

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

SIZE APPEAL OF:

Shoreline Services, Inc.,

Appellant,

RE: Six Sigma Technology, Inc.

Appealed From  
Size Determination No. 02-2013-52

SBA No. SIZ-5466

Decided: May 28, 2013

APPEARANCES

Tony I. Lowe, Owner, Shoreline Services, Inc., New London, Connecticut

Meheraly M. Merchant, President and CEO, Six Sigma Technology, Inc., Philadelphia, Pennsylvania

Gail J. Pitts, Contracting Officer, U.S. Army Contracting Command, Natick, Massachusetts

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On March 14, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2013-52 finding that Six Sigma Technology, Inc. (Six Sigma) is a small business under the \$12.5 million size standard associated with Solicitation No. W911QY-12-R-0060. The Area Office specifically determined that Six Sigma's relationship with its subcontractor, Waste Management Inc. (Waste Management), did not violate the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Shoreline Services, Inc. (Appellant), which had originally protested Six Sigma's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and

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<sup>1</sup> This decision was initially issued on May 14, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded the protested concern, Six Sigma Technology, Inc. (Six Sigma), an opportunity to file a request for redactions if it desired to have any information withheld from the published decision. Six Sigma responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

Appeals (OHA) reverse and conclude that Six Sigma is not an eligible 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 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 Protest

On October 2, 2012, the U.S. Department of the Army (Army) issued Solicitation No. W911QY-12-R-0060 (RFP) seeking trash collection and disposal services at the Natick Soldier System Center (NSSC) and its five military housing areas. The RFP was issued as a commercial items acquisition pursuant to Federal Acquisition Regulation (FAR) Part 12. The Contracting Officer (CO) set aside the procurement entirely for Historically Underutilized Business Zone (HUBZone) small businesses, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of \$12.5 million average annual receipts. Offers were due December 31, 2012.

On January 31, 2013, the CO announced that Six Sigma was the apparent awardee. On February 5, 2013, Appellant, an unsuccessful offeror, protested Six Sigma's size. Appellant alleged that Six Sigma is affiliated with Waste Management, the incumbent on the predecessor contract, under the ostensible subcontractor rule. Specifically, Appellant maintained that Six Sigma “has subcontracted Waste Management to perform all of the services involved with the principal purpose of the acquisition.” (Protest at 1.) Appellant characterized the contract's principal purpose as being the “collection and transportation of refuse and recyclable materials.” (*Id.* at 2.) Appellant contended that Waste Management will be providing all personnel, trucks, and equipment to perform this work. (*Id.*) Appellant further asserted that Six Sigma lacks any relevant corporate experience, and that Six Sigma's offices are located approximately six hours away from the NSCC. (*Id.* at 4.)

In response to the protest, Six Sigma maintained that “the principal purpose of the [procurement] is not refuse collection but rather the management of the waste stream being generated at the [NSSC].” (Protest Response at 1.) Six Sigma explained that it would fulfill this managerial role by scheduling pick-ups, performing quality control, and interfacing with the Army. Waste Management would be responsible for collecting and transporting trash and recyclable materials, using Waste Management's own trucks and drivers, but Six Sigma asserted that drivers would be “managed by Six Sigma when working on the federal facilities.” (*Id.*)

### B. RFP

The RFP's Statement of Work (SOW) required that the contractor collect, transport, and properly dispose of non-hazardous waste and recyclables at the NSSC main installation and at 75 military housing units located in Natick, Needham, Wayland, and Hudson, Massachusetts. The

contractor will provide “all labor, equipment, materials, supervision, and accessories” necessary to accomplish this work. (SOW § 1.1.)

In performing trash collection services at the NSSC main installation, the contractor must collect and dispose of refuse from 19 containers twice weekly. (*Id.* §§ 3.2, 3.4.) The SOW specified the exact days and locations where such collections must occur. (*Id.*) The collection vehicles must be properly weighed and recorded. (*Id.* § 3.3.) Further, the contractor must provide roll-off containers to collect and transport bulky waste generated at the NSSC main installation on an as-needed basis. (*Id.* § 5.1.) For trash collection at the military housing, the contractor must supply each housing unit with an appropriate container, and collect refuse once weekly. (*Id.* § 6.2.) The SOW identified the exact street address of each housing unit, and specified a trash collection schedule for each unit. (*Id.* § 11.5.) The contractor must also collect and dispose of approximately 50 Christmas trees annually. (*Id.* § 8.2.)

In performing recycling collection services, the contractor must furnish a single stream recycling container and a hydraulic compactor at the NSSC main installation, and pick up, transport, and dispose of recyclable materials on an on-call basis. (*Id.* §§ 4.1, 4.2.) The contractor must also supply each military family housing unit with an individual or shared container for single stream recycling, and pick up recyclable materials every other week. (*Id.* § 7.1.) The SOW specified a pick-up schedule at each housing unit. (*Id.* § 11.5.)

The SOW stated that, within five days after contract award, the contractor must appoint a Project Manager who will be “responsible for the supervision, overall administration, and coordination of the required services.” (*Id.* §§ 11.8, 11.9.) In addition, a Project Manager Alternate must be identified in the event that the Program Manager is unavailable. (*Id.* § 11.10.)

The RFP required offerors to submit as part of their proposals a quality control plan, two examples of similar projects performed within the past two years, copies of required permits, truck dispatch locations, and the name and address of any proposed subcontractors. (RFP at 38.) The RFP did not request, or require, information about offerors' managerial personnel or management approach. The RFP stated that the Army would evaluate proposals, and make an award decision, based on two equally-weighted factors: Past Performance and Price. (*Id.*)

### C. Six Sigma's Proposal

Six Sigma proposed itself as the prime contractor, and Waste Management as its sole subcontractor. (Proposal at 4.) According to the proposal, Waste Management would perform all trash and recyclable collections pursuant to the schedules outlined in the SOW, and would also transport and dispose of these materials. (*Id.*, Subcontract, Ex. A-1). Further, Waste Management would supply all drivers and trucks necessary to perform the contract. (*Id.*) The drivers would be supervised by Mr. Michael Wall, a Waste Management employee, who is identified in Six Sigma's proposal as Contracts Manager. (*Id.* at 5-6.) Mr. Wall in turn would report to Six Sigma's President and CEO, Mr. Meheraly Merchant, the Project Manager for the contract. (*Id.* at 5.) The proposal states that Six Sigma will also provide two other managerial employees: a Project Administrator, and a Financial Manager. (*Id.*)

The proposal stated that Mr. Merchant, as Project Manager, would be “globally responsible for administrative and operational issues.” (*Id.* at 5.) He would also bear ultimate responsibility for the quality control plan. Together, the Project Manager and Project Administrator “will monitor driver performance of the scheduled and on-call services for waste removal” and submit daily and monthly reports to the Army. (Quality Control Plan at 2.)

In the proposal, Six Sigma described itself as an “analytical development laboratory” that “serves the environmental, chemical, biotechnical and pharmaceutical industries with dedication and enthusiasm.” (Proposal at 4.) The proposal does not state whether Six Sigma has any direct experience with waste collection and disposal. Six Sigma submitted four contracts in the past performance portion of its proposal, but the proposal does not state whether these projects were performed by Six Sigma or by Waste Management. (*Id.* at 18-21.)

#### D. Area Office Investigation and Size Determination

On March 14, 2013, the Area Office issued its size determination finding that Six Sigma is an eligible small business. The Area Office determined that Six Sigma would perform the contract's primary and vital requirements and that Six Sigma was not unduly reliant on its subcontractor, Waste Management. The Area Office noted that Waste Management is a large business which by itself exceeds the applicable size standard. (Size Determination at 4.)

In considering the primary and vital requirements of the contract, the Area Office relied heavily on an e-mail from the CO, who stated that the contract primarily called for the management of a trash and recycling program. (*Id.* at 6.) The CO advised the Area Office that:

The physical act of collecting trash and recycling is very simple and can be accomplished by a single able bodied person with a truck. It requires no extraordinary skill or expertise. What is more important to the Government is management, scheduling, customer service, and timely resolution of problems.

This requirement encompasses several different areas. It includes the NSSC Main installation and Military Family Housing, refuse collection and transportation services, Single Stream Recycling and miscellaneous other services, to include bulk waste, special collection and disposal services on an as needed basis. This requires a hands-on management approach to make sure all scheduled pickups are completed as well as monitor any changes to weather and/or holiday closures of the Government facility. Also, the prime contractor is required to maintain quality control.

Meeting the schedules is vital to the success of the contract. It includes maintaining close coordination with the [Army]. The prime contractor is also responsible for making sure that approved facilities comply with all federal, state and local regulations, ordinances and statutes pertaining to the collection, transportation and disposal of solid waste or handling of recyclable materials.

In sum, this contract is not simply a contract for someone to come on post and pick up the trash. The primary and vital requirement is overall management of the trash and recycling program. A simple contract for the physical act of picking up trash would not be successful without proper management and oversight.

(E-mail from Gail J. Pitts, CO (Feb. 19, 2013, 3:38 PM EST).)

The Area Office noted that, according to Six Sigma's proposal, Six Sigma is responsible for contract management. The Project Manager and the Project Administrator—who are both employees of Six Sigma—would monitor contract performance and submit daily and monthly reports to the Army. Thus, the Area Office reasoned, Six Sigma would manage the refuse and recycling needs of the NSSC and military family housing, and thereby perform the contract's primary and vital requirement. (Size Determination at 6.)

The Area Office determined Six Sigma was not unusually reliant on its subcontractor for key personnel. The Area Office noted that Six Sigma's proposal identified four managerial personnel, of which three—including the Project Manager—would be Six Sigma employees. Although the Contract Manager would be a subcontractor employee, the proposal makes clear that he would report to the Project Manager. Thus, the Area Office determined that Six Sigma was not overly reliant on Waste Management for key personnel. (*Id.* at 7 (citing *Size Appeal of J.W. Mills Mgmt., LLC*, SBA No. SIZ-5416 (2012)).)

The Area Office then determined Six Sigma was not unduly reliant on Waste Management for past performance. The Area Office explained that Six Sigma had provided four past performance examples in its proposal, and, according to the CO, the “most relevant” of these examples was a contract that Six Sigma reportedly performed as the prime contractor for the Department of Defense (DoD) Washington Headquarters Services. (*Id.* at 8.) Thus, the Area Office reasoned, Six Sigma's own past performance would have merited a high rating independent of Waste Management. (*Id.*)

The Area Office then reviewed the subcontract between Six Sigma and Waste Management, and concluded that Six Sigma had assigned discrete tasks to Waste Management. The Area Office also observed no evidence that Waste Management “is in control of contract administration, interfaces with government customers, or took the lead in pursuing the contract.” (*Id.*) Six Sigma represented that it pursued the contract and initiated contact with Waste Management. Therefore, the Area Office concluded, Six Sigma is not unduly reliant on Waste Management for contract management or performance. (*Id.*)

The Area Office noted that Waste Management is the incumbent on the predecessor contract. (*Id.*) However, this issue does not automatically constitute a violation of the ostensible subcontractor rule. *Size Appeal of Spiral Solutions and Techs. Inc.*, SBA No. SIZ-5279 (2011). The Area Office further reasoned that Six Sigma is not unduly reliant on Waste Management's corporate experience because Six Sigma demonstrated its own experience through its past DoD contract. (Size Determination at 8-9.)

After concluding that Six Sigma would perform the contract's primary and vital requirements and was not unduly reliant on Waste Management to win or to perform the contract, the Area Office calculated Six Sigma's average annual receipts. The Area Office noted that Six Sigma submitted its offer in 2012, and therefore calculated average receipts for the years

2011, 2010, and 2009 using Six Sigma's tax returns. The Area Office determined Six Sigma was an eligible small business under the \$12.5 million size standard.

#### E. Appeal

On March 28, 2013, Appellant filed its appeal with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant asserts the primary purpose of the acquisition is the collection and transportation of refuse and recyclable materials. (Appeal at 2.) Appellant notes that the SOW and CLIN structure refer to activities such as:

- Main Installation Refuse Collection and Disposal (Front-Loading Dumpsters)
- Main Installation Single Stream Recycling Collection and Disposal (As-needed Basis)
- Main Installation Bulk Waste Collection and Disposal
- Military Housing Refuse Collection and Disposal (Curbside Pickup)
- Military Housing Single Stream Recycling (Curbside Pickup)
- Military Housing Christmas Tree Collection and Disposal (Curbside Pickup)
- Military Housing Collection and Disposal of Bulky Objects & White Goods (As-needed Basis) Goods (As-needed Basis)
- Special Collection and Disposal Services (As-needed Basis)

(*Id.*) Appellant argues that all of these services involve the collection, transportation, and disposal of refuse and recyclable materials. Indeed, the RFP refers to recycling and refuse collection repeatedly, but makes no suggestion that the solicitation's primary purpose is to manage a waste program at NSSC. Appellant emphasizes that no CLIN asks for a quote for managerial or consulting services. (*Id.* at 3.)

Appellant argues the CO oversimplified the required tasks when she remarked, "The physical act of collecting trash and recycling is very simple and can be accomplished by a single able bodied person with a truck." Appellant points out that the contractor must also comply with applicable regulations, keep appropriate records, and adhere to the schedules set forth in the SOW. Further, drivers must be properly trained, and the contractor must maintain the equipment. In any event, Six Sigma does not own any trucks, and has no employees in place to collect or transport refuse and recycling materials.<sup>2</sup> Nor has Six Sigma expressed any intent to acquire the necessary personnel or equipment. Six Sigma therefore is completely reliant on Waste Management's personnel, experience, and equipment to perform the contract. As a result, Appellant asserts, the relationship between Six Sigma and Waste Management violates the ostensible subcontractor rule. (*Id.* at 2, 8.)

Appellant goes on to argue the Area Office failed to consider whether Six Sigma will

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<sup>2</sup> Appellant predicts that successful performance of the contract will require at least three different trucks and at least seven employees. (Appeal at 4.) Appellant describes the necessary trucks and includes sample pictures. (*Id.* at 4-7.)

comply with “limitations on subcontracting” requirements. (*Id.* at 3 (citing 15 U.S.C. § 637(a)(14) and 13 C.F.R. § 125.6).) Appellant contends that it is not possible for Six Sigma to observe these requirements, because Six Sigma is “simply providing the administrative function of this solicitation,” without furnishing any of the requisite equipment. (*Id.* at 7-8.)

#### F. Appeal Supplement

On March 29, 2013, Appellant filed a supplement to its appeal. Appellant argues that the OHA decisions referenced in the size determination, such as *J.W. Mills*, are inapposite here because, in those cases, contractors were not required to provide equipment. (Supplement at 1.) Appellant reiterates its contention that Six Sigma must perform 51% of the work and provide 51% of the necessary equipment. Appellant maintains that Six Sigma's proposal cannot meet these requirements. (*Id.* at 2.) Appellant also argues the Area Office overlooked the language, set forth in § 1.1 of the SOW, that the contractor must supply all labor, equipment, materials, supervision, and accessories necessary to perform the contract. (*Id.*)

#### G. CO's Response

On April 12, 2013, the CO submitted her response to the appeal. The CO maintains that the size determination is correct and should be upheld.

The CO first addresses Appellant's assertions regarding the labor and equipment necessary to perform the contract. The CO disputes Appellant's assessment, and argues that Appellant is making this argument for the first time on appeal, and that Appellant is relying on new evidence not previously submitted to the Area Office. As a result, OHA should disregard these arguments and evidence.<sup>3</sup> (CO Response at 1.)

The CO argues the contract's primary and vital requirement is “management of the refuse and recycling services.” (*Id.*) The collection and transportation of waste, although important, are not the most vital services performed. Rather, this procurement “requires a hands-on management approach to make sure that all scheduled pickups are completed.” (*Id.*) The CO states that the contractor will “monitor any changes to weather and/or holiday closures,” maintain quality control, interface with the Army, and ensure legal compliance. (*Id.*)

Next, the CO contests Appellant's assertion that Six Sigma lacks relevant experience, and is dependent upon Waste Management's experience, equipment, and reputation. To this end, the CO emphasizes that the Area Office considered Six Sigma's past performance on a DoD procurement. (*Id.* at 2-3.)

Finally, the CO argues that Six Sigma's proposal does not contravene the limitations on

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<sup>3</sup> The “new evidence” to which the CO refers are the pictures of trucks Appellant included in its appeal. *See* footnote 2, *supra*. The appeal petition is clear, however, Appellant included these pictures merely to illustrate the types of equipment the contract entails. Appellant does not assert that these pictures have any evidentiary value. Accordingly, I find these pictures do not constitute new evidence.

subcontracting. SBA regulations provide that, “In the case of a contract for services (except construction), the qualified HUBZone [small business concern must] spend[] at least 50 percent of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone [small business concerns].” 13 C.F.R. § 125.6(c)(1); *see also* FAR 52.219-14. Therefore, argues the CO, the analysis does not turn on which company is performing more of the duties or supplying more of the equipment, but on which company incurs more of the costs of performance. (CO Response at 3.)

#### H. Six Sigma's Response

On April 3, 2013, Six Sigma moved to intervene, and OHA granted that motion pursuant to 13 C.F.R. § 134.210(b). Six Sigma did not seek an extension of the close of record, which OHA set for April 15, 2013 at 5 p.m. eastern time.

On April 15, 2013, at 5:51 p.m. eastern time, Six Sigma filed its response to the appeal. Six Sigma asserts that its proposal does not violate the ostensible subcontractor rule because the CO and Area Office determined as much. According to Six Sigma, Appellant attempts to dispute these conclusions by alleging bad faith and bias; however, Appellant's arguments are not supported by specific proof. (Six Sigma Response at 2.) Six Sigma also argues that Appellant's allegations concerning limitations on subcontracting should be disregarded because this issue is beyond OHA's jurisdiction. (*Id.* at 1.)

#### I. Appellant's Motion to Strike and Six Sigma's Opposition

On April 19, 2013, Appellant moved to strike Six Sigma's response from the record. Appellant emphasizes that OHA set the close of record for April 15, 2013 at 5 p.m. eastern time, and that Six Sigma's response was filed after this deadline. In its Notice and Order docketing the appeal, OHA stated that, “Any submission received at OHA after 5 p.m. eastern time is considered filed the next business day. 13 C.F.R. § 134.204(b)(2).” Appellant further observes that Six Sigma did not request an extension of the close of record, nor did Six Sigma offer any justification to excuse the late filing.

On April 22, 2013, Six Sigma opposed Appellant's motion. Six Sigma states that, although Six Sigma intervened in the case on April 3, 2013, Six Sigma did not at that time receive a copy of OHA's Notice and Order. It was not until April 15, 2013, when Six Sigma contacted OHA to inquire when responses were due, that Six Sigma learned of the deadline. Six Sigma argues that Appellant is not prejudiced by accepting the late filing, and that Six Sigma's failure to meet the deadline is partially due to the fact that Six Sigma did not promptly receive a copy of OHA's Notice and Order.

### 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. Motion to Strike

OHA's rules of procedure make clear that, for each new size appeal, OHA will issue a Notice and Order establishing a close of record for the case, and notifying interested parties that "OHA must receive any responses to the appeal petition no later than the close of record." 13 C.F.R. § 134.309(b). The close of record typically occurs 15 days after issuance of the Notice and Order. *Id.* Interested parties are instructed to contact OHA if they do not receive a copy of the Notice and Order. 13 C.F.R. § 134.204(f).

In the instant case, OHA issued a Notice and Order establishing the close of record for April 15, 2013, at 5 p.m. eastern time. Six Sigma concedes that its response to the appeal was filed after this deadline, but argues that its response should be accepted because Six Sigma did not promptly receive a copy of OHA's Notice and Order. I find this argument unpersuasive for several reasons. First, the record indicates that OHA served Six Sigma a copy of the Notice and Order by e-mail on March 29, 2013, at the same e-mail address that Six Sigma subsequently used to intervene on April 3, 2013. Even assuming that Six Sigma did not actually receive the Notice and Order, it was Six Sigma's responsibility to contact OHA to obtain a copy. 13 C.F.R. § 134.204(f). Further, in Six Sigma's opposition to the motion to strike, Six Sigma acknowledges that it became aware of the close of record before the deadline expired. *See* Section II.I, *supra*. Six Sigma offers no explanation why it did not then seek an extension of time, as OHA's rules would have permitted. 13 C.F.R. §§ 134.202(d)(2) and 134.211(f). Accordingly, I find Six Sigma has not shown good cause to admit the untimely response, or to reopen the record retroactively. *E.g.*, *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4647 (2004) (rejecting various pleadings filed after the close of record). For these reasons, Six Sigma's response to the appeal is UNTIMELY and is EXCLUDED from the record.

### C. Analysis

#### 1. Ostensible Subcontractor

The "ostensible subcontractor" rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when 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). The "primary and vital" 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 Mgmt. 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.* 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).

In the instant case, Appellant has persuasively shown that the principal purpose of this procurement is the collection and transportation of trash and recyclables, not the management of a trash and recycling program. The RFP contains no discussion of the contractor “managing” or “designing” such a program. Indeed, based on the RFP, the contractor has no involvement in deciding how materials are collected or separated at NSSC. Rather, the contractor's duties consist of picking up and transporting trash and recyclables after those materials have already been placed in disposal containers. *See* Section II.B, *supra*. Further, the RFP describes in detail the process for completing trash and recycling collection, including exact schedules and locations for pickups. *Id.* Based on the RFP, then, the contractor has little discretion to design or develop its own approach or methodology. It is also worth noting that the Army structured the procurement as a commercial items acquisition under FAR Part 12. This suggests that the Army viewed the acquisition as a routine trash collection contract, not a more complicated procurement requiring a unique technical or management solution.<sup>4</sup> In sum, based on the RFP, the primary purpose of this procurement is the collection and transportation of trash and recyclables.

In determining that the contract primarily called for management of a trash and recycling program, the Area Office appears to have been influenced by the CO's remarks concerning the importance of the contractor's managerial responsibilities. In prior decisions, however, OHA has made clear that a contract's primary and vital requirements are ascertained from the solicitation itself, and not from comments by the procuring agency. *Size Appeal of iGov Techs. Inc.*, SBA No. SIZ-5359, at 6, 13 (2012). Further, in the instant case, the RFP does not support the conclusion that managerial aspects were of particular significance to the Army. The RFP did not request information about offerors' management approaches, or about their managerial personnel. *See* Section II.B, *supra*. Although the RFP did require the contractor to name a Project Manager, that individual need not be selected until after award, and need not be personally involved in overseeing contract performance. *Id.* Moreover, when evaluating proposals, the RFP gave no weight to offerors' management approaches or to key personnel; instead, the RFP stated that the Army would base its decision solely on Past Performance and Price. *Id.* Accordingly, the CO's comments as to the importance of the contractor's managerial duties are not controlling here, because those remarks are not supported by the RFP.

Because the principal purpose of this procurement is the collection and transportation of trash and recyclables, it is clear that Six Sigma's proposal does violate the ostensible subcontractor rule. It is undisputed that Six Sigma is not performing any collection, transportation, or disposal of trash or recyclables. Rather, Six Sigma is wholly dependent upon its subcontractor, Waste Management, for such work. Indeed, as Appellant emphasizes, Six Sigma has no trucks or drivers, and has no plans to obtain them. Thus, Six Sigma would not be capable of performing any portion of the contract without Waste Management. Based on Six Sigma's proposal and the subcontract with Waste Management, Six Sigma's only contribution to the procurement is providing three managerial personnel. OHA has recognized, however, that a

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<sup>4</sup> Pursuant to FAR 2.101, services are commercial items if they are “of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.”

prime contractor does not perform the primary and vital requirements merely by supervising subcontractors in their performance of work. *E.g.*, *Size Appeal of Competitive Innovations LLC*, SBA No. SIZ-5369 (2012), *recons. denied*, SBA No. SIZ- 5392 (2012) (PFR) (finding violation of the ostensible subcontractor rule where the challenged firm was managing the contract but not delivering any instruction, the contract's primary and vital requirement); *Onopa*, SBA No. SIZ-5302 (finding violation of the ostensible subcontractor rule where the subcontractor performed the primary requirement of trash collection, and the challenged concern managed the contract and performed recycling services).

A reading of the full RFP demonstrates that the collection and transportation of refuse and recyclable materials is the procurement's primary purpose. It is undisputed that Waste Management, not Six Sigma, is performing all such aspects of the contract. Six Sigma, on the other hand, is merely overseeing Waste Management's performance of these tasks. Such an arrangement is in clear violation of the ostensible subcontractor rule. Indeed, it would vitiate the rule completely to allow a prime contractor to merely supervise its subcontractor's performance—while performing no part itself—of the contract's primary and vital requirements. Thus, because Waste Management is performing the contract's primary and vital requirements, Six Sigma is in violation of the ostensible subcontractor rule and is therefore affiliated with Waste Management for purposes of this procurement.

## 2. Limitation on Subcontracting

Appellant also argues that Six Sigma's proposal does not comply with the limitations on subcontracting. This issue, however, is a matter of contractor responsibility, beyond OHA's jurisdiction. 13 C.F.R. § 125.6(f). It is the procuring agency, rather than SBA, which makes this determination. *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 4 (2012).

## IV. Conclusion

Appellant has demonstrated that Six Sigma is affiliated with Waste Management under the ostensible subcontractor rule. According to the size determination, Waste Management is a large business which by itself exceeds the applicable size standard. (Size Determination at 4.) For these reasons, the appeal is GRANTED and the size determination is REVERSED. Six Sigma is not a small business for the instant procurement. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge