

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

SIZE APPEAL OF:

Indigo Blue Construction, LLC,

Appellant,

Appealed From  
Size Determination No. 03-2020-100

SBA No. SIZ-6081

Decided: November 19, 2020

APPEARANCES

Kimela J. Overstreet, Esq., President, for Appellant Indigo Blue Construction, LLC

Theodore P. Watson, Esq., Watson & Associates, LLC, Denver, Colorado, for Contego Environmental, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 14, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 03-2020-100, concluding that Indigo Blue Construction, LLC (Appellant) is not an eligible small business for the instant procurement. On appeal, Appellant, the original protestor, maintains that the size determination is clearly erroneous. 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 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 no requests for redactions. Therefore, I now issue the entire decision for public release.

## II. Background

This is the third time OHA has had occasion to consider Appellant's size in connection with this procurement. In *Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6054 (2020) (*Contego I*), OHA remanded this matter to the Area Office to consider the issue of whether Appellant was affiliated with its subcontractor Patriot Construction LLC (Patriot) under the ostensible subcontractor rule. In *Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6073 (2020) (*Contego II*), OHA found Appellant was affiliated with Patriot under the ostensible subcontractor rule, and remanded the matter to the Area Office again to determine whether Appellant and Patriot were similarly situated entities, and if not, whether their combined receipts exceeded the applicable size standard.

### 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.) Appellant submitted a timely offer.

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.)

### B. Proposal

Appellant's proposal stated that Appellant is a 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.) Appellant is located in Atlanta, Georgia. (*Id.*, at 1.) For the instant procurement, Appellant partnered with Patriot to perform the required work. (*Id.*, at 5.) The proposal described Patriot as “a privately held full services facilities and infrastructure solutions provider with operations from coast to coast and abroad whose main office is located in Dunkirk, Maryland.” (*Id.*) Appellant and Patriot 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 Appellant's President, Ms. Kimela J. Overstreet, will oversee the contract as the Program Manager. (*Id.*, at 6, 7.) According to the organizational chart, Ms. Overstreet will not be located on-site for the instant contract. The Project Manager/SSHO, Ms. Addie Eaves, “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.) Ms. Eaves has worked for Patriot for more than six years. (*Id.*, at 12, 25.)

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

### C. Contego I

After the CO announced that Indigo was the apparent awardee, Contego Environmental, LLC (Contego) filed a protest disputing Indigo's size. On March 2, 2020, the Area Office issued Size Determination No. 3-2020-035, denying the protest, and concluding that Indigo is a small business. Appellant challenged Size Determination No. 3-2020-035 at OHA, and on May 19, 2020, OHA issued its decision in *Contego I*, granting the appeal with respect to the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and remanding the matter to the Area Office for further review. OHA found that Appellant did not otherwise show clear error in Size Determination No. 3-2020-035.

OHA agreed with Contego that, in Size Determination No. 3-2020-035, the Area Office did not discuss, and apparently did not consider, which firm (Appellant or Patriot) will perform the “primary and vital” contract requirements. *Contego I*, SBA No. SIZ-6054, at 8. The instant procurement is for construction, and under OHA precedent “[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.” (*Id.*, quoting *Size Appeal of Milani Constr., LLC*, SBA No. SIZ-5898, at 6 (2018).) As a result, “on-site management of the contract is of paramount importance in a construction procurement.” (*Id.*, citing *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945 (2018) and *Size Appeal of Iron Sword Enters., LLC*, SBA No. SIZ-5503 (2013).)

Here, Appellant's proposal appeared to indicate that Patriot employees will manage all of the on-site operations. (*Id.*, at 8.) All of the on-site managers identified in the proposal were Patriot, rather than Appellant's, employees. (*Id.*) In addition, although the proposal stated that Appellant's President, Ms. Overstreet, would oversee the contract as Program Manager, she would not be based on-site. (*Id.*, at 3.) Because it was not evident that Appellant itself would perform the on-site management, OHA remanded the ostensible subcontractor issue to the Area Office for further review.

#### D. Contego II

On June 10, 2020, the Area Office issued Size Determination No. 3-2020-060, concluding that Appellant is an eligible small business for this procurement. The Area Office found that Appellant would perform the primary and vital requirements of the contract and was not unusually reliant upon Patriot. On June 24, 2020, Contego appealed Size Determination No. 3-2020-060 to OHA.

On September 22, 2020, OHA issued *Contego II*. OHA found that Appellant's proposal did not establish that Appellant will manage the instant contract. Indeed, all of the on-site managers — including the Project Manager and the Site Superintendent — were identified in the proposal as Patriot, rather than Appellant's, employees. (*Contego II*, at 9.) Further, while the proposal did state that Appellant's President, Ms. Overstreet, would oversee the contract as Program Manager, the proposal also made clear that she would not be based on-site. Accordingly, OHA found that Appellant's proposal does not support the notion that Appellant will manage this contract. (*Id.*)

OHA further found that that record did not support the conclusion that Appellant would perform the on-site management, and therefore, would not be responsible for the primary and vital contract requirements. (*Id.*) OHA thus found that Patriot, not Appellant, would be responsible for the primary and vital contract requirements. OHA remanded the matter to the Area Office again solely for the purpose of assessing whether Appellant and Patriot were similarly-situated entities, and if not, whether the combined receipts of Appellant and Patriot exceed the \$39.5 million size standard. (*Contego II*, at 10.)

#### E. Size Determination No. 03-2020-100

On October 14, 2020, the Area Office issued Size Determination No. 03-2020-100. The Area Office noted the direction in OHA's remand decision to assess if Appellant and Patriot are similarly-situated entities, and if not, whether the combined receipts of Appellant and Patriot exceed the size standard. The Area Office noted Appellant asserted in its October 6, 2020 submission that Patriot is not an SDVOSB, and thus not a similarly-situated entity to Appellant, and further that Patriot was other than small as of the date the parties entered into a subcontracting agreement. Therefore, the Area Office found that Patriot was other than small for this procurement. (Size Determination, at 3-5.) The Area Office determined Appellant and Patriot would be treated as joint venturers for this procurement, with their annual receipts aggregated. (*Id.*, at 5.) The Area Office considered Appellant's size and concluded it was small by itself, but when its receipts are aggregated with its ostensible subcontractor Patriot, Appellant was other than small. (*Id.*)

#### F. The Appeal

On October 29, 2020, Appellant filed the instant appeal. Appellant argues the Area Office erred when it determined that Patriot was affiliated with Appellant for this procurement under the ostensible subcontractor rule. (Appeal, at 3.) Appellant states that in determining whether affiliation exists on the basis of the ostensible subcontractor rule, SBA reviews the prime and

subcontractor relationship between the challenged concern and its subcontractor. The 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, and on-site management is of prime importance. (*Id.*, at 4.)

Appellant maintains its proposal establishes it will be managing the contract. More specifically, that its President, Ms. Overstreet, will serve as Project Manager and will provide overall management of contract performance. (*Id.*) Ms. Overstreet has an advanced degree in Construction Management and served 20 years in the U.S. Army Reserve. Appellant points to the many management tasks Ms. Overstreet will perform, according to the Proposal. Further, Appellant points out the Proposal does not say Ms. Overstreet will not be on site. Rather, Appellant maintains Ms. Overstreet has remained on-site throughout contract performance. (*Id.*, at 5.) Appellant argues that because the 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, and Appellant's technical proposal shows it will be managing the performance of the contract, clearly Appellant will perform the primary and vital requirements of the solicitation.

Accordingly, Appellant asserts the Area Office's determination that Patriot is performing the primary and vital requirements of the contract and is thus affiliated with Appellant, rendering Appellant other than small, is erroneous. (*Id.*) Because the Appellant is not affiliated with Patriot under the ostensible subcontractor rule, the Area Office need only have considered Appellant's annual receipts to determine its size. Since the Area Office found Appellant was by itself small, the Area Office should have found Appellant was a small business. (*Id.*, at 5-6.)

#### G. Contego's Response

On November 12, 2020, Contego responded to the appeal. Contego asserts Appellant is actually improperly attempting to appeal OHA's legal and factual rulings in *Contego II*. (Response, at 1.) Contego maintains that Appellant has failed to show any errors of fact or law in the size determination. Contego argues Appellant is expressing mere disagreement with the decision in *Contego II*, which found Appellant affiliated with Patriot under the ostensible subcontractor rule. The Area Office was to determine whether Appellant and Patriot were similarly situated entities, and if not, whether their combined receipts exceed the size standard. Appellant failed to present any argument on these issues, and so the appeal should be denied. (*Id.*, at 5.)

Contego further argues that OHA may not readdress the issue of whether Appellant is affiliated with Patriot under the ostensible subcontractor rule under the principles of *res judicata* and *stare decisis*. (*Id.*, at 5-7.) Contego further asserts Appellant, in its submissions to the Area Office, did not dispute that Patriot was not a similarly situated entity. (*Id.*, at 7.) Appellant failed to challenge the Area Offices' calculations of its receipts and those of Patriot. Appellant conceded in its submission to the Area Office that Patriot was other than small. (*Id.*, at 8.) Appellant had the opportunity to appeal *Contego II* and failed to do so. Appellant has thus waived its right to challenge it. (*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. Discussion

In *Contego II*, OHA held as a matter of law that Patriot will perform the primary and vital requirements of the contract and thus Appellant and its subcontractor Patriot were affiliated under the ostensible subcontractor rule, unless they were found to be similarly situated entities. The remand to the Area Office was solely to consider whether Appellant and Patriot were similarly situated entities, and if so, to aggregate them to calculate their size. The Area Office properly followed the remand instructions, finding, based upon Appellant's own admissions, that Patriot was not a similarly situated entity, and that Patriot was other than small. As such, Appellant was other than small for this procurement.

However, Appellant has chosen not to address any of these issues on appeal. Rather, Appellant is attempting to relitigate the issue of whether Patriot will be performing the primary and vital tasks of this procurement, the very issue that was addressed and settled in *Contego II*. Appellant is attempting to relitigate an issue that has already been decided in this matter and cannot now raise it again. This raises the law of the case doctrine. "Under the law of the case doctrine once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. The purpose of this doctrine is to promote "the judicial system's interest in finality and efficient administration." *Todd & Co., Inc. v. S.E.C.* 637 F.2d 154, 156 (3d Cir. 1980)." OHA has addressed this procedural issue before:

The relevant doctrine in this matter is the law of the case. "[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (citations omitted). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *In re Pharmacy Benefit Managers Antitrust Litigation*, 582 F.3d 432, 439 (3d Cir. 2009), quoting *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 856 (3d Cir. 1994). The law of the case doctrine takes on the force of a mandate when it applies to rulings made by an appellate court in a decision remanding a case to a lower court for further proceedings. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 524, 427-28 (1978). Such

a ruling is a mandate that is completely controlling as to all matters before the appellate body and disposed of in its decree. *Knapp Shoes, Inc. v. Sylvania Shoe Manufacturing Corp.*, 72 F.3d 190, 198 (1st Cir. 1995).

*Size Appeal of Chu & Gassman*, SBA No. SIZ-5344, at 8 (2012).

Here, OHA clearly ruled in *Contego II* that Patriot was performing the primary and vital requirements of this contract, and that therefore, unless Appellant and Patriot were similarly situated entities, the firms was affiliated for this procurement under the ostensible subcontractor rule. This holding is now the law of this case, and Appellant cannot challenge it again. To hold otherwise would open the size appeal process to endless litigation over every issue. As to the issues actually decided in the size determination, the appeal is silent.

Accordingly, I hold that the instant appeal is completely meritless. Appellant does not address the issues actually raised in the size determination, and attempts to relitigate issues already decided, which it cannot do because the holding in *Contego II* is the law of the case. Appellant has failed to establish any error of law or fact in the size determination, and I must deny the appeal.

#### IV. Conclusion

Appellant has failed to establish that the size determination is based upon any clear error of fact or law. Accordingly, I DENY the instant appeal, and I AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge