHA. Appellant contends that the Area Office “erroneously applied [Appellant's] 2014 facts to the superseded 2012 size standard, rather than the 2014 size standard.” (Appeal at 2.)

Appellant highlights that, in December 2013, “SBA completely rewrote its size standards for the industries generating renewable energy.” (*Id.*) The revised size standards for these industries are based on employee counts, and concerns are no longer expected to be primarily engaged in the generation, transmission or distribution of electrical energy for sale. (*Id.*) Further, SBA regulations stipulate that, for an unrestricted procurement, size is determined as of the date a COC applicant submits its application to SBA. In this case, the revised size standards took effect on January 22, 2014, prior to the date of Appellant's COC application. Nevertheless, the Area Office applied the older size standard in concluding that Appellant did not qualify as a small business. Appellant asserts that the Area Office should have used the 250-employee size standard currently associated with NAICS code 221114, Solar Electric Power Generation. (*Id.*)

Appellant argues that area offices are empowered to clarify, complete, or supply “[a]n unclear, incomplete, or missing NAICS code designation or size standard . . . in connection with a formal size determination.” (*Id.* at 10, quoting 13 C.F.R. § 121.402(e).) Furthermore, Appellant maintains, OHA has held that the authority to clarify, complete, or supply a NAICS code extends to correcting flawed and outdated size standards. (*Id.* at 11, citing *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-4990 (2008), *Size Appeal of Johnson Granite Lodging, LLC*, SBA No. SIZ-4602 (2004), and *Size Appeal of B&M Construction, Inc.*, SBA No. SIZ-4805 (2006).)

In this case, Appellant contends, the Area Office unreasonably chose not to correct the NAICS code and size standard identified in the RFP. (*Id.* at 12-13.) Appellant emphasizes that, as of the date of Appellant's COC application, NAICS code 221119 and the older size standard had already been removed from the *NAICS Manual* and from 13 C.F.R. § 121.201. (*Id.* at 13.) In addition, SBA commentary in the *Federal Register* acknowledged that the older size standard was inconsistent with public policy to promote alternative energy production. Appellant requests that the matter be remanded to the Area Office to ascertain whether Appellant qualifies as a small business under NAICS code 221114 and the new, 250-employee size standard.

#### D. Motion to Dismiss

On April 2, 2014, the Army moved to dismiss the appeal as untimely. The Army argued that, although styled as a size appeal, Appellant's appeal is in substance a challenge to the NAICS code assigned to the RFP, and, pursuant to 13 C.F.R. § 134.304(b), a NAICS code appeal must be brought within ten calendar days after issuance of the solicitation or an amendment affecting the NAICS code. (Motion at 1.) Appellant opposed the motion, asserting that the Army mischaracterized Appellant's size appeal as an untimely NAICS code appeal. (Opposition at 2.)

On May 8, 2014, OHA issued an order denying the motion to dismiss. The order directed that the Army would have until May 20, 2014 to file any response to the appeal.

#### E. Army's Response

On May 20, 2014, the Army responded to the appeal. The Army contends that the appeal should be denied.

The Army maintains that the appropriate date to determine Appellant's size is governed by 13 C.F.R. § 121.404(a)(1), which applies to Multiple Award Contracts, rather than by 13 C.F.R. § 121.404(c). (*Id.* at 6.) In particular, § 121.404(a)(1)(i) instructs SBA to determine size “at the time of the initial offer (or other formal response to a solicitation) which includes price for a Multiple Award Contract based upon the size standard set forth in the solicitation.” (*Id.* at 6-7 quoting 13 C.F.R. § 121.404(a)(1)(i).) Initial offers for this procurement were submitted October 5, 2012, long before the new size standards became effective. Thus, the Army reasons, the Area Office correctly determined Appellant's size under the size standard identified in the RFP.

The Army asserts that Appellant's reliance on *Social Impact*, *Johnson Granite Lodging*, and *B&M Construction* is misplaced. (*Id.* at 8-9.) The Army explains that the procuring agencies in those cases specified the wrong size standard in the solicitation, which SBA then corrected during the size review. Conversely, in the instant case, “the size standard that was included in the RFP was correctly stated exactly as it appeared in SBA's applicable size standard [regulations].” (*Id.* at 9.)

The Army complains that “Appellant has filed at least a dozen successful size protests against its competitors for this procurement,” on grounds that those competitors were not primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. (*Id.* at 5.) Further, at least some of these protests were lodged after the effective date of the new size standards for the renewable energy industries. It would be “fundamentally unfair” for Appellant “to be assessed by a [size] standard that is different from that applied to all of its competitors, including those whose size [Appellant] successfully challenged.” (*Id.* at 5-6.)

The Army argues that granting this appeal would violate Federal Acquisition Regulation (FAR) 19.303(c)(5), which indicates that OHA may change the NAICS code assigned to a

procurement only if OHA's decision is issued prior to the deadline for initial offers. (*Id.* at 6.) Moreover, ruling in Appellant's favor would “create havoc and uncertainty” for this and other procurements because offerors could not determine which NAICS code and size standard were applicable. (*Id.*)

The Army argues that OHA itself acknowledged that NAICS code 221119 applies to this procurement in *Size Appeal of Bull Moose Energy Ventures, LLC*, SBA No. SIZ-5542 (2014), although OHA did not address the question of which size standard would apply if an offeror had submitted a COC application after the new standards became effective. (*Id.* at 10.) Nevertheless, the Army urges OHA to adhere to the rule for Multiple Award Contracts in deciding the appropriate date for determining Appellant's size. (*Id.*) The Army reiterates that permitting Appellant to benefit from the new size standard “based solely on the fact its size appeal occurred after that of other offerors would be completely unfair,” and would undermine other offerors' “faith in the fairness of the competition process.” (*Id.*)

#### F. Additional Pleadings

On May 23, 2014, three days after the close of record, Appellant moved to reply to the Army's response and submitted its proposed reply. Appellant contends a reply is warranted in order to address arguments raised in the Army's response. (Reply at 1.) Appellant does not state whether the Army opposes the request.

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, Appellant's reply was filed after the close of record and elaborates upon legal points raised in the appeal petition and in Appellant's opposition to the motion to dismiss. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. *E.g.*, *Size Appeal of Professional Security Corp.*, SBA No. SIZ-5548, at 7 (2014).

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its 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 the 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

I find no reversible error in the size determination. Pursuant to 13 C.F.R. § 121.402(a), “[t]he contracting officer must specify the size standard in effect on the date the solicitation is issued.” If, however, SBA revises the size standard before initial proposals are due, “the

contracting officer may amend the solicitation and use the new size standard.” *Id.* In this case, as the Army emphasizes in its response to the appeal, the CO assigned NAICS code 221119, and the contemporaneous size standard set forth at 13 C.F.R. § 121.201 n.1 (2012), to the RFP. Although NAICS code 221119 was subsequently eliminated, and the size standards for renewable energy significantly revised, the CO did not amend the RFP to incorporate any new NAICS code and/or size standard. Consequently, NAICS code 221119 and the size standard at 13 C.F.R. § 121.201 n.1 (2012) applied to the RFP. *See, e.g., Size Appeal of Dawson Technical, LLC*, SBA No. SIZ-5476 (2013) (size standard in the solicitation was controlling, notwithstanding that the procuring agency intended to utilize a newer size standard, because the procuring agency did not actually amend the solicitation to accomplish this change); *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at n.3 (2013). Furthermore, OHA has considered other cases involving this same procurement, and has found that NAICS code 221119, and the size standard 13 C.F.R. § 121.201 n.1 (2012), were applicable to this RFP. *Size Appeal of Bull Moose Energy Ventures, LLC*, SBA No. SIZ-5542, at 2 (2014); *Size Appeal of West Texas Power Co.*, SBA No. SIZ-5539, at 1 (2014).

Appellant highlights that, under 13 C.F.R. § 121.404(c), SBA determines the “size status of an applicant for a [COC] relating to an unrestricted procurement . . . as of the date of the concern's application for the COC.” Because the removal of NAICS code 221119 and the revision to the size standards both occurred before the date of Appellant's COC application, Appellant urges that its size should be assessed under the newer NAICS code and size standard, rather than the NAICS code and size standard assigned to the RFP. This argument fails as it confuses the date to determine size with the governing size standard. Appellant's application for a COC does establish the date for determining size, but does not alter the NAICS code or size standard specified in the RFP. *See* 13 C.F.R. § 121.409 (explaining that “[f]or the purpose of receiving a [COC] in an unrestricted procurement, the applicable size standard is that corresponding to the NAICS code set forth in the solicitation.”). In addition, as the Army observes in its response, Appellant's approach has the potential to create irrational results, as there could then be multiple definitions of small for the same procurement depending merely on the timing of the size review, and irrespective of whether the procuring agency had amended the solicitation to change the size standard. I find, therefore, that the Area Office appropriately determined Appellant's size as of the date Appellant submitted its application for the COC, and properly did so under the NAICS code and size standard identified in the RFP.<sup>2</sup>

Appellant also points to 13 C.F.R. § 121.402(e), which permits that “[a]n unclear, incomplete or missing” NAICS code or size standard may be clarified, completed, or supplied by SBA in conjunction with a size determination. Appellant maintains that the Area Office abused its discretion by refusing to utilize the new NAICS code and size standard. I find no merit to this argument. The NAICS code and size standard assigned to the instant RFP were not “unclear, incomplete, or missing,” so 13 C.F.R. § 121.402(e) is not applicable here. Appellant further

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<sup>2</sup> Pursuant to 15 U.S.C. § 637(b)(7) and FAR 19.601(b), the purpose of a COC is to address concerns about whether a small business is sufficiently responsible “to receive and perform a specific Government contract.” Because a COC relates to a particular acquisition, it is logical that the NAICS code and size standard pertaining to that acquisition should be utilized in assessing the size of a COC applicant.

references various case decisions in which OHA has allowed area offices to correct erroneous size standards. *E.g.*, *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-4990 (2008); *Size Appeal of Johnson Granite Lodging, LLC*, SBA No. SIZ-4602 (2004). These cases, however, involved situations where a procuring agency mistakenly specified a size standard that deviated from the one mandated by regulation. The instant case is readily distinguishable, because the size standard at 13 C.F.R. § 121.201 n.1 (2012) was correct for NAICS code 221119 at the time the RFP was issued.

#### IV. Conclusion

For the above reasons, the appeal is DENIED and the size determination is AFFIRMED. The Area Office appropriately utilized the size standard at 13 C.F.R. § 121.201 n.1 (2012) in concluding that Appellant is not a small business. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge