United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Shoreline Services, Inc., Appellant, RE: Onopa Services, LLC Appealed From Size Determination No. No. 3-2012-118	SBA No. SIZ-5432 Decided: January 2, 2013

APPEARANCES

Joseph M. Goldstein, Esq., Andrew E. Schwartz, Esq., Shutts & Bowen LLP, Fort Lauderdale, Florida, for Onopa Services, LLC.

DECISION [1]

I. Introduction and Jurisdiction

On October 26, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2012-118 finding that Onopa Services, LLC (Onopa) is a small business under the size standard associated with Solicitation No. FA2835-12-C-0017.

Shoreline Services, Inc. (Appellant) maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and conclude that Onopa is not a small business. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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. The record reflects that the size determination was issued August 28, 2012, but not received by Appellant until September 10,

[1] This Decision was issued under a Protective Order to prevent the disclosure of confidential or proprietary information. On January 2, I issued an Order for Redactions directing Onopa to file a request for redactions if it desired to have any information redacted from the published Decision. OHA has received no timely request from any party requesting that the original Decision be redacted in any way. Thus, OHA now publishes the Decision in its entirety.

2012. 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 Protest

On May 16, 2012, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA2835-12-R-0013 (RFP) seeking Refuse Collection Services at Hanscom Air Force Base, Massachusetts. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding $12.5 million annual receipts size standard.

On September 19, 2012, the CO announced that Onopa was the apparent awardee. On July 26, 2012, Appellant, an unsuccessful offeror, protested Onopa's size. The protest alleged that Onopa and Dorado Inc. (Dorado), are affiliated under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant alleged Dorado would be providing the trucks, equipment. and personnel to perform the contract. The protest further stated that Onopa and Dorado are owned by the same individual, and are thus affiliated due to common ownership.

B. Size Determination

On October 26, 2012, the Area Office issued its size determination finding that Onopa is a small business. The Area Office rejected Appellant's protest allegations regarding the ostensible subcontractor rule.

The Area Office found Onopa was incorporated in August 2011 and that Mr. R. David Bermudez is a Managing Member of Onopa and holds a 100% ownership in the firm.[2] Further, the Area Office found Mr. Bermudez is the 100% owner of Foamship Management Corp. (FMC). Lastly, the Area Office found Onopa is a Managing Member and 51% owner of Onopa-Dorado JV (OD JV). The Area Office found Onopa and FMC are affiliated based on control through stock ownership, and their revenues must be combined when calculating Onopa's size. Further, based on their 51% ownership of OD JV, the Area Office determined that revenues based on their ownership of OD JV must be added in calculating Onopa's size. The Area Office stated that the aggregated average annual receipts of Onopa, FMC, and OD JV do not exceed the $12.5 million size standard.[3]

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[2] Onopa is a participant in SBA's 8(a) Business Development program. Dorado is a graduate of the program.

[3] According to the record, on September 14, 2010, Dorado and Onopa entered into a Mentor-Protégé Agreement under SBA's 8(a) program, with Dorado as mentor and Onopa as protégé. On January 31, 2011, SBA approved the Agreement. On October 18, 2012, the Agreement was extended until June 23, 2013. On June 23, 2011, Dorado and Onopa entered into OD JV as an 8(a) Mentor-Protégé joint venture. On June 27, 2011, SBA approved OD JV as an 8(a) Mentor-Protégé joint venture

The Area Office next examined potential affiliation between Onopa and Dorado based on the ostensible subcontractor rule. The Area Office noted that the award would be based on the lowest price, technically acceptable proposal. The technical proposal required a recycling plan, transition plan, and reporting/record requirements. The Area Office found that Onopa's transition plan contained detailed description as to how Onopa would obtain the required equipment and take over the contract from the incumbent contractor. The Area Office noted that Waste Management, and not Dorado, is the incumbent contractor. In addition, Dorado is not mentioned anywhere in Onopa's transition plan. Lastly, the Area Office found Onopa will be purchasing the equipment needed to perform this contract from other vendors, which does not include Dorado, if it is unable to purchase the equipment from Waste Management.

The Area Office next considered Onopa's source of employees for the contract at issue. However, the Area Office noted that the solicitation does not require specific information on employees to be used or a staffing plan. Onopa informed the Area Office that it will be retaining qualified current refuse collection and recycling center employees, while also posting job openings online. The Area Office noted that Onopa does not plan to use any subcontractor employees, including Dorado, to perform this contract. The Area Office requested information from Onopa regarding the site visit, which Onopa did not attend. The Area Office noted that Onopa asked for base access for two Dorado employees in order to perform the site visit. However, when the Area Office inquired about this, Onopa failed to provide a response. The Area Office did not elaborate any more on the subject.

Next, the Area Office considered the other allegations regarding Onopa and Dorado sharing addresses and leadership or ownership. The Area Office received evidence that Onopa and Dorado do not, and have never, shared any office space. Rather, they have occupied the same address at different times. Further, the Area Office, after examining federal tax returns, and their SBA Form 355, found that neither Mr. Bermudez, nor Onopa, have any ownership interest in Dorado. Consequently, these forms showed that Dorado does not have any ownership interest in Onopa.

Lastly, the Area Office found that the only ownership existing between Onopa and Dorado is OD JV. Given the documentation available to them, the Area Office concluded that Onopa and Dorado are not affiliated for purposes of the instant procurement.

C. Appeal

On November 7, 2012, Appellant filed an appeal of the instant size determination with OHA. Appellant maintains that the determination is clearly erroneous and should be reversed.

Appellant first argues the Area Office erred by failing to recognize that Dorado will be supplying the equipment and performing all of the contract functions. Appellant further argues that Onopa's failure to respond to the inquiries regarding base access for Dorado employees to perform the site visit should have been treated as an adverse inference.

Appellant argues Onopa is unusually reliant on Dorado because Richard Curry, a Vice-President at Dorado, attended the site visit, evidence of which was provided by the CO's sign-in sheet. Further, Appellant argues this fact provides evidence that Onopa and Dorado share key employees and management. Because bid pricing is a key component of the solicitation, argues Appellant, evidence mat a Dorado employee attended the site visit proves that Onopa and Dorado are affiliated based on common management. In addition, Appellant states Mr. Curry in the past has attended site visits for other solicitations in which he identified himself as an Onopa employee. Appellant argues this evidence further shows that Onopa is unusually reliant upon Dorado's management.

In support of its claim that Dorado is purchasing and supplying the equipment needed to perform the contract, Appellant states that on November 2, 2012, International Container, Inc. (ICC) delivered over 100 containers to Hanscom Air Force base, which were purchased by Dorado. Appellant argues this is conclusive evidence that Dorado is performing primary and vital requirements of the contract and that affiliation exists.

Accompanying its appeal petition, Appellant moves to supplement the record with additional evidence: the sign-in sheet for a site visit at Fort Carson, CO, where Mr. Curry represented himself as an Onopa employee and the delivery of container by ICC to Hanscom Air Force base that has been paid by Dorado.

On November 21, 2012, Appellant further supplemented the record by filing a Motion to Clarify Previous Statements. Appellant wished to clarify that the request to obtain a site-visit pass for Mr. Curry shows Onopa and Dorado share employees, collaborated in submitting the proposal, and clearly establishes affiliation based on common management.

D. Onopa's Response

On November 28, 2012, Onopa filed its response to Appellant's appeal. Onopa maintains Appellant has failed to establish clear error of fact or law, and thus the size determination should not be disturbed.

Onopa first argues Appellant has no standing to Appeal the size determination because it did not allege that it had standing to submit a size protest. Additionally, Onopa argues the record is inconclusive as to whether Appellant was eliminated to receive the contract by the CO for reasons unrelated to size. Based on these facts, Onopa argues Appellant's appeal should be dismissed for lack of standing.

Next, Onopa argues Appellant is raising new issues for first time on Appeal. Onopa states the appeal contains allegations of affiliation under the ostensible subcontractor rule that refer to improper financial assistance, allegations that were not raised at the size protest, and thus OHA lacks the proper jurisdiction to consider these new allegations.

Onopa further argues Appellant improperly attempted to introduce new evidence on Appeal. Onopa maintains Appellant has not shown good cause as to why the sign-in sheet for the

site visit at Fort Carson should be admitted as new evidence. Onopa argues Appellant did not provide any explanation as to why the sign-in sheet was not publicly available at the time the size protest was filed. Further, Onopa states the sign-in sheet for the Fort Carson site visit was available to the public on October 12, 2012, thus Appellant had an opportunity to timely submit this evidence as part of the protest process. Lastly, Onopa argues the evidence submitted by Appellant which allegedly shows Onopa's performance of the procurement at issue is in violation of the performance of work requirements necessarily enlarges the issues on appeal, and as such, Appellant's motion to admit new evidence should be dismissed.

Next, Onopa argues OHA does not have jurisdiction to hear the issues raised by Appellant in its appeal. Onopa argues Appellant's claims that Dorado is supplying the trucks required for contract performance is an issue of contract administration, which is the responsibility of the CO. Thus, these issues should not be considered by OHA in this appeal.

Onopa argues Appellant's claims that the Area Office needed to draw an adverse inference against Onopa due to its failure to respond to the inquiries about the Hanscom site visit is meritless. Onopa states Appellant failed to establish any legal argument or precedent as to why the Area Office needed to draw an adverse inference. Onopa maintains that this argument is further muted because Onopa did in fact submit a response to the Area Office regarding the Hanscom site visit and states the Area Office's file, which is part of the record, contains the email response.

Onopa states Appellant's allegations that it shares leadership with Dorado are factually inaccurate. Onopa argues Mr. Bermudez does not have any ownership or employment position with Dorado, and no person affiliated with Dorado has any ownership or leadership position with Onopa. In addition, Onopa states the SBA is aware of Onopa and Dorado's mentor-protege agreement, which would not be approved if there was any common ownership or leadership between the two concerns.

Lastly, Onopa argues there is no clear error of fact or law regarding the size determination because Dorado is not performing any contract requirements, thus it cannot be found to be affiliated with Onopa based on the ostensible subcontractor rule. Onopa maintains Dorado provided Onopa with financial assistance in the form of a short-term bridge loan until Onopa's line of credit is authorized. Onopa explains this loan became necessary when an acceleration of work limited Onopa's time to implement its transition plan. Further harming Onopa's transition plan, the incumbent contractor, WM, refused Onopa's offer to buy its refuse containers. Due to these circumstances, Onopa sought out a short-term loan from Dorado. Onopa states that it will either be paying the vendor directly for the containers, or repaying Dorado's short-term loan.

Onopa goes on to introduce new evidence displaying the financial arrangements it has performed in reliance of the contract at issue, including its mentor-protege agreement with Dorado, and the modification to resume work. Additionally, Onopa introduced as new evidence information on the employees retained to perform the contract here, none of whom are Dorado employees.

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New Evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, both Appellant and Onopa move to supplement the record with new evidence concerning Onopa's response to the Area Office's inquiry regarding the Hanscom site visit, documents pertaining to the container purchase for the Hanscom contract, the Fort Carson site visit, and Onopa and Dorado's mentor-protégé agreement.

Onopa's response to the Area Office's inquiry regarding the Hanscom site visit was made via email on October 26. The email contained an attached detailed response to all of the Area Office's inquiries regarding the Hanscom site visit. Due to an apparent oversight, the email attachment was not printed out and included in the Area Office file. Onopa submitted the complete printout to this Office with its submission of new evidence, which discusses the site visit in detail. This submission is consistent with the pattern of prompt and detailed response by Onopa in its dealings with the Area Office. I conclude that this document should have been part of the record before the Area Office and therefore order it ADMITTED to the record in the instant appeal.

The documents concerning Onopa and Dorado's mentor-protégé agreement were already part of the record and as such do not need to be admitted. Lastly, I find Appellant has not shown good cause to admit its proffered new evidence. The documents relating to the container agreement between Dorado and Onopa, and the Fort Carson site visit, provided by Appellant, are EXCLUDED from the record because "Appellant offers no explanation why this evidence could

not have been prepared much earlier in the review process." *Size Appeal of SIMMEC Training Solutions*, SBA No. SIZ-5404, at 8 (2012).

C. Analysis

Under the "ostensible subcontractor" rule, if a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, then 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 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).

However, in this case, the ostensible subcontractor rule does not apply because there is no indication that Dorado is a subcontractor to Onopa on this procurement. Concerns cannot be affiliated under the ostensible subcontractor rule when one of the concerns is not a subcontractor to the procurement at issue. *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012); *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5098 (2009). Onopa's response to the protest emphasized that Dorado is not performing any contract requirement because it is not a subcontractor. Nor are there any subcontracts included in the record. Significantly, the proposal identified, in detail, the recycling and transition plan Onopa is to perform. At no point is Dorado mentioned as a subcontractor with any responsibilities in contract performance. Further, the proposal specifically states that Onopa employees, whether they are current refuse collection and recycling center employees or new employees obtained through recruitment efforts, will be performing the primary and vital requirements of the contract. Indeed, there is no indication that Dorado would be involved in contract performance.

Appellant argues the purchase of the containers by Dorado shows financial assistance affiliation under the ostensible subcontractor rule. However, not only is Dorado not a subcontractor on this procurement, but an SBA-approved mentor-protégé agreement exists between Onopa and Dorado. In Onopa and Dorado's mentor-protégé agreement, financial assistance through loans or lines of credit is mentioned in detail as activities that are allowed and expected. Here, the short-term or bridge loan between Dorado and Onopa is the type of financial

assistance that may be anticipated between a mentor and its protégé in order to assist the protégé in obtaining federal contracts. *Size Appeal of VMD-MT Security, LLC*, SBA No. SIZ-5380, at 11 (2012) ("It is clear that assistance between concerns that enter into a mentor-protégé agreement is contemplated and expected. Affiliation cannot be found due to assistance received during the existence of a mentor-protégé relationship.")

Appellant also argues the Area Office should have found an adverse inference against Onopa for failing to answer the Area Office's inquiry regarding the site visit to Hanscom Air Force Base. Under its regulations, the SBA "may draw an adverse inference where a concern fails to cooperate in providing the requested information and documents." 13 C.F.R. § 127.604(c). However, the evidence shows that Onopa in fact replied to the Area Office's inquiry as directed via email. On October 26, 2012, Onopa submitted a statement to the Area Office that initially, Onopa was not certain whether it would bid on this procurement alone or with Dorado. A Dorado employee who lives near the Hansom AFB attended the pre-bid conference on behalf of both firms when Mr. Bermudez was not available. Dorado assisted Appellant with site assessment under its Mentor-Protégé agreement, but is not involved with contract performance. Thus, Onopa did not fail to cooperate with the Area Office's inquiry, and the adverse inference rule is inapplicable. Further, the record does not reflect anything that would support the finding the initial assistance Dorado provided Onopa as constituting undue reliance or performing the primary and vital functions of the contract.

Appellant also argues Onopa and Dorado are affiliated based on common management. However, it is clear from the record that Onopa and Dorado have no common management because the two concerns share no common officer, directors, or managers.

The purpose of the ostensible subcontractor rule is to ask whether a large subcontractor, and not the small business prime contractor, is performing or managing the contract. *Size Appeal of Colamette Construction*, SBA No. S1Z-5151, at 7 (2010). Here, the record is clear that Dorado is not a subcontractor for the contract at issue. Because Dorado is not involved in performing or managing the contract, the ostensible subcontractor rule is not applicable and the Area Office determination is supported by the record.

The instant appeal is based upon arguments completely unsupported by the record. Appellant alleges common ownership and common management where none exists, and alleges a concern is an ostensible subcontractor when it is not a subcontractor at all. Appellant's meritless appeal has failed to establish any error of fact or law in the size determination, and I must affirm the Area Office's size determination.

IV. Conclusion

The Area Office determined that Onopa is not affiliated with Dorado through the ostensible subcontractor rule. Appellant has not shown that the size determination is clearly erroneous. I therefore DENY this appeal and AFFIRM the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge