

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

Small Business Sub-Committee

October 12, 2015

Subcommittee Chair: Lisa Colon Heron
Smith Currie & Hancock, LLP

**I. SIZE APPEAL OF: B GSE GROUP, LLC., SBA No. SIZ 5679 (2015)
Decided September 17, 2015.**

This appeal arises out of a U.S. Department of Air Force, Air Force Material Command RFQ for a 400 Hz frequency converter. The Contracting Officer set aside the procurement entirely for small businesses under NAICS Code 335312, Motor and Generator Manufacturing with a corresponding size standard of 1000 employees. The RFQ was subject to FAR part 12.

On July 8, 2015, B GSE Group was named the successful offeror. On July 28, 2015 the Contracting Officer initiated a size protest against B GSE. The basis for the protest was that the proposed frequency convertor was manufactured by a large business, Piller USA, Inc. and there was no class waiver in place for frequency converters under NAICS code 335312.

B GSE argued that it was eligible for the award as a kit assembler under 13 C.F.R. § 121.406(c). The kit manufacturer exception states:

- (1) Where the manufactured item being acquired is a kit of supplies or other goods provided by an offeror for a special purpose, the offeror cannot exceed 500 employees and 50 percent of the total value of the components of the kit must be manufactured by business concerns in the United states which are small under the size standards for the NAICS codes of the components being assembled. The offeror need not itself be the manufacturer of any of the items assembled.
- (2) Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such item shall be excluded from the calculation of total value in paragraph (c)(1) of this section.

13 C.F.R. § 121.406(c); see also FAR 19.102(f)(2). B GSE argued that this exception was applicable because it intended to purchase portions of the frequency

converter from Piller and supply the remaining parts and assemble them. This argument was rejected for two reasons.

First, the OHA found that B GSE failed to demonstrate that it will procure and assemble parts from multiple suppliers to produce the converter. The OHA found that B GSE did not show that it would utilize parts from any other supplier other than Piller. Second, the OHA found that the assembly of parts and components does not make B GSE a “kit assembler” under the SBA regulations. The OHA held that the work B GSE did in connection with the converter rendered it a manufacturer. Under 13 C.F.R. § 121.406(b) (2) a manufacturer performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components into the end item being acquired. Contrast with the definition of a “kit assembler” which is a concern that “purchases items and packages them into a kit.” FAR 19.102(f)(2).

The OHA concluded that it is the procuring agency and not the offeror which determines whether a “kit” is being acquired. In this case the frequency converter was not a kit and the Contracting Officer advised the Area Office that the government did not specify a kit.

NEXT MEETING

October 28, 2015 @ 12 PM EST.

Call-in number and password: 888-376-5050 / Pin 7542148521.