

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

SIZE APPEAL OF:

WG Pitts Company,

Appellant,

Appealed From
Size Determination No. 3-2014-043

SBA No. SIZ-5575

Decided: July 9, 2014

APPEARANCES

James E. Krause, Esq., Jacksonville, Florida, for Appellant

Loria Samples Hile, Contracting Officer, U.S. Department of Defense, Defense Commissary Agency, Fort Lee, Virginia.

DECISION¹

I. Introduction

This appeal arises from a size determination concluding that WG Pitts Company (Appellant) is affiliated with its subcontractor, Cintas Corporation (Cintas), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

The U.S. Small Business Administration (SBA) 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 appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

II. Background

A. The Solicitation

On December 30, 2013, the Defense Commissary Agency (DeCA) issued Request for Quotations (RFQ) No. HDEC05-14-T-0001 for linen/mat rental and cleaning services at 22 commissaries located across seven states and the District of Columbia. The RFQ explained that DeCA planned to award one or more Indefinite-Delivery Requirements contracts on a lowest-price technically-acceptable basis. (RFQ at 13, 17-19.) According to the RFQ, “an offeror may submit an offer on any one or more locations,” and “there is a possibility of receiving an award for one or more locations.” (*Id.* at 6, 13.) The particular commissaries covered under each resulting contract would be determined at the time of award.

The RFQ's Statement of Work indicated that, during contract performance, the contractor(s) will “furnish all plant facilities, labor, material and equipment to provide commissary linen/laundry, and mat services, to include pickup/delivery of items in such quantities as estimated in the contract.” (*Id.* at 32.) Items to be provided and cleaned would include: butcher shirts, pants, and coats; butcher aprons, cobbler aprons, and bib aprons; three sizes of floor mats; and four types of mops. (*Id.*, Att. 2.) Quantities of items vary by commissary and may increase or decrease during the life of the contract. (*Id.* at 34 & Att. 1.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 812332, Industrial Launderers, with a corresponding size standard of \$35.5 million average annual receipts. Proposals were due February 3, 2014.

B. Appellant's Proposal

On February 3, 2014, Appellant submitted its proposal, stating in its cover letter that Appellant is “proud to team with Cintas Corporation to facilitate this procurement,” and noting that Appellant and Cintas currently are teaming on two other contracts. Appellant's proposal did not identify any planned subcontractors other than Cintas, and did not explain what portions of the work were to be performed by Appellant and Cintas respectively.

On February 12, 2014, DeCA requested physical descriptions of the items Appellant would provide. Appellant responded later that same day, recounting the advantages of “Cintas [t]owels,” “Cintas [a]pron,” and the “Cintas dust control program.” (Email from C. Hall to E. Kelley (Feb. 12, 2014).)

On February 21, 2014, the CO issued Appellant a set of discussion questions, requesting, among other items, “[a] written statement . . . describing the percentage of duties [Appellant] is doing and the percentage of duties that Cintas is doing.” (Letter from L. Hile to Appellant (Feb. 21, 2014).) The CO also requested that Appellant address its “ability to deliver the types and quantities” of items specified by the RFQ. (*Id.*) Appellant responded on February 28, 2014. (Letter from C. Hall and W. Spann to E. Kelley (Feb. 28, 2014).) Appellant estimated that

Appellant would perform 78% of the contract and Cintas the remaining 22%. With regard to the specific responsibilities of each firm, Appellant provided the following information:

[Appellant's] Role: 78%

Provide [a] single 24-7-365 contact for all DeCA customer needs and [DeCA] concerns/questions for duration of this contract;
Facilitate, execute, coordinate and follow-up on all communications between [Appellant], Cintas, individual DeCA facility personnel and DeCA Contracting Authorities;
Ensure quality service is provided to DeCA facilities through regular contract by phone, email and, if required, in-person;
Address and correct any performance issues with Cintas;
Make suggestions to improve performance and cut costs where possible;
Coordinate all communications with Cintas relevant to this contract;
Handle all requested contract changes/adjustments/issues between each individual DeCA facility, DeCA Contracting Authorities and Cintas;
Perform periodic surveys to ensure each DeCA facility remains completely satisfied;
Ensure each DeCA facility receives all contracted items in a timely and regular fashion;
Perform all billings to U.S. government; Perform all payments to Cintas.

Cintas Corporation Role: 22%

Make regular reports to [Appellant] on services provided;
Make suggestions to [Appellant] for potential improvements to the contracted services.
Provide advance notice to [Appellant] on any issues with timely delivery, equipment breakdowns, delays, changes, or proposed substitutions so that [Appellant] may alert DeCA facilities as needed;
Supply well-maintained items to DeCA facilities as stipulated by contract;
Maintain customer-friendly, professional relations with DeCA facility employees.
(Id.) On a separate page entitled "Ability to Deliver", Appellant stated:
[Appellant] will be teaming with the largest custodial and janitorial supply [c]ompany in . . . North America. This company provides highly specialized services to businesses of all types throughout North America. Our teaming partner designs, manufactures and implements corporate identity and other uniform programs, provides entrance mats, restroom supplies, promotional products, document management, fire protection, and first aid and safety services for more than 900,000 businesses.

(Id.)

On March 19, 2014, the CO issued a second set of discussion questions to Appellant. The CO requested a copy of any teaming agreement between Appellant and Cintas, and sought

assurance that Appellant will comply with Federal Acquisition Regulation (FAR) clause 52.219-14, Limitations on Subcontracting. (Letter from L. Hile to Appellant (Mar. 19, 2014).) The CO also warned Appellant that DeCA did not anticipate additional rounds of discussions, and that Appellant therefore should submit any final proposal revisions for DeCA's consideration. (*Id.*) Appellant responded the next day, attaching a copy of its final proposal revisions. (Letter from C. Hall and W. Spann to L. Hile (Mar. 20, 2014).) In response to the discussion questions, Appellant "confirm[ed] that [Appellant] 'will be performing at least 50% of the cost of contract performance incurred by [Appellant's] personnel in the performance of any resultant contract' in accordance with [FAR] 52.219-14." (*Id.*) Appellant further asserted that "Cintas agrees to conform to all sub-contractor requirements." (*Id.*)

C. Protest and Area Office Proceedings

On April 2, 2014, the CO announced that Appellant was the apparent awardee for seven commissaries. On April 10, 2014, the CO filed a size protest with SBA's Office of Government Contracting, Area III (Area Office) alleging that Appellant is affiliated with Cintas under the ostensible subcontractor rule. In her protest, the CO maintained that "[t]he primary and vital requirements of the procurement are to rent linens and mats, pick up soiled items, launder and return clean items on a weekly basis." (Protest at 2.) The CO contended that Appellant will be "unusually reliant on Cintas to provide the pickup, delivery and laundering requirements of the contract." (*Id.*)

On April 21, 2014, Appellant responded to the protest and provided a copy of its proposal, its completed SBA Form 355, and other documents.² Appellant's response asserted that "[i]n six of the seven DeCA Commissary locations tentatively awarded to [Appellant] certified small businesses are performing [the] primary and vital functions." (Protest Response at 1 (emphasis in original).) Appellant indicated that Halifax Linen Service, Inc. (Halifax) would perform pickup, delivery, and cleaning services at six commissaries in the state of North Carolina, whereas Cintas would perform these functions at one commissary in the state of Mississippi. (*Id.*) According to an attached spreadsheet, Appellant's role would be to provide a Project Director, CFO/Auditor, Operations Manager, and Bookkeeper. (*Id.*) Appellant estimated that these four personnel comprised approximately 33% of contract dollar value. (*Id.*) In subsequent correspondence with the Area Office, Appellant reiterated that Cintas would perform pick-up, delivery, and cleaning activities at only one of the seven locations that were to be awarded to Appellant. (Email from W. Pitts to I. Bascumbe (April 23, 2014), at 3.) At the other six locations, the pick-up, delivery, and cleaning functions would be performed by Halifax, which Appellant described as a "certified small business." (*Id.* at 2-3.) Appellant stated that:

² As an attachment to its appeal, Appellant provided OHA a document purporting to be a copy of Appellant's response to the protest. (Appeal, Exhibit K.) This document, however, differs substantially from the protest response Appellant actually submitted to the Area Office, particularly with regard to the specific functions and amounts of work to be performed by Appellant itself. Citations herein refer to the protest response filed with the Area Office.

[Appellant] originally planned to utilize direct employees in all North Carolina locations to pick up and deliver. After reviewing all of the subcontractor bids in the NC locations, [Appellant] decided to subcontract these services to another small business rather than self-perform.

(*Id.* at 2.)

D. Size Determination

On May 1, 2014, the Area Office issued Size Determination No. 3-2014-043 concluding that Appellant is not an eligible small business for the instant procurement due to affiliation with Cintas under the ostensible subcontractor rule.³

The Area Office agreed with the CO that the primary and vital contract requirements are to “rent linens and mats, pick up soiled items, launder and return clean items on a weekly basis.” (Size Determination at 4.) However, upon review of Appellant’s proposal and the responses to the discussion questions, the Area Office found that Appellant would not self-perform these requirements. Rather, Cintas would be responsible for “supplying 100% of the products, delivery of the items and the equipment.” (*Id.* at 5.)

The Area Office elaborated:

Cintas is picking up soiled uniforms, mats and mops and delivering the product[s] to the laundry facility that is owned by Cintas. [Appellant] does not own laundry cleaning equipment, nor do[es] Appellant own the trucks for pick up or delivery which are the primary and vital requirements of this contract. [Appellant] could not have made an offer under the RFQ without the assistance of Cintas. [Appellant] the prime contractor is relying on the facilities and equipment of the subcontractor to perform the primary and vital requirements of the contract.

(*Id.*)

The Area Office noted that, in correspondence with the Area Office, Appellant expressed an intent to utilize Halifax, in lieu of Cintas, as Appellant’s primary subcontractor at six locations. This new approach, however, was not reflected in Appellant’s proposal, and therefore could not be considered. (*Id.* citing *Size Appeal of KVA Electric, Inc.*, SBA No. SIZ-5045 (2009).)

Appellant acknowledged that Cintas is not a small business under the \$35.5 million size

³ The Area Office also determined that Appellant is affiliated with six other companies through stock ownership and identity of interest, but that the combined average annual receipts of these companies, including Appellant, do not exceed the size standard. (Size Determination at 3, 6.) Appellant does not dispute these findings on appeal, so further discussion of them is not warranted.

standard applicable to the RFQ. (*Id.* at 2.) As a result, when Appellant's receipts are aggregated with those of Cintas, Appellant does not qualify as a small business for this procurement.

C. Appeal

On May 16, 2014, Appellant filed its appeal of the size determination with OHA. Appellant contends that the Area Office improperly concluded that Appellant is affiliated with Cintas.

Appellant explains that, at time of proposal submission, Appellant could not predict which, if any, of the 22 commissaries might ultimately be awarded to Appellant. (Appeal at 5.) Consequently, Appellant "did not attempt to pin down what subcontractor it might use for laundry operations until the actual locations were known." (*Id.* at 10.) While Appellant did reference Cintas in response to the discussion questions, Appellant "did not intend to use Cintas at all locations, [but] just wanted to show [DeCA] that [Appellant] could handle whatever business might be awarded." (*Id.*) Once Appellant learned that it was the apparent awardee for seven commissaries, Appellant could better define its subcontracting arrangements, and now expects for Cintas to handle transportation and laundry at one location in the state of Mississippi. Thus, Appellant reasons, there can be no violation of the ostensible subcontractor rule here because Cintas, the large business subcontractor, is "only partially involved in one of [Appellant's] seven locations." (*Id.* at 13 (emphasis in original).)

Appellant complains that the discussion questions failed to mention the ostensible subcontractor rule, and did not ask Appellant to clarify whether Appellant was proposing to use Cintas at all 22 commissaries. As a result, Appellant, "perhaps naively, provided the information about Cintas without realizing that there might be an issue of ostensible subcontracting." (*Id.* at 10.) Appellant insists that, "[a]t the time of the solicitation, [Appellant] planned to utilize direct employees in all North Carolina locations to self-perform a majority of the work." (*Id.* at 18.) The CO and the Area Office, however, incorrectly "assumed that Cintas was going to be used everywhere to the maximum extent possible which is contrary to [Appellant's] assertions that [Appellant] would perform at least 51% of the work, and more specifically 78% of the contract." (*Id.*) In addition, Appellant argues, the Area Office improperly focused its analysis on Appellant's responses to the discussion questions, rather than confining its inquiry to Appellant's proposal. (*Id.* at 14, 18.)

Appellant disputes the notion that Appellant would be reliant upon Cintas or other subcontractors to perform the contract. Appellant highlights that Appellant submitted its own past performance references for the RFQ, and, as the prime contractor, bears the financial risks of the project. (*Id.* at 11.) Further, Appellant asserts that it will self-perform all management, scheduling, client interface, contract administration, quality control, and accounting functions. (*Id.* at 16.) Although Appellant may subcontract the cleaning and delivery tasks, Appellant asserts that "[n]o special skill set is required to perform the driving for delivery and pickup, doing laundry or laundry folding requirements of the [RFQ], and there are a number of providers of such services in most locations." (*Id.* at 10.) Appellant could, if it so chose, purchase laundry facilities, hire appropriate personnel, and lease vehicles to self-perform this work. (*Id.*)

D. CO's Response

On June 4, 2014, the CO responded to the appeal. The CO supports the Area Office's findings and urges OHA to deny the appeal. According to the CO, there was nothing in Appellant's proposal or in Appellant's discussion responses to suggest that Appellant might utilize any subcontractor other than Cintas, or that Cintas might not be used at all locations awarded to Appellant. Rather, Appellant raised these arguments for the first time after its size was protested. (Response at 1-2.)

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 that 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

Appellant's principal argument in this case is that the Area Office improperly found affiliation with Cintas because Appellant will use Cintas as a subcontractor at only one of the seven commissaries awarded to Appellant. At the six remaining commissaries, Cintas will have no involvement at all, and Appellant instead will either self-perform the work or use Halifax as its main subcontractor. The problem with Appellant's argument is that, for purposes of the ostensible subcontractor rule, size is determined as of the date of final proposal revisions. 13 C.F.R. § 121.404(d). Thus, OHA has repeatedly held that changes of approach occurring after the date of final proposals have little, if any, bearing in determining compliance with the ostensible subcontractor rule. See, e.g., *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011) ("The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by [the offeror's] proposal (and anything submitted therewith, including teaming agreements). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant."); *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010) (rejecting contentions as to how much work would be performed by a subcontractor, because those contentions were inconsistent with the offeror's proposal).

Here, Appellant submitted its initial proposal on February 3, 2014, and, following two rounds of discussions, submitted its final proposal revisions on March 20, 2014. See Section II.B, *supra*. Therefore, Appellant's compliance with the ostensible subcontractor rule is

determined as of March 20, 2014.⁴ As of that date, Appellant's proposal did not identify any subcontractors besides Cintas, and Appellant's responses to the discussion questions indicated that Cintas would perform the pick-up, delivery, and cleaning functions. Specifically, Appellant represented that Cintas would “[s]upply well-maintained items to DeCA facilities as stipulated by [the] contract”, “[m]ake regular reports to [Appellant] on services provided” and “[p]rovide advance notice to [Appellant] on any issues with timely delivery, equipment breakdowns, delays, changes, or proposed substitutions so that [Appellant] may alert DeCA facilities as needed.” *Id.* Appellant would manage and administer the contract, such as by “[a]ddress[ing] and correct[ing] any performance issues with Cintas”, “[c]oordinat[ing] all communications with Cintas relevant to this contract”, and “[p]erform[ing] all payments to Cintas.” *Id.* In addition, there is no dispute that Appellant lacks the necessary facilities, vehicles, and personnel to self-perform the laundry and delivery tasks, and Appellant's proposal did not express any intent to acquire such resources. *Id.* Based on Appellant's final proposal, then, the Area Office correctly concluded that Appellant would be heavily dependent upon Cintas to perform the contract.

Appellant also argues that it did not contravene the ostensible subcontractor rule because Appellant has always claimed that it will self-perform the contract management and administration, which, Appellant asserts, are more complex and difficult than the delivery and cleaning functions that Appellant may delegate to subcontractors. OHA has long held, however, that “it is the goods or services which the procuring agency actually seeks to acquire, and not those goods or services which the contractor must perform or provide in order to deliver those goods or services, which determine what the primary and vital tasks of the contract are.” *Size Appeal of Anadarko Industries, LLC*, SBA No. SIZ-4708, at 10 (2005), *recons. denied*, SBA No. SIZ-4753 (2005) (PFR). Here, it is evident from the RFQ that DeCA seeks to acquire linen/mat rental and cleaning services, and Appellant itself appears to have estimated that these activities constitute a large majority of the contract dollar value. *See Sections II.A and II.C, supra.* Furthermore, the CO advised the Area Office that “[t]he primary and vital requirements of the procurement are to rent linens and mats, pick up soiled items, launder and return clean items on a weekly basis”, and OHA has recognized that the views of the procuring agency are given weight in determining which contract requirements are primary and vital. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 11 (2011). Contrary to Appellant's contentions, then, the Area Office did not err in concluding that contract management and administration are ancillary to this contract's primary purpose, and are not “primary and vital” requirements.

⁴ The size determination twice states that Appellant's size was being determined as of February 3, 2014, the date of Appellant's initial proposal and self-certification. (Size Determination at 1, 6.) As discussed in footnote [3] above, however, the ostensible subcontractor rule was not the only issue in the size determination, and the Area Office may have intended the February 3, 2014 date to apply to the other findings of affiliation, not to the ostensible subcontractor rule analysis. Moreover, the size determination makes clear that the Area Office considered Appellant's entire proposal, as revised through discussions, in assessing Appellant's compliance with the ostensible subcontractor rule. (*Id.* at 4-5.) At most, then, the reference to the February 3, 2014 date is harmless error, and would provide no reason to disturb the size determination.

IV. Conclusion

The ostensible subcontractor rule is violated when a prime contractor will have no meaningful role in performing the contract's primary and vital requirements. *E.g., Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). In this case, based on Appellant's final proposal as revised through discussions, the Area Office properly found that Cintas would perform the primary and vital requirements. Subsequent changes in approach do not alter this analysis because size is determined as of the date of final proposal revisions. For these reasons, 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).

KENNETH M. HYDE
Administrative Judge