

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

SIZE APPEAL OF:

IPKeys Technologies, LLC,

Appellant,

RE: EHS Technologies Corp.

Appealed From

Size Determination No. 1-SD-2012-016

SBA No. SIZ-5353

Decided: May 14, 2012

APPEARANCES

John G. Stafford, Jr., Esq., Dorn C. McGrath, Esq., William M. Jack, Esq., Greenberg Traurig, LLP, Washington, DC, for EHS

John E. Jensen, Esq., Nicole Y. Beeler, Esq., Pillsbury Winthrop Shaw Pittman, LLP, McLean, VA, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On March 6, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2012-016 finding EHS Technologies Corporation (EHS) to be an eligible small business for the procurement at issue and accompanying size standard. IPKeys Technologies, LLC (Appellant) now appeals the decision. For the reasons discussed *infra*, the appeal is denied.

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 timely filed the instant appeal on March 27, 2012. Accordingly, this matter is properly before OHA for decision.

¹ This Decision was originally issued under a Protection Order. On May 15, 2012, I issued an Order for Redactions. OHA received one request for redactions. I now issue a redacted version of the Decision for public release.

II. Issue

Whether the size determination finding EHS to be an eligible small business not in violation of the ostensible subcontractor rule was based on clear error of fact or law.

II. Background

A. Solicitation and Protest

On June 8, 2011, the Department of the Army (Army), Program Executive Office, Simulation, Training and Instrumentation, Orlando, FL issued Solicitation No. W900KK-11-R-0006 (RFP) seeking to procure services for the Home Station Instrumentation Training System (“HITS”). The RFP required the awardee to procure, configure, manage, test, install, and field the HITS system. The Contracting Officer (CO) set aside the procurement for participants in the 8(a) Business Development program and designated North American Industry Classification System (NAICS) code 333319, Other Commercial and Service Industry Machinery Manufacturing, with a corresponding size standard of 500 employees as the appropriate code for this procurement.

On January 17, 2012, the Army issued a notice that EHS was the apparent successful offeror. On January 24, 2012, Appellant protested EHS's small business status, claiming EHS was unduly reliant on its ostensible subcontractors, Camber Corporation (Camber) and Riptide Software, Inc. (Riptide). Appellant alleged that based on this affiliation, EHS exceeded the size standard for this procurement.

B. Size Determination

On March 6, 2012, the Area Office issued Size Determination No. 1-SD-2012-016, concluding that EHS is a small business concern for the procurement at issue. The Area Office found that EHS was an SBA 8(a) certified concern at the time it submitted its initial offer for the procurement at issue.

The Area Office found, after reviewing EHS's proposals, that EHS has three subcontractors for the procurement at issue, Camber, Riptide, and Engineering and Computer Simulations (ECS). Even though Appellant did not mention ECS in its protest, the Area Office considered its relationship with EHS in its affiliation analysis.

The Area Office examined whether EHS was generally affiliated with any other concern. The Area Office found that EHS was established in 1996, and wholly owned by Denis M. Eckerle, and William J. Eckerle. EHS owns 99% of Eckerle Management Company (EMC), a real estate management company. Mr. Eckerle owns the remaining 1% of EMC. Based on this finding, EHS and EMC are affiliated.

The Area Office determined that EHS and its three subcontractors did not have any common ownership or management. It determined that EHS has not received any order from Camber or ECS, but that it did receive an order from Riptide in April 2010 that accounted for

0.06% of EHS revenues in 2010. Additionally, there have never been any bonding or financial arrangements between EHS and its subcontractors, thus the Area Office found no general affiliation existed between them.

The Area Office proceeded to examine whether EHS and its subcontractors have violated the ostensible contractor rule. The Area Office determined that the Statement of Work (SOW) defined the scope of the procurement as “procuring, managing, testing, installing, and fielding of the HITS.” Size Determination at 4. Furthermore, the requirements for the SOW were divided into fifteen areas: (1) HITS Procurement; (2) System Configuration; (3) Information Assurance; (4) Quality Assurance; (5) HITS Test; (6) Post Award Conference; (7) Program Management and Reviews; (8) Financial Management; (9) Risk Management; (10) Fielding; (11) Item Unique Identification (IUID) of Tangible Items; (12) Training Support; (13) Transfer of Property; (14) Warranty; and (15) Computer Hardware Enterprises Software Solutions (CHESS) Program.

The Area Office stated that in order to find a violation of the ostensible subcontractor rule, the subcontractor must perform the primary and vital requirements of the contract or the prime contractor is unusually reliant upon the subcontractor. The Area Office found the SOW to define the primary and vital requirements as procuring, managing, testing, installing, and fielding the HITS program. In turn, any other work required to produce the services are ancillary to the primary and vital services.

The Area Office found that EHS will perform the areas of Program Management and Quality Assurance. Furthermore, EHS will be the lead of Quality Assurance, HITS Test, Post Award Conference, Program Management and Review, Financial Management, Risk Management, IUID, and Transfer of Property. Additionally, it would be the joint lead with ECS on Information Assurance and Fielding, and involved in HITS procurement with Riptide, and Training with Camber and Riptide. Thus, the Area Office found EHS to be the lead, or involved in performing, on twelve of the SOW elements. Based on EHS's proposals and submissions, EHS will provide 55.1% of the labor associated cost of this procurement.

The Area Office determined that Riptide would be purchasing the hardware and software components for the Battalion and Company Sets in connection with the production of HITS from the Army's CHESS program. The Area Office found Riptide to be the Major Subcontractor for this procurement based on their total costs, which exceed 51% of the total contract value. Additionally, Riptide will be the sole lead and assisting in performing the HITS procurement and System Configuration. Additionally, Riptide will be involved in Information Assurance, Post Award Conference, IUID, and Training. Based on these findings, Riptide will be providing 15.5% of the labor associated costs of this procurement. The Area Office found that Riptide's contributions as sole lead in HITS Procurement, System Configuration, and involvement in Information Assurance are not minimal contributions. Instead, the Area Office determined these to be primary and vital requirements of the procurement. Additionally, five of the nine past performance contracts that EHS submitted in their proposal are from Riptide's past performance history. The Area Office determined that without Riptide, major functions of the procurement could not be completed. Based on these findings, the Area Office concluded that Riptide is an ostensible subcontractor for this procurement, and EHS and Riptide to be joint venturers affiliated for this procurement.

The Area Office determined Camber has more than 500 employees, and would be performing new equipment testing. The Area Office found Camber to be the sole lead in the Training element, with EHS and Riptide also involved. Additionally, Camber would be involved in Post Award Conference with EHS and the other subcontractors. The Area Office determined Camber's duties under the contract to not constitute primary and vital requirements, and found no other evidence that would make EHS unusually reliant upon Camber. Furthermore, Camber will only be providing 10.9% of the labor associated cost for this procurement and its past performance history was not a part of EHS's past performance submission. Based on these findings, the Area Office found EHS to not be affiliated with Camber for this procurement.

The Area Office found ECS to be a woman-owned business with approximately 20 employees and performing production acceptance testing, installation and site survey work, and field acceptance testing. ECS will be the joint lead, along with EHS, in the Information Assurance and Fielding elements, while also involved in HITS testing with EHS. The Area Office determined that ECS's involvement in Information Assurance and Fielding, a primary and vital contract requirement, does not make EHS unusually reliant on ECS. This is supported by ECS only providing 18.5% of the labor associated cost for this procurement. Lastly, EHS did not include Camber's past performance history in its own past performance submission.

The Area Office found EHS to be affiliated with Riptide and EMC. Nevertheless, even while aggregating EHS, Riptide and EMC's employees, EHS still meets the applicable size standard. The Area Office thus determined that EMS was an eligible small business.

C. Appeal Petition

On March 27, 2012, Appellant filed the instant appeal. Appellant assigns as error the Area Office's determination finding Appellant eligible for the present procurement. Appellant states the Area Office erred in finding that Camber and EHS's subcontractor relationship does not violate the ostensible subcontractor rule. Appellant states the Area Office erred in failing to find EHS to be unusually reliant on Camber to perform the primary and vital requirements of the procurement at issue.

Appellant maintains the Area Office erred in failing to find that EHS does not possess the necessary technical experience, expertise, and capability to perform the primary and vital requirements of the contract. Appellant argues that EHS does not possess the simulation training, design, testing, and fielding experience necessary to meet the RFP's requirements. In turn, Appellant argues that Camber does possess the necessary experience that EHS lacks to perform the contract. Appellant argues these facts suggest that EHS will rely heavily upon Camber to perform the primary and vital requirements of the contract.

Appellant further argues the Area Office failed to consider EHS's Central Contractor Registration (CCR) at time of award. Appellant argues EHS did not include NAICS code 333319 in its CCR listing. Conversely, Camber did list NAICS code 333319 in its CCR listing, thus showing further evidence that Camber will be performing primary and vital contract requirements.

Appellant argues the Area Office erred in failing to find that Camber will be performing primary and vital requirements of the contract, thus violating the ostensible subcontractor rule. Based on the resulting affiliation, EHS exceeds the size standard for the procurement at issue. Appellant requests the size determination be reversed.

D. EHS's Response

On April 13, 2012, EHS filed a response to Appellant's appeal petition. EHS argues that Appellant's appeal should be dismissed or denied. EHS argues Appellant failed to show that the Area Offices' size determination is based on clear error of fact or law.

EHS argues that the Area Office's determination that EHS, and not Camber, will be providing the majority of the labor costs associated with the contract is correct. EHS goes on to cite numerous OHA decisions stating that the firm who performs the majority of the total contract must be deemed to be performing the primary and vital contract requirements.

EHS asserts Appellant's argument regarding EHS's capability to perform the contract goes to a responsibility determination, which falls under the CO's purview. EHS argues it would not have been appropriate for the Area Office to implement its own judgment regarding EHS capability to perform the contract.

EHS argues Appellant's claims that Camber will be performing primary and vital contract requirements, based on Camber's experience and EHS's lack thereof, are meritless and factually incorrect. EHS relies on its experience working with the *** while *** to rebuke Appellant's claim.

EHS states the Area Office found Camber will only provide 10.9% of the labor associated costs, and that Camber's selection as a subcontractor is based on ***. Additionally, EHS states that it did not include *** in its proposal.

EHS further argues that Appellant's argument regarding EHS's failure to list NAICS code 333319 in its CCR is irrelevant and seeks to raise matters of responsibility. EHS argues the Area Office is under no obligation to comment on every size protest allegation. EHS argues that this particular argument put forth by the Appellant is irrelevant and has no bearing on the outcome.

EHS does not challenge the Area Office finding Riptide to be EHS's ostensible subcontractor, and thus affiliated for the procurement at issue.

EHS contends the Area Office did not err in finding no affiliation based on the ostensible subcontractor rule between EHS and Camber due to Camber's lack of performing primary and vital contract requirements. EHS requests Appellant's appeal be dismissed or denied.

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 engaged in a joint venture and are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The Area Office considers all aspects of the relationship between the two concerns, including the terms of the proposal and any agreements between the concerns, in order to determine whether the ostensible subcontractor rule applies. *Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 9 (2011) (citing *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009)). Requirements that are not a part of the primary purpose of the solicitation are not considered primary and vital requirements. *Id.* 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).

Appellant argues EHS is unusually reliant on Camber to perform the primary and vital contract requirements. Appellant asserts Camber's involvement in the Training, Post Award Conference and Fielding elements is sufficient to establish the existence of an ostensible subcontractor rule violation. I find this argument meritless.

In this case, it is evident the scope of this procurement, based on the SOW, is “procuring, managing, testing, installing, and fielding of the HITS.” Size Determination, at 4. The SOW is then divided into fifteen different areas. Camber will be the lead on the Training element, but with EHS and Riptide's involvement. Camber will also be involved in Post Award Conference and Fielding, but with EHS and Riptide. However, Camber will not be the lead in either element, and EHS will be heavily involved in twelve of the fifteen SOW elements. According to EHS's proposal, Camber will only be providing 10.9% of the labor associated cost for this procurement. Camber's role in this procurement is small, evidenced by the percentage of associated cost it will be responsible for. The fact Camber will be the lead for the Training element, only one out of fifteen elements, is not sufficient to find them performing the primary and vital requirements of this procurement. EHS and Riptide will be involved in the Training element along with Camber, and EHS will be the sole lead in Post Award Conference and Fielding, thus Camber will not be performing any of the primary and vital requirements of the contract by itself. It is clear that Camber will be performing the majority of the work and managing the contract, and thus there can be no violation of the ostensible subcontractor rule. *Size Appeal of Paragon TEC, Inc.*, SBA

No. SIZ-5290, at 10-13 (2011).

In evaluating claims of an ostensible subcontractor rule violation, OHA will base its analysis on the solicitation and proposal before it. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011). Based upon the solicitation and EHS's proposal, there is no doubt that EHS, along with Riptide, will be performing the primary and vital contract requirements.

Appellant relies heavily on arguing EHS is insufficiently experienced to perform this contract, which would cause Camber to perform the primary and vital contract requirements. Specifically, Appellant argues that EHS does not have the necessary technical experience, capabilities, and expertise to perform the primary and vital contract requirements. Appellant lists past contracts performed by Camber that show Camber possess the necessary experience and capabilities to perform the HITS contract.

I find Appellant's argument regarding EHS's ability to perform the contract meritless. Any analysis regarding a concern's experience and competency to perform a contract are matters of responsibility, and "responsibility determinations are beyond the jurisdiction of the size determination process." *Size Appeal of TCE Incorporated*, SBA No. SIZ-5003, at 11 (2008). The Area Office thus properly did not consider EHS's capability to perform the contract. Furthermore, EHS did not even include Camber in its own past performance submission, which conclusively establishes that EHS was not reliant upon Camber for its past performance evaluation. Appellant thus cannot point to any part of this procurement in which EHS is unusually reliant upon Camber. EHS has submitted a well put together proposal which makes use of a large subcontractor. However, the use of this large subcontractor is minor and within the parameters of the ostensible subcontractor rule.

Appellant further argues that the Area Office did not address EHS's failure to include NAICS code 333319 in its CCR listing. Appellant argues that this oversight is further proof that Camber will be performing primary and vital contract requirements. A concern's failure to list in its CCR the NAICS code for which it submitted a proposal is utterly irrelevant to its proposal and the solicitation, and thus to the subsequent size determination. Appellant does not point to any regulation or OHA precedent explaining why this is pertinent to an ostensible subcontractor rule analysis. The question of an individual firm's CCR listing has no relevance to the issue of the relationship between the two firms. An Area Office is under no duty to examine every allegation made in a protest, especially those that are unfounded and irrelevant. *Size Appeal of Assessment & Training*, SBA No. SIZ-5228 (2011). There is simply no evidence for an indication of affiliation under the ostensible subcontractor rule to apply here. The Area Office did not err in finding a violation of the ostensible subcontractor rule. Camber will provide minimal assistance in this procurement, and will not be performing primary and vital contract requirements. Accordingly, Camber is not EHS's ostensible subcontractor for the procurement at issue.

IV. 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