

REDACTED DECISION FOR PUBLIC RELEASE

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

SIZE APPEAL OF:

Fischer Business Solutions, LLC

Appellant

Appealed from
Size Determination No. 2-2009-62

SBA No. SIZ-5075

Decided: October 7, 2009

APPEARANCE

Cynthia Fischer, President, Fischer Business Solutions, LLC, Lorton, Virginia, for Appellant.

DECISION

I. Jurisdiction

This appeal is decided 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 was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Solicitation and Protest

On April 7, 2008, the Department of the Army, Center for Health Care Contracting at Fort Sam Houston, Texas, issued the subject solicitation for Nursing Services. The Contracting Officer (CO) set the procurement aside 100% for small business and assigned North American Industrial Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding \$7 million annual receipts size standard.

The solicitation is for nursing services. The contractor will provide technically proficient Health Care Providers (HCP), including licensed vocational nurses and certified nursing

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assistants. The individual HCPs will be subject to day-to-day supervision and control by the government's health care facility personnel. Offers were due on January 22, 2009.

On April 14, 2009, the CO notified unsuccessful offerors that Fischer Business Solutions, LLC (Appellant) was the apparent successful offeror. On April 16, 2009, Nurses's Etc. Staffing, Inc., an unsuccessful offeror, filed a protest asserting that Appellant was other than small because it was affiliated with its ostensible subcontractor, STG International, Inc. (STG). On April 28, 2009, the Small Business Administration (SBA) Office of Government Contracting for Area 2 in King of Prussia, Pennsylvania (Area Office) informed Appellant of the protest and requested it submit a response to the protest, a completed SBA Form 355, and certain other information.

Appellant is a Virginia limited liability company established in April 2007. Appellant's president, Cynthia Fischer has a 51% interest and her husband, Richard Fischer, has a 49% interest. Both principals have extensive business management experience and have individually run contracts of greater scope and complexity than the instant contract. Appellant's annual receipts are well within the size standard and Appellant admits to no affiliates.

Appellant's proposed subcontractor is STG, an other than small business. Appellant's technical proposal states Appellant has had an ongoing relationship with STG for five years. Ms. Fischer was an employee of STG from [xxxxxxxxxxxxxxxxxxxx], serving as Director of its Healthcare and Strategic Recruitment Services Division. Ms. Fischer is no longer employed by STG.

Appellant was organized in 2007 and its relevant experience is one contract for twenty nurses. Appellant's president, Ms. Fischer, gained extensive experience with this type of contract while working for STG. STG has substantial experience with this type of contract.

B. The Size Determination

On June 12, 2009, the Area Office issued a size determination finding Appellant other than small. The Area Office found that Appellant's president was a former employee of STG and that Appellant and STG are in the same line of business. The Area Office further found STG would provide technical assistance to Appellant for this procurement using its recruitment network and Appellant has had an ongoing relationship with STG for five years. Accordingly, the Area Office concluded there was no clear fracture between Appellant and STG and the two firms were affiliated under the newly organized concern rule.

The Area Office then stated that a comment on Appellant's responsibility was pertinent to the case. The Area Office found that the instant procurement is valued at almost \$90 million and Appellant has been in business for less than three years with average revenues of less than \$[xxxxxxx]. The Area Office stated Appellant's past performance is limited. The Area Office relies on *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), in stating that when a firm has unproven or questionable capabilities the CO could only have concluded the firm is responsible by relying on the subcontractor's experience. The Area Office thus concluded that Appellant was reliant upon STG for technical support and there was no clear fracture between

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the firms.

The Area Office also considered what it found to be Appellant's lack of capability to perform the contract in determining which firm would be performing the primary and vital functions of the contract. The Area Office considered that Appellant would be utilizing STG's recruitment network and that the lead recruiter would be an STG employee. Based on these facts, the Area Office concluded that STG would be performing the primary and vital requirements of the contract. The Area Office thus concluded that Appellant and STG were affiliated under the ostensible subcontractor rule.

The Area Office also found: Appellant's majority owner is a former key employee of STG; STG has experience applicable to the requirements of the instant procurement; Appellant is unduly reliant on STG for Recruitment, Quality Control, and Credentialing; and Appellant and STG are in the same line of business. Further, the Area Office noted Appellant has generated small revenues and has been in business for less than three years and STG has the ability to perform a contract of this magnitude. The Area Office thus concluded Appellant and STG were also affiliated under the totality of circumstances rule.

C. The Appeal

On June 15, 2009, Appellant received the size determination. On June 26, 2009, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA).

Appellant asserts that the newly organized concern rule is not applicable here because STG has not furnished Appellant with contract, financial, or technical assistance. Appellant points out that there is no finding STG has provided it with contracts, financial assistance, bid or performance bond indemnification, facilities, or other assistance. Rather, Appellant states the Area Office's size determination rests on the reference in Appellant's technical proposal to its relationship with STG and STG's provision of technical assistance concerning recruiting.

Appellant asserts the relationship is based upon Ms. Fischer's past employment and her personal relationship with STG's president rather than years of business ties between the firms. Appellant notes STG's president mentored Ms. Fischer. However, Appellant asserts there are not business ties creating a dependent relationship between Appellant and STG. Appellant further asserts that Ms. Fischer's twenty years of recruiting and retention experience in the U.S. Army were valuable for STG and provide her with the needed expertise to manage Appellant's business.

Appellant denies that STG is providing technical assistance, such as expertise which Appellant lacks. Appellant asserts that both Ms. and Mr. Fischer have extensive experience in the field of recruitment, retention, training, and quality control. Appellant asserts it has the ability to design and manage effective recruitment and quality control programs. While Appellant plans to use STG to augment its resources, Appellant states the recruitment and placement plan is Appellant's. Further, Appellant asserts Appellant's personnel will oversee the plan and its Program Manager will oversee all program activities. Appellant asserts, while the Director of Quality Control will be an STG employee, she will report to Appellant's president,

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with a working relationship with the Program Manager. Appellant argues STG will be doing no more than performing specific subcontract requirements.

Appellant also asserts that, in finding Appellant unusually reliant on STG the Area Office has, in effect, made a responsibility determination, which it has no authority to do. Appellant argues the Area Office ignores or misconstrues the experience and expertise of Appellant's principals and employees, Appellant's proposal, and the solicitation's requirements. Appellant states the Area Office emphasized STG's experience and failed to consider Ms. and Mr. Fischer's experience. Appellant notes STG's involvement is limited to assisting Appellant in implementation of plans designed by Appellant. Further, Appellant asserts recruitment and quality control are only two areas of the contract and the need for recruitment will drop over the course of performance as positions are filled. Appellant states most of the positions will be filled by nurses working for the current incumbent and thus the recruitment task is not as formidable as it appears at first glance. In addition, Appellant notes the contract allows only a 20% turnover rate, which limits the need for recruitment over time.

Finally, Appellant argues that the totality of the circumstances should not be used as an independent basis for affiliation.

IV. Discussion

A. Timeliness

Appellant filed its 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 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), for a full discussion of the clear error standard of review. 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. The Merits

Affiliation between firms is based upon whether one firm controls, or has the power to control, the other. 13 C.F.R. § 121.103(a)(1). Area offices are responsible for determining affiliation by applying 13 C.F.R. § 121.103 to the record before them. 13 C.F.R. § 121.1002. The affiliation rules relevant to this appeal are: (1) the newly organized concern rule, 13 C.F.R. § 121.103(g); (2) the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4); and (3) general principles of affiliation, 13 C.F.R. § 121.103(f).

REDACTED DECISION FOR PUBLIC RELEASE**1. Newly Organized Concern Rule**

The Area Office found Appellant affiliated with STG under the newly organized concern rule. Under this rule, firms are affiliated when (1) former officers, directors, principal stockholders, or key employees of one firm organize a new firm; (2) these individuals serve as the new firm's officers, directors, principal stockholders, or key employees; (3) the new firm is in the same or a related industry or field of operation; and (4) the one concern is furnishing or will furnish to the new concern contracts, financial or technical assistance, bid or performance bond indemnification, or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(a).

Here, Appellant concedes it meets the first three criteria, but denies that STG is furnishing it with significant technical assistance. The Area Office asserts that STG and Appellant have had an ongoing relationship for five years and STG is providing technical support, specifically STG's recruiting network, to Appellant. Indeed, Appellant's proposal emphasizes its relationship with STG; however, this is a reference to the mentoring relationship between STG's president and Ms. Fischer since Appellant has not been in business for five years. Moreover, although Appellant has retained STG as its subcontractor for the current contract, there is no evidence that STG's assistance as a subcontractor on the contract rises to the level to support a finding of affiliation (STG's assistance as a subcontractor is discussed in greater detail below under the ostensible subcontractor rule). In fact the size determination notes Appellant designed a recruitment and outreach strategy to attract highly-skilled healthcare workers and that Ms. Fischer has overseen more than 1,000 healthcare workers supporting federal agencies and military treatment facilities. STG's recruiting strengths are clearly an asset to Appellant's proposal, but do not amount to more than *de minimis* assistance, especially given Appellant's principals experience and expertise in recruitment and quality control. Accordingly, I find the Area Office erred as a matter of law in finding Appellant affiliated with STG under the newly organized concern rule.

2. Ostensible Subcontractor Rule

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 a 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. An area office evaluates "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).

Here, the Area Office reviewed the proposal and the relationship between the two firms. The Area Office noted: neither Appellant nor STG are incumbent contractors for this procurement; Appellant has less than three employees; the proposed program manager and

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deputy program manager are neither employees of Appellant or STG; the proposed lead medical recruiter and proposed credentials coordinator were STG employees; the proposed director of quality is an STG employee; STG's past contract performance is highlighted; the cost proposal indicates Appellant will incur 51% of the labor cost and STG will incur 49%; and Appellant represents it will perform over 51% of the work. The Area Office also commented on Appellant's capability and responsibility and noted Appellant has been in business for less than three years with average revenues of about \$[xxxxxxx], where STG has substantial past performance. The Area Office stated the recruitment and staffing are the primary and vital requirements and Appellant is relying on STG's recruitment network to meet those requirements. Based on the record, the Area Office found Appellant unduly reliant on STG.

The Area Office relies heavily on STG's experience in this field, in contrast to what it characterizes as Appellant's inexperience. As the Area Office acknowledges, comments on Appellant's capacity to perform the contract are outside the purview of the size appeal process and are more properly the province of the CO, and yet the Area Office felt compelled to include statements on Appellant's responsibility.

The factual record before the Area Office contained indicia establishing that the relationship between Appellant and STG is not an ostensible subcontractor relationship. STG is not the incumbent contractor on this contract. Appellant has experience in performing this type of work and, as previously discussed, designed a recruitment and outreach strategy to attract healthcare workers. Moreover, although Appellant is a young business, its principals have extensive business experience, as well as recruiting-specific expertise. Appellant is not financially reliant on STG for funding, bonding, or in any other way and Appellant will manage the contract.

The procurement's evaluation criteria identified four technical factors: (1) personnel, (2) management capability, (3) quality control plan, and (4) staffing plan. The first factor was further subdivided into three subfactors: (1) recruitment, (2) retention and employee relations, and (3) compensation. Accordingly, STG's assistance on recruitment and quality control is only a portion of the contract and does not demonstrate STG will be performing the primary and vital requirements of the contract.

In sum, the size determination's ostensible subcontractor analysis is based on errors of fact and law. Although the Area Office notes facts favorable to the Appellant, the size determination's analysis gives them little weight. Moreover, there are simply not sufficient indicia of affiliation for the ostensible subcontractor rule to apply.

The Area Office relied upon its judgment Appellant was insufficiently experienced to perform this contract. However, Appellant's experience and competency are a matter of record and responsibility determinations are beyond the jurisdiction of the size determination process. To place too much emphasis on the challenged firm's prior experience in making an ostensible subcontractor determination runs the risk of closing the door on new small firms. While Appellant makes use of a large subcontractor, it stays within the established parameters of the ostensible subcontractor rule and is not unusually reliant upon STG. The Area Office erred in its determination to the contrary.

REDACTED DECISION FOR PUBLIC RELEASE**3. General Principles of Affiliation**

Affiliation through the totality of the circumstances is found at 13 C.F.R. § 121.103(a)(5). *Size Appeal of Lance Bailey and Associates*, SBA No. SIZ-4817, at 13-14 (2006). Totality of the circumstances is not an independent basis of affiliation. *Size Appeal of TKC Technology Solutions, LLC*, SBA No. SIZ-4783 (2006). Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor, the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates. 13 C.F.R. § 121.103(a)(5); *Size Appeal of A.M. Kinney Associates*, SBA No. SIZ-4401, at 5-8 (2000). Thus, while the evidence in the record may not establish affiliation under one of the specific factors enumerated in 13 C.F.R. § 121.103(a), (b), (c), (d), (e), (f), (g), or (h), an area office's review of the totality of circumstances may lead it to conclude one business has the power to control another. This means affiliation can arise where business or personal ties leads an area office to a reasonable conclusion that businesses are affiliates. The preference is that area offices find affiliation based upon the specific factors enumerated in 13 C.F.R. § 121.103.

Here, the evidence is insufficient to demonstrate affiliation exists between Appellant and STG under the totality of the circumstances. The Area Office's finding on the totality of the circumstances relies heavily on the facts cited for affiliation under the newly organized concern rule and the ostensible subcontractor rule, which has been rejected. The Area Office's determination relies on the fact: Appellant and STG are in the same line of business; STG has experience applicable to the procurement; Appellant's majority owner is a former key employee of STG; and Appellant is unduly reliant on STG's services to perform the contract. The Area Office reiterates that Appellant has generated minimal revenues and is less than three years old, where STG has the infrastructure required to perform the contract. The Area Office notes there are no common managers and the size determination includes no evidence STG controls or has the power to control Appellant. Accordingly, the proof in the record is insufficient to sustain the Area Office's size determination that Appellant and STG are affiliated based on the totality of the circumstances as described in 13 C.F.R. § 121.103(a)(5).

V. Conclusion

For the above reasons, I GRANT Appellant's size appeal. The Area Office's size determination is REVERSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge