United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Onopa Management Corporation, Appellant, Appealed From Size Determination No. 3-2011-102	SBA NO. SIZ-5302 Decided: December 5, 2011

APPEARANCES

Joseph M. Goldstein, Esq., Fort Lauderdale, Florida, for Appellant

DECISION[1]

I. Introduction and Jurisdiction

On September 16, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-102 finding Onopa Management Corporation (Appellant) other than small for the procurement at issue. The Area Office determined that Appellant's relationship with [subcontractor][2] violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the size determination is flawed in numerous respects. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

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, so the

[1] This decision was initially issued on November 15, 2011. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

[2] At Appellant's request, the identity of Appellant's subcontractor for the instant procurement has been redacted throughout the decision. All references to [subcontractor] refer to this firm.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On August 12, 2010, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA4800-10-R-0013 (RFP) seeking refuse collection and recycling services. The Contracting Officer (CO) set aside the procurement entirely for participants in the SBA 8(a) Business Development (BD) program and designated North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of $12.5 million in average annual receipts. The procurement was conducted under Federal Acquisition Regulation (FAR) Part 12—Acquisition of Commercial Items.

The Performance Work Statement (PWS) explains that the contractor will be required to perform solid waste collection and recycling services at three locations in Virginia: Langley Air Force Base (AFB), Fort Eustis, and the Hampton Veterans Affairs Medical Center (VAMC). The contractor is to provide "all personnel, equipment, tools, materials, vehicles, supervision, and other items and services" to carry out the contract. (PWS ¶ 1.)

In performing waste collection services, the contractor must provide containers (including dumpsters and compactors), establish vehicle routes, and set up collection schedules. The contractor is also responsible for collecting any litter, waste, or recyclable materials within a ten foot radius of any receptacle. (PWS ¶ 1.1.1.) Food waste containers must be emptied daily, and public trash cans and other containers must be emptied before reaching 80% capacity. (PWS ¶¶ 1.1.1.1, 1.1.1.2.) The contractor must also be prepared to accommodate special events, unforeseen pickups, and the collection of storm debris. (PWS ¶¶ 1.1.2, 1.1.3, 1.1.4.) The contractor is responsible for maintenance of containers and collection areas, and collection vehicles must be properly weighed and recorded. (PWS ¶¶ 1.1.10, 1.1.11.)

The contractor is also responsible for "processing" recyclable materials. According to the PWS, the contractor would provide collection containers and sell the recyclable commodities, with the proceeds to be submitted to the Government. (PWS ¶ 1.2.) The materials to be recycled vary according to each location. (PWS ¶¶ 1.2.1, 1.2.1.1, 1.2.1.2.) The PWS specifies the locations where recycling containers must be placed. (PWS ¶ 1.2.2, Appendices A, B, C.) Additionally, during certain hours, the contractor must provide staff at recycling centers at Langley AFB and Fort Eustis to assist customers with unloading and separating materials. (PWS ¶¶ 1.2.3, 1.2.3.1, 1.2.3.2.)

The transportation and disposal of both solid waste and non-marketable recyclable materials is the responsibility of the contractor. (PWS ¶¶ 1.3.1, 1.3.2.) The contractor must maintain and clean all equipment and containers and must report on a monthly basis the total tonnage of refuse and recyclable materials collected, disposed of, and sold. (PWS ¶¶ 1.4, 1.5.) The contractor is also required to designate a contract manager to oversee performance. The contract manager must have full authority to make decisions for the contractor and must be

available during working hours to resolve problems. (PWS ¶ 4.16.)

Attached to the PWS are tables that provide estimated workload data and estimated pick up frequency for each performance location. At Langley AFB, the estimated annual quantity of refuse to be collected is 3,400 tons. The estimated annual quantity of recyclable commodities (including paper, cardboard, metal, and co-mingled items such as plastic and glass) at Langley AFB is 370 tons. (PWS Appendix A, Table A1.) At Fort Eustis, the estimated annual quantity of refuse to be collected is 3,425 tons. The estimated annual quantity of recyclable commodities at Fort Eustis is 1513.3 tons. (PWS Appendix B, Table B1.) At the VAMC, the final estimate is listed as "600 tons refuse" with no identified quantity of recyclables. Furthermore, based on the cubic yard capacity listed for each item in the VAMC table, it appears there are 152 cubic yards available for recycling and 302 cubic yards (along with 85 thirty gallon trash cans) available for refuse. (PWS Appendix C, Table C1.)

At Langley AFB, the majority of buildings require trash collection three to six times per week. A smaller number of buildings require pickup only once or twice per week. (PWS Appendix A, Table A2.) The buildings at Langley AFB require collection of cardboard once per week and collection of paper and co-mingled items once every other week. (PWS Appendix A, Tables A3-A4.) At Fort Eustis, most of the buildings require trash collection two to five times per week. A very small number of buildings require trash collection only once per week. (PWS Appendix B, Table B2.) Cardboard pick-up is required once per week, and paper/co-mingled pick-up is required once every other week. (PWS Appendix B, Tables B4-B5.) There is no specific pick-up schedule listed for the VAMC.

The RFP instructed offerors to submit proposals in two volumes: price and past performance. (RFP 118.) Completion of the price proposal volume required offerors to insert proposed prices into the blank price evaluation sheet attached to the RFP. The past performance volume was to contain information relating to no more than five contracts "in the area of refuse and recycling services" performed in the previous three years. (RFP 119.) The Air Force would assess the relevancy of each contract, and would assign a rating of relevant, semi-relevant, or not relevant. In the event of a teaming arrangement, offerors were directed to "provide complete information as to the arrangement, including any relevant and recent past performance information on previous teaming arrangements or joint ventures with same partner. If this is a first time joint effort, each party to the arrangement must provide a list of past and present recent and relevant contracts." (RFP 119.) The RFP provides that the contract will be awarded on a "best value" basis to the firm whose proposal is most advantageous to the Government. In making the award decision, "[p]ast performance is significantly more important than price." (RFP 121.)

A "Refuse and Recycling Revenue Share Plan" was included with the solicitation. (RFP, Attachment 7.) The plan is designed to encourage contractors "to achieve highest financial return on recyclables while ensuring responsible financial management and to minimize the waste going into the solid waste landfills." *Id.* at 2. According to the plan, if recycling constitutes at least 40% of the total tonnage of waste collected for each place of performance, the contractor will receive a share of the revenues returned to the Government. The amount of revenue to be received by the contractor increases as the percentage of recycling rises. Thus, if recycling is less

than 40% of total tonnage, the contractor receives no added revenue. If recycling constitutes 40% of total tonnage, the contractor receives 25% of revenues returned. If recycling constitutes 45% of total tonnage, the contractor receives 30% of revenues returned. If recycling constitutes 50% of total tonnage, the contractor receives 35% of revenues returned. If recycling exceeds 50% of total tonnage, the contractor receives 40% of revenues returned. *Id.* at 3.

In response to the Area Office's request to identify the "primary and vital" contract requirements, the CO responded:

> I would say the entire contract is primary and vital. The DoD has a goal to recycle, at a minimum, 40% of their waste. So I guess if you do the math that way, it could be construed that the primary service is refuse because the remaining waste would be 60%. But the goals are to increase recycling and reduce waste, which is why we are incentivizing the contractors to find ways to get Langley and Fort Eustis to recycle.

Email from Melissa Tamayo, Contracting Officer, U.S. Department of the Air Force, to Scott Nirk, Size Specialist, U.S. Small Business Administration (May 12, 2011). In response to the CO's email, another Air Force official added:

> I agree that the primary and vital requirements are refuse collection, transportation and disposal/disposition services. That being said, servicing the 90 gallon toters is certainly a requirement as well in that we are required by [Executive Order (EO) 13,423[3]] to divert 40% of the bases' waste from the landfills and to increase the diversion rate each year in hopes of eventually recycling waste at 100%. Of course this is optimistic, but if we eliminate the 90 gallon toter service, the waste that is generally collected in toters will go back into the waste stream and into the landfills which will not help us meet the EO requirement in terms of preserving our environment.

Email from Jacqueline Howard, Contract Performance Evaluator, U.S. Department of the Air Force, to Scott Nirk, Size Specialist, U.S. Small Business Administration (May 12, 2011).

B. Appellant's Proposal

On October 22, 2010, Appellant submitted its initial proposal, self-certifying as a small business. On January 24, 2011, Appellant submitted its final proposal revision. The price proposal consists of a completed price evaluation sheet, as required by the RFP. The final price schedule lists 30 contract line item numbers (CLINs) for the base year and 30 CLINs for each of four option years. Appellant's total proposed price was $6,848,885.

Appellant's past performance proposal explains that Appellant is an 8(a) BD program participant and would serve as the prime contractor with [subcontractor] as its subcontractor. (Proposal Vol. II, Tab A, at 1.) The proposal indicates that Appellant will be responsible for

[3] 72 Fed. Reg. 3,919 (Jan. 24, 2007).

overall contract management, will "self perform all of the recycling requirements," and will perform the administrative functions. *Id.* at 2. Appellant will "process and market the recyclables with the help of [subcontractor's local knowledge of recycling markets." *Id.* [Subcontractor] will perform the refuse collection services and provide all equipment necessary for contract performance. Specifically, the proposal explains [subcontractor's] role as follows:

> [Appellant] will subcontract to [subcontractor] the refuse collection, transportation and disposal services. [Subcontractor] will manage the refuse collection part of the contract and provide the refuse collection drivers (front load and rolloff trucks). [Subcontractor] will provide all equipment, trucks, containers and support vehicles to enable performance, all of which will be based out of [subcontractor's] local facility at Hampton Roads, VA. [Subcontractor's] existing supervisors and managers will supervise [subcontractor's activities, including all quality and safety issues.

Id. In addition, the proposal states that Appellant will employ a [subcontractor] official to manage the contract. The proposal also contains a formal teaming agreement between Appellant and [subcontractor]. The teaming agreement was executed on October 19, 2010, and indicates that Appellant will be responsible for the contract's recycling requirements, while [subcontractor] will perform the refuse collection services.

The proposal includes past performance information on five contracts (four submitted with the initial proposal and one submitted with the final proposal) for which [subcontractor] was the prime contractor, as well as two contracts (one submitted with the initial proposal and one submitted with the final proposal) for which [subcontractor] was a subcontractor. (Proposal Vol. II, Tab B.) Appellant had no involvement with any of those contracts. The proposal also includes a list of ten other contracts under which [subcontractor] performed waste collection services but which did not meet the relevance criteria set forth in the RFP. *Id.* Again, Appellant was not involved with any of these contracts; they were solely related to [subcontractor's past experience. The proposal includes past performance information on one contract (submitted with the final proposal) at Eglin AFB for which Appellant served as the prime contractor and [subcontractor] served as subcontractor. (Proposal Vol. II, Tab C.) The proposal describes that Eglin AFB contract as follows:

> [Appellant] subcontracts [subcontractor] to provide all equipment and personnel for base wide [military family housing (MFH)] refuse and recyclables collection at Eglin AFB. There were 2,359 MFH units at the start of the contract which have been reduced to 920 by an ongoing demolition/refurbishment project. [Subcontractor] provides each MFH unit with a 65 gallon cart for refuse, a 65 gallon cart for yard trash and a 35 gallon cart for recyclables. Each MFH receives twice a week refuse collection, and weekly yard trash and recyclables collection. [Subcontractor] segregates all of the recyclables at the point of collection (curbside) and delivers them segregated to the Base Recycling center.

Id. The proposal also includes a list of nineteen federal refuse collection and recycling contracts performed by [subcontractor] since 2003. (Proposal Vol. II, Tab D.) Appellant was not involved

in performing those contracts. Finally, the proposal includes five letters authorizing past clients of [subcontractor] to discuss [subcontractor's] performance with the government and with Appellant. (Proposal Vol. II, Tab E.) There are no client authorization letters related to Appellant's performance.

C. Contract Award and Protests

On March 18, 2011, the CO notified all offerors that Appellant was the apparent successful offeror. On April 1, 2011, a disappointed offeror protested Appellant's size, but that protest was dismissed as untimely, and OHA subsequently affirmed the dismissal. *Size Appeal of Falcon, Inc.*, SBA No. SIZ-5239 (2011). On April 14, 2011, the Director of the 8(a) BD Office of Compliance requested a formal size determination.

On June 21, 2011, the Area Office issued Size Determination No. 3-2011-65 finding Appellant to be other than small because its relationship with [subcontractor] violates the ostensible subcontractor rule. On July 7, 2011, Appellant appealed that size determination to OHA claiming, *inter alia*, that the Director of the 8(a) BD Office of Compliance did not have authority to request a formal size determination.

On July 14, 2011, the Associate Administrator for Business Development requested a new size determination. On August 4, 2011, upon a joint motion from Appellant and SBA, OHA dismissed the appeal and ordered the Area Office to vacate size determination 3-2011-65 without prejudice to the pending size determination 3-2011-102 and without prejudice to Appellant's presentation of additional argument to the Area Office. *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5265 (2011).

D. Appellant's Supplemental Response

On August 15, 2011, Appellant provided additional information to the Area Office. Specifically, Appellant submitted a labor break out spreadsheet, two certificates of liability insurance (one for Eglin AFB, one for Langley AFB), W-2 wage and tax statements for three employees, a check register indicating payment to those three employees, and a letter containing additional arguments and comments regarding these documents.

In the letter, Appellant presented additional arguments about its own experience and capability to perform the contract. Appellant argued that it will perform the primary and vital requirements of the contract at issue. Appellant also explained that the description in its proposal of its Eglin AFB refuse and recycling contract (for which Appellant served as the prime contractor and [subcontractor] as a subcontractor) was incomplete and misstated that [subcontractor]'s employees would perform the contract. In an attempt to correct this purported misstatement, Appellant submitted the payroll information and certificate of insurance described above to prove that Appellant actually employs the personnel performing the Eglin AFB contract.

Appellant also explained its labor break out spreadsheet. Appellant indicated that it will staff the contract with [XXX] employees, and [subcontractor] will supply [XXX] employees.

The labor spreadsheet consists of two worksheets. The first worksheet shows labor dollars by category of work for each location for the base year. The categories are refuse collection front loaders, refuse collection rolloff, recyclable collection, common use collection, and operation of the recycle yard. The chart separates the labor dollars from the equipment/overhead dollars for each category and for each location. The chart also separates Appellant's labor dollars from [subcontractor]'s labor dollars. Based on this worksheet, Appellant calculated that it will incur approximately 68% of labor costs in the base year, and [subcontractor] will incur approximately 32%. The worksheet also indicates that Appellant's employees will perform [XXX] hours of work per week, and [subcontractor]'s employees will perform [XXX] hours of work per week. The second worksheet connects each labor total to a specific CLIN in the price proposal for the base year to further illustrate which CLINs require labor and how much labor is required for those CLINs. The worksheet indicates that the total labor cost for the base year is $[XXXXX]. Landfill fees, recycling revenue share, and storm debris constitute $[XXXXX]. The total base year price is listed at $[XXXXX], which leaves $[XXXXX] for equipment, operating costs, overhead, and profit.

E. Size Determination

On September 16, 2011, the Area Office issued its size determination. The size determination explains the procedural history of this matter and notes that Appellant submitted additional information and documentation for the Area Office's consideration on August 15, 2011, after dismissal of the first appeal. While acknowledging receipt of the additional information, the size determination states that Appellant "did not provide any additional written comments or further rebuttal arguments on [its] affiliation with [subcontractor]." (Size Determination 4.)

The Area Office first explains that Appellant is affiliated with [affiliate A] and [affiliate B] through common ownership. 13 C.F.R. § 121.103(c)(1). The Area Office next analyzes Appellant's relationship with [subcontractor]. Upon review of Appellant's proposal, the Area Office concludes that Appellant would rely upon [subcontractor] to perform the primary and vital requirements of the contract.

The Area Office determined that refuse collection represents the primary and vital contract requirement. (*Id.* at 6.) Based on the teaming agreement between Appellant and [subcontractor], as well as Appellant's proposal, the Area Office determined [subcontractor] alone would perform the refuse collection and disposal services. The Area Office recognized that the contract also contained a significant recycling component, which Appellant itself would perform. However, the "[r]ecycling requirements of the contract, though required, are unpredictable and could actually constitute a small percentage of the overall work." (*Id.* at 19.) The Area Office emphasizes that Appellant did not provide any of its own relevant past performance information and could only present [subcontractor]'s relevant past performance information.

Based on source selection information received from the CO, the Area Office explained that the CO was concerned that Appellant had no proven experience in refuse collection or recycling. According to the CO, there is no past performance information on Appellant itself in

the government's Past Performance Information Retrieval System (PPIRS) or the Contractor Performance Assessment Reporting System (CPARS). Thus, the Air Force could only base its evaluation on [subcontractor]'s past performance. Additionally, the CO did not verify whether offerors had experience in recycling, which the Area Office believes confirms its view that refuse collection, not recycling, is the primary and vital contract requirement.

The Area Office also concluded that Appellant's Eglin AFB contract, included in Appellant's final proposal revision, does not support Appellant's claim that it has experience in refuse or recycling. Instead, the description of the contract in the proposal indicates that [subcontractor] provides all equipment and personnel for refuse and recyclables collection. Moreover, the CO was unable to determine whether this contract was relevant. Additionally, although Appellant cites this contract to support its recycling capabilities, the recycling plant at Eglin AFB is run by the government.

The Area Office includes in the size determination the CO's summary of performance references. Five [subcontractor] prime contracts were listed in Appellant's initial past performance proposal, and the CO located three other [subcontractor] contracts through CPARS. Each of these contracts was performed by [subcontractor], and no work was subcontracted to Appellant. The CO determined only one of these eight contracts to be relevant based on the provision of recycling services and the total tonnage processed. Based on this assessment, the Area Office finds that Appellant can provide no performance references to verify that it has any experience with refuse collection or recycling services. Consequently, the Area Office concludes Appellant would be unusually reliant upon [subcontractor] to perform the solicitation at issue.

The Area Office next examines the three additional performance references included in Appellant's final proposal. The one contract on which Appellant served as prime contractor (the Eglin AFB contract) was found not to be relevant, as described above. One reference pertained to work performed by [subcontractor] as a subcontractor, and the CO determined that contract not to be relevant. The third reference was for another contract for which [subcontractor] served as the prime contractor and performed all the work. The Area Office also points out that Appellant submitted five client authorization letters for [subcontractor] and a list of nineteen federal refuse collection and recycling contracts performed by [subcontractor] since 2003. Based on Appellant's submission of this additional information, the Area Office reiterated its conclusion that Appellant cannot demonstrate any proven experience of its own.

The Area Office also considered the facts that [subcontractor] assisted with the preparation of Appellant's proposal and that Appellant and [subcontractor] had worked together in the past. The Area Office determined that these facts support the conclusion that the relationship between Appellant and [subcontractor] is more like a joint venture or partnership than a prime contractor-subcontractor relationship.

The Area Office next described the information and documentation submitted after OHA's dismissal of Appellant's initial appeal petition. The Area Office noted that Appellant provided a labor category breakdown for the instant procurement, two certificates of insurance, a 2011 check register for three of Appellant's employees, and 2010 W2's for those employees. The Area Office determined that the insurance certificates, the check register, and the W2's are

irrelevant in determining what portion of the contract work Appellant will perform, particularly because the Area Office was unable to ascertain why Appellant provided the documents.

Appellant estimates in its labor breakdown that it will provide approximately 68% of contract labor, and [subcontractor] will perform approximately 32%. The labor breakdown indicates the bulk of the hours will be performed by refuse collection front loaders, refuse collection rolloff, and recyclable collection. The labor hours for these three categories exceed the combined labor hours for common use collection and operating the recycle yards. The Area Office submits Appellant's labor breakdown reinforces its conclusion that refuse collection, and not recycling, is the primary and vital contract requirement. The Area Office emphasizes that this requirement will be performed by [subcontractor], as per the teaming agreement. The teaming agreement also indicates that Appellant plans to staff the Langley AFB and Fort Eustis recycling centers, but will use [subcontractor]'s knowledge of local markets to process and sell the recyclable materials. From this, the Area Office infers that [subcontractor] will assist Appellant in operation of the recycling yards, even though Appellant lists no labor hours for [subcontractor] under the "operating recycle yard" labor category. The Area Office indicates this supports its conclusion that Appellant would be reliant upon [subcontractor] to perform the contract, including the recycling requirements.

The Area Office claims its determination is supported by the *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011) because as in that case, Appellant's subcontractor assisted with the proposal, Appellant relied upon the experience of its subcontractor to obtain award, Appellant will hire a key employee of its subcontractor ([subcontractor]'s project manager) to perform the contract, and Appellant lacks sufficient relevant experience to perform the contract without its subcontractor. The Area Office also highlights that Appellant's revenues for the past three years are substantially less than the value of this contract, so the Area Office questions Appellant's assertions that it has experience managing contracts of this magnitude. The Area Office reiterates that based on Appellant's past performance proposal, it appears Appellant does not have the capability, resources, equipment, and employees necessary to perform this contract without relying upon [subcontractor]. (Size Determination 15.)

The Area Office also points out that Appellant stated it plans to employ a total of [XXX] people to perform its portion of the contract work, including the project manager it will hire from [subcontractor]. The project manager will oversee contract performance, and the other individuals will perform administrative and recycling services. The Area Office explains that, according to the CO, [XXX] individuals are needed for refuse and recyclables collection services at Langley AFB, and [XXX] individuals are needed to complete the recycling services at Fort Eustis alone. The Area Office notes that it although it requested information as to how many people [subcontractor] would employ to perform its portion of the contract, Appellant never provided that information. The Area Office further notes that [subcontractor] is providing all the equipment necessary to perform the contract.

The Area Office acknowledges that Appellant will perform some of the contract work, but emphasizes that [subcontractor] will perform the primary and vital requirements. The Area Office recognizes that the contract employs a refuse and recycling revenue share plan designed

to incentivize the contractor to increase recycling services, which could result in an increase in Appellant's share of the contract work. However, the Area Office explains that this is only a goal, and it cannot assume any increase in Appellant's share of the work.

Moreover, the Area Office asserts that Appellant failed to substantiate the percentage of labor costs it proposes to incur. The Area Office claims that Appellant's labor breakdown does not separate labor costs for Appellant from those of [subcontractor]. Appellant merely claims that it will perform approximately 68% of the work. Additionally, the Area Office discredits Appellant's previous claim that the labor percentages are only estimates for payroll dollars and do not connect to any specific CLIN. The Area Office explains that each CLIN price would necessarily include the total cost of labor and supplies required to perform a particular function. In any case, the Area Office concludes that even if its accepts Appellant's percentages, that does not preclude a finding of an ostensible subcontractor relationship because Appellant still lacks the experience to perform and still must rely upon [subcontractor] to perform the contract.

The Area Office next emphasizes that Appellant's proposed project manager is currently a [subcontractor] employee. The Area Office acknowledges that Appellant planned to hire the project manager. Nonetheless, the Area Office contends this scenario supports the supposition that Appellant does not currently employ any individuals qualified to perform a contract of this magnitude, as well as the ultimate conclusion that Appellant is reliant upon [subcontractor].

Based upon the foregoing analysis, the Area Office concludes that [subcontractor] is Appellant's ostensible subcontractor. The Area Office notes that Appellant's average annual receipts for the applicable measurement period, when combined with those of [affiliate A] and [affiliate B], do not exceed the applicable size standard. However, [subcontractor] is known to be other than a small business concern, so when Appellant's receipts are aggregated with those of [subcontractor], Appellant too exceeds the size standard for the instant procurement.

F. Appeal Petition

On September 23, 2011, Appellant filed its appeal petition. Appellant first contends the size determination should be reversed or remanded because the Area Office apparently did not consider Appellant's additional comments and arguments, which were provided to the Area Office after dismissal of Appellant's initial appeal. As noted above, the size determination incorrectly states that Appellant "did not provide any additional written comments or further rebuttal arguments." (Size Determination 4.) To the contrary, Appellant did submit comments along with its additional documentation, and the Area Office confirmed receipt of the additional information.[4] Appellant contends this error alone renders the determination fatally flawed.

Appellant also submits arguments on the merits of the size determination. Appellant

[4] The record reflects that the Area Office received the email (dated August 15, 2011) to which the additional documentation and the additional comments were attached. In the record, the printout of the email is followed by copies of each document electronically attached to the email, except the letter containing Appellant's comments. That letter does not appear anywhere in the Area Office file.

contends the Area Office should have focused on its general qualifications and ability to perform this straight-forward contract rather than its lack of past performance. Appellant claims it is capable of performing the contract, and its Eglin AFB work affords it relevant experience, though admittedly it has less experience than [subcontractor]. Appellant explains that, pursuant to the RFP, past performance was the more important evaluation criteria, which is why it entered into a teaming agreement with [subcontractor]. Appellant further explains (and the size determination also notes) that the CO recognized that it would be difficult to find an 8(a) BD program participant with sufficient resources, equipment, and experience to perform the contract. Accordingly, the RFP allowed offerors to pursue teaming arrangements. Appellant thus contends it was reasonable for Appellant to team with a more experienced contractor.

Appellant contends the Area Office improperly usurped the CO's authority to determine a contractor's responsibility. Appellant argues it is the CO's role to review an offeror's past performance and determine whether a firm can perform a contract, and the Area Office should not interfere with that determination. Additionally, although the Area Office emphasizes the value of the contract, Appellant claims its value is actually less due to various pass through fees to be paid to other entities. Appellant explains that its president and owner is well qualified to oversee a contract of this magnitude because he holds degrees in engineering and business, has extensive project management experience, and has advised other companies and government entities on matters involving waste management. Appellant concludes it is qualified to perform this contract even without directly relevant past performance references.

Nevertheless, Appellant explains that it does have one directly relevant past contract—its Eglin AFB contract, which Appellant claims the Area Office misconstrued. Appellant asserts that it is performing all project management functions for the contract, including logistics, reporting, and personnel management. Appellant asserts that its successful ongoing performance of this contract, even with [subcontractor] as its subcontractor, supports the conclusion that it could perform the primary and vital requirements of the instant contract. Appellant claims the Area Office discounted its performance of this contract because of the description of the contract in Appellant's proposal, which erroneously indicated that [subcontractor's employees would perform the contract work.

Appellant explains that the Eglin AFB contract is a contract of short duration because the military family housing units serviced by the contract are being privatized. Considering the short duration of the contract, Appellant elected to rent the equipment needed to perform the contract from the incumbent contractor, [subcontractor], instead of buying or leasing the equipment itself. Appellant maintained responsibility for project management and quality control. Appellant explains that although the proposal indicated [subcontractor's employees would perform the work required by the Eglin AFB contract, that statement was incorrect. In fact, Appellant hired the drivers previously employed by [subcontractor] to perform the contract. Appellant sent insurance information and employee payroll information to the Area Office after the dismissal of its initial appeal to clarify this point. Appellant explains that it attempted to explain this situation in its rebuttal comments, but the Area Office apparently failed to consider those comments.

Appellant next contends it will perform the primary and vital contract requirements of the instant procurement. Appellant explains that it entered into a teaming agreement to maximize the

value of its proposal to the government, not to diminish its own responsibilities. Appellant also notes that teaming agreements are permitted by the FAR, and it is common for teaming agreements to be signed prior to proposal submission. Appellant argues the fact that it entered into a teaming agreement with [subcontractor] before submitting its proposal does not support a finding of a violation of the ostensible subcontractor rule. In fact, Appellant contends its teaming agreement supports the conclusion that Appellant did not violate the ostensible subcontractor rule because it clearly delineates the tasks to be performed by each contractor. *See Size Appeal of C&C Int'l Computers & Consultants, Inc.*, SB A No. SIZ-5082 (2009); *Size Appeal of TCE, Inc.*, SB A No. SIZ-5003 (2008).

Appellant also emphasizes that it will be responsible for overall contract performance, a fact Appellant claims the Area Office improperly discounted because of [subcontractor]'s experience. Appellant explains that although [subcontractor] will perform refuse collection services, it will only do so under Appellant's management and direction, including the supervision of the project manager, who will be Appellant's own employee. Appellant also highlights that it would not receive any financial assistance from [subcontractor]. *See Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235 (2011). Appellant argues these factors detract from the Area Office's ostensible subcontractor analysis.

Appellant contends it has repeatedly indicated that it would provide [XXX] employees to perform this contract, and [subcontractor] would provide [XXX] employees to perform its assigned contract tasks. Appellant points out that its employees include the supervisory project manager, whereas [subcontractor]'s employees will all be laborers. Appellant contends these numbers support its calculation that Appellant will incur 68% of the labor cost.

Appellant disputes the Area Office's conclusion that refuse collection, not recycling, is the primary and vital contract requirement. Appellant contends refuse collection, recyclables collection, and processing of both refuse and recyclables are all primary and vital tasks, as expressed in the PWS. Appellant asserts that the recycling component of this contract must constitute 40% of the collected materials, and that amount can only increase due to contractual incentives. Moreover, Appellant explains that at least three of its own [XXX] employees (the project manager, the rear end loader driver, and the front end loader) who will staff this contract will be involved in performing both recycling and refuse collection services. Thus, Appellant claims that it "will be directly involved in performing the refuse collection portion of the contract." (Appeal 16.) Appellant quotes from its initial protest response to support its contention that it previously explained this to the Area Office.

Appellant also explains that the larger CLINs for refuse collection and disposal (to be performed by [subcontractor]) are capital intensive and include equipment and maintenance costs, but labor costs are spread across all CLINs and are not proportional to capital costs, so Appellant is still incurring a majority of labor costs. Additionally, Appellant notes it will operate the recycling centers, which must process at least 40% of the materials collected. Appellant argues the Area Office should have recognized that recycling services are also a primary and vital requirement of the contract, as explained in the PWS. Appellant concludes that because it will participate in the refuse collection, and will completely perform the recycling services, the Area Office erred in determining that Appellant will not perform the primary and vital contract

tasks.

Finally, Appellant explains that in its initial response to the Area Office's request for a labor breakdown, it focused on explaining the labor percentage each party would perform. Subsequently, in response to questions from the Area office, Appellant submitted a detailed, color-coded spreadsheet demonstrating how the labor costs are connected to the price schedule. Appellant indicates the spreadsheet included all labor expense dollars (including payroll, benefits, taxes, etc.) rather than the simple hourly rates that were presented in the initial response. Appellant asserts that although the Area Office reviewed the spreadsheet, it failed to review the rebuttal comments, which put the spreadsheet in context, and the Area Office erroneously assumed Appellant had been nonresponsive to its requests for more information. Appellant submits in its appeal petition an explanation of how labor categories and dollars are connected to the price proposal, as depicted in the spreadsheet.

Appellant lastly notes that it subcontracted the equipment requirements of the contract to [subcontractor] because it was a cost effective option that made Appellant's proposal more competitive. Appellant points out that it demonstrated its own financial worth by obtaining insurance for this contract and contends the Area Office failed to take all of this information into account. Based on its analysis of the errors committed by the Area Office, Appellant requests that OHA reverse the size determination or, in the alternative, remand this matter for consideration of the additional comments submitted to the Area Office.

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. OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has 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). To determine whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, the Area Office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Id.; 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 Bus. Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). Ostensible subcontractor inquiries are “intensely fact-specific

given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

In this case, the Area Office determined that refuse collection and disposal were the "primary and vital" requirements of the contract, and that [subcontractor] (not Appellant) would perform these requirements. The Area Office also found that Appellant would be unduly reliant upon [subcontractor] for performance. As discussed below, the record amply supports the Area Office's conclusions. Accordingly, the appeal is denied.

1. Primary and Vital Requirements

First, I find no error with the Area Office's determination that refuse collection and disposal are the primary and vital requirements of the contract. Appellant strenuously argues that recycling is also a primary and vital requirement. However, Air Force officials opined that refuse collection, not recycling, was the principal purpose of the contract. Although the CO did note that the procurement included some recycling, she ultimately concluded that refuse collection was the primary and vital task. The Contract Performance Evaluator concurred: "I agree that the primary and vital requirements are refuse collection, transportation and disposal/disposition services."

In arguing that recycling constitutes a "primary and vital" function, Appellant claims that "[t]he recycling component of this contract must remain at 40% of the collection, and may only increase due to contractual incentives." (Appeal 16.) The PWS, however, does not actually require that 40% or more of the total tonnage collected be recycled. Rather, the "Refuse and Recycling Revenue Share Plan" provides that the contractor will not enjoy any revenue sharing incentive if recycling amounts to less than 40% of total tonnage. Therefore, it appears that 40% recycling is aspirational and not contractually mandatory. Likewise, the Air Force officials explained that the agency merely has a goal to recycle 40% of its waste. This is also consistent with Department of Defense guidance implementing EO 13,423, which indicates that "[t]he diversion goal for non-hazardous solid waste ... is 40% by 2010."[5]

The estimated workload data attached to the PWS further supports the conclusion that refuse collection is the primary contract task. (PWS, Appendices A-C, Tables A1, B1, C1.) At Langley AFB, the total annual tonnage of refuse collected is estimated to be more than nine times the total tonnage of recyclables collected. At Fort Eustis, the estimated trash tonnage is more than double the estimated recycling tonnage. For the VAMC, "600 tons refuse" is estimated with no identified quantity of recyclables, and much more capacity is devoted to collecting refuse than to collecting recyclable commodities. Additionally, it appears that refuse must be collected much more frequently than recyclable items. Whereas trash generally must be collected multiple times per week, recyclables are collected once per week at most. (PWS, Appendices A-C, Tables A2-A4, B2, B4-B5.)

[5] Memorandum of Alex A. Beehler, Acting Deputy Under Secretary of Defense (Feb. 1, 2008), *available at* http://www.denix.osd.mil/swr/upload/DoD-Integrated-Solid-Waste-Management-Policy-and-Guidelines.pdf (implementing EO 13,423).

Appellant's own price proposal similarly supports the conclusion that refuse collection represents the large majority of the work. Appellant asserts that the CLINs associated with recyclable collection and operating the recycling yards are CLINs xx04, xx05, xx16, and xx21-xx22. (Appeal Petition 18-19). These five CLINs, however, represent a small portion of Appellant's total price. For example, for the base year, Appellant proposed $[XXXXX] for the five recycling CLINs, out of a total base year price of $[XXXXX]. (Proposal Vol. I) Furthermore, of the $[XXXXX] Appellant proposed for recycling work, more than half is attributable to a single CLIN (xx22, pertaining to staffing the Fort Eustis recycling yard). Thus, the remaining four recycling CLINs constitute only a small fraction of the total contract value. Even when Appellant's price for the five recycling CLINs is compared directly against Appellant's price for CLINs that pertain specifically to refuse collection (xx01-xx02, xx14-xx15, xx20, and xx23), it is apparent that refuse collection is predominant. Based upon all this evidence in the record, then, the Area Office could reasonably determine that trash collection and disposal are the "primary and vital" contract requirements.

It was also not erroneous for the Area Office to conclude that [subcontractor] will be performing those primary and vital requirements. As discussed above, Appellant's proposal specifically stated that Appellant "will subcontract to [subcontractor] the refuse collection, transportation and disposal services. [Subcontractor] will manage the refuse collection part of the contract and provide the refuse collection drivers (front load and rolloff trucks). [Subcontractor] will provide all equipment, trucks, containers and support vehicles to enable performance." (Proposal Vol. II, Tab A, at 2.) The teaming agreement between Appellant and [subcontractor]—which was submitted as part of the proposal—also contains this exact language. (Teaming Agreement, Ex. A.) Both the proposal and teaming agreement indicate that Appellant will perform the recycling portion of the contract, as well as overall contract management. Based on this primary evidence, there can be little doubt that [subcontractor] will be performing the refuse collection and disposal services.

Appellant contends that Appellant itself will actually perform a significant portion of the refuse collection services. Appellant asserts that "at least [XXX] of [Appellant's] [XXX] employees will be directly involved in performing refuse collection," including a "Rear End Loader Driver" and "Front End Loader." (Appeal Petition 16.) This information, however, does not appear in Appellant's proposal. Instead, as described *supra*, Appellant's proposal clearly indicates that [subcontractor] will perform the refuse collection and disposal portion of the contract. Appellant only expressed an intent to perform the refuse collection work in response to the size protest. It is well-settled that documents created in response to a size protest may not be used to contradict an offeror's actual proposal. *See, e.g., Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011) ("The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal (and anything submitted therewith, including teaming agreements). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant."); *Size Appeals of CWU, Inc., et al*, SBA No. SIZ-5118, at 16 (2010) (rejecting contentions as to how much work would be performed by a subcontractor, because those contentions were inconsistent with the offeror's proposal); *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009) ("Appellant's representation of their incumbency status in its Proposal, which predates the current dispute, is entitled to great if not controlling weight.

Thus, it is too late for Appellant to attempt to claim otherwise now and it will not be entertained."). Accordingly, Appellant's contention that it will participate in the refuse collection and disposal portion of the contract is not sufficient to overcome the clear statements in Appellant's proposal that [subcontractor] will perform those activities.[6]

Appellant also argues that it will provide a majority of the labor required by the contract, citing the labor breakdown worksheets it provided to the Area Office. Again, however, this contention appears to be based on the premise that Appellant's personnel would be actively involved in refuse collection and, thus, is inconsistent with Appellant's proposal.

The ostensible subcontractor rule is violated when a subcontractor would be performing the "primary and vital" contract requirements. 13 C.F.R. § 121.103(h)(4). Identifying the primary and vital requirements of a contract requires a comprehensive reading of the entire solicitation. Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. Rather, the primary and vital requirements are those associated with the principal purpose of the acquisition. *See Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 9-10 (2011) (determining, in relation to an Air Force procurement for electronics equipment to test aircraft systems, that manufacture of the test system itself was the primary and vital contract requirement, not the provision and tracking of spare parts, even though the spare parts work constituted a significant portion of the contract work); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 9 (2011) (rejecting the contention that environmental cleanup operations should be considered primary and vital requirements, because these efforts, although "undoubtedly important," were secondary to the principal purpose of the procurement); *Size Appeal of TLC Catering*, SBA No. SIZ-5172, at 4 (2010) (finding, with regard to a procurement to provide boxed lunches, and where the challenged firm hired a subcontractor to make the sandwiches, that "[a] fair reading of the full PWS leads to the conclusion that it is the provision and service of the noon meal ... that is the primary contract task" and explaining that "the sandwiches are an important part of the contract, but it is the service of an entire meal that must be provided"). Here, although the procurement contains a substantial recycling component, the record supports the Area Office's determination that refuse collection and disposal are the primary and vital requirements. Appellant's own proposal demonstrates that [subcontractor], not Appellant, will perform those requirements. Accordingly, Appellant has not established that the size determination is clearly erroneous.

2. Reliance

The record also supports the Area Office's conclusion that Appellant would be unduly

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[6] It is worth noting that, pursuant to 13 C.F.R. § 121.404(d), Appellant's size must be determined as of the date of its final proposal revision. In this case, Appellant submitted its final proposal revision on January 24, 2011. Any subsequent changes in approach, such as outlined in response to the size protest, would be irrelevant to assessing Appellant's size as of January 24, 2011. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010) (noting that "the Area Office may not consider evidence or events that transpired after" the date to determine size).

reliant upon [subcontractor] to perform the contract. As the Area Office explored extensively in the size determination, Appellant has no experience performing refuse and recycling services, whereas [subcontractor] has extensive experience. Appellant acknowledges that it has less experience than [subcontractor] but maintains that its Eglin AFB contract affords it relevant experience. The Area Office rejected that contention, however, noting that Appellant's proposal indicated that [subcontractor] was performing the Eglin AFB contract. Appellant asserts that the description in its proposal was incorrect, and that Appellant itself employs the personnel performing the Eglin AFB contract. In an attempt to clarify this point, Appellant submitted payroll and other information to the Area Office.

As explained above, under OHA precedent, information submitted in response to a size protest has little probative value as compared with the proposal itself. Thus, the Area Office could reasonably credit statements in Appellant's proposal in lieu of subsequent arguments that the proposal was inaccurate. Moreover, even accepting that Appellant could have some minimal experience through its Eglin AFB contract, I still cannot conclude that the Area Office erred in determining that Appellant would be unusually reliant upon [subcontractor]. All of the past performance references included with Appellant's proposal, aside from the Eglin AFB contract, were for contracts performed by [subcontractor]. Additionally, all of the client authorization letters were related to [subcontractor's past performance. Appellant itself concedes that the Eglin AFB contract is of short duration and was awarded to Appellant only in October 2010. (Appeal Petition 10.) Furthermore, the Air Force determined that the Eglin AFB work was not even relevant to instant procurement. Thus, it is apparent that [subcontractor] has extensive experience in the field, whereas Appellant's experience is negligible, or completely non-existent.

Appellant argues that, by examining the corporate experience of Appellant and [subcontractor], the Area Office usurped the CO's authority to make a responsibility determination. This argument has no merit. Contrary to Appellant's contentions, OHA has recognized that "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 Assessment & Training Solutions Consulting Corp.*, SB A No. SIZ-5228, at 7 (2011). Here, Appellant's past performance proposal was based entirely on [subcontractor's performance record. Indeed, the proposal even went so far as to characterize Appellant's only potentially-relevant prime contract as having been performed entirely by [subcontractor]. Undue reliance may be found when a novice prime contractor delegates heavily to a much more experienced subcontractor. *Size Appeal of Smart Data Solutions, LLC*, SB A No. SIZ-5071, at 21-22 (2009) (finding unusual reliance where the challenged firm had no relevant experience and noting "[although such total or unusual reliance may be permitted by the RFP, it is not permitted under 13 C.F.R. § 121.103(h)(4)"); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ- 4775, at 9-10 (2006) (explaining that the prime contractor was "unproven," and the contract in question was "almost 50 times the amount of its work to date").

Further, Appellant's proposal indicates that [subcontractor] will provide all the equipment necessary to perform the contract. (Proposal Vol. II, at 2.) Appellant contends it subcontracted the equipment requirements to [subcontractor] because this option was most cost-effective and emphasizes that it would receive no financial assistance from [subcontractor]. Nevertheless, the

fact that [subcontractor] is providing the equipment required to perform the contract (including the portions of the contract will be performed by Appellant) increases Appellant's reliance upon [subcontractor], as Appellant would be unable to proceed without [subcontractor]. Appellant repeatedly emphasizes that it would be responsible for overall management of the contract. The teaming agreement between Appellant and [subcontractor], however, states that "[subcontractor's existing supervisors and managers will supervise [subcontractor]'s activities, including all quality and safety issues." (Teaming Agreement, Ex. A.) Contrary to Appellant's claims, then, it appears that [subcontractor] would independently perform large portions of the contract, with limited oversight or control by Appellant.

The Area Office cited a number of additional considerations to support its view that Appellant would be unduly reliant upon [subcontractor]. Appellant is employing [subcontractor's project manager to manage this contract. (Proposal Vol. II, at 2.) The project manager is the only key employee on this contract, and Appellant chose to hire a [subcontractor] employee instead of proposing to use one of its own personnel. Additionally, [subcontractor] assisted with preparation of Appellant's proposal, and the firms have previously collaborated on other projects. These factors have been recognized as indicia of reliance in ostensible subcontractor cases. *E.g., Size Appeals of CWU, Inc., et al*, SBA No. SIZ-5118, at 4, 14-15 (2010) (finding a violation of the ostensible subcontractor based in part on the fact that the proposed on-site management employees, including the project manager, were employed by the subcontractor); *Size Appeal of Public Commc'ns Servs, Inc.*, SBA No. SIZ-5008, at 10 (2008) (considering, among other issues, the extent to which the subcontractor participated in preparation of the challenged firm's proposal). In light of all these considerations, I find no error in the Area Office's conclusion that Appellant is unduly reliant upon [subcontractor].

3. Appellant's Supplemental Comments

Appellant also complains that the Area Office did not consider additional arguments Appellant submitted following the first remand. According to Appellant, the case should be remanded for a second time in order for the Area Office to fully address these arguments. Upon review of the record, it appears that Appellant is correct that the Area Office considered only the additional documentation that Appellant submitted on August 15, 2011, but not the accompanying commentary. *See* note [4], *supra*. Nevertheless, I find this was harmless error and does not warrant reversal of the size determination. Even with Appellant's supplemental arguments, the record amply supports the Area Office's conclusion that Appellant's relationship with [subcontractor] violates the ostensible subcontractor rule. Accordingly, further consideration of Appellant's comments would not alter the outcome of this case. *E.g., Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected the outcome).

IV. Conclusion

Appellant has not demonstrated that the size determination contains any material error of fact or law. Rather, the Area Office properly concluded that [subcontractor] would perform the primary and vital contract requirements and that Appellant would be unusually reliant upon

[subcontractor] to carry out the contract. Consequently, [subcontractor] is Appellant's ostensible subcontractor, and Appellant is other than small for the instant procurement. I therefore DENY this appeal and AFFIRM the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge