

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

SIZE APPEAL OF:

SM Resources Corporation, Inc.

Appellant,

Appealed From  
Size Determination No. 2-2012-01

SBA No. SIZ-5338

Decided: March 27, 2012

APPEARANCES

Joseph P. Hornyak, Esq., Megan Mocho Jeschke, Esq., Holland & Knight, LLP, McLean, Virginia, for Appellant

Donald J. Walsh, Esq., Offit Kurman, Baltimore, Maryland, for Reema Consulting Services, Inc.

Sherry L. Compton, Contracting Officer, for the U.S. Army Contracting Command, Aberdeen Proving Ground

DECISION<sup>1</sup>

This is an appeal of a size determination in which the Area Office concluded that Appellant, SM Resources Corporation, Inc., is not an eligible small business. For the reasons discussed below, I affirm the Area Office and deny the appeal. SM Resources Corporation, Inc., is not an eligible small business for this procurement.

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 clearly erred in concluding that Appellant's Proposal violated the ostensible subcontractor rule. *See* 13 C.F.R. § 134.314.

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<sup>1</sup> I originally issued this Decision under a Protective Order. *See* 13 C.F.R. § 134.205. After reviewing the original Decision, Appellant informed OHA it had no requested redactions. Therefore, I now issue the entire Decision for public release.

### III. Background

#### A. The Solicitation

On July 16, 2009, The Department of the Army, U.S. Army Contracting Command — Aberdeen Proving Ground, Edgewood Contracting Division (Army) issued Request for Proposals No. W911SR-09-R-0018 (RFP) for environmental, safety, health, and research support for operations at Edgewood Chemical Biological Center (ECBC). The Contracting Officer (CO) issued the RFP as a competitive 8(a) procurement, and designated North American Industry Classification System (NAICS) code 541620, Environmental Consulting Services, with a corresponding \$7 million annual receipts size standard, as the applicable code for this procurement. The contract will be an Indefinite Quantity/Indefinite Delivery (ID/IQ) contract. The contract will be comprised of task orders, with a minimum value of \$100,000 and a maximum value of \$48,500,000.

Environmental support will be in the form of sample collection analysis using Government instrumentation in fixed and mobile laboratories. Safety and health support will be in the form of site inspections at workplaces using chemical agents, biological agents, and other hazardous materials. Research support will be in the form of scientific research into the environmental fate, effects, and detection of chemical and biological agents. RFP § C.1.1.2, at 4.

The RFP identified fourteen subtasks: (1) Scientific Research, (2) Engineering Design, (3) Fabrication Services, (4) Process Development, (5) Testing (Environmental Sampling and Analysis), (6) Measuring and Test Equipment (Calibration and Maintenance of Chemical Instrumentation), (7) Plans and Systems Analysis, (8) Safety, Surety, Health and Security Planning, Audits, and Inspections, (9) Environmental Activities (Waste, Materiel Disposal, Handling), (10) Meetings, Conferences, Demonstrations, and Symposia, (11) Support for Chemical Services and Operations, (12) Environmental Planning and Operations, (13) Safety and Security, and (14) Administrative. RFP § C.3, at 4-9.

The RFP required offerors to prepare and include two Evaluation Sample Task Orders with their proposals. The first was for Environmental Monitoring Laboratory (EML) Support. The objective of the task is to perform the sample collection and analysis of air and environmental samples for chemical agent, associated decomposition products and characterization analysis in the Edgewood Area of Aberdeen Proving Grounds. Additionally, the contractor may be required to perform non-routine analyses using specialized analytical equipment. RFP, at 40.

The second sample task was EML Support of the Laboratory Information Management System (LIMS). The EML supports all chemical agent material operations at the U.S. Army Research Development and Engineering Command. EML's mission is to provide data on the level of chemical agent material exposure, to verify the efficiency of the ventilation systems designed to contain chemical agent materials, and to fulfill the regulatory requirements calling for monitoring support. The task is to maintain and manage the LIMS, which is a database for sample collection and analysis data. RFP, at 46.

Proposals were to have three separate volumes: Technical/Management, Past Performance, and Cost. RFP, at 58. The Technical/Management volume would include a Personnel Plan addressing the availability of all personnel to support the contract, and specifically addressing the plan to perform the Sample Tasks upon award. The offeror will define its own key personnel and provide resumes of its proposed personnel. RFP, at 61. The offeror will include matrices of labor hours showing the number of hours for all categories. The offeror will identify specific personnel to the category and identify the individuals' responsibilities. RFP, at 60. The offeror will include all agreements executed with subcontractors.

The Past Performance volume was to include contracts for the prime and each proposed subcontractor who will perform a significant portion of the contract. RFP, at 62.

#### B. Appellant's Proposal

Appellant submitted its Proposal on August 24, 2009. Appellant presented its core competencies as being a “[w]ell-established science and technology firm providing innovative technical and Information Technology solutions” to various Government agencies. Proposal, Executive Summary.

Appellant's subcontractor is STEM International, Inc. (STEM). Appellant presented STEM's core competencies as incumbent contractor on this contract with strong experience in chemical agent monitoring, analysis, safety, quality assurance, chemical demilitarization, technical and program integration support and a strong staff of trained chemical agent environmental safety and health professionals, as well as administrative and technical personnel. The Subcontract Agreement and Proposal state Appellant will do 51% of the labor and STEM 49% of the labor over the course of the contract.

In its Personnel Plan, Appellant defined four key personnel: the Program Manager, the Quality Assurance/Quality Control (QA/QC) Manager, the Air Monitoring Support Task Leader (Sample Task 1) and the LIMS Database/Systems Administrator Task Leader (Sample Task 2). The QA/QC Manager is to be a STEM employee; the others will all be Appellant's employees. At the time of Proposal submission; however, all of these individuals were STEM's employees. The proposed Program Manager is the incumbent Program Manager, a STEM employee.

Appellant lists 12 personnel for Task Order 1. Five, including the Task Leader, are identified as STEM employees. The remaining seven are to be Appellant's personnel. These seven were STEM employees at the time of Proposal submission. Appellant proposes it will perform 59% of the labor cost, and STEM 41% for Task Order 1. Appellant lists two employees for Task Order 2, both identified as Appellant's employees. One of these two, the Task Leader, was employed by STEM at the time of Proposal submission. The Program Manager and QA/QC Specialist are also proposed to perform; as noted above, they are incumbent STEM employees. Appellant proposes it will perform 100% of Task Order 2.

The Proposal lists 30 technical specialists for the contract. Of these, five are Appellant's personnel, and include Appellant's President. The remaining 25 are identified as STEM

employees, and were employed by STEM at the time of Proposal submission.

For its own Past Performance, Appellant submitted summaries of eight contracts. The first (\$274,068) was a subcontract for the National Oceanic and Atmospheric Administration (NOAA) Environmental Satellite Data Processing Center. Appellant supported the prime contractor in tasks including raw data ingest from environmental satellite instruments, systems administration of computer servers, configuration management of hardware and software, reports and scientific data products. Appellant provided science, data management, monitoring, verification, and documentation support to operations. The second (\$661,924) was a NOAA Critical Infrastructure Protection contract. Appellant was a subcontractor in this effort to develop an operations backup facility. Appellant engaged in design, development, and deployment of web-based technologies, migration of legacy systems to current technologies, hardware and software installation, and technical writing.

The third (\$107,910) was a prime contract for NOAA's Alternate Lagrangian Orbits Study, where Appellant provided science algorithm support in areas like space weather in environmental data records. The fourth contract (\$300,000) was a subcontract for NASA's Independent Validation and Verification (IV&V) facility at Goddard Space Flight Center. Appellant provided IV&V review of system architecture, and IV&V design and interface review, to determine whether system products meet the operational need and interface design satisfies validated integration requirements. Appellant provided systems modeling for risk assessment and management.

The fifth, and largest performance (\$4,900,000) is as a subcontractor for NOAA's Comprehensive Large Array Data Stewardship System (CLASS) Archival and Distribution contract, which will last through 2018. CLASS is a large data system for archiving and retrieving weather satellite data. Appellant supports the prime contractor as a systems engineer with tasks including hardware studies, technical writing, system testing, and IT architecture. Appellant provides test plans, architecture analysis, and data volume verifications and validation. The sixth (\$250,000) was as a subcontractor for the National Cancer Research Institute for development and maintenance of a web application interface used by researchers and the public. The seventh (\$327,960) was for the U.S. Army Armor School Library to digitize over a million pages of documents and film images. The eighth (\$46,833) was for the U.S. Army Environmental Center to digitize one million pages of documents, with STEM as Appellant's subcontractor.

Appellant's Proposal included summaries of eleven STEM contracts. The first (\$26,000,000), is the incumbent contract. In the "Past and Current Performance Matrix, 13 of the 14 subtasks listed in the SOW (all except C.3.1.10, meetings and conferences) are checked off relating to this contract. The second (\$6,661,021) is for the U.S. Army Chemical Materials Agency Program and Integration Support IV - Technical Services contract. On this contract, STEM provides technical services for the Army's chemical demilitarization at multiple sites. The third (\$60,000,000) is for the Defense Threat Reduction Agency, Chemical Weapons Convention Mission Support and Program Management Services contract which will last until 2013. STEM provides logistics and chemical demilitarization.

The fourth performance summary (\$19,168,064) is for the Department of Homeland

Security, Chemical Agent Training Support Services. STEM provides monitoring, testing, and training operations, and manages a clinical laboratory. The fifth (\$2,500,000) is for the Pine Bluff Arsenal Engineering and Professional Technical Services contract. STEM provides process safety management and technical security services, and ensures documents and materials are in compliance with regulations.

The sixth (\$1,308,163) was for RBC Cholinesterase Collection, Processing, Testing and Monitoring Laboratory Services at Anniston Chemical Disposal Facility. STEM operates this laboratory to test and monitors levels of Cholinesterase in staff and visitors to this facility. The seventh (\$73,664) was for the U.S. Army Medical Research Institute of Chemical Defense Safety Support (Industrial Hygienist Services). The eighth (\$1,000,000) was for Chemical Surety Laboratory Decommissioning and Decertification. STEM worked with the Government in monitoring and decontamination operations.

The ninth (\$4,800,000) was a subcontract for the U.S. Army Corps of Engineers Cold Regions Research and Engineering Laboratory Information Technology Services. STEM worked as a subcontractor to provide user, network, website, graphic design, engineering, research, data entry, reception, data management, and production control services. The tenth (\$99,933) contract was for the U.S. Army Materiel Systems Analysis Activity. STEM provided computer modeling and simulation support, and also software development and V&V of munitions and countermines. The eleventh performance (\$1,046,431) was a subcontract for Escort Personnel Support at Tooele Chemical Agent Disposal Facility. STEM escorted visitors to Deseret Chemical Depot where demilitarization activities extend.

### C. The Protest

On September 26, 2011, the CO issued a notification of awards identifying SM Resources Corporation (Appellant) as the successful offeror. On September 30, 2011, Reema Consulting Services, Inc. (Reema) filed a protest with the CO. Reema asserted Appellant was affiliated with STEM under the ostensible subcontractor rule.

### D. The Size Determination

On December 29, 2011, the Area Office issued Size Determination No. 2-2012-01 (Size Determination), concluding that Appellant is not small for this procurement.

The Area Office found that Neelu Modali is Appellant's 100% stockholder and Chief Executive Officer. Appellant has no affiliates and is, by itself, a small business.

The Area Office discussed Appellant's response to Reema's protest allegations. Appellant had argued it has the requisite experience and ability for this contract, a responsibility issue, as demonstrated by its Certificate of Competency. Appellant also argued that several of its current employees will work on the contract as well as new hires of incumbent personnel and others. Appellant pointed out the new presidential policy on hiring incumbent personnel and the difficulty in segregating tasks for an ID/IQ contract where specific tasks are not yet known.

Reviewing the Proposal, the Area Office found Appellant had proposed 44 employees for this project, 14 from Appellant and 30 from STEM. Seven of the Appellant's 14 employees were STEM employees at the time of Proposal submission; one was employed by another firm. Therefore, Appellant proposed only six of its own employees, or 14% of the proposed workforce, for this contract at the time of submission. The Area Office found this reliance on the incumbent ostensible subcontractor for virtually all the staff to perform primary and vital requirements of the contract established undue reliance by Appellant upon STEM for contract performance.

The Area Office then turned to the Sample Task Orders, noting it gives weight to the allocation of work and proposed personnel in sample tasks since it is difficult to assess these otherwise in an ID/IQ contract. For Task Order 1, the Area Office found the Proposal states that Appellant will perform 59% of the task and STEM will perform 41%. However, Appellant's team will consist entirely of personnel currently employed by STEM. Proposal, Vol. I, § 1.2.1, at 10. Therefore, 100% of the work will be completed by incumbent personnel who were STEM employees at the time of Proposal submission.

In reviewing Task Order 2, the Area Office found the Proposal stated Appellant would perform the entire task. Nevertheless, three of the four key employees (Program Manager, QA/QC Specialist and Task Leader) are current STEM employees. One proposed employee is Appellant's current employee, whose role is emergency support and backup resource, and is proposed to perform approximately 2% of the work. The Task Leader is to perform 94.5%. The Program Manager and QA/QC Specialist will perform 3.5% of the work. The Area Office thus concluded that even though the task here is in the nature of information management, 98% of the work will be performed by STEM's current employees. The Area Office noted that the Proposal states that STEM has been providing the administration, maintenance, support of current LIMS programs, and migration and testing of LIMS upgrades, by running current LIMS in parallel with LIMS upgrades, and Appellant proposes to have STEM continue this support. Proposal, Vol. I, § 2.2.2, at 31.

After reviewing the sample tasks, the Area Office concluded that STEM employees would be performing the environmental, safety, health, and research support services which are the primary and vital requirements of the contract. Only one of Appellant's employees at the time of the Proposal submission would be performing on the Sample Tasks.

The Area Office also found Appellant's proposed management team as evidence of reliance upon STEM for contract performance. Appellant states its goal is to utilize incumbent personnel currently executing key functions as key personnel. Proposal, Vol. I, § 4.3, at 54. Appellant is relying entirely upon STEM's management team to execute this contract; not one of Appellant's current employees is proposed as a key employee. Proposal, Vol. I, Ex. 5-2, at 63.

The Area Office concluded that, although the Program Manager and the QA/QC Manager will report directly to Appellant's President, Appellant's President is not identified as a key employee and is not included in the discussion of key employees. Therefore, Appellant's President is not a key employee and will play little to no role in management of the contract. Proposal, Vol. Ex, 5-2, at 63; Vol. I, § 4.3. Instead, the Program Manager, a STEM employee at

the time of Proposal submission, would be in charge of the contract. He would form the task teams, conduct day-to-day activities of the contract, and regularly meet with the Government representative. Proposal, Vol. I, § 5.3, at 66-67. The Program Manager is charged with responsibility for all work performed regardless of company affiliation of personnel performing. Proposal, Vol. I, § 5.10, at 72. The Area Office found this another indicia of Appellant's unusual reliance upon STEM for contract performance.

The Area Office also considered Appellant's Past Performance submission. The Area Office concluded that while both firms have experience in government contracting, Appellant is largely an information technology firm, and STEM is an environmental sciences firm. The Area Office found that the Past Performance summaries in Vol. II emphasize Appellant's limited exposure to contracts of this nature. Appellant's summaries focus more on data management, record digitization, and documentation support — not tasks associated with environmental, safety, health, and research support.

In contrast, the Area Office found STEM is the incumbent and its past performance highlights the depth of its technical experience specific to the contract and the subtasks. The Area Office found Appellant's reliance upon STEM's experience, knowledge, and expertise to perform the contract resonates throughout the Proposal, Proposal, Vol. I, § 1.2.1, at 6 and Vol. I, § 4.1, at 50. Nearly all of the technical staff and all of the proposed management team will be current STEM employees.

The Area Office reviewed agreements executed between Appellant and STEM, including the contract agreement between the two concerns and mentor/protégé agreement.<sup>2</sup> Other than the general 51%/49% allocation of work between Appellant and STEM, the Area Office found no details of task allocation or management of the contract.

The Area Office concluded that Appellant brings little more than its 8(a) status to this procurement. Appellant proposes to hire a number of STEM's incumbent employees to perform this contract. Appellant proposes to rely upon only a very limited number of its own employees to perform the tasks here, none in the key personnel roles. Furthermore, Appellant's past performance highlights its limited experience with the core competencies of the contract at issue.

The Area Office determined Appellant is unusually reliant upon STEM to perform the primary and vital tasks of the contract. The Area Office thus concluded Appellant is engaged in a joint venture with STEM, and affiliated with it for this procurement under the ostensible subcontractor rule. Because STEM is not a small business, the Area Office determined Appellant is not small for this procurement.

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<sup>2</sup> The Area Office found that Appellant and STEM had executed a mentor/protégé agreement on December 2, 2009, and that SBA approved it on December 4, 2009. Because this was not prior to Proposal submission, Appellant could not avail itself of the mentor/protégé exclusion from affiliation. *Size Appeal of Medical and Occupational Services Alliance*, SBA No. SIZ-4989 (2008). The Area Office noted the mentor/protégé agreement has since been dissolved.

### E. The Appeal

On January 9, 2012, Appellant received the Size Determination. On January 13, 2012, Appellant filed the instant appeal.

Appellant asserts the Area Office erred in finding that Appellant would be performing only a small percentage of the work under the proposed sample tasks. Appellant asserts that it would perform 59% of the work for Sample Task 1 and 100% of the work on sample Task 2 with its own employees. Proposal, Vol. III at III-3. Appellant argues that under an ID/IQ contract such as the instant contract, the concern managing the contract and performing the majority of the work is deemed to be performing the primary and vital requirements. Appellant asserts that upon award, it will hire the incumbent personnel designated in its Proposal, and not merely subcontract the work to STEM, and the Area Office erred in taking this sufficiently into account in its analysis.

Appellant argues that OHA has held that the hiring of incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance. Therefore, the Area Office erred in finding Appellant's prospective hiring of STEM's incumbent non-key employees as evidence of unusual reliance.

Appellant argues that its hiring plan here is more like that in *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011), which was found not to represent unusual reliance, than that of *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), which was. Appellant, like the challenged concern in *Spiral*, has offered positions to the employees individually, and each has signed a contingent offer letter. Therefore, it is not an *en masse* transfer, without any input from the employees.

Appellant asserts the Area Office erred in finding undue reliance because Appellant's proposed key personnel were current STEM personnel. Appellant asserts there is no requirement that proposed key employees be in the employ of the small business prime contractor at the time it submits the Proposal. Appellant asserts proposed employees are often incumbent employees, and it is unreasonable to expect prospective employees to quit their positions and join a new company in anticipation of a new contract, especially where there is, as here, an extended evaluation period.

Appellant further argues that while Executive Order 13,495 does not require successor contractors to offer a right of first refusal to managerial employees, the same policies of minimizing disruption in service apply to managerial employees as to non-managerial employees.

Appellant also asserts the Area Office erred in finding Past Performance as an indicia of undue reliance. There is no requirement that an offeror in a small business set-aside procurement have previously performed precisely the same type of contracts as in the past. It is sufficient that the concern have some experience in functions relevant to the contract at issue. Further, Appellant's Past Performance demonstrates it has ample experience in the core competencies required for contract performance. Proposal, Vol. II, at 12. For example, in the NOAA

Environmental Satellite Data Processing Center subcontract, Appellant demonstrated broad experience with environmental science instrumentation. Proposal, Vol. II, at 8-9.

Further, in the NOAA Critical Infrastructure Protection contract, Appellant provided engineering, facility plans, equipment calibration, program management and administrative tasks. Proposal, Vol. II, at 10-11. On the NOAA Lagrangian Orbits contract, Appellant provided science algorithm support. Proposal, Vol. II, at 12-13. On the NASA Independent Validation and Verification contract, Appellant provided systems modeling capabilities applicable to risk assessment, system management and modeling. Proposal, Vol. II, at 14-15. On the NOAA Comprehensive Large Array Data Stewardship contract, Appellant asserts that while its responsibility was database support and retrieval, its experience is relevant because it is verifying that the environmental data is accurate and current. Proposal, Vol. II, at 16-17.

As for the two Army record digitization contracts, these are not important. The other six contracts are more important, and establish Appellant's experience, contrary to the Area Office finding.

Appellant further asserts its existing employee base confirms it has sufficient past performance for this solicitation. Appellant identifies five employees, and enumerates their qualifications. Four of the five employees are identified with some environmental science experience. Proposal. Vol. I App., at 38, 39, 43, 95, 97.

Appellant maintains it is not unduly reliant upon STEM for the primary and vital requirements of the contract, and the Area Office clearly erred in finding undue reliance.

#### F. The Contracting Officer's Response

On January 13, 2012, the CO filed a pleading in support of the appeal. The CO asserted Reema had no standing to protest, because it was eliminated by the CO for reasons unrelated to size. 13 C.F.R. § 121.1001(a)(2)(i). The CO submits as new evidence the Source Selection Decision, to support this assertion.

#### G. Protestor's Response

On January 30, 2012, the protestor Reema responded to the appeal. Reema first asserts it has standing. Reema asserts that nothing in the record suggests it was eliminated or deemed ineligible for award.

Reema argues that Appellant brought only its 8(a) status to the table for this procurement. Reema argues that Appellant focuses not upon its current capabilities, but its post award capabilities. The focus is rather upon what is in the Proposal. Here, Reema asserts STEM has the personnel, the past performance, the experience, the facilities and the financials; Appellant only has the status. Appellant points to the mentor/protégé agreement, which states that STEM prepared the Proposal. MP Agreement at 5.

Reema further argues that Executive Order 13,495 does not apply here, because this is

not a service contract. Reema points to OHA decisions which apply a heightened level of scrutiny to cases where the incumbent is the subcontractor, and the small business prime contractor is hiring the incumbent's staff. Reema asserts that Appellant has little to no relevant experience for this contract, and the Area Office did not err in finding Appellant unusually reliant.

Reema further asserts the Proposal highlights STEM's capabilities, and not Appellant's, showing unusual reliance. Appellant emphasizes STEM's experience on this contract. Reema also points out the frequent use of "team" language throughout the Proposal, as evidence of affiliation.

#### IV. Discussion

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

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

I DENY the CO's motion to admit new evidence. Evidence not considered by the Area Office is not to be admitted absent a motion establishing good cause. 13 C.F.R. § 134.308(a)(2). Here, the Source Selection document was not in the record before the Area Office, when the CO had the opportunity to submit it. The CO gives no good cause for its late submission here.

I further find no merit to the CO's contention that Reema had no standing to protest Appellant's size. There is no evidence that Reema was eliminated from consideration for this award, as opposed to merely being an unsuccessful offeror. Reema had standing to protest the award to Appellant as an offeror not eliminated for reasons unrelated to size. 13 C.F.R. § 121.1001(a)(2)(i).

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. The Merits of the Ostensible Subcontractor Issue

Under SBA's "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4), a prime contractor and its subcontractor may be treated as affiliates if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. To apply the ostensible subcontractor rule, the Area Office must consider all aspects of the relationship between the prime and subcontractor, including the 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); *Size Appeal*

of *Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006).<sup>3</sup> The purpose of the rule is to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). An ostensible subcontractor case must be analyzed on the basis of the RFP and Proposal at hand. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011).

Appellant argues that the Area Office erred in finding it unusually reliant upon STEM for performance of the contract's primary and vital functions. First, the Area Office was required to, and did, consider that STEM is the incumbent contractor. While it is not a *per se* rule that a concern which proposes the incumbent as its subcontractor has violated the ostensible subcontractor rule, the fact that the regulation explicitly identifies this as a factor to consider requires that such a prime/subcontractor relationship receive heightened scrutiny when performing an ostensible subcontractor analysis. *Size Appeal of Spiral Technologies, Inc.*, SBA No. SIZ-5279, at 27 (2011).

The Area Office then considered Appellant's hiring of the incumbent's employees. In response to the policy enunciated in Executive Order 13,495<sup>4</sup> OHA has held that the mere hiring of incumbent non-management personnel is no longer indicative of unusual reliance under the ostensible subcontractor rule. *Spiral*, at 28.<sup>5</sup>

Nevertheless, there are two important distinctions between the *Spiral* case and here. First, here, Appellant intends not merely to hire some of its staff from STEM but the great majority of its staff. Only 14% of the proposed contract personnel are currently Appellant's employees. Appellant's Proposal relies heavily upon the expertise of STEM and its employees, mentioning many times STEM's incumbent status as a qualification of the team for the hiring of the contract. Further, the personnel Appellant proposes for performance of the Sample Tasks are almost entirely current STEM employees.

What Appellant proposes is more in the nature of an *en masse* hiring of employees, which OHA has found to be indicative of unusual reliance. *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). The fact that Appellant had obtained commitment letters from these employees does not alter the fact that Appellant is merely proposing to adopt the personnel of its incumbent ostensible subcontractor. The Area Office properly considered Appellant's proposed *en masse* hiring of STEM's employees as an indicia of unusual reliance.

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<sup>3</sup> The seven factors test is no longer applicable. *C&C Int'l Computers and Consultants, Inc.*, at 12-13.

<sup>4</sup> E.O. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009).

<sup>5</sup> *Spiral* is not based upon a legal requirement that challenged concerns hire the incumbent employees, but rather holds that, given the clear change in policy expressed in the Executive Order and the industry practice in doing so, the mere hiring of non-management incumbent employees should no longer be used as an indicia of unusual reliance under the ostensible subcontractor rule. *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at fn. 2 (2011)

The Area Office further considered the fact that all of Appellant's managerial and supervisory employees for this contract are currently STEM employees. Appellant itself clearly stated that its goal was to utilize the incumbent key personnel as its own key personnel Proposal, Vol. I, § 4.3, at 54. While the key personnel will report to Appellant's President, that official is not identified as a key employee. Thus, it is clear that the Program Manager, the QA/QC Specialist and the Task Leaders will be managing and supervising this contract. The Program Manager will form the task teams, conduct the day-to-day activities, and is charged with responsibility for all the work performed. Proposal, Vol. I, § 5.10, at 72. Managerial employees are exempted from the reach of Executive Order 13,495. OHA has consistently held that among the main considerations in ostensible subcontractor analysis are which concern is managing the contract, and will be providing the key employees. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290 (2011). Therefore, the Area Office properly considered the fact that Appellant would be hiring all of its key employees who manage the contract from STEM as strongly indicative of unusual reliance. *DoverStaffing*, at 9.

Appellant's arguments that there is no prohibition against hiring incumbent personnel, and that it cannot keep personnel on staff during a long evaluation period are meritless. While both statements are true, the point here is that Appellant's reliance upon the incumbent ostensible subcontractor's key personnel for performance of the contract is an extremely strong indicia that Appellant is unusually reliant upon STEM for performance of the contract's primary and vital functions.

The Area Office also considered Appellant's Past Performance submissions as evidence of its unusual reliance upon STEM. Reviewing the contracts Appellant presented to document its own Past Performance, I conclude that the Area Office correctly concluded that Appellant is largely an Information Technology firm, and STEM largely an environmental sciences firm.

The Area Office found the NOAA Satellite Data Processing Center contract was largely an IT contract. Appellant points to the underlying environmental science aspects of the project to support its claim that this contract gives it experience in environmental science. However, Appellant's submission mentions only IT type work, involving data ingests, systems administration of computer servers, management of hardware and software, and the purchase and development of processors. This was clearly an IT contract.

On the NOAA Infrastructure Protection contract, Appellant makes no showing that the contract was anything other than an IT services contract.

On the NOAA contract for a study of Lagrangian Orbits, Appellant provided science algorithm support. Appellant argues that some of the areas supported included Environmental Data Records. Nevertheless, Appellant's work here was IT work, even if it supported the collection of environmental data.

Appellant's NASA's Goddard Space Flight Center, providing system modeling for risk assessment and management was clearly an IT contract, and Appellant does not really argue that it was not.

Appellant's NOAA contract for the Comprehensive Large Array Data Stewardship System, where Appellant's submission states it was systems engineer and describes the IT work it performed. On appeal, Appellant attempts to argue that some of the data supported was environmental data. However, its submission in the Proposal describes IT related work.

Appellant does not discuss in its appeal its other Past Performance submissions, but because these were for web development tasking digitizing written documentation, they were clearly IT contracts.

I thus conclude that the Area Office was correct when it found that Appellant's Past Performance submissions represented work in the field of IT, and did not represent work in the fields of environmental consulting services. I further conclude the Area Office was correct in concluding Appellant had limited experience in contracts of this nature. Conversely, the Proposal is replete with references to STEM's extensive experience in this field, and its performance as the incumbent on this contract.

It is appropriate to consider a prime contractor's experience as part of an ostensible subcontractor analysis because this experience is relevant to whether the prime contractor can perform independently from the subcontractor. *DoverStaffing*, at 10. OHA has found unusual reliance upon an ostensible subcontractor where the prime contractor's past performance showed no experience in performing the primary and vital work required by the solicitation, but the subcontractor's performance did. *Id.*; *Size Appeal of EarthCare Solutions, Inc.*, SBA No. SIZ-5183, at 10 (2011); *Size Appeal of Smart Data Solutions LLC*, SBA No. SIZ-5071, at 21-22 (2009). When a prime contractor relies almost totally upon the experience of other firms to establish its relevant experience, that is probative evidence it is unusually reliant upon its subcontractor to perform the contract in question. *See DoverStaffing*, at 10-11; *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192, at 9 (2011). Therefore, the Area Office did not err in finding Appellant unusually reliant upon STEM based upon the Past Performance submission, which relies almost entirely upon STEM for the directly relevant experience for this contract.<sup>6</sup>

Appellant argues that several of its own personnel have experience in the field of environmental science, but a review of their resumes reveals that most of their experience is not in environmental science, but in IT.

Further, as Reema noted, the mentor/protégé agreement pending SBA approval at the time of Proposal submission states:

STEM has introduced SMRC to it's [sic] current customer at the U.S. Army in Edgewood, Maryland. STEM has introduced SMRC as a potential prime contractor and is actively working with SMRC in development of a proposal for this initiative. This activity includes proposal development workshops with the

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<sup>6</sup> Appellant maintains SBA had certified its experience by issuing a Certificate of Competency (COC). As the Area Office noted in the size determination a COC is a different procedure from the size protest process, and is not binding here.

team at SMRC. STEM has funded a large proposal development initiative at their offices in Bethany, Maryland, where SMRC business development team members are going through a one week “on-the-job” training initiative on an actual proposal. This proposal will be submitted to ECBC with SMRC as the prime contractor.

Mentor/Protégé Agreement, at 5.

It is thus clear that here it was STEM who initiated the contact between Appellant and the Army, and that it was STEM who is largely responsible for the preparation of this Proposal. Reliance upon the subcontractor for proposal preparation is another indicia of unusual reliance. *Size Appeal Onopa Management Corporation*, SBA No. SIZ-5302, at 18-19 (2011). Further, it appears that here it was STEM that took the lead in “chasing the contract”, which is also an indicia of unusual reliance. *Size Appeal of Avantara Corporation*, SBA No. SIZ-4225 (1996); *Size Appeal of Space Mark, Inc.*, SBA No. SIZ-3713 (1992).<sup>7</sup>

I therefore conclude that Area Office did not err in finding Appellant was unusually reliant upon STEM for this contract. The record reflects that STEM is the incumbent contractor, with long experience in the environmental consulting field. STEM initiated the contact between Appellant and the Army, and is largely responsible for the preparation of this Proposal. The great majority of Appellant's proposed personnel are STEM's personnel, currently working on this requirement. All of Appellant's proposed key personnel are currently STEM employees, currently performing on this requirement. Appellant is an Information Technology firm, with little experience in this field, while STEM, as the incumbent, has a great deal of experience in this field. Appellant's proposed Past Performance submissions were in the field of IT, while STEM is the incumbent, and offered other environmental science contracts as its past performance. I thus conclude that STEM's involvement does more than merely enhance Appellant's Proposal, and that STEM's participation is vital to Appellant's performance of his contract, and I conclude that Appellant is unusually reliant upon STEM for the performance of this contract, and is thus affiliated with it under the ostensible subcontractor rule. A prime contractor must bring something to the table beyond its small business or 8(a) status, it must bring, at a minimum, the ability to perform the primary and vital requirements of the contract. Here, Appellant has not done so, but is reliant upon STEM for this performance. *C&C Int'l Computers and Consultants, Inc.*, at 21-22.

Because Appellant is affiliated with STEM under the ostensible subcontractor rule, and STEM is not a small concern, Appellant is not a small business for this procurement.

## V. Conclusion

The record on appeal supports the Area Office's conclusion that Appellant is unusually reliant upon its subcontractor STEM for performance of the instant contract. The Size

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<sup>7</sup> As noted above, the mentor/protégé agreement was not yet approved at the time of the Proposal's submission, therefore Appellant was not entitled to the exception from affiliation. *Size Appeal of Medical and Occupational Services Alliance*, SBA No. SIZ-4989 (2008).

Determination is AFFIRMED and the Appeal is DENIED.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge