United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
TLC Catering	SBA No. SIZ-5172
Appellant	Decided: December 6, 2010
Appealed from Size Determination No. 6-2011-004	

APPEARANCES

Thomas Chapman, Founder & Owner, TLC Catering, San Diego, California, for Appellant.

DECISION

HOLLEMAN, Administrative Judge:

I. Introduction & Jurisdiction

On October 25, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2011-004 finding TLC Catering (Appellant) other than small due to its affiliation with Penny Gas Station, LLC (Penny Gas Station). The Area Office determined Appellant's relationship with Penny Gas Station violates the ostensible subcontractor rule for purposes of the procurement at issue (13 C.F.R. § 121.103(h)(4)). For the reasons discussed below, the appeal is granted, and the size determination is reversed.

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. Solicitation and Protest

On August 6, 2010, the Contracting Officer (CO) for the U.S. Department of the Army, Mission & Installation Contracting Command Center in Fort Knox, Kentucky (Army), issued Solicitation No. W9124D-10-T-0130 (RFQ) for the provision of sandwiches for applicants processed at the Military Entrance Processing Station (MEPS) in New Orleans, Louisiana. The CO set the procurement totally aside for small business and designated North American Industry Classification System (NAICS) code 722320, Caterers, with a corresponding size standard of $7 million in average annual receipts.

On September 24, 2010, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror. On September 29, 2010, Specialized Contracting Services, Inc. (SCS) filed a protest alleging Appellant is other than small. SCS alleged Appellant would not perform the work required by the RFQ, but would subcontract the work to independent contractors. Thereafter, the Area Office dismissed SCS's protest for lack of standing, and the SBA Government Contracting Area Director initiated his own protest based upon the allegations in SCS's protest. 13 C.F.R. § 121.1001(a)(1)(iii).

B. Size Determination

On October 25, 2010, the Area Office issued its size determination finding Appellant's relationship with its subcontractor, Penny Gas Station, violates the ostensible subcontractor rule and Appellant is other than a small firm for this procurement. The Area Office first noted that Appellant's average annual receipts for the last three years fall below the applicable size standard, so Appellant itself is a small firm. *See* 13 C.F.R. § 121.404(a).

The Area Office went on to examine the relationship between Appellant and Penny Gas Station with regard to the procurement at issue. The Area Office quoted the ostensible subcontractor rule, set forth at 13 C.F.R. § 121.103(h)(4), and explained that if Penny Gas Station is performing the primary and vital contract requirements or if Appellant would be unduly reliant on Penny Gas Station in performing the contract, the firms are considered to have formed a joint venture and are affiliated for purposes of this procurement. The Area Office observed it is Penny Gas Station that will prepare the sandwiches to be provided under this procurement. Consequently, the Area Office concluded Penny Gas Station will perform the primary and vital requirements of the RFQ. Further, the Area Office explained Appellant provided operation permits and health inspection violation notices for Penny Gas Station, but none for itself. Thus, the Area Office also determined Appellant would be unduly reliant upon Penny Gas Station to perform the contract.

The Area Office next analyzed the size of Penny Gas Station. The Area Office found, based on a telephone conversation with her, that the owner of Penny Gas Station shares an identity of interest with her husband, who owns other firms. Thus, Penny Gas Station is affiliated with its owner's husband's firms. *See* 13 C.F.R. § 121.103(f). Because the owner declined to provide information on her husband's holdings, the Area Office presumed such

information would show that Penny Gas Station and its affiliates are other than small under the applicable size standard. *See* 13 C.F.R. § 121.1008(d). The Area Office thus concluded Penny Gas Station is other than a small firm for the instant procurement.

Because Penny Gas Station will perform the primary and vital requirements of the RFQ, and because Appellant would be unduly reliant upon Penny Gas Station in performing the contract, Appellant is considered affiliated with Penny Gas Station for this procurement. Because the Area Office determined Penny Gas Station is other than a small firm, Appellant too is considered other than small for purposes of this procurement.

C. Appeal Petition

On November 9, 2010, Appellant filed the instant appeal. Appellant contends it has only a casual relationship with Penny Gas Station. Appellant asserts the noon meal service to be provided under the RFQ is performed at all MEPS by local restaurants, caterers, or entrepreneurial ventures such as Appellant. Appellant explains entrepreneurial ventures such as itself were formerly allowed to install refrigeration and store components at the MEPS, but storage and assembly of sandwiches is no longer permitted at the MEPS. Thus, Appellant contends, in order to stay in business performing the noon meal service, it had to hire a local subcontractor with the appropriate local licenses to perform the sandwich function.

Appellant argues it is not unduly reliant upon Penny Gas Station because there are many local restaurants, caterers, and sub shops it could have hired to perform the sandwich function. Additionally, Appellant alleges the Performance Work Statement (PWS) provides for the ability to change sandwich preparation providers, and Appellant has in fact changed vendors in the past for various reasons. Appellant conclude the sandwich function is no more than the purchase of sandwiches from a local facility for delivery to the MEPS. Appellant requests that OHA reverse the size determination.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. Consequently, I will disturb the Area Office's size determination only if, after reviewing the record, I have a definite and firm conviction that the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

B. Analysis

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 affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). Here, the RFQ lists only one contract line item

for each option year, described as the provision of noon meals (sub sandwiches) to applicants processing through the New Orleans MEPS. The PWS provides: "The contractor shall furnish food, facilities, furniture, equipment, supplies, management, supervision, and labor to provide noon (boxed lunch) meals, as specified herein, for the Armed Forces applicants processing at the New Orleans MEPS." (PWS § 1.1.) The PWS indicates the meals must be prepared in a locally licensed facility and transported to MEPS. (PWS § 1.1.1.) The PWS explains that the contractor is expected to provide noon meals every Monday through Friday excluding holidays and estimates that meals will be needed for an estimated total of 264 days per year. (PWS § 1.1.3.) In addition to providing definitions and specifications for the meals to be provided, the PWS also indicates "[t]he food shall be prepared at the contractor's facility, and transported to and served at the MEPS." (PWS § 5.2.) The full box lunch to be provided at the MEPS consists of "a sandwich, lettuce, tomato, bag of chips, cookie, apple, straw, and napkin." (PWS § 5.12.) The contractor is also expected to provide beverages, as well as clean-up services after the noon meal is served. (PWS §§ 5.3.1 - 5.3.3, 5.13.1.)

The subcontracting agreement between Appellant and Penny Gas Station indicates Penny Gas Station will "prepare sandwiches for [Appellant] to be served at the [New Orleans MEPS] conforming to the terms in the statement of work" and will prepare the sandwiches "in bulk containers for pick up by [Appellant] by 10:00 a.m." The agreement also provides: "It is further understood, that [Appellant] will furnish all management, employees, transportation and handle direct contact with the MEPS." Thus, it appears Penny Gas Station will make the sandwiches at its facilities, and Appellant will pick up the sandwiches from Penny Gas Station, provide the other items (such as beverages, cookies, and napkins), assemble the box lunches, deliver the meals to the MEPS, serve the noon meal at the MEPS every weekday, and provide clean-up services after each meal.

The Area Office determined the task to be performed by Penny Gas Station, the preparation of sandwiches, is the primary and vital contract task. I find this constitutes clear error. A fair reading of the full PWS leads to the conclusion that it is the provision and service of the noon meal at the MEPS that is the primary contract task. In other words, this contract is essentially one for services. Obviously, the sandwiches are an important part of the contract, but it is the service of an entire meal that must be provided under the RFQ. The conclusion would be different if Appellant was merely transporting the box lunches to the MEPS and the Army was serving them. But here, it is Appellant who must assemble the lunches, serve the lunches, and clean up afterwards. These services are the heart of the contract, and because Appellant will provide these services, I find it is Appellant who will perform the primary contract task of providing the noon meal at the MEPS.

Similarly, Appellant is not unusually reliant upon Penny Gas Station. I must again emphasize that the primary goal of this contract is to provide a full meal and all the necessary accompanying services. It is clear from the PWS that there will be more effort expended in assembling the lunches, transporting the lunches, serving the lunches, and cleaning up after the meal than in simply preparing the sandwiches. Appellant has merely subcontracted one part of the total services it will provide under the RFQ. In other words, Appellant has delegated one discrete task to its subcontractor as part of Appellant's overall management of its contract. Although it is true that Appellant could not perform its primary contract task without the

provision of sandwiches from its locally-licensed subcontractor, this fact alone does not render Appellant unusually reliant upon its subcontractor because Appellant will still perform the majority of the labor and all the tasks required under this RFQ, except preparing the sandwiches. Accordingly, I find Appellant has not violated the ostensible subcontractor rule, and Appellant is a small business for this procurement.

IV. Conclusion

The Area Office committed clear error in its size determination. Accordingly, this appeal is GRANTED, and the size determination is REVERSED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge