United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: J. W. Mills Management, LLC, Appellant, Appealed From Size Determination No. 6-2012-112 Solicitation No. N00244-12-R-0014	SBA No. SIZ-5416 Decided: November 29, 2012

APPEARANCE

Jerrad W. Mills, Los Angeles, California. for J.W. Mills Management, LLC

DECISION[1]

I. Introduction and Jurisdiction

On August 20, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2012-2012 finding that J.W. Mills Management, LLC (Appellant) is not a small business under the size standard associated with Solicitation No. N00244-12-R-0014. Specifically, the Area Office determined that Appellant's relationship with its proposed subcontractor, Blackstone Consulting, Inc. (BCI), created affiliation under the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4).

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and determine that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

OHA decides size determination appeals under the Small Business Act of 1958, 15

[1] This decision was initially issued on November 8, 2012. 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.

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

II. Background

A. Solicitation and Protests

On April 3, 2012, the U.S. Department of the Navy (Navy) issued Solicitation No. N00244-12-R-0014 (RFP) seeking mess attendant services at the Naval Air Station, Lemoore, California. The Contracting Officer (CO) set aside the procurement for Historically Underutilized Business Zone (HUBZone) small businesses, and assigned North American Industry Classification System (NAICS) code 722310, Food Service Contractors, with a corresponding size standard of $35.5 million average annual receipts. Proposals were due May 9, 2012. The RFP was a "commercial items" procurement conducted under Part 12 of the Federal Acquisition Regulation (FAR).

The RFP included a Performance Work Statement (PWS) outlining contractual requirements. The PWS explained that the contractor will prepare and serve meals at designated dining facilities, and perform related services such as cleaning tables and washing dishes. (PWS § 1.3.) The contractor must assign an On-Site Manager, who is "responsible for the entire contractor work force," as well as an Assistant Manager, who acts as "a full-time supervisor for the contractor employees." (PWS §§ 4.7.1 and 4.8.2.)

The RFP is the successor to an earlier procurement for similar services. The incumbent prime contractor is Rainbow Brite Industrial Services, LLC (Rainbow Brite). (RFP, Amendment 003, at 2.)

The RFP stated that the Navy intended to award a single firm-fixed price contract to the offeror that submitted the lowest-price technically acceptable proposal. (RFP, at 73.) There were three evaluation factors: Technical Capability, Past Performance, and Price. (*Id.*) To be eligible for award, offerors must be rated "acceptable" for the Technical Capability factor, and must be rated "acceptable" or "neutral" for the Past Performance factor. (*Id.* at 73-74.)

For the Past Performance factor, offerors were instructed to provide information about three projects within the preceding five years that were similar in scope and magnitude to the instant procurement. (*Id.* at 70.) The RFP indicated that offerors could also submit information about proposed subcontractors' past performance. (*Id.*) Offerors without any relevant performance record would receive a "neutral" rating. (*Id.* at 75.)

As part of their proposals, offerors were instructed to provide information demonstrating their financial responsibility and the availability of operating capital. (*Id.* at 70.) If the offeror proposed subcontractors, the same information was required of each subcontractor. (*Id.*)

On July 17, 2012, the CO announced that Appellant was the apparent awardee. On July 19, 2012, Native Resource Development Co., Inc. (NRD), a disappointed offeror, protested

Appellant's size. The protest alleged that Appellant is affiliated with BCI and two other concerns. The protest did not assert that Appellant is affiliated with BCI under the ostensible subcontractor rule, but the Area Office exercised its discretion to explore that issue pursuant to 13 C.F.R. § 121.1009(b).

B. Appellant's Proposal

Appellant's proposal stated that Appellant would perform the required services with its own personnel. (Proposal, Vol. I, Mess Attendant Services Plan, at 3.) Appellant proposed BCI as its subcontractor, but indicated that BCI would have no direct role in contract performance. Rather, BCI would perform "support functions/consulting functions/systems" to assist Appellant. (*Id.*) The proposal contained a table which more specifically delineated the respective responsibilities of Appellant and BCI. According to the table, BCI would have ""primary" responsibility in four areas: ***. (*Id.* at 4.) In all other respects, Appellant had primary responsibility. (*Id.*)

Appellant's proposal stated that the individuals who would fill the two "key personnel" positions — On-Site Project Manager and Assistant Project/Quality Control Manager — were both current employees of BCI. (Proposal, Vol. I, Staffing Plan, at 4, 7.) Appellant explained that these individuals were contingent hires who would join Appellant's staff if Appellant were awarded the contract. (*Id.*) Appellant represented that it would be appointing a Vice-President to "oversee the daily operation of the NAS Lemoore contract." (Proposal, Vol. I, Mess Attendant Services Plan, at 12.) In addition, the On-Site Project Manager "would report directly to [Appellant's] President," Mr. Jerrad W. Mills, who "will have ultimate control over the entire operation." (*Id.* at 11.)

According to Appellant's Transition Plan, Appellant anticipated, if possible, hiring non-key personnel from the incumbent contractor, Rainbow Brite. (Proposal, Vol. I, Transition Plan, at 4.) Appellant's Human Resources Manager will be in charge of staffing the remaining non-key personnel positions still open after incumbent employees were selected. (*Id.*)

Appellant's proposal included past performance data on two projects performed by Appellant. ***. Appellant's proposal listed three "Full Food Services" contracts performed by BCI. (*Id.* at 6, 21, 23.)

Appellant and BCI executed a subcontract, to become effective upon contract award. The subcontract states that BCI would provide record-keeping and other support services to Appellant, including ***. (Subcontract, at 11.) According to the subcontract, "[t]he employees, methods, facilities, and equipment of each party shall at all times be under the exclusive direction and control of that party." (*Id.* at 7.) BCI's fee for its services would be "XX% of net monthly profits" generated by Appellant on the contract. (*Id.* at 12.)

C. Size Determination

On August 20, 2012, the Area Office issued its size determination finding that Appellant

is not a small business. The Area Office rejected NRD's protest allegations, but determined that Appellant is affiliated with BCI under the ostensible subcontractor rule.

The Area Office found that Appellant is 100% owned by Mr. Mills, who also serves as Appellant's sole officer. (Size Determination at 2.) Mr. Mills controls Appellant by virtue of his ownership interest. The Area Office found that Mr. Mills owns a 51% interest in, and has the power to control, Pro Specialty Contractors (PSC). (*Id.*) Because Mr. Mills has the power to control both Appellant and PSC, the firms are affiliated under 13 C.F.R. § 121.103(a)(1). The combined size of Appellant and PSC is below the applicable $35.5 million size standard. (*Id.* at 7.)

The Area Office next examined potential affiliation between Appellant and BCI. The Area Office observed that Mr. Mills was once employed by BCI, but resigned his position in December 2004. The Area Office further noted that a previous size determination, which had found Appellant affiliated with BCI under the newly organized concern rule, 13 C.F.R. § 121.103(g), was later overturned on appeal. *Size Appeal of J.W. Mills Management, LLC*, SBA No. SIZ-4909 (2008). The Area Office found that the rationale behind OHA's decision — particularly the fact that Mr. Mills was never a "key employee" at BCI — remains valid, and that Appellant and BCI therefore are not affiliated under the newly organized concern rule. (Size Determination at 3.)

The Area Office next determined that Appellant violated the ostensible subcontractor rule. (*Id.* at 4-6.) The Area Office cited several factors as evidence of Appellant's unusual reliance upon BCI.

First, the Area Office noted that Appellant's proposal used both companies' logos, and contained numerous references to Appellant and BCI as a "team." (*Id.* at 4.) The Area Office observed that in the Executive Summary portion of the proposal, anytime Appellant's name was mentioned, BCI was also referenced. The Area Office stated that the only instance were Appellant is mentioned without referencing BCI was in discussing Appellant's past performance history. The Area Office remarked that, in communications with the Area Office, Appellant "downplayed the role and significance of BCI in the performance of the contract requirements" by contending that BCI was "performing only administrative type functions." (*Id.*)

Second, the Area Office found that the proposal highlighted BCI's performance record, without which Appellant's proposal "would be vastly different and considerably weaker." (*Id.* at 5.) The Area Office found that Appellant's past performance references contained only two past contracts performed by Appellant, but three past contracts performed by BCI. (*Id.*) In addition, the Area Office found that XX projects were discussed in the proposal's Executive Summary, and all were BCI projects. (*Id.*) Further, the Area Office noted that, in the proposal, Appellant claimed that Appellant and BCI had XX combined years of experience, although Appellant itself was formed only in 2009. Thus, "the vast majority of the 'combined years of experience' is based on BCI's experience." (*Id.*) The Area Office asserted that Appellant relied on BCI's past performance and experience in order to be awarded the procurement at issue.

The Area Office next explained that, based on Appellant's proposal, "all on site labor

requirements will be performed by [Appellant's] personnel." (*Id.*) However, the Area Office found that Appellant will be hiring the On-site Project Manager and Assistant Project/Quality Manager prior to contract award. The Area Office noted that the individuals proposed to fill these positions are both current BCI employees. The Area Office further stated that, in addition to the "on site" work, the solicitation identified other "key and vital requirements of the contract that need to be performed for contract success." (*Id.* at 5-6.) These areas include quality control, training, transition, and staffing. The Area Office found that Appellant's organization chart lists only a President and Administrative Assistant, whereas BCI's organizational chart includes ***. (*Id.* at 6.) Based on these findings, the Area Office determined that Appellant would be unable to support many of the key and vital requirements of the contract without BCI. (*Id.*)

The Area Office also considered the fact that Appellant's proposal identified BCI as primarily responsible for *** and Appellant as primarily responsible for ***. (*Id.*) The Area Office noted that Appellant, when responding to the protest, notified the Area Office that Appellant should have been identified as primarily responsible for these functions. (*Id.*) However, according to the Area Office, these changes were not reflected in Appellant's actual proposal. Further, the Area Office stated that these changes cannot be considered as part of the size determination because they are "post-offer representations that contradict credible evidence." (*Id.*) Based on these findings, the Area Office determined that Appellant will be reliant on BCI for the financial resources needed to perform the contract.

The Area Office also highlighted that Appellant and BCI would be sharing in the profits of the contract. (*Id.*) The Area Office explained that such an arrangement is typical of a joint venture. According to the Area Office, "[t]he profit sharing provision of [the subcontract] certainly appears to establish the relationship as that of a joint venture." (*Id.*)

The Area Office concluded that Appellant is unusually reliant on BCI. (*Id.* at 7.) Appellant exceeds the applicable size standard once its receipts are aggregated with those of BCI. As a result, Appellant is not a small business. (*Id.*)

D. Appeal

On September 4, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant first argues that it has no ostensible subcontractor relationship with BCI based on past performance and experience. (Appeal at 1.) According to Appellant, its own past performance record was sufficient to warrant the award of the procurement at issue. Appellant maintains that it discussed BCI's past performance in the proposal in order to instill confidence about the type of service it would be providing. (*Id.*) Appellant states that its discussion of BCI's past performance was not the determining factor in receiving the contract award. Appellant asserts that it wanted to assure the Navy that it was receiving support from a reputable subcontractor. (*Id.*) Appellant states that the same contracting officials responsible for the procurement at issue are also responsible for other similar contracts awarded to Appellant. Therefore, argues Appellant, the procuring agency is satisfied with Appellant's services and has determined that Appellant is capable of satisfying the procurement's requirements. (*Id.* at 2.)

Addressing the size determination's findings regarding key personnel, Appellant states that its philosophy is to hire incumbent managers unless contracting officials advise otherwise. (*Id.*) Appellant states that it did not have any available management personnel or potential management personnel that met the criteria of the RFP at the time it submitted its proposal. Appellant explains that BCI provided the names of qualified managers that could potentially become part of Appellant's management team. Appellant emphasizes that, upon award, these proposed managers would become Appellant's employees, and would no longer report to BCI.

Appellant asserts that it will be "self-performing all areas of this proposed contract," including all "vital and key" requirements, using Appellant's own employees. (*Id.* at 3.) Appellant further argues that the Area Office incorrectly concluded that Appellant is incapable of performing the contract without BCI. According to Appellant, if the relationship with BCI were severed, "the only challenge to [Appellant] would be to replace the administrative support services that [BCI] provide[s] to our firm." (*Id.*) Appellant explains that in some situations, BCI may be asked to perform additional tasks, such as occasional training. Appellant explains that if it did not use BCI personnel to perform such work, it would simply hire another subcontractor. Appellant argues that it is not unduly reliant upon BCI, and that all work performed by BCI will ultimately be under Appellant's direction and control. (*Id.*)

Next, Appellant argues it is not financially reliant upon BCI to perform the contract. (*Id.* at 4.) Appellant contends that it is "fully capable of self-funding" based on its own resources. (*Id.*) ***. (*Id.*)

Lastly, Appellant argues the Area Office erred in finding that Appellant's relationship with BCI is the nature of a joint venture. Appellant argues that the two firms are wholly independent, with their "own employees, own management, own purchasing, own insurance, [and] own systems." (*Id.* at 3.) Appellant argues that Appellant prepared its own proposal for the instant procurement, and BCI merely provided guidance after reviewing Appellant's pricing worksheets. Appellant explains that it insisted on the profit sharing arrangement, in lieu of fixed payments to BCI, in an effort to ensure that Appellant would not lose money on the contract. (*Id.* at 5.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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). 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).

OHA has explained that the "primary and vital" contract requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgm't Corp.*, SBA No. SIZ-5302, at 17 (2011). 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. *Id.* In this case, the preparation and service of meals is plainly the principal purpose of the contract, and the Area Office found that Appellant alone would perform such work with Appellant's own personnel. (Size Determination at 5.) Similarly, the appeal petition emphasizes that Appellant will be "self-performing all areas of this proposed contract." (Appeal at 3.) Appellant's subcontractor, BCI, will provide administrative support services to Appellant, but would have no direct involvement in contract performance. It is thus apparent that Appellant alone will perform the "primary and vital" contract requirements.

The size determination suggests that, although BCI would perform no "on site" work, BCI would nevertheless participate in other "key and vital requirements of the contract that need to be performed for contract success," including quality control, training, transition, and staffing. (Size Determination at 5-6.) This finding, however, conflicts with Appellant's proposal and the subcontracting agreement, which indicate that BCI's role is limited to providing record-keeping and administrative support, such as ***. *See* Section II.B, *supra*. Thus, the record does not support the conclusion that BCI will be responsible for quality control, training, transition, or staffing. Rather, BCI will be performing administrative support functions incidental to the primary purpose of the contract. Further, it is permissible for a small business prime contractor to subcontract discrete tasks to a large business without violating the ostensible subcontractor rule. *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359, at 13-14 (2012); *Size Appeal The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 7 (2011); *Size Appeal of Colamette Construction Company*, SBA No. SIZ-5151, at 7 (2010). Thus, even if Appellant had chosen to subcontract significant portions of the contract to BCI, it does not follow that Appellant would be in violation of the ostensible subcontractor rule, given that Appellant alone is carrying out the principal purpose of the contract.

The Area Office also determined that Appellant violated the ostensible subcontractor rule

through unusual reliance upon BCI. (Size Determination at 4.) The Area Office cited several factors to support this conclusion, but as discussed below, each of these grounds is marred by significant flaws. I find, rather, that no proper basis exists to conclude that Appellant is unusually reliant on BCI.

The Area Office first noted that Appellant's proposal referred to itself and BCI as a "team," and prominently displayed both firms' logos. (Size Determination at 4.) Such practices, however, are commonplace in Government contracting, and OHA has repeatedly held that they are not suggestive of reliance. *E.g., Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 10 (2011); *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 26 (2011). I thus find no validity in the Area Office's determination that Appellant's use of teaming language in its proposal, or the inclusion of multiple logos, is indicative of unusual reliance upon BCI.

The Area Office also found unusual reliance because the individuals Appellant proposed for the two key personnel positions are currently BCI employees, although Appellant plans to hire them directly upon award of the contract. It is true that OHA has recognized that, when a prime contractor chooses to employ key personnel from a subcontractor, "rather than proposing to use its own employees or to hire new employees for the positions," this could be suggestive of unusual reliance. *Size Appeal of Alutiiq Educ. and Training, LLC*, SBA No. SIZ-5192, at 11 (2011). In this case, though, Appellant's proposal made clear that these key employees will report to Appellant's President, Mr. Mills; thus, ultimate control and decision-making resides with Appellant. *Cf., Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011)(finding no unusual reliance when subcontractor would supply mid-level managers who were subordinate to the prime contractor). Although the individuals that were proposed to fill the key personnel positions are current BCI employees, upon accepting the positions, they would terminate their relationship with BCI and become employees of Appellant. Thus, BCI itself would have no role in managing the contract. Furthermore, the non-key workforce performing the contract will be comprised entirely of Appellant's personnel. The proposal indicates that Appellant plans to hire non-key personnel from the incumbent contractor, Rainbow Brite, a firm with no connection to BCI. I find, then, that Appellant's plan to hire key personnel from BCI does not establish unusual reliance, given that overall management and staffing of the contract will rest firmly with Appellant.

The Area Office also questioned whether Appellant has sufficient capabilities (*e.g.*, organizational structure and financial resources) to perform the contract, and therefore assumed that Appellant would likely derive substantial assistance from BCI. *See* Section II.C, *supra*. The procurement in question, however, is a relatively straightforward "commercial items" acquisition for mess attendant services, similar to contracts that Appellant has previously performed. Sections II.A and II.B, *supra*. It is thus not apparent why substantial technical or financial assistance would be necessary to enable Appellant to perform this contract. Appellant's proposal and the subcontract state that BCI may perform "consulting" for Appellant, but there is no indication that BCI would provide assistance essential for contract performance. Section II.B, *supra*. Moreover, "the determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contractor responsibility," and thus are the province of the CO, not the Area Office. *Spiral*, SBA No. SIZ-5279 at 23.

Accordingly, insofar as the Area Office concluded that Appellant is incapable of independently performing the instant contract — and therefore must be reliant on BCI despite the dearth of evidence to that effect — such a finding is clearly improper, as it amounts to a responsibility determination.

The Area Office also found unusual reliance because Appellant's proposal made reference to BCI's corporate experience and past performance. The Area Office speculated that, without BCI, Appellant's proposal "would be vastly different and considerably weaker," and might not have been selected for award. (Size Determination at 5.) This finding, however, is untenable in light of the source selection methodology described in the RFP, which indicates that the award would be made to the "lowest price technically acceptable" offeror. *See* Section II.A, *supra*. In this type of source selection, proposals are evaluated as either acceptable or unacceptable, and are not ranked on the basis of criteria other than price. *See* FAR 15.101-2. Nor is any tradeoff analysis conducted; rather, award is made to the technically acceptable offeror with the lowest price. *Id.* Thus, while it is true that Appellant's proposal discussed BCI's experience in some detail, this could not have materially enhanced Appellant's prospects for award, because proposals were being evaluated on a "pass-fail" basis, and price was the dispositive factor in the selection process. The Area Office thus clearly erred in concluding that BCI's involvement was crucial in enabling Appellant win the contract.

The Area Office also found that the profit-sharing arrangement between Appellant and BCI is suggestive of a joint venture. Specifically, in lieu of a fixed price, the firms agreed that BCI would be entitled to XX% of the net profits generated by the procurement at issue. Under OHA precedent, though, a profit sharing arrangement does not automatically create affiliation based under the ostensible subcontractor rule, but is only "one aspect of the totality of the circumstances" that should be considered. *Size Appeal of Infotech Enterprises, Inc.*, SBA No. SIZ-4346, at 15 (1999). Here, Appellant reasonably explains that Appellant advocated the profit-sharing approach, in order to ensure that Appellant would not lose money on the contract. *See* Section II.D, *supra*. Accordingly, under the circumstances presented here, the profit sharing arrangement is not indicative of a joint venture.

The ostensible subcontractor rule "asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor." *Colamette Construction*, SBA No. SIZ-5151, at 7. Here, the record does not support the conclusion that BCI is performing or managing the instant contract. Pursuant to Appellant's proposal and the subcontract agreement, Appellant alone will perform the "primary and vital" requirements of the contract, specifically preparing and serving meals, using Appellant's own personnel. Further, Appellant alone will manage the contract, retaining control over decision-making. BCI will have a limited and defined role in the contract, furnishing support services of an administrative nature, and will not participate in contract management. There is no indication that BCI would provide Appellant with assistance essential to performing the contract. Nor is BCI the incumbent contractor, an issue which must be considered under 13 C.F.R. § 121.103(h)(4). Based upon all of this information, the record does not support the Area Office's conclusion that Appellant is excessively reliant upon BCI.

IV. Conclusion

The Area Office determined that Appellant exceeded the size standard only due to its affiliation with BCI under the ostensible subcontractor rule. Appellant has shown that the ostensible subcontractor portion of the size determination is clearly erroneous. I therefore GRANT this appeal and REVERSE the Area Office's size determination. Appellant is a small business for purposes of the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge