United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Cox Construction Co., Appellant, Appealed From Size Determination No. 6-2009-077	SBA No. SIZ-5070 Decided: September 25, 2009

APPEARANCE

David S. Demian, Marks, Golia & Finch, LLP, San Diego, CA, for Appellant

DECISION

I. Jurisdiction

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.

II. Issue

Did the Area Office make a clear error of fact or law when it determined that 13 C.F.R. § 121.404(a) governs the date on which Appellant's size status should be determined for the purposes of this solicitation and thereafter calculated Appellant's size as of the date it submitted its Phase Two proposal, which included price for the first time? *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On October 2, 2008, the Contracting Officer (CO) for the Department of the Navy, Naval Facilities Engineering Command Southwest issued Request for Proposals No. N62473-08-R-8651 (RFP), seeking new construction and renovation services at various locations.

2. The RFP was a total small business set-aside, and the CO designated North American Industry Classification System (NAICS) code No. 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in average annual receipts. Pursuant to the RFP, the proposal was divided into two phases.

3. On November 5, 2008, Cox Construction, Inc. (Appellant) submitted its Phase One proposal, which included its experience, past performance, and management plan. The Phase One proposal, pursuant to instructions provided in the RFP, also included the offeror's Online Representations and Certifications Application (ORCA).

4. On May 27, 2009, after the CO selected Appellant to proceed to Phase Two, Appellant submitted its Phase Two proposal, which included its site plan and price.

5. The CO did not require offerors to recertify their size status with their Phase Two proposals, despite the fact that prices were first requested at this stage. Appellant did not submit another ORCA or recertify its size with its Phase Two proposal.

6. On June 8, 2009, after determining that Appellant was a best value offeror, the CO filed a protest challenging Appellant's size.

7. On July 16, 2009, the CO supplemented her protest with a letter explaining that her protest was based on concerns about Appellant's size brought to her attention by Appellant's president.

B. The Size Determination

On July 31, 2009, the U.S. Small Business Administration (SBA) San Francisco Office of Government Contracting-Area VI (Area Office) issued Size Determination No. 6-2009-077 (Size Determination), finding Appellant other than small. Based on Appellant's Federal Income Tax Returns and financial statements, and pursuant to 13 C.F.R. § 121.404(a), the Area Office determined Appellant's size status as of May 27, 2009, the date Appellant submitted its Phase Two proposal, which included price for the first time. Therefore, the Area Office calculated Appellant's annual receipts for its fiscal years ending December 31, 2006, 2007, and 2008. The Area Office determined that Appellant's average annual receipts were above the applicable size standard as of May 27, 2009.[1]

C. The Appeal

Appellant received the size determination on July 31, 2009, and filed its size appeal on August 17, 2009, with SBA's Office of Hearings and Appeals (OHA).

Appellant contends that there is a conflict between the Federal Acquisition Regulations (FAR) and SBA's regulations in the Code of Federal Regulations (CFR) with respect to the issue of when a company's size should be determined. FAR 4.1201(a) requires contractors to comply with ORCA procedures, and FAR 4.1201(b) requires contractors to update ORCA at least

[1] The Area Office also determined that Appellant is affiliated with another company, Keystone Ventures, LLC (Keystone) pursuant to 13 C.F.R. § 121.103(c)(2), because two of Appellant's officers also have the power to control Keystone. This finding is not at issue in the instant appeal.

annually. FAR 52.204-8, a clause that must be inserted into solicitations pursuant to FAR 4.1202, requires contractors to verify that their representations and certifications are accurate as of the date of the offer. Appellant emphasizes that the FAR does not require contractors to verify that that their representations and certifications are accurate as of the date of the offer that includes price. However, 13 C.F.R. § 121.404(a) explicitly provides that SBA determines size status as of the date that a contractor "submits a written self-certification that it is small to the procuring activity as part of its initial offer . . . which includes price."

Here, pursuant to FARs 4.1201 and 52.204-8(d), Appellant certified on November 5, 2005, in its Phase One proposal, that the representations and certifications in its ORCA had been updated within the twelve months prior to the issuance of the RFP and that its ORCA was accurate as of that date, November 5, 2005. Subsequently, Appellant inquired as to whether it was required to recertify when it submitted its Phase Two proposal, the first offer that included price. The CO responded that Appellant was not required to recertify because its previous certification was sufficient, and Appellant did not recertify when it submitted its Phase Two proposal on May 27, 2009. Based on the fact that Appellant complied with both the FAR and the instructions of the CO, Appellant claims that the Area Office's determination that pursuant to 13 C.F.R. § 121.404 (a) Appellant's size should be determined as of May 27, 2009, was in error. Because Appellant self-certified on November 5, 2008, and was never asked to recertify, Appellant argues November 5, 2008, is the only date on which size can be determined because it is the only date on which it (and the other offerors) self-certified.

Appellant further argues that the FAR should control the date of size determination, rather than the CFR, because the FAR more clearly comports with the policy goals of the ORCA procedure. Specifically, Appellant contends that the FAR promotes the goals of reduction in paperwork and streamlining of contracting procedures because COs often obtain a company's ORCA early in the procedure pursuant to FAR, whereas the CFR requires further certification at the time when an offer includes price. Appellant opines that "in order to harmonize these provisions, the later submission of price should be deemed to be a continuation of and relate back to the earlier offer that included the FAR [representations and certifications]."

In further support of this argument, Appellant cites *Size Appeal of FDR Incorporated*, SBA No. SIZ-4781 (2006), which addressed the intersection of FAR 52.204-8 and 13 C.F.R. § 121.404 in a different context. In *FDR Incorporated*, the CO inadvertently failed to identify the applicable NAICS code, as required by subsection (a) of FAR 52.204-8. As a result, it was unclear whether the successful offeror had effectively self-certified that it was a small business for the purposes of that solicitation. *Id.* at 3, 8. OHA determined that because the offeror's intent to designate a certain NAICS code was clear, and because the designation was required by the FAR, the clause was included in the solicitation by operation of law for the purpose of determining size under 13 C.F.R. § 121. *Id.* at 12-13. Here, each offeror unquestionably self-certified on the date of the initial offer, November 5, 2008, and did not recertify upon submission of their proposals including price. Based on *FDR Incorporated*, Appellant argues that the November 5, 2008, date must control the size determination because "otherwise . . . [Appellant] will be judged on a standard which neither it, nor any of the other offerors, had notice of."

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

The standard of review for this appeal is whether the Area Office based the Size Determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

C. Analysis

1. There is No Conflict Between the FAR and the CFR

The primary contention of Appellant's appeal petition is that because the FAR does not require contractors to verify that that their representations and certifications are accurate as of the date the offer includes price, SBA's size regulations (specifically 13 C.F.R. § 121.404(a)) conflict with the FAR by requiring self-certification as of the date the offer includes price. Appellant's assertion is incorrect.

FAR 4.12 requires a contractor to complete representations and certifications through the ORCA system and update them at least annually; the clause required by FAR 52.204-8 requires a contractor to certify that its ORCA has been updated within twelve months before the date of any specific offer. Appellant places great emphasis on the fact that these regulations do not require self-certification as of the date the contractor's offer includes price. Nevertheless, 13 C.F.R. § 121.404(a), which provides that SBA determines size as of the date an offeror submits an offer including price, does not conflict with these provisions.

Merely because the FAR provisions do not require a certain condition does not compel the conclusion that any provision that does require that condition is conflicting. Rather, 13 C.F.R. § 121.404(a) cannot conflict with these FAR provisions because each serves a different purpose. The FAR provisions deal with *what* representations and certifications a business makes and *how* it makes them, whereas 13 C.F.R. § 121.404(a) deals with *when* SBA determines size. The regulations work toward different goals and perform different functions within their respective regulatory schemes. Thus, the fact that they both deal with self-certification is, in fact, irrelevant here.

Regardless, Appellant was required to comply with both the applicable FAR provisions and the requirements set forth in 13 C.F.R. § 121.404(a). Despite the fact that Appellant complied with the FAR, the Area Office correctly found Appellant to be other than small, and therefore ineligible to receive the instant procurement, under 13 C.F.R. § 121.404(a) (Facts 3-5). Simply put, size is not determined, regardless of the date a company's ORCA is submitted, until the date when an offer includes price. 13 C.F.R. § 121.404(a); *Size Appeal of Pyramid Services, Inc.*, SBA No. SIZ-4879, at 8 (2008) ("Absent a price in an offer, SBA will not determine a concern's size until the date when a price is offered. Therefore, since the Navy did not even require offerors to price their proposals until they submitted their Step II offers, the Area Office had no option but to determine Appellant's size as of the date it submitted its price.").

Appellant also places great emphasis on the fact that it complied with the CO's instructions throughout the certification process (Fact 5). Although the CO did not require Appellant to recertify with its Phase Two proposal, such instructions cannot preempt the Area Office's application of 13 C.F.R. § 121.404(a). The Area Office was still compelled to determine Appellant's size as of the date when its offer included price.

2. In the Event of a Conflict, SBA's Regulations in the CFR Control

Appellant next claims that the FAR should control to the extent of any conflict with 13 C.F.R. § 121.404(a). Appellant's assertion is incorrect. SBA is the agency entrusted with determining size pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Thus, whether a company is considered a small business concern for the purposes of individual solicitations is determined by SBA's regulations. "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted). Therefore, under *Chevron*, SBA's size regulations control the determination of size.

In analyzing a case involving conflicting FAR and CFR provisions dealing with the Certificate of Competency (COC) program, the Court of Federal Claims recognized:

> The FAR, promulgated by DOD, GAO, and NASA, are designed to provide uniform acquisition procedures for federal government agencies. Once the contracting officer refers a matter to the SBA, as required by the FAR, the SBA's procedures generally should control, especially considering that the SBA is the agency charged with issuing COCs, not DOD, GAO, or NASA.

C&G Excavating, Inc. v. U.S., 32 Fed.Cl. 231, 239 (Fed. Cl. 1994) (citing *Chevron*, 467 U.S. at 844). Additionally, the Government Accountability Office, in sustaining a size protest, noted that it "view[s] as controlling" the SBA regulations, as opposed to the FAR, in the area of size determinations.[2] Based on the foregoing, I conclude that SBA's regulations regarding size determinations are controlling in the event of a conflict with the FAR.

[2] *Adams Indus. Servs., Inc.*, B-280186 (August 28, 1998) ("While FAR § 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract,

3. *FDR, Incorporated* Does Not Apply

Appellant cites *Size Appeal of FDR, Incorporated*, SBA No. SIZ-4781 (2006), a case in which the CO failed to identify the NAICS code applicable to the procurement. OHA determined that the procurement was nonetheless properly set aside for small businesses because, despite the error, the intent of the CO was clear and the error was self-correcting by operation of law. The principal focus of *FDR, Incorporated* was that a missing NAICS code can be incorporated in a contract as a matter of law under the*Christian* Doctrine. *See id.* at 8-13; *see also G.L. Christian and Associates v. U.S.*, 312 F.2d 418 (Ct. Cl. 1963).

It is not entirely clear why Appellant cites *FDR, Incorporated*. Appellant states that the case "touches upon the relationship of CFR 121.404(a) and FAR 52.204-8," then immediately goes on to say it is "distinguishable from the case at hand." The crux of Appellant's argument seems to be that "it was not clear that FDR, Incorporated had properly represented itself as small for that solicitation," whereas "[i]n contrast, in this case, there is no question that all offerors, including [Appellant], represented themselves as small as of their initial offers made on November 5, 2008." It thus appears that Appellant may be offering *FDR, Incorporated* for the proposition that because the date on which each offeror represented itself as small is clear in this case—each offeror submitted its ORCA as of the Phase One proposal date, November 5, 2008—the Area Office was required to apply that date as the date of the size determination.

FDR, Incorporated does not stand for such a proposition. Indeed, I can see no reasonable application of *FDR, Incorporated* to the instant case. Whatever Appellant's argument, *FDR, Incorporated* simply does not address the issue presented here—when the date of an offeror's self-certification is different than the date price is first included in the offer. Furthermore, the resolution of that issue is clear—because the CO did not require price to be submitted until Phase Two, the Area Office had no choice but to determine Appellant's size status as of the Phase Two proposal date, May 27, 2009. *Size Appeal of Pyramid Services, Inc.*, SBA No. SIZ-4879, at 8 (2008).

V. Conclusion

I have considered Appellant's Petition, the applicable law, and the Record. The applicable law supports the Area Office's determination of Appellant's size as of the May 27, 2009, Phase Two proposal date. The Record supports the Area Office's determination that Appellant exceeds the applicable $33.5 million size standard as of that date. Therefore, the Area Office did not base its size determination upon a clear error of fact or law when it determined Appellant was other than a small concern for this procurement.

Accordingly, the Size Determination is AFFIRMED. Appellant's appeal is DENIED.

SBA's regulations, which we view as controlling in this area, provide that '[a] timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest.' 13 C.F.R. § 121.1004(c).").

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge