Cite as: *Size Appeal of Colamette Construction Company,* SBA No. SIZ-5151 (2010)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Colamette Construction Company	SBA No. SIZ-5151
Appellant	Decided: August 19, 2010
Appealed from Size Determination No. 6-2010-098	

APPEARANCE

Jeremy T. Vermilyea, Esq., Bullivant Houser Bailey PC, Portland, Oregon, for Appellant.

DECISION

I. Introduction and Jurisdiction

On July 8, 2010, the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2010-098 (Size Determination) finding that Colamette Construction Company (Appellant) is other than a small concern under the $33.5 million size standard applicable to Solicitation No. VA-260-10-IB-0532 (IFB), which was issued by the U.S. Department of Veterans Affairs (VA). On July 23, 2010, Appellant filed the instant appeal of the Size Determination. For the reasons discussed below, this appeal is granted, and the Size Determination is reversed.

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 its appeal within fifteen days of receiving the Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

II. Issue

Did the Area Office commit a clear error of fact or law in determining that Appellant is other than small for the instant procurement due to a violation of the ostensible contractor rule? 13 C.F.R. § 121.103(h)(4).

III. Background

A. Facts

I find the Record establishes the following facts by the preponderance of the evidence:

1. On May 4, 2010, the VA Puget Sound Healthcare System in Tacoma, Washington issued the IFB soliciting bids for the seismic upgrade and renovation of a building. The VA Contracting Officer (CO) set aside the procurement for service-disabled veteran-owned small business concerns (SDVO SBC) and designated North American Industrial Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million.

2. Appellant submitted its bid on June 3, 2010, and bids were opened that same day. Appellant was the apparent low bidder.

3. On June 8, 2010, Glen/Mar Construction, Inc. (Glen/Mar), an unsuccessful bidder, protested Appellant's size to the CO. Glen/Mar alleged that Appellant is affiliated with S.D. Deacon General Contractors (S.D. Deacon) primarily on the basis that the firms share a business address. The Area Office determined the protest was specific and timely.

4. On June 21, 2010, the Area Office informed Appellant of Glen/Mar's protest and requested that Appellant submit the documentation necessary to perform a size determination.

5. On June 24, 2010, Appellant provided substantial information and documentation in response to the protest, including a completed SBA Form 355. Appellant provided further information via email correspondence in response to multiple requests from the Area Office during the period of July 1, 2010 through July 7, 2010.

6. Information provided by Appellant establishes:

a. Mr. James A. Hirte is Appellant's owner and President. Appellant has been in business since 1979.

b. According to Appellant's 2007, 2008, and 2009 federal income tax returns, Appellant's average annual receipts fall within the applicable size standard.

c. S.D. Deacon would be one of Appellant's subcontractors for the instant procurement. Mr. Hirte provided a bid breakdown to the Area Office and explained that the work to be performed by S.D. Deacon constitutes Item Number 36 (of 36 total items): "technical support." Mr. Hirte further explained that this would include setting the master critical path management schedule, design and implementation of a site-specific safety plan, setup and maintenance of the site computer, telephone, and fax systems, review and editing of all of Appellant's subcontracting agreements, and the provision of clerical personnel to handle submittals and material purchases, log weekly site safety inspections, and record minutes for weekly safety meetings and weekly construction coordination meetings.

d. Along with Mr. Hirte and his wife, S.D. Deacon agreed to indemnify the surety for Appellant's bid bond, as well as for a performance and payment bond in the event Appellant became the successful bidder.

e. S.D. Deacon is not a small business under the applicable size standard.

f. S.D. Deacon's work under the contract would constitute approximately 3% of the total contract price.

B. The Size Determination

On July 8, 2010, the Area Office issued the Size Determination concluding Appellant is other than small. The Area Office found Appellant to be affiliated S.D. Deacon on the basis of the ostensible subcontractor rule. 13 C.F.R. §121.103(h)(4).

The Area Office first noted that it must evaluate whether S.D. Deacon is Appellant's ostensible subcontractor on the basis of "all aspects of the relationship" between the firms. *See Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082 (2009). In analyzing the relationship between the firms, the Area Office found that Appellant and S.D. Deacon collaborated extensively on the bid for the instant procurement. Quoting from a letter sent by Mr. Hirte, to the Area Office on July 1, 2010, the Area Office set forth the details of this cooperation. Among other things, Appellant asked that all sub-bids be sent to S.D. Deacon on the day of the bid, Mr. Hirte assembled the bid in S.D. Deacon's office, and S.D. Deacon's chief estimator, as well as several other S.D. Deacon employees, assisted Mr. Hirte with the bid assembly. Mr. Hirte explained: "[Appellant] currently has only 3 office employees and for a bid this size and as complex as it is, I needed help to prepare our price proposal and [S.D. Deacon] provided that support." (Size Determination 3.) The Area Office also highlighted the fact that S.D. Deacon's chief estimator and another S.D. Deacon employee attended the pre-bid conference with Mr. Hirte, and both Appellant and S.D. Deacon solicited subcontractor and vendor proposals for the project.

The Area Office next focused on the fact that "[a]pproximately 70% of the contract amount will be subcontracted, approximately 12% is material purchases and the balance is jobsite overhead and work done by [Appellant's] work force." (Size Determination 3-4.) The Area Office determined the fact that approximately 70% of the contract will be performed by subcontractors is compelling support for the conclusion that Appellant is unusually reliant upon S.D. Deacon in violation of the ostensible subcontractor rule. *See Size Appeal of Ahuska Int'l Sec. Corp.*, SBA No. SIZ-4752 (2005).

The Area Office then emphasized that S.D. Deacon would have significant management and oversight responsibilities under the contract, despite Appellant's claim that it would manage the contract. Specifically, Appellant indicated that S.D. Deacon would develop the critical path management project schedule, develop that site-specific safety plan, oversee and update the project schedule, oversee and recommend subcontractor and vendor awards, and provide clerical support as requested by Appellant.

Additionally, the Area Office highlighted that S.D. Deacon (in addition to Mr. Hirte and his wife personally) provided indemnification on Appellant's payment and performance bonds. As a result of this indemnification, Mr. Hirte indicated that "it is [his] duty to allow [S.D. Deacon] to review the bid preparation to assure [S.D. Deacon is] comfortable with [his] analysis, subcontractor bid analysis, and overall approach to a project." (Size Determination 4.)

Finally, the Area Office noted that Appellant and S.D. Deacon are located in the same building, and Appellant has rented space from S.D. Deacon since October 2009. Although Appellant claims it does not share facilities, equipment, or personnel with S.D. Deacon, the Area Office pointed out that S.D. Deacon provided receptionist services to Appellant for a fee from October to December, 2009.

Based upon the above facts, the Area Office concluded that S.D. Deacon is Appellant's ostensible subcontractor for the instant procurement because Appellant would be unusually reliant upon S.D. Deacon in performing the contract. The Area Office calculated the combined average annual receipts of Appellant and S.D. Deacon and concluded that the receipts exceed the $33.5 million size standard applicable to the procurement. Thus, the Area Office determined Appellant is other than a small business concern for the subject procurement only.

C. The Appeal Petition

On July 23, 2010, Appellant filed the instant size appeal with OHA claiming the Area Office erroneously concluded that it is affiliated with S.D. Deacon. Appellant emphasizes that the decisive question when analyzing issues of affiliation is always whether one firm has the power to control the other. 13 C.F.R. § 121.103(a)(1); S*ize Appeal of Pro Services—Teltara Joint Venture, LLC*, SBA No. SIZ-5115, at 4 (2009). Unless one firm has the power to control the other, Appellant points out, there is no affiliation. Appellant went on to analyze a number of the factors considered by the Area Office to be indicia of affiliation between it and S.D. Deacon.

First, Appellant alleges S.D. Deacon would perform only 3% of the total contract resulting from the instant procurement. Appellant argues that the Area Office erroneously combined S.D. Deacon's proposed performance with the performance of all other subcontractors to reason that because subcontractors will perform 70% of the contract, S.D. Deacon is Appellant's ostensible subcontractor. Appellant contends that if S.D. Deacon itself were to perform 70% of the contract, such a factor may weigh in favor of finding a violation of the ostensible subcontractor rule, but because S.D. Deacon would perform only 3% of the contract, S.D. Deacon's percentage of subcontracted work is not evidence of an ostensible subcontractor relationship. *See Size Appeal of Greenleaf Constr. Co., Inc.*, SBA No. SIZ-4765 (2006); *Size Appeal of Ahuska Int'l Sec. Corp.*, SBA No. SIZ-4752 (2005).

Appellant next argues it will perform the primary and vital functions of the contract. Appellant cites a number of cases to support its proposition that its control over the project precludes finding a violation of the ostensible subcontractor rule. See *Size Appeal of A1 Procurement, LLC*, SBA No. SIZ-5121 (2010); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006); *Size Appeal of Anadarko Indus., LLC*, SBA No. SIZ-4708 (2005).

Appellant contends it will ensure compliance with the contract's terms and ensure fulfillment of the contract's purpose. Appellant asserts it pursued the bid independently and did not defer to S.D. Deacon in so doing. Appellant acknowledges that S.D. Deacon assisted with the bid estimate, S.D. Deacon's employees attended the pre-bid conference, and S.D. Deacon contacted other subcontractors regarding price proposals. However, Appellant contends this sort of cooperation is not prohibited by regulation and is only one factor to be considered in the relationship between the firms. Appellant asserts it will perform "the bulk of the ongoing management throughout the duration of the project," including supervision, safety inspections, schedule maintenance, vendor selection, communication with the VA, etc. (Appeal Petition 8.)

Appellant also claims it clearly delineated S.D. Deacon's limited duties as a subcontractor. In contrast to Appellant, S.D. Deacon will provide primarily support services in the early stages of the project. According to Appellant, it will consult with S.D. Deacon regarding specific preparatory items, but S.D. Deacon will not maintain control over the project once it is underway because those responsibilities are specifically reserved for Appellant.

Appellant asserts S.D. Deacon is merely an ancillary subcontractor from whom it will not take direction. Appellant argues the Area Office erred in determining that S.D. Deacon would undertake significant management responsibilities.

Appellant next emphasizes that it has the experience and expertise necessary to perform this project. Appellant explains that it has been in business since 1979 and has managed projects similar to the instant one. Appellant argues the fact that it "is not a nascent concern is informative to its relationship and the control it exercises over its subcontractors." (Appeal Petition 10.) Appellant asserts it would be able to manage this project without S.D. Deacon, and S.D. Deacon is not its ostensible subcontractor.

Appellant contends the other ties between the firms are not evidence of affiliation. Appellant argues hiring secretarial personnel for three months does not constitute sharing employees, 13 C.F.R. § 121.103(b)(4), and this arrangement had concluded by the time the instant IFB was issued. *See Size Appeal of IAP Leopardo Constr., Inc.*, SBA No. SIZ-5127 (2010). Additionally, Appellant asserts that although it leases space from S.D. Deacon, its offices are completely separate, the lease observes formalities, and this is not sufficient to show affiliation. *See Size Appeal of CorTrans Logistics, LLC*, SBA No. SIZ-4691 (2005). Appellant argues the Area Office's reliance upon these minor factors to find affiliation result in an erroneous outcome. When the entire relationship between the firms is considered, Appellant contends, it is clear that Appellant is independent, S.D. Deacon has only a limited subcontractor rule, and Appellant would not be unusually reliant upon S.D. Deacon to perform this contract.

Finally, Appellant claims the teaming agreement between it and S.D. Deacon is reasonable and does not allow S.D. Deacon to control Appellant. Appellant argues it is common and convenient for small businesses to seek assistance from larger businesses to perform large contracts. Appellant asserts that its hiring of S.D. Deacon is similar to any other allowable subcontractor relationship. Appellant also maintains that it would retain full control over this project and the relationship between it and S.D. Deacon. Appellant alleges the Area Office erred in failing to consider the common practice of teaming that the SBA itself encourages.

Appellant concludes that the Area Office's finding of affiliation between it and S.D. Deacon was erroneous because S.D. Deacon cannot control Appellant. Appellant argues the Area Office placed too much weight on minor factors and did not properly consider all the factors at issue. Appellant contends that the Size Determination should be reversed because it is based upon clear errors of fact and law.

IV. Analysis

A. New Evidence

On June 23, 2010, Appellant submitted a Motion for Admission of New Evidence. Appellant seeks to admit an affidavit from Mr. Hirte explaining Appellant's past experience, the portion of the instant contract to be performed by S.D. Deacon, and Appellant's Teaming Agreement with S.D. Deacon. Appellant also seeks to admit a chart of its completed projects, a bid breakdown sheet for the current project (which was in the Record before the Area Office), email correspondence between Mr. Hirte and the SBA regarding teaming agreements and the ostensible subcontractor rule, and the Teaming Agreement executed between Appellant and S.D. Deacon (which was also in the Record before the Area Office). Appellant argues it could not

have reasonably foreseen the need to submit this evidence based on the protest alone and asserts that it has established good cause for the admission of the evidence.

I agree with Appellant that it could not have anticipated the need for providing this evidence to the Area Office based upon the protest alone, which did not identify the ostensible subcontractor rule as the alleged basis for affiliation between Appellant and S.D. Deacon. Accordingly, because Appellant has established good cause, I GRANT Appellant's motion, I ADMIT the additional evidence into the Record, and I have considered it in issuing this decision. 13 C.F.R. § 134.308(a)(2).

B. 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. 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 based on the record before it. It is Appellant's burden to prove that the Area Office committed an error. *Id.* Consequently, I will disturb the Area Office's Size Determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

C. The Merits

The SBA's size regulations provide that concerns are affiliated if one has the power to control the other. 13 C.F.R. §121.103(a)(1). The ostensible subcontractor rule provides one basis for finding affiliation between two firms working together on a particular procurement. The rule mandates 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 engaged in a joint venture, and thus affiliated. 13 C.F.R. § 121.103(h)(4).

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 must evaluate "all aspects" of the relationship between the two concerns to determine whether the ostensible subcontractor rule applies. *Id.*; *Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082 (2009). For the following reasons, I conclude the Area Office clearly erred in determining that S.D. Deacon is Appellant's ostensible subcontractor.

The Area Office relied upon *Size Appeal of Ahuska Int'l Sec. Corp.*, SBA No. SIZ-4752 (2005), to find that because approximately 70% of the contract will be performed by subcontractors, Appellant's relationship with S.D. Deacon represents a violation of the ostensible subcontractor rule. As Appellant argues, this was a clear error. In *Ahuska*, OHA found the fact that *one* subcontractor was to perform approximately 70% of the contract was compelling evidence that the appellant was unusually reliant upon that firm, and the firm was the appellant's ostensible subcontractor. In sharp contrast, *all* of Appellant's subcontractors combined will perform 70% of the instant contract, and S.D. Deacon will perform only 3% of the contract. The fact that Appellant will rely upon multiple subcontractors to perform 70% of the contract cannot establish that Appellant would be unusually reliant upon S.D. Deacon specifically, which is the precise issue to be decided under the ostensible subcontractor rule.

Additionally, the Area Office provided little to no analysis in the Size Determination. The Area Office relied upon information provided by Mr. Hirte and then concluded that S.D. Deacon is Appellant's subcontractor without setting forth its own examination of the factors it listed as supporting its conclusion. For instance, the Area Office indicated that S.D. Deacon will perform "some significant management responsibilities" without explaining why it considers the tasks delegated to S.D. Deacon to be significant or why Appellant would be unable to perform the contract without S.D. Deacon's assistance (which would make it unusually reliant upon S.D. Deacon). Due to this lack of analysis, it is difficult to determine how much weight the Area Office placed on this factor or on any of the other factors it mentioned; *i.e.*, assistance with the bid for this procurement, bond indemnification, and the provision of office space and receptionist services. Nevertheless, the Area Office did conclude based upon these factors that Appellant would be unusually reliant upon S.D. Deacon to perform the contract.

However, the fact that Appellant leases office space or receptionist services from S.D. Deacon is irrelevant under an ostensible subcontractor rule analysis. These ties may constitute evidence of general affiliation between the firms, but the ostensible subcontractor rule governs only a particular type of contract-specific affiliation. The rule asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business general contractor. Whether there is a lease between the firms is unrelated to this question. Although assistance with the bid and bond indemnification are proper factors to consider under the ostensible subcontractor, I note again that the lack of analysis in the Size Determination makes it impossible to tell what weight the Area Office placed upon these factors.

Additionally, although the Area Office indicated that it must consider all aspects of the relationship between Appellant and S.D. Deacon pursuant to the ostensible subcontractor rule, the Area Office failed to address a number of important factors evinced by the Record. As Appellant emphasizes, the Area Office did not take into account Appellant's extensive industry experience, nor did it consider the fact that the three key employees for the project are all Appellant's employees. These are factors that OHA has consistently taken into account when evaluating a potential ostensible subcontractor relationship. *See, e.g., Size Appeals of CWU, Inc., et al.,* SBA No. SIZ-5118, at 14-15 (2010) (finding the key management employees for the project were all employees of the subcontractor); *Size Appeal of McKissack & McKissack,* SBA No. SIZ-5093, at 8 (2009) (finding the general contractor would provide a significant number of key employees); *Size Appeal of Smart Data Solutions LLC,* SBA No. SIZ-5071, at 21-22 (2009) (finding the general contractor had no experience related to the primary and vital contract requirements); *Size Appeal of Pub. Comms. Servs., Inc.,* SBA No. SIZ-5008, at 8 (2008) (finding the general contractor could perform the contract because it had twenty years of relevant experience). The Area Office should have at least acknowledged these factors and weighed them in its analysis.

Based upon the foregoing analysis, I hold the Record lacks sufficient evidence to establish that S.D. Deacon has the power to control Appellant for the purposes of this procurement as anticipated by 13 C.F.R. § 121.103(h)(4). First, there is no evidence of unusual reliance because S.D. Deacon is performing only 3% of the anticipated value of the contract. Second, other than the evidence concerning the shared indemnity, and perhaps the evidence that S.D. Deacon provided limited assistance with Appellant's bid preparation, I can find no evidence that is even arguably probative that S.D. Deacon may be Appellant's ostensible subcontractor for the instant procurement. When I weigh S.D. Deacon's agreement to indemnify the surety against Appellant's extensive industry experience and S.D. Deacon's limited role in performing the

contract, I find the issue of indemnification to be an outlier and thus not probative of a violation of the ostensible subcontractor rule.

The Area Office committed clear errors of fact and law, and the Record does not support the conclusion that S.D. Deacon is Appellant's ostensible subcontractor. Consequently, Appellant is not affiliated with S.D. Deacon for this procurement, and Appellant's size must be determined absent S.D. Deacon's average annual receipts. Taken alone, Appellant's average annual receipts fall within the applicable size standard, and Appellant is a small business concern for this procurement.

V. Conclusion

For the foregoing reasons, I GRANT this appeal and REVERSE the Area Office's Size Determination.

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

THOMAS B. PENDER
Administrative Judge