United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
McKissack & McKissack	SBA No. SIZ-5093
Appellant	Decided: November 24, 2009
Appealed from Size Determination No. 2-2009-96	

APPEARANCES

Grace Bateman, Joshua C. Drewitz, and Bennett Greenberg, Seyfarth Shaw LLP, Washington D.C., for McKissack & McKissack, Appellant.

Kenneth B. Weckstein and Pamela A. Reynolds, Brown Rudnick, Washington D.C., for Delon Hampton & Associates Chartered.

DECISION

I. Introduction

On October 1, 2008, the Contracting Officer (CO) for the U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Business Operations Center, Office of Procurement Services, Division of Job Corps A/E Construction Services issued a notice on the Federal Business Opportunities website (https://www.fbo.gov/) for Solicitation No. DOL089RP20629 (RFP) to request SF330 applications and technical proposals for a construction management support services contract pursuant to the Brooks Act procedures for procuring architect-engineering services.[1] The notice indicated the RFP would be a total small business set-aside, and the North American Industry Classification System (NAICS) code would be 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in average annual receipts. Under the Brooks Act procedures, an RFP was not issued for this procurement and offerors did not submit cost proposals with their applications. Instead, once a technically sound vendor was determined based upon the SF330 applications and technical proposals, the RFP would be sent to that vendor, and the CO would negotiate price directly with the vendor.

[1] The Brooks Act procedures are set forth in FAR Part 36.6.

On November 7, 2008, Delon Hampton & Associates, Chartered (DHA) submitted its application (including technical proposal) pursuant to the notice. On July 23, 2009, the CO notified DHA and the unsuccessful offerors that DHA had been selected for negotiations. On July 31, 2009, McKissack & McKissack (Appellant), an unsuccessful offeror, filed its protest challenging DHA's size. Appellant alleged that DHA violated the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)) for purposes of the instant procurement because DHA would be unduly reliant upon PB Dewberry (PBD) in performing the contract.

On September 23, 2009, the Small Business Administration's (SBA) Office of Government Contracting—Area II (Area Office) issued Size Determination No. 2-2009-96 (Size Determination) finding that DHA is not unduly reliant upon PBD and, thus, is small for this procurement. On October 5, 2009, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). On October 23, 2009, DHA filed its response to the appeal.

II. Background

A. Jurisdiction & Timeliness

OHA decides size determination appeals pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed its appeal within fifteen days of receiving the Area Office's Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this appeal is properly before the OHA.

B. Size Determination

The Area Office first noted that DHA itself is small under the $33.5 million size standard. The Area Office then undertook an analysis of the relationship between DHA and PBD based on the allegations in Appellant's protest to determine whether DHA is affiliated with PBD. Specifically, the protest alleged that DHA would be unduly reliant upon its subcontractor, PBD, in performing the contract in violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). The Area Office concluded that PBD is not DHA's ostensible subcontractor, and consequently DHA is small for this procurement.

The Area Office observed that DHA's proposal outlined 11 separate tasks. "Of the 11 tasks, DHA will perform 9 while PBD will perform 6 of the tasks. Three of the tasks will be performed by both firms." (Size Determination, at 5.) The Area Office accepted DHA's explanation that its personnel would be responsible for assigning work to PBD under this task order contract on a job-by-job basis and that it would perform at least 51% of the three overlapping tasks. Additionally, the most recent Memorandum of Understanding between DHA and PBD indicates that DHA will perform 51% of the total labor and that DHA is responsible for overall management of the contract. The Area Office concluded that this information was sufficient to prove that discrete tasks had been assigned to PBD.

The Area Office next discussed DHA's hiring of PBD's incumbent employees. The Area Office pointed out that firms are not prohibited from hiring incumbent employees or from hiring incumbent contractors as subcontractors. The contract requires approximately 62 employees,

and DHA will hire 29 of PBD's incumbent employees, only two of whom will fill key positions. The remaining positions will be filled by current DHA employees or persons hired by DHA specifically to perform the contract.

Although there were a number of factors for consideration, the most important factor was key staff qualifications and competence as a whole. The Area Office found that of the 6 key staff positions, 4 will be current or new DHA employees and 2 will be PBD employees. Only 1 of the new DHA employees is a former PBD employee, and he will occupy a key staff position only because the DHA employee originally chosen for the position became ill and had to be replaced. The Program Manager, who will be responsible for overall management of the contract, is a current DHA employee and a licensed engineer.

The Area Office also discussed DHA's qualifications and performance history. The Area Office found that DHA's past performance record demonstrates that it can perform construction, design, and engineering tasks that it and has been doing so for over 36 years. The Area Office also found that DHA employs the engineers, architects, and other technical specialists required to perform those tasks. Additionally, "DHA provided evidence that it has demonstrated experience in all functional requirements outlined by the solicitation." (Size Determination, at 8.) The Area Office concluded that DHA possesses the necessary expertise to perform the requirements of the contract.

Finally, the Area Office distinguished this case from two prior ostensible subcontractor cases, *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817 (2006), and *Size Appeal of ACCESS Systems, Inc.*, SBA No. SIZ-4843 (2007). Each case dealt with a small prime contractor who hired a large incumbent contractor as a subcontractor. The Area Office emphasized that the difference between those cases and this one is that DHA will include its own staff as employees and managers for this contract, whereas the prime contractors in those cases hired primarily incumbent employees and managers. Because the existing employees of the contractors in those cases had little to no involvement with the contract, it was determined that each contractor would be unduly reliant upon its subcontractor. The same cannot be said here.

The Area Office concluded that based on DHA's proposal (which included discrete tasks assigned to PBD and indicated DHA would perform at least 51% of the work in addition to overall contract management), its prior experience, and the inclusion of its own employees in performing the contract, DHA would not be unduly reliant upon PBD. Therefore, DHA did not violate the ostensible subcontractor rule, and it is small for the instant procurement.

C. Appeal Petition

Appellant argues that DHA is ineligible to receive the contract resulting from the instant procurement because it has proposed to subcontract nearly half of the work to PBD. Appellant emphasizes that PBD, a large firm, is the incumbent contractor and has more experience than DHA. Thus, according to Appellant, DHA would be forced to rely on PBD to perform the contract in violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)).

Appellant contends the Area Office erred in determining the number of tasks DHA assigned to PBD. The Area Office found that there are 11 total tasks to be performed under the contract—DHA will perform 9 tasks, and PBD will perform 6 tasks, with 3 overlapping those to be performed by DHA. From this analysis, Appellant reasons that the Area Office clearly erred in either listing the total number of tasks or determining how many tasks would be performed by each entity. Appellant urges OHA not to consider this arithmetical mistake a mere harmless error. Instead, according to Appellant, this error is important because (1) the ostensible subcontractor rule requires the prime contractor to set forth the "segregated and discrete" tasks assigned to its subcontractor, and (2) without knowing what tasks DHA will perform, it is impossible to verify that DHA will perform at least 51% of the work.

Appellant claims DHA failed to set forth in its proposal the segregated and discrete tasks to be assigned to PBD. Appellant cites *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003) for the proposition that a failure to identify discrete tasks is indicative of unusual reliance. Appellant also notes that upon request from the Area Office to identify the tasks assigned to PBD, DHA responded that because the contract at issue is a task order contract, DHA would assign work to PBD on a job-by-job basis. Appellant argues this response is "wholly inadequate" (Appeal Petition, at 9). Appellant further argues that based on these facts, the Area Office had no basis to conclude that DHA's proposal sufficiently allocated discrete tasks to PBD.

Appellant also contends the Area Office failed to properly consider the substantial proportion of work that PBD employees will perform. Appellant emphasizes that PBD will perform up to 49% of the contract, the maximum allowable percentage, and that the percentage of the work contracted is a factor that must be considered under 13 C.F.R. § 121.103(h)(4). Appellant claims there is no evidence that the Area Office gave proper weight to this factor and points again to *SecTek*, where the small prime contractor proposed to contract up to 49% of the work required by the contract. There, OHA concluded that the large percentage of the work to be performed by the large subcontractor indicated that the large subcontractor was indispensable to the small prime contractor's performance of the contract. Appellant argues the same rationale applies here.

Appellant next asserts the Area Office erred in determining that only 2 PBD employees would occupy key personnel positions. Appellant claims it was clear error for the Area Office to count a current PBD employee as a DHA employee because DHA plans to hire the employee to perform the contract. "If this approach sufficed to establish that the small business prime contractor has the majority of key personnel, the prime contractor would simply propose to hire all of the large business subcontractor's key personnel upon award, thereby rendering SBA's consideration of this factor meaningless." (Appeal Petition, at 12.) Instead, according to Appellant, the Area Office should have determined that DHA and PBD would have an equal number of key personnel assigned to the contract.

Finally, Appellant claims the Area Office failed to properly consider PBD's status as an ineligible incumbent contractor, another factor the Area Office must consider pursuant to 13 C.F.R. § 121.103(h)(4). Appellant asserts the Area Office's dismissal of the issue by distinguishing the facts of this case from those of *Lance Bailey* and *ACCESS Systems* is inappropriate because the Area Office still failed to consider that the ineligible incumbent will

provide the same number key personnel as the small prime contractor. Based on all of these factors, Appellant concludes the Area Office clearly erred in concluding that DHA will not be unduly reliant upon PBD in performing the contract.

D. DHA's Response

DHA contends Appellant has failed to meet its burden to prove the Area Office committed a clear error of fact or law. DHA disputes each of Appellant's claimed errors in turn. First, DHA asserts the Area Office did not err in determining either (1) the number of tasks assigned to PBD or (2) that DHA assigned segregated and discrete tasks to PBD. With regard to the number of tasks, DHA asserts it will perform 8 of the 11 tasks enumerated in its proposal, along with overall management of the contract, thus totaling 9 tasks, as the Area Office properly concluded. PBD will perform work under 6 of the 11 enumerated tasks, as properly determined by the Area Office. There are 3 tasks PBD alone will perform and 3 that PBD and DHA will perform jointly. Thus, contrary to Appellant's argument, DHA concludes the Area Office did not err in its calculations and any misunderstanding is nothing more than harmless error.

With regard to whether DHA assigned discrete tasks to PBD, DHA claims it did exactly that by listing which tasks would be performed by PBD, which tasks would be performed by DHA, and which tasks would be performed by both entities. Furthermore, DHA points out that no work has yet been assigned under this task-order contract, and it is unknown at this point what work will be assigned. Thus, until a job is assigned, DHA cannot know specifically how the job will be staffed. What is certain, DHA claims, is that DHA is responsible for assigning all tasks and managing the work of PBD staff for the three overlapping tasks that DHA and PBD will perform jointly. "The fact that DHA has the option to utilize PBD for some of that work does not make DHA unduly reliant on PBD" (DHA Response, at 8).

DHA next disputes Appellant's argument that the fact that PBD may perform up to 49% of the contract indicates that PBD is an ostensible subcontractor. DHA claims the Area Office appropriately considered all aspects of the relationship between DHA and PBD to determine that DHA is not unduly reliant upon PBD. DHA cites numerous cases highlighting the importance of examining all aspects of the prime contractor-subcontractor relationship rather than relying on bright line rules to determine undue reliance. Here, DHA is capable of performing all elements of the contract on its own, and DHA will manage and control the performance of the contract. Thus, the Area Office properly concluded, after examining all aspects of the relationship between DHA and PBD, that DHA is not unduly reliant upon PBD.

DHA next contends the Area Office correctly determined that 4 of the 6 key staff positions will be filled by DHA employees. Contrary to Appellant's argument that the Area Office did not properly consider the fact that one key employee is a current PBD employee to be hired by DHA upon award of the contract, DHA asserts the Area Office obviously considered that fact because it is discussed in the Size Determination. DHA claims "the Area Office simply did not come to the same conclusion as [Appellant] would have" (DHA Response, at 17). Even if the Area Office had concluded that DHA and PBD would each provide 3 employees, DHA argues, such a finding does not compel the conclusion that PBD is an ostensible subcontractor, and the Area Office did not err in finding no undue reliance.

Finally, DHA argues the Area Office did give proper consideration to PBD's status as an ineligible incumbent. DHA contends the Area Office's discussion of *Lance Bailey* and *ACCESS Systems* shows that it considered PBD's incumbent status. DHA points out that ostensible subcontractor cases are fact-specific and supports the Area Office's finding that the *Lance Bailey* and *ACCESS Systems* are not controlling here because the facts are distinguishable. For all these reasons, DHA asserts the Area Office's Size Determination is reasonable and supported by the Record and should be affirmed.

III. Analysis

A. Standard of Review

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009). Furthermore, it is Appellant's burden to prove, by a preponderance of the evidence, that the Area Office committed an error. 13 C.F.R. § 134.314. Thus, the Administrative Judge may only overturn a size determination if Appellant establishes the Area Office made a patent error based on the record before it.

B. Merits

The ostensible subcontractor rule 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). For the following reasons, I conclude the Area Office did not make a clear error of fact or law in determining that PBD is not DHA's ostensible subcontractor.

First, it is true that the calculation of how many tasks will be performed by PBD and how many will be performed by DHA in the Size Determination is not entirely clear. The Area Office lists 11 specific tasks outlined in the proposal, then states DHA will perform 9 tasks and PBD will perform 6, with 3 tasks overlapping between DHA and PBD. Obviously, this totals 12 tasks, not 11. Nevertheless, the Record indicates that DHA's interpretation of the situation is correct—the Area Office counted overall program management as the 12th task but failed to include it in its list of enumerated tasks.

In the proposal, DHA first lists the tasks it will perform and then separately lists the tasks PBD will perform. Under DHA, there are 9 tasks listed: 8 of the 11 tasks listed by the Area Office, along with "Overall Program Management." Under PBD, there are 6 tasks listed, each of which were listed by the Area Office. By each task there is a number listed in pencil—it appears the Area Office numbered the tasks for its own reference. Under DHA, the tasks are numbered 1-9. Under PBD, the tasks are numbered 1-6, and an additional number from the DHA list is included by each overlapping task on the PBD list. Thus, the numbers are as follows:

DHA:
1. Overall Program Management
2. Site Selection and Analysis
3. Utilization Studies
4. Facility Surveys
5. Design Project Management
6. Construction Project Management
7. Technical and Administrative Support
8. On-Site Construction Engineer
9. Real Estate Services

PBD:
1. Job Corps Annual Construction and Rehabilitation Plan
2. Presentation of the Budget
3. (5) Design Project Management
4. (7) Technical and Administrative Support
5. (8) On-Site Construction Engineer
6. Information Technology Infrastructure Support

It is clear from this list that the Area Office included overall project management as DHA's 9th task but simply did not include that task in its list of all the contract tasks. Thus, the Area Office did not err in its calculations—DHA will perform 9 tasks and PBD will perform 6, with 3 overlapping. Rather, any confusion generated by the Size Determination is merely a result of less-than-careful drafting—the Area Office should have listed overall program management as the 12th task to avoid any misunderstanding of its calculations. In any event, because the Record itself is clear, I find this is a harmless error.

Second, Appellant claims DHA failed to assign discrete tasks to PBD. I disagree. As discussed, DHA set forth 12 tasks in its proposal and specifically designated each task to either DHA, PBD, or both. Contrary to Appellant's assertion that this is "wholly inadequate," I find this is a sufficient delineation under the circumstances. This is a task-order contract, and it would be impracticable to break down the work to be performed in any greater detail because it is not yet known specifically what work will need to be performed. *Cf. Size Appeal of The Analysis Group, LLC*, SBA No. SIZ-4814, at 7 (2006) (finding undue reliance where the appellant's proposal for an indefinite-delivery indefinite-quantity contract enumerated discrete tasks but failed to identify which of those tasks each firm would perform).

Third, Appellant claims the Area Office failed to give proper weight to the fact that PBD may perform up to 49% of the work under the contract. The Area Office did note that the most recent Memorandum of Understanding between the parties indicates that DHA will perform 51% of the work and PBD will perform 49%. Because there is no further discussion of the matter, it is not clear what weight the Area Office gave to this factor, which mandates consideration pursuant to 13 C.F.R. § 121.103(h)(4). Nevertheless, it is clear that the Area Office at least considered the factor because it included this fact in the Size Determination. Thus, this allegation cannot constitute a clear error. Moreover, I find there is sufficient evidence in the Record to support the Area Office's determination that DHA is not unduly reliant upon PBD with or without consideration of this factor. The Area Office specifically determined that DHA had the expertise and past experience to perform the requirements of this contract. Thus, even if the Area Office did fail to give proper weight to the proportion of the work to be performed by PBD, such an error was harmless.

Fourth, Appellant claims the Area Office erred in determining that only 2 PBD employees would hold key personnel positions. Instead, Appellant argues the Area Office should have found that 3 PBD employees would hold key personnel positions because one of the employees that the Area Office counted as a DHA employee is currently a PBD employee who will become a DHA employee upon award of the contract. Appellant argues that if a concern could merely hire all the incumbent employees to establish that its employees constitute a majority of key personnel, OHA's consideration of this factor would be meaningless. This is a valid point. However, those are not the facts here. Rather, the Area Office specifically determined that the most important factor in its consideration of key personnel was that DHA's own employees will fill a substantial number of key staffing positions. Whether there are 4 DHA employees and 2 PBD employees or 3 DHA employees and 3 PBD employees, the fact remains that DHA employees will fill a significant number of key personnel positions.

Finally, Appellant argues the Area Office failed to properly consider PBD's ineligible incumbent status. On the contrary, as DHA points out, the Area Office's discussion of the *Lance Bailey* and *ACCESS Systems* cases clearly shows that it considered this factor. Despite the fact that DHA is hiring the incumbent contractor as a subcontractor, as did the small prime contractors in those two cases, the Area Office found it significant that DHA's own employees will fill both key personnel positions and general staff positions and distinguished this case from those cases on that basis. The Area Office also determined that DHA's past performance history indicates that "it has demonstrated experience in all functional requirements outlined in the solicitation" (Size Determination, at 8). Thus, the fact that PBD is an ineligible incumbent does not compel the conclusion that DHA is unduly reliant upon it.

The Area Office properly analyzed all aspects of the relationship between DHA and PBD. Its conclusion that DHA will not be unduly reliant upon PBD in performing this contract was not based on clear error of fact or law. Therefore, DHA did not violate the ostensible subcontractor rule, and it is small for this procurement.

IV. Conclusion

The Area Office's Size Determination was not based on clear error. Accordingly, this appeal is DENIED and the Size Determination is AFFIRMED.

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

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CHRISTOPHER HOLLEMAN
Administrative Judge