

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

J.R. Conkey & Assocs., Inc., d/b/a Solar  
Power Integrators

Appellant,

RE: R.E.M. Engineering Co, Inc.

Appealed From  
Size Determination No. 6-2012-11

SBA No. SIZ-5326

Decided: February 17, 2012

APPEARANCES

David S. Demian, Esq., Marks, Finch Thornton & Baird, LLP, San Diego, CA, for  
Appellant

Laurence P. Lubka, Esq., Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Inc.,  
Pasadena, California, for R.E.M. Engineering Co., Inc., d/b/a R.E.M. Construction

DECISION<sup>1</sup>

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

II. Issue

Whether the Area Office made a clear error of fact or law in determining that R.E.M.'s proposal does not violate the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4).

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<sup>1</sup> This Decision was originally issued under a Protective Order. On February 17, 2012, I issued an Order for Redactions directing each party to file a request for redactions if that party desired any information redacted from the published Decision. No party requested any redactions. Thus, OHA now publishes the Decision in its entirety

### III. Background

#### A. The Solicitation

On June 7, 2011, the U.S. Department of Veterans Affairs (VA), issued Solicitation No. VA-101-11-RP-0021 for the construction of a photovoltaic system at the VA Medical Center in Las Vegas, Nevada. The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran-Owned Small Businesses (SDVOSB), and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard, as the appropriate code for this procurement.

Statement of Bid Item. The contractor is to prepare the site completely for building operations and to furnish all labor, materials, supplies, transportation, equipment, and supervision to construct a 3.3 MW Photovoltaic System. The system is comprised of a solar farm and four steel truss canopy structures. The 10-acre solar farm will provide 1.5 MW of power with ground mounted single axis tracking solar panels, and will have 500KW of future expansion capacity. The four steel truss canopy structures will shade parking spaces below and provide 1.8 MW of power with 12.5 degree tilt fixed solar panels. Work will consist of earthwork and grading, excavation and concrete for footings and trenching for underground electrical, structural concrete, steel, and masonry, hollow metal doors, frames, and louvers, moisture protection for inverter enclosures, ornamental fencing, and all electrical work, materials and equipment for a complete photovoltaic system installation. (Solicitation ¶ 1.2, at 66).

Selection Criteria and Weightings. Proposals are evaluated on the basis of both cost and technical considerations most advantageous to the government. All technical factors when combined are significantly more important than cost or price. If the technical proposals are essentially equal, award is made on the basis of the lowest cost. Technical Evaluations are based on three factors in descending order of importance: Construction Management, Past Performance, and Schedule. (1) Construction Management is evaluated on the basis of corporate project experience, project personnel experience, and technical/management approach, with each being equal. (2) Past Performance is evaluated on the basis of corporate project experience and client satisfaction, with corporate experience more important than client satisfaction. Corporate experience is evaluated on the basis of the offeror's experience as a prime and/or general contractor, subcontractor or other. (3) Schedule is evaluated on the basis of realism and reasonableness of the proposed schedule. (Solicitation ¶ A4, at 7-8).

#### B. R.E.M.'s Proposal

R.E.M. Engineering Co., Inc., d/b/a R.E.M. Construction (R.E.M.) submitted its proposal on August 12, 2011. The proposal includes Standard Form 24, Bid Bond, identifies Robert E. and Manuella Milton as principals and Liberty Mutual Insurance Company as the sole surety. R.E.M.'s total bonding capacity is \$50,000,000. R.E.M. has a VA mentor-protégé agreement with Swinerton Builders (Swinerton) dated August 11, 2010, and approved by the VA on December 21, 2010. Mr. Milton's Declaration states R.E.M. made the final decisions on the bidding and planning for this project. There is no incumbent on this contract.

The proposal identifies Swinerton and six other major subcontractors. The work is broken out as follows: R.E.M.: 32.35%; Swinerton: 30.86%; Other subcontractors: 36.79%. The vast majority of R.E.M.'s and Swinerton's shares being in materials costs, R.E.M.'s labor costs are 2.47% of the entire project, and Swinerton's are 0.64% of the entire project. The team will also work with factory-trained manufacturer representatives to ensure proper installation and start-up of equipment such as switchgear, the single-axis tracking system, inverters, and the SCADA system.

As for recent corporate project experience, the proposal lists two R.E.M. projects at VA medical facilities and six Swinerton projects. All of the Swinerton projects involve solar facilities, but none was at a VA medical facility. R.E.M.'s projects are smaller than all but one of Swinerton's projects, but even the largest Swinerton project is well less than one-third the size of the instant project.

There are five key personnel. Two, including the senior manager, are R.E.M. employees and the other three are Swinerton employees. Luis Vite is Overall Project Executive and the direct point of contact with the VA. Mr. Vite is R.E.M.'s vice president, has over 30 years of project management and engineering, and has never worked for Swinerton. Bruce Schlosser, Construction Project Manager, reports to Mr. Vite and is Swinerton's employee. The other three key personnel report to Mr. Schlosser. These include Kevin Esch, Project Engineer, who has 26 years of experience, is R.E.M.'s employee, and has never worked for Swinerton. Ernest Sauer, Overall Project Superintendent, is Swinerton's employee. Michael Brown, Project Scheduler, is Swinerton's employee.

### C. Appellant's Protest

On September 28, 2011, the CO awarded the contract to R.E.M. On October 3, 2011, the CO notified J.R. Conkey & Associates, Inc. d/b/a Solar Power Integrators (Appellant), an unsuccessful offeror, of the award.

On October 11, 2011, Appellant filed a size protest, alleging R.E.M. is other than small because it is affiliated with Swinerton. Appellant included with its protest Swinerton's Central Contractor Registration (CCR) listing showing Swinerton self-identifies as other than small for NAICS code 236220. Appellant also included R.E.M.'s Dun & Bradstreet (D&B) Report projecting R.E.M.'s 2010 receipts at \$2,700,000 and R.E.M.'s listing on the usaspending.gov website showing Appellant's receipt, as prime contractor, of \$513,893 for four Federal contracts since 2000. Appellant also noted the instant project is valued at over \$23 million.

Based on this information, Appellant asserted the "sudden increase in workload by R.E.M. can only have been facilitated by reliance on Swinerton, including via bonding capacity, experience and other support ..." Thus, R.E.M. is economically dependent upon Swinerton for contract revenues. Appellant cites *Size Appeal of TKTM Corporation*, SBA No. SIZ-4885 (2008) for the proposition that SBA may find a protégé concern affiliated with its mentor for revenue dependence that is separate from mentor-protégé assistance.

The CO forwarded the size protest to the Small Business Administration (SBA) Office of Government Contracting - Area VI, in San Francisco (Area Office), for a size determination.

#### D. The Size Determination

On November 2, 2011, the Area Office informed R.E.M. of the protest, and on November 6, 2011, R.E.M. submitted to the Area Office its response to the protest allegations, its tax returns and financial statements for the applicable fiscal years, R.E.M.'s proposal for the instant project, and its mentor-protégé agreement with Swinerton. This information shows R.E.M. was established in 1979 and is wholly-owned by Robert E. Milton, Jr. By itself, R.E.M. does not exceed the \$33.5 million annual receipts standard. R.E.M. conducts business as an engineering and design-build company.

R.E.M.'s response to the protest asserted it is not dependent on Swinerton for financing, bonding, labor, or key employees. R.E.M. also noted its mentor-protégé agreement with Swinerton permits it to obtain certain assistance from Swinerton without affiliation. Both Mr. Milton and Swinerton's Vice President have declarations made under penalties of perjury stating that R.E.M. and Swinerton had no contracts or subcontracts from each other.

On November 23, 2011, the Area Office issued Size Determination No. 6-2012-11 (Size Determination). The Size Determination first summarizes the protest and R.E.M.'s response. As for the economic dependence protest allegation, the Area Office found the record shows no contracting or subcontracting between Appellant and Swinerton over the past three years. After mentioning the mentor-protégé agreement, the Area Office then discussed R.E.M.'s proposal in light of the ostensible subcontractor rule.

The Area Office noted R.E.M. developed and mostly prepared the proposal, and Swinerton assisted with formatting and in making recommendations. Subcontractors include Swinerton for solar projects and other contractors for specialty areas. In addition to the Bid Bond is Mr. Milton's sworn declaration that only R.E.M. and its principal put up the assets.

The Area Office concluded that R.E.M.'s proposal did not violate the ostensible subcontractor rule, and that R.E.M. is an eligible small business for this procurement.

Appellant received the Size Determination on November 23, 2011, and filed its appeal on December 8, 2011.

#### E. The Appeal

Appellant renews both allegations made in its protest, that R.E.M. is economically dependent on Swinerton and that R.E.M.'s proposal for the instant project violates the ostensible subcontractor rule. As for economic dependence, Appellant additionally asserts that 13 C.F.R. § 121.103(h) and *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010) provide that “at some point ... contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.” Thus, despite the mentor-protégé agreement, R.E.M. and Swinerton are affiliated entities.

As for the ostensible subcontractor allegation, Appellant additionally asserts that R.E.M. has no experience in the construction of photovoltaic systems, that Swinerton will perform the primary and vital requirements of the instant project, and that if Swinerton breaches the subcontract with R.E.M., the project will fail. Appellant also elaborates on its legal argument based on *Size Appeal of TKTM Corporation*, noting that the mentor-protégé agreement there did not shield the challenged concern from affiliation with its mentor under the ostensible subcontractor rule, where the mentor was also serving as the protégé's subcontractor. Appellant urges a similar result here.

Appellant attaches copies of Swinerton's CCR listing and R.E.M.'s usaspending.gov listing to the appeal.

#### F. R.E.M.'s Response to the Appeal

On December 23, 2011, R.E.M. responded to the appeal. R.E.M. asserts the allegations in the Appeal Petition are baseless, that Appellant has not shown Swinerton is other than small, and that even if Swinerton is other than small, the assistance afforded R.E.M. by Swinerton is specifically allowed by the VA and SBA.

Further, R.E.M. asserts that *Size Appeal of TKTM Corporation* is inapposite and not controlling because the mentor-protégé agreement at issue there was not with the VA but with the Department of Defense; some items of assistance found improper in *TKTM Corporation* are specifically allowed by the VA; and the prime contractor in *TKTM Corporation* was not doing the actual project work but “primarily administrative functions.”

R.E.M. also asserts that Appellant's attachments are improper new evidence.

### IV. Discussion

#### A. Timeliness, New Evidence, and Standard of Review

Appellant filed its appeal within 15 days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

New evidence not presented to the Area Office is generally not considered on appeal. *See* 13 C.F.R. § 134.308(a). Swinerton's CCR listing and R.E.M.'s usaspending.gov listing, however, are not new evidence, as Appellant had attached them to its protest and these documents were part of the record considered by the Area Office.

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 on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction 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. Mentor-Protégé Agreement

Appellant asserts the VA mentor-protégé agreement does not shield R.E.M. from affiliation. R.E.M. asserts that any assistance from Swinerton is exempt from affiliation analysis because R.E.M. is a protégé to Swinerton under a mentor-protégé agreement approved by the VA. I agree with Appellant. The SBA size regulations contain exceptions for assistance from mentors only where (1) the protégé is an 8(a) Business Development (BD) Participant and the SBA has approved the mentor-protégé agreement, (2) there is a statutory exception to affiliation in another Federal Mentor-Protégé Program, or (3) SBA has specifically authorized an exception to affiliation for the VA program under § 121.903. 13 C.F.R. § 121.103(b)(6). R.E.M. is not currently an 8(a) BD Participant so the first exception cannot apply. As for the others, I find no evidence that the VA Mentor-Protégé Program has qualified for either the statutory or the regulatory exception, and R.E.M. has not cited any statutory or regulatory provision to that effect.

Therefore, I conclude the Area Office did not err in finding that the VA mentor-protégé agreement did not shield R.E.M. from affiliation analysis. I must consider each substantive allegation of affiliation.

### C. The Merits of the Appeal

In determining R.E.M.'s size status, SBA must count the receipts of R.E.M. combined with those of any affiliates. 13 C.F.R. § 121.103(a)(6). R.E.M., by itself, is indisputably a small business. Contrary to R.E.M.'s assertion in its response to the appeal, Appellant has presented Swinerton's own CCR listing, which states that Swinerton is large under NAICS code 236220. Therefore, if R.E.M. and Swinerton are affiliated, R.E.M. also must be large and ineligible under that NAICS code.

After reviewing the record, I conclude R.E.M. and Swinerton are not affiliated and that R.E.M. is an eligible small business under NAICS code 236220.

Appellant's assertion that R.E.M. is economically dependent on Swinerton, is completely meritless. Economic dependence arises when concerns have contracts with each other accounting for a large proportion of the challenged concern's receipts. 13 C.F.R. § 121.103(f); *Size Appeal of Incisive Technology Incorporated*, SBA No. SIZ-5122 (2010). There are declarations in the record by both Mr. Milton and an officer of Swinerton stating R.E.M. and Swinerton have no contracts or subcontracts with each other, other than what is being proposed on the instant solicitation and their mentor-protégé agreement. Appellant offers only an unsupported assertion. Thus, there can be no economic dependence by R.E.M. upon Swinerton.

Appellant's argument, based on *Size Appeal of Safety and Ecology Corp.*, likewise is without merit. That case involved concerns that were joint venturers with each other on multiple projects. Here, in contrast, there is no joint venture between R.E.M. and Swinerton, nor has there ever been a joint venture between them. Thus, *Size Appeal of Safety and Ecology Corp.* is completely inapplicable here.

#### D. The Ostensible Subcontractor Rule

Finally, R.E.M.'s proposal does not violate the ostensible subcontractor rule. The SBA's size regulations provide that, under 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 terms of the proposal, 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).

The purpose of the ostensible subcontractor 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). Ostensible subcontractor appeals are intensely fact specific because the facts underlying these appeals are unique. The facts are unique because they are based upon the specific requirements of each solicitation and an individual offeror's response to those requirements in its proposal. *Size Appeals of CWU, Inc. et al.*, SBA No. SIZ-5118 (2010).

With respect to the instant proposal, some of the regulatory criteria that tend toward an ostensible subcontractor finding can be dispensed with right away. First, R.E.M. is the prime contractor and Swinerton is one of seven major subcontractors. Second, R.E.M. is shouldering the bond entirely by itself with no assistance from Swinerton; in fact, R.E.M.'s bonding capacity far exceeds the needs of this contract. Finally, Swinerton is not an ineligible incumbent contractor.

As for contract management, the senior manager proposed for this contract and the sole point of contact with the Government is R.E.M.'s vice president, Luis Vite. Mr. Vite has over 30 years of project management and engineering, and has never worked for Swinerton. The highest Swinerton employee on this contract reports to Mr. Vite. The organizational chart included with the proposal supports this fact. R.E.M. manages and, therefore, is in control of this contract, despite the fact Swinerton is contributing three of the four lower-level key personnel to the proposal. *See Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 11 (2011). Further, R.E.M. made the final decisions on the bidding and planning for this project.

Turning to the primary and vital requirements of the work, this requirement is to build a 3.3 MW Photovoltaic System comprised of a 10-acre solar farm and the four canopy structures which support solar panels while also providing shade for parking areas. Although the solicitation does not break out the requirement beyond a single contract line item, it does specify that work includes earthwork, excavation, structural concrete, steel, and masonry, and electrical work in addition to purchasing and installing the solar components themselves. Thus, there is much construction and trades work in this requirement. Although it is clear that Swinerton has the solar expertise, it cannot be said that R.E.M. contributes little to this effort. R.E.M. is an engineering and design-build company of 30 years experience, and it has presented in its

proposal two prior contracts involving construction and building systems at VA medical facilities in which it has been the prime contractor.

As is common in construction, subcontracting accounts for the majority of work; however, R.E.M. has 32.35% of the total value. Swinerton has only 30.86% of the total value, while all other subcontractors, together, have 36.79%. When boiled down to each concern's actual labor costs, R.E.M. (2.47%) has nearly four times the labor value as Swinerton (0.64%), demonstrating even more clearly which firm is performing most of the work. Further, R.E.M. clearly is managing the contract. Where there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 14 (2011).

Taken together, these factors weigh heavily in favor of the Area Office's conclusion that R.E.M. is not unduly reliant on Swinerton and that, therefore, the instant proposal does not violate the ostensible subcontractor rule.

Appellant has failed to establish any error of fact or law in the Size Determination, and I must deny its appeal.

#### V. Conclusion

Appellant has not met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is DENIED, and the Size Determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge