United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
TKTM Corporation	SBA No. SIZ-4885
Appellant	Decided: January 31, 2008
Appealed from Size Determination No. 6-2008-022	

APPEARANCE

Manuel Arce, President, TKTM Corporation, Spokane, Washington, for Appellant.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On December 18, 2007, the Small Business Administration (SBA) Office of Government Contracting, Area Office VI (Area Office) issued Size Determination No. 6-2008-022 finding TKTM Corporation (Appellant) to be other than a small concern under Invitation For Bids No. W912EF-07-B-0021 (IFB). On December 28, 2007, Appellant filed the instant appeal at the SBA Office of Hearings and Appeals (OHA).

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. Accordingly, this matter is properly before OHA.

II. Issue

Whether the Area Office made a clear error of fact or law when it determined Appellant to be other than a small business due to its affiliation with its subcontractor. 13 C.F.R. § 121.103(h)(4).

III. Background

A. Findings of Fact

I find the following facts have been established by the preponderance of the evidence in the Record:

1. On October 2, 2007, the U.S. Army Corps of Engineers, Walla Walla District, (Army), issued IFB No. W912EF-07-B-0021 titled "Little Goose Pit Tag Dewater Structure and Flume Relocation." The IFB required the successful bidder to fabricate and install a Passive Integrated Transponder (PIT) Tag Detection System and a fish facility dewatering structure. The successful bidder had to replace the dewatering structure, relocate the fish bypass flume, install a new valve vault with two new valve actuators, and perform the associated electrical work. The purpose of the flume relocation and tag system is to enable the Government to monitor spawning salmon as they pass through the flume.

2. Although the IFB is unrestricted, it incorporated FAR 52.219-4, a price evaluation preference for HUBZone small business concerns.

3. The IFB required the successful bidder to perform forty percent of the work required by the contract (FAR 52.236-1).

4. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, as the applicable NAICS code for this procurement, with a corresponding $31 million annual receipts size standard. The bid opening date was November 2, 2007.

5. On November 2, 2007, Appellant submitted the only bid under the IFB as a HUBZone small business concern. Appellant broke out its bid (not including optional items) as follows:

CLIN	Description	Quantity	Amount
0001	Mobilization and demobilization	1	197,500
0002	Construct PIT tag detector system	1	750,000
0003	Perform work on Dewatering Structure	1	990,000
0004	Perform work on Flume Relocation	1	1,800,000
0005	Install 2 new actuators and new vault B	1	200,000
0006	Spare pipe and couplings	1	30,000
	Total Basic Requirements		3,967,500

6. On November 15, 2007, the CO sent a letter to the SBA Office of Government Contracting informing SBA that she had determined Appellant to be non-responsible. The CO cited Appellant's marginal and unsatisfactory performance ratings under previous contracts. The CO stated, "[A] major issue with [Appellant's] performance has historically been its propensity

to subcontract large portions of the work [and] its inability to manage subcontractors efficiently." The CO also found Appellant unable to comply with the limitations on subcontracting clause in the solicitation (FAR 52.236-1). Accordingly, the CO postulated a high risk of non-performance should Appellant be awarded the contract and requested SBA review the matter through the Certificate of Competency (COC) and Determination of Responsibility procedure. *See* 13 C.F.R. § 125.5 and FAR 19.601.

7. After being informed of the CO's COC request, Appellant filed a COC application. Appellant stated that it had the capacity to perform the contract because it would be supported by the "TKTM/Garco Mentor/Protégé Agreement" [1] and emphasized the "enormous advantage" of its mentor-protégé agreement and the "enormous capacity" of its mentor. For example, Appellant stated its mentor, Garco Construction, Inc. (Garco), had the capacity to develop above $200 million projects and had extensive military work experience. In addition, in a November 7, 2007 email, Appellant claimed that it had access to Garco's heavy construction equipment and crews to perform the work.

8. During the COC review, the SBA questioned Appellant's eligibility for award because it appeared Appellant was using its Department of Defense (DOD) Mentor-Protégé Agreement as a tool to subcontract a larger portion of the contract work than permitted by the IFB to Garco, an undisputed large firm.

9. On December 4, 2007, the SBA Government Contracting Area Director referred the matter to SBA's Office of Government Contracting, Area VI (the Area Office) for a size determination. 13 C.F.R. § 121.1001(b)(3)(ii).

10. On December 4, 2007, the Area Office notified Appellant of the size protest and requested certain information. On December 6, 2007, Appellant filed its response and submitted the requested information, including Appellant's SBA Form 355, its Articles of Incorporation, and its DOD Mentor-Protégé Agreement.

11. Information provided by Appellant to the Area Office stated:

a. Appellant is a protégé in a DOD-approved mentor-protégé relationship with Garco;

b. Under the instant IFB, Garco would "perform steel erection and dewatering structure concrete" and perform twenty-four percent of the work. Other subcontractors would secure the floating plant and perform mechanical work, electrical work (including the fiber optics data transmission systems), and painting;

c. Appellant's plan (at bidding time) was for Appellant to:

[S]uperintend, check quality control, write all the subcontractor's agreements,

[1] On April 26, 2005, Appellant (protégé) and Garco Construction, Inc. (mentor), were approved for participation in the Department of Defense Mentor-Protégé Program

> negotiate change orders, provide daily reports as per specifications, do all excavation, asphalt, piping underground, valves relocation and installation, prepare all billing, transportation of emergency materials, mobilize, conduct all safety meetings, temporary utilities, project security, environmental protection, demolition, excavation and fill, other exterior improvement, boat transportation, uninterrupted bypass flume operations, OSHA regulations, supervision of floating plant installation, maintain site and headquarters documentation, submittal requirements and installation of fiberglass lined corrugated pipe. New vaults will be installed by [Appellant].

and;

d. Appellant: (1) "will manage the contract"; (2) "has the background to carry the contract and manage the specialty subcontractors"; (3) chased the work; (4) will independently plan how to perform the work and will purchase all the materials; (5) will assign complex and specialized functions to the proper subcontractors (*e.g.*, painting, corrugated lined fiberglass, electrical work); and (6) can do forty percent of the work.

B. The Size Determination

On December 18, 2007, the Area Office issued Size Determination No. 6-2008-022 (size determination), finding Appellant other than small for the instant procurement due to Appellant's affiliation with its ostensible subcontractor, Garco (a large concern).

First, the Area Office determined Appellant's size as of November 2, 2007, the date Appellant submitted its final bid. 13 C.F.R. § 121.404(d). Then the Area Office applied the seven factors test to determine whether Appellant violated the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). The Area Office first analyzed who would manage the contract. The Area Office concluded that Appellant would manage the contract as the proposed managers were Appellant's employees.

Next, the Area Office analyzed which party had the requisite background and expertise to perform the contract. The Area Office concluded that it was actually Garco who had the expertise to perform the contract based on the following evidence:

a. Appellant's November 28, 2007 letter stating (1) "Our Mentor, Garco Construction, is committed to help us in all aspects of the project"; (2) Garco "has the capacity to develop above $200,000,000 projects"; and (3) "the ability of [Appellant] working in government projects, together with the long military work experience from our Mentor, is proof of success";

b. Garco's November 28, 2007 letter stating that as a mentor, it is "committed to provide any help necessary to satisfy the conditions of the project. Any need to increase [Appellant's] capacity will be available. For example, our management, accounting, job cost control, field crews and equipment items will be ready to participate in helping [Appellant]….";
and

c. Appellant's statements that "All necessary heavy equipment, Cranes, Boom Trucks, Generators, etc. are available through our Mentor Protégé Agreement" and "[Appellant] is approved to be part of the Mentor/Protégé Pilot Project. As such we are allowed to team up with our Mentor who is Garco Construction ($150,000,000 annual volume). We have access to any type of heavy construction equipment like cranes, boom trucks, flat beds, etc. We can also request help from their experienced crews."

The Area Office then addressed which party chased the contract and found there was substantial evidence Garco chased the contract and collaborated extensively on the bid. The Area Office noted that Garco sent the COC application, submitted many of the subcontractor quotes, and assisted Appellant in preparing the final quote.

Next, the Area Office addressed the commingling of personnel. The Area Office noted Appellant's December 13, 2007 Response, which identified discrete tasks to be performed by Appellant (such as quality control, excavation, piping, demolition) and Garco (steel erection and dewatering structure concrete). However, the Area Office also observed that Appellant and Garco collaborated extensively on the bid.

The Area Office then examined the relative amount of work to be performed by Appellant. The Area Office noted that the issue was difficult to ascertain without a breakdown of Appellant's bid by line item and without Appellant's subcontractor agreements (Appellant stated there were no agreements prior to award). The Area Office noted that Appellant stated in a phone conversation that it could perform forty percent of the work (subcontracting sixty percent) and estimated that Garco would perform approximately twenty-four percent of the work.

Finally, the Area Office determined that Garco would be performing the more complex and costly contract functions because Garco was "doing steel erection and dewatering structure concrete." Further, the Area Office found Garco and the remaining subcontractors would perform at least sixty percent of the work.

The Area Office concluded that based on the totality of the circumstances, "Garco and the remaining subcontractors will perform a minimum of sixty percent of the contract." The Area Office noted that while the DOD Mentor-Protégé Program allows some types of developmental assistance, Garco was performing the primary and vital requirements of the contract. Accordingly, the Area Office found Appellant unusually reliant upon, and thus affiliated with, Garco in violation of the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). Therefore, Appellant and Garco's receipts were aggregated and Appellant was found other than small for the instant procurement.

C. The Appeal

On December 28, 2007, Appellant filed the instant appeal seeking reversal of the size determination. First, Appellant argues the DOD Mentor-Protégé Program allows the mentor (Garco) to assist the protégé (Appellant) in bid preparation. Second, Appellant asserts that while

it was unable to provide a task breakdown by bid line item, it did provide the Area Office with a list of discrete tasks to be performed by Garco and Appellant. Appellant contends it could not provide a line item task breakdown because "[a] contractor does not decide which subcontractor or suppliers to use until it is awarded the contract" and the contract has not been awarded. Appeal, at 3.

In conclusion, Appellant argues that because Garco and Appellant are in an approved Mentor-Protégé Program with Garco planning on performing only twenty-four percent of the work on the instant IFB, there is no evidence of affiliation under the ostensible subcontractor rule.

IV. Discussion

A. Timeliness

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

B. Standard of Review

Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. I will disturb the Area Office's size determination only if, after reviewing the Record and pleadings, I have a definite and firm conviction 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).

C. Applicable Regulations

Authority for a Size Determination

Appellant submitted its bid as a HUBZone small business on an unrestricted procurement that contained a HUBZone price evaluation preference. Appellant was the only bidder. Accordingly, once the CO determined Appellant non-responsible, the CO was required to refer Appellant (as the "apparent low small business offeror") to SBA for a possible COC. 13 C.F.R. § 125.5(a)(2); *see also* FAR 19.602-1(a)(2).

Here, the CO referred Appellant to the SBA for a potential COC after making a non-responsibility determination based on Appellant's past performance history, particularly Appellant's inability to manage its subcontractors (Fact 6). Under 13 C.F.R. § 125.5(b)(1)(i), a firm must qualify as a small business in order for the SBA to issue the firm a COC. During the course of the COC review, the SBA Government Contracting Area Director requested a size determination due to concerns that Appellant was "using its DOD approved Mentor-Protégé Agreement as a tool to subcontract a larger portion of the contract than was spelled out in the solicitation" and thus did not qualify as a small business for the instant procurement.

Accordingly, the Area Office's authority to render a size determination was based on 13 C.F.R. § 121.401, which provides that SBA has the authority to render a size determination for "all Federal procurement programs for which status as a small business is required or advantageous, including…SBA's Certificate of Competency program…." If the Area Office determined Appellant was small, the SBA would proceed with the COC review. Conversely, if the Area Office determined Appellant was other than small for the procurement, SBA could not issue Appellant a COC because SBA can only issue COCs to small business concerns; thus, the CO's non-responsibility determination would stand.

DOD Mentor-Protégé Agreement

Appellant, the protégé firm, and Garco, the mentor firm, are participants in the DOD Pilot Mentor-Protégé Program (the Program), set forth at 48 C.F.R. Subpart 219.71, with Appendix I to 48 C.F.R. Chapter 2 implementing the Program. Appellant argues that it is insulated from a finding of affiliation with Garco due to their mentor-protégé relationship.

The DOD non-affiliation treatment rule for mentor-protégé firms provides:

> For purposes of the Small Business Act, no determination of affiliation or control (either direct or indirect) may be found between a protégé firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protégé firm, pursuant to a mentor-protégé agreement, any form of developmental assistance described in I-107(f).

48 C.F.R. Chapter 2, Appendix I-104(d).

OHA has held that the DOD non-affiliation rule does not shield parties from a finding of affiliation when the mentor is serving as the protégé's subcontractor on a small business set-aside. *Size Appeal of American Eagle Industries, Inc.*, SBA No. SIZ-3709, at 11 (1992). OHA held that "[s]uch a construction of the Nonaffiliation Treatment rule would pervert the purposes of the Small Business Act…." *Id.* Accordingly, OHA found the large mentor was affiliated with its small protégé because the mentor, as a subcontractor to its protégé, would perform so much of the proposed contract as to be rendered an ostensible subcontractor.

I agree with OHA's precedent that the DOD Program is not designed to allow a large concern to perform as its protégé's subcontractor. Rather, the developmental assistance described in I-107(f) includes increasing "the protégé's ability to participate in DoD, Federal, and/or commercial contracts and subcontracts" and increasing "small business subcontracting opportunities in industry categories where eligible protégés or other small business firms are not dominant in the company's vendor base." Appendix I-107(f)(1), (2). The Program's purpose is thus for the mentor to develop the protégé by providing the protégé subcontracting opportunities, not to afford the mentor an opportunity to receive subcontract work from the protégé. *Id*.

Moreover, the purpose of the Program is further explained as being to (1) "[p]rovide incentives to major DoD contractors, performing under at least one active approved subcontracting plan…to assist protégé firms in enhancing their capabilities to satisfy DoD and

other contract and subcontract requirements"; (2) "[i]ncrease the overall participation of protégé firms as subcontractors"; and (3) "[f]oster the establishment of long-term business relationships between protégé firms and such contractors." Appendix, I-100(a).

Accordingly, I find the purpose of the DOD Program is to increase the participation of small disadvantaged business concerns as subcontractors and suppliers under DOD and other contracts. The Program is not intended to allow a large concern to perform as the protégé's subcontractor.

Here, Appellant, the protégé firm under the DOD Mentor-Protégé Program, is the prime contractor while Garco, the mentor firm, is the subcontractor. Thus, neither the Area Office nor OHA is precluded from applying SBA's affiliation regulations to the facts of this case.

In addition, SBA's non-affiliation rule for mentor-protégé firms contains an important caveat:

> A protégé firm is not an affiliate of a mentor firm *solely* because the protégé firm receives assistance from the mentor firm under Federal Mentor-Protégé programs. *Affiliation may be found for other reasons.*

13 C.F.R. § 121.103(b)(6) (emphasis added).

In other words, SBA can find a protégé and mentor affiliated under 13 C.F.R. § 121.103(c), (d), (e), (f), (g), or (h), as long as an area office does not base its determination *solely* upon the mentor protégé relationship. *See Size Appeal of Technical Support Services*, SBA No. SIZ-4794 (2006). Hence, 13 C.F.R. § 121.103(b)(6) does not act as a bar to a finding of a violation of the ostensible subcontractor rule between mentor and protégé firms.

The Ostensible Subcontractor Rule

SBA predicates its affiliation regulations upon the power of one concern to control another. 13 C.F.R. § 121.103(a). One independent basis of control area offices must consider is the ostensible subcontractor rule, which provides:

> A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4).

The purpose of 13 C.F.R. § 121.103(h)(4) is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements. The ostensible subcontractor rule permits an area office to determine a subcontractor and a prime have effectively formed a joint venture (and are thus affiliates) for determining size.

In determining whether or not there has been a violation of the ostensible subcontractor rule, area offices must evaluate "all aspects of the relationship between the prime and the subcontractor." The word "all" has a simple meaning, *i.e.*, an area office must consider the full scope of the relationship between the prime and the subcontractor.

The Area Office used the "seven factors test" to evaluate the relationship between Appellant and Garco. The "seven factors test" is an earlier way of encapsulating what has become the ostensible subcontractor rule codified in 13 C.F.R. § 121.103(h)(4). These seven factors are now almost twenty years old; they are neither exclusive nor exhaustive, nor do they address "all aspects" of the prime contractor/subcontractor relationship the Area Office is required to evaluate by 13 C.F.R. § 121.103(h)(4). Instead, area offices must, at a minimum, consider the aspects listed in 13 C.F.R. § 121.103(h)(4) and should analyze factors outside of the seven factors if relevant. *See Size Appeal of FDR, Inc.*, SBA No. SIZ-4781 (2006); *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775 (2006). In their analyses, area offices may choose to concentrate on one factor if it is dominant or persuasive. *See Size Appeal of Ahuska Int'l Security Corp*., SBA No. SIZ-4752 (2005). Therefore, while it is acceptable to consider the seven factors, the area office must evaluate "all aspects" of the prime contractor/subcontractor relationship to determine if the ostensible subcontractor rule applies.

As explained in *Size Appeal of Lance Bailey & Associates, Inc.,* SBA No. SIZ-4817, at 16-17 (2006), "all aspects" is equivalent to considering the totality of the circumstances, but unlike a finding of affiliation based upon the totality of the circumstances under 13 C.F.R. § 121.103(a)(5), affiliation based on the ostensible subcontractor rule applies only to the contract at issue and not to the concern's status for future procurements.

D. The Merits

An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4). While I find the Record is not adequate to support the Area Office's finding that Garco would perform the primary and vital requirements of the contract, I do find the Record establishes Appellant is unusually reliant upon Garco.

Garco was to perform "steel erection and dewatering structure concrete" (Fact 11.b). The Area Office determined this work was a primary and vital requirement of the contract. However, I find the Area Office's determination conclusory and void of explanation or rationale. While it is true that CLIN 0003 of the IFB established a separate line item for performing work on the dewatering structure and Appellant bid approximately twenty-five percent of its bid on CLIN 0003 (Fact 5), there is no evidence in the Record supporting the Area Office's determination that

the work to be performed by Garco or CLIN 0003 is both a primary and vital requirement of the IFB.

Nevertheless, the Area Office's determination that Appellant is unusually reliant upon Garco is supported by the Record. The Record shows that:

a. Garco had a significant role in preparing Appellant's bid[2];

b. Appellant's bid indicates Garco would perform a line item that is approximately twenty-five percent of Appellant's bid (Facts 5 and 11.b) and Appellant stated Garco would perform twenty-four percent of the work (Fact 11.b);

c. Appellant claimed it has the ability to perform the work because of the "enormous capacity" of Garco (Fact 7);

d. Appellant emphasized it had access to Garco's heavy construction equipment and crews (Fact 7); and

e. Appellant would primarily perform the administrative functions of the contract as opposed to the mechanical, dewatering structure, steel erection, electrical, and painting work (Fact 11.b, c).

The Area Office cannot consider the foregoing facts in a vacuum. Instead, 13 C.F.R. § 121.103(h)(4) requires the Area Office to consider all aspects of the prime/subcontractor relationship that bear on unusual reliance, including the capacity of the putative prime to perform the work. In this instance, the CO had already provided the Area Office with probative evidence that Appellant had difficulty managing subcontractors, performing work on time (and to specifications), and would thus have difficulty complying with the limitation on subcontracting clause (Fact 6). Armed with the facts provided by the CO and the facts listed above, I find a reasonable person could conclude that Appellant is unusually reliant upon Garco. Accordingly, the Area Office's determination that Appellant is unusually reliant upon Garco cannot be clearly erroneous.

Therefore, I hold the Area Office did not make a clear error of fact or law when it determined Appellant to be other than a small concern for the instant procurement due to affiliation with its ostensible subcontractor, Garco.

[2] While I note the Record does establish that Garco provided significant assistance to Appellant in the preparation of its bid, the Record, as supplemented by Appellant, does not support a conclusion that only Garco chased the work. Regardless, this is a harmless error because the "seven factors test," which emphasizes who chased the contract, must yield to the consideration of all aspects of the relationship between Appellant and Garco as required by 13 C.F.R. § 121.103(h)(4).

V. Conclusion

For the above reasons, the Area Office's size determination is AFFIRMED and Appellant's appeal is DENIED. Accordingly, at the option of the CO, the CO's non-responsibility determination stands.

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

THOMAS B. PENDER
Administrative Judge