

**REDACTED DECISION FOR PUBLIC RELEASE**

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

Public Communications Services, Inc.

SBA No. SIZ-5008

Appellant

Decided: October 17, 2008

Re: Value-Added Communications, Inc.

Appealed from  
Size Determination No. 5-2008-049

**APPEARANCES**

Daniel R. Forman, Esq. John E. McCarthy, Jr., Esq., James J. Regan, Esq., and Puja Satiani, Esq., Crowell & Moring LLP, Washington, D.C., for Appellant.

Peter F. Garvin III, Esq., Stephanie Clouston, Esq., and Nancy L. Berardinelli-Krantz, Esq., Jones Day LLP, Washington, D.C., for Value-Added Communications, Inc.

**DECISION**

HOLLEMAN, Administrative Judge:

**I. Jurisdiction**

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals 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**

Whether the size determination concluding that there is no violation of the ostensible subcontractor rule was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

**REDACTED DECISION FOR PUBLIC RELEASE****III. Background****A. The Solicitation and the Statement of Objectives**

On January 3, 2008, the Department of Homeland Security, Immigration & Customs Enforcement (ICE), in Washington, D.C., issued Solicitation No. HSCETE-08-R-00001 for a fixed price-zero cost contract to provide detainee telephone services at ICE detention facilities. ICE set the procurement aside for small businesses and classified it under North American Industry Classification System (NAICS) code 517911 (Telecommunications Resellers), which has a size standard of 1,500 employees. Proposals were due on February 8, 2008.

The Statement of Objectives (SOO) requires the contractor to provide the detainee telephone system for some 30,000 ICE detainees at 15 primary and 206 secondary detention facilities. At the primary detention facilities, the contractor will provide all normal inmate telephone services including physical assets and privacy screens. The only revenue the contractor will receive on this contract is that from outgoing debit-card and collect calls made by detainees at these primary facilities. The contractor will host a centralized “pro bono” network to provide detainees at all facilities with telephone access to consulates, immigration courts, and community-based legal services providers, at no cost to either ICE or the detainees. The contractor does not provide equipment at secondary detention facilities, which are run by state and local governments.

The incumbent contractor is Public Communications Services, Inc. (Appellant).

The solicitation instructed offerors to provide a Statement of Work/Performance Plan detailing how they plan to carry out the required tasks. This Performance Plan must address the planned detainee telephone system, including hardware and security features; the debit and collect calling systems; processes to add and delete secondary detention facilities and pro bono numbers; the customer service plan; and other topics. The proposal must include a Quality Assurance Surveillance Plan (QASP) addressing performance objectives and performance thresholds; a description of its Management/Staffing Approach, including a proposed staffing plan identifying key personnel (with resumes); and a Schedule Plan. The Past Performance section must describe two contracts of similar size, scope, and complexity.

In the best value evaluation, Technical Capability (with subfactors Performance Plan, QASP, Management/Staffing Approach, and Schedule Plan) is more important than Past Performance, and Past Performance is more important than Cost and Price.

**B. Appellant’s Proposal**

On February 8, 2008, Value-Added Communications, Inc. (VAC) submitted its proposal, which describes how VAC intends to leverage its VAC FOCUS System to provide the needed telephone services. VAC named as subcontractor Unisys Corporation (Unisys).

The proposal sets out the Program Management Plan which assigns total accountability

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and responsibility to the VAC Sr. Program Manager, Mark Montgomery, and notes all other team members will report to him. These include the Unisys Oversight Program Manager, Paul Nicandri; and the VAC Executive Manager, Keith Eismann. Other team members are the VAC ICE-2 Program Manager, VAC ICE-2 Administrator, Field Services Manager, six Field Service Technicians, the ICE-1 PIN Manager, the ICE-1 PIN Administrator, the Operations Manager, and the Help Desk Manager. VAC named many of the proposed staff. Of these named individuals, only Mr. Nicandri is other than a VAC employee. Mr. Nicandri will work directly with Mr. Montgomery, “to provide an over-the-shoulder view and guidance.”

For Past Performance, VAC referenced its work as a subcontractor to Unisys on [xxxxxx  
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] for an inmate calling system at 93 locations, and its work as prime contractor for the Colorado Department of Corrections for inmate telephone services at 26 locations.

C. The Protest, Size Determinations, First Size Appeal, and Remand

On March 28, 2008, the Contracting Officer (CO) notified unsuccessful offerors that VAC had been chosen for award. On April 4, 2008, Appellant, an unsuccessful offeror, filed a size protest asserting VAC was ineligible for the award under the ostensible subcontractor rule. The CO referred the size protest to the Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office), for a size determination.<sup>1</sup>

On April 28, 2008, the Area Office issued Size Determination Nos. 05-2008-040, -041, -042, finding VAC is an eligible small business. On May 14, 2008, Public Communications Services, Inc. (Appellant) appealed, and on June 6, 2008, in response to joint motion from the parties and SBA, I remanded the size proceedings to the Area Office for a new size determination. *Size Appeal of Public Communications Services, Inc.*, SBA No. SIZ-4963.

D. Size Determination No. 05-2008-049

1. VAC’s Submission

On June 9, 2008, the Area Office informed VAC that it would be performing a new size determination. It requested VAC to submit additional documents and to respond to the additional allegations that PCS had included in its Supplemental Petition filed with OHA on May 30, 2008. On June 19, 2008, VAC submitted to the Area Office its audited financial statements for 2005, 2006, and 2007, its originally submitted and corrected Online Representations and Certifications Application (ORCA) printouts, a 98-page list of its past telecommunications experience titled “Exhibit 1,” a complete copy of its proposal for the instant solicitation; and the Unisys proposal and Unisys-VAC subcontract agreement for the [xxxxxxxxxxxxx].

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<sup>1</sup> Appellant also filed two bid protests at the General Accountability Office (GAO). The GAO sustained both protests. *Public Communications Services, Inc.*, B-400058.1, B-400058.3 (July 18, 2008).



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Hodge. Further, Messrs. Eismann, Hodge, and Montgomery have over 20 years experience in the field.

Third, contrary to Appellant's allegation, VAC "chased the contract". VAC's sole business is Inmate Telephone Services. Mr. Eismann stated he was aware of this procurement well in advance, and contacted Mr. Nicandri of Unisys about it only after completing his preliminary business case analysis.

Fourth, VAC's Mr. Eismann prepared the proposal himself without any contribution or "template" from Unisys.

Fifth, VAC is responsible for virtually all the tasks in this contract. Unisys's sole role will be as an "over the shoulder" consultant and to report certain VAC-provided quality and operational data to ICE and provide feedback to VAC. Thus, there is no commingling of personnel.

Sixth, VAC will perform at least [xxx] of the work, and Unisys will perform only a part-time consulting function limited to [xxxxxxx] a year in billings.

Seventh, contrary to Appellant's allegations, VAC will itself perform the more costly functions of the contract using its VAC FOCUS System and its own personnel.

At Appellant's request, the Area Office examined VAC's proposal against the Unisys proposal for the similar [xx] procurement. The Area Office concluded that it did not appear that VAC had used a template from that proposal for its own, because the writing styles, numbering system, and format were different, although with a similar approach given the scope of work is almost identical.

The Area Office noted that neither VAC nor Unisys was the incumbent on this contract. Further, all of the proposed employees are VAC employees, except for one Unisys employee. All the employees, both VAC and Unisys, have discrete areas of responsibility. The amount of work for Unisys is less than [xxx] of contract value and consists in part of government relations. There is no indication Unisys prepared the proposal. VAC demonstrated it had the expertise to complete the contract and its proposal reflects its own expertise and experience. VAC has performed as a prime contractor on many similar contracts without any assistance from Unisys. VAC will provide the inmate telephone services using VAC's proprietary FOCUS system, using VAC's facilities and employees, except for one Unisys employee. VAC employees will perform all primary and vital functions.

The Area Office thus concluded that there was no evidence VAC was unusually reliant on Unisys for the performance of the primary and vital requirements of the contract, and therefore the two firms are not affiliated under the ostensible subcontractor rule.

**REDACTED DECISION FOR PUBLIC RELEASE****E. The Second Size Appeal**

Appellant received the size determination on July 1, 2008, and appealed it to OHA on July 15, 2008. Appellant filed a motion for leave to file a supplemental pleading, and the proposed supplemental pleading, on July 28, 2008.

Appellant again asserts VAC lacks the financial capacity to fund this contract, particularly since it is a zero cost contract in which little revenue will be generated for the vendor early on. VAC's ORCA representations originally showed it had annual gross revenues of only [xxxxxxxxxxxxxx]. Appellant argues VAC's financial statements show a bleak picture. Therefore, VAC must be dependent upon Unisys for funding.

Appellant takes issue with VAC's characterization of Unisys' role in the contract as minor, pointing to some 95% of contract tasks in which Unisys will participate in some way or other. Appellant argues that the Quality Control Plan "matrix" in VAC's proposal identifies Unisys as participating in some respect in all but 5 of 110 contract performance tasks, and that for a number of these tasks it will be either the "responsible authority" or have "primary responsibility." Appellant also notes that, of the two key personnel resumes in the proposal, one belongs to Mr. Nicandri, the Unisys employee.

Appellant asserts the Area Office should have drawn a negative inference from VAC's "continued failure" to produce a Teaming Agreement, because one must exist.

Appellant asserts VAC overstated its experience, but makes only a few allegations as to its overstatement on a few issues, none of them supported by sworn statements or documentation. Appellant asserts VAC and Unisys "have flipped" their usual roles (VAC as subcontractor to Unisys as prime) for this contract.

Appellant asserts VAC will be reliant on Unisys's equipment for part of its performance, pointing to references in the proposal such as "the Unisys provided workstations."

Appellant asserts the inclusion of the Unisys logo in VAC's proposal indicates undue reliance and Unisys's participation in proposal preparation. Appellant further argues that similarities between VAC's proposal and Unisys's proposal for the similar [xx] procurement indicate Unisys participation in preparation. Appellant provides a side-by-side comparison of several sections of both proposals.

**F. Response to the Appeal**

On August 11, 2008, VAC responded to the appeal. VAC asserts the Area Office had sufficient documentation to support its size determination. VAC further asserts it will be performing the primary and vital functions of the contract, and reasserts the statements it made in response to the protest. VAC points out that in its Form 355, it certified that Unisys did not provide assistance in proposal preparation, and in arranging for subcontractors to perform this contract or any other contract awarded to VAC in the last two years. VAC will perform the

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majority of work including all the primary and vital functions of the contract: equipment installation and servicing, software and development, logistics and technical support, and program and financial management.

VAC asserts that the matrix Appellant relies upon to establish its reliance on Unisys is merely VAC's Quality Control Plan for the contract. It is not the complete checklist of work tasks to be performed to meet the contract requirements. It is simply a guide to ensure that ICE knew VAC appreciated the importance of quality assurance and would be implementing a quality control plan. The responsibilities in the matrix are related only to the quality control plan and represent a very small percentage of the overall work required to implement and manage the ICE contract.

VAC further asserts the Area Office correctly found it is not unduly reliant on Unisys's financial resources. VAC asserts Appellant apparently used figures from Dun & Bradstreet to assert VAC had inadequate financial capacity to perform the contract, and these should not be taken as valid over the financial information VAC submitted. VAC asserts its ORCA submission included a clerical error, stating that it had [xxxxxxxxxxxxxx] in gross revenues, when it should have said over [xxxxxxxxxx] in revenue.

VAC also asserts the Area Office properly considered VAC's extensive experience in performing this type of contract.

#### IV. Discussion

##### A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving Size Determination No. 05-2008-049, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has 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).

##### B. Appellant's Supplemental Appeal

The regulations permit a supplemental pleading on motion for good cause. 13 C.F.R. § 134.207(a). Appellant so moved on July 28, 2008. Accordingly, I GRANT Appellant's motion and accept Appellant's Supplemental Petition into the record on appeal.

**REDACTED DECISION FOR PUBLIC RELEASE****C. The Merits of the Appeal**

The ostensible subcontractor rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are found to be engaged in joint venture, and thus affiliated. 13 C.F.R. § 121.103(h)(4). All aspects of the relationship between the two concerns are considered, including the terms of the proposal (such as contract management, technical responsibilities, and percentage of subcontracted work, agreements between the concerns (such as teaming agreements, bonding or financial assistance) and whether the subcontractor is the incumbent and is now ineligible. *Id.*

The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements. The Area Office must evaluate "all aspects" of the relationship between the two concerns to determine whether the ostensible subcontractor rule applies. *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). The regulation directs special attention to cases where the proposed subcontractor is the incumbent who is not eligible to compete for a set-aside or newly set-aside procurement. *See Size Appeal of ACCESS Systems, Inc.*, SBA No. SIZ-4843 (2007). The proposal at issue in instant appeal, however, does not fall into this abusive fact-pattern, as the proposed subcontractor, Unisys, is not the incumbent. Appellant is the incumbent. Thus, Appellant's constant references, in its pleadings, to Unisys and VAC having "flipped" their roles, are irrelevant.

The Area Office here reviewed the documentation submitted by VAC. The Area Office concluded VAC would be managing the contract and performing all the work except for one employee from Unisys. VAC has the requisite background to handle the contract, having 20 years experience in the telephone industry. Sworn statements by VAC's management established that VAC identified the contract as an opportunity, decided to submit an offer on the requirement, prepared its proposal without assistance from Unisys, and will perform at least [xxx] of the work. Unisys will perform all the primary and vital functions of the contract using its proprietary VAC FOCUS system. In summary the Area Office found that VAC is not unduly reliant on Unisys for contract performance here, and is itself performing the primary and vital tasks of the contract. Unisys will provide one employee who will provide "over the shoulder" advice concerning federal contract administration, a Washington presence, and assist with quality control.

All this information adequately supports the Area Office's finding that VAC is not unduly reliant upon Unisys.

Appellant attempts to overturn the size determination by raising several issues, none of which go to the heart of the matter here. First, Appellant attempts to rely on the inclusion of Unisys insignia on the cover pages of VAC's proposal. However, the type of logo or insignia used on a proposal has nothing to do with the substantive question of which firm is actually performing the primary and vital tasks of the procurement. A proposal which refers to the contractor and subcontractor as a "team" is not an indicia of affiliation. *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4663 (2004). Appellant's argument on this point is meritless.



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While neither the Area Office nor VAC responded to Appellant's allegations on VAC's reliance on Unisys equipment, the Appellant could only point to the provisions of some equipment which will be used by VAC's employees. This hardly rises to the level of undue reliance, or of Unisys performing the primary and vital tasks of the contract.

Appellant further argues that VAC's proposal identifies Unisys as participating in some respect in all but 5 of 110 contract performance tasks, and that for a number of these tasks it will be either the "responsible authority" or have "primary responsibility". However, the document Appellant relies upon for this argument is simply the "Quality Control Plan" Tab 1, Volume 1 of VAC's proposal. This document is merely one portion of the proposal, and deals with only with quality control, one aspect of contract performance. It is clearly not a matrix for performance of the contract as a whole, but for the quality control aspect of performance. Appellant's argument rests on one document which simply does not say what Appellant argues it says. The proposal also contains a Statement of Work, a Staffing and Program Management Plan and a Transition Plan. The Staffing and Program Management Plan sets forth how VAC will perform the contract. It identifies an 11-member team, only one of whom is a Unisys employee. The plan describes the roles of the team members in four pages. In those four pages, the Unisys member's tasks are described in one brief paragraph. Appellant's argument on this point fixes on one aspect of portion of contract performance, and fails to consider VAC's proposal as a whole. It is meritless.

Appellant argues that VAC must be reliant upon Unisys for financial resources. Appellant argues the absence from the record of a teaming agreement, subcontract, financing agreement, leasing agreement or any other agreement between VAC and Unisys means the record must be incomplete. Appellant argues that the Area Office should have drawn an adverse inference from the absence of such agreements from the record.

However, given that VAC has provided a sworn SBA Form 355, which states that there are no such agreements, and given the small role Unisys plays in VAC's contract performance this is a perfectly credible statement. It is important to consider that all of VAC's statement were attached to its SBA Form 355, and are thus sworn statements, as are the two affidavits VAC submitted. Conversely, many of Appellant's assertions are speculation, based on supposition. OHA's settled precedent establishes that more weight is given to the signed and sworn statements made by the challenged firm on its SBA Form 355, and any other sworn statements submitted, than to unsupported statements made by other parties. *Size Appeal of FFTF Restoration Company, LLC*, SBA No. SIZ-4684, at 6 (2005). Here, any assertion that other agreements or documents must exist is mere speculation by Appellant, and the Area Office properly relied upon the documents in record before it.

Further, VAC submitted adequate documentation, including affidavits from its senior management, which established VAC self-funded its contracts as a prime contractor, and documented substantial sales revenue for the preceding three years, rising from [xxxxxxxxxx] in 2005 to [xxxxxxxxxx] in 2007. In response to this documented, sworn evidence, Appellant offers only its speculations about VAC's finances, and attempts to seize on a clerical error in

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VAC's ORCA filings. Even if one accepts Appellant's arguments that VAC's statements shown a difficult financial condition, Appellant submits no evidence whatever that Unisys is providing the financial assistance alleged. Again, the Area Office properly relied upon the sworn statement before it to reach its conclusion.

Further, Appellant's argument the Area Office should have examined VAC's financial capacity to perform the contract comes perilously close to insisting the Area Office make a responsibility determination. The Area Office properly declined to do so, deferring to the CO, who presumably has already made a responsibility determination. *Size Appeal of TCE Incorporated*, SBA No. SIZ-5003, at 11 (2008). It is one thing to examine evidence that a challenged firm may be financially dependent upon its ostensible subcontractor, another to step into the CO's shoes and examine the firm's overall financial responsibility. The first is required of the Area Office; the latter is the CO's role. FAR 9.103(b).

Appellant further argues that Unisys must have had a role in preparing VAC's proposal. Appellant points to similarities between VAC's proposal here and a Unisys proposal for a similar procurement by the [xxxxxxxxxxxxx], and asserts this is evidence of Unisys participation in proposal preparation. However, a review of the passages does not lead to a finding of Unisys participation but of, at worst, plagiarism by VAC. VAC may have similar passages in its proposal, but the fact that the two requirements were so similar, with both proposals based largely on VAC's technology, software, and operation and maintenance, may be the primary reason for this. This does not establish that Unisys participated in drafting VAC's proposal.

More to the point, the Area Office found the two documents were not similar in content, scope, format or numbering. My review of the record confirms this finding, and Appellant offers only some similarly phrased passages to contradict it. Further, the Unisys proposal relied heavily on VAC, with one of three key personnel and 7 of 11 team members coming from VAC. The Unisys proposal relies on VAC's FOCUS system. Simply put, the two proposals are not that similar, despite having similar language in a few passages that Appellant extracts for its brief. A review of the record establishes that Appellant's argument the Unisys participated in drafting VAC's proposal is meritless.

In summary, it is clear that Unisys has a minor role in VAC's contract performance. Unisys will provide only one employee for this procurement, and will perform no more than [xx] of the work. VAC's extensive documentation establishes that VAC identified this contract as an opportunity, has performed extensive work of this kind in the past, prepared an extensive proposal, and is relying for performance, not only upon its own personnel, but upon a system (VAC FOCUS) which is its own proprietary system. Unisys will play a minor role, providing one employee and performing [xxxxxxxxx] of the work.

Nothing Appellant submits contradicts these facts all documented in the record with sworn statements. Rather, Appellant makes speculative statements about what "must have" happened, grasps at similarities between Appellant's proposal and another Unisys proposal for a similar contract, the use of the Unisys logo, the quality control plan where Unisys will play a larger role, and a clerical error in an earlier ORCA filing to attempt to manufacture undue

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reliance where none whatever exists. The instant appeal is entirely without merit, and must be denied.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge