United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Orion Construction Corporation Appellant, Appealed From Size Determination No. 06-2015-085	SBA No. SIZ-5694 Decided: November 24, 2015

APPEARANCES

James S. Azadian, Esq., Enterprise Counsel Group, ALC, Irvine, California, for Appellant

Julia M. Holden-Davis, Esq., Garvey Schubert Barer, Anchorage Alaska, for Bethel-Webcor JV-1

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION

I. Introduction and Jurisdiction

On October 14, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2015-085, finding that Orion Construction Corporation (Appellant) is not an eligible small business. Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be a small business for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On February 21, 2013, the Department of the Navy (Navy), Naval Facilities Engineering Command, Southwest issued Request for Proposals (RFP) No. N62473-12-R-5015 "for the design and construction of multiple facilities, including a Headquarters building, maintenance/supply building, multi-purpose training/coordination facility, warehouse, host switch/data server facility, remote switch building, and various other ancillary structures within one complex (total of 112,000 square feet)." (RFP, Tab 1, at 7.) The construction would take place at the Communication Information Systems (CIS) Operations Complex at the Marine Corps Base Camp in Pendleton, California.

The solicitation followed the Two-Phase Design-Build selection procedure of Part 36.3 of the Federal Acquisition Regulations (FAR). (*Id*. at 11.) Phase One proposals were due April 24, 2013, and Phase Two proposals due January 27, 2015. Phase Two proposals included price; Phase One proposals did not. (*Id*. at 8-9, 11.)

The Contracting Officer (CO) set the contract aside entirely for small businesses and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction. The RFP stated that "the annual size standard is $33.5 million." (*Id*. at 5.) SBA subsequently increased the size standard associated with NAICS code 236220 to $36.5 million with an effective date of July 14, 2014. 79 Fed. Reg. 33647, 33657 (June 12, 2014).

On November 19, 2014, the Navy issued Amendment 0006. The Navy stated, "The purpose of this amendment is to close Phase One Request for Proposals (RFP) and issue Phase Two RFP of the solicitation." (RFP, Amendment 0006, at 1.) The Navy required offerors to include a cover letter accompanying their Phase Two proposals. The cover letter would contain, *inter alia*, "[a] size status certification that is signed and dated by an authorized representative from your company and that indicates your firm is a small business at time of Phase Two proposal submittal." (*Id*. at 3.)

On September 15, 2015, the CO notified offerors that Appellant was the apparent successful offeror. On September 21, 2015, Bethel-Webcor JV-1 (Bethel), an unsuccessful offeror, filed a timely protest with the CO, alleging that Appellant was not an eligible small business because it joint ventures with Balboa Construction Corporation (Balboa). Further, Balboa's registered agent, Ms. Fia Dowsing, participates in industry activities with Mr. Richard Dowsing, and the two hold themselves out as Appellant's representatives. They also own or operate multiple other companies together, including RFD Business, LP; RFD Investments, LP; and RFD Real Estate, LP. The CO forwarded the protest to the Area Office for a formal size determination.

B. Protest Response and Size Investigation

On September 29, 2015, Appellant responded to the protest. Appellant represented that Mr. and Ms. Dowsing are married, Mr. Dowsing owns 100% of Appellant, and Ms. Dowsing owns 100% of Balboa. Nevertheless, Appellant argued, Orion and Balboa are not affiliated because they "have different project managers, different full-time construction crews, and each separately lease[s] and separately pay[s] for office space." (Protest Response at 2.) Further, Mr. and Ms. Dowsing each have their own contractor's license.

Appellant conceded that together Mr. and Ms. Dowsing control RFD Business, LP; RFD Investments, LP; and RFD Real Estate, LP (collectively, "RFD Entities"), as well as La Miranda Office Park, LLC (LMOP). The RFD Entities, however, "do not produce revenue and have never been required to file tax returns." (*Id*. at 1 n.2.)

Appellant argued that even if Balboa and the RFD entities were considered Appellant's affiliates and their receipts were combined, Appellant would still be a small business because their combined receipts would not exceed the $33.5 million size standard for Phase I. However, even when its receipts are combined with all alleged affiliates, they still do not exceed the $36.5 million size standard.

On September 30, 2015, the Area Office asked the CO, "Was the solicitation amended to incorporate the new size standard for NAICS 236220 from $33.5 to $36.5 million (effective July 14, 2014)[?]" (Letter from T. Brown to M. Orpilla (Sep. 30, 2015).) The Navy responded, "The size standard of 36.5 million was not amended to the solicitation." (Letter from S. Mai to T. Brown (Sep. 30, 2015).)

On October 8, 2015, on the Area Office's request, Appellant submitted information regarding LMOP. Appellant stated:

> LMOP was formed in 2009 and its sole member (owner) is RFD Real Estate, LP, which is owned by Mr. Richard Dowsing and Mrs. Fia Dowsing. LMOP's only manager is Mr. Richard Dowsing. LMOP's only business is to manage and own an office/warehouse space, the same space rented, in part, by Orion and, in other part, by Balboa.

(Letter from J. Azadian, Esq. to T. Brown (Oct. 8, 2015), internal citations omitted.)

C. Size Determination

On October 14, 2015, the Area Office determined that Appellant is not an eligible small business. The Area Office determined Appellant's size as of January 27, 2015, the date Appellant self-certified as small as part of its Phase II offer, including price. 13 C.F.R. § 121.404(a); *Size Appeal of Cox Constr. Co.*, SBA No. SIZ-5070 (2009). The Area Office considered whether Appellant was small under the $33.5 million size standard, reasoning that the increased size standard did not apply because the CO "did not amend the solicitation before the date initial

offers (including price) were due to use the new size standard." (Size Determination at 1 n.1, citing 13 C.F.R. § 121.402(a).)

The Area Office stated that, because Mr. and Ms. Dowsing are husband and wife, there is a presumption that they have an identity of interest, and that the firms they control are affiliated. 13 C.F.R. § 121.103(f). The Area Office determined that Appellant did not rebut the presumption due to the following factors: Mr. and Ms. Dowsing both primarily operate in construction activities. They created the Orion-Balboa joint venture (Orion-Balboa JV), which they use to bid on projects, and they own multiple businesses together. Appellant and Balboa lease office space together at a space jointly owned by Mr. and Ms. Dowsing. According to Appellant's tax returns, moreover, Ms. Dowsing devotes 100% of her time to Appellant.

The Area Office then calculated Appellant's size based on fiscal years 2012, 2013, and 2014. Area Office noted that "[f]or size purposes, a concern must include in its receipts its proportionate share of joint venture receipts." (Size Determination at 4.) The Area Office then calculated the combined average annual receipts for Balboa, Orion-Balboa JV, the RFD entities, and LMOP, and determined that they exceed the $33.5 million size standard. As a result, the Area Office concluded Appellant is not a small business for the subject procurement.

D. Appeal Petition

On October 20, 2015, Appellant filed its appeal of the size determination with OHA. Appellant argues the size determination contains clear errors of law, so OHA should reverse it or vacate and remand it to the Area Office.

Appellant first argues that the Area Office should have applied the $36.5 million size standard. This is the correct size standard, Appellant contends, because the CO amended the solicitation for Phase Two, and in doing so, specifically required a "size status certification ... that indicates your firm is a small business at the time of Phase Two proposal submittal." (RFP, Amendment 0006, at 3.) According to SBA regulations, "[a] request for a re-certification shall include the size standard *in effect at the time of recertification* that corresponds to the NAICS that [ ] was initially assigned to the contract." 13 C.F.R. § 121.404(g)(3)(iii) (emphasis Appellant's). Appellant argues it certified as small as part of the Phase II proposal on January 27, 2015. The size standard applicable at this time was $36.5 million. Appellant argues further that, because the Area Office calculated average receipts for fiscal years 2012, 2013, and 2014, it was incorrect to use a size standard applicable in 2013. (Appeal at 6-9).

Next, Appellant contends the Area Office's reliance on *Cox Construction* is misplaced because the facts of that case are distinguishable. In *Cox Construction*, the size standard did not change during the time between when the challenged firm submitted its proposals for Phases One and Two. (*Id*. at 10-11.)

Appellant complains that the size determination does not state what Appellant's size was, only that Appellant was "other than small." Appellant then implies that the calculation of receipts was also over-inclusive. Because Orion-Balboa JV does not file its own tax return, and each joint venture reports its own share of the joint venture's receipts, Orion-Balboa JV's receipts

should not be included. To do so would be double counting. Further, because LMOP's receipts are derived from real estate rented to Orion and Balboa, those receipts should be excluded as inter-affiliate transactions. 13 C.F.R. § 121.104(a). Although inter-affiliate transactions may not be introduced for the first time on appeal, Appellant contends it "provided information of interaffiliate transactions to the Area Office prior to the size determination." Appellant points to the excerpt from its October 8th submission to the Area Office, quoted *supra*, discussing LMOP's business. (Appeal at 12, citing Letter from J. Azadian, Esq. to T. Brown (Oct. 8, 2015).) Appellant argues that had the Area Office excluded these inter-affiliate transactions, Appellant would be well below the $33.5 million size standard.

E. Bethel's Response

On November 6, 2015, Bethel responded to the appeal. Bethel argues the size standard for this contract was $33.5 million, and the Area Office correctly calculated Appellant's receipts. Accordingly, OHA should deny the appeal.

The size standard is $33.5 million, Bethel argues, because the Navy never amended the solicitation to incorporate the increased size standard. As evidence, Bethel points to the "fax-back memo" that the CO sent to OHA on October 26, 2015. In the "fax-back memo," the CO confirms that the size standard for the subject contract is $33.5 million. As for the evidence Appellant cites to support its argument that the Navy incorporated the increased size standard—Amendment 0006—Bethel argues this evidence is clear on its face the Navy did not intend to change the size standard set forth on the Standard Form 1442.

Bethel points out the CO has discretion to incorporate an increased size standard, and is not required to do so. 13 C.F.R. § 121.402(a) ("the contracting officer **may** amend the solicitation and use the new size standard.") (emphasis Bethel's). Bethel argues that before it protested Appellant's size "everyone was operating under the size standard established at the time of the initial solicitation." (Response at 3-4.)

Bethel contends 13 C.F.R. § 121.404(g)(3)(iii) does not apply to the facts of this case. That regulation applies to long-term contracts of more than five years, and the subject contract has not even been awarded yet.

F. Agency Response

On November 5, 2015, SBA responded to the appeal. SBA argues the Area Office properly determined that Appellant exceeds the $33.5 million size standard and therefore is not an eligible small business for the subject contract. OHA, therefore, should deny the appeal.

SBA explains that the Navy issued Amendment 0006 on November 19, 2014, to "close Phase One Request for Proposals (RFP) and issue Phase Two RFP of the solicitation." (RFP, Amendment 0006 at 1.) Nowhere in this amendment did the Navy change the size standard.

Under 13 C.F.R. § 121.402(a), a CO is permitted, but not required, to amend a solicitation to use a size standard that becomes effective after a solicitation is issued but before

initial offers that include price are due. 67 Fed. Reg. 70,339, 70,343 (Nov. 22, 2002.) "The rule simply means that if the agency decides at its discretion to incorporate a new size standard, the agency applies the new size standard by issuing a 'formal solicitation amendment.'" (SBA Response at 2, quoting *Size Appeal of Dawson Tech., LLC*, SBA No. SIZ-5476 (2013).) Further, the Area Office does not have the authority to substitute another size standard where the solicitation already includes a valid one. 13 C.F.R. § 121.402(e).

SBA stresses that the contract in this case has not been awarded, so it is not in the fifth year of performance. Appellant's reliance on 13 C.F.R. § 121.404(g)(iii) is therefore misplaced, because that regulation applies to recertification within 120 days of the end of the fifth year of a contract.

Further, *Cox Construction* is inapposite because it does not address the issue of what size standard must be applied or the application of 13 C.F.R. § 121.402(a). In *Cox Construction*, OHA determined that the date to determine size in a two-phase solicitation is the date of offer that includes price. In relying on *Cox Construction*, Appellant confuses the issue of the date to determine size with the effective date of a size standard.

Next, SBA argues the appeal of the size standard is untimely. An appeal of a NAICS code or size standard must be filed within 10 calendar days of the solicitation or amendment at issue. 13 C.F.R. § 134.304(b). Appellant had the opportunity to challenge the size standard but failed to do so.

Appellant's arguments with respect to inter-affiliate transactions, SBA contends, are procedurally improper because Appellant is raising them for the first time on appeal. *Size Appeal of SN/M, A Joint Venture*, SBA No. SIZ-2778 (1987). However, even if Appellant raised this argument to the Area Office, the Area Office would not have deducted the transactions because the exclusion for inter-affiliate transactions applies only to receipts received by both a parent company and its subsidiary. *Size Appeal of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015). The transactions Appellant seeks to exclude—between itself and LMOP—are between entities with different parent companies. Appellant is owned by Mr. Dowsing, and LMOP is owned by Mr. and Ms. Dowsing. Thus, the exclusion does not apply.

G. Motion to Reply

On November 11, 2015,[1] five days after the close of record, Appellant moved to reply to SBA's and Bethel's responses, and submitted its proposed reply. There is good cause to permit the reply, Appellant argues, because SBA raises a new issue—that Appellant's appeal was untimely—and SBA is incorrect in its assertion that Appellant raised the inter-affiliate transaction issue for the first time on appeal. Appellant argues it should be permitted to reply to Bethel's response, because Bethel is incorrect that "everyone was operating under the size standard established at the time of the initial solicitation." Appellant does not state whether it

[1] OHA received the motion at 6:17 p.m. eastern time on November 10, 2015. However, "[a]ny submission received at OHA after 5 p.m. eastern time is considered filed the next business day." 13 C.F.R. § 134.204(b)(2).

contacted SBA or Bethel to determine whether either opposes the motion, as 13 C.F.R. § 134.211(b) requires.

Appellant's motion to reply is DENIED. 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, OHA did not direct Appellant to file a reply, the factual errors Appellant identifies are insignificant, and the reply was filed after the close of record. Accordingly, the reply is EXCLUDED from the record. *E.g., Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 14 (2015); *Size Appeal of Pac. Power, LLC*, SBA No. SIZ-5572, at 5 (2014); *Size Appeal of Prof'l Security Corp.*, SBA No. SIZ-5548, at 7 (2014) (denying a motion to reply filed after the close of record where the "reply d[id] not identify significant factual errors or inaccuracies").

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

This procurement is a Two-Phase, Design/Build procurement under FAR 36.3, where price proposals are included with Phase Two proposals, not with Phase One proposals. In such cases, OHA has held that a concern's size is determined as of the date of its Phase Two Proposal. *Size Appeal of Cox Constr. Co.*, SBA No. SIZ-5070 (2009). Here, however, the issue is not the date used to determine Appellant's size, but which size standard to apply, because the size standard changed between the date of the initial solicitation and the submission of Phase Two proposals.

Appellant's argument that the $36.5 million size standard applies is meritless. SBA regulations provide that "[t]he contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard." 13 C.F.R. § 121.402(a). In issuing this regulation, SBA stated:

> The proposed regulation does note that if a size standard is amended and becomes effective before the date initial offers are due, the CO may modify the solicitation and use the new size standard. This has been a long-standing policy of SBA's, and SBA believes it should be specifically set forth in the regulations for clarity purposes.

67 Fed. Reg. 70,339, 70,343 (Nov. 22, 2002) (proposed rule). It is clear that the regulation specifically contemplated a situation in which a size standard changed in the interval between issuance of a solicitation and the submission of a concern's self-certification as small. It is also clear, from the use of the word "may" that the regulation then permits, but does not require, the CO to use the new size standard. The CO may also choose to leave in place the size standard in effect at the time of the initial solicitation. It is a matter left to the CO's discretion, and there is no requirement that the new size standard be applied. *See Size Appeal of OBXtek, Inc*., SBA No. SIZ-5451, at 1 n.3 (2013) (finding the CO did not amend the solicitation to incorporate a new size standard.)

In this case, the CO assigned NAICS code 236220, and the corresponding $33.5 million size standard in effect at the time the initial solicitation was issued. 13 C.F.R. § 121.201 (2013). Although the size standard was subsequently increased, the RFP contains no specific amendment to this effect. *See, e.g., Size Appeal of Dawson Tech., 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); *see also Size Appeal of Pac. Power, LLC*, SBA No. SIZ-5572, at 5 (2014); *Size Appeal of OBXtek, Inc*., SBA No. SIZ-5451, at 1 n.3 (2013). Other evidence in the record confirms this omission. The Navy unambiguously represented to the Area Office that it did not amend the solicitation. Section II.B., *supra*. Further, the "fax-back memo" the CO sent to OHA confirms the $33.5 million size standard. Accordingly, the record establishes that the CO did not amend the RFP to incorporate any new size standard, and I find no error in the determination that the $33.5 million size standard applies to the RFP.

Contrary to Appellant's argument, the language Appellant cites in Amendment 0006 does not support a finding that the CO incorporated the increased size standard. Rather, by requiring a "size status certification . . . that indicates your firm is a small business at the time of Phase Two proposal submittal," the CO required offerors to represent their small business status under the size standard assigned to the RFP. For the reasons discussed *supra*, that size standard was $33.5 million. Appellant's reliance on 13 C.F.R. § 121.404(g)(3)(iii), moreover, is misplaced because that regulation applies where a contractor has been performing a contract for five years. Here, the contract has not yet been awarded, so the regulation does not apply.

Further, I note that the Area Office did not rely on *Cox Construction* to determine whether the $33.5 million size standard applies. The pertinent discussion in *Cox Construction* regards the date for determining size, rather than the effective date of a size standard. Accordingly, I find no legal error with respect to the Area Office's citation *Cox Construction*.

Appellant's argument that it identified inter-affiliate transactions during the size investigation is wholly unpersuasive. Stating that "LMOP's only business is to manage and own an office/warehouse space, the same space rented, in part, by Orion and, in other part, by Balboa," at most hints at the presence of inter-affiliate transactions and falls far short of explicitly stating that the receipts contain inter-affiliate transactions and identifying those specific amounts. Appellant therefore did not meet its burden of identifying the specific amounts

of inter-affiliate transactions at issue. *Size Appeal of Eastco Building Servs*., SBA No. SIZ-5437, at 5-6 (2013) (finding that, "although the dollar amounts of the management fees may have been recorded in Appellant's tax returns, it would not have been obvious to the Area Office that Appellant considered those fees to be inter-affiliate transactions, particularly in the absence of any explanation from Appellant.") Further, in addition to clearly identifying amounts in question as inter-affiliate transactions, it was also incumbent on Appellant to demonstrate that the exclusion would apply to those amounts, given that the exclusion applies only to transactions between a parent company and its subsidiary. *Size Appeal of G&C Fab-Con, LLC*, SBA No. SIZ-5649, at 8 (2015) ("I must agree with the Area Office that the inter-affiliate transaction exclusion applies only if the concerns in question have a parent-subsidiary relationship and are eligible to file a consolidated tax return."). Appellant did not make such an argument to the Area Office, and it may not do so now.

Appellant's suggestion that the Area Office may have double counted joint venture receipts is likewise unconvincing because Appellant does not directly address the Area Office's calculations, which are set forth in the appeal file. Instead, Appellant merely speculates as to errors the Area Office conceivably might have committed. To make a robust argument, then, Appellant could have, and should have, availed itself of the opportunity to examine the appeal file and critique the Area Office's calculations. *Size Appeal of ASI-Sumo JV*, LLC, SBA No. SIZ-5594, at 5 (2014) (citing 13 C.F.R § 134.205(d)). Because Appellant did not do so here, the arguments on appeal do not convincingly show error in the size determination.

Finally, I find no merit in SBA's argument that the appeal should have been filed as a NAICS appeal and is therefore untimely. OHA has considered appeals of size determinations where the principal issue is whether the CO amended the solicitation to incorporate a new size standard. *E.g., Size Appeal of Pac. Power, LLC*, SBA No. SIZ-5572 (2014); *Size Appeal of Dawson Tech., LLC*, SBA No. SIZ-5476 (2013). Moreover, OHA has specifically stated that "a NAICS code appeal is not the appropriate mechanism to challenge an area office's size determination." *Size Appeal of Project Enhancement Corp*., SBA No. SIZ-5604, at 12 (2014).

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