United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Four Winds Services, Inc. Appellant, RE: Shiloh Services, Inc. Petition for Reconsideration of SBA No. SIZ-5260 Appealed From Size Determination Nos. 5-2011-56, -57	SBA No. SIZ-5293 (PFR) SBA No. SIZ-5260 Decided October 13, 2011

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

On June 9, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination Nos. 5-2011-56 and 5-2011-57, finding Shiloh Services, Inc. (Petitioner) to be an eligible small business for Solicitation No. FA8601-11-R-0005 issued by the U.S. Department of the Air Force. On June 14, 2011, Four Winds Services, Inc., the incumbent on the predecessor contract and one of the original protesters, appealed to the Office of Hearings and Appeals (OHA).

On July 18, 2011, OHA issued its decision in *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011). OHA found that Petitioner's proposal violated the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4); as a result, OHA granted the appeal and remanded the matter to the Area Office for a new calculation of Petitioner's size. Specifically, OHA determined that Petitioner's proposed subcontractor, Phoenix Management Inc. (PMI), "will perform the primary and vital contract tasks because, according to [Petitioner's] proposal, PMI will perform the majority of the contact labor, and a PMI employee will hold the second most influential contract position." *Four Winds* at 7.

Petitioner argued during the appeal that, as the prime contractor, Petitioner would perform the majority of the contract work because its personnel would perform the day shift work and manage the contract, whereas PMI personnel would perform the mid and night

shifts.[1] Therefore, according to Petitioner, 52% of the overall effort would be performed by Petitioner itself, and 48% by PMI. *Id.* at 5 - 6. OHA rejected Petitioner's argument, however, because this division of labor was not reflected in Petitioner's actual proposal. *Id.* at 6 and fn.1. Rather, Petitioner had addressed this purported breakdown of labor only in response to discussion questions posed by the Air Force, but not in the proposal itself. Petitioner's proposal indicated, in very general terms, that Petitioner planned to staff the contract by hiring incumbent employees if possible, or by utilizing PMI personnel. Proposal, Vol. I, at 5. Thus, OHA could not ascertain, based on the proposal, "whether [Petitioner] intends to supply any employees at all, aside from the key employees, to perform this contract." *Four Winds* at 7. Furthermore, the proposal identified a PMI employee, Mr. John C. Yinger, as the proposed "Day Shift Supervisor," thereby undermining Petitioner's contention that it alone would perform the day shift work. Proposal, Vol. I, at 10.

B. Petition for Reconsideration

On August 8, 2011, Petitioner requested reconsideration of OHA's decision.[2] Petitioner contends that OHA's decision is flawed for three reasons. First, Petitioner argues that OHA ignored evidence in the record showing that Petitioner would perform 53% of the work with its own efforts. Second, Petitioner asserts that OHA unreasonably found Petitioner's plan to hire the incumbent workforce to be problematic. Third, Petitioner maintains that OHA misinterpreted Petitioner's proposal with respect to key personnel.

Petitioner first contends that, contrary to OHA's decision, Petitioner's proposal did make a binding "commitment to perform [the majority of] work under the contract with [Petitioner's] own efforts." Petition at 7 (emphasis in original). In particular, Petitioner argues that OHA should have found that Petitioner's responses to the discussion questions were part of Petitioner's proposal, instead of "merely an informal communication without legal effect." Petition at 13. Petitioner asserts that "[e]xchanges between offerors and the contracting agency which modify, enhance or amplify the offer are legally part of that offer." *Id.* Petitioner further emphasizes that, in its response to discussion questions, Petitioner stated that:

> [Petitioner] has teamed with [PMI] in a Prime Contractor/Subcontractor Teaming Agreement. [Petitioner] is the Prime Contractor and will perform 53% of the work and [PMI] will perform 47%. [Petitioner] will provide the [contract management personnel and] the Fuels Specialists (including Cryotainer) for the day shifts. [PMI] will provide the Lab Technician and the Fuels Specialists for the swing shifts and mid shifts.

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[1] The procurement at issue involved "only one line item: fuels management." *Four Winds* at 2. Petitioner maintained that both it and PMI would perform these fuels management services, but during different shifts.

[2] OHA afforded an opportunity for the original Appellant, Four Winds Services, Inc., to respond to the petition, but no response was received.

Exhibit 8, at 3. According to Petitioner, this response became part of Petitioner's proposal and constitutes "a firm commitment as to how the contract would be performed." Petition at 10. Petitioner argues that OHA erred by failing to recognize this commitment, and by instead concluding that PMI would perform the majority of the contract.

Petitioner also asserts that, along with its response to the discussion questions, Petitioner attached certain revisions to its proposal. Petitioner asserts that "[t]hese proposal revision pages are clear, unequivocal comments in the record accepted by the Area Office that establish that [Petitioner] affirmatively stated that it would perform 53% of the work, and establish that [Petitioner] identified with which specific employee positions [Petitioner] would perform this work." *Id.* at 13. In light of its response to discussion questions and proposal revisions, Petitioner insists that the "proposal was very clear when it stated that the entire [day] shift of [employees] would be provided by [Petitioner]," not PMI. *Id.* at 16.

Petitioner next complains that OHA improperly faulted Petitioner for planning to hire the incumbent workforce. Petitioner insists that OHA itself has previously acknowledged that it is routine practice in Government services contracts for successor companies to hire the incumbent's employees. In addition, the Air Force's Contracting Officer for this particular acquisition stated that it would be expected for the successor contractor to hire the incumbent workforce. Thus, according to Petitioner, OHA erroneously concluded that, merely because Petitioner proposed to utilize the incumbent workforce, Petitioner was "bringing nothing to this procurement but its small business status." *Id.* at 17 (citing *Four Winds* at 7).

Lastly, Petitioner objects to OHA's findings with respect to Petitioner's key personnel. In the decision, OHA noted that the proposed contract manager was a contingent hire (not a current employee of Petitioner), and the proposed assistant contract manager, Mr. Yinger, was a PMI employee. *Four Winds* at 6. OHA therefore determined that "a PMI employee will hold the second most influential contract position." *Id.* at 7. OHA went on to conclude that "because PMI will provide the assistant contract manager, PMI will also provide over 50% of the required contract labor according to [Petitioner's] own organizational chart." *Id.* Petitioner insists that OHA's finding is "a clear non sequitur" and that "OHA essentially re-writes [Petitioner's] proposal when OHA engaged in the assumption that PMI would employ all three shifts of Fuels Specialists, simply because Mr. Yinger was employed by PMI." Petition at 16.

II. Discussion

A. Jurisdiction and Standard of Review

A party seeking reconsideration of an OHA decision must serve the petition for reconsideration within twenty days after service of the written decision. 13 C.F.R § 134.227(c). Petitioner filed the instant petition for reconsideration within twenty days of the service of the decision in *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011). Accordingly, this matter is properly before OHA for reconsideration.

SBA's regulations provide that OHA may grant a petition for reconsideration "upon a clear showing of an error of fact or law material to the decision." 13 C.F.R § 134.227(c). This is

a rigorous standard. *Matter of Hazzard's Excavating and Trucking Co.*, SBA No. BDP-364 at 2 (2010) (PFR); *Size Appeal of Envtl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935 at 2 (2008) (PFR). A petition for reconsideration is "appropriate only in limited circumstances, such as situations where OHA has misunderstood a party, or has made a decision outside the adversarial issues presented by the parties." *Size Appeal of KVA Electric, Inc.*, SBA No. SIZ-5057 at 2 (2009) (PFR). A petitioner will not prevail on a motion for reconsideration if it merely repeats arguments OHA already considered in the original decision, or seeks rehearing based upon evidence previously presented. *Size Appeal of Luke & Associates, Inc.*, SBA No. SIZ-4993 at 2 (2008) (PFR).

B. Analysis

The bulk of this Petition for Reconsideration is devoted to arguing that OHA failed to consider Petitioner's entire proposal. Specifically, Petitioner argues at length that OHA should have deemed Petitioner's letter responding to discussion questions, and the accompanying proposal revision pages, to be part of Petitioner's proposal. According to Petitioner, if these documents had been considered part of the proposal, OHA could only have concluded that Petitioner itself would be performing the majority of work, and therefore was responsible for the "primary and vital" contract requirements. *E.g., Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 6-7 (2011) (prime contractor was performing the "primary and vital" requirements where the contract called for training instructors, and both the prime contractor and the subcontractor would provide instructors, but the prime contractor would supply the majority of instructors).

The problem for Petitioner — both in the original appeal and upon reconsideration — is that its proposal made no firm commitment that Petitioner would perform the day shift work. As OHA observed in its decision, the initial proposal that Petitioner submitted to the Air Force was silent as to the breakdown of labor between Petitioner and PMI, and unclear as to which firm would employ which positions. Further, the proposal identified a PMI employee as the proposed "Day Shift Supervisor," and indicated that Petitioner might utilize PMI personnel if its attempts to recruit incumbent staff were unsuccessful. If anything, then, Petitioner's initial proposal suggested that PMI (not Petitioner) would perform the majority of the work. Due to the vagueness of Petitioner's proposal, OHA appropriately concluded that, "it is unclear whether [Petitioner] proposed to provide any contract employees at all." *Four Winds* at 6.

In its request for reconsideration, Petitioner does not argue that its initial proposal made a clear commitment that Petitioner would perform the majority of the contract work. Instead, Petitioner contends that such a commitment arose through its letter responding to discussion questions, and in accompanying revisions to Petitioner's proposal. As explained below, these arguments are without merit.

Contrary to Petitioner's assertions, a response to discussion questions is not equivalent to a proposal, if that response attempts to introduce new or different information rather than merely clarifying material already contained in the proposal. Federal Acquisition Regulation 15.306(d) (recognizing that discussions are undertaken for the purpose of "allowing the offeror to revise its proposal") and 15.307(b)(indicating that formal proposal revisions may be necessary

to "clarify and document understandings reached during negotiations"); *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125, at 8 (2010)(explaining that an offeror's final proposal consists of the initial proposal and "any revisions subsequent to the initial proposal," not all communications which occur during discussions). Indeed, the very fact that Petitioner submitted proposal revisions in addition to its responses suggests that the responses alone would not suffice to accomplish changes in the proposal. Nor does Petitioner cite any persuasive legal authority in support of its argument that a response to discussion questions must always be considered part of the proposal, even if the substance of the response is not reflected anywhere in the proposal.[3]

Petitioner also argues that its proposal revision pages should have been considered part of the proposal. The revision pages, however, still do not demonstrate that Petitioner alone would perform the day shift work independently from PMI. Petitioner repeatedly quotes its statements that "[Petitioner] is the Prime Contractor and will perform 53% of the work and [PMI] will perform 47%" and "[Petitioner] will provide the [contract management and] the Fuels Specialists (including Cryotainer) for the day shifts. [PMI] will provide the Lab Technician and the Fuels Specialists for the swing shifts and mid shifts." These statements, however, are found only in the letter responding to discussion questions, not in the proposal revision pages. Petitioner has identified no specific language in the proposal revision pages themselves to establish that Petitioner alone would perform the majority of the work. Rather, it appears that, on this issue, the proposal revision pages did not significantly alter the contents of the initial proposal. Furthermore, Petitioner has offered no reason to believe that OHA did not already consider these proposal revision pages. While it is true that the *Four Winds* decision remarked that Petitioner's letter responding to discussion questions was not part of Petitioner's proposal, OHA made no such statement with respect to the proposal revision pages. Insofar as Petitioner disagrees with OHA's analysis of the proposal, but can point to no specific error, Petitioner has not stated a valid basis for reconsideration. *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5210, at 3 (2011) (PFR) (denying reconsideration of issues that were already considered and rejected in the initial decision).

Petitioner further contends that OHA erroneously determined that it would be improper for Petitioner to hire incumbent workers. It is true, as Petitioner argues, that it is common practice in Government services contracts for successor companies to hire the incumbent's employees. *E.g., Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 28-30 (2011). The problem here, though, was not merely that Petitioner planned to hire the incumbent workforce, but rather that Petitioner's proposal was already unclear as to the division

[3] Petitioner refers to a number of cases from other tribunals holding that, when an agency opens discussions with one offeror, the agency must also conduct discussions with other offerors remaining in the competitive range. For example, in *Raytheon Co.*, B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37, the U.S. Government Accountability Office (GAO) determined that a procuring agency had inadvertently engaged in discussions with one offeror, and noted that "[t]he acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal." GAO therefore recommended that the agency also conduct discussions with the other offerors, and obtain revised proposals. Such cases have no bearing on the issue presented here — *i.e.*, whether a response to discussion questions is equivalent to a binding proposal.

of labor between the prime contractor and subcontractor. Thus, the broad statements in Petitioner's proposal that Petitioner planned to hire the incumbent workforce, but might utilize PMI personnel if these efforts were unsuccessful, contributed to the lack of clarity as to which firm would actually perform the contract.

Petitioner also takes issue with OHA's statement that "because PMI will provide the assistant contract manager, PMI will also provide over 50% of the required contract labor according to [Petitioner's] own organizational chart." This finding again stems from the lack of clarity in Petitioner's proposal. During the appeal, Petitioner claimed that it would perform the day shift work, while PMI would perform the mid and night shifts. However, Petitioner's proposal did not reflect this division of labor, and the proposal identified Mr. Yinger, a PMI employee, as the "Day Shift Supervisor." Thus, based on Petitioner's proposal, OHA could reasonably infer that PMI would perform the day shift work, and therefore the majority (if not the entirety) of the contract.

III. Conclusion

Petitioner has not shown a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c). Accordingly, the petition for reconsideration is DENIED.

KENNETH M. HYDE
Administrative Judge