United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Bering Straits Logistics Services, LLC Appellant, Appealed From Size Determination No. 2-2011-77	SBA No. SIZ-5277 Decided: September 2, 2011

APPEARANCES

William A. Roberts, III, Richard B. O'Keeffe, Jr., John R. Prairie, and Benjamin Kohr, Wiley Rein, LLP, and William K. Walker, Esq., Walker Reausaw, Washington, D.C., Counsel for Bering Straits Logistics Services, LLC

David S. Cohen and Laurel A. Hockey, Cohen Mohr, LLP, Washington, D.C., Counsel for ProLog, Inc.

DECISION[1]

I. Introduction

On August 30, 2010, the Contracting Officer (CO) for the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA3002-10-R-0032 (solicitation) as a competitive 8(a) Business Development (BD) small business set-aside. The solicitation sought a contractor to provide supply and transportation support services at Tyndall Air Force Base, Florida. The CO assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of $35.5 million.[2]

The Performance Work Statement (PWS) calls for the contractor to provide Tyndall AFB

[1] This decision was initially issued on September 2, 2011, under a protective order to prevent the disclosure of confidential or proprietary information. I also issued an order for redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received a timely request for redactions and considered that request in redacting the decision. OHA now publishes a redacted version of the decision for public release.

[2] An incorrect size standard of average annual receipts not to exceed $32.5 million was stated in the solicitation. Pursuant to 13 C.F.R. § 121.402(d), the Small Business Administration corrected the size determination to average annual receipts not to exceed $35.5 million.

with a board range of supplies, equipment, mobility bags, clothing, weapons and other materials. Solicitation, PWS, at 23.1.1. The contractor will provide central storage and inspection of the equipment. The contractor will also provide transportation services. These will include traffic management, both air and surface terminal operations, vehicle operations, maintenance management services passenger movement, small air terminal operations, cargo movement, outbound packaging and preservation, receiving, and personal property services. Solicitation, PWS, at 25.1.1.

On April 22, 2011, the CO notified ProLog, Inc. (ProLog), an unsuccessful offeror, that award was made to Bering Straits Logistics Services, LLC (Appellant) that same day. On April 29, 2011, ProLog protested Appellant's eligibility due to alleged affiliation with DEL-JEN, Inc. (DEL-JEN), an ostensible subcontractor.

On June 13, 2011, the Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued a size determination finding that Appellant is other than small due to a violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). The Area Office found Appellant unusually reliant on its ostensible subcontractor, DEL-JEN, an acknowledged large business, for the purpose of this procurement.

On June 28, 2011, Appellant filed an appeal of the Area Office's size determination with SBA's Office of Hearings and Appeals.

For the reasons discussed below, the appeal is granted, and the size determination is reversed.

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). Accordingly, this appeal is properly before OHA.

B. Size Determination

The Area Office stated Appellant submitted its final proposal revision with its last submitted pricing under the solicitation on February 3, 2011. Accordingly, this was the date the Area Office used to determine Appellant's size. 13 C.F.R. § 121.404(d). The Area Office also noted that Appellant is a wholly-owned subsidiary of Bering Straits Native Corporation (BSNC), an Alaska Native Corporation (ANC). However, the size determination explains Appellant's size was calculated independent of its parent company and its wholly-owned entities 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.”).

The Area Office found Appellant is a certified 8(a) BD participant and is itself small,

based on the solicitation, regulations, OHA precedent, and the all aspects standard, yet, the Area Office concluded Appellant is other than small for the instant procurement due to its affiliation with DEL-JEN. Specifically, the Area Office determined Appellant would be unduly reliant upon DEL-JEN in violation of the ostensible subcontractor rule based on a number of factors: Appellant's technical proposal is dependent on the qualifications of DEL-JEN, the current incumbent; DEL-JEN employees represent three of the five key employees identified by Appellant, as well other key roles, and serve as the program manager; Appellant's past performance proposal is dependent on DEL-JEN's qualifications, especially past performance and experience; DEL-JEN's subcontractor labor exceeds 49% of the labor costs for the contract and represents the more complex and costly functions; and many joint responsibilities indicating an intermingling of responsibilities between Appellant and DEL-JEN.

C. Appeal Petition

Appellant alleges several clear material mistakes of fact requiring its appeal be granted. First, Appellant asserts, as an ANC, Appellant, by law, is considered small for procurement competitions, but has the ability to draw on the resources of a much larger corporation, BSNC. Appellant notes Appellant was permitted by the solicitation and Government Accountability Office (GAO) precedent to propose the experience and past performance of BSNC affiliates, which Appellant did. Appellant argues, as an ANC, Appellant is not a typical small business at risk of being subordinated to a large subcontractor. Appellant asserts it has the ability to finance, staff, and perform the work required by this contract and does not need to be unusually reliant on DEL-JEN to win and perform the contract. Appellant cites *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5075 (2009), to support its contention that an ANC can rely upon its parent's experience to allay concerns of undue reliance on a large subcontractor.

Similarly, Appellant argues it was not unusually reliant upon DEL-JEN for key personnel. Appellant argues the Area Office misconstrued Appellant's proposal. Appellant asserts its proposal identified only four key employees and only one of them would be a DEL-JEN employee under the new contract. Appeal at 3, 14. Appellant states the Area Office failed to account for the fact that while the project manager is currently a DEL-JEN employee, he would be an employee of Appellant upon contract award. Moreover, Appellant argues it was fully capable of performing the contract without hiring any DEL-JEN employees and, accordingly, Appellant is not reliant on DEL-JEN.

Finally, Appellant asserts it will perform the majority of the requirements and that the tasks performed by Appellant constitute the more complex tasks required under the contract. Appellant states the solicitation divides the contract into four areas: (1) management of the program as a whole; (2) material management; (3) distribution; and (4) vehicle management. Appellant notes only *** will be performed by DEL-JEN. Appellant argues while DEL-JEN plays an important role, Appellant performs ***. Appellant states Appellant was primarily responsible for the preparation and submission of the proposal, dominates three of the four key areas, and is the contractor providing ***. Appellant acknowledges DEL-JEN will provide a substantial number of employees, but states the majority will *** under the contract." Appeal at 19. Based on the evidence, Appellant asserts the more complex and costly tasks are performed by Appellant and there is no undue reliance on DEL-JEN.

D. ProLog's Response to the Appeal

ProLog asserts the size determination properly considered all aspects of the parties' relationship and is based on: facts in the teaming agreement between Appellant and DEL-JEN; the technical, past performance, and cost volumes of Appellant's proposal; Appellant's list of key personnel; and a breakdown of the labor costs on the contract.

ProLog asserts the size determination is well-supported. ProLog notes the Area Office relied on Appellant's proposal which emphasizes DEL-JEN, the current incumbent, will play a major role on the contract and serves as a key member of Appellant's team. ProLog states the Area Office recognized that Appellant's proposal does not distinguish whether Appellant or DEL-JEN would perform the majority of the functions under the contract. ProLog notes Appellant will perform 29 functions, DEL-JEN will perform 25, and together they will perform 56 functions, which are not identified into discrete tasks for Appellant and DEL-JEN. ProLog argues the Area Office's finding of undue reliance under the ostensible subcontractor rule is supported by the intermingling of responsibilities between Appellant and DEL-JEN. ProLog Response at 11 (citing *Size Appeal of The Analysis Group, LLC*, SBA No. SIZ-4814 (2006)). ProLog states OHA has upheld ostensible subcontractor affiliations where, as here, the proposal emphasizes a team approach and the subcontractor's role enhances the competitive status of the proposal. ProLog Response at 12. ProLog asserts the Area Office appropriately considered that three of Appellant's five key personnel, including the project manager, are currently employed by DEL-JEN and that Appellant will maintain the incumbent management staff and work force.

ProLog notes the size determination demonstrates Appellant will rely upon DEL-JEN for more than 49% of the contract labor and the record indicates that the labor costs for each of the base period and option periods 1, 2, 3, and 4 exceeds 49% of the labor costs. ProLog states OHA has found that a teaming agreement providing the ostensible subcontractor with as close as possible to 49% of the effort demonstrates the ostensible subcontractor's indispensable role. ProLog Response at 20 (citing *Size Appeal of InfoTech Enterprises, Inc.*, SBA No. SIZ-4346 (1999)). Moreover, ProLog states OHA case law supports the Area Office determination that Appellant's reliance on DEL-JEN's experience, especially as an incumbent, is probative of affiliation. ProLog Response at 21 (citing *Size Appeal of Alutiiq Education & Training*, SBA No. SIZ-5192 (2011)).

Additionally, ProLog argues Appellant's appeal is based on errors. ProLog states Appellant's use of the ANC exception is misplaced and is not supported by its proposal which does not clearly indicate that Appellant's parent or sister entities will perform on this contract. ProLog asserts that Appellant incorrectly represents that the Area Office decided that DEL-JEN would not perform the primary and vital requirements of the solicitation. ProLog states the Area Office had sufficient facts upon which to find affiliation under the ostensible subcontractor rule and did not need to go further in addressing the primary and vital prong than it did. Finally, ProLog argues Appellant fails to support its assertion that it is responsible for performing the primary and vital requirements under the solicitation and the most costly and complex work.

III. Issue

Whether the size determination finding a 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. Appellant's Motion to Supplement the Record

With its appeal, Appellant moved to admit two additional documents into the record: (1) a redacted CO statement filed in connection with a GAO protest; and (2) a signed declaration of the Vice President for Business Development of BSNC/Vice President of Appellant. Appellant asserts the documents do not enlarge the issues, does not prejudice the parties, and are relevant as they serve to clarify the arguments made on appeal. ProLog objects to the admission of the 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).

Here, Appellant's arguments for the new evidence are unpersuasive. The CO statement is a statement prepared in the course of pending litigation filed at GAO to defend the Air Force's award decision. The actual proposal, which the Area Office reviewed, is far more helpful for a size determination than a contracting officer's statement defending award in litigation. As for the declaration of the Vice President for Business Development of BSNC/Vice President of

Appellant, the declaration is based on evidence available at the time of the size determination that was not submitted to the Area Office. 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).

2. Appellant's Request to Reply to ProLog's Response

The record in this matter closed on July 14, 2011, as explicitly stated in the notice and order issued on June 29, 2011. On July 19, 2011, five days after the record closed, Appellant requested an opportunity to reply to ProLog's response to Appellant's motion to admit new evidence. Appellant did not seek leave to file late comments, nor did it show good cause for its late filing. Accordingly, because Appellant's pleading filed after the close of record was filed without leave and failed to show good cause for the late filing, it will not be considered.

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 Area Office relied heavily on the technical, past performance, and price volumes of Appellant's proposal. The record reflects that the Area Office considered: the solicitation; the technical, past performance, and cost volumes of Appellant's proposal; the teaming agreement between Appellant and DEL-JEN; Appellant's list of key personnel; a breakdown of the labor costs on the contract; and DEL-JEN's incumbency. The Area Office determined Appellant would be unduly reliant upon DEL-JEN in violation of the ostensible subcontractor rule based on a number of factors: (1) DEL-JEN employees represent three of the five key employees identified by Appellant and serve as the program manager; (2) Appellant's proposal is dependent on the qualifications of DEL-JEN, the current incumbent; (3) DEL-JEN's subcontractor labor exceeds 49% of the labor costs for the contract and represents the more complex and costly functions; and (4) shared responsibilities indicating an intermingling of responsibilities between Appellant and DEL-JEN.

1. Key Employees

Based on a request for information during the size review, the Area Office found three of five of Appellant's key personnel are currently DEL-JEN employees: the incumbent project manager, safety manager, and quality control manager. However, based upon Appellant's proposal organization chart, figure 3-1, in addition to Appellant's president, there are four key employees: the project manager, *** manager. According to Appellant's proposal, all but the *** manager will be Appellant's employees. "[A]n ostensible subcontractor analysis is undertaken on the basis of the solicitation and the proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010). The proposal indicates, along with two other key employees, that the project manager will be employees of Appellant.

The hiring of incumbent personnel is expected, required by Executive Order 13,495, and does not constitute undue reliance. Exec. Order No. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009). Executive Order 13,495 states that "The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees." *Id.* Although, in the past OHA has regarded the hiring of the incumbent contractor's personnel as indicative of undue reliance under the ostensible subcontractor rule, in accordance with the hiring practices encouraged by Executive Order 13,495, the hiring of the incumbent contractor's personnel is not a persuasive indicia of a violation of the ostensible subcontractor rule. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011).

Therefore, the Area Office erred as a matter of fact and law. Factually, only one of the key employees identified in the proposal will be an employee of Appellant and, legally, with the issuance of Executive Order 13,495, which explicitly encourages hiring an incumbent's employees, the hiring of an incumbent's employees is not a persuasive indicia of undue reliance.

2. Influence of Subcontractor's Qualifications

According to the Area Office's size determination, for its past performance, Appellant relied largely upon its various ANC affiliates and DEL-JEN to establish its ability to perform this contract, and not upon Appellant's own record of performance. The solicitation limited the number of contracts allowed to be submitted for past performance to 7.[3] Appellant's proposal includes four past performance contracts for itself and three past performance contracts for DEL-JEN.

Three of the four past performance contracts Appellant submitted for itself were performed by affiliate/sister companies of Appellant. This is the basis of the Area Office's size determination. However, the solicitation specifically allows past performance evaluation based on "the past performance of affiliated companies or operating divisions within the parent company or joint ventures of the parent company." Solicitation, Section M, at C(2). Therefore, Appellant's submission of these past performance contracts by its ANC affiliates was permitted by the solicitation, and should not be counted as indicia of unusual reliance. I also note the one

[3] Originally, the number of contracts allowed to be submitted for past performance was limited to 5, but Amendment 0003 increased the amount to 7.

past performance contract submitted for Appellant is a Tyndall Air Force Base Fuels Support contract. This past performance contract is thus for work at the same installation as the instant Supply and Transportation contract, and provides similar services. It is therefore a particularly relevant past performance contract, helping to support an award to Appellant. Further, the solicitation actually requires past performance information on proposed subcontractors. Solicitation, Section L, at E(3). Therefore, Appellant's inclusion of DEL-JEN's past performance contracts was required, and should not be counted as indicia of unusual reliance.

I therefore conclude that the Area Office erred in counting Appellant's past performance submissions as evidence of unusual reliance by Appellant on DEL-JEN.

3. Labor Costs

Another indicia of affiliation the Area Office relies upon is that the teaming agreement provides that the ostensible subcontractor shall have a level of effort as close to 49% of the contract as possible and DEL-JEN's projected labor costs exceeds 49% of the labor costs for the entire contract. Size Determination at 13. Federal Acquisition Regulation clause 52.219-14, Limitations on Subcontracting, requires, in a service contract, at least 50% of the cost of contract performance incurred for personnel be expended for employees of the concern. Although subcontracting that approaches the 50% threshold may raise concerns of an ostensible subcontractor issue, it is only after 50% is exceeded that the regulation is violated. The Area Office's determination is not based on exceeding the 50% cut-off and there is nothing in the record to indicate DEL-JEN will exceed 50%. Accordingly, the Area Office made a legal error in finding affiliation where the subcontracting costs do not exceed the regulatory limit.

4. Division of Work

The Area Office determination relies on the workforce matrix in Appellant's technical proposal to note that Appellant will perform 29 functions, DEL-JEN will perform 25 functions, and they will jointly perform a majority, 56, of the functions under the contract. Size Determination at 12; Appellant's Technical Proposal- Volume II at 55-57. An intermingling of work between a challenged concern and its ostensible subcontractor, without discrete tasks identified for each firm, can support finding the firms are affiliated under the ostensible subcontractor rule. *Size Appeal of CWU, Inc. and U. S. Dept. of Homeland Security*, SBA No. SIZ-5118, at 13 (2010.

However, the workforce matrix relied on in the size determination tracks the government's PWS and the 56 joint Appellant/DEL-JEN functions, are ministerial and not indicative of undue reliance. Six examples of these minor administrative joint performance functions the Area Office relied on in finding affiliation are: 2.1.2.1. Safety Program and 2.1.2.2 Safety Compliance, which according to the PWS simply requires compliance with the Occupational Safety and Health Act; 2.1.2.3.17 Key Control and 2.1.2.3.17.1 Lost Keys, which the PWS explains deals with adhering to Air Force procedures to properly safeguard keys and report lost keys; 2.1.2.6.11 Freedom of Information Act (FOIA) Program, which amounts to compliance with the Department of Defense FOIA Program; and 2.1.2.16 Traffic Laws, which under the PWS requires compliance with base traffic regulations. These functions are

administrative requirements of a routine nature with which all contractors and subcontractors are required to comply. The functions outlined in the workforce matrix thus do not support a conclusion of undue reliance, but simply indicate Appellant and DEL-JEN will both comply with various base policies and procedures. The Area Office's determination to the contrary was in error.

Additionally, although a prime contractor's failure to assign discrete tasks to its subcontractor can support a finding of unusual reliance, the proposal demonstrates that DEL-JEN's resources will be dedicated to certain sectors of the transportation portion of the contract: ***. Those are the areas where all of DEL-JEN's employees are assigned. Therefore, as to the important areas of substantive performance under this contract, Appellant has specifically designated discrete tasks for DEL-JEN to perform. The Area Office thus erred in finding that Appellant was unusually reliant on DEL-JEN based upon the workforce matrix in Appellant's proposal.

V. Conclusion

The record does not support the conclusion that Appellant would be unusually reliant upon DEL-JEN for performance of the Air Force contract. Accordingly, I find the Area Office erred in concluding that DEL-JEN is an ostensible subcontractor. Thus, the appeal is GRANTED, and the size determination is REVERSED. Because Appellant is not affiliated with DEL-JEN, and the Area Office determined Appellant is a certified 8(a) BD participant and is itself small, Appellant is an eligible small business for this procurement.

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

CHRISTOPHER HOLLEMAN
Administrative Judge