

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

SIZE APPEAL OF:

NEIE Medical Waste Services, LLC,

Appellant,

Appealed From
Size Determination No. 2-2014-10

SBA No. SIZ-5547

Decided: April 3, 2014

APPEARANCES

William E. Hughes, Esq., Whyte Hirschboeck Dudek S.C., Milwaukee, Wisconsin, for Appellant

Grant J. Book, Esq., Crowell & Moring LLP, Washington, DC, for eStrategy One Salute, Inc.

DECISION¹

I. Introduction and Jurisdiction

On January 16, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-10, finding that NEIE Medical Waste Services, LLC (Appellant) is not an eligible small business due to its affiliation with Stericycle under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

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 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

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 did not receive any request for redactions. OHA now publishes 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 and Protest

On July 8, 2013, the Department of Veterans Affairs (VA), Great Lakes Acquisition Center, issued Solicitation VA69D-13-Q-1583 (RFQ) as a firm-fixed-price, indefinite quantity contract. The solicitation sought medical waste disposal services at Edward Hines, Jr. VA Medical Center. The Contracting Officer (CO) set aside the procurement 100% for Service-Disabled Veteran-Owned Small Business (SDVO SB), and assigned North American Industry Classification System (NAICS) code 562112, Hazardous Waste Collection, with a corresponding \$35.5 million average annual receipts size standard.

The RFQ stated that the contractor would be responsible for picking up and disposing of Regulated Medical Waste (RMW) and Medical Pathological Waste (MPW) and providing reusable sharp containers. RFQ § 1. The RFQ shows that the majority of the work would be the pickup and disposal of RMW, followed by MPW, and medical sharps. *Id.* The Statement of Work (SOW) specifies that the awardee would be “furnishing labor and material to pick up, transport, and microwave-grind and/or provide another acceptable disposal method.” SOW, § 1. The SOW stated that the contractor shall provide no less than two full-time key employees. The collected medical waste, after being treated, shall be disposed of at the appropriate landfill, according to Federal and State regulations. The SOW also stipulates that the contractor must include in its price the cost of “containers, liners, vehicle(s), and the services of qualified vendor.” *Id.* at § 2. Additionally, the transport vehicle and processing facility utilized by the contractor must meet Federal and State regulations and the contractor must furnish any applicable licenses. The solicitation stated each proposal needed to contain (i) Technical Capability, (ii) Past Performance, (iii) Proof of the Center for Veterans Enterprise Certification for SDVO SB/VOSB Status, and (iv) Price. The CO would award to the proposal that presented the best value and was most advantageous to the VA.

On October 9, 2013, the CO notified all unsuccessful offerors that Appellant had been selected for award. On October 17, 2013, eStrategy One Salute, Inc. (eStrategy), an unsuccessful offeror, filed a protest with the CO, claiming that Appellant was in violation of the ostensible subcontractor rule based on its reliance on two concerns, Daniels and Stericycle. eStrategy also claimed that Appellant was affiliated with NEIE, Inc. (NEIE) based on common management.

B. Appellant's Proposal

On July 19, 2013, Appellant submitted its proposal in response to the RFQ. Appellant stated that Stericycle has been their subcontractor in past contracts involving RMW and Reusable Sharps Collection and Disposal. Technical Proposal at 5. Appellant's proposal establishes Stericycle as the subcontractor for “the regulated medical waste disposal portion” of the contract. *Id.* at 7. Further, the proposal states that Stericycle will be responsible for the “transportation and disposal duties” of all the “regulated medical waste.” *Id.* Additionally,

Stericycle would also be responsible for the incineration of all MPW at its facility in Clinton, IL. *Id.* at 20.

Appellant identified 69 contracts for medical waste collection and disposal as part of their past performance, including serving as the incumbent contractor for the solicitation at issue. The proposal specified that Appellant's personnel would be responsible for all the collection of RMW associated with the solicitation. *Id.* at 23. The key personnel for the contract, specifically the Primary Project Manager, Alternate Project Manager, and Quality Control Environmental Health and Safety Manager are all Appellant's employees. Additionally, training for the handling of medical waste will also be provided by Appellant, at a rate of once per year. *Id.* at 27. Appellant's proposal contains the state licenses required to perform transportation and disposal services for the medical waste specified by the solicitation. The licenses were all awarded to Stericycle. *Id.* at 71-75.

C. Size Determination

On January 16, 2014, the Area Office issued its size determination finding Appellant affiliated with its subcontractor, Stericycle, under the ostensible subcontractor rule. The Area Office determined Stericycle would perform the majority of the contract's primary and vital requirements, and thus Appellant was unduly reliant on Stericycle to perform the contract.

The Area Office found that Mr. Jeremy Feldbusch owns 51% of Appellant and acts as its Managing Member. Additionally, Patricia Sumner owns 30% of Appellant, and Dean Hohman owns the remaining 19%. Size Determination, at 2. In its protest response, the Area Office notes that Appellant stated it would perform 55% of the contract's primary and vital requirements. Nevertheless, Appellant acknowledged that Stericycle would be responsible for the transportation of the medical waste to the processing facilities because Appellant did not have an Illinois license to transport Potentially Infectious Medical Waste (PIMW). The Area Office received notification from Appellant that it had applied for a PIMW license and that it did not partner exclusively with Stericycle to perform this task. *Id.*

In reviewing the solicitation, the Area Office found that the contractor would need to “obtain all necessary permits and/or licenses regarding transportation, treatment, and disposal of biohazardous medical waste and provide a copy of such permits and/or licenses with the proposal.” *Id.* at 3. According to the Area Office, Appellant's proposal listed Stericycle as its proposed subcontractor, and stated that Stericycle would be responsible for transportation and disposal of medical waste. Further, the Area Office determined that Stericycle would be responsible for the transportation and processing of the medical waste during the base year but that Stericycle's role would diminish to only processing during the contract's option year. *Id.* at 4. Regarding Appellant's potential affiliation with Daniels, the Area Office found that Daniels was not involved in the instant procurement, and therefore not affiliated with Appellant based on the ostensible subcontractor rule. Next, the Area Office determined that transportation is involved in any medical waste collection and disposal, thus it is also a part of the contract's primary and vital requirements.

After reviewing a cost breakdown analysis of Appellant's proposal, the Area Office established that Appellant would responsible for just over 51% of the contract's total cost. *Id.* at

5-6. However, the Area Office noted that Appellant's proposal states Stericycle would be responsible for the medical waste transportation and disposal, in contrast with Appellant's assertions in its protest response that Appellant will be responsible for transportation. The Area Office cites *Size Appeal of Combat Readiness Health Services, Inc.*, SBA No. SIZ-5498 (2013), in establishing that the Area Office must rely on a contractor's proposal over any responses to a size protest when examining potential affiliation based on the ostensible subcontractor rule. *Id.* at 6.

The Area Office further determined that “in the absence of teaming agreements that would have clearly identified the assigned tasks” it is unable to determine Appellant's role or participation in the transportation of medical waste, as it submitted Stericycle's PIMW transportation license. *Id.* In finding that Appellant would still be responsible for a portion of the contract's medical waste collection requirement; the Area Office concluded that Appellant's share of the contract was for 40% of the work, while Stericycle's share was 60%, due to its responsibility for transporting, processing, and disposing of the medical waste. The Area Office added that the submission of Stericycle's PIMW license was “further evidence to support the conclusion that Stericycle would perform the transportation portion of the primary and vital requirements.” *Id.*

Next, the Area Office examined Appellant's potential affiliation with NEIE, Inc. based on common management. The Area Office found that, based on Appellant's SBA Form 355, as well as its tax returns and affidavits by all of Appellant's owners, no affiliation between the two concerns exist.

The Area Office determined Appellant was not an eligible small business as a result of its affiliation with Stericycle. However, the Area Office did not have access to Stericycle's tax returns nor its SBA Form 355, but noted that according to the System for Award Management (SAM), Stericycle is not small under the size standard applicable here. Accordingly, the Area Office determined that were it not for its affiliation with Stericycle, Appellant would be an eligible small business for this procurement. *Id.* at 9.

D. Appeal Petition

On January 31, 2014, Appellant filed its appeal of the size determination with OHA. Appellant argues the Area Office committed errors of fact and law, and thus the size determination should be reversed.

Appellant argues the Area Office erroneously determined what the contract's primary and vital requirements are. Appellant contends that it is performing the primary and vital requirements and no violation of the ostensible subcontractor rule exist. Appeal, at 2. Appellant explains that the CO “determined that medical waste collection and disposal are the primary and vital requirements of the contract.” *Id.* at 3. Appellant argues that the Area Office's unilateral decision to include transportation as another primary and vital requirement was in error and resulted in a “deeply flawed analysis.” *Id.* Appellant argues the Area Office determined that transportation was a primary and vital requirement by relying on Appellant's proposal and size protest response, while ignoring the solicitation and the CO's interpretation. According to

Appellant, the Area Office's view that transportation is part of medical waste collection and disposal is not indicative of transportation also being a primary and vital requirement of the contract. *Id.* Appellant contends that the Area Office's analysis is "contrary to existing law which provides that services which are merely ancillary to the primary and vital requirements are not themselves primary and vital requirements." *Id.* at 4.

Appellant notes the solicitation itself states that medical collection is the "most complex, high-level work under the contract." *Id.* Appellant argues that the transportation of medical waste acts as an ancillary task to the contract's primary and vital requirements. Because collection of medical waste is necessary before any transportation takes place, Appellant contends that subcontracting this task does not put Appellant in violation of the ostensible subcontractor rule. *Id.*

Appellant adds that the Area Office's analysis of the contract's primary and vital requirements resulted in an "alternative formula" that incorrectly calculated Appellant's share of the labor costs. Appellant does not allow the Area Office's determination that Appellant is performing 40% of the primary and vital requirements, but allows that even if it were true, the ostensible subcontractor rule is not violated because Appellant "is still playing a vital, meaningful role in the performance of the contract's principal requirements." *Id.* at 5.

Next, Appellant argues the Area Office committed further error in relying on the absence of a teaming agreement between Appellant and Stericycle in its analysis of the ostensible subcontractor rule. Appellant states that its proposal clearly establishes that it will provide the required full-time employees responsible for collecting, packaging and preparing the medical waste for transportation and disposal, as well as providing, and monitoring the sharp and reusable waste containers. *Id.* Additionally, Appellant claims that it will provide all of the key personnel required by the solicitation, and all contract management. Appellant contends these functions, when added with its performance of 51% of the primary and vital requirements, clearly show Appellant is performing the majority of the work required. *Id.* at 6.

Appellant further explains the Area Office erroneously calculated the amount of work that Stericycle will be performing. Appellant claims Stericycle will only perform a portion of the processing and disposal of medical waste, as its responsibilities are for MPW. *Id.* In addition, Appellant notes that of the three waste disposal facilities identified in its proposal, Stericycle owns only one. Appellant argues that because MPW accounts for a small proportion of the total waste breakdown contained in the solicitation, Stericycle is not performing a majority of the contract's primary and vital requirements. *Id.* at 7. Appellant also states that the Area Office failed to properly consider Appellant's role managing the contract. Appellant cites to previous OHA case law in supporting its argument that contract management in this case plays a significant role in the solicitation's requirements. *Id.*

Lastly, Appellant argues the Area Office erred in concluding that Appellant was unusually reliant upon Stericycle for contract performance because it relied on Stericycle's transportation services and licenses. Appellant notes that Stericycle will be performing routine, simple tasks, the key personnel for contract performance will be Appellant's employees, Appellant is not financially dependent on Stericycle, Appellant has previously performed these

services in the past and will manage the contract, and Appellant is the incumbent contractor. *Id.* at 8-9. Appellant argues that “each of these factors weighs in favor of a finding that [Appellant] is not unusually reliant upon Stericycle.” *Id.* at 10. Appellant concludes the Area Office misapplied the facts in this situation, and erroneously found Appellant in violation of the ostensible subcontractor rule.

E. eStrategy's Response

On February 18, 2014, eStrategy filed its response to the appeal. eStrategy requests that OHA affirms the size determination and deny Appellant's appeal because it has not shown any clear error of fact or law by the Area Office.

eStrategy proposes that the solicitation's disposal requirements account for a majority of the primary and vital functions. eStrategy contends that because Stericycle was responsible for all of the disposal duties, Appellant is in clear violation of the ostensible subcontractor rule. eStrategy's Response, at 3.

According to eStrategy, 60.9% of the solicitation's primary and vital duties are medical waste disposal, thus, Stericycle is performing the majority of the contract's primary and vital requirements. *Id.* at 4. eStrategy further contends the Area Office was correct in ascertaining that transportation of medical waste was an “integral part” of the disposal duties. *Id.* at 5. eStrategy states that even though Appellant's appeal claims Stericycle will be responsible for only MPW, its proposal clearly establishes that Stericycle is responsible for all medical waste disposal. Supporting their argument, eStrategy maintains that “[Appellant]'s proposal shows that the licenses for all three facilities are in Stericycle's name.” *Id.* at 6. eStrategy argues that Appellant's claims on appeal must be given less weight if in contradiction with their statements set forth in the proposal. *Id.*; citing *Size Appeal of Combat Readiness Health Services, Inc.*, SBA No. SIZ-5498 (2013). Because Appellant's proposal shows Stericycle as the party responsible for disposal duties, and no teaming agreement or subcontract establishes otherwise, eStrategy concludes that Stericycle is responsible for all transportation and disposal responsibilities outlined in the solicitation.

Next, eStrategy argues the Area Office correctly determined Appellant was unduly reliant on Stericycle in performing the contract. eStrategy contends Appellant's claims that it is not unduly reliant on Stericycle lack merit because in ostensible subcontractor cases, facts are unique and “are based upon the specific requirements of each solicitation and an individual offeror's response to those requirements in its proposal.” *Id.* at 10; citing *Size Appeal of Smart Data Solutions LLC*, SBA No. SIZ-5071 (2009). eStrategy suggests that Appellant's appeal is meritless when it attempts to establish transportation and disposal duties as “simple routine tasks” required by the solicitation. eStrategy maintains that transportation and disposal duties “are the most complicated tasks to be performed under the contract and are highly regulated.” *Id.* at 11. Additionally, eStrategy argues Appellant's dependence on Stericycle for the licenses to transport and dispose of the regulated medical waste is dispositive of Appellant's undue reliance on Stericycle for contract performance.

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 stipulates that 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). Of utmost importance in any ostensible subcontractor rule is whether the subcontractor is performing the primary and vital contract requirements, and which concern is responsible for contract management. *Size Appeal of Maywood Closure Company, LLC & TPMC-EnergySolutions Environmental Services 2009, LLC*, SBA No. SIZ-5499 (2013). A contract's primary and vital requirements are those closely associated with the solicitation's primary purpose. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012). When examining the relationship between a prime and subcontractor, OHA will look into all aspects of the relationship, including any agreement between the concerns, and whether the subcontractor is the incumbent contractor. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009).

Here, the contract's primary and vital requirements are the collection and disposal of RMW and MPW. Additionally, the contractor is required to provide reusable sharps containers. The solicitation specifically states that the contractor will pick-up, transport, and dispose of all medical waste as regulated by Federal and State EPA guidelines. *Supra*, Section II.A. The solicitation further provides that the contractor must have all the required licenses or permits for handling, transporting, processing, treating, storing and disposing of all medical waste. The CO would evaluate offers based on the best value offered to the VA. The evaluation factors taken into consideration by the CO include Technical Capability, Past Performance, Proof of Size Status, and Price. Under Technical Capability, an offeror's explanation on how it will perform the contract will be evaluated along with its proposed key personnel and its licensing to perform the duties in the State of Illinois.

Cases dealing with ostensible subcontractor issues 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). Additionally, in any ostensible subcontractor rule analysis, the question is “in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Construction*, SBA No. SIZ-5151, at 7. Here, the record shows that Appellant, the prime contractor, is responsible for all the medical waste collecting duties and contract management, as

well as providing all the key employees required by the solicitation. It is clear that Appellant is performing a primary and vital contract requirement in collecting all the medical waste and preparing it for collection. In addition, I cannot find that Stericycle is involved in any contract management, as Appellant's proposal clearly states that Stericycle's duties regarding the solicitation lie solely in disposing of the medical waste.

Furthermore, the transportation and disposal of the medical waste is an inherent part of the contract, and not an "ancillary" task as argued by the Appellant. However, I disagree with the Area Office's finding that transportation is a primary and vital contract requirement. In the past, OHA has found that where a CO provides written identification of a solicitation's primary and vital requirements, some weight must be given to the CO's statements. *Size Appeal of Paragon TEC Inc.*, SBA No. SIZ-5290 (2011). Here, the record establishes that the Area Office directly contacted the CO to inquire about the solicitation's primary and vital requirements. The CO responded that medical waste collection and disposal were the primary and vital contract requirements, with providing reusable sharp containers being a smaller portion. At no point did the CO respond that transportation was another primary and vital contract requirement. I must then agree with Appellant in ruling that the Area Office's unilateral addition of transportation as a primary and vital contract requirement is unsubstantiated.

In the case at hand, there is no question that Appellant is managing the contract and performing a majority of it. Although Stericycle is responsible for the disposal aspect of the contract, Appellant will be performing all collection duties, as well as providing the sharp containers. Further, the collection duties are the most complex and delicate part of the contract, and thus Appellant's performance of this portion of the contract should be given particular weight in determining whether it is performing the primary and vital function of the contract. *Santa Fe Protective Servcs.*, at 10. Based on these facts, I cannot find that Stericycle is performing a majority of the contract's primary and vital requirements. Thus, the Area Office erred in finding Appellant would not be responsible for performing a majority of the contract's primary and vital requirements because it will not be performing disposal duties.

The Area Office failed to consider the proposal's evaluation factors, which clearly states that Past Performance will be given the same weight as Technical Capability. Reviewing Appellant's proposal, it is without question that Appellant has significant experience in acting as a prime contractor in similar solicitations, as well as the fact that Appellant is the incumbent contractor for this particular contract. Appellant also prepared the proposal, will manage the contract and provide the key personnel, and act as the sole point of contact with the VA. These factors clearly show that Appellant will not be unduly reliant on Stericycle for contract performance. *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012).

Consequently, I find that Appellant has clearly established that it has the ability to perform the contract, will perform a majority of the contract's primary and vital requirements, is performing a majority of the work, and will manage the contract. Under these findings, Appellant is not in violation of the ostensible subcontractor rule. *Size Appeal of Paragon TEC Inc.*, SBA No. SIZ-5290 (2011).

Accordingly, the Area Office erred in determining that Appellant will not be performing the majority of the contract's primary and vital requirements. Therefore, I find Appellant is not affiliated with its subcontractor, Stericycle, under the ostensible subcontractor rule.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge