

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

SIZE APPEAL OF:

Contego Environmental, LLC,

Appellant,

RE: Indigo Blue Construction, LLC

Appealed From

Size Determination No. 3-2020-035

SBA No. SIZ-6054

Decided: May 19, 2020

APPEARANCES

Theodore P. Watson, Esq., Watson & Associates, LLC, Denver, Colorado, fr Appellant

Antonio R. Franco, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., fr Indigo Blue Construction, LLC.

DECISION¹

I. Introduction and Jurisdiction

On March 2, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2020-035 finding that Indigo Blue Construction, LLC (Indigo) is a small business under the size standard associated with the subject procurement. Contego Environmental, LLC (Appellant), which had previously protested Indigo's size, contends that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is granted in part and the matter is remanded to the Area Office for further review in accordance with this decision.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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. The Solicitation

On October 24, 2019, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C24919R0152, seeking a contractor to perform construction projects at the Lexington VA Medical Center. (RFP at 1, 16.) 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 236220, Commercial and Institutional Building Construction, with a corresponding \$39.5 million annual receipts size standard. (*Id.* at 1.) Proposals were due December 23, 2019. (RFP Amendment 0003 at 1.) Indigo and Appellant submitted timely offers.

According to the RFP, VA planned to award a single Indefinite-Delivery Indefinite-Quantity (ID/IQ) contract to the offeror with the lowest-price technically acceptable proposal. (RFP at 16, 31.) Specific work would be defined in task orders issued after award of the base contract, but the scope of the contract would include “carpentry, asphalt [and] concrete paving, roofing, excavation, interior renovation, carpet, window and door installation, electrical, plumbing, painting and stucco, demolition, masonry, fire protection construction, telecommunications, and [Heating, Ventilation, and Air Conditioning (HVAC)]” projects. (*Id.* at 1.)

The RFP stated that “[t]he contractor shall be required to be located, either by virtue of his main office or a satellite operation base, within an area permitting a maximum of a two (2) hour response time to the [Lexington VA] Medical Center.” (*Id.* at 17.) Further, “[a] superintendent must be present at work site at all times a Contractor has his/her forces or subcontractor forces working.” (*Id.* at 21.)

The RFP stated that the Project Manager and Site Superintendent would be considered Key Personnel. (*Id.* at 33.) Both individuals were required to have a minimum of five years' experience managing hospital/healthcare construction projects. (*Id.*) In addition, “[t]he Prime Contractor shall provide demonstrated experience in hospital/medical center and/or health care facility construction projects.” (*Id.*)

B. Proposal

Indigo's proposal stated that Indigo is an SDVOSB specializing in “general contracting, construction management and design/build services from project inception through close-out to private and public clients.” (Proposal at 5.) Indigo is located in Atlanta, Georgia. (*Id.* at 1.) For the instant procurement, Indigo partnered with [Subcontractor] to perform the required work. (*Id.*

at 5.) The proposal described [Subcontractor] as “[XXXXXXXXXXXXXXXXXXXXX
XXXXXX].” (*Id.*) Indigo and [Subcontractor] collectively are referred to throughout the proposal as “Team Indigo Blue.” (*Id.*)

The proposal explained that Team Indigo Blue will perform construction management, administrative support, quality control management, and other types of project management, while specialty trade subcontractors will be engaged to provide mechanical, plumbing, electrical, communications, carpentry, drywall/framing, painting, demolition, fire protection, casework, and flooring. (*Id.* at 5-6.)

An organizational chart included in the proposal showed that Indigo's President, Ms. Kimela J. Overstreet, will oversee the contract as the Program Manager. (*Id.* at 6, 7.) Ms. Overstreet will not be located on-site. (*Id.*) According to the proposal, Ms. Overstreet's role will be to provide: “[s]ignature authority for contracts, task orders and modifications”; “[r]esponsible for overall contract management”; “Senior Executive in Team Indigo Blue”; “[c]entral point of contact for all project matters”; “[r]esponsible for all design and construction related activities”; “[r]esponsible for overall contract compliance”; “[n]egotiating all contract requirements”; “[p]rovide [oversight] and guidance for each project”; “[e]nsure audits are conducted for safety and quality control”; “[p]rovide corporate support for all accounting and administrative actions”; and “[o]versee Project Managers.” (*Id.* at 7.) The proposal did not include a resume for Ms. Overstreet.

The proposal indicated that on-site supervision and management will be conducted by several named [Subcontractor] employees. (*Id.* at 7, 22-31.) The Proposal stated that Team Indigo Blue will establish a [XXXXXXXXXXXXXXXXXX] which “will provide the necessary on-site personnel to ensure successful project delivery.” (*Id.* at 7.) The following employees will be located at the [XXXXXXX]: Project Manager/Site Safety Health Officer (SSHO); Site Superintendent; Contractor Quality Control System Manager; and On-Site Quality Control Manager. (*Id.*) The Project Manager/SSHO, [XXXXXXXXXXXX], “will remain the ‘point person’ from project start to finish” and “will act as the primary point of contact and is responsible for overall project execution, cost control, progress reporting, and on-site safety.” (*Id.* at 7, 20.) She is also “responsible for the quality of work performed and ensuring that requirements are met.” (*Id.*) [The Project Manager/SSHO] has worked for [Subcontractor] for more than six years. (*Id.* at 12, 25.)

The Site Superintendent, [XXXXXXXXXXXX], will be responsible for “[m]anag[ing] all on site construction activities and subcontractors throughout the project.” (*Id.* at 7.) [The Site Superintendent] has been employed by [Subcontractor] for more than two years. (*Id.* at 14, 27.) [The Project Manager/SSHO] and [the Site Superintendent] are the only two individuals identified in the proposal as “Key Personnel.” (*Id.* at 12-15.)

The proposal stated that the Contractor Quality Control System Manager, [XXXXXXXXXXXX], is charged with “develop[ing] project quality plans and procedures” and “oversee[ing] the on-site Quality Control Program to ensure organizational compliance.” (*Id.* at 20.) [The Contractor Quality Control System Manager] has worked for [Subcontractor] for more than two years. (*Id.* at 29.) The On-Site Quality Control Manager, [XXXXXXXXXXXX], has “full

authority, at the site, to manage and implement all requirements of the [quality control] [p]rogram and all contract requirements.” (*Id.* at 20.) [The On-Site Quality Control Manager] has worked for [Subcontractor] for more than five years. (*Id.* at 30.) Both [the Contractor Quality Control System Manager] and [the On-Site Quality Control Manager] are endowed with “stop work” authority. (*Id.* at 20-21.)

For Experience/Past Performance, Indigo submitted [XXXXXX] reference for itself, and [XXXXXX] for [Subcontractor]. (*Id.* at 8-10, 39.)

C. Protest

On January 17, 2020, the CO announced that Indigo was the apparent awardee. On January 24, 2020, Appellant filed a size protest challenging Indigo's size. The CO forwarded the protest to the Area Office for review.

In the protest, Appellant alleged that Indigo is affiliated with [Subcontractor], a large business, and that the combined receipts of Indigo and [Subcontractor] exceed the size standard applicable to this procurement. More specifically, Appellant contended that Indigo is affiliated with [Subcontractor] through common management, joint ventures, ostensible subcontracting, and the totality of the circumstances. (Protest Narrative at 1-5.)

To support its allegations, Appellant provided two examples of [Subcontractor] employees allegedly representing themselves as Indigo employees. First, Appellant submitted the sign-in sheet for the “Life Safety Project” dated July 9, 2019. (*Id.* at 2.) The image marked “Example 1: Life Safety Project” showed the name and signature of [XXXXXXXXXX] beside the company name “Indigo Blue,” but with the e-mail, [XXXXXXXXXXXXXX]. (*Id.*) Next, “Example 2: O2 Tank Farm Project 626A4-18-304” provided an e-mail from an employee of Appellant stating:

[A]t today's site visit for the O2 Tank Farm Project 626A4-18-304 a blonde headed lady from [Indigo] named [XXXXXXXXXX] (last name unknown) introduced herself as ‘[XXXXXXXXXX] from [Subcontractor], well Indigo Blue, [Subcontractor].’

(*Id.*)

Appellant argued that these examples are evidence of affiliation:

The above examples clearly apply under both management and the other relationship or interactions between parties. [Indigo] is receiving the benefit of project bidding and management from [Subcontractor]. Any support provided is a financial benefit, to provide support in any manner, [Indigo] is circumventing the overhead of the staff required to fairly compete. [Subcontractor] is using excess capacity to unfairly compete [as a] small business through [Indigo]. [Subcontractor's] and [Indigo's] payrolls should be examined for dual employment. If this cannot be connected and no direct payment to [Subcontractor] can be found

[Appellant] can only assume the compensation is off the books. Other companies interviewed about the relationship revealed a personal relationship between the two companies.

(*Id.* at 3.)

Appellant argued that Indigo and [Subcontractor] are affiliated as joint venturers under 13 C.F.R. § 121.103(h). (*Id.*) For these reasons, Appellant stated, it would be “fraud” for the partnership of Indigo and [Subcontractor] to compete for small business set-asides. (*Id.* at 4.) In accordance with 13 C.F.R. § 121.103(a)(5), Appellant also argued that Indigo is affiliated with [Subcontractor] based on the totality of the circumstances, alleging that the websites of Indigo and [Subcontractor] were previously “a mirror image” of one another, the inadequate bonding/financial capacity of Indigo without [Subcontractor's] support, and that [Subcontractor's] assistance has resulted in Indigo being awarded several small business contracts that Indigo would not otherwise have received. (*Id.*)

Finally, Appellant alleged that [Subcontractor] is participating in small business procurement efforts through Indigo in violation of Federal Acquisition Regulation (FAR) clause 52.203-7, “Anti-Kickback Procedures (May 2014).” (*Id.* at 6.)

D. Protest Response

On February 14, 2020, Indigo responded to the protest, and submitted its completed SBA Form 355, Operating Agreement, financial records, and other documents. In response to Appellant's protest, Indigo denied affiliation with [Subcontractor], asserting that the relationship between Indigo and [Subcontractor] is “strictly limited to a teaming agreement permitted by FAR [subpart] 9.6 and the teaming agreement is clear that the relationship envisioned is a typical prime and subcontractor relationship.” (Protest Response at 1.) Indigo went on to deny the Appellant's allegations that Indigo and [Subcontractor] are affiliated based on the totality of the circumstances, that Indigo and [Subcontractor] are a joint venture, and that Indigo has received kickbacks from [Subcontractor]. (*Id.* at 2, 3.)

On its completed SBA Form 355, Indigo stated that Ms. Overstreet is the President and sole owner of Indigo. (SBA 355 at 4.) According to Indigo's Operating Agreement, Ms. Overstreet also is the only member and manager of Indigo. (Operating Agreement at 2.) In response to Appellant's protest, Ms. Overstreet averred that she is Indigo's sole owner responsible for making all decisions and that there are no other business entities that have any ownership or interest in the firm. (Protest Response at 1.)

Indigo addressed the two examples of interaction with [Subcontractor] identified by Appellant. Indigo stated that it is common practice for prime contractors and their subcontractors and other key personnel to be present at site visits. (*Id.*)

Indigo further denied allegations of affiliation with [Subcontractor], maintaining that “[Indigo] has not benefitted from [Subcontractor] as [Indigo] has not executed any contracts.” (*Id.* at 2.) Indigo asserted that “[Subcontractor] will not perform any primary and vital requirements

of [the instant] contract” and that Indigo will not be “unusually reliant or dependent on [Subcontractor] as [Indigo] has [its] own project support and key personnel such as Project manager and Superintendent etc.” (*Id.*) Indigo also argued that it does not have an ostensible subcontractor relationship with [Subcontractor] because the Teaming Agreement “indicates that [Subcontractor] will follow the direction of [Indigo],” and [Subcontractor] will not be Indigo's only subcontractor for the subject procurement. (*Id.*) Furthermore, contrary to Appellant's suggestions, Ms. Overstreet has no personal relationship with [Subcontractor's] principals. (*Id.* at 3.) Rather, the relationship between the two firms is for business purposes only. (*Id.*)

E. Size Determination

On March 2, 2020, the Area Office issued Size Determination No. 3-2020-035, concluding that Indigo is a small business under the \$39.5 million size standard for the instant procurement. The Area Office found that Indigo is not affiliated with [Subcontractor], and that Indigo's own receipts do not exceed the size standard. (Size Determination at 7.)

The Area Office first explained that it could not address Appellant's allegations pertaining to the Anti-Kickback Act because this is not a size issue. (*Id.* at 4.) The Area Office reviewed Appellant's allegations of affiliation between Indigo and [Subcontractor], including stock ownership, common management, identity of interest, joint ventures, and ostensible subcontracting. The Area Office found that Ms. Overstreet is the President and 100% owner of Indigo, and that she has the power to control Indigo in accordance with 13 C.F.R. § 121.103(c)(1). (*Id.*) Ms. Overstreet has no managerial or ownership interest in any other entity. (*Id.*) The Area Office found no affiliation between Indigo and other concerns based on common management because Ms. Overstreet does not manage or control any other concerns, and she alone has the power to manage and control Indigo. (*Id.* at 5.)

Turning to identity of interest, the Area Office found no evidence of affiliation through economic dependence under 13 C.F.R. § 121.103(f). (*Id.*) Ms. Overstreet and Indigo have no ownership interest in [Subcontractor], nor do they have the power to control [Subcontractor]. Further, the Area Office reviewed the financial statements for Indigo from FY2016 to FY2018 and found that Indigo did not derive any receipts from [Subcontractor]. (*Id.*)

The Area Office found that Indigo and [Subcontractor] did not form a joint venture for this procurement in accordance with 13 C.F.R. § 121.103(h). (*Id.* at 5-6.) Rather, the Area Office stated, Indigo and [Subcontractor] are prime contractor and subcontractor. (*Id.* at 6.) Additionally, the two firms do not have a joint venture agreement in place. (*Id.*)

Lastly, the Area Office considered whether Indigo and [Subcontractor] are affiliated under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). (*Id.* at 6-7.) The Area Office observed that OHA has identified “four key factors” that may be suggestive of unusual reliance. (*Id.* at 6, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) However, the Area Office found, none of the four factors is present here:

- (1) there is no incumbent contractor for this procurement; [(2)] [Indigo] does not intend to hire the large majority of its workforce from [Subcontractor];

(3) [Indigo] management did not previously work for [Subcontractor] nor was [Subcontractor] the incumbent contractor; and (4) [Indigo] with its previous contracting experience does not lack relevant experience nor must [Indigo] rely on its subcontractor to win the contract.

(*Id.* at 7.)

Having concluded that Indigo and [Subcontractor] are not affiliated, the Area Office analyzed Indigo's size as of December 23, 2019, the date of Indigo's proposal for the instant procurement. (*Id.*) Indigo's average annual receipts do not exceed the size standard. Therefore, Indigo is a small business for the instant procurement. (*Id.*)

F. Appeal

On March 16, 2020, Appellant filed the instant appeal. Appellant contends that the size determination is clearly erroneous and should be reversed or remanded. (Appeal at 2.) In particular, the Area Office did not adequately explore whether Indigo is affiliated with [Subcontractor] under various theories of affiliation, including power to control (positive or negative), identity of interest, the totality of the circumstances, and the ostensible subcontractor rule. (*Id.* at 3.) Appellant asserts that the Area Office misapplied these theories of affiliation and did not conduct meaningful review. (*Id.* at 11.)

Appellant claims that the Area Office did not investigate any previous relationship or ties between [Subcontractor] and Indigo in determining whether affiliation exists. (*Id.* at 4.) Specifically, the Area Office did not give any consideration to the protest allegations that [Subcontractor] represented Indigo at several site visits. (*Id.* at 4-5.) Appellant offers a list of questions and answers, reasoning that because “presumably [Subcontractor] posed the bulk of the questions,” [Subcontractor] is an ostensible subcontractor who will perform the primary and vital contract tasks for the instant procurement. (*Id.* at 9.) Appellant insists that the Area Office did not correctly determine whether there was a violation of the ostensible subcontractor rule because the Area Office did not address which firm would perform the primary and vital contract requirements. Nor is there even any indication that the Area Office obtained, and reviewed, Indigo's proposal. (*Id.*) Because the Area Office should have found Indigo and [Subcontractor] affiliated, the Area Office should have requested [Subcontractor's] tax and revenue information in order to properly determine Indigo's size for the instant procurement. (*Id.* at 10-11.)

G. Indigo's Response

On March 19, 2020, Indigo intervened in the case and requested a protective order. Indigo did not respond to the merits of the appeal.

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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The Area Office in this case determined that Indigo is compliant with the ostensible subcontractor rule because Indigo will not be unusually reliant upon [Subcontractor] to perform the subject contract. *See* Section II.E, *supra*. As Appellant observes in its appeal, however, the ostensible subcontractor rule poses a disjunctive test. That is, a concern may violate the rule not only through unusual reliance upon a subcontractor, but also if the subcontractor will perform the “primary and vital” contract requirements. 13 C.F.R. § 121.103(h)(4); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 14 (2017). In the instant case, the Area Office did not discuss, and apparently did not consider, which firm (Indigo or [Subcontractor]) will perform the “primary and vital” contract requirements. *See* Section II.E, *supra*. As a result, the size determination is incomplete in its analysis of the ostensible subcontractor rule.

Nor can I conclude that failure to address the “primary and vital” contract requirements was mere harmless error. OHA has repeatedly explained that “[t]he primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors.” *Size Appeal of Milani Constr., LLC*, SBA No. SIZ-5898, at 6 (2018) (quoting *Size Appeal of Iron Sword Enters., LLC*, SBA No. SIZ-5503, at 6 (2013) and *Size Appeal of C.E. Garbutt Constr. Co.*, SBA No. SIZ-5083, at 6 (2009)). As a result, on-site management of the contract is of paramount importance in a construction procurement. *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945, at (2018); *Iron Sword*, SBA No. SIZ-5503, at 6-7; *C.E. Garbutt*, SBA No. SIZ-5083, at 7.

Here, the instant procurement is for construction, and Indigo's proposal seemingly indicated that [Subcontractor] employees will manage all of the on-site operations. Sections II.A. and II.B, *supra*. Indeed, all of the on-site managers — including the Project Manager and the Site Superintendent — were identified in the proposal as [Subcontractor], rather than Indigo, employees. Section II.B, *supra*. Because it is not evident that Indigo itself will perform the on-site management, I find it appropriate to remand the ostensible subcontractor issue to the Area Office to further explore whether Indigo or [Subcontractor] is responsible for the “primary and vital” requirements of this contract.

Apart from the ostensible subcontractor question, Appellant has not met its burden of demonstrating error in the size determination. The record reflects that the Area Office reviewed Appellant's protest allegations and found such allegations to be meritless. Sections II.C and II.E,

supra. Given that Ms. Overstreet is the sole owner and sole manager of Indigo, and that she holds no interest in [Subcontractor], the Area Office could appropriately conclude that Indigo and [Subcontractor] are not affiliated through common ownership or common management. Likewise, the Area Office properly found that [Subcontractor] and Indigo did not form a joint venture for the instant procurement, and that Indigo and [Subcontractor] are not affiliated through economic dependence as Indigo has derived no revenues from [Subcontractor]. Appellant has not shown any error in these portions of the Area Office's decision.

IV. Conclusion

For the above reasons, the appeal is GRANTED with respect to the ostensible subcontractor rule, and I REMAND that question to the Area Office for further review. Appellant has not otherwise shown clear error in the size determination. I therefore DENY the appeal and AFFIRM the size determination with regard to all other findings, excluding the ostensible subcontractor rule.

KENNETH M. HYDE
Administrative Judge