

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

SIZE APPEAL OF:

Combat Readiness Health Services, Inc.,

Appellant,

RE: Fischer Business Solutions, LLC

Appealed From
Size Determination No. 2-2013-89

SBA No. SIZ-5498

Decided: September 11, 2013

APPEARANCES

Lee P. Curtis, Esq., William J. Bainbridge, Esq., Perkins Coie LLP, Washington, D.C.,
for Appellant

Thomas O. Mason, Esq., Christopher J. Kimball, Esq., Cooley LLP, Washington, D.C.,
for Fischer Business Solutions, LLC

DECISION¹

I. Introduction

On June 14, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2013-89 finding that Fischer Business Solutions, LLC (Fischer) is an eligible small business for the procurement at issue. Combat Readiness Health Services, Inc. (Appellant), which had originally protested Fischer's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination. 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 under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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

On January 22, 2013, the U.S. Department of Defense, National Guard Bureau (Guard) issued Request for Quotations (RFQ) No. W91SMC-13-T-0001 for mobile medical and dental services. The solicitation stated that the Guard planned to award a single indefinite-delivery indefinite-quantity contract to the lowest-price technically-acceptable offeror. (RFQ § M.1.) Specific requirements would be defined in task orders issued after award of the base contract. (*Id.* §§ B.2.3, C.2.2, C.4.2.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621999, All Other Miscellaneous Ambulatory Health Care Services, with a corresponding size standard of \$14 million average annual receipts. Proposals were due March 8, 2013. On April 8, 2013, the CO notified Appellant that Fischer had been selected for award.

B. Protest

On April 9, 2013, Appellant filed a size protest with the CO. The protest asserted that Fischer has not previously been awarded a contract of this nature, and “does not list any medical or dental assets on [its] website.” (Protest at 1.) As a result, Appellant alleged, Fischer would be heavily reliant upon a large business subcontractor, Onsite Health, Inc. (Onsite), to perform the contract. Appellant further contended that the RFQ required laboratory certification, which Fischer itself does not possess. The CO forwarded Appellant's protest to the Area Office for consideration.

C. Performance Work Statement

The RFQ included a Performance Work Statement (PWS) outlining contractual requirements. According to the PWS, the contractor will provide medical and dental exams and related services to Guard personnel in the state of Illinois, as specified in individual task orders. (RFQ § C.2.) The services must be performed by physicians, physician's assistants, nurse practitioners, dentists, dental technicians, and other medical professionals. (*Id.* §§ C.3.2, C.3.3.) Work is expected to occur on-site at Guard installations in Illinois. (*Id.* §§ B.5.1, C.7.) The Guard will provide facilities for conducting medical exams, but the contractor must provide “mobile units (e.g., buses, vans, trailers)” for dental work. (*Id.* § C.2.1.9.)

Unless otherwise stated in a task order, the contractor is responsible for “all consultation, management, labor, material, equipment, certifications and supplies.” (*Id.* § C.3.) The required medical services will include physical exams, blood and urine testing, and immunizations. (*Id.* § C.3.2.) The required dental services will include dental exams, x-rays, and treatment. (*Id.* § C.3.3.) All laboratory tests must be conducted by a laboratory with Clinical Laboratory Improvement Amendments (CLIA) certification, or an appropriate waiver. (*Id.* § C.3.2.5.) The PWS states that required certifications, such as medical and dental licenses, may be held by the

The Area Office reviewed the subcontract between Fischer and Onsite, and considered it to be “a standard agreement with no unusual terms and conditions.” (*Id.* at 6.) The subcontract “is clear that [Fischer] and its CEO are managing the contract and in complete control of the contract.” (*Id.*) The Area Office stated that the primary and vital aspects of this procurement are “providing medical staff with required certifications in the state of Illinois.” (*Id.*) Fischer has “demonstrated expertise in providing medical staffing,” and stated that it will provide a large majority of the staffing. (*Id.*) The Area Office also indicated that, although Onsite will be providing the mobile medical equipment, such equipment is required mainly for the dental portions of the contract, and would be “essentially worthless” without dental staff, which are to be provided by Fischer. (*Id.*)

Next, the Area Office addressed the issue of CLIA certification. Onsite has CLIA certification, but the Area Office determined that Fischer proposed to utilize Quest Diagnostics, which also has CLIA certification, for laboratory testing. Therefore, Fischer “is not unduly reliant on Onsite for its CLIA certification.” (*Id.*)

The Area Office also determined that Onsite having begun recruiting is not indicative of Fischer's undue reliance upon Onsite. (*Id.* at 7.) Fischer responded to the protest by stating that “it has staff on-hand from an existing pool of candidates and chose not to publicly recruit for this procurement.” (*Id.*) The Area Office concluded that Onsite is not Fischer's ostensible subcontractor and the firms are operating under a permissible prime contractor/subcontractor relationship. (*Id.*)

F. Appeal

On June 28, 2013, Appellant filed the instant appeal with OHA. Appellant argues the size determination is clearly erroneous and should be reversed.

Appellant maintains that the Area Office should have examined the solicitation, rather than Fischer's proposal, to determine the primary and vital contract requirements. Moreover, the Area Office erred in concluding that the instant contract is primarily a staffing vehicle rather than services contract. Appellant insists that the primary and vital requirements are not medical staffing, but “the provision of medical and dental services” to Guard personnel. (Appeal at 11.) Appellant emphasizes the RFQ refers repeatedly to ““medical services” and “dental services” and discusses such services in detail. (*Id.* at 5-8.) Further, all of the ordering CLINs, and all of the contract deliverables, are for medical and dental services. (*Id.* at 9-10.) Although “the requirement to provide staffing is part and parcel of any service contract,” the Area Office failed to grasp that the Guard “was seeking medical and dental services, not staffing services.” (*Id.* at 11.)

Appellant asserts that “[o]nce the primary and vital purpose of the contract is correctly determined, [Fischer's] undue reliance on [Onsite] — with its expertise in providing medical and dental services — becomes readily apparent.” (*Id.* at 12.) Appellant highlights that the Area Office found that Fischer has experience in staffing, but “did not conclude that [Fischer] has experience providing medical or dental services.” (*Id.*) Appellant further argues that Fischer's

experience is in staffing services that may have some connection to the healthcare industry, but that Fischer evidently has no relevant experience in providing medical or dental services. (*Id.* at 13.) Appellant maintains that Fischer's dearth of experience supports the conclusion that Fischer cannot perform the instant contract without undue reliance on Onsite. (*Id.* 13-14.)

Next, Appellant asserts that Fischer must rely on subcontractors for licenses required to perform the contract. Appellant cites past OHA decisions that have found violation of the ostensible subcontractor when a subcontractor possesses essential licenses or certifications. (*Id.* at 16.) Because Fischer admits that it does not possess CLIA certification, Appellant argues that Fischer must rely on Onsite and/or Quest Diagnostics to perform the requirements of the contract.

Appellant further argues the Area Office improperly disregarded the importance of the contract's requirement for mobile medical equipment. Appellant maintains that this requirement further establishes that Fischer must rely on Onsite to perform the contract. (*Id.* at 18.) Appellant also complains the Area Office failed to consider that Onsite is a former incumbent contractor, although Onsite is not the current incumbent. (*Id.*)

Lastly, Appellant states that Fischer's claim that it will perform 60% of the contract, with Onsite responsible for the remaining 40%, is dubious, because Fischer acknowledged that it also planned to use at least one other subcontractor, Quest Diagnostics. "Consequently, the Area Office disregarded factual evidence when it concluded that [Fischer] will perform 60% of the contract." (*Id.* at 19.)

G. Fischer's Response

On July 15, 2013, Fischer responded to the appeal. Fischer maintains that the size determination is correct and should be affirmed.

Fischer states that Appellant fails to establish a clear error of fact or law in the size determination. (Response at 2.) Fischer disputes Appellant's contention that the Area Office discerned the primary and vital contract requirements from Fischer's proposal rather than the solicitation. Fischer argues the size determination clearly considered the solicitation in its discussion of the primary and vital requirements.

Fischer goes on to argue that Appellant attempts to distinguish between medical services and medical staffing without explaining any meaningful difference between these concepts. (*Id.* at 3.) In Fischer's view, "[a]part from the label, there is no practical difference between providing the government with (i) medical and dental services and (ii) medical and dental professionals (*i.e.*, "staff") who perform medical and dental services." (*Id.*) Appellant maintains that the medical and dental staff it will provide under the contract will perform the medical and dental services, and the Area Office found that Fischer will provide a large majority (60%) of the staff. Thus, Fischer argues, the Area Office correctly concluded that both companies will contribute to the performance of the contract without violating the ostensible subcontractor rule. (*Id.* at 4.)

in contract performance, the appeal does not establish Fischer's undue reliance on Onsite, nor has Appellant shown that the Area Office committed significant errors of fact or law in its size determination. The overall management and staffing of the contract remain in the purview of Fischer, the prime contractor.

IV. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge