

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

SIZE APPEAL OF:

Bacik Group, LLC,

Appellant,

RE: DSC-EMI Maintenance Solutions,
LLC

Appealed From
Size Determination No. 03-2020-07

SBA No. SIZ-6071

Decided: September 9, 2020

ORDER DISMISSING APPEAL¹

DECISION

I. Background

On December 17, 2019, the Department of the Navy issued a Request for Proposals (RFP) under Solicitation No. N4008519R9223 for Grounds Maintenance Services for Facility Investment, Pest Control, and Railroad Maintenance Services at Marine Corps Logistics Base, in Albany, Georgia. The Solicitation was set aside totally for small businesses under NAICS code 561210, Facilities Support Services, with a corresponding \$41.5 million annual receipts size standard. The due date for offers was January 21, 2020, later extended by amendment to February 6, 2020.

On June 23, 2020, the offerors were notified that DSC-EMI Maintenance Solutions, LLC (DSC-EMI) was selected for an award. On June 30, 2020, an unsuccessful offeror, Bacik Group, LLC (Appellant) filed a timely and specific size protest against DSC-EMI. Appellant alleged DSC-EMI was other than small “because of its affiliation under the ostensible subcontractor rule with several companies, based on common management, identity of interest, and/or newly organized concern.” (Protest at 1.) Appellant further alleged that Diversified Service Contracting, Inc., the protégé firm, was not small and was not an 8(a) company. (*Id.*, at 2.) Appellant also challenged the protégé firm's ability to perform at least 40% of the work as required by 13 C.F.R.

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

§ 125.8 because such a large portion of the work must be performed by specialty trade contractors. (*Id.*, at 27.)

On July 28, 2020, the Small Business Administration (SBA) Office of Government Contracting - Area III (Area Office) issued a size determination finding that DSC-EMI was a small business. The Area Office found that DSC-EMI was an unpopulated joint venture between Diversified Service Contracting, Inc., an 8(a) protégé firm, the 51% owner, and its mentor, TechFlow Mission Support, LLC, d/b/a EMI Service, a large firm and the 49% owner. (Size Determination, at 5.) The Area Office considered all of Appellant's allegations and rejected them, finding DSC-EMI was a small business. Specifically, the Area Office found that DSC-EMI would meet the performance of work requirements. (*Id.*, at 13-14.)

On August 12, 2020, Appellant filed the instant appeal. Appellant challenges DSC-EMI's ability to self-perform the necessary percentage of the work required by 13 C.F.R. § 125.8 and FAR 52.219-14 (Limitations on Subcontracting), included in Attachments to the solicitation. (Appeal, at 1.) The scope of work requires certain specialty trade licenses and certifications, which Appellant alleges the protégé firm does not possess. (*Id.*) Appellant further alleges DSC-EMI cannot comply with the Limitations on Subcontracting requirements.

On August 18, 2020, DSC-EMI filed a Motion to Intervene, which I granted, and a Motion to Dismiss. DSC-EMI argues first that Appellant's challenge to its ability to perform the contract and comply with the Limitations on Subcontracting clause are matters of contractor responsibility and are beyond OHA's jurisdiction. (DSC-EMI Motion to Dismiss, at 1-2.) Second, Appellant did not raise these issues in its original protest, and so cannot raise them now. Third, Appellant failed to state a claim or allege any error in the size determination. In the Alternative, if the Motion to Dismiss is not granted, Appellant seeks to strike Attachment 2 of the Appeal. (*Id.*, at 2-3.)

On September 2, 2020, SBA responded to the Motion to Dismiss. SBA supports the Motion. (SBA Response, at 1.) Appellant's allegations regarding whether DSC-EMI has the necessary licenses were not raised in its original protest, and so cannot be raised now. (*Id.*, at 2.) Appellant's allegations regarding the performance of work are responsibility issues outside of OHA's jurisdiction. (*Id.*)

Appellant failed to respond to the Motion to Dismiss, despite my issuing an Order on August 20, 2020, which pointed out the provisions of 13 C.F.R. § 134.211(c).

II. Discussion

A non-moving party must file and serve a response to a motion or be deemed to have consented to the relief sought. 13 C.F.R. § 134.211(c). Because Appellant has failed to respond to the Motion to Dismiss, I may grant the Motion on that basis alone. However, I also find that I must grant the Motion on the merits.

The appeal rests on two grounds: DSC-EMI does not have the necessary licenses and certifications to perform the contract, and DSC-EMI cannot meet the performance of work

requirements of 13 C.F.R. § 125.8 and the Limitations on Subcontracting clause at FAR 52.219-14.

As to the first issue, Appellant failed to raise the issue of whether DSC-EMI possesses the necessary licenses and certifications to perform this contract in its initial protest. I may not decide substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c). Because the regulation prohibits me from deciding issues raised for the first time on appeal, I cannot address Appellant's new arguments and must dismiss the appeal as to this issue. *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5678, at 3 (2015).

The second issue Appellant raises is not within OHA's jurisdiction. Whether a concern complies with the performance of work requirements is a matter of capability and thus of contractor responsibility, not within the jurisdiction of the size protest and appeals process. *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466, at 10 (2013) (compliance with the Limitations on Subcontracting is a responsibility issue, beyond OHA's jurisdiction); *Size Appeal of Assessment and Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 3 (2012). The determination of what capabilities are necessary to perform a contract and whether the awardee has them, are matters of responsibility for the contracting officer to determine and thus, are not within OHA's jurisdiction. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 23 (2011)

Accordingly, I conclude that in raising the issue of DSC-EMI's compliance with the performance of work requirements of 13 C.F.R. § 125.8 and Limitations on Subcontracting clause (of FAR 52.219-14) Appellant has raised an issue of contractor responsibility, which is not within OHA's jurisdiction. Therefore, I must dismiss the appeal as to the second issue, which means I must dismiss this appeal in its entirety.

III. Conclusion

Accordingly, I DISMISS the instant appeal because Appellant has failed to respond to the Motion to Dismiss, and thus is deemed to have consented to it; and because the issues Appellant raises are either beyond OHA's jurisdiction or are raised for the first time on appeal. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge