

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

**SIZE APPEAL OF:**

Harbor Services, Inc.,

SBA No. SIZ-5579

Appellant,

Decided: August 4, 2014

RE: BES Design/Build, LLC

Appealed From  
Size Determination No. 3-2014-054

**APPEARANCES**

Jonathan T. Williams, Esq., Kelly A. DiGrado, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant

Bryan R. King, Esq., Todd R. Overman, Esq., Bass, Berry & Sims PLC, Washington, D.C., for BES Design/Build, LLC

**DECISION<sup>1</sup>**

I. Introduction and Jurisdiction

This is a protester's appeal of a size determination pertaining to BES Design/Build, LLC (BES). On June 2, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting Area III (Area Office) issued Size Determination No. 3-2014-054, finding that BES is a small business under the size standard associated with the subject solicitation. Harbor Services, Inc. (Appellant), which had originally protested BES's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand it. 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

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<sup>1</sup> I originally issued this decision under a protective order. See 13 C.F.R. § 134.205. After reviewing the decision, the parties informed OHA they had no requested redactions. Therefore, I now issue the entire decision for public release.

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 April 7, 2014, the U.S. Department of Veterans Affairs (VA) issued Invitation for Bids (IFB) No. VA249-14-B-0002 seeking a contractor to upgrade fire sprinkler systems at the VA Medical Center in Memphis, Tennessee. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 238220, Plumbing, Heating, and Air Conditioning Contractors, with a corresponding size standard of \$14 million average annual receipts. Bids were due May 7, 2014. Upon bid opening, the CO announced that BES was the apparent low bidder.

On May 14, 2014, Appellant, a disappointed bidder, protested the size of BES.<sup>2</sup> Appellant alleged that BES is affiliated with five other concerns: JLB Design Build Solutions (JLB); B&B Design Build, LLC (B&B); Beaufort Engineering Services, Inc. (Beaufort); BES, P.C. (BPC); and KCI Technologies, Inc. (KCI). (Protest at 1.) Appellant maintained that the majority owner of BES, Mr. Joseph L. Banach, holds controlling interests in JLB and B&B. (*Id.* at 2.) Further, Mr. Wm. Walter Bolton, a partner at BES, is the Chief Executive Officer of both Beaufort and BPC. (*Id.*) Appellant cited and quoted from 13 C.F.R. § 121.103(e), the SBA regulation pertaining to affiliation through common management. (*Id.* at 1.) Appellant observed that BES has entered into a mentor-protégé arrangement with KCI, and alleged that “KCI is not solely ‘mentoring’ BES, but actually performing work with/for BES.” (*Id.* at 2.) In support, Appellant pointed to a 2012 press release entitled “VA Selects KCI and BES for the Mentor Protégé Program.” In addition, Appellant noted that, based on public records, BES shares similar addresses with each of the five alleged affiliates. (*Id.*)

### B. BES Protest Response

The CO forwarded Appellant's size protest to the Area Office for a size determination. On May 22, 2014, BES responded to the protest and provided a copy of its bid, its completed SBA Form 355, and other documents.

BES explained that Mr. Banach, a service-disabled veteran, is BES's majority owner and Managing Partner, and that he alone controls BES. “At no time is anyone other than Mr. Banach

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<sup>2</sup> Appellant's protest also questioned whether BES meets the eligibility criteria for an SDVOSB as set forth in VA's regulations at 38 C.F.R. part 74. (Protest at 2-3.) These allegations are not addressed in the size determination, and are beyond OHA's jurisdiction. *E.g., Size Appeal of HAL-PE Associates Engineering Services, Inc.*, SBA No. SIZ-5391, at 4 (2012) (recognizing that “under current law any SDVO status protest arising out of a VA solicitation will be decided by the VA [Office of Small and Disadvantaged Business Utilization (OSDBU)].”). The instant decision discusses only the allegations pertaining to BES's size.

in control of [BES], nor does anyone other than Mr. Banach have the ability to exert any type of control.” (BES Protest Response at 3.) BES asserted that the company is intentionally structured to give Mr. Banach full control so as to ensure compliance with VA and SBA eligibility requirements for SBVOSBs. (*Id.* at 1.) BES is headquartered in the state of Alabama, but maintains five branch offices elsewhere in order to oversee and perform various contracts and projects. (*Id.* at 3.) BES shares offices with KCI at one of these branch locations, and at another branch location BES leases office space from a company owned by Mr. Bolton. (*Id.* at 2.)

According to the documentation BES submitted to the Area Office, BES was founded in 2007 by Mr. Rick P. Bradley and Mr. Bolton, with Mr. Bradley holding a 51% share. Mr. Banach acquired Mr. Bradley's interest in 2009. The company originally was known as B&B and changed its name to BES in 2010.

BES acknowledged that KCI is BES's mentor under a VA-approved mentor-protégé agreement. On its SBA Form 355, BES stated that it currently has subcontracts in place with KCI and Beaufort, and that “[t]he subcontracts between the alleged affiliates in 2013 make up less than 15% of [BES's] total revenues.” (SBA Form 355, Response to Question 16.) In subsequent correspondence with the Area Office, BES clarified that no contracts have been awarded to BES and KCI under the mentor-protégé program, and that KCI will not participate on the instant procurement. BES also provided a list of contracts awarded to BES and KCI outside the mentor-protégé program. In each of these contracts, BES serves as the prime contractor and KCI is a subcontractor.

### C. Size Determination

On June 2, 2014, the Area Office issued its size determination concluding that BES is a small business under the applicable size standard.

The Area Office found that Mr. Banach owns 51% of BES and is the Managing Partner. (Size Determination at 4.) The remaining 49% interest is held by Mr. Bolton. The Area Office determined that Mr. Banach alone controls BES by virtue of his majority ownership. (*Id.*) In addition, “[t]he provisions of BES's operating agreement give control of BES to the managing member.” (*Id.*) The Area Office explained that Mr. Banach is also the sole owner of JLB. As a result, JLB is affiliated with BES through common ownership by Mr. Banach. (*Id.*)

The Area Office rejected Appellant's allegation that BES is affiliated with B&B. Rather, B&B is the prior name of BES, and B&B “changed its name to BES on March 31, 2010.” (*Id.*)

The Area Office determined that BES's minority owner, Mr. Bolton, owns Beaufort and two other companies. (*Id.*) However, Mr. Banach holds no interest in any of these concerns. Therefore, the Area Office concluded, BES is not affiliated with the companies owned and controlled by Mr. Bolton. (*Id.*)

The Area Office also considered the relationship between BES and KCI, and determined that they are parties to a mentor-protégé agreement approved by VA. The Area Office found no affiliation between BES and KCI because the firms did not jointly submit a bid for the instant

procurement, and “KCI will not participate in the performance of this procurement at all.” (*Id.* at 5.)

The Area Office calculated that the combined average annual receipts of BES and JLB do not exceed \$14 million. Therefore, BES qualifies as a small business.

#### D. Appeal Petition

On June 17, 2014, Appellant filed the instant appeal. Appellant maintains that the size determination is flawed in several respects.

First, Appellant argues, the Area Office conducted an “improperly narrow” analysis of potential affiliation between BES and the concerns owned and controlled by Mr. Bolton. (*Appeal* at 5.) Appellant states that its protest alleged affiliation through common management and noted that the companies share similar addresses. The Area Office, however, ignored these allegations, and instead focused on the question of common ownership. In Appellant’s view, “it was a clear error for the Area Office to only consider affiliation based on stock ownership, without any apparent consideration of the common management, common facilities, and obvious interrelation between these entities, all of which share a principal (i.e., Mr. Bolton), very similar names, and appear to be in the same or similar line of business.” (*Id.*) Appellant complains that the Area Office did not examine the nature of Mr. Bolton’s managerial role at BES. (*Id.* at 6.) Further, the Area Office failed to consider that BES and the Bolton companies may share common employees besides Mr. Bolton. (*Id.* at 6-7.)

Appellant also argues that the Area Office also did not properly investigate the relationship between BES and KCI. Specifically, the Area Office “erroneously limited its analysis to contract-specific affiliation through a joint venture or teaming arrangement,” but did not assess whether the two concerns are generally affiliated based on assistance provided to BES by KCI. (*Id.* at 10.) Appellant emphasizes that SBA recognizes no exception from affiliation for assistance provided under another agency’s mentor-protégé program. (*Id.* at 9-10.) “Thus, in theory, any of the assistance KCI has provided to [BES] could lead to affiliation.” (*Id.* at 10.)

#### E. Appellant’s Motion to Supplement the Record and BES Opposition

Accompanying its appeal, Appellant moved to supplement the record with additional evidence. Appellant seeks introduce corporate records for BES; press releases issued by Beaufort and KCI in 2012; and information found on a BES website referring to assistance from KCI. Appellant argues that there is good cause to admit the new evidence because it suggests affiliation “based on common ownership, common management/employees, common facilities, identity of interest, and the totality of the circumstances.” (Motion at 3.) The Area Office “did not mention several key facts from these records,” so the Area Office apparently never obtained or considered the information. (*Id.* at 1.)

BES opposes Appellant’s motion. According to BES, Appellant’s new evidence is outdated and irrelevant. (Opp. at 2-3.) Moreover, all of the evidence was publicly available at the

time of Appellant's protest. Because Appellant failed to produce the evidence with the protest, the evidence should be excluded from the record. (*Id.* at 3-4.)

#### F. BES Response

On July 3, 2014, BES responded to the appeal. BES insists that the size determination is correct and that the appeal should be denied.

BES argues that the Area Office properly found that, as the majority owner and Managing Partner of BES, Mr. Banach is in complete control of BES. Further, Mr. Banach holds no ownership or managerial interest in KCI or any of the Bolton-owned companies. Logically, then, BES cannot be affiliated with KCI or the Bolton-owned companies, because Mr. Banach and BES do not control the alleged affiliates, nor do the alleged affiliates control BES. (Response at 6-7.) BES emphasizes that any finding of affiliation under the "totality of the circumstances" would still require the Area Office to find facts showing that one concern has the power to control the other. (*Id.* at 9.) In addition, BES asserts that it maintains its own offices and does not share an office with any of the Bolton-owned companies. (*Id.* at 10.)

BES contends that the instant case is "eerily similar" to OHA's decision in *Size Appeal of Morris-Clark Contracting, LLC*, SBA No. SIZ-5044 (2009). (*Id.* at 11.) In *Morris-Clark*, the challenged firm's minority owner held ownership interests in several other concerns. OHA affirmed the area office's conclusion that the challenged firm was not affiliated with the other concerns because there was no evidence that the challenged firm could control those other concerns, or *vice versa*. (*Id.*)

#### G. BES's Motion to Supplement the Record

Accompanying its response, BES moved to supplement the record with additional evidence. Specifically, BES seeks to introduce a declaration from Mr. Banach describing BES's subcontracting with KCI and the Bolton-owned companies. BES argues that the new evidence is relevant to the arguments raised in the appeal, and demonstrates that the subcontracts BES has received from these concerns have been "extremely minimal." (BES Motion at 2.) BES indicates that Appellant opposes the motion. (*Id.* at 3.)

#### H. Supplemental Appeal

On July 3, 2014, after reviewing the record under an OHA protective order, Appellant filed a supplement to its appeal.

Appellant reiterates its contention that "the Area Office's analysis was too narrow and overlooked probative evidence of affiliation" between BES, KCI, and the Bolton-owned companies. (Supp. Appeal at 1.) Appellant observes that BES's mentor-protégé agreement with KCI contemplates that KCI may provide substantial managerial, financial, and developmental assistance to BES. (*Id.* at 3.) Moreover, since 2011, BES has subcontracted to KCI at least 18 times. (*Id.*) BES also admits to performing projects with, and leasing office space from, some of the concerns owned by Mr. Bolton. According to Appellant, "[a]t a minimum, the foregoing

information should have provoked the Area Office to examine whether [BES] has substantial connections with KCI and Mr. Bolton's other companies such that [BES] is dependent on these companies financially or whether these companies share identical or substantially identical business or economic interests or have long-term contractual relationships sufficient to cause an affiliation between the firms." (*Id.* at 4.)

Appellant also argues that BES provided misleading and incomplete responses on its SBA Form 355. (*Id.* at 5-6.) Appellant maintains that the Area Office could have drawn an adverse inference against BES for failure to produce all necessary information.

#### I. BES Supplemental Response

BES requested, and was granted, leave to respond to the supplemental appeal and on July 14, 2014, filed its supplemental response.

BES argues that Appellant's protest made only "a vague claim of affiliation due to common management, and the Area Office conducted a reasonable investigation into the issue." (Supp. Response at 10.) On appeal, however, Appellant attempts to raise several new issues and theories of affiliation, such as identity of interest, common employees, and the totality of the circumstances. BES urges OHA to disregard these allegations because the Area Office was not required to, and did not, investigate issues other than common management. (*Id.* at 2.)

In any event, BES contends, Appellant "has failed to identify any evidence in the record to support these allegations." (*Id.*) BES asserts that it has relied upon KCI for very little support during the term of the mentor-protégé agreement, and that BES has been the prime contractor for nearly all of the contractual dealings between the two companies. (*Id.* at 3.) Further, the contract dollars sent by BES to KCI represent a small percentage of BES's total revenues. (*Id.* at 4.) Thus, there is no validity to the suggestion that BES is economically dependent upon KCI.

BES reiterates that the Area Office determined that Mr. Banach is in complete control of BES, and that he has "no stake or management responsibility with any of the Bolton-owned companies." (*Id.* at 6.) As a result, the Area Office correctly found no affiliation with the Bolton-owned companies. BES asserts that it does not share facilities with, and does not derive any revenues from, the Bolton-owned companies. (*Id.* at 6-8.) Nor do the companies have common employees, other than Mr. Bolton himself. (*Id.* at 6.)

BES denies that it submitted inaccurate or incomplete information to the Area Office. (*Id.* at 8-9.) In addition, BES fully cooperated with the Area Office's subsequent inquiries.

#### J. BES's Second Motion to Supplement the Record

Accompanying its supplemental response, BES again moved to supplement the record with additional evidence. Specifically, BES seeks to introduce a second declaration from Mr. Banach describing BES's relationships with KCI and the Bolton-owned companies. In addition, BES submits copies of decisions issued by the VA OSDBU denying Appellant's status protest. BES argues that the new evidence is relevant because it addresses the affiliation arguments

raised for the first time in the appeal and supplemental appeal. (Motion at 1-2.) BES indicates that Appellant opposes the motion. (*Id.* at 2.)

### 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 that 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. E.g., *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a)(2). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 6 (2009).

In this case, I find that Appellant has not shown good cause to supplement the record. The information in question was publicly available at the time of Appellant's protest, and as the protester, it was Appellant's responsibility to submit all relevant evidence and argument with its protest. See 13 C.F.R. § 121.1007(b). Accordingly, if Appellant wished to have the information considered, Appellant could, and should, have produced it to the Area Office during the size review. *Size Appeal of Professional Project Services, Inc.*, SBA No. SIZ-5411, at 7 (2012) ("OHA has repeatedly declined to accept new evidence when the proponent did not first submit the material to the Area Office during the size review."). Further, as is discussed in more detail below, the Area Office did not err in choosing to investigate only matters specifically raised in Appellant's protest, and the new evidence appears to have little relevance to the protest allegations. As a result, it is unnecessary to consider this new evidence in order to resolve the appeal. *Size Appeal of Eagle Consulting Corp., Inc.*, SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR) (finding evidence to be inadmissible when it was probative only of issues that OHA did not reach). For these reasons, Appellant's motion to supplement the record is DENIED. Similarly, it is unnecessary to consider the new evidence offered by BES, which seeks to refute new allegations and arguments raised in the appeal and supplemental appeal. Accordingly, BES's requests to supplement the record are also DENIED.

### C. Analysis

I find no reversible error in the size determination. As BES observes in response to the appeal, it is well-settled that “[a]n area office has no obligation to investigate issues beyond those raised in the protest.” *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012). Rather, an area office is vested with the discretion to decide whether or not it will examine additional issues not raised in the underlying protest. *Size Appeal of TFab Mfg., LLC*, SBA No. SIZ-5379, at 8 (2012). Here, Appellant's protest alleged that BES is affiliated through common management with the Bolton-owned concerns. *See Section II.A, supra*. The protest noted that Mr. Bolton holds leadership posts at BES and other companies, and cited and quoted from 13 C.F.R. § 121.103(e), the SBA regulation pertaining to affiliation through common management. *Id.* The Area Office investigated this claim but found no affiliation, because BES is controlled solely by Mr. Banach (not by Mr. Bolton), and because Mr. Banach holds no ownership or managerial interest in any of the Bolton-owned companies. Section II.C, *supra*. Thus, there is no common nexus of control between BES and the Bolton-owned companies, a prerequisite for affiliation. 13 C.F.R. § 121.103(a). Indeed, as BES argues, OHA considered a highly similar case in *Size Appeal of Morris-Clark Contracting, LLC*, SBA No. SIZ-5044 (2009), and concluded that the challenged firm was not affiliated with concerns associated with the minority owner due to the absence of any common control. Accordingly, I see no error in the Area Office's analysis here. The Area Office conducted a reasonable investigation of Appellant's protest allegation and found it to be meritless. Further, the Area Office was not required to expand the scope of its review to investigate identity of interest or other new theories of affiliation advanced by Appellant on appeal.

The Area Office likewise conducted an appropriate review of the alleged affiliation with KCI. Appellant's protest stated that BES had entered into a mentor-protégé agreement with KCI, and posited that “KCI is not solely ‘mentoring’ BES, but actually performing work with/for BES.” Section II.A, *supra*. Appellant offered no evidence or explanation to support this accusation, and the Area Office apparently understood Appellant to be alleging that KCI would play a dominant role in the performance of the instant procurement. The Area Office found, however, that “KCI will not participate in the performance of this procurement at all,” and therefore rejected Appellant's allegation. Section II.C, *supra*. Again, this analysis was proper, and the Area Office was not required to explore whether BES might be affiliated with KCI on alternate grounds beyond those raised in the protest.

It is worth noting that the business ties between BES and Bolton-owned concerns appear to be quite limited, as BES asserts that it does not share facilities with, nor derive any revenues from, the Bolton-owned companies. Section II.I, *supra*. While BES may lease office space for some of its branch locations from Mr. Bolton or his companies, OHA has recognized that a valid lease agreement between the challenged firm and an alleged affiliate does not indicate common facilities. *Size Appeal of Patriot Construction, Inc.*, SBA No. SIZ-5439, at 5 (2013). Similarly, there have been a number of subcontracts between BES and KCI, but BES emphasizes that BES has nearly always been the prime contractor, which does not suggest any economic dependence upon KCI. E.g., *Size Appeal of Accent Service Co.*, SBA No. SIZ-5237, at 7 (2011) (“That a challenged concern grants subcontracts to another concern is not evidence of dependence upon

the second concern."); *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155 (2010). Accordingly, even if the Area Office had chosen to conduct a broader review, it is not evident that the result of this case would have been different.

**IV. Conclusion**

For these reasons, 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