

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

SIZE APPEAL OF:

Kupono Government Services, LLC,

Appellant,

Re: Eagle Harbor, LLC

Appealed From
Size Determination No. 06-2023-010

SBA No. SIZ-6299

Decided: July 25, 2024

APPEARANCES

Robert K. Tompkins, Esq., Hillary J. Freund, Esq., Kelsey M. Hayes, Esq., Richard Ariel, Esq., Holland & Knight LLP, Washington, D.C., for Kupono Government Services, LLC

James Y. Boland, Esq., Michael T. Francel, Esq., Venable LLP, Tysons, Virginia, for Eagle Harbor, LLC

DECISION¹

I. Introduction and Jurisdiction

On January 30, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area VI (Area Office) issued Size Determination No. 06-2023-010, concluding that Eagle Harbor, LLC (Eagle Harbor) is a small business for the subject procurement. The Area Office rejected protest allegations filed by Kupono Government Services, LLC (Appellant) that Eagle Harbor's proposal contravenes the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(3). On appeal, Appellant maintains 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 matter is remanded to the Area Office for a new size determination.

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

¹ OHA issued a Protective Order for this proceeding on February 14, 2023. This decision, though, does not contain any confidential or proprietary information. Accordingly, this decision is not issued under the Protective Order and is intended for public release.

15 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 September 15, 2020, the U.S. Department of Energy (DOE) issued Request for Proposals (RFP) No. 89303020REA000003 for management and operations of the National Training Center in Albuquerque, New Mexico. (RFP at 1.) The Contracting Officer (CO) set aside the procurement entirely for 8(a) program participants, and assigned North American Industry Classification System (NAICS) code 611519, Other Technical and Trade Schools, which at that time had a corresponding size standard of \$16.5 million average annual receipts.²

Initial offers were due November 18, 2020, and final proposal revisions were due April 1, 2022. On December 22, 2022, the CO announced that Eagle Harbor was the apparent awardee.

B. Protest

Appellant, an unsuccessful offeror, timely filed a protest with the CO challenging Eagle Harbor's size. The protest alleged that Eagle Harbor will be unduly reliant upon an ostensible subcontractor to perform the primary and vital contract requirements. The CO forwarded Appellant's protest to the Area Office for review.

C. Size Determination

On January 30, 2023, the Area Office issued Size Determination No. 06-2023-010, concluding that Eagle Harbor is an eligible small business for the subject procurement. The Area Office found that Eagle Harbor ultimately is owned and controlled by an Alaska Native Corporation (ANC), and that Eagle Harbor, by itself, is small. (Size Determination at 3-5.) The Area Office further found that Eagle Harbor is not in violation of the ostensible subcontractor rule. (*Id.* at 5-13.) The Area Office based this latter portion of its decision on Eagle Harbor's final proposal revisions, dated April 1, 2022. (*Id.* at 8, 10.)

D. OHA Proceedings

Appellant timely appealed Size Determination No. 06-2023-010 to OHA. The appeal challenges only Eagle Harbor's compliance with the ostensible subcontractor rule. (Appeal at 1-2.) On February 28, 2023, while the appeal was pending, the parties informed OHA that DOE would undertake corrective action on this procurement in response to a bid protest at the U.S. Government Accountability Office (GAO). (E-mail from H. Freund (Feb. 28, 2023).) More specifically, DOE planned to “request and evaluate revised cost proposals, and then make a new award determination.” *Kupono Gov't Servs., LLC*, B-421392, B-421392.6, Feb. 23, 2023, at 1.

² Pursuant to SBA regulations, “the size standard in effect on the date the solicitation is issued” is controlling. 13 C.F.R. § 121.402(a).

Subsequently, GAO recommended that DOE should instead “permit offerors the opportunity to revise any aspect of their proposals” or alternatively “to revise any aspect of their proposals impacted by changes to their costs proposals.” *Kupono Gov't Servs., LLC; Akima Sys. Eng'g LLC*, B-421392.9, B-421392.10, B-421392.11, B-421392.12, June 5, 2023, 2023 CPD ¶ 136, at 14-15.

On March 1, 2023, in the interest of judicial economy, OHA stayed the instant appeal pending the outcome of corrective action. In its Order staying proceedings, OHA stated:

If Eagle Harbor is not again selected for award, OHA will dismiss the matter as moot. If, however, Eagle Harbor remains the apparent awardee, OHA will lift the stay and remand the matter to the Area Office for a new size determination addressing solely the question of Eagle Harbor's compliance with the ostensible subcontractor rule.

(Order at 1.)

On July 19, 2024, the CO notified OHA that corrective action has been completed, and that Eagle Harbor remains the apparent awardee. (E-mail from R. Miller (Jul. 19, 2024).)

III. Discussion

It is well-settled that OHA itself lacks authority to issue size determinations. 13 C.F.R. § 121.1002; *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5747, at 3 (2016). Consequently, if an area office conducts its review without having access to the correct version of essential documents, OHA will remand the matter to the area office for a new size determination. *Size Appeal of Kako'o Spectrum Healthcare Sols., LLC*, SBA No. SIZ-6293 (2024); *Size Appeal of Size Appeal of GaN Corp.*, SBA No. SIZ-5658 (2015); *Size Appeal of IAP World Servs., Inc.*, SBA No. SIZ-5480 (2013); *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125 (2010).

Here, in Size Determination No. 06-2023-010, the Area Office assessed Eagle Harbor's compliance with the ostensible subcontractor rule based on Eagle Harbor's proposal dated April 1, 2022. Section II.C, *supra*. While this appeal was pending, however, and well after Size Determination No. 06-2023-010 was issued, DOE undertook corrective action on the procurement. Section II.D, *supra*. As part of this process, DOE permitted offerors to revise their proposals. *Id.*

SBA regulations require that a concern's compliance with the ostensible subcontractor rule must be examined as of the date of final proposal revisions. 13 C.F.R. § 121.404(d). Accordingly, because the Area Office assessed Eagle Harbor's compliance with the ostensible subcontractor rule as of the wrong date, and because the Area Office was unable to review the most current version of Eagle Harbor's proposal which did not exist at the time Size Determination No. 06-2023-010 was issued, remand is warranted. This result is consistent with OHA's Order of March 1, 2023, in which OHA explained that, if Eagle Harbor remained the apparent awardee following corrective action, OHA would “remand the matter to the Area Office

for a new size determination addressing solely the question of Eagle Harbor's compliance with the ostensible subcontractor rule.” Section II.D, *supra*.

IV. Conclusion

For the above reasons, the question of Eagle Harbor's compliance with the ostensible subcontractor rule is REMANDED to the Area Office for a new size determination. Size Determination No. 06-2023-010 is otherwise AFFIRMED.

KENNETH M. HYDE
Administrative Judge