Cite as: *Size Appeal of Assessment & Training Solutions Consulting Corporation*, SBA No. SIZ-5228 (2011)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Assessment & Training Solutions Consulting Corporation Appellant RE: TSO Armor and Training, Inc. Appealed from Size Determination Nos. 2-2011-23 and 2-2011-24	SBA No. SIZ-5228 Decided: April 27, 2011

APPEARANCES

Gary S. Grossman, Esq., and Gabriel D. Soll, Esq., McCarthy, Sweeney & Harkaway, P.C., Washington, D.C., for Assessment & Training Solutions Consulting Corporation, Appellant.

Michael J. Gardner, Esq., Dawn L. Serafine, Esq., and George G. Booker, Jr., Esq., Troutman Sanders LLP, Norfolk, Virginia, for TSO Armor and Training, Inc.

DECISION[1]

I. Background

A. Solicitations

On May 6, 2010, the Department of the Navy (Navy), Fleet and Industrial Supply Center, Norfolk, Virginia, issued two solicitations seeking antiterrorism and military training instructors. The solicitations covered two geographic regions, East (Solicitation No. N00189-10-R-0063) and West (Solicitation No. N00189-10-R-0065). In the East Region, the contractor was to provide 57 instructors at locations in Virginia, Florida, and Texas. In the West Region, the contractor was to provide 45 instructors at locations in California, Washington, Hawaii, and Japan. The

[1] This decision was originally issued under a protective order. Each party was provided an opportunity to request redactions from the published decision. After considering the parties' requests for redactions, I am issuing a redacted version of the decision for public release.

Contracting Officer (CO) set aside the procurements entirely for small businesses and assigned North American Industry Classification System (NAICS) code 611699 ("All Other Miscellaneous Schools and Instruction"), with an associated size standard of $7 million in average annual receipts. In response to questions from prospective offerors, the Navy advised that there were no incumbent contractors, because the solicitations were for new requirements. East Region Q&A number 8; West Region Q&A number 38.

B. TSO's Proposals

On June 11, 2010, TSO Armor and Training, Inc. (TSO) submitted proposals for both solicitations. TSO's proposals indentified a large business, Linxx Global Solutions, Inc. (Linxx), as a "teaming partner" (principal subcontractor), and described the firms' experience providing antiterrorism and weapons-based training. The proposals outlined TSO's [XXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX]. TSO Proposals, Volume I, at 3. In each proposal, TSO self-certified as a small business.

C. Contract Awards and Protests

On November 22, 2010, the CO issued a pre-award notice that TSO had been selected for award. Assessment and Training Solutions Consulting Corporation (Appellant), a disappointed offeror, filed a size protest, alleging that TSO was not small business. Two other unsuccessful offerors also filed size protests. The CO referred the protests to Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office), for a size determination.

In its protest, Appellant alleged that TSO is affiliated with Linxx under the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). In support of this contention, Appellant argued that, because TSO is a small company with only [XXXX] employees, TSO is incapable of performing the contracts "without the near complete reliance upon a subcontractor." Protest at 3. Appellant asserted that "Linxx is a well-known provider of the services sought under these procurements and is, in fact, the incumbent contractor," and that "Linxx personnel were observed delivering TSO's proposal to the contracting office, without even being accompanied by a TSO representative." *Id.* Appellant further noted that "Linxx has added recruiting efforts to their webpage seeking applicants for positions to perform these services" whereas "[n]o such recruiting efforts have been publically undertaken by TSO to [Appellant's] knowledge." *Id.*

Appellant also alleged that, before it became an independent company, TSO had been a division of Brekford International Corp. (Brekford). According to Appellant, Linxx and Brekford previously entered into a teaming agreement whereby Linxx would provide "staffing…to meet Proposal requirements." (Teaming Agreement at 6) Appellant stated that "it is assumed that this agreement relates to the two Solicitations at issue and was somehow transferred as part of the asset sale [from Brekford] to TSO."[2]

[2] Protest at 4. In addition to alleging that the Brekford/Linxx teaming agreement should be attributed to TSO, Appellant's protest also contended that TSO is affiliated with Brekford.

On December 21, 2010, the Navy notified the Area Office that the Navy intended to proceed with contract award, without awaiting the outcome of the ongoing size protests. The CO stated that the Navy had determined that further delay would disadvantage the Government. On December 30, 2010, the Navy awarded Contract Nos. N00189-11-D-0006 (East Region) and N00189-11-D-0007 (West Region) to TSO.

D. Size Determination

On March 1, 2011, the Area Office issued a consolidated size determination addressing Appellant's size protest, as well as one of the other two size protests.[3] The Area Office concluded that there was no violation of the ostensible subcontractor rule and, thus, TSO is a small business for purposes of the contracts.

In reaching its decision, the Area Office reviewed several volumes of documents, including the solicitations, TSO's proposals, and a subcontract between TSO and Linxx describing their collaboration on the contracts. The subcontract identifies TSO as the prime contractor, and requires that Linxx provide [XXXXXXX] percent of direct labor on each contract. At the request of the Area Office, TSO submitted a series of charts outlining the distribution of work among TSO and Linxx. The tables indicate that TSO will provide the majority of the instructors on both contracts, and will perform the majority of the work in terms of contract dollars. The Area Office reviewed the credentials of TSO's principals, Mr. Michael Wall and Mr. David Tezza. Both are distinguished Navy veterans. Mr. Wall, who would be serving as TSO's project manager overseeing both contracts, brings extensive expertise teaching anti-terrorism courses and leading training teams. The Area Office noted that TSO has previously submitted proposals for similar contracts independently from Linxx. The Area Office also reviewed the resumes of instructors that TSO had hired or that had signed employments with TSO.

E. Appeal and TSO Response

On March 16, 2011, Appellant appealed the size determination to the Office of Hearings and Appeals (OHA). Appellant filed its appeal within 15 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). In its appeal, Appellant argues that, because TSO itself has only [XXXXXXX] employees, TSO would be unable to perform the contracts without Linxx as a subcontractor, in violation of the ostensible subcontractor rule. Appellant argues that the Area Office should have addressed TSO's capabilities separately from the ostensible subcontractor analysis. Appellant also maintains that the Area Office did not conduct a thorough investigation, noting in particular that the Area Office failed to address all of the allegations raised in Appellant's protest. Appellant requested a protective order and moved to admit additional evidence.

The Area Office rejected this allegation, however, and Appellant does not challenge that portion of the Area Office's determination. Accordingly, TSO's alleged affiliation with Brekford is not at issue in these proceedings and will not be discussed further.

[3] The third size protest was summarily dismissed in Size Determination No. 2-2011-25.

On April 4, 2011, TSO responded to the appeal. TSO moves to dismiss the appeal as beyond OHA's jurisdiction. In the alternative, TSO contends the appeal should be denied because the appeal does not identify a clear error of fact or law in the size determination.

II. Jurisdiction

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.

III. Issue

Whether the size determination concluding that there is no violation of the ostensible subcontractor rule was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

IV. 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. 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).

B. Preliminary Motions

1. TSO's Motion to Dismiss

TSO moves to dismiss this appeal pursuant to 13 C.F.R. § 121.1101(b), which until last month stated that "OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as compliance with the…ostensible subcontractor rule." This regulation was in effect when the size determination was issued on March 1, 2011, and the contracts had already been awarded by that date. Effective March 4, 2011, however, SBA amended the regulatory provision to provide that "OHA will review all timely appeals of size determinations." 76 Fed. Reg. 5,680, 5,683 (Feb. 2, 2011). The revised regulation was in effect at the time the appeal was filed on March 16, 2011. To resolve TSO's motion, therefore, it is necessary to decide whether this dispute is governed by the version of the regulation that was in effect at the time of the size determination, or the version in effect at the time of the appeal.

OHA has held that, when a new regulation relating to the appeal process is promulgated, the regulation applies to any appeals filed after the effective date. *Size Appeal of MBI Corp.*, SBA No. SIZ-4356, at 6 n.8 (1999)(revised OHA regulations govern appeals filed after the

effective date); *Size Appeal of George E. Hill*, SBA No. SIZ-4222, at 2 n.1 (1996) ("because the appeal was filed after the effective date of the new [OHA] procedural regulations, they apply."). Accordingly, because the regulation in question pertains to the OHA appeal process, it is appropriate to utilize the version of the regulation that was in effect at the time of the appeal. At the time of the appeal, the language of 13 C.F.R. § 121.1101(b) no longer posed a barrier to OHA's jurisdiction over this case. As a result, TSO's motion to dismiss is DENIED.

2. Appellant's Motion to Supplement the Record

Appellant moves to supplement the record with additional evidence. Appellant first seeks to introduce two memoranda prepared by the Navy discussing the evaluation of proposals. [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXX] According to Appellant, these memoranda establish that Navy personnel "understood that TSO was not able to perform these contracts without Linxx." Appeal at 9. Appellant also moves to admit the declaration of Mr. Timothy E. Poole, a purported employee of Linxx. In his declaration, Mr. Poole states that, out of 20 total instructors at the "Northwest Site," 14 are Linxx employees. The declaration is only a few sentences in length, does not identify the contract or project to which it pertains, and does not mention TSO. Appellant maintains that the Poole declaration demonstrates that, despite TSO's claims that a majority of instructors on the instant contracts will be TSO employees, "Linxx actually is providing the majority of the instructors on at least one of the two contracts." Appeal at 8. TSO opposes the motion, arguing that Appellant has not shown good cause to admit new evidence.

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009)("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the Administrative Judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, Appellant has failed to show that the proffered new evidence is relevant to these proceedings. The Navy's two evaluation memoranda compare the strengths and weaknesses of the various offerors for the purpose of determining which firm(s) should be selected for award. The memoranda were not intended to – and do not – assess whether TSO is unduly reliant upon Linxx, and thus are not relevant here. Furthermore, [XXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. Similarly, the Poole declaration is not pertinent to this dispute. Mr. Poole does not reference any specific contract or project, and it is not clear whether he is referring to the same procurements at issue here.[4]

[4] The contractual documents in the record make no mention of any "Northwest Site."

Furthermore, the East and West Region contracts call for 57 and 45 instructors, respectively, across numerous locations. Thus, even supposing it were true, as the Poole declaration implies, that Linxx did have more instructors than TSO at one particular site, this would not establish that Linxx, overall, employs the majority of the instructors on either contract.

The proffered evidence is not relevant to these proceedings, and does not clarify any facts and issues on appeal. Accordingly, Appellant's motion to supplement the record is DENIED. The additional evidence is not admitted into the record, and I have not considered it in preparing this decision. 13 C.F.R. § 134.308(a).

C. The Merits

Under SBA's "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4), a prime contractor and its subcontractor may be treated as affiliates if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. To apply the ostensible subcontractor rule, the Area Office must consider all aspects of the relationship between the prime and subcontractor, including the percentage of work subcontracted, agreements between the firms (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). The purpose of the rule is to "prevent other than small firms from forming relationships with small firms to evade SBA's size requirements." *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009).

In this case, the contracts' primary and vital requirements are the provision of instructors to conduct antiterrorism and military training. According to the tables prepared by TSO at the request of the Area Office, TSO itself (not Linxx) will supply the majority of instructors for both the East and West Region contracts. Likewise, when calculated in terms of dollar value, TSO would perform the majority of the work. The tables are consistent with the subcontract between TSO and Linxx indicating that Linxx will perform [XXXXXXX] percent of the work, and with TSO's proposals which outline [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXX]. On these facts, the Area Office concluded that, "Linxx is not performing the primary and vital requirements in either the East Region or West Region contract." Size Determination at 5.

The Area Office similarly found that TSO is not unduly reliant on Linxx for contract performance. Mr. Wall, TSO's project manager for both contracts, is well-qualified for the position, and the Area Office determined that that "Mr. Wall's experience as a military instructor gives TSO sufficient expertise to support the contracts." Size Determination at 5. In addition, TSO previously submitted proposals for similar requirements independently from Linxx, thereby demonstrating that TSO is "not merely a conduit for Linxx's involvement." *Id.* The Area Office also considered, and rejected, Appellant's allegation that TSO has insufficient manpower to

perform the contracts, noting that Government services contractors regularly hire additional employees post-award.

The above findings adequately support the Area Office's determination that there was no violation of the ostensible subcontractor rule. Although it is clear that Linxx will have a substantial role in the performance of the contracts, the Area Office nevertheless reasonably concluded that TSO itself is performing the primary and vital tasks of the contract, and that TSO is not unduly reliant upon Linxx.

In seeking to overturn the Area Office's determination, Appellant reiterates its protest allegation that TSO lacks the capability to perform the contracts. Appellant emphasizes that TSO reportedly has only [XXXXXXX] personnel, which would be insufficient to conduct training operations on the scale contemplated by the two contracts. Appellant maintains that its arguments regarding TSO's capabilities should have been addressed separately by the Area Office, but instead were "subsumed by the argument regarding Linxx as an ostensible contractor." Appeal at 4.

Under OHA precedent, it is appropriate to consider a prime contractor's experience as part of an "ostensible subcontractor" analysis, because such matters are relevant to whether the prime contractor can perform independently from the subcontractor. *Size Appeal of Smart Data Solutions LLC*, SBA No. SIZ-5071 (2009) (prime contractor had no experience related to the primary and vital contract requirements); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 9-10 (2006) (prime contractor was "unproven", and the contract in question "almost 50 times the amount of its work to date"). A broad inquiry into a firm's "capabilities," however, is the nature of a responsibility determination, and therefore is the province of the CO, not the Area Office. 48 C.F.R. § 9.103(b); *Size Appeal of Public Communications Services, Inc.*, SBA No. SIZ-5008, at 8 (2008) (Area Office may not "step into the CO's shoes" to examine a firm's overall responsibility); *Size Appeal of TCE Inc.*, SBA No. SIZ-5003, at 9 (2008) (Area Office erred by "substitut[ing] its own judgment of Appellant's ability and experience to perform this contract (a responsibility determination) for that of the CO.") Accordingly, I find no merit to Appellant's contention that the Area Office should have assessed TSO's capabilities separately from the ostensible subcontractor issue. Insofar as Appellant is arguing that the Area Office should have conducted its own responsibility determination, the Area Office properly declined to do so, deferring to the CO. Appellant's allegations regarding TSO's limited manpower were appropriately addressed in the context of the "ostensible subcontractor" analysis.

Appellant also alleges that the Area Office did not conduct a sufficiently thorough investigation. Appellant complains in particular that several of the allegations from its initial protest are not specifically addressed in the size determination. There is, however, no requirement that an Area Office comment directly on every protest allegation. Moreover, as discussed below, it appears that many of Appellant's allegations are factually unfounded or of little relevance. By regulation, the Area Office is instructed "give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions." 13 C.F.R. § 121.1009(d); see also *Size Appeal of FFTF Restoration Company, LLC*, SBA No. SIZ-4684, at 6 (2005). Accordingly, the Area Office did not err by neglecting to comment on each of Appellant's allegations.

Appellant contends that the Area Office ignored its protest allegation that Linxx was the incumbent contractor. It is true that the "ostensible subcontractor" regulation directs special attention to situations where the proposed subcontractor is an incumbent that is not eligible to compete for the successor procurement. In this case, however, it does not appear that Linxx was actually the incumbent contractor. The Navy advised prospective offerors that the procurements were for new requirements and that there were no incumbent contractors. As a result, the Area Office need not have addressed this issue. *Size Appeal of Public Communications Services, Inc.*, SBA No. SIZ-5008, at 6 (2008) (finding no reversible error when "the proposed subcontractor…is not the incumbent.")

The Area Office similarly did not address Appellant's allegations that Linxx advertised on its website to recruit instructors, and that "Linxx personnel were observed delivering TSO's proposal to the contracting office, without even being accompanied by a TSO representative." With regard to the advertising, it is undisputed that both TSO and Linxx are providing instructors under the contracts. Therefore, the fact that Linxx was recruiting instructors is not surprising, and does not suggest that TSO is reliant upon Linxx, or that Linxx is performing the primary and vital tasks of the contracts. TSO insists that the proposal delivery allegation is false.[5] Even if true, though, such matters would have no bearing on the substantive question of whether Linxx is TSO's "ostensible subcontractor."

Lastly, the Area Office did not comment on the teaming agreement between Brekford and Linxx, which indicated that Linxx would provide "staffing…to meet Proposal requirements." This agreement, however, was signed in January 2007 and expired after one year (*i.e.*, more than two years before the solicitations were issued). (Teaming Agreement at 3-4) Thus, Appellant's contention that it should be "assumed that this agreement relates to the two Solicitations at issue" is untenable. TSO was not a party to the teaming agreement, and there is no reason to believe the agreement is binding upon TSO. Furthermore, TSO and Linxx entered into a subcontract stating that Linxx will provide [XXXXXX]% of labor. The subcontract makes no mention of the teaming agreement. Logically, if TSO and Linxx were already bound by a teaming agreement, there would have been no need for a separate subcontract, or the parties would, at a minimum, have referenced the teaming agreement in the subcontract.

Contrary to Appellant's allegations, the record reflects that the Area Office thoroughly examined the relationship between TSO and Linxx. The Area Office considered the solicitations, TSO's proposals, the subcontract between TSO and Linxx, the tables describing the distribution of work between TSO and Linxx, the qualifications of TSO's personnel including Mr. Wall, and the standard practices in the industry. Although the Area Office did not address all of Appellant's protest allegations, those allegations are not meritorious, and thus do not demonstrate error on the part of the Area Office.

[5] TSO's President, Mr. Tezza, submitted to the Area Office a signed statement that he personally delivered TSO's proposals, along with a representative from Linxx.

V. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DENY the instant appeal.

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

KENNETH M. HYDE
Administrative Judge