

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

SIZE APPEAL OF:

Iron Sword Enterprises, LLC,

Appellant,

Appealed From  
Size Determination Nos. 1-SD-2013-43  
and 1-SD-2013-44

SBA No. SIZ-5503

Decided: September 26, 2013

APPEARANCES

Lawrence M. Prosen, Esq., Daniel P. Broderick, Esq., Thompson Hine LLP, Washington, D.C., for Appellant

DECISION<sup>1</sup>

I. Introduction

On July 3, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination Nos. 1-SD-2013-43 and 1-SD-2013-44 finding that Iron Sword Enterprises, LLC (Appellant) is not an eligible small business for the procurement at issue. The Area Office specifically determined that Appellant's relationship with its subcontractor, Pike/PJ Dick Joint Venture (Pike/PJD JV), violated the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

Appellant maintains that the size determination is flawed and should be reversed. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the

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<sup>1</sup> This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. OHA received one or more timely requests for redactions and considered those requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation and Protests

On April 10, 2013, the U.S. Department of the Army (Army) issued Request for Proposals (RFP) No. W911SD-13-R-0005 seeking the restoration and modernization of Scott Barracks at the U.S. Military Academy in West Point, New York. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$33.5 million average annual receipts. Proposals were due May 13, 2013. On June 6, 2013, the CO announced that Appellant was the apparent awardee.

On June 12, 2013, two unsuccessful offerors, APS/ICE, LLC and FSA/JKC Joint Venture One, LLC, filed size protests with the CO challenging Appellant's size. Both protesters alleged Appellant will be unusually reliant upon its subcontractor to perform the contract, in violation of the ostensible subcontractor rule. The CO forwarded the protests to the Area Office for consideration.

### B. Size Determination

On July 3, 2013, the Area Office issued Size Determination Nos. 1-SD-2013-43 and 1-SD-2013-44, finding that Appellant does not qualify as a small business concern for the instant procurement. The Area Office found that Appellant itself is "undoubtedly small" under the applicable size standard. (Size Determination at 9.) However, Appellant is affiliated with Pike/PJD JV for the instant procurement, and exceeds the size standard once its receipts are combined with those of Pike/PJD JV. (*Id.* at 11.) Pike/PJD JV is a joint venture between two large construction firms, The Pike Company and PJ Dick, Inc. (*Id.* at 4.)

The Area Office explained that the instant procurement called for a variety of design-build construction work at West Point, including: water infiltration repairs to cadet rooms; repairs to failed plumbing systems for latrines and showers; repair of storage rooms, day rooms, study rooms, and offices; repairs to mechanical and electrical systems, telecommunications, heating, ventilation and air conditioning, fire detection and suppression, and integrated energy monitoring and control systems; installation of an alarm system; connection of supporting facilities to utilities; road improvements; interior design, fixtures, and furniture; and restoration of exterior facades. (*Id.* at 2.) The contractor must designate an on-site Project Manager, and have bonding capacity of at least \$48 million. (*Id.*, at 2, 9.) The Army planned to award the contract to the offeror whose proposal represented the best value based on three evaluation factors: (i) Technical/Mission Capability, (ii) Past Performance, and (iii) Price. The Technical/Mission Capability factor consisted of four equally-weighted subfactors: (1) Project Execution, (2) Key Program Management, (3) Design Build, and (4) Experience. (*Id.* at 2-3.) Pursuant to the RFP, Technical/Mission Capability was more important than Past Performance,

and the non-Price factors collectively were significantly more important than Price.

The Area Office found that Appellant proposed that Appellant, in conjunction with subcontractors other than Pike/PJD JV, would perform approximately [XX]% of the contract by dollar value. (*Id.* at 7.) Pike/PJD JV would perform the remaining [XX]% of the contract by dollar value. (*Id.*) Appellant proposed that Pike/PJD JV would be primarily responsible for [XX] (*Id.*) Meanwhile, Appellant would have primary responsibility for [XX]. (*Id.*) The Area Office determined that Appellant planned to subcontract its portions of the contract, except perhaps [XXXXXXXXXX], to subcontractors other than Pike/PJD JV. (*Id.* at 11.) According to the Area Office, the [XXXXXXXXXX] work may also be subcontracted, because Appellant has no apparent expertise in these areas. (*Id.*) Thus, “[i]t appears that nearly 100% of actual construction work, not including management, contract administration and support services, will be subcontracted.” (*Id.*)

The Area Office then explained that Appellant's proposal designated a Pike/PJD JV employee as the [XXXXXXXXXX]. This individual will be “[XX].” (*Id.* at 8-9.) An employee of Appellant would serve as [XX XXX]. (*Id.* at 7.) Pike/PJD JV employees also hold [XX XXXXXXX]. (*Id.* at 8.)

The Area Office found that Appellant relied heavily upon Pike/PJD JV for past performance in its proposal. [XX XXX]. (*Id.* at 9.) Further, Appellant has only 10 employees. (*Id.* at 6.)

Next, the Area Office stated that the financial backing of Pike/PJD JV was crucial to enabling Appellant to obtain the required bonding. (*Id.* at 9.) [XX XXX XXX XXX].

The Area Office concluded that Appellant intends to subcontract “most, if not all, of the contract functions” to Pike/PJD JV and other subcontractors. (*Id.*) Appellant itself will perform “[a] minimal amount of the actual work other than supervision and oversight.” (*Id.* at 11.) Moreover, “[t]he extent of [[Appellant's] supervision and oversight of the contract is itself questionable”, because Pike/PJD JV will play a major role in contract management. (*Id.*)

### C. Appeal

On July 12, 2013, Appellant filed the instant appeal with OHA. Appellant argues that the Area Office clearly erred in determining that Pike/PJD JV is Appellant's ostensible subcontractor.

Appellant maintains that the size determination “is premised on the misguided and inaccurate presumption that the [contract’s] primary and vital requirements are physical construction activities.” (Appeal at 1.) Appellant asserts that in the construction industry, it is common practice that the general contractor will “self-perform the contract management and administration functions while subcontracting most, if not all, of the ‘actual construction work.’” (*Id.* at 17.) Similarly, 13 C.F.R. § 125.6(a)(3) requires that the prime contractor on a construction contract need only perform “at least 15 percent of the cost of the contract with its own employees.” (*Id.* at 18.) Appellant argues that the size determination is flawed because it suggests that Appellant must “either (i) self-perform virtually all of the design and construction tasks on the [[contract]; or (ii) only contract with other small businesses.” (*Id.* at 17.)

Appellant argues that the Area Office erred in labeling the contract’s primary and vital requirements as restoration and modernization of Scott Barracks. Rather, Appellant characterizes the contract’s primary and vital requirements as “the contract management, oversight, and coordination aspects of the [[contract], which [Appellant] will largely self-perform with its own forces.” (*Id.* at 19.) In Appellant’s view, it would be highly unusual if a small business general construction contractor could “self-perform all of the construction, to say nothing of the design, services called for in the [RFP].” (*Id.*)

Appellant maintains that the solicitation’s project description states it is for the “Design and Renovation” of the Scott Barracks, making the design-build aspect of the contract the primary and vital requirement. (*Id.* at 20.) “A critical aspect of all design-build projects is the management of both the design process, the construction process and the coordination of the two.” (*Id.*) Appellant argues that because unforeseen situations may arise during renovation projects, “the management of the renovation and modernization is in fact the primary and vital requirement of the acquisition.” (*Id.*)

Next, Appellant states that Appellant will maintain control over the contract’s mechanical, electrical, and plumbing work. Appellant maintains these are among the more “complex and difficult” aspects to manage. (*Id.* at 21.) Additionally, Appellant states that these are the most costly portions of the contract requirements, and Appellant will be in charge of coordinating their implementation. (*Id.*)

Appellant further argues that the Area Office incorrectly found that Pike/PJD JV employees will have control over contract management. Appellant contends that, contrary to the Area Office’s findings, all Pike/PJD JV employees report to Appellant’s personnel and Appellant will be the primary point of contact with the Army. (*Id.*) Appellant challenges the Area Office’s determination that a Pike/PJD JV employee will be responsible for daily contract performance. Appellant states that the RFP requires the Project Manager to be on-site only two days a week, and that the Project Executive, an employee of Appellant, “is essentially fulfilling the role of the project-wide Project Manager, who will provide [oversight] to the design-build process and interact directly with the owner.” (*Id.* at 21-22.) Appellant asserts that the Project Manager, a Pike/PJD JV employee, will only oversee the construction and safety portions of the contract. (*Id.* at 23.) Appellant argues that the Project Manager is essentially a “mid-level” manager who reports to the Project Executive. (*Id.*) Appellant adds that its organizational chart and proposed

key employee descriptions make clear that “ultimate control and decision making rests with [Appellant] and not with the Pike/PJD JV, whose employees are subordinate to [Appellant’s].” (*Id.* at 22.)

Appellant maintains that it has “not obtained a payment or performance bond” for the contract. (*Id.* at 24.) Additionally, Pike/PJD JV have not indemnified any payment or performance bond. [XXX  
XX  
XX]. (*Id.*) Appellant argues that in a large construction contract valued at \$50 million or more, a small business will “almost by definition” need assistance in obtaining a payment or performance bond. (*Id.*) Thus, Appellant reasons, relying on a subcontractor to assist with bonding should not constitute a *per se* violation of the ostensible subcontractor rule. (*Id.*)

[illegible]

Appellant states that the Area Office erred by suggesting that if Appellant breaches its agreement with Pike/PJD JV, Appellant could be removed as the prime contractor. Appellant explains that the teaming agreement “only restates the rights already granted to the surety by the FAR and gives absolutely no rights of any kind to Pike/PJD JV.” (*Id.*) Appellant adds that [XXX]. (*Id.*) Appellant concludes that this is not indicative of unusual reliance on Pike/PJD JV.

Appellant contends that the Area Office's determination failed to take into consideration that [XXXXXXXXXXXXXXXXXXXXXXXXXXXX "XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX"]. (*Id.* at 27.) Appellant argues the Area Office should have weighed these facts in its analysis. Appellant further argues that its protest response contained numerous facts that were not included in the size determination, and these omissions establish error by the Area Office. (*Id.* at 28.) Appellant asserts that the Area Office failed to consider [XXXXXXXXXXXX XX]. (*Id.* at 28-29.) Appellant adds that the Area Office also erred in suggesting that Appellant will not self-perform any construction activities, that it would be easier for Pike/PJD JV to replace Appellant than *vice versa*, that Pike/PJD JV likely prepared large portions of Appellant's proposal, that the use of scheduling consultants indicates that Appellant has abdicated its supervisory role, and that Appellant could not bid on this project without Pike/PJD JV. Appellant states that each of these findings are "inaccurate statements of fact" upon which the Area Office improperly relied. (*Id.* at 29-30.)

### 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

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 rule is intended 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 4 (2009). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *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).

In this case, Appellant correctly observes that, under OHA precedent, compliance with the ostensible subcontractor rule is analyzed somewhat differently in the context of construction procurements as opposed to ordinary services procurements. For services, OHA has held “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 Bell Pottinger Communications USA, LLC*, SBA No. SIZ-5495, at 5 (2013). In construction contracting, however, OHA has recognized that subcontractors often perform a majority of the actual construction work, because the prime contractor frequently must engage multiple subcontractors specializing in a variety of trades and disciplines. *Size Appeal of J.R. Conkey & Associates, Inc. d/b/a Solar Power Integrators*, SBA No. SIZ-5326, at 8 (2012). Accordingly, “[t]he primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors.” *Size Appeal of C.E. Garbutt Construction Company*, SBA No. SIZ-5083, at 7 (2009). Stated differently, a small business prime contractor on a construction contract may delegate a large portion of the construction work to its subcontractors without contravening the ostensible subcontractor rule, provided that the prime contractor retains management of the contract. *J.R. Conkey*, SBA No. SIZ-5326, at 8; *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383, at n.6 (2012); *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 6 (2010). In this case, then, the mere fact that Appellant

proposed to self-perform a comparatively small portion of the actual construction work is not sufficient to establish a violation the ostensible subcontractor rule.

The more fundamental problem for Appellant is that the record simply does not establish that Appellant will, in fact, manage the instant contract. [XXXXXXXXXXXXXXXXXXXX XX]. See Sections II.B and II.C, *supra*. The issue is significant because OHA has held that the on-site project superintendent, responsible for day-to-day decision-making, is a crucial position for management of any construction contract. *C.E. Garbutt*, SBA No. SIZ-5083, at 7 (“the provision of the on-site superintendent is a primary and vital function for a construction contract.”). Further, it is undisputed that [XX XX]. Thus, it appears that Pike/PJD JV, not Appellant, controls management of the contract.

Appellant asserts that Appellant nevertheless retains control of the contract because [XXX  
XX  
XXX XXXXX]. Thus, the Area Office could reasonably infer that they cannot effectively manage the contract as compared with the full-time, on-site Project Manager. Moreover, Appellant's own proposal confirms that [XXX  
XX  
XXXXXXXXXXXX XXX  
XXX]. (*Id.* at 14-15.) An area office must give “great if not controlling weight” to statements in the proposal and other contemporaneous documentation, as opposed to any subsequent representations. *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009). Based on this record, then, I find no clear error in the Area Office's determination that Pike/PJD JV, rather than Appellant, primarily controls management of the contract.

The instant case bears substantial similarity to OHA's decision in *C.E. Garbutt*. In that case, OHA found a small business general construction contractor affiliated with its large, highly-experienced subcontractor under the ostensible subcontractor rule. OHA determined that a subcontractor employee would serve as the on-site superintendent on the contract, and rejected the notion that the prime contractor could remotely control the project from its headquarters because “[s]uperintending and managing construction cannot be accomplished without presence at the construction site.” *C.E. Garbutt*, SBA No. SIZ-5083, at 7. OHA found that “performing [the on-site managerial] role goes beyond mere assistance and gives an important measure of control or power to [the subcontractor].” (*Id.*) In addition, the prime contractor had no demonstrated experience performing contracts of similar magnitude, and was reliant upon its subcontractor to obtain the requisite performance and payment bonds. (*Id.*) Similarly, Appellant here chose to align itself with a single large subcontractor, Pike/PJD JV, rather than a group of smaller subcontractors. As discussed above, the Area Office found, and record confirms, that Pike/PJD JV, not Appellant, would be primarily responsible for management of the contract. Like the prime contractor in *C.E. Garbutt*, Appellant is a relatively small firm, whereas Pike/PJD JV is an extremely large entity with extensive experience. Further, the teaming agreement

between Appellant and Pike/PJD JV contemplates that Pike/PJD JV may provide Appellant assistance in bonding. While Appellant emphasizes that such assistance has not yet come to fruition, Appellant concedes that it would require assistance to obtain bonds of the magnitude required for this contract, and identifies no other possible source of this assistance. (Appeal at 24-25.) In sum, the Area Office's determination that Appellant is affiliated with Pike/PJD JV under the ostensible subcontractor rule is consistent with OHA precedent in *C.E. Garbutt*.

#### 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