

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

SIZE APPEAL OF:

FTSI-Phelps, JV,

Appellant,

Appealed From
Size Determination Nos. 06-2014-087 &
06-2014-088

SBA No. SIZ-5583

Decided: August 19, 2014

APPEARANCES

Dirk Haire, Esq., Alexa Santora, Esq., Fox Rothschild LLP, Washington, DC, for
Appellant

Brian A. Darst, Esq., Odin, Feldman & Pittleman, P.C., Reston, VA, for ASI

Jim Cehula, General Manager, Bethel Contracting LLC

Richard Lam, Executive Vice-President/COO, Webcor Construction LP d/b/a Webcor
Builders for Bethel-Webcor JV-1

DECISION¹

I. Introduction and Jurisdiction

On June 9, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination Nos. 06-2014-087 & 06-2014-088, finding FTSI-Phelps JV (Appellant) is not an eligible small business for Department of the Navy Solicitation No. N62742-14-R-1310 because Appellant was not in the SBA's 8(a) Business Development (BD) program.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to propose redactions to the published decision. Appellant indicated it did not wish to propose redactions. OHA now publishes the decision in its entirety.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determinations and find Appellant to be a small business for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determinations are 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 October 18, 2013, the Department of the Navy (Navy), Naval Facilities Engineering Command, Pacific issued Solicitation No. N62742-14-R-1310 (RFP) seeking a contractor to design-build a low-rise building for the 3D Radio Battalion Complex that includes offices for Battalion Headquarters, Headquarters and Service Company, Company A and Company B. The contractor would also provide for classroom and other training spaces and offices, platoon command offices and workspaces, mail room, family readiness and career planning offices and other workspaces needed to support 3D Radio. Further, the contractor would provide furniture, fixtures and equipment (FF&E) to allow for a fully functional, fully integrated, higher quality facility for the customer and quicker delivery date. The solicitation followed a two-phase design-build selection procedure, with phase-one proposals due November 19, 2013. When the Navy notified offerors they had been selected to provide proposals for phase-two, they did not notify unsuccessful offerors of the concerns selected to submit phase-two proposals. The due date for Phase-two proposals was March 11, 2014, later extended to April 3, 2014.

The Contracting Officer (CO) designated this procurement as a 100% small business set-aside, firm fixed price contract under North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million average annual receipts size standard.

On May 13, 2014, the CO issued a notice that Appellant was the apparent successful offeror. On May 14, 2014, Bethel-Webcor JV (Bethel JV), an unsuccessful offeror, filed a protest with the CO, alleging Appellant was not an eligible small business concern because Federal Technologies Solutions, Inc. (FTSI) graduated from the 8(a) BD program and its Mentor-Protégé Agreement with Hensel Phelps Construction Company (Phelps) was terminated. On May 16, 2014, Alan Shintani Inc. (ASI) also filed a size protest, alleging FTSI exited the 8(a) BD program before initial proposals were due. The Area Office aggregated the protests and filed concurrent size determinations Nos. 06-2014-087 & 06-2014-088.

B. Size Determinations

On June 9, 2014, the Area Office issued its size determinations finding Appellant is not a small business concern for the solicitation at issue.

The Area Office found FTSI and Phelps had been parties to a Mentor-Protégé agreement dating back to June 3, 2013 and approved by SBA on August 2, 2013. At the time, FTSI was an 8(a) BD program participant. However, FTSI graduated from the program on March 1, 2014, before phase-two proposals were due. Additionally, Phelps admits it is a large firm for the size standard at issue. Size Determination, at 2.

In response to the protest, Phelps argued Appellant is exempt from affiliation because of its Mentor-Protégé agreement. Phelps asserts that FTSI, as the protégé, is a small business concern under the applicable size standard.

In making the size determinations, the Area Office first had to establish the appropriate date for determining Appellant's size. The Area Office found that under 13 C.F.R. § 121.404(a), the date to determine size is when an offeror certifies itself as a small business concern as part of its initial offeror that includes price. The Area Office notes that Appellant's phase-one proposal, received November 19, 2013, contained a small business self-certification valid from April 24, 2013 until April 24, 2014. However, the Area Office found Appellant's phase-one proposal did not contain price information, and the Navy did not notify unsuccessful offerors which concerns had been selected to submit phase-two proposals. *Id.* at 3-4. Phase-two proposals were due on April 3, 2014, and required offerors to include their pricing information for the first time. Appellant submitted its proposal on April 3rd, and included its price. The Area Office thus decided that April 3, 2014, was the appropriate date for determining Appellant's size, and that this date was subsequent to FTSI's graduation from the 8(a) program.

The Area Office noted Appellant argued the Area Office should look at the 8(a) BD program regulations in determining Appellant's size. Appellant asserted to the Area Office that under 8(a) BD program regulations, the date to determine size is when offers were submitted, regardless of whether price was included. The Area Office rejected this argument because the regulations suggested by Appellant are applicable to procurements set-aside exclusively for 8(a) BD program participants, which the instant procurement was not. *Id.* at 4. The Area Office found that even if the 8(a) BD program regulations were applicable, which the Area Office asserts they are not, Appellant still would not meet the exception under 13 C.F.R. § 124.507(d) because it graduated from the 8(a) BD program after initial offers were originally due on March 11, 2014.

The Area Office concludes that “[s]ince both the original date specified for receipt of offers and the date of the actual offer occurred after FTSI graduated from the 8(a) program, the size of the apparent successful offeror, [Appellant], must be determined by aggregating the receipts of both joint venture partners.” *Id.* at 5. Lastly, the Area Office determined that under 13 C.F.R. § 124.520(d)(1)(iii), once the protégé firm graduates from the 8(a) BD program, it cannot reap the benefits from the mentor-protégé relationship, including the exception to affiliation found in 13 C.F.R. § 121.103(h)(3)(iii).

C. Appeal Petition

On June 24, 2014, Appellant filed its appeal of the size determinations with OHA. Appellant argues the Area Office erred in focusing on rules for determining size instead of the

8(a) BD program rules when determining Appellant's size. Appellant states it certified as a small business concern when it submitted its phase-one proposal, and that the Navy did not request a second size certification with phase-two proposals.

Appellant contends that under SBA's 8(a) BD program rules, the size status of an 8(a) concern is determined at the time of initial offers, whether or not it includes price. Appeal, at 10. Given that FTSI was an 8(a) BD program participant when it submitted its phase-one proposal on November 19, 2013, Appellant argues the affiliation exception for mentor-protégé joint ventures is applicable here. Appellant adds that because FTSI is a small business concern regardless of the date to determine size, the joint venture itself is small for the procurement at issue.

Appellant argues there is no dispute FTSI is small, and that the issue here is whether FTSI should be classified as an 8(a) BD participant for the purposes of this procurement. Appellant argues 13 C.F.R. § 124.507(d) establishes FTSI's eligibility. Appellant contends § 124.507(d) makes “clear that 8(a) eligibility is determined as of the date specified for submitting initial offers, regardless of whether or not the initial offer includes price.” *Id.* at 13. Appellant asserts that the correct date to determine Appellant's size is when it submitted its phase-one proposal, while FTSI was an 8(a) BD program participant. Appellant acknowledges § 124.507(d) applies to competitive 8(a) BD contracts, but because SBA applies 8(a) BD program rules regarding joint venture agreements to non-8(a) contracts, the same should occur here. Appellant adds that because “no other regulation” can answer the question at issue here, SBA rules applying to competitive 8(a) contracts should govern. *Id.* at 13-14

Appellant further contends the real issue is whether Appellant can compete for this procurement under the SBA's 8(a) Mentor-Protégé Program rules. Appellant states because FTSI's size is unequivocally small, the joint venture between FTSI and Phelps is also small. Appellant adds the Area Office's size determinations contravene the 8(a) BD program's purpose “to grow the capabilities of the protégé, assist the protégé in meeting its business goals, and to improve the protégé's ability to successfully compete for contracts.” *Id.* at 15. Accordingly, finding Appellant other than small would mean it wasted money and resources in preparing its proposals for the instant procurement.

Next, Appellant asserts 13 C.F.R. § 121.404(a) does not apply in the context of two-phase design-build procurements. Appellant argues initial offers in a two-phase design-build procurement will never include price, thus making § 121.404(a) inapplicable to the situation found here. Appellant argues 13 C.F.R. § 121.404(f) is more apt to the situation found here. Under § 121.404(f), the dispositive date for determining size is when the concern submits its initial proposal, with or without price, on an architect-engineering or two-step sealed bidding procurement. *Id.* at 17. Appellants states that in two-step sealed bidding procurements, similar to the solicitation here, technically qualified offerors can submit their price in phase two because phase-one does not allow for submission of price. In addition, because an offeror's technical approach is more important in this procurement than price, the date an offeror submitted its price should not be the conclusive factor in determining an offeror's size. Appellant argues this view is supported by the Navy's decision to only seek a small business size certification prior to phase-one proposals and not phase-two.

Lastly, Appellant argues the Area Office erred in requesting Appellant to change its SAM.gov status, and to notify officials in any pending procurements, to reflect the Area Office's decision. Because Appellant is still considered small for purposes of competitive 8(a) procurements if the initial proposal was submitted prior to March 1, 2014, Appellant requests that such notification is not needed for procuring officials in these possible situations.

D. Bethel JV's Response

On July 12, 2014, Bethel JV offered its response to the appeal. Bethel JV supports the Area Office's size determinations and requests that OHA affirm their decision.

Bethel JV asserts Appellant is simply asking OHA to speculate what the result would be if FTSI had not graduated from the 8(a) BD program before submitting its phase-two proposal. Bethel JV argues Appellant misinterprets SBA regulations, as 13 C.F.R. Part 124 applies to a concern's 8(a) eligibility, and issues relation to a concern's size fall under the purview of 13 C.F.R. Part 121. Bethel JV's Response, at 2. Bethel JV asserts the date to determine size referred to in 13 C.F.R. § 124.507(d) applies to 8(a) competitive procurements, whereas the instant procurement is a small business set-aside. Bethel JV concurs with the Area Office's use of 13 C.F.R. § 121.404(a) to establish the date to determine Appellant's size. Thus, the correct date is April 3, 2014, time of Appellant's submission of its phase-two proposal, which included price for the first time. *Id.*

Bethel JV further asserts Appellant's argument that its size is based on FTSI's small business size regardless of the date to determine size is meritless. Bethel JV asserts a joint venture does not simply adopt the size of the small business concern, but instead must either meet the size requirements or be exempt from them, neither of which applies to Appellant. Bethel JV argues that under 13 C.F.R. § 124.520(d)(iii), once the protégé firm, FTSI, graduated from the 8(a) BD program, the Mentor-Protégé agreement was voided. *Id.* at 3.

Bethel JV further adds Appellant's argument that affirming the Area Office's decision would contravene the Mentor-Protégé Program is also meritless. According to Bethel JV, “[i]f wasting time and money on a procurement was a valid reason for upholding/denying appeal, every Federal contractor would have cause.” *Id.*

Lastly, Bethel JV argues Appellant errs in asserting that 13 C.F.R. § 121.404(f) is the appropriate regulation for defining the date to determine Appellant's size. Bethel JV notes the solicitation is clear when it establishes the instant procurement as a negotiated procurement under NAICS code 236220. Because FAR 36.3 also falls under FAR Part 15, Bethel JV concludes the Area Office “was correct in applying FAR 15 to this procurement and in its application of 13 C.F.R. § 121.404(a).” *Id.* at 5.

E. ASI's Response

On July 14, 2014, ASI filed a response to the appeal. ASI contends the Area Office did not err in finding Appellant other than small, and requests that OHA deny the appeal.

ASI argues the Mentor-Protégé agreement between FTSI and Phelps provides the agreement terminates immediately upon FTSI's graduation from the 8(a) BD program. Based on this fact, ASI asserts that the termination of the agreement clearly establishes Appellant could not qualify to receive this contract. ASI maintains the termination of the agreement occurred before Appellant submitted its phase-two proposal, which included price, thus “nothing in the Agreement extended its duration or any rights/obligations of the parties to any yet-to-be awarded contracts, on-going solicitations, or other open procurement actions.” ASI's response, at 6. As a result, ASI contends the agreement needed to be in effect before Appellant could submit its phase two-proposal and avail itself of SBA's affiliation exception for mentor-protégé joint ventures. *Id.* at 8; citing 13 C.F.R. § 124.520(d)(iii).

Next, ASI challenges Appellant's argument that 13 C.F.R. § 124.507(d) establishes the date to determine size. ASI asserts § 124.507(d) only applies to situations involving a competitive 8(a) BD program set-aside procurement, which is clearly not the situation found here. Additionally, even if OHA were to look at SBA regulations regarding competitive 8(a) BD program set-aside procurements, § 124.507(d) only applies if the 8(a) Participant was eligible for award at the initial date for receipt of offers. The initial date found here was March 11, 2014, thus, Appellant was no longer an 8(a) Participant because it had graduated from the 8(a) BD program on March 1, 2014. *Id.* at 10. Further, ASI maintains Appellant's claim that OHA should apply 8(a) BD program regulations to determine its size is meritless. ASI asserts that under OHA precedent, 8(a) BD program regulations do not apply to procurements which are not 8(a) BD program competitive set-asides. *Id.* at 12; citing *Size Appeal of Diversified Global Partners JV, LLC*, SBA No. SIZ-4967 (2008).

ASI disputes Appellant's claims that § 121.404(d) is inapplicable to the situation at hand. ASI states the size of small business concerns is determined by the regulations found in 13 C.F.R. R. § 121.404(a) through (h). Any other finding would allow large businesses to team up with small businesses and take advantage of benefits usually reserved for 8(a) BD program participants. In addition, ASI asserts § 124.520(d)(1)(iii) removes any benefits afforded a protégé firm once it graduates from the 8(a) BD program. *Id.* at 12-13. ASI also challenges Appellant's argument that letting the size determination stand would affect an 8(a) BD program participant's decision to pursue federal procurements. ASI rejects this contention and states such considerations go beyond OHA's jurisdiction under 13 C.F.R. § 102 because OHA is not a rulemaking or policy-making body. *Id.* at 14.

ASI proceeds to contest Appellant's assertion that § 121.404(f) should govern any analysis regarding the date to determine size because the procurement found here is similar to architect-engineering or two-step sealed bidding procurements. ASI maintains that past OHA decisions “have held that the time for determining an offeror's size status in a FAR Subpart 36.3 two-phase procurement occurs at the time that offeror submits its Phase II price proposal in accordance with 13 C.F.R. § 121.404(a).” *Id.* at 16; citing *Size Appeal of Cox Constr. Co.*, SBA No. SIZ-5070 (2009). Given that the procurement at issue falls under FAR Subpart 36.3, ASI asserts Appellant's arguments are unfounded.

Lastly, ASI contends Appellant's claims the Area Office erroneously directed it to change

its SAM.gov status are not a basis for appeal of the size determination. ASI argues the Area Office was following SBA regulations in directing Appellant to change its SAM registration to reflect the conclusion of the instant size determination. ASI maintains despite the Area Office's ruling, contracting officials will be able to determine whether Appellant was a small business concern at any point in its existence.

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

At the time the Navy issued the solicitation, 13 C.F.R. § 121.404(a) provided:

SBA determines the size status of a concern, including its affiliates, 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.

Applying this regulation, the Area Office found that Appellant's size should be determined on the date it submitted its phase-two proposal, which included price, on April 3, 2014.

Appellant contends the correct date to determine its size is November 19, 2013, the date it submitted its phase-one proposal, which did not include price. Appellant makes numerous arguments as to why this is the correct date. First, it argues SBA's 8(a) BD program regulations apply here, which states that the size status of an 8(a) BD program concern is determined at time of initial offers, regardless of whether price is included. Because at the time it submitted its phase-one proposal Appellant was a participant in the 8(a) BD program, it argues the affiliation exception afforded to mentor-protégé joint ventures should be extended. Next, it argues that since no other regulation can answer the question of the correct date to determine size, OHA should apply 13 C.F.R. § 121.404(f). Appellant maintains that § 121.404(f) is appropriate because it applies to architect-engineering or two-step sealed bidding under FAR subpart 14.5, which is similar to the solicitation here. Lastly, Appellant asserts that because FTSI is a small business concern, the joint venture itself should be considered small. I find all of Appellant's arguments meritless.

First, Appellant's citation to 13 C.F.R. § 121.404(f) is misplaced. The version of the regulation upon which Appellant relies took effect on December 31, 2013. 78 Fed. Reg. 61113-

148, at 61114 (October 2, 2013). The previous version of the regulation is applicable here, because it was in effect when the Navy issued the instant solicitation on October 18, 2013. *Size Appeal of VMD-MT Security, LLC*, SBA No. SIZ-5380 (2012). That version of the regulation stated that for purposes of two step sealed bidding under FAR Subpart 14.5, a firm certifies itself as small as part of its step one proposal. 13 C.F.R. § 121.404(f) (2013). The regulation providing certification with the phase one of a two step process only applies to two step sealed bidding procurements under FAR Subpart 14.5, and the instant procurement is not such a procurement.²

The instant procurement is a design-build procurement under FAR Part 36.3. OHA has clearly held that “[i]n 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 IAP-Leopardo Construction, Inc.*, SBA No. SIZ-5127 (2010). Additionally, the fact that the CO did not request a recertification with a phase-two proposal is irrelevant, as a concern's size cannot be determined until the date an offer includes price. *Size Appeal of Cox Construction Co.*, SBA SIZ-5070 (2009) (“Although the CO did not require Appellant to recertify with its Phase Two proposal, such instructions cannot preempt the Area Office's application of 13 C.F.R. § 121.404(a). The Area Office was still compelled to determine Appellant's size as of the date when its offer included price.”) Thus, under 13 C.F.R. § 121.404(a) and OHA precedent, the correct date to determine Appellant's size was on April 3, 2014, the date of Appellant's submission of its phase-two proposal, which included price.

Appellant's arguments to the contrary are based upon FTSI's status as an 8(a) BD program participant, and it attempts to argue that 8(a) BD program regulations apply here. However, the instant procurement is not an 8(a) BD procurement. FTSI graduated from the program on March 1, 2014. Under 13 C.F.R. § 124.507(d), a firm which has graduated from the program may receive an award if the firm was eligible as of the initial date for receipt of offers specified in the original solicitation. However, this regulation explicitly provides that it is only applicable to competitive 8(a) procurements, and this procurement is a total small-business set-aside, not a competitive 8(a) procurement. Therefore, this regulation is inapposite here.³

Appellant's argument that the 8(a) BD program regulations are applied in other situations not involving competitive 8(a) BD program set-aside procurements is misleading. 8(a) BD program regulations are applied in the context of reviewing a joint venture agreement's content in order to determine whether an exception from a finding of affiliation exists. Here, the issue is not content of the agreement, but whether FTSI was still a program participant at the time size was to be determined, and thus whether Appellant was eligible for the exception to a finding of affiliation available to an 8(a) Mentor-Protégé joint venture. 13 C.F.R. § 121.103(h)(3)(iii). FTSI was not, and accordingly, no exception to affiliation applies. The regulation provides that “[o]nce a protégé firm graduates from or otherwise leaves the 8(a) BD program, it will not be eligible for

² Even if the current version of § 121.404(f) applied, it is doubtful it would be applicable, because the instant procurement is a Design-Build procurement under FAR Subpart 36.3, not an Architect-Engineering procurement under FAR Subpart 36.6. RFP, Section 1.1, at 2.

³ Even if the regulation were to apply, FTSI would not be eligible for award because it graduated from the program on March 1st, and phase two offers were due on March 11th.

any further benefits from its mentor/protégé relationship (i.e., the receipts and/or employees of the protégé and mentor will generally be aggregated in determining size for any joint venture between the mentor and protégé after the protégé leaves the 8(a) BD program.)” 13 C.F.R. § 124.520(d)(1)(iii).

In this case, the record clearly establishes FTSI graduated from the 8(a) BD program on March 1, 2014, one month before phase two offers were due, and two months before the CO awarded the contract to Appellant. As stated above, the date to determine size is April 3, 2014, making the joint venture ineligible to benefit from the expired mentor-protégé agreement. Therefore, according to SBA regulations, the receipts of FTSI and Phelps must be aggregated, unless some exception to affiliation applies. 13 C.F.R. § 121.404(h). Appellant can point to none. Given that Phelps admittedly is a large business that exceeds the size standard for the procurement at issue, the joint venture between FTSI and Phelps is not a small business concern.

I therefore conclude that at the time of Appellant's initial offer, which included price, none of the parties to the mentor-protégé joint venture agreement were participants of the 8(a) BD program, and thus cannot avail themselves of the affiliation exceptions. The receipts for the joint venture members, FTSI and Phelps, once aggregated, exceed the size standard found here, thus Appellant is not a small business concern for the procurement at issue.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge