

**The Florida Bar: Real Property, Probate and Trust Law Section
Construction Law Committee**

Small Business Subcommittee Monthly Report

Lisa Colon Heron - chair

Month of September 2014

FEDERAL DECISIONS

SBA Office of Hearings and Appeals

Size Appeal of: Harbor Services Inc.

Re: ***BES Design/Build, LLC***

Decided August 4, 2014

This was a protest appeal of a size determination of BES Design/Build, LLC (“BES”). Harbor Services, Inc., (“Harbor Services”) filed a protest with the SBA Office of Government Contracting Area II (Area Office) when BES was determined to be the low bidder on a Department of Veteran Affairs solicitation for a fire sprinkler contractor. Harbor Services alleged that BES was affiliated with 4 other companies that were owned by BES’ minority owner and that BES entered into a mentor-protégé agreement with KCI Technologies Inc. (“KCI”) not for the purpose of mentoring but that KCI would perform the work for BES.

Affiliation based on common management.

BES is a certified Service-Disabled Veteran-Owned Small Business (SDVOSB). It is 51% owned and controlled by a service disabled veteran Mr. Banach. Mr. Bolton owns the remaining 49%. Mr. Bolton also owns other companies, but Mr. Banach does not have any ownership interest in Mr. Bolton’s companies. BES leased space from one of Mr. Bolton’s companies for a branch office.

Harbor Services alleged that BES is affiliated through common management with Mr. Bolton’s companies and therefore exceeds the size requirement of a SDVOSB.

Affiliation based on assistance provided under the mentor-protégé agreement.

BES is a mentor of KCI under a VA approved mentor-protégé agreement. At the time of the protest no contracts had been awarded to BES and KCI under the mentor-protégé agreement. BES also stated that KCI would not participate in the underlying procurement. Further, at the time of the protest BES had subcontracted work to KCI but in those instances BES was the prime contractor.

Area Office determination.

The Area Office found that Mr. Banach was the majority owner and managing partner of BES. The Area Office rejected Harbor Services' claim that BES is affiliated with Mr. Bolton's companies. The Area Office found that Mr. Banach held no interest in any of Mr. Bolton's companies. The Area Office considered the relationship between BES and KCI and determined that they were parties to an approved mentor-protégé agreement and there was no affiliation because the firms did not jointly submit a bid for the underlying procurement.

The Appeal

Harbor Services argued that the Area Office conducted an improper narrow analysis of the affiliation between BES and Mr. Bolton's companies because it only considered affiliation based on stock ownership. Harbor Services maintained that there is affiliation through common management, common facilities, common employees and common principals.

The OHA found that Area Office was correct when it found no affiliation because BES is controlled solely by Mr. Banach and not by Mr. Bolton and because Mr. Banach holds no ownership or managerial interest in any of Mr. Bolton's companies. Thus there is no common nexus between BES and the Bolton owned companies which is a prerequisite for affiliation under 13 C.F.R. § 121.103(a).

With regard to the relationship between BES and KCI the OHA found that since KCI would not be participating in the underlying procurement that Harbor Services' complaints were without merit. Further, the OHA found that Harbor Services had not presented evidence to support its other claims regarding the relationship between KCI and BES.

During the appeal Harbor Services sought several times to supplement the appellate record to introduce new evidence to support its claims of affiliation. OHA denied the motion to supplement the record finding that its review is based on the evidence in the record at the time the Area Office made its determination. A record may only be supplemented if the proponent demonstrates that the new evidence is relevant to the issues on appeal and clarifies the facts and does not unduly enlarge the issues.

IN THE NEWS

On August 28, 2014, Drew Boggs, the CEO of Boggs Paving Inc. a prominent North Carolina paving company pled guilty to conspiracy to defraud in federal court to what prosecutors alleged to be a ten year, \$87 million DBE fraud scheme involving government funded road construction projects. He now faces 25 years in prison and \$500,000 in fines. According to the indictment, Boggs conspired with 7 other defendants to get federal and state construction contracts by exaggerating the work a DBE was to perform. Prosecutors alleged the amounts to be paid to the DBE were funneled back to Boggs Paving.