

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

SIZE APPEAL OF:

Logistics & Technology Services, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2013-037

SBA No. SIZ-5482

Decided: July 2, 2013

APPEARANCES

Roweana Hale, President/CEO, for Appellant

Mark J. Blando, Esq., Daniel Craig, Esq., Eckland & Blando LLP, for Intervenor
Exemplar Enterprises, Inc.

DECISION¹

I. Introduction and Jurisdiction

This is an appeal of a size determination concluding Appellant is not an eligible small business for the instant procurement because Appellant is unusually reliant on its large ostensible subcontractor. For reasons discussed below, I grant the appeal and reverse the size determination.

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.

II. Issue

Whether the SBA's determination that Appellant's proposal violates the ostensible subcontractor rule was based on clear error of fact or law.

¹ This Decision was originally issued under a Protective Order. On July 2, 2013, I issued an Order for Redactions directing each party to file a request for redactions if that party desired any information redacted from the published Decision. No party requested any redactions. Thus, OHA now publishes the Decision in its entirety.

III. Background

A. Solicitation, Protest, and Area Office Proceedings

On March 7, 2012, the General Services Administration (GSA) issued Solicitation No. GS-05P-12-SID-0039 (RFP) for janitorial and related services. The Contracting Officer (CO) set the procurement aside 100% for 8(a) competition and designated it under North American Industry Classification System (NAICS) code 561720, Janitorial Services, with a corresponding \$16.5 million annual receipts size standard. Initial offers were due on April 25, 2012, with final proposal revisions due on December 12, 2012. On December 21, 2012, the CO notified unsuccessful offerors that Logistics and Technology Services, Inc. (Appellant), was the apparent successful offeror.

On January 7, 2013, Exemplar Enterprises, Inc. (Exemplar), filed a protest alleging Appellant was other than small. Exemplar alleged, based on the sign-in sheet for the walkthrough that Appellant was paired with American Building Maintenance (ABM), a large concern. The Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) dismissed this protest as untimely. Nevertheless, on February 8, 2013, the Acting Area Director adopted the protest as her own, and directed that a size determination be performed on Appellant. That same day, the Area Office informed Appellant of the protest, and directed Appellant to submit a response to the protest, a completed SBA Form 355, and certain other information.

On February 13, 2013, Appellant responded to the Area Office, identifying ABM Custodial Services, LLC (ABM) as its subcontractor on the instant procurement, and Linc Government Services, LLC (LGS), as its mentor under an SBA Mentor-Protégé Agreement (MPA). The Area Office then requested additional information and documents, including Appellant's Proposal and cost breakdown. In its March 15, 2013, email accompanying the cost breakdown, Appellant wrote:

LTS had our sub contractor, ABM do the heavy lifting on building the cost prop for the JCK Chicago bid as they are a large business custodial/ janitorial company with extensive experience in the custodial/janitorial business, to include downtown Chicago area. Unfortunately, we nor our sub contractor, ABM, have all the detailed information you are requesting.

Basic cleaning was predicated on the existing staffing in the building and the conditions outlined in the union agreement. . . .

For other areas including snow removal, window washing, pest control, and trash removal we coordinated with ABM Janitorial to approximate costs based on their experiences with similar buildings in the Chicago area. Those estimates were the basis of our cost proposal for those work areas instead of solicitations for sub-contractor bids. . . .

Email at 1.

B. The Statement of Work (SOW)

This contract is for janitorial and related services at two Federal buildings in Chicago, Illinois. The Contractor will furnish all personnel, labor, equipment, material, tools, and management to perform the contract. The Contractor will service the main lobbies and high public use areas, service complaints, perform special cleaning required by vacating occupants, set-up and breakdown conference rooms, do cleanup work made necessary by toilet floods and similar occurrences, and assist in loading and unloading supplies and carpet, moving furniture, grounds maintenance, and other similar functions. (§ C.2.0) The Contractor must implement a quality control plan and an effective service call system, and use environmentally sound practices, processes, and products. (§ C.2.2)

The floors shall be clean and free of debris, maintain their natural luster and not have a dull appearance. (§ C.4.1.1) Carpets and rugs shall be cleaned, free of dirt and removable spots. (§ C.4.1.2) Restrooms, shower rooms, locker rooms and holding cells shall be cleaned with disinfectant cleaner, and fixtures shall maintain a high level of luster. (§ C.4.1.4) Fixtures and surfaces shall be clean and sanitized. (§ C.4.1.5) All horizontal surfaces shall be cleaned and free of marks; walls shall be free of smudges, marks and dirt. (§§ C.4.1.6, C.4.1.7) All trash shall be collected and removed to a location designated by the COR. (§ C.4.1.9) The Contractor will also clean all plate glass, windows, elevators and escalators, and police all building areas so they are free of trash and litter. (§§ C.4.1.11-C.4.1.15) The Contractor will also clean the postal space, fitness center, health unit, and laboratories in accordance with cleaning standards appropriate for those areas.

The Contractor will clean the exteriors of the buildings, the plate glass and windows, police the hard surface areas, and remove trash and excrement. (§ C.4.2) The Contractor will also remove all snow and ice before and during normal business hours. (§ C.4.3)

The incumbent contractor is KCorp Technologies Services, Inc. (KCorp). Appellant has not proposed KCorp as a subcontractor.

A Collective Bargaining Agreement (CBA) with Service Employees International Union, Local 1 (the Union), covers the incumbent janitorial staff at both buildings. (Solicitation, Amendment 6) Article 26 of the CBA restricts the Contractor's ability to make changes in that incumbent staff and their working conditions without the written consent of the Union. For example, the Contractor may not reduce the number of employees or man hours worked or change the starting or quitting times of any employee. (CBA, Section 26.1) Article 5 sets the wage rates for employees. Thus, the awardee will receive with the contract not only the incumbent staff but also much of their working conditions, and any changes to incumbent staff or conditions require the Union's consent.

Offerors were required to present at least three relevant past performance experiences of \$500,000 or more in value. (§ L.7) The evaluation factors for award were price and past performance. (§ M.1) Past performance was ““significantly more important than price.” (*Id.*) Past performance references were evaluated with adjectival ratings, which translated into a numerical

score on a scale of 1 (unsatisfactory) to 5 (Excellent), with a Neutral rating for offerors who did not submit the minimum number of relevant past performances and no other performances could be obtained by the CO. (§ M.1) “In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.” (§ M.2, quoting FAR 15.305(a)(2)(iv))

C. Appellant's Proposal

Of the 38 incumbent janitorial employees, Appellant will hire 25 and the other 13 will be ABM's. (Breakout Spreadsheet) All of these employees would be “rebadged” from the incumbent to Appellant and ABM. (March 19, 2013, email to Area Office) These incumbent employees include the project manager with overall responsibility for the project and an assistant manager, to work for Appellant, and one supervisor to work for ABM. (Proposal § 5.1) Each of these individuals has years of experience in one of the buildings. The proposed Program Manager is not an incumbent employee, but has been Appellant's employee since 2011. (Proposal § 5.1) Both Appellant and ABM will undertake inspections in the buildings. (Proposal at 11)

In addition to subcontractor ABM, proposed vendors included Orkin Pest Solutions, Euro Blinds, and Sila Maintenance. These companies were not contacted to help develop the cost proposal; instead ABM estimated their costs based on its own past experience.

ABM will provide all the equipment. The surety bond was signed solely by Appellant, with no assistance from ABM.

For past performance, Appellant listed four contracts valued over \$500,000. Three of the four are ABM's contracts. These are for janitorial work at the Cook County Administration Building, the Chicago, Illinois, FBI Building, and the Sears Tower. (Proposal at 18-20) The other contract presented as past experience is a “Joint LTS/ABM Project” at Coronado Naval Base in San Diego, California. (Proposal at 17)

B. Size Determination

On March 22, 2013, the Area Office issued Size Determination No. 3-2013-037 finding Appellant other than small for this procurement.

First, the Area Office examined whether Appellant was affiliated with any other concern under the common ownership and identity of interest rules. The Area Office found Appellant was established March 3, 2005, and entered SBA's 8(a) program on October 4, 2007. Roweana Hale is Appellant's President and owns 100% of its stock. The Area Office concluded that Orion Technology, Inc., was a former affiliate, and thus not to be counted in determining Appellant's size. The Area Office noted Appellant's mentor/protégé agreement is with LGS, not ABM. ABM is LGS's parent company. Further, there is a joint venture between Appellant and LGS, LTS/LGS JV, LLC. The Area Office concluded that LGS was not affiliated with Appellant, but that Appellant's share of the joint venture's receipts must be counted when determining size. Even so,

the Area Office found that, by itself, Appellant is a small concern.

The Area Office then turned to the question of whether Appellant was affiliated with its large subcontractor ABM under the ostensible subcontractor rule. The Area Office noted that Appellant bid with ABM as a subcontractor. The Area Office file contains Appellant's proposal (and Quality Control Plan (QCP)) dated April 17, 2012, as revised December 11, 2012, and a spreadsheet breaking down the number of employees and costs for Appellant and ABM by site, as well as email traffic between the Area Office and Appellant regarding the proposal.

The Area Office noted the solicitation emphasized past performance as an evaluation factor, "significantly more important than price." (Determination at 9, quoting Solicitation ¶ M.1) The Area Office noted that of Appellant's four past performance submittals, three were for ABM and one for a "Joint LTS/ABM Project". The Area Office then stated, "Based on the evaluation factors, it is reasonable to conclude that without ABM's past performance, Appellant would not have won the subject competition." (Determination at 9)

The Area Office discussed Appellant's March 15 and 19, 2013, emails, where Appellant admitted that ABM did the "heavy lifting" on the cost proposal because of its "extensive experience" in the janitorial business and in downtown Chicago. (Determination at 10) Thus, the Area Office concluded ABM developed the pricing and proposal based upon its knowledge of the work. The Area Office noted that Appellant had hired all incumbent employees, including managers, and referred to the only non-incumbent employee as "a figurehead from the corporate office". (*Id.*) The Area Office also found that Appellant did not know which employees are performing which tasks and that it had merely allocated incumbent employees between it and ABM according to an undisclosed memorandum.

Thus, the Area Office concluded that Appellant was unduly reliant upon ABM, and that it was reasonable to assume ABM would be performing the primary and vital requirements of the contract. Further, Appellant had not fulfilled its role as a prime contractor by defining the work to be performed, soliciting subcontractors, estimating costs and developing the proposals, but rather allowed ABM to perform these tasks. As to requested information Appellant had failed to provide, the Area Office also drew the inference that disclosure would show Appellant was in violation of the ostensible subcontractor rule.

The Area Office therefore determined Appellant, by itself was affiliated with large concern ABM under the ostensible subcontractor rule, and thus other than small and ineligible for the instant contract.

C. Appeal Petition

Appellant filed the instant appeal on March 27, 2013. Appellant asserts the Area Office finding appears to be based on Appellant's failure to submit detailed information, rather than discovery of any specific information establishing that Appellant was affiliated with ABM. Appellant asserts its failure to provide information is due to mistakes made in operating in janitorial services, a new and unfamiliar field of business.

Appellant notes it does not have a great deal of experience in pricing and proposal development for janitorial services, and that most of the detailed information the Area Office sought was not “properly performed” (which I conclude means properly documented) prior to submitting the offer. Appellant maintains that this does not demonstrate unusual reliance, but rather inexperience. Appellant argues it could have bid even lower had it been unusually reliant upon ABM. (Appeal at 1-2)

Appellant admits it “leveraged the experience” of ABM to provide a quote to perform basic labor for the core cleaning operations and the additional services needed to fulfill contract requirements, and participated in the job walk. ABM did not provide any other quotes for any other services, such as snow removal, window washing, trash removal and pest management. Appellant asserts it did not receive any formal quotes for these services or sign any teaming agreements.

Appellant asserts ABM did not develop the pricing or prepare the proposal, and that the Area Office erred in finding that it did. Appellant's personnel integrated ABM's input into Appellant's proposal. Appellant concedes it made (unspecified) errors in the process. Appellant asserts its proposal did not capture all the information including snow removal, window washing, trash removal and pest management. Appellant argues this demonstrates that ABM was not overly involved in proposal preparation. Appellant further asserts it missed including additional general and administrative costs, such as a performance bond, as part of its offer, again due to its inexperience. (Appeal at 1-2)

Appellant asserts ABM will have a total of 12 personnel, working on one shift. ABM will also provide the cleaning equipment because they can better support equipment repairs. This is all the effort ABM will provide as a subcontractor. Appellant will provide management (Project Manager and Assistant Project Manager are Appellant's employees), a majority of the work force, all the supplies, and all ancillary services (snow removal, window washing, trash removal and pest management). Appellant asserts it is not unusually reliant upon ABM, that it could not provide the level of detail the Area Office requested because it did not prepare its proposal and pricing with that level of detail to begin with, due to its inexperience.

D. Intervener's Response

On April 29, 2013, Exemplar filed its Opposition to the appeal. Exemplar reviewed the Size Determination, pointing out that the Area Office noted the lack of specific detail as to how work would be apportioned with ABM. Exemplar noted that Appellant's responses to the Area Office stated that ABM did the “heavy lifting” on the cost proposal, and that Appellant lacked the detailed information the Area Office sought.

Exemplar asserts that, but for ABM's inclusion in the proposal, Appellant would not have met the solicitation's minimum requirement for relevant references of past performance. Here, GSA required a minimum of three past performance references for the offeror in order to receive a better than Neutral rating for past performance, which was the most significant evaluation factor for the award. Exemplar asserts that of Appellant's four references, three were past performance of ABM only, the last an ABM/Appellant joint venture. Exemplar argues that this

establishes that Appellant did not have the ability to perform independently of ABM. Further, only by listing ABM as a co-offeror was Appellant able to meet the threshold of three relevant references through combined experience. Without ABM, Appellant would have only one relevant reference of past performance and would have received a Neutral grade.

Exemplar also asserts ABM will perform the primary and vital requirements of the contract. ABM will supply all the necessary equipment, and Appellant describes its own employees as performing the “ancillary tasks”. (Response at 12, Appeal at 2) Exemplar concludes from this that the 12 ABM employees, out of 38, will be performing the primary janitorial work required under the contract. Further, Appellant's “Working Lead Employee” is an ABM employee, and this is presumably the “janitorial supervisor” under the proposal who has contact with the contracting officer. ABM is thus providing some of the management of contract performance here.

Further, Appellant's own appeal admits it would not be able to perform the contract without ABM, when it describes janitorial contracts as a new service area for it, that it does not have a great deal of experience, its performance is not as high as it would wish, and it is still developing processes to discover what will work in this field.

III. Discussion

A. Timeliness and Standard of Review

Appellant filed this appeal within 15 days of its receipt of the size determination. Therefore, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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. The Ostensible Subcontractor Issue

Because Appellant, by itself, is small, the only issue in this appeal is whether Appellant's proposal violates the ostensible subcontractor rule, thus creating affiliation between Appellant and ABM. Under the ostensible subcontractor rule, a prime contractor and its subcontractor may be treated as affiliates if the subcontractor performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. 13 C.F.R. § 121.103(h)(4).

To apply the ostensible subcontractor rule, the Area Office must consider all aspects of the relationship between the prime and subcontractor, including the terms of the Proposal, agreements between the firms (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract. *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, at 7 (2006). The purpose of the rule is to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 5 (2009). An ostensible subcontractor case must be analyzed on the basis of the solicitation and the proposal at issue. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011).

Appellant contends that the Area Office erred in finding it unusually reliant upon ABM as its ostensible subcontractor. I agree with Appellant and overturn the Area Office's size determination.

First, to the extent that the Area Office took any adverse inference against Appellant for failing to submit information, the Area Office erred. (Determination at 11) A review of the record establishes that Appellant made a complete submission of its entire proposal and additional explanatory material. The Area Office record contained all information necessary to resolve the case. No detailed staffing plan was available because of the requirements of the collective bargaining agreement.

The Area Office also erred in finding that Appellant's hiring of all incumbent employees was a factor supporting a finding that it was affiliated with ABM under the ostensible subcontractor rule. (Size Determination at 10) The employees in question were not ABM's, but those of the incumbent, KCorp, so there was no question of finding any reliance upon ABM in their hiring. Further, the collective bargaining agreement mandated their hiring by any contractor, and thus would have been true for any awardee. In any event, the hiring of incumbent employees is now encouraged by Executive Order, and thus is not a factor in making an ostensible subcontractor determination. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 7 (2011).²

The Area Office found Appellant unusually reliant upon ABM for its past performance submission to the Area Office. In this case it is true that Appellant relied almost entirely on ABM for its past performance for this contract. Three of Appellant's four submissions were from ABM, and one was a joint venture between Appellant and ABM. OHA has found such reliance upon a firm's past performance to be a factor in finding unusual reliance under the ostensible subcontractor rule. *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300, at 9 (2011). However, it has always been only one among other factors in the ostensible subcontractor analysis.

Similarly, Appellant concedes that ABM “did the heavy lifting”, that is, performed the real work, in preparing the cost proposal for this procurement, and the Area Office found that

² “This is in accordance with the policy expressed in the President's January 30, 2009, Executive Order, which announced that “[t]he Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees.” Exec. Order No. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009). I recognize that, as a result of this Order, the hiring of incumbent employees can no longer be considered a meaningful indicia of unusual reliance.”

ABM developed all Appellant's estimates. Reliance upon the subcontractor for proposal preparation has been held to be an indicia of unusual reliance. *Size Appeal of SM Resources Corp., Inc.*, SBA No. SIZ-5338, at 14 (2012). But again, it has been only one factor among others in the analysis. Further, because the wage rates were set in the collective bargaining agreement, there was relatively little discretion in preparing cost proposals. This factor thus has less weight than in other cases without such set wage rates. The issue here is whether these two factors alone are enough to establish unusual reliance upon the ostensible subcontractor, or establish that the ostensible subcontractor is performing the primary and vital requirements of the contract.

Here, there is no question that Appellant is managing the contract and performing most of it. The Program Manager will be Appellant's employee, and has been for some time. The other supervisory personnel will be Appellant's employees, except for one supervisor to be allocated to ABM. There is no indication in the record that ABM will undertake any management responsibilities. It is thus clear that Appellant will manage this contract. This fact supports a finding that Appellant is not in violation of the ostensible subcontractor rule. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 11 (2011). The Area Office erred in failing to consider Appellant's management role in the contract, and for that matter, describing the Program Manager as a "figurehead" without any evidence that person would not be managing the contract.

Further, the great majority of the employees on this contract, 25, or about two thirds, will be Appellant's employees. Only 13 employees will be ABM's employees. ABM will be performing on one shift. There is no indication in the record that ABM's employees will be performing any different janitorial work than Appellant's. It is clear that Appellant will not only be managing the contract, but also performing the great majority of the work. The 38 employees were not hired from ABM, but were "rebadged" from KCorp. Indeed, any awardee of this contract was required to hire these employees, under the terms of the collective bargaining agreement. The fact that ABM's equipment will be used does not alter the fact that it is Appellant that will be performing most of the work. A concern that will manage the contract and is performing the majority of the work is not in violation of the ostensible subcontractor rule. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 13 (2011).

The Area Office erred in failing to consider the heart of any ostensible subcontractor case, namely which concern is managing the contract, and which concern is performing the primary and vital requirements of the contract. The Area Office's determination rests upon only two findings, that ABM assisted in cost proposal preparation, and that Appellant was reliant upon ABM for its past performance. These findings are insufficient to sustain the size determination. First, the cost proposal finding is especially weak because the collective bargaining agreement limited the cost proposal preparation for all offerors. Second, because while these are two factors to be considered, by themselves they are far outweighed by the issues of which concern is managing the contract and which concern is performing the contract. Here, the Appellant is clearly performing both functions. The Area Office's reliance upon past performance to the exclusion of other, more important factors, amounts to substituting its judgment of Appellant's ability to perform the contract for the judgment of the contracting officer, and that it cannot do. *Size Appeal of TCE, Inc.*, SBA No. SIZ-5003 (2008).

Accordingly, I conclude that the size determination is based upon clear error of law and fact, that Appellant is not unduly reliant upon its subcontractor, ABM, and that Appellant is performing the primary and vital functions of the contract. Accordingly, I grant this appeal and reverse the size determination.

IV. Conclusion

Appellant has met its burden of proving that the size determination is based on clear error of fact or law. Accordingly, I GRANT this appeal and REVERSE the size determination. Appellant Logistics and Technology Services, Inc., is an eligible small business for this contract.

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

CHRISTOPHER HOLLEMAN
Administrative Judge