

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

SIZE APPEAL OF:

Alutiiq International Solutions, LLC

Appellant

Appealed from
Size Determination No. 6-2009-074

SBA No. SIZ-5069

Decided: September 22, 2009

ORDER REMANDING SIZE DETERMINATION

I. Jurisdiction

This appeal arises from an August 7, 2009, size determination issued by the Small Business Administration's Office of Government Contracting, Area VI Office (Area Office) finding Alutiiq International Solutions, LLC (Appellant) is other than small because of a violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). The Area Office found Appellant violated the ostensible subcontractor rule when it entered into an agreement with a large concern, IAP Worldwide Services, Inc., (IAP) to perform the work described by Solicitation No. NIHOD2008040 (RFP), which was issued by the National Institutes of Health (NIH) on November 7, 2007, for Long-Term Administrative Support Services. For the reasons discussed below, the size determination is remanded and vacated.

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

Did the Area Office, while conducting a size determination arising from a protest filed on other grounds, give Appellant adequate notice that it was evaluating whether Appellant violated the ostensible subcontractor rule?

III. Background

A. Findings of Fact

1. On November 7, 2007, the NIH issued the RFP as a 100% set-aside for small businesses. The RFP required the successful offeror(s) to provide Long-Term Solicitation Administrative Support Services at various locations and assigned North American Industry Classification System (NAICS) code 561110, Office Administrative Services, with a corresponding size standard of \$6.5 million.

2. On July 1, 2009, the Contracting Officer (CO) informed the unsuccessful offerors, including Manufacturing Engineering Systems, Inc., (MES), who the successful offerors would be. Appellant was one of the offerors the CO identified as being successful.

3. On July 10, 2009, MES protested Appellant's size. MES alleged that Appellant's average annual receipts exceeded the \$6.5 million size standard. MES provided excerpts from Appellant's own website to support its allegations.

4. On July 15, 2009, the Area Office informed Appellant of MES' protest and enclosed a copy of the protest. The Area Office further requested that Appellant submit a completed SBA Form 355, various other documents, and a response to the allegations of the protest.

5. On July 20, 2009, the Area Office sent an email to Appellant and requested additional information. Among the information the Area Office requested was a copy of the proposed subcontract agreement between Appellant and IAP. The Record contains no indication the Area Office explained to Appellant why it wanted the agreement.

6. In a July 27, 2009, email to the CO, the Area Office notified the CO it had concerns about Appellant's teaming agreement with IAP. Hence, the Area Office requested the CO provide a copy of Appellant's proposal. The Record contains no indication the Area Office notified Appellant it had issues with Appellant's teaming agreement with IAP.

7. On August 4, 2009, the Area Office requested that Appellant provide copies of IAP's Tax Returns for 2004, 2005, and 2006. The Record contains no indication the Area Office explained to Appellant why it wanted IAP's tax returns.

B. The Size Determination

On August 7, 2009, the Area Office issued Size Determination No. 6-2009-074 (Size Determination), which determined that Appellant was other than small because its relationship with IAP violated the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). Thus, Appellant is other than small for this procurement only. Although the Area Office found Appellant was itself within the RFP's size standard, it aggregated Appellant's receipts with IAP's because it concluded Appellant was unduly reliant upon IAP based upon: (1) Extensive collaboration in preparation of the proposal; (2) IAP's hiring responsibilities; (3) IAP's provision of key

personnel; (4) Joint evaluation of labor mix by site; (5) IAP's possession of work experience; (6) IAP's establishment of a program management office to support overall management and quality control; (7) the fact that IAP is other than small for the applicable size standard; (8) the fact that IAP will share in the fixed fee of each task order; and (9) the fact that IAP will be performing between 45% and 49% of the work.

C. The Appeal

Appellant appealed the Size Determination on August 21, 2009. In addition, Appellant moved to submit additional evidence—specifically, an affidavit of its Vice President for Bids & Proposals—upon which Appellant, in part, based its contention that the Area Office did not provide notice to Appellant that it was investigating whether Appellant was other than small pursuant to the ostensible subcontractor rule. Appellant also challenged the facts found by the Area Office and, thus, the conclusions of law based upon those facts.

IV. Analysis

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 10 -11 (2006).

C. The Merits

1. Size Protest Specificity

The regulation governing the content of a size protest provides, in relevant part:

A protest must include specific facts. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

Non-specific protests will be dismissed. Protests which do not contain sufficient specificity will be dismissed by SBA.

13 C.F.R. § 121.1007(b), (c).

In determining the sufficiency of protests, OHA has focused on (1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds. *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430, at 6 (2001) (holding challenger's protest was sufficiently specific in that the protest asserted that the challenged firm was other than small, included the grounds for the challenge, and incorporated factual allegations to support its allegations). The purpose of 13 C.F.R. § 121.1007(b) and (c) is to ensure protested concerns have specific notice of the grounds of protests against them so they may craft a response that protects their interests and, thus, to afford protested concerns due process.

Even though 13 C.F.R. § 121.1009(b) permits area offices to issue size determinations on grounds beyond those raised by a protestor and 13 C.F.R. § 121.1007(b) and (c) do not explicitly say they apply to an area office, it is axiomatic that before finding a concern other than small on grounds not found in a protest, an area office must provide notice to the protested concern of any change in focus and request a response. Otherwise, an area office would be able to effectively avoid the notice requirements found in 13 C.F.R. § 121.1007(b) and (c). Consequently, protested concerns would lack the notice required to craft a meaningful response to a protest.

The Record in the present appeal contains no evidence the Area Office informed Appellant it was considering a violation of the ostensible subcontractor rule along with the other matters raised by MES (Facts 4 - 7). Instead, the Area Office requested information from Appellant without explaining why it wanted this information. Accordingly, the Area Office committed clear error in denying Appellant due process granted it by 13 C.F.R. § 1007(b) and (c)

2. Instructions

The Area Office must solicit a narrative response from Appellant as to whether it violates the ostensible subcontractor rule. The Area Office should ask Appellant to submit all the evidence it wishes the Area Office to consider in support of its response along with a revised SBA Form 355. (Appellant need not resubmit evidence already provided.) In evaluating the evidence, the Area Office should give more weight to the RFP, the proposal, and the teaming agreement verses any evidence created after the protest. Based upon Appellant's response and the Record, the Area Office must craft a new size determination that affords Appellant the basic due process denied to Appellant and explains why its findings of the facts may differ from those argued by Appellant.

Appellant is cautioned not to impute the experience or abilities of its affiliates to itself because that is an irrelevant argument, and attempting to impute the abilities or experience of affiliates is suggestive of affiliation beyond that permitted by 13 C.F.R. § 121.103(b)(2)(i) or 13 C.F.R. § 121.103(b)(2)(ii). Nor is it relevant that IAP cannot control Appellant in the classic sense. Instead, as provided by 13 C.F.R. § 121.103(h)(4), it is only relevant whether IAP will be performing primary and vital tasks or whether Appellant is unusually reliant upon IAP.

I also note that the findings concerning fee sharing, work allocation, key personnel, and lack of experience have the potential to be relevant to this appeal. Therefore, in addition to addressing other relevant issues, both the Area Office and Appellant should carefully address the relevance and import of these particular issues.

V. Conclusion

For the above reasons, I VACATE the Size Determination and REMAND the case to the Area Office. The Area Office is ORDERED to conduct a size determination consistent with this Order. Accordingly, it is unnecessary to rule on Appellant's Motion to Submit New Evidence.

THOMAS B. PENDER
Administrative Judge