United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Alutiiq International Solutions, LLC	SBA No. SIZ-5098
Appellant	Decided: December 10, 2009
Appealed from Size Determination No. 6-2009-074	

APPEARANCES

S. Lane Tucker, Esq., Perkins Coie LLP, Anchorage AK, for Alutiiq International Solutions, LLC, Appellant.

DECISION

I. Introduction

On November 7, 2007, the Contracting Officer (CO) for the U.S. Department of Health and Human Services, National Institutes of Health (NIH) issued Solicitation No. NIHOD2008040 (RFP) as a total small business set-aside. The RFP required the successful offeror(s) to provide Long-Term Solicitation Administrative Support Services at various locations, and the CO assigned North American Industry Classification System (NAICS) code 561110, Office Administrative Services, with a corresponding size standard of $6.5 million.

On July 1, 2009, the Contracting Officer (CO) informed the unsuccessful offerors, including Manufacturing Engineering Systems, Inc., (MES), of the identity of the successful offerors. Appellant was one of the offerors the CO identified as being successful. On July 10, 2009, MES protested Appellant's size. MES alleged that Appellant's average annual receipts exceeded the $6.5 million size standard.

On August 7, 2009, the Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued a size determination finding that 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 the RFP. On August 21,

2009, Appellant filed an appeal of the Area Office's initial size determination with SBA's Office of Hearings and Appeals.

On September 22, 2009, OHA issued an Order remanding the case to the Area Office. Because the Area Office found Appellant to be other than small on a basis outside that alleged in MES's protest, the Administrative Judge determined "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." *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009). The Administrative Judge found the Area Office had not notified Appellant that it was considering the ostensible subcontractor rule and remanded the case to allow Appellant the opportunity to present arguments and evidence on whether it violated the rule.

On October 23, 2009, after consideration of the materials submitted by Appellant, the Area Office issued a new size determination again finding Appellant to be other than small based on a violation of the ostensible subcontractor rule. The Area Office determined that IAP would perform primary and vital requirements of the contract and that Appellant would be unduly reliant upon IAP in performing the work required by the contract. On November 4, 2009, Appellant filed the instant appeal of the Area Office's second size determination with OHA.

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 set forth its initial size determination in full. There, although the Area Office found Appellant is itself small, the Area Office ultimately concluded Appellant is other than small for the instant procurement due to its affiliation with IAP. Specifically, the Area Office determined Appellant would be unduly reliant upon IAP in violation of the ostensible subcontractor rule based on a number of factors: (1) IAP's 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 relevant and longstanding work experience; (6) IAP's establishment of a program management office to support overall management and quality control; (7) Consistent emphasis in the proposal on a team effort; (8) IAP's other than small size under the applicable size standard; (9) IAP's proposed share in the fixed fee of each task order; and (10) IAP 's proposed performance of between 45% and 49% of the work. Accordingly, the Area Office aggregated Appellant's receipts with IAP's receipts and concluded Appellant is other than small for this RFP.

Next, the Area Office responded to Appellant's arguments regarding the ostensible subcontractor rule. First, the Area Office disputed Appellant's claim that it will perform the primary and vital tasks of the contract because it will manage the project. The Area Office determined that "since the solicitation considers both 'key personnel' and 'non-key personnel' essential to the work being performed under this contract, it would be presumed that the primary and vital functions of the contract would be the personnel requirements to specifically include 'key/non-key personnel,' not solely the management of the project." (Size Determination, at 10.) The Area Office found that IAP would be providing both key personnel (a Program Manager with a supervisory role) and non-key personnel. Thus, the Area Office concluded IAP would perform primary and vital requirements of the contract and Appellant would not retain control over the project.

Additionally, the Area Office noted that because IAP would perform nearly half the work and would provide the same services as Appellant, "it is difficult to discern which party will be performing the more costly and complex tasks or if [Appellant] is able to perform the full range of tasks without IAP's background or experience." (Size Determination, at 11.) The Area Office also pointed out that the Teaming Agreement between IAP and Appellant allows IAP to have a direct line of contact with the government. The Area Office concluded that IAP was heavily involved in the proposal and negotiation process to obtain the contract and that tasks assigned under the contract would be performed by both parties as a team. As a result, according to the Area Office, "the two concerns look like a joint venture, talk like a joint venture, and act like a joint venture." (Size Determination, at 12.)

Second, the Area Office challenged Appellant's argument that it would not be unusually reliant upon IAP in performing the contract. The Area Office argues the fact that IAP will receive a fixed fee for each task order it performs under the contract is indicative of a joint venture because "[i]n a true contractor/subcontractor relationship, the subcontractor would not share in the contract's profit or fees, but rather, would present the price it intends to charge the contractor for the subcontractor's services." (Size Determination, at 12.) The Area Office also emphasizes that Appellant's proposal showcases IAP's relevant experience and qualifications; it argues that "IAP's experience and background would presumably be considered a domina[nt] factor behind [Appellant's] ability to submit an offer and qualify for the contract." (Size Determination, at 13.)

Finally, the Area Office disputes Appellant's contention that it has the necessary experience to perform the requirements of the contract on its own. Instead, the Area Office submits that Appellant is relying on the experience of both its parent company, Alutiiq, LLC,[1] and its subcontractor, IAP, to qualify for award of the instant procurement. Specifically, the Area Office points out that both people named as key personnel in the proposal are employed by Alutiiq, LLC, not Appellant. Furthermore, the Area Office contends the prior experience listed

[1] Alutiiq, LLC, is an Alaska Native Corporation (ANC) that wholly owns Appellant. As explained in the Size Determination, Appellant's size was calculated independent of its parent company because ANCs are exempt from SBA's general affiliation rules. 13 C.F.R. § 121.103(b)(2)(i) ("Business concerns owned and controlled by . . . ANCs . . . are not considered affiliates of such entities.").

in the proposal is that of Alutiiq, LLC, and IAP, not Appellant. Consequently, the Area Office finds it is actually the two large concerns, Alutiiq, LLC, and IAP, that will perform the contract, not Appellant. The Area Office concludes it is "abundantly clear . . . that . . . [Appellant] is dependent on its parent entity's qualifications and experience and its major subcontractor's qualifications and experience to qualify for the procurement and the only qualification that [Appellant] brings to the mix is its small business size status." (Size Determination, at 15.)

C. Appeal Petition

Appellant first claims the Area Office's finding that IAP will perform primary and vital tasks of the contract is a clear error. Appellant takes issue with the Area Office's determination that all of the work required by the contract is primary and vital. "If, as the Area Office concluded, all work under the contract is 'primary and vital,' the company that performs more than half the work—in this case [Appellant]—must be performing the contract's 'primary and vital' requirements." (Appellant's Response, at 4.) Appellant goes on to explain that it alone, and not IAP, will be providing key personnel. There are only two key personnel positions, and both will be filled by Alutiiq, LLC employees. The one IAP program manager to which the Area Office referred will not hold a key personnel position and will report to one of Appellant's key personnel. "It appears that the only basis for the Area Office's conclusion that IAP is providing 'key personnel' is that IAP used the title 'Program Manager' to identify the head of IAP's own operations." (Appellant's Response, at 5.) Moreover, Appellant contends it will retain overall control over the project because IAP has only lower tier managers working on the contract, not key personnel.

Appellant next argues that because the Area Office did not affirmatively determine that IAP was performing the more complex and costly functions of the contract (it merely stated it was difficult to discern whether this was the case), this factor cannot support its finding that Appellant violated the ostensible subcontractor rule. Appellant goes on to refute the Area Office's contention that IAP has a direct line of communication with the government. Instead, Appellant claims the Area Office quoted the Teaming Agreement out of context, and any communication between IAP and the government with regard to this project must first be approved by Appellant. Therefore, Appellant argues, the Area Office's conclusion that these factors are indicative of a joint venture is clearly erroneous.

Appellant contends the Area Office committed a clear error when it determined that Appellant would be unduly reliant upon IAP to perform the contract. Appellant explains that a flow-down fee to a subcontractor is not the same as a prime contractor sharing profits with its subcontractor and cites *Size Appeal of Ideal Services, Inc.*, SBA No. SIZ-3317 (1990) to support its proposition that this is an acceptable arrangement that does not equate to the sharing of profits. Appellant also disputes the Area Office's findings that it showcased IAP's experience in the proposal rather than its own and that IAP was the dominant factor in Appellant's obtaining the award.

Finally, Appellant asserts that it does have the relevant and necessary experience to perform the requirements of the contract. With regard to the Area Office's assertion that Appellant is relying on Alutiiq, LLC's experience to qualify for this procurement, Appellant

claims that its size must be determined independent of Alutiiq, LLC, because that is the law of the case and that the Area Office never made any actual determination regarding the relationship between Appellant and Alutiiq, LLC. Appellant argues "rather than making any findings of fact or conclusions of law, the Area Office merely noted its 'perception' about 'potential' ostensible subcontractor issues," and then "the Area Office 'suggested' that [Appellant] was selected for award because . . . of the combination of Alutiiq and IAP." (Appellant's Response, at 19.) Accordingly, Appellant argues its relationship with Alutiiq, LLC, cannot support a determination that it is other than small and the Area Office's "suggestion" that Appellant was only selected because of its relationship with Alutiiq, LLC, has no legal effect. Appellant concludes it has not violated the ostensible subcontractor rule, and the Area Office's size determination must be reversed because it is based upon clear errors of fact and law.

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 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). For the following reasons, I conclude the Area Office committed a clear error in determining that IAP is Appellant's ostensible subcontractor.

First, IAP will not be providing any key personnel. The solicitation makes clear that there are only two key personnel positions: "This contract requires at least one Program Manager and one Deputy Program Manager to be considered **Key Personnel**. Additional, non-key Deputy Program Managers may be utilized as deemed necessary by the Contractor over the life of the contract." (RFP, Vol. I, at 8.) Neither of these positions will be filled by IAP personnel. Instead, IAP will provide a non-key program manager (who will report to the Key

Program Manager) to lead IAP's own program management office, which will be established to manage the Task Orders assigned by Appellant to IAP under the contract.

Second, IAP will not perform the primary and vital contract tasks. Although the Area Office's analysis is not entirely clear, it appears that because the evaluation of contract performance will depend upon the administrative support personnel provided by the awardee, the Area Office found that all administrative support personnel are essential to performance of the contract and the provision of all administrative support personnel is a primary and vital function of the contract. Based on this analysis, the Area Office concluded that because IAP will provide a program manager and other personnel, it will be performing primary and vital contract requirements. This analysis is flawed because the only thing to be provided under the contract is administrative support services. The policy behind the regulation prohibiting a subcontractor from performing the primary and vital requirements of a contract is to preserve the integrity of the small business set-aside contracting system by ensuring that small prime contractors perform the bulk of the contracts awarded to them. The "primary and vital" language in the regulation allows this to be measured by either quantity or quality.

When, as here, the contract calls for only one type of service or product, then the only way to determine which firm is performing the bulk of the contract is to look at which firm is performing the majority of the work or which firm is providing the most high-level of the services or products required by the contract. Here, IAP is not providing any key personnel, as discussed above. Nor is IAP performing the majority of the work. IAP will provide 45% to 49% of the labor required by the contract, with the remainder to be provided by Appellant. Thus, IAP is not performing the primary and vital contract requirements.

Third, Appellant's proposal does not indicate that it will share profits with IAP. Rather, it provides that "IAP will share in the fixed fee of each Task Order." (RFP, Vol. II, at 45.) As Appellant explains, this indicates that IAP will receive the fee for its services from the fixed fee paid by the government for each Task Order assigned under the contract. This is merely a direct flow-through expense, not a sharing of profits. Such an arrangement is not indicative of a joint venture. *See Size Appeal of Ideal Services, Inc.*, SBA No. SIZ-3317, at 16 (1990).

Fourth, none of the other factors the Area Office relied upon, taken alone or together, warrants a finding that Appellant violated the ostensible subcontractor rule. The Teaming Agreement does not provide that IAP has a direct line of communication with the government. Instead, the Teaming Agreement provides that Appellant is the sole government contact, that "in the event it becomes desirable" for IAP to communicate with the government, Appellant must first approve such contact, and that if the government does contact IAP, such communication is not a breach by IAP of this policy. (Teaming Agreement, at ¶¶ 11-12.) Additionally, Appellant was not forced to rely on IAP's past experience in submitting its proposal. Only one of the four relevant experiences listed in Appellant's proposal is IAP's. (RFP, Vol. I, app.2.) The parties clearly collaborated on the proposal, and the proposal often refers to the two firms as a team. But, some level of cooperation on the proposal is to be expected when a subcontractor will be performing a (permissibly) large portion of the work, and the proposal does initially distinguish between Appellant and IAP by explaining what each firm brings to the contract. Moreover, these facts are not dispositive of the question of whether Appellant relied on IAP and do not in

themselves compel the conclusion that Appellant is reliant on IAP. *See* 13 C.F.R. § 121.103(h)(4) (providing that analysis under the ostensible subcontractor rule must be based on all aspects of the relationship between the prime contractor and subcontractor); *see also Greenleaf Constr. Co., Inc.*, SBA No. SIZ-4663 (2004) ("Under any circumstances, the mention of 'team' and 'partnering' does not equate with a mandatory finding of an ostensible subcontractor relationship.").

Finally, with regard to the Area Office's assertion that Appellant is unduly reliant upon its parent company, Alutiiq, LLC, such reliance does not constitute a violation of the ostensible subcontractor rule because Appellant's parent is not a subcontractor. Moreover, such reliance does not violate the general principles of affiliation due to the ANC exemption set forth in the regulations. Specifically, 13 C.F.R. § 121.103(b)(2)(i) provides that concerns owned by ANCs are not considered affiliates of such entities, and 13 C.F.R. § 121.103(b)(2)(ii) provides that concerns owned by ANCs cannot be found affiliated with other concerns owned by these entities because of their common ownership, common management, or common administrative services. In alleging that Appellant has relied upon its parent company's employees and experience to obtain this contract, the Area Office has essentially alleged that Appellant should be considered affiliated with its parent due to common ownership/management. Thus, this arrangement does not appear to be a violation of the applicable affiliation regulations due to the broad ANC exemptions outlined above.

The Area Office failed to properly analyze all aspects of the relationship between IAP and Appellant. Its conclusions that IAP will perform the primary and vital contract requirements and that Appellant would be unduly reliant upon IAP in performing this contract were based upon clear errors of fact and law. I find Appellant's relationship with IAP does not violate the ostensible subcontractor rule.

IV. Conclusion

The Area Office's Size Determination was based on clear error. Accordingly, this appeal is GRANTED, and the Size Determination is REVERSED and VACATED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge