United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Bell Pottinger Communications USA, LLC Appellant, Appealed From Size Determination No. 3-2013-085	SBA No. SIZ-5495 Decided: August 28, 2013

APPEARANCES

Darrel C. Smith, Esq., Shumaker, Loop & Kendrick, LLP, Charlotte, North Carolina, for Appellant

DECISION [1]

I. Introduction and Jurisdiction

On July 24, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2013-085, finding that Bell Pottinger Communications USA, LLC (Appellant) is not an eligible small business due to its affiliation with Pelham Bell Pottinger (Pelham) under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).[2]

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be a small business for the instant procurement. 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. Appellant filed the instant appeal within

[1] This decision was initially issued on August 28, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant the opportunity to file a request for redactions if it desired to have any information withheld from the published decision. Appellant responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

[2] The Area Office determined Appellant is also affiliated with the Kestrel Group, LLC and GHI Strategic Solutions, LLC. Appellant, however, does not challenge these findings on appeal.

fifteen days of receiving the size determination, so the appeal is timely.[3] 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On November 21, 2012, the Department of Defense, Washington Headquarters Services (WHS), issued Solicitation HQ0034-13-R-0012 (RFP) seeking indigenous trade show support services for the Task Force for Business and Stability Operations (Task Force). The Task Force "seeks to elevate Afghanistan's business profile in the global market by promoting the export of consumer goods, facilitating private sector investment, and creating opportunities for women." RFP § C.1. To this end, the Task Force will promote Afghan carpets, cashmere, gems, and jewelry at nine trade shows around the world. *Id.* § C.2. WHS, therefore, seeks a contractor to establish booths at these trade shows, develop promotional materials for distribution at the trade shows, advertise prior to the trade shows in strategic industry publications, conduct public relations and media outreach, train Afghan stakeholders participating at the trade shows, and hold a carpet design competition. *Id.* § C.3.

The Contracting Officer (CO) set aside the procurement exclusively for small businesses, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding $14 million average annual receipts size standard. Offers were due December 27, 2012. Appellant and Norris Professional Services (Norris) submitted timely offers self-certifying as small businesses.

B. Appellant's Proposal

On December 14, 2012, Appellant submitted its proposal in response to the RFP. Appellant stated it would be the prime contractor and Pelham would be the subcontractor. Appellant explained that Pelham "will be subcontracted as operational lead on this project." Technical Proposal at 2. In addition, "Pelham will undertake full logistics organization for the trade show program, including arranging a potential presentation event at each trade show or an Afghanistan focused event reception." *Id.* at 8. Throughout the proposal, Appellant referred to the two firms as "the Bell Pottinger consortium."

The proposal contained a section describing the experience of the personnel who would perform the contract. Seven of these people work for Pelham, and two work for Appellant. Of the five individuals on the "core team," four are Pelham employees; the other is Appellant's vice president and COO. *Id.* at 10-11. Of the five individuals on the "advisory board," three are Pelham employees; another is Appellant's president and CEO.[4] *Id.* at 11-12.

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[3] Appellant produced evidence indicating it received the size determination on July 25, 2013. Appeal, Exh. B. OHA received the appeal on August 9, 2013, fifteen days later.

[4] The proposal does not state the employer of the fifth advisory board member.

Appellant provided three examples of past performance. Of the three, Appellant performed work on one: Appellant was a sole source prime contractor with the US Special Operations Command (USSOCOM) for a strategic communications program. Pelham performed work on the other two. *Id.* at 13-15.

In the pricing section of the proposal, Appellant included "[two Pelham] team members attending each trade show" as one of the "key underlying assumptions" of its proposed price. Price Proposal at 2. Appellant did not plan for its own employees to attend trade shows.

C. Protest and Response

On April 30, 2013, the CO notified unsuccessful offerors that Appellant was selected for award. Norris, an unsuccessful offeror, protested Appellant's size, alleging Appellant is affiliated with Bell Pottinger Private Communications, Ltd., a multinational large business that owns 100% of Pelham. The Area Office determined the protest was untimely, and on June 24, 2013, the Area Director submitted a timely protest adopting Norris's allegation. 13 C.F.R. § 121.1004(b).

On July 1, 2013, Appellant responded to the Area Director's protest. Addressing the issue of whether there was a violation of the ostensible subcontractor rule, Appellant asserted, "Should the [SBA] have concerns that [Pelham] may cross the threshold as a potential 'ostensible' subcontractor, [Appellant] is prepared to dismiss [Pelham] as a subcontractor at the request of the government, or reduce their level of involvement." Response at 2. Appellant did not address whether, under the terms of the proposal, there was a violation of the ostensible subcontractor rule.

D. Size Determination

On July 24, 2013, the Area Office issued its size determination finding Appellant affiliated with its subcontractor, Pelham, under the ostensible subcontractor rule. The Area Office determined Pelham would perform all of the contract's primary and vital requirements, and Appellant was unduly reliant on Pelham to perform the contract.

The Area Office noted that, according to subcontract documents, Pelham would perform over 90% of the contract, and Appellant would perform minimal administrative functions. According to the proposal, Pelham employs 70% of the key personnel. Further, of the three past performance references, two were projects Pelham performed. The Area Office then noted that Appellant was awarded the USSOCOM contract when it was a subsidiary of Chime USA, Inc.[5] Size Determination at 6-7.

The Area Office determined Appellant was not an eligible small business as a result of this affiliation. Although the Area Office did not have access to Pelham's tax returns, it noted that, according to Appellant's owner and Pelham's officers, Pelham's revenues substantially

[5] On October 25, 2012, Chime USA, Inc. assigned 100% of its membership interest in Appellant to Kestrel Group, LLC. Size Determination at 1-2.

exceed the size standard. The Area Office observed, however, that Appellant's average revenues for 2009, 2010, and 2011, when aggregated with those of the Kestrel Group, LLC and GHI Strategic Solutions, LLC, do not exceed the $14 million size standard. Accordingly, were it not for this affiliation with Pelham, Appellant would be an eligible small business. *Id.* at 8.

E. Appeal Petition

On August 9, 2013, Appellant filed its appeal of the size determination with OHA. Appellant argues the appeal contains clear errors of fact and law, and should be reversed. Alternatively, Appellant requests that OHA remand the size determination for a new calculation that takes into account Pelham's actual revenue.

Appellant argues the size determination is erroneous because the Area Office failed to consider a major factor—whether the prime or the subcontractor will manage contract performance. Appeal at 4 (citing *Size Appeal of Longview Constr. Co.*, SBA No. SIZ-2422 (1986); *Size Appeal of George C. Sharp, Inc.*, SBA No. SIZ-2000 (1984); *Size Appeal of Troutman & Shreve, Inc.*, SBA No. SIZ-1908 (1984). Appellant argues it has managed the majority of contract performance over the course of this contract. It has "handled all discussions of any management issue with the [CO], prepared and submitted all invoices, and otherwise managed the Prime Contract." By contrast, Appellant explains, "Pelham has handled only operational issues" and "does not interface with the [CO] regarding any issues related to contract management." Appellant disputes the Area Office's findings that Pelham is providing 70% of the key personnel and performing over 90% of the contract, but offers no alternative percentages or supporting evidence. Appeal at 3-4.

Next, Appellant argues that the Area Office contravened 13 C.F.R. § 121.104(c)(1) when it did not obtain actual financial data from Pelham when calculating size. *Id.* at 4.

Appellant argues it is in the Government's best interest for Appellant to finish the contract. Appellant explains that the contract has been substantially completed, and restates its offer to modify the arrangement with Pelham. *Id.* at 5.

Appellant also complains that the Area Office did not notify Pelham of the size determination, as required by 13 C.F.R. § 121.1009(f). *Id.*

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

I find Appellant has not met its burden of proving clear error. For the reasons discussed *infra*, the appeal is denied.

This appeal reflects a fundamental misunderstanding of the ostensible subcontractor rule. 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). Appellant does not argue that it will perform the contract's primary and vital requirements, or that it does not unduly rely on Pelham to perform the contract. Indeed, Appellant seems to concede this central issue when it argues "Pelham has handled operational issues." Appellant argues unpersuasively that it is managing the contract and interfacing with the contracting officer, because the prime contractor must perform the contract's primary and vital requirements, not merely manage the subcontractor's performance of these tasks. *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 10-11 (2013) (finding violation of the ostensible subcontractor where the principal purpose of the acquisition was trash collection, and the challenged firm would manage, but not perform, this task).

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 Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). In this case, the principal purpose of the acquisition is to obtain trade show support services, such as establishing booths at the trade shows. The record does not show that management of the contract or interfacing with the government is of particular importance to WHS. The RFP did not request information about offerors' management approaches, or about their managerial personnel. Moreover, when evaluating proposals, the RFP gave no weight to offerors' management approaches or to key personnel.

Here, the record is clear that Pelham will perform the trade show support services. The proposal states that Pelham "will be subcontracted as operational lead on this project" and "will undertake full logistics organization for the trade show program, including arranging a potential presentation event at each trade show or an Afghanistan focused event reception." *See*, Section II.B., *supra*. Nowhere does the proposal state—nor does Appellant argue—that Appellant will play a meaningful role in establishing booths at these trade shows. For that matter, the record does not show that Appellant will perform any of the other support services, such as developing promotional materials, advertising, conducting public relations and media outreach, training Afghan stakeholders, or holding a carpet design competition. Accordingly, because Appellant is not performing the contract's primary and vital requirements, the proposal violates the ostensible subcontractor rule.

The record also supports the Area Office's determination that Appellant is unduly reliant on Pelham for performance. According to the technical proposal, seven of the ten key personnel are Pelham's employees. The pricing proposal likewise shows that Pelham will perform over 90% of the contract.

Appellant argues to no avail that the Area Office should have obtained actual financial data from Pelham when calculating size. During the course of a size determination, "[t]he concern whose size is under consideration has the burden of establishing its small business size." 13 C.F.R. § 121.1009(c). According to the Area Office, Appellant stipulated that Appellant would not be an eligible small business if the Area Office found affiliation with Pelham. *See*, Section II.D., *supra*. The record demonstrates that the Area Office requested this stipulation, and Appellant does not challenge the validity of the Area Office's representation on appeal. Thus, I find no reason to disturb the finding that Appellant conceded this issue during the course of the size determination. Moreover, the record contains publicly available information demonstrating that Pelham's parent company is a large business.

Appellant offers no legal support for its argument that it is in the Government's best interest for Appellant to finish the contract. Although the contracting officer can make such a determination in the context of a size protest, 48 C.F.R. § 19.302(h)(1)(ii), OHA lacks such authority in the context of a size appeal.

Appellant's complaint that the Area Office did not notify Pelham of the size determination does not bear on whether the size determination is clearly erroneous. Accordingly, this issue is outside the scope of OHA's review, so there is no need to decide it.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge