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

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| SIZE APPEAL OF:<br><br>A1 Procurement, LLC<br><br>Appellant<br><br>Solicitation No. W91248-10-B-0100<br>Department of the Army<br>Ft. Campbell, KY | SBA No. SIZ-5121<br><br>Decided: April 2, 2010 |

## DECISION

### I. Introduction & Jurisdiction

On March 1, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2010-38 (Size Determination) finding A1 Procurement, LLC (Appellant) other than small due to its affiliation with Schardein Mechanical Contractors, Inc. (Schardein). The Area Office determined Appellant's relationship with Schardein 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.

SBA's Office of Hearings and Appeals (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. 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). Accordingly, this matter is properly before OHA for decision.

### II. Background

#### A. Facts

1. On November 2, 2009, the Contracting Officer (CO) for the U.S. Department the Army, Mission and Installation Contracting Command, issued Invitation for Bids No. W91248-10-B-0100 (IFB), seeking bids for chiller maintenance services at Fort Campbell, Kentucky. Winter and summer preventive maintenance of chillers is the primary purpose of the contract, though emergency repair assessment is required as well.

2. The IFB was a total service-disabled veteran-owned small business set-aside, and the CO designated North American Industry Classification System (NAICS) code 811310, Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance, with a corresponding size standard of $7 million in average annual receipts.

3. On November 20, 2009, Appellant submitted its bid, and bids were opened the same day. According to the CO, the low bidder's bid was determined to be nonresponsive, and the second low bidder's bid was withdrawn. Appellant was the third low bidder.

4. On January 5, 2010, in response to a request for responsibility information from the CO, Appellant indicated in an email that it "has entered into a Joint Venture agreement with, Schardein Mechanical regarding this solicitation." Appellant further asserted that both Appellant and Schardein are small business concerns for the applicable size standard.

5. On January 5, 2010, approximately two hours after its initial email to the CO and after the CO informed Appellant that Schardein is not a small business for this procurement, Appellant sent another email requesting that the CO "[p]lease disregard [Appellant's] joint venture representations and Schardein Mechanical Inc.'s size status as a small business concern. For this solicitation, [Appellant] is acting as a prime contractor and is subcontracting to Schardein." Additionally, in response to the CO's request that Appellant provide three "relevant past customers/contracts" and three "credit/supplier references," Appellant provided four chiller references and three vender references for Schardein.

6. Since its inception in 2009, Appellant has not been awarded any contracts or earned any income.

7. On February 5, 2010, the CO filed a protest of Appellant's size with the Area Office alleging that Appellant is other than small due to its affiliation with Schardein. The CO specifically explained that it was requesting a size determination "under the ostensible subcontractor rule as outlined in SBA regulations and CFR 121.103."

8. On February 5, 2010, the Area Office informed Appellant of the CO's protest and furnished a copy of the protest to Appellant. On February 22, 2010, Appellant responded to the protest and provided a completed SBA Form 355, along with other requested documentation.

9. Schardein's average annual revenues exceed the applicable size standard.

## B. The Size Determination

On March 1, 2010, the Area Office issued its Size Determination finding Appellant other than small based on its affiliation with Schardein. In its ostensible subcontractor rule analysis, the Area Office first points out that Appellant has only two employees—Mr. Derrick Storms, a service-disabled veteran and 51% owner, and Mr. Adrian Batlle, 49% owner. As a service-disabled veteran, Mr. Storms would be physically unable to perform most of the on-site work required by the contract, and Mr. Storms was unable to identify for the CO what type of

'direct labor' Appellant's employees would perform. With Appellant's response to the protest, Mr. Storms provided the subcontractor agreement, which included a list of thirteen tasks to be performed by Appellant's employees. These tasks included, among other things, project management and responsibility, control of job performance, assignment of jobs, on-site supervision and inspections, on-site services, and transportation. Based upon this list and Mr. Storms's representations the Area Office concluded Appellant's employees would perform only ancillary administrative tasks under the contract. (Size Determination 4-5.)

The Area Office next emphasized that the primary and vital requirements of the contract are the maintenance and repair of chillers. Specifically, "[t]he contract requires preventive maintenance on 23 chillers, 6 of which alone are greater than 100 tons in size." Emergency repair assessment is also required. The technicians performing the maintenance work are required to have at least three years of experience performing work on similar equipment. The Area Office determined that it would be difficult for the contract requirements to be completed by Appellant's two employees, especially considering neither of them offered any evidence that they have the necessary expertise to perform such work. Additionally, when the Area Office requested references, Appellant offered references for Schardein. Taking these facts into consideration, the Area Office concluded Appellant is obviously reliant upon Schardein for the experience, employees, and technical expertise necessary to perform this contract. (Size Determination 5-6.)

The Area Office acknowledges that the subcontractor agreement between Appellant and Schardein indicates that Appellant shall maintain complete control over all aspects of the project and perform all primary and vital contract tasks. Nevertheless, the Area Office maintains that this cannot be the case because Appellant has only two employees and will perform only ancillary tasks. The Area Office determines that it is clearly the subcontractor that has the requisite personnel, experience, and resources to complete the contract. Moreover, the Area Office notes it cannot determine whether Appellant is even capable of performing the management functions it claims it will perform because it has no experience in performing or managing this type of work. (Size Determination 6.)

Finally, the Area Office finds that Appellant failed to allocate specific contract responsibilities between itself and Schardein. The Area Office indicates it is not clear from the proposal or the subcontracting agreement which tasks will be performed by whose employees. *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006); *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003). The Area Office further alleges it is the experience and background of Schardein that was the basis of Appellant's ability to qualify for this contract. Under the facts and circumstances of the case, the Area Office determined it is not clear that Appellant would have been considered for the contract at all without Schardein's involvement. *See Size Appeal of B&M Constr., Inc.*, SBA No. SIZ-4805 (2006). (Size Determination 6-7.)

Based on the Record, the Area Office concluded Appellant would be unduly reliant upon Schardein to perform the contract, and Schardein would perform the primary and vital elements of the contract. Additionally, the Area Office noted that Appellant had not provided all the requested tax information for Schardein so that it could find Appellant other than small based on an adverse inference. Based on the information available to it, the Area Office combined the

average annual receipts of both firms, which rendered Appellant other than small for purposes of the IFB.

C. The Appeal

Appellant received the Size Determination on March 1, 2010, and filed its size appeal with OHA on March 15, 2010. Appellant's overarching claim of error is that the Area Office failed to differentiate the instant IFB from the Requests for Proposals (RFP) that are often at issue in ostensible subcontractor cases, and this failure resulted in numerous errors of fact and law. (Appeal Petition 1.)

Appellant first contends that the CO's protest lacked specificity and should have been dismissed. Appellant asserts the protest merely asserts in a conclusory manner that Appellant does not meet the size standard applicable here because it entered into a joint venture with Schardein. Appellant argues this is insufficient because the CO failed to offer any evidence or establish any factual basis in support of this statement. *See* 13 C.F.R. § 121.1007(b)-(c). Thus, Appellant concludes the protest should have been dismissed. (Appeal Petition 2-3.)

Appellant also claims the Area Office's request for information failed to put it on notice that the ostensible subcontractor rule was at issue. Appellant indicates that OHA has previously reversed a finding of ostensible subcontractor affiliation because the Area Office did not inform the protested concern that it was considering the ostensible subcontractor rule. *See Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069 (2009). Appellant contends neither the protest nor the Area Office's request for information was sufficient to put it on notice that the ostensible subcontract rule was at issue, and the issue should not have been considered. (Appeal Petition 3-4.)

Appellant next argues that it would not rely on Schardein to perform any of the contract requirements. According to Appellant, it is clear from the subcontracting agreement that Schardein would perform only minor parts of the solicitation at Appellant's request. Appellant points to the list of thirteen tasks set forth therein that it will perform: (1) overall project management and responsibility, (2) complete control of job performance, (3) assignment of jobs to either Appellant's or Schardein personnel, (4) perform on-site services, (5) perform on-site supervision, (6) perform on-site inspections, (7) ensure all materials, equipment, and services comply with the requirements of the solicitation, (8) transport material, equipment, and personnel, (9) communicate with the CO, (10) allocate progress payments, (11) research, draft, and submit the proposal, (12) research and respond to bid protest, and (13) initiate and/or defend legal actions. In light of this list, Appellant contends the Area Office's conclusions that specific tasks were not delineated and that the work to be performed by Appellant is only ancillary are clearly erroneous. (Appeal Petition 4-5.)

Appellant also claims the Area Office erred in finding that Appellant lacks the necessary personnel to perform the contract. Appellant emphasizes that the IFB indicates that technicians are required to have three years experience and that "[p]roof of this employee experience shall be provided to the government for approval a minimum of five (5) days prior to an employee starting work under this contract." Appellant argues that because the time period under the

solicitation to provide proof of qualifications of its personnel has not yet expired, it was clear error for the Area Office to assume that it will not be able to provide the requisite personnel. Appellant explains that it hired Schardein only for the emergency repairs that could possibly arise under the contract. Otherwise, it plans to provide its own qualified personnel to perform maintenance work under the contract. Appellant claims it so indicated in a February 24, 2010, email to the Area Office in response to the Area Office's question asking how many personnel Appellant would use for this project. Appellant stated: "I will hire additional employees, on a task basis, according to the work that needs to be performed and the time restraints given by the [CO]." Thus, Appellant argues the Area Office clearly erred when it indicated that Appellant will only use two personnel to perform this contract, when it concluded that Appellant's personnel are unqualified to perform the work, and when it assumed Appellant would not be able to provide qualified personnel within the requisite timeframe. Appellant also distinguishes the cases relied upon by the Area Office and notes that SBA has no jurisdiction over performance issues and should not be considering them. *See* 13 C.F.R. §§125.25, 134.102(q); *Matter of Alliance Med. Servs. of Az.*, SBA No.VET-143, at 2-3 (2008). (Appeal Petition 6-11.)

Finally, Appellant contends it is clear Schardein will have only an ancillary role under the contract, and no affiliation exists between the firms. Thus, Schardein's size is irrelevant to Appellant's size, and the Area Office's finding that it could find Appellant to be other than small based on an adverse inference because Schardein's tax returns were not provided is erroneous. Appellant concludes that it has not violated the ostensible subcontractor rule, and the Area Office's determination was based upon unsubstantiated assumptions and was clearly erroneous as a matter of fact and law. (Appeal Petition 12.)

## III. Discussion

### A. 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 the Area Office made a patent error of fact or law based on the Record before it. Consequently, I may not disturb an area office's size determination unless I have 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).

### B. Analysis

#### 1. Applicable Legal Standard

13 C.F.R. § 121.103(h)(4), the regulation that sets forth 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.

The intent of the ostensible subcontractor rule is to prevent other than small firms from circumventing the size regulations. Additionally, it is important to note that these appeals are intensely fact specific because they are based upon the specific requirements of each solicitation and an individual offeror's response to those requirements. *Size Appeal of Smart Data Solutions LLC*, SBA No. SIZ-5071. In order to determine whether a prime contractor-subcontractor relationship violates the rule, the Area Office must evaluate "[a]ll aspects of the relationship." 13 C.F.R. § 121.103(h)(4); *see also Size Appeal of C&C Int'l Computers and Consultants, Inc.,* SBA No. SIZ-5082, at 12-13 (2009) (explaining that area offices should apply only the all aspects standard to when analyzing the ostensible subcontractor rule and should make no size determination relying upon the outmoded seven factor test).

2. The Merits

a. Specificity

Appellant's claim that the CO's protest lacks specificity is without merit. As Appellant explained, "[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." 13 C.F.R. § 121.1007(b). Appellant asserts the CO's protest does not meet this standard because its allegations are conclusory, and the CO offered no evidence to support her allegations. I disagree. During the CO's responsibility review the CO learned various facts that led to the protest. For example, the protest explains that Appellant indicated it was in a joint venture relationship with Schardein (noted as a large concern by the CO), later indicated it was in a prime contractor-subcontractor relationship with Schardein, and indicated that its staff would perform only administrative and legal functions under the contract. Hence, the CO determined it appears Appellant "WILL NOT" be performing fifty percent of the contract. Based upon what the CO had learned, she specifically requested the Area Office conduct a size determination under the ostensible subcontractor rule.[1] The basis for the CO's allegations, as set forth in the protest, is the CO's firsthand email and telephone communications with Appellant's representatives.

"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." *Id.* Contrary to

[1] The Area Office provided Appellant with the CO's size protest and Appellant addressed the CO's February 5, 2010 protest in its February 22, 2010 response.

Appellant's assertions, the CO's protest did not merely assert that Appellant is small without specifying the grounds for its concerns. The CO provided notice of the grounds upon which she was contesting Appellant's size as well as factual allegations as a basis for these grounds. *See, e.g., Size Appeal of Unitron, LP*, SBA No. SIZ-5084 (2009); *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4888 (2008). Thus, the protest was sufficiently specific, and the Area Office properly performed a size determination.

b. Notice of Ostensible Subcontractor

Appellant claims the CO's protest and the Area Office's request for information failed to put it on notice that the ostensible subcontractor rule was at issue. Appellant cites *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069 (2009) to support its contention that because it was not on notice that the ostensible subcontractor rule was at issue, the Area Office should not have considered the issue. Again, I find this argument to be without merit.

In the *Alutiiq* case, the protest was based solely on the challenged firm's average annual receipts. The area office then issued a size determination finding the challenged firm other than small based on a violation of the ostensible subcontractor rule. OHA vacated the size determination and remanded the case because it determined the area office failed to give the challenged firm adequate notice that it was considering the ostensible subcontractor issue. In sharp contrast, the protest here explicitly states that the CO is requesting a size determination "under the ostensible subcontractor rule." (Fact 7.) Thus, *Alutiiq* has no application here, and Appellant knew the Area Office would be considering the ostensible subcontractor rule.

c. Subcontracting agreement

Appellant contends that its subcontracting agreement with Schardein clearly indicates that Appellant would perform the major work under the solicitation while Schardein would perform only minor duties at Appellant's request. The agreement sets forth a list of thirteen tasks that Appellant will perform. However, I agree with the Area Office that these tasks are ancillary and do not represent the primary and vital elements of performance under the contract. It is clear from the solicitation that winter and summer preventive maintenance of chillers is the primary purpose of the contract. (Fact 1.) The tasks that Appellant indicates it will perform in the subcontracting agreement are nearly all general administrative tasks. Noticeably absent from the list is any form of chiller maintenance. "Perform on-site services" could perhaps be construed to include chiller maintenance, but it is far from clear. Accordingly, I cannot agree with Appellant that its subcontracting agreement proves that Appellant is not unduly reliant upon Schardein, nor can I find clear error in the Area Office's analysis of the document.

d. Personnel

Appellant repeatedly asserts that the Area Office is "confused" by the fact that this solicitation was an IFB and not an RFP and "does not understand" the requirements of the IFB. Appellant insists that "RFPs require bidders to submit proof of their personnel's experience, past performance, and licenses in advance; however, this IFB did not." (Appeal Petition 1.) Appellant claims it is the Area Office's failure to distinguish this IFB from an RFP that renders

this Size Determination deficient because Appellant had more time to provide personnel under the IFB and was not required to present personnel qualifications.

Appellant frequently quotes the IFB, which indicates that proof of an employee's technical qualifications must be provided five days prior to the employee beginning work under the contract in support of its arguments. Appellant claims it will hire personnel (specifically, technicians) on a task basis to perform the chiller maintenance work required by this contract, and it explained this to the Area Office. Essentially, Appellant claims the time period set by the IFB for hiring the requisite technical employees has not yet expired, so it was improper for the Area Office to find Appellant other than small based on the fact that it has not yet hired those employees.

I agree with Appellant that it was not required to present proof of personnel qualifications upon award of the contract. However, Appellant was required to prove its size. 13 C.F.R. § 121.1009(c) ("The concern whose size is under consideration has the burden of establishing its small business size."). In other words, Appellant had to prove it was not unusually reliant upon Schardein to perform the contract. Likewise, Appellant had to prove Schardein would not perform primary and vital contract requirements. Appellant failed to do so. In fact, the evidence strongly supports a presumption that Appellant intended to contract all the primary and vital work to Schardein and that Appellant could not have been found responsible by the CO without Schardein. Hence, Appellant plainly misunderstands the Size Determination. [2]

I find the Area Office did not base the Size Determination primarily on the fact that Appellant does not yet have personnel to perform the technical aspects of the contract.[3] Rather, the Area Office found Appellant other than small because the evidence established Appellant has no experience in performing this type of contract, and against this background, Appellant hired a large, experienced subcontractor to perform unnamed tasks required by the contract. (Fact 9.) In light of this evidence, I must find that Appellant failed to prove its size—*i.e.*, it failed to prove it would not rely upon Schardein to perform the contract.

First, Appellant initially notified the Area Office that it was in a joint venture relationship with Schardein. (Fact 4.) After discovering that Schardein is an other than small firm for the applicable size standard, Appellant then represented that Schardein is merely its subcontractor, not its joint venture partner. (Fact 5.) It is suspicious, to say the least, that Appellant acknowledged Schardein as its joint venture partner and did not refer to Schardein as its subcontractor until after realizing that Schardein is other than small. If the parties were planning to work closely together in a joint venture type of relationship at the time the contract was awarded, it is not unreasonable to assume they are still planning to work closely together in the

[2] I also note that in contrast to Appellant's assertions, the Area Office specifically recognized the solicitation was an IFB. (Size Determination at 4.)

[3] To the extent the Area Office did rely on this fact in determining Appellant is other than small, I find such reliance to be harmless error in light of the fact that the Record as a whole strongly supports a finding of a violation of the ostensible subcontractor rule.

absence of evidence to the contrary. The Area Office found no sufficient evidence to the contrary, nor do I.[4]

Second, Appellant hired Schardein, a large subcontractor experienced in chiller maintenance, to perform work under the contract without ever indicating what Schardein's function will be. As the Area Office discussed, there is no clear delineation of tasks to be performed by Schardein in the subcontractor agreement. Appellant now claims that Schardein would only perform emergency maintenance. However, such an assignment is not set forth in the subcontractor agreement or in any other relevant document. Nor is it clear that the solicitation even requires emergency repairs. The IFB refers to "emergency repair assessment." (Fact 1.) Even if I were to discount Appellant's admission that it had formed a joint venture with Schardein, I would still find that it is unclear, based on the Record, exactly what function Schardein would perform under the contract. In addition, I find that Appellant has not attempted to remedy this lack of clarity. Absent a clear idea of what Schardein's function is, it is difficult to conclude that Appellant would not be reliant upon Schardein when Appellant, a small company with no experience (Fact 6), hired Schardein, a large and experienced subcontractor, to perform unnamed contract tasks.

Third, Appellant's employees do not have any experience in managing this type of contract. When asked for references, Appellant provided only references for Schardein. (Fact 5.) As Appellant points out, it would not be necessary for Mr. Storms or Mr. Batlle to obtain the licenses required for chiller maintenance because they would not be performing the technical work. However, it is necessary that Appellant demonstrate some ability to perform the contract so that the Area Office can conclude it would not be unusually reliant upon Schardein. It appears that neither of Appellant's employees has any contract management experience whatsoever, let alone experience specific to this type of contract.[5] Contrary to Appellant's claims, this does not constitute an improper responsibility determination by the Area Office. Appellant may well be responsible based upon its affiliation with or reliance upon a subcontractor. Nevertheless, the question of responsibility is irrelevant to whether Appellant is affiliated with a subcontractor because it violated the ostensible subcontractor rule. The Area Office simply noted Appellant's lack of experience in concluding that Appellant would be forced to rely on Schardein's experience to perform the contract.

Simply put, Appellant failed to meet its burden of proving that it would not be unusually reliant upon Schardein at the protest level. Here, Appellant has failed to meet its burden of proving clear error on the part of the Area Office. I conclude that the Area Office properly considered all aspects of the relationship between Appellant and Schardein and properly determined that the relationship violates the ostensible subcontractor rule.

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[4] I am also satisfied that Appellant's admission that it intended to form a joint venture indicates its true intent, especially because it admitted this fact before there was any controversy.

[5] Appellant indicates in its Appeal Petition that it will allocate work "in conjunction with [Appellant's] Quality Control Manager and Assistant Project Manager, both of which are experts in the field of chiller maintenance." (Appeal Petition 8.) However, Appellant does not identify these employees, nor did it provide this information to the Area Office.

## IV. Conclusion

Upon consideration of the Record and Appellant's Appeal Petition, I hold 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