

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

SIZE APPEAL OF:

BCI Construction USA, Inc.,

Appellant,

Appealed From  
Size Determination No. 3-2019-072

SBA No. SIZ-6029

Decided: September 30, 2019

APPEARANCE

Ronald J. Garber, Esq., Weissmann Zucker Euster Morochnik & Garber P.C., Atlanta, Georgia, for Appellant

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On July 12, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2019-072 concluding that BCI Construction USA, Inc. (Appellant) is not eligible for award of the subject procurement. The Area Office specifically found that Appellant is not the manufacturer of the end item being procured, nor does Appellant qualify for any exception as a nonmanufacturer. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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.

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA afforded Appellant an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now issues the entire decision for public release.

## II. Background

### A. Solicitation

On November 9, 2018, the U.S. Army Corps of Engineers, Portland District, issued Request for Proposals (RFP) No. W9127N-19-R-0021 for the design, manufacture and installation of a new 20 Ton Trash Rake Gantry Crane to be located at the John Day Dam in Oregon. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 333923, Overhead Traveling Crane, Hoist, and Monorail System Manufacturing, with an associated size standard of 1,250 employees. The RFP did not state that any waiver of the nonmanufacturer rule would apply to the procurement. Appellant timely submitted its proposal on January 16, 2019. There were no final proposal revisions.

### B. Proposal

Appellant's proposal stated that REEL COH, Inc. (REEL COH), a large business based in Canada, would design and manufacture the crane. According to the proposal, "REEL COH will be performing all of the design, analysis, and Manufacturing, while [Appellant] will be responsible for all site construction activities to include electrical installation and mechanical installation." (Tech. Proposal at 3.) The proposal added that "[f]or this contract, REEL COH will be providing to [Appellant] the gantry crane design and engineering and fabrication of the new crane components and direct oversight by REEL COH experienced Installation Supervisor, Commissioning Engineer and Load Test Supervision for the onsite work performed by [Appellant]." (*Id.* at 2.)

Appellant's proposal provided three examples of relevant past performance. On all three of the projects, REEL COH performed "100% of design and fabrication/manufacture work." (*Id.* at 5, 14, 22.) For two of the projects, "a Small Business subcontractor" performed "100% of the construction work"; the third project was entirely performed by REEL COH. (*Id.*)

### C. Protest

On June 3, 2019, the CO announced that Appellant was the apparent awardee. After an unsuccessful offeror questioned Appellant's size, the CO asked Appellant to clarify how it complied with 13 C.F.R. § 121.406, given that "REEL COH is [Appellant's] subcontractor for the manufacturer portion of the project." (E-mail from T. Dailey to B. Miller (June 10, 2019).) In response, Appellant maintained that it qualifies as a kit assembler under 13 C.F.R. § 121.406(c). (E-mail from B. Miller to T. Dailey (June 10, 2019).) "The total value of the components for the crane are being supplied to [Appellant] as a kit from REEL COH. 50% of the components of the kit / Crane will be manufactured by business concerns in the United States which are small under the subject NAICS code for this solicitation." (*Id.*)

On June 13, 2019, the CO formally protested Appellant's size.<sup>2</sup> The CO alleged that Appellant is not the manufacturer of the end item being procured and is not eligible as a nonmanufacturer or as a kit assembler. Appellant's proposal stated that REEL COH will manufacture the crane. (Protest at 2.) Appellant does not qualify as a nonmanufacturer because Appellant “plans to have a large business from outside the United States perform the manufacturing portion of the work.” (*Id.*) In addition, the exception for kit assemblers is not applicable, as the procurement here called for “one end item, the trash rack crane,” rather than “a collection of separate items.” (*Id.* at 3, citing *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5679 (2015).)

#### D. Area Office Proceedings

On June 25, 2019, Appellant responded to the protest. Appellant argued that the statement in its proposal that REEL COH would perform all manufacturing had been “misunderstood.” (Protest Response at 2.) In actuality, Appellant asserted, “a large part of the components required to complete the crane will be purchased through other suppliers and fabricators,” whereas REEL COH will only “provide engineering as well as the supply of certain components on the crane that they are particularly equipped to fabricate.” (*Id.* at 3-4.)

Appellant offered a “general breakdown of the components required for the crane and their prospective suppliers.” (*Id.* at 4.) According to Appellant, only “Hoist Drums,” “Trolley Frame,” “Crane Trucks,” and “Crane Controls” will be produced by REEL COH. (*Id.*) Appellant identified potential suppliers for some of the remaining crane components, noting that some of these suppliers are small businesses. (*Id.*)

Appellant contended that, although Appellant itself will not produce any crane components, Appellant will play an important role in the manufacturing process by “purchasing all the components [and] assembling them in [Appellant's] shop into sub-assemblies for testing prior to shipment and mobilization to site.” (*Id.*) Once “[Appellant's] millwrights [have] assemble[d] the parts into their respective sub-assemblies for quality verification and testing,” the crane will be disassembled, shipped to John Day, and re-assembled on-site. (*Id.* at 5.) Under OHA precedent, “where the small business assembles the components it is to be recognized as the manufacturer.” (*Id.* at 8, citing *Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723 (2005).) Thus, Appellant, not REEL COH, is “the ultimate manufacturer of the end item.” (*Id.* at 6.)

Appellant also renewed its argument that it qualifies for the exception available to kit assemblers at 13 C.F.R. § 121.406(c). Appellant asserted:

The manufactured “item” is the crane and the “kit of supplies or other goods” are the components that are assembled to complete the crane. In our industry there are many examples of “Kit Cranes” and “Kit Cranes” are installed in many applications. There is no justification why the accumulation of parts that comprise this crane cannot be defined as a kit. . . . As can be seen in the table

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<sup>2</sup> A contracting officer's size protest is always timely. 13 C.F.R. § 121.1004(b).

above [Appellant is] only purchasing a few select components from REEL COH and the remainder of the components will be purchased from United States based manufacturers qualifying as a small business.

(*Id.*)

On July 1, 2019, the Area Office requested that Appellant provide an itemized breakdown of the total value of the end item. Appellant responded with a table indicating that the cost of “Components from REEL COH” will be \$1,900,000. (Letter from B. Miller to C. Thompson (July 1, 2019), at 1.) The cost of “Components from US Suppliers and Fabricators” will be \$1,650,000. (*Id.*)

#### E. Size Determination

On July 12, 2019, the Area Office issued Size Determination No. 3-2019-072, sustaining the protest. The Area Office found that Appellant itself has fewer than 500 employees and therefore is a small business. (Size Determination at 8.) Appellant is ineligible for this award, though, because Appellant is neither the manufacturer of the end item being procured, nor does Appellant qualify as a nonmanufacturer or kit assembler. (*Id.* at 9.)

The Area Office found that Appellant does not comply with 13 C.F.R. § 121.406 because REEL COH, not Appellant, is the manufacturer of the end item. The Area Office must base its analysis on the challenged firm's proposal, and Appellant's proposal here stated that REEL COH will manufacture the crane. (*Id.* at 5-6.) The Area Office noted that it examined Appellant's size as of January 16, 2019, the date of Appellant's proposal. (*Id.* at 1, 8.)

The Area Office determined that, even based on Appellant's post-proposal submissions to the Area Office, REEL COH will perform the bulk of the manufacturing, including design of the crane and producing the most important components. (*Id.* at 6-7.) According to the Area Office, “the value added by REE[L] COH, the main components, the design, the technical capabilities and the complexity of the fabrication outweighs the site construction activities that [Appellant] is performing.” (*Id.* at 7.) The Area Office observed that a firm which performs only minimal operations upon the item being procured is not the manufacturer. (*Id.* at 7-8.) In the instant case, the “welding, testing and reassembly” work that Appellant stated it will perform could easily be accomplished by REEL COH. (*Id.* at 8.)

The Area Office rejected the notion that Appellant qualifies under the exception for kit assemblers, finding that this procurement does not call for delivery of a kit. (*Id.* at 6.) The Area Office further found that Appellant is not eligible as a nonmanufacturer, because the manufacturer of the end item, REEL COH, is not small nor is it based in the United States. (*Id.* at 7-8.)

#### F. Appeal

On July 26, 2019, Appellant filed the instant appeal. Appellant argues that the Area Office clearly erred by disregarding Appellant's contributions in producing the end item. Under

SBA regulations and OHA case precedent, a firm which assembles and integrates components purchased from other businesses can be considered the manufacturer. (Appeal at 10.) Further, the proportion of total value added by the manufacturer can be very small so long as the concern adds important functionality to the end item. (*Id.* at 9, citing *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668 (2015).)

Here, relying on its protest response and its letter of July 1, 2019, Appellant maintains that, while some components will be manufactured by REEL COH, Appellant will obtain other components, including “the Trash Rake and Lifting Beam,” from different suppliers, and then will integrate and assemble the components into the final end item. (*Id.* at 5-6, 11.) The crane cannot function properly without these components, so “[s]urely, the addition of a large Tra[sh] Rake and Lifting Beam as well as other components by [Appellant] should make [Appellant] the manufacturer of the end item.” (*Id.* at 12.)

Appellant contends that the Area Office incorrectly analyzed the respective value of the contributions of Appellant and REEL COH. According to Appellant's July 1, 2019 cost breakdown, Appellant will contribute 54.39% of total costs and REEL COH 45.61%, provided that “costs of suppliers other than REEL COH” are counted towards Appellant's contribution. (*Id.* at 7, 12-13.) The Area Office further erred by taking into consideration REEL COH's contributions to the design and engineering of the crane, which should not be relevant in deciding which company is the manufacturer. (*Id.* at 13-14.)

Appellant argues that the Area Office misinterpreted Appellant's proposal. Read in context, the proposal makes clear that Appellant will perform all onsite work and that REEL COH's onsite role is limited to “oversight, not performance of work.” (*Id.* at 14.) The proposal did not specifically discuss whether REEL COH would manufacture the Trash Rake and Lifting Beam. (*Id.*) Nor did the proposal “address which company would be purchasing off-the-shelf components or custom Third-Party Manufactured parts from other suppliers to add to the Crane components that REEL COH was to fabricate.” (*Id.*)

Even if OHA concludes that Appellant is not the manufacturer of the crane, OHA should still find that Appellant is a “kit assembler” for the instant procurement. (*Id.* at 17-18.) Some of the component parts of the crane must be custom designed and fabricated, but the underlying regulation, 13 C.F.R. § 121.406(c), “does not contain any requirement the assembled product must be built from commercial off-the-shelf components.” (*Id.*)

### 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

When a manufacturing or supply contract is set aside for small businesses, the prime contractor either must be the manufacturer or producer of the end item being acquired, or must fall within certain “nonmanufacturer” exceptions. 15 U.S.C. § 637(a)(17); 48 C.F.R. § 19.102(f); 13 C.F.R. § 121.406. In the instant case, Appellant's principal argument is that Appellant is the manufacturer of the end item, because Appellant will assemble and integrate the component parts. Appellant observes that, under 13 C.F.R. § 121.406(b)(2), “the assembly of parts and components, into the end item being acquired” may constitute manufacturing. OHA likewise has reached similar conclusions in prior decisions. *E.g.*, *Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723, at 4 (2005) (“Assembly of components to produce the required end item is sufficient to designate the assembler as manufacturer of the end item.”).

The problem for Appellant is that Appellant's proposal contained no indication that Appellant will assemble the component parts of the crane, or indeed that Appellant would have any involvement at all in the manufacturing process. On the contrary, the proposal stated that REEL COH, a large Canadian firm, “will be performing all of the design, analysis, and Manufacturing,” whereas Appellant will perform “all site construction activities.” Section II.B, *supra*. The proposal further stated that REEL COH will be responsible for “fabrication of the new crane components,” making no mention of any other producers of components. *Id.* The notion that Appellant will assemble and integrate components from several suppliers, then, is not supported by Appellant's proposal, but rather stems from Appellant's protest response and other post-proposal documents. Section II.D, *supra*.

By regulation, SBA determines a concern's size as of the date of its self-certification, or for purposes of 13 C.F.R. § 121.406, the date of final proposal revisions. 13 C.F.R. § 121.404(a) and (d). As a result, OHA has long held that, in analyzing compliance with 13 C.F.R. § 121.406, the challenged firm's proposal is controlling, and changes of approach created in response to a protest may not be used to contradict the proposal. *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 9-10 (2017) (a challenged firm cannot “re-write its Proposal in response to the protest”); *Size Appeal of Tech. Assocs., Inc.*, SBA No. SIZ-5814 (2017); *Size Appeal of Camp Noble, Inc. dba 3-D Marketing*, SBA No. SIZ-5644 (2015); *Size Appeal of M1 Support Servs., LP*, SBA No. SIZ-5297 (2011); *Size Appeal of Fernandez Enters., LLC*, SBA No. SIZ-4863 (2007). Here, Appellant's proposal was submitted on January 16, 2019, and the Area Office determined Appellant's size as of that date. Sections II.A and II.E, *supra*. The proposal stated that REEL COH alone will manufacture the crane. Section II.B, *supra*. Appellant's arguments to the contrary are based on its protest response and other post-proposal submissions, which cannot supersede the proposal. The Area Office therefore did not err in concluding that, based on Appellant's proposal, Appellant is not the manufacturer of the end item. *M1 Support Servs.*, SBA No. SIZ-5297, at 9 (“while [the challenged firm] is correct that a firm performing assembly and integration efforts could be the ‘manufacturer’ of an end item, the issue is ultimately immaterial here because [the challenged firm's] proposal does not demonstrate that [the challenged firm] would actually perform such work.”).

Appellant also contends that it qualifies for the exception available to “kit assemblers” at 13 C.F.R. § 121.406(c), but this argument fails for several reasons. As the Area Office and the CO recognized, the procurement here calls for delivery of a single end item — the crane — not a “kit” of separate items, and Appellant's proposal does not, in any event, support the conclusion that Appellant will be engaged in any assembly. Further, the kit assembler exception requires that at least “50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the size standards for the NAICS codes of the components being assembled.” 13 C.F.R. § 121.406(c)(1). Here, even according to the post-proposal data Appellant submitted to the Area Office, REEL COH will provide well over 50% of the total value of the components (*i.e.*, \$1,900,000 of REEL COH components, compared to \$1,650,000 from “US Suppliers and Fabricators”). Section II.D, *supra*. I therefore see no basis to conclude that Appellant is eligible as a kit assembler.

#### IV. Conclusion

Appellant has not proven that the size determination is clearly erroneous. The appeal therefore is DENIED and 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