Cite as: *Size Appeal of J.W. Mills Management*, SBA No. SIZ-4955 (2008)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: J.W. Mills Management, Appellant, Appealed From Size Determination No. . 6-2008-032	SBA No. SIZ-4955 Decided: May 21, 2008

APPEARANCE

Jerrad Mills. President, J.W. Mills Management, Los Angeles, California, for Appellant

DECISION

I. Introduction and Jurisdiction

This appeal arises from a U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) Decision and Remand Order, *Size Appeal of J. W. Mills Management*, SBA No. SIZ-4909 (2008) (Remand Order). In the Remand Order, I ordered the SBA Office of Government Contracting, Area VI (Area Office) to conduct a new size determination[1] analyzing whether J.W. Mills Management (Appellant) and Blackstone Consulting, Inc. (BCI) are affiliated under 13 C.F.R. § 121.103(a)(5) or 13 C.F.R. § 121.103(h)(4).

On April 14, 2008, the Area Office issued Size Determination No. 6-2008-032 (size determination upon remand), finding Appellant other than small for the instant procurement due to its affiliation with BCI, a large concern, under the ostensible subcontractor rule at 13 C.F.R. § 121.103(h)(4). On April 28, 2008, Appellant filed the instant appeal at OHA.

OHA has jurisdiction to decide 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.

[1] The January 16, 2008 size determination found Appellant other than small under the newly organized concern rule, 13 C.F.R. § 121.103(g). I reversed this ground of the determination and remanded the case.

II. Issue

Whether the Area Office's determination that Appellant is other than small because of affiliation with its ostensible subcontractor (13 C.F.R. § 121.103(h)(4)) was based on a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Findings of Fact

My March 4, 2008 Remand Order contains detailed facts. For the sake of clarity, I repeat only Fact 8 below and make one supplemental finding relevant to analyzing the ostensible subcontractor rule.

1. Evidence in the record establishes that:

a. BCI listed Mr. Mills as an alternate point of contact on its Central Contractor Registration (CCR) Profile;

b. As of May 3, 2007, BCI's website stated:

> Blackstone Consulting, Inc. (BCI) *has entered mutually supportive partnerships with three companies owned by BCI employees*. Under the terms of the partnership, BCI will provide fee-based administrative and management support to each of the companies on contracts they receive. This arrangement relieves them of the need to incur the costs of staffing administrative and management functions when the companies are not actively working on a contract. The Companies are:
> · Avery Group, Inc.
> · The Severson Group, LLC
> · *J.W. Mills Management*;

c. Appellant certified it received the following gross sales between 2004 and 2006:

2006	0.00
2005	55,839.32
2004	0.00

and

d. Appellant's proposal emphasized the JWM/BCI team as the basis of its qualifications to perform the work required by the RFP, *e.g.*, Appellant usually refers to Appellant and BCI's joint accomplishment of contract tasks. In addition, Appellant's proposal provided a corporate organization chart that indicates

> Appellant's only employee is Mr. Mills. Finally, Appellant's proposal identified current BCI employees as the on-site manager and assistant/quality control manager for the work required by the RFP and identified both positions as key positions.

Remand Order, Fact 8 (emphasis added).

2. The RFP contains a section entitled "Evaluation Criteria and Basis for Award," which states, in pertinent part:

> The Government will award a contract resulting from this solicitation to the responsible Offeror whose offer, conforming to the solicitation, will be most advantageous to the Government, price and other factors considered. The following factors shall be u[s]ed to evaluate offers under this acquisition:
>
> FACTOR 1 — TECHNICAL CAPABILITY
>
> Subfactor(a) Staffing Plan
> Subfactor (b) Cleaning and Hous[e]keeping Plan
> Subfactor (c) Quality Control and Inspection Plan
> Subfactor (d) Training Plan
>
> FACTOR 2 — PAST PERFORMANCE
>
> FACTOR 3 — PRICE
>
> The Government will use a two-step process to evaluate Offerors' proposals. Step 1 will consist of the evaluation of Factor 1 Technical Capability. The Government will determine each Offeror's [sic] as either Technically Acceptable or Technically Unacceptable.
>
> Only those Offerors that are determined Technically Acceptable under Factor 1 will be further evaluated under Step 2. Step 2 will consist of the evaluation of Factor 2, Past Performance, and Factor 3, Price. The Government will evaluate the quality of each Offeror's Past Performance as Outstanding, Satisfactory, Marginal, Unacceptable, or Neutral.
>
> The Government will base the final source selection decision on a trade-off between Past Performance and Price. The Government will consider Past Performance to be significantly more important than Price. As such, the Government reserves the right to award a contract to other than the lowest evaluated price Offeror and award to a higher priced Offeror with a better performance risk rating. Only one award will be made as a result of this solicitation.
>
> ***

TECHNICAL CAPABILITY.

Factor 1. Mess Attendant Services Plan.

The Government will evaluate Factor 1, Mess Attendant Services Plan, as Technically Acceptable or Unacceptable. An Offeror must receive an Acceptable rating on each of the four subfactors listed above in order to be rated Technically Acceptable overall. The evaluation will be based solely on the written proposal.

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Subfactor (a), Manning:

To be considered Technically Acceptable, the Offeror's proposed Manning Plan must demonstrate adequate personnel and skill level to perform all the functions and task[s] identified in the PWS.

Specifically, the Plan must identify each of the required positions and sufficiently describe their duties, qualifications and appropriate experience. The plan must accurately demonstrate that personnel have been appropriately matched to the required task ....

Subfactor (c), Quality Control and Inspection Plan

To be considered Technically Acceptable, the Offeror's proposed Quality Control and Inspection Plan must demonstrate a satisfactory plan to in[s]pect all of the tasks required by referenced NAVMED P-5010.

Specifically, the Offeror's Quality Control and Inspections Plan must describe a satisfactory quality control organization in terms of personnel as well as authority and responsibilities. The Quality Control and Inspection Plan must adequately describe a plan for the service areas to be inspected, to include frequency that match the required task and planned inspection. The Quality Control/Inspection plan must satisfactori[l]y address methods and procedures for recording and filing inspection results with the Government personnel.

Subfactor (d), Transition Plan:

Factor 2. Past Performance. Only those Offerors that are Technically Acceptable under Factor 1 will proceed to be evaluated under Factor 2, Past Performance. *The Government will determine whether an Offeror has consistently demonstrated a commitment to quality and excellence under existing and prior contracts for services consistent with the scope and complexity of this solicitation. . . .*

> Offerors lacking relevant past performance will not be evaluated favorably or unfavorably on past performance. However, the proposal of an Offeror with no relevant past performance, while not rated favorably or unfavorably for past performance, may not represent the most advantageous proposal to the Government and, thus, may be an unsuccessful proposal when compared to the proposals of other Offerors.
>
> An Offeror must provide the information requested by this solicitation for past performance or affirmatively state that it possesses no relevant or similar past performance. An Offeror that fails to provide the past performance information or that fails to assert that it has no relevant or similar past performance may be considered ineligible for award.
>
> The evaluation of Past Performance is separate and distinct from the Contracting Officer's responsibility determination. *The assessment of an Offeror's Past Performance will be used as a means of evaluating the relative capability of each Offeror to successfully meet the requirement of the PWS and as a measure of performance risk*. The Government will perform an evaluation of Past Performance based on the following elements, collectively:
>
> 1. Conformance to contract requirements;
> 2. Management effectiveness;
> 3. Quality Control;
> 4. Timeliness and adherence to schedules; and
> 5. Customer satisfaction.
>
> ***
>
> (d) Price. The Government will evaluate Price for reasonableness. Price may be the deciding factor for source selection if proposals are priced so significantly high as to outweigh the value of highly rated Past Performance. The Government reserves the right to select other than the lowest priced Offeror.

(emphasis added).

B. The Size Determination

On April 14, 2008, the Area Office issued its size determination upon remand, finding Appellant other than small for the instant procurement due to its affiliation with BCI, a large concern, under the ostensible subcontractor rule at 13 C.F.R. § 121.103(h)(4).

The Area Office applied the seven factors test in evaluating whether Appellant was unduly reliant upon BCI. First, the Area Office found that BCI will manage the contract because the on-site manager and assistant/quality control manager, positions identified as key positions in the solicitation, are both current BCI employees. Next, the Area Office found BCI had the requisite background and expertise to carry out the contract because Appellant's proposal makes

multiple references to the team and references BCI's past performance twice. Further, Appellant has had minimal receipts for its last three completed fiscal years.

Next, the Area Office concluded that both BCI and Appellant chased the contract. Based on the fact that Appellant's proposal emphasizes BCI's past performance and experience and identifies two current BCI employees for key positions, the Area Office found Appellant collaborated extensively with BCI on the proposal. The Area Office then found the proposal indicated there would be commingling of personnel and materials between BCI and Appellant. Specifically, BCI and Appellant share a fax number and while the proposal states that Appellant will conduct the day-to-day management, the on-site manager and assistant/quality control manager are BCI employees.

The Area Office also found BCI would perform the greater share of the workload and more complex and costly contract functions because Appellant has only one employee, Mr. Mills, to perform the work. After discussing the seven factors and their application to Appellant and BCI, the Area Office concluded Appellant was unusually reliant upon BCI and that BCI would be performing the primary and vital contract requirements. Thus, the Area Office found Appellant and BCI affiliated and BCI's annual receipts were combined with Appellant's to find Appellant exceeded the applicable size standard and was other than small for the subject procurement.

C. The Appeal

On April 28, 2008, Appellant appealed the size determination upon remand. Appellant replied to each finding under the seven factors test. First, Appellant asserts that its proposal indicates that Appellant will manage the contract and its subcontracting agreement is non-binding. Thus, Appellant has proposed “candidates to operate the Mess Attendant Services” but it is “not bound to provide these specific individuals upon award of contract.” Appeal, at 3. Further these employees would become Appellant's employees, not BCI's employees.

Next, Appellant contends it has the requisite expertise to carry out the contract and should not be penalized for using the word “team” in its proposal to emphasize that it has subcontract support. Appellant admits it is an emerging business and “does not possess the past performance and perceived stability of a larger company” but contends Mr. Mills has over eight years of experience in the food service industry, including project oversight on government contracts. Appeal, at 5. Appellant also claims it chased the contract and did not consult with BCI during the bidding process.

With regard to whether Appellant and BCI would commingle personnel and material to perform the contract, Appellant asserts it will hire all employees once awarded the contract. Further, Appellant emphasizes that its agreement with BCI is non-binding and its subcontracting work could be performed by BCI or any other subcontractor. Appellant also asserts it is able to obtain funding on its own “[i]f additional funding is required or unavailable through any subcontracting agreement.” Appeal, at 8. Appellant also maintains that “all payroll costs will be borne by [Appellant]” but its subcontractor will process the payroll checks. *Id.*

In rebutting the Area Office's finding that BCI will perform the more complex and costly contract functions, Appellant asserts it will hire all key employees, including key employees, who will report directly to Appellant's corporate office. Finally, Appellant argues that its relationship with BCI does not rise to the level of a joint venture.

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 its size determination upon a 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. *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006). 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.

C. Affiliation under 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 size determination purposes. An

area office may determine that the prime is unusually reliant upon its ostensible subcontractor, the ostensible subcontractor is performing primary and vital requirements of the contract, or both. Moreover, a finding of either unusual reliance or performance of primary and vital requirements is sufficient to violate the ostensible subcontractor rule.

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." 13 C.F.R. § 121.103(h)(4). 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 BCI. 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 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) *(Ahuska)*. 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 size status for future procurements.

Despite the language of 13 C.F.R. § 121.103(h)(4) and the caselaw discussed above, the Area Office found it "must" apply the seven factors test as described in *Size Appeal of D.P. Associates, Inc.*, SBA No. SIZ-2719 (1987) *(D.P. Associates)*. The Area Office should not have applied the seven factors test and relied on the twenty year-old decision in *D.P. Associates* because 13 C.F.R. § 121.103(h)(4) requires area offices to analyze all aspects of the relationship between the prime and the subcontractor, not just the seven factors, and OHA overruled *D.P. Associates* in 2006. *See Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006). Moreover, by choosing to exclusively address the seven factors, the Area Office unnecessarily limited its analysis.

I find, however, the Area Office's error to be harmless because the record supports a finding that Appellant is unusually reliant upon BCI and that BCI will be performing the primary and vital requirements of the contract. Specifically, the record before me establishes:

a. Appellant has only one employee, Mr. Mills;

b. Appellant is a nascent concern without a history of significant corporate earnings;

c. BCI is providing two of the key employees identified in the proposal, including the on-site manager;

d. The evaluation factors for award emphasize quality control and the individual Appellant designated to perform this role is a BCI employee;

e. The evaluation factors for award emphasize the offeror's past performance yet Appellant, as an entity, has no relevant past performance history;

f. Appellant's proposal makes consistent reference to its anticipated teaming arrangement with BCI and emphasizes the experience of the team, including placing the BCI logo along with Appellant's logo on various pages of its proposal, which is probative of a joint effort in submitting the proposal;

g. Certain proposal references (past performance) involve only BCI experience;

h. Appellant anticipates BCI will perform administrative functions, including providing payroll services, internal accounting, and providing working capital; and

i. BCI claims it is in a partnership with Appellant, among others.

As explained in *Ahuska*, area offices may consider one factor, if strong enough, to be sufficient proof of affiliation. In the present appeal, I find the record establishes there are several strong indicators of unusual reliance. Perhaps the most telling is that Appellant, as essentially a start-up business without meaningful revenues or corporate experience, was dependent upon BCI's qualifications to be identified as the successful offeror under the RFP. Further, the proffer of two BCI employees as key employees (required by the RFP as part of Appellant's “Mess Attendant Services Plan”) is strong evidence of unusual reliance. Hence, I conclude that Appellant is unusually reliant upon BCI.

Because the RFP places great emphasis on manning and quality control, Appellant's proffer of BCI employees as its on-site manager and quality control manager is probative that BCI will be performing primary and vital contract requirements. When the provision of these two managers is combined with BCI's performance of payroll processing and internal accounting, it is difficult to discern exactly what Appellant is providing to the Navy beyond its small business size status. Therefore, I find the evidence of record is more than sufficient to support the Area Office's conclusion that BCI would be performing primary and vital contract requirements. Accordingly, I hold the Area Office was correct to determine a violation of the ostensible subcontractor rule existed between Appellant and BCI for this procurement.

I also considered Appellant's argument that its arrangement with BCI is "non-binding." This argument, however, is without merit because the Navy relied upon the representations contained within Appellant's proposal to determine Appellant would be the successful offeror.

Thus, it is too late now for Appellant to argue these representations have no meaning.

V. Conclusion

For the above reasons, the Area Office's size determination is AFFIRMED and Appellant's appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge