Cite as: *Size Appeal of C.E. Garbutt Construction Co.*, SBA No. SIZ-5083 (2009)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: C.E. Garbutt Construction Company, Appellant, Appealed From Size Determination No. 3-2009-76	SBA No. SIZ-5083 Decided: November 2, 2009

DECISION

I. Jurisdiction

On September 18, 2009, the Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2009-76 (Size Determination) finding C.E. Garbutt Construction Company (Appellant) other than small due to its affiliation with The Christman Company (Christman). The Area Office determined Appellant's relationship with Christman violates the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)) for purposes of the procurement at issue. For the reasons discussed below, the Size Determination is affirmed.

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 make a clear error of fact or law when it determined that Appellant is affiliated with Christman pursuant to the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4))? *See* 13 C.F.R. § 134.314.

III. Background

A. Facts

1. On June 1, 2009, the Contracting Officer (CO) for the U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management issued Invitation for Bids No. DOL099RB20699 (IFB), seeking bids for the modernization of buildings at the Gerald R. Ford Jobs Corps Center in Grand Rapids, Michigan.

2. The IFB was a total HUBZone Small Business set-aside, and the CO designated North American Industry Classification System (NAICS) code No. 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in average annual receipts. The estimated cost range is over $10 million.

3. On July 21, 2009, Appellant submitted its bid for $12,297,800, including a bid bond from Westfield Insurance Company (Surety) and was determined to be the low bidder when all sealed bids were opened later that same day.

4. On August 13, 2009, MoHawk Construction Group, LLC (MoHawk), an unsuccessful bidder, filed its protest of Appellant's size with the CO alleging that Appellant is other than small due to its affiliation with Christman. MoHawk alleged: (1) Appellant's bid was submitted in a Christman envelope; (2) Appellant did not attend the pre-bid meeting; (3) Appellant did not obtain bid documents; and (4) Appellant and Christman have a previous joint venture relationship. Accordingly, MoHawk alleged Appellant had a joint venture relationship with Chrisman and is other than small.

5. The CO forwarded MoHawk's August 13, 2009 protest to the Area Office on August 17, 2009. In the transmittal letter, the CO included a copy of the pre-bid walk-thru attendance list, a copy of the bid distribution list, and other information. In addition, the CO noted Appellant's proposed Surety stated that Appellant intended to subcontract a portion of the work required by the IFB to Chrisman and that Chrisman had agreed to indemnify the surety for bonds provided by the Surety.

6. The pre-bid walk thru list shows that Christman was represented during the walk-thru by two individuals, including an estimator. There is no evidence Appellant attended the walk-thru, although many other concerns, including potential subcontractors and prime contractors, such as MoHawk, attended.

7. The Bid Distribution list provided by the CO does not list Appellant, but it does list Christman and 69 other concerns, including MoHawk.

8. On August 19, 2009, the Area Office informed Appellant of MoHawk's protest and furnished a copy of the protest to Appellant. On August 24, 2009, Appellant responded to the protest and provided a completed SBA Form 355.

9. The Area Office dismissed MoHawk's protest as untimely. However, on August 31, 2009, the Director adopted MoHawk's size protest and directed that a size determination of Appellant be performed.

10. After Appellant provided documents to the Area Office, the Area Office requested that Appellant answer questions and provide additional documents. The additional documents provided by Appellant, along with its answers to the Area Office's questions, established the following:

a. Appellant intended to subcontract the majority of the work required by the IFB and would retain earnings of $885,000 (7.1% of its bid);

b. Appellant is acting as the general contractor, which includes holding the contract between contractor and owner, holding all subcontractor agreements and associated risk, performing project accounting, processing payment applications, acting as the project executive, performing clerical functions, sharing senior project management with its subcontractor Christman, acting as senior quality control officer, acting as safety manager (a position that is to be shared with its subcontractor Christman), and serving as assistant field superintendent as needed;

c. Appellant is headquartered in Dublin, Georgia. The partial list of projects completed by Appellant includes no work outside the State of Georgia, with the largest project being for $3,118,078;

d. Christman would receive approximately $684,773 for the work it is to perform under the contract arising from the IFB (5.6% of Appellant's bid);

e. Christman is to assist Appellant with overall project management, provide on-site field supervision, perform selected general condition items, manage overall general conditions and coordinate general trades items like general carpentry, millwork, cabinets, doors and door hardware, and other miscellaneous specialties;

f. Appellant provided the bid bond from the Surety without any involvement from Christman. With regard to the Miller Act Performance and Payment bonds, the Surety is to provide these bonds of behalf of Appellant. However, Christman has agreed to indemnify the Surety for any losses arising out of the performance and payment bonds;

g. In response to the Area Office's questions concerning its relationship with Christman Appellant explained:

> [Appellant] and The Christman Company have had multiple contracting arrangements in many geographic areas throughout the past two years. It has become very clear to both firms familiarity of the local subcontracting market is key to the success of the project. In past instances, both [Appellant] and Christman have had the local subcontractor relationships depending upon the geographic area in question. In this project instance, The Christman Company has an office in Grand Rapids and familiarity with the local subcontract market. Christman assisted [Appellant] in the determination of qualified and un-qualified subcontractor [sic] for the specific project circumstances. Christman also assisted [Appellant] in solicitation of qualified subcontractor bids with the complete understanding all subcontracts will be held by [Appellant].

11. Christman is a large concern whose average annual revenues are many times higher than the $33.5 million size standard applicable to the IFB. Christman has successfully performed projects much larger than Appellant's bid for the IFB.

12. Appellant and its acknowledged affiliates are much smaller than the size standard applicable to the IFB. In fact, Appellant's average annual revenues are much less than its bid under the IFB.

B. The Size Determination

On September 18, 2009, the Area Office issued its Size Determination finding Appellant other than small based on its affiliation with Christman. Upon request from the Area Office for a list of the services Christman would perform, Appellant provided that Christman would assist Appellant with overall project management—*e.g.*, field supervision, performance of certain general condition items, and coordination of general trade items. Christman would also share responsibility for the roles of senior quality control officer and safety manager. Additionally, Appellant provided that the estimated cost of the work to be provided by Christman is $684, 773 (5.6% of the overall contract value), whereas Appellant expects to retain $885,000 (7.1% of the overall contract value). Based on these figures, the Area Office calculated that Christman would receive nearly 50% of the administrative/management costs of the contract. Therefore, the Area Office concluded that Christman would perform some of the primary and vital requirements of the contract.

The Area Office also determined that Appellant would be unduly reliant upon Christman to perform the work required by the contract. Appellant provided that Christman would share responsibility for five of the nine key personnel roles identified in the proposal. Appellant has worked with Christman on multiple past projects. Furthermore, of the six projects listed in the past performance section of the proposal, only two were projects on which Appellant was the prime contractor, and the only projects valued over $10 million were projects on which Christman was the prime contractor. Finally, Christman secured the performance bonds issued on Appellant's behalf, Christman is located in the geographical area where the work is to be performed, Christman assisted Appellant in retaining other qualified subcontractors, and it was Christman who delivered Appellant's bid.

Based on the totality of the circumstances, the Area Office concluded Christman would perform some of the primary and vital requirements of the contract, and Appellant would unduly rely on Christman to perform the contract. Accordingly, the Area Office determined that Christman is Appellant's ostensible subcontractor and combined the average annual receipts of both firms, rendering Appellant other than small for purposes of the IFB.

C. The Appeal

Appellant received the Size Determination on September 18, 2009, and filed its size appeal on September 28, 2009, with SBA's Office of Hearings and Appeals (OHA). Appellant contends that Christman is not performing primary and vital requirements of the contract, nor is Appellant reliant upon Christman to perform the work required by the contract. Appellant also

emphasizes that, as the general contractor, it holds all the subcontracts, and it bears all the risk of the project, as it is ultimately legally responsible for all the work performed.

Appellant claims that, in view of the totality of the circumstances, it is clear that Christman would only assist Appellant with contract management and would not have the ability to control the project. Appellant provided the Area Office with information on twenty-three projects it successfully completed without Christman, the largest being valued at over $3 million. Appellant did not enter into any agreements with Christman related to this project. Rather, Appellant would only offer Christman the same subcontract as all other subcontractors hired once the contract is formally awarded. Each of the individual staff members assigned to fill a key personnel role identified in the proposal is an employee of Appellant, except for one employee of Christman who would share the role of safety manager with an employee of Appellant. Finally, as the Area Office noted, Christman would perform only 5.6% of the total contract in terms of revenue.

Appellant also argues that it was unfair for the Area Office to focus on the fact that Christman secured its performance bond because, due to the size of the project, any HUBZone bidder would have required assistance with bonding. Additionally, Appellant contends that whereas it is a general contractor, many other bidders were normally subcontractors who teamed up with general contractors to obtain this contract. Appellant and its other subcontractors (not Christman) are performing the most complex and costly functions of the contract, and ultimate responsibility for the work performed under the contract lies with Appellant. Thus, Appellant is capable of performing this contract, and, in fact, "[t]his project is the type of work for which [Appellant] is well-suited." Appellant concludes that Christman would not perform primary and vital contract requirements, nor would Appellant be unduly reliant upon Christman to perform, and it did not violate the ostensible subcontractor rule for this procurement.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within fifteen 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 the 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 an area office made a patent error of fact or law based on the record before it. Consequently, the Administrative Judge may disturb an area office's size determination only if he has a definite and firm conviction that the area office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

C. Analysis

1. Applicable Legal Standard

Ostensible subcontractor appeals are intensely fact specific because the facts underlying these appeals are unique. The facts are unique because they are based upon the specific requirements of each solicitation and an individual offeror's response to those requirements in its proposal. For example, very few solicitations have exactly the same scope of work or evaluation standards for award. Additionally, proposals will almost always be different based upon the offeror's own unique understanding, experience, expertise, personnel, and subcontractor relationships. As a result, prior cases have very little precedential value, aside from certain general principles, and OHA has acknowledged this reality. In *Size Appeal of Smart Data Solutions LLC*, SBA No. SIZ-5071, I explained that:

> It is important to note that while previous ostensible subcontractor cases may be interesting or instructive, they are unlikely to be binding, for the facts and solicitations involved are usually unique. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817, at 16 (2006). Thus, when we review an ostensible subcontractor decision, OHA looks to see if an area office has considered all aspects of the relationship between the prime and the subcontractor. (13 C.F.R. § 121.103(h)(4)). That means an area office shall consider the relationship between the prime and its intended subcontractor as shown in the record available to it. As a practical matter, this is equivalent to considering the totality of the circumstances, but the burden is upon the protested concern to establish its size. 13 C.F.R. § 121.1009(c).

13 C.F.R. § 121.103(h)(4) 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.

2. The Merits

Appellant contends Christman will only assist it in managing the work required by the IFB and will not have the ability to control the project. Appellant also claims it is unfair for the Area Office to focus on Christman's bonding assistance because, given the size of the project, any HUBZone bidder would have required assistance. Appellant further alleges it and its

subcontractors are performing the most complex and costly contract functions, and it bears ultimate responsibility for contract performance.

The essential problem with Appellant's appeal is that Appellant does not explain how the Area Office committed any material error of fact or law. Instead, Appellant merely asserts that the Area Office's conclusion is wrong without explaining how, under the all aspects test, the relevant facts could not have led to that conclusion. In short, Appellant disputes the Area Office's application of the facts, not the Area Office's findings of fact themselves or the Area Office's application of the law.

The facts in the Record strongly support the Area Office's determination. The primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors. Superintending and managing construction cannot be accomplished without presence at the construction site, and Appellant's headquarters is more than 900 miles from Grand Rapids, Michigan (Facts 1 and 10.c.). Accordingly, I find it significant that: (1) Only Christman has an office in Grand Rapids and familiarity with qualified subcontractors; (2) Appellant did not attend the pre-bid walk-thru or request plans and specifications whereas Christman did; (3) Appellant's work experience as a prime is concentrated in Georgia; (4) Christman will perform the role of the on-site superintendent in Grand Rapids and share senior project management duties with Appellant; (5) Christman agreed to indemnify the Surety for the statutorily required (40 U.S.C. §§ 3131 to 3134) performance and payment bonds (Facts 6, 7, and 10.c., e., f., g.); and (6) Christman's average annual revenues exceed the $33.5 million size standard applicable to the IFB by many times and it has accomplished construction projects for dollar amounts much larger than Appellant's bid (Fact 11).

The foregoing findings are exacerbated because: (1) Neither Appellant nor Christman are performing trade items on their own; and (2) Much of Appellant's role as prime contractor involves performing overhead roles such as project accounting, clerical work, and payment application processing, while the on-site superintendence of the construction is left to Christman. Nor does Appellant claim any experience in performing contracts near the size of its current $12,297,800 bid—the largest Appellant identified was $3,118,078 (Fact 10.c.). Hence the facts undeniably suggest that Appellant and Christman are really proposing to share the management of a project much larger than those performed by Appellant in the past and for which Appellant could not obtain the statutorily required payment and performance bonds on its own (Fact 10.f.). The Record also establishes Christman took the lead and responsibility for submitting the bid and locating the required subcontractors who are going to perform the work required by the IFB (Facts 6, 7, and 10.g.). Under the circumstances, it stretches the facts for Appellant to suggest Christman is merely assisting it in managing the contract.

Finally, the provision of the on-site superintendent is a primary and vital function for a construction contract, especially a contract as large as the one at hand. A Christman employee will be the on-site superintendent on the instant contract (Fact 10.e.), and performing this role goes beyond mere assistance and gives an important measure of control or power to Christman. When combined with Christman's agreement to indemnify the Surety, a factor the Area Office must consider under 13 C.F.R. § 121.103(h)(4), I cannot say the Area Office erred in finding that

Appellant was unusually reliant upon Christman or in finding that Christman will be performing primary and vital contract requirements.

It appears Appellant's only material contribution to this procurement is its size and its HUBZone status, and I find the Record is entirely too suggestive of a pass-through. Therefore, I hold the Area Office committed no error of fact or law in its Size Determination.

V. Conclusion

Upon consideration of the Record and Appellant's appeal petition, I have determined that the Area Office did not commit a clear error of fact or law. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge