

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

SIZE APPEAL OF:

Lynxnet, LLC,

Appellant,

RE: Strategic Operational Solutions, Inc.

Appealed From

Size Determination No. 2-2014-91

SBA No. SIZ-5609

Decided: November 7, 2014

APPEARANCES

Dorn C. McGrath III, William M. Jack, Amba M. Datta, Barnes & Thornburg LLP,
Washington, D.C., for Lynxnet, LLC.

Dismas N. Locaria, Melanie Jones Totman, Nathaniel S. Canfield, Venable LLP
Washington, D.C., James Y. Boland, Venable LLP, Tysons Corner, Virginia, for Strategic
Operational Solutions, Inc.

DECISION¹

I. Introduction and Jurisdiction

On August 18, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2014-91 concluding that Strategic Operational Solutions, Inc. (STOPSO) is an eligible small business for purposes of U.S. Department of Justice, Federal Bureau of Investigation (FBI), Solicitation No. DFJ-14-1200-R-0000040. Lynxnet, LLC (Appellant), which had originally protested STOPSO's size, contends that the size determination made several clear errors in finding that STOPSO was not unduly reliant on its ostensible subcontractor, 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.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205(f), OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

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.

II. Background

A. Solicitation

On January 16, 2014, the FBI issued Solicitation No. DFJ-14-1200-R-0000040 (solicitation). The solicitation stated that the FBI sought offers to supply operational support for the Terrorist Screening Center (TSC), a multi-agency center that manages the federal government's terrorist watchlist. Solicitation at § B.1(a). The solicitation sought approximately 116 full-time equivalents (FTEs) to support the TSC. Statement of Work (SOW) at § 1.

The Contracting Officer (CO) issued the solicitation as an 8(a) Business Development (BD) competitive requirement, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, and NAICS code 541990, All Other Professional, Scientific and Technical Services. Solicitation at § K.13; § L.10.1.1. Both NAICS code 541611 and NAICS code 541990, have corresponding \$14 million annual receipts size standards. 13 C.F.R. § 121.201; Solicitation at § K.13. The solicitation provides for a labor-hour contract, with the period of performance set as a base period of one year and up to four additional one-year periods. Solicitation at § B.1(b). STOPSO submitted its final proposal revision to the FBI on April 3, 2014. On April 24, 2014, the CO notified offerors STOPSO was the selected awardee.

B. SOW

The purpose of the solicitation is to obtain contractor support to operate the TSC located in Vienna, Virginia, which oversees the government's Terrorist Screening Database (TSDB). Solicitation at § B.1(a). The TSDB is the government's watchlist for known or suspected terrorists and contains information regarding individuals associated with terrorism or terrorist activity. The TSC is a 24/7 operation that requires shiftwork. SOW at § 1. The solicitation requires approximately 116 FTEs for operational support in direct support of TSC primary responsibilities established by Homeland Security Presidential Directives, Intelligence Community Guidance, and Federal Bureau of Investigation Guidance and Policies. *Id.* “The majority of these FTEs provide analysis, database management, center operation services, and program management, with a small requirement for operational training and facility support.” *Id.*

C. Protest

On April 30, 2014, Appellant filed a size protest with the CO. The protest asserted that STOPSO is ineligible to receive award under the 8(a) BD small business set-aside contract because it affiliated with Sotera Defense Solutions, Inc. (Sotera). Protest at 1. Appellant alleged STOPSO lacks the experience, past performance, and financial resources necessary to perform

the contract and therefore STOPSO is unduly reliant on the incumbent Sotera. *Id.* at 1-2. The CO forwarded Appellant's protest to the Area Office for consideration.

D. Size Determination

On August 18, 2014, the Area Office issued Size Determination No. 2-2014-91, finding that STOPSO is a small business concern for the instant procurement.

The Area Office determined that the primary and vital requirements of this contract are the provision of employees to perform operational support for the Terrorist Screening Operational Center (TSOC). Size Determination at 4. The Area Office noted that, based on STOPSO's proposal and its response to the protest, STOPSO will perform more than 50% of the contract labor with its own employees. *Id.* at 4-5. The Area Office stated STOPSO will not be unusually reliant on its subcontractor and existing STOPSO employees will manage the contract, including as the program manager and transition manager. *Id.* at 5. The Area Office indicated the transition manager has worked with STOPSO for seven years and the transition manager has worked with STOPSO for two years. *Id.* The Area Office noted STOPSO is the primary point of contact with the government and the lead party for proposal preparation and the STOPSO president and CEO plans to schedule monthly meetings with the government. *Id.* The Area Office stated STOPSO is not reliant on its subcontractor for financial assistance and STOPSO included relevant past performance. *Id.* The Area Office found STOPSO had performed similar work of comparable magnitude, would perform the majority of work, would manage the contract, and would perform the primary and vital requirements of the contract and, therefore, was in compliance with the ostensible subcontractor rule. Size Determination at 5 (citing *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 15 (2013)).

E. Appeal

On August 29, 2014, Appellant filed the instant appeal with OHA.² Appellant argues the Area Office erred in concluding that STOPSO was not unusually reliant on its ostensible subcontractor, Sotera. Rather, Appellant asserts STOPSO is unusually reliant upon Sotera because Sotera would perform the primary and vital requirements and STOPSO lacks the experience, past performance, and personnel to perform the contract.

Appellant argues the Area Office erred as a matter of fact and law by conflating the ostensible subcontractor rule with the limitations on subcontracting. Appeal at 6. Appellant

² Appellant had previously filed a post-award protest at the U.S. Government Accountability Office (GAO) based on multiple grounds, including allegations of flawed evaluation of technical, past performance, and security clearance requirements. Appellant also alleged a lack of meaningful discussions with Appellant and failure for the FBI to conduct proper realism analysis and best value determination. In a supplemental protest, Appellant further protested the acceptability of STOPSO's proposal based on the limitations on subcontracting clause. GAO denied Appellant's GAO protest, but did not address Appellant's supplemental protest. On August 13, 2014, Appellant filed an action at the Court of Federal Claims (COFC) on the limitations on subcontracting issue; Appellant's COFC action is still pending.

asserts the Area Office's size determination is clearly erroneous because it miscalculated STOPSO's labor cost. *Id.* Appellant argues in its GAO protest it alleged that STOPSO's proposal did not agree to comply with the limitations on subcontracting requirement because STOPSO's proposal stated its Industrial Hygienist would be a 1099 independent contractor. *Id.* Appellant asserts this means STOPSO would only actually perform 49.5% of the cost of performance, as opposed to the required 50%. *Id.* Appellant argues the Area Office's determination that STOPSO will perform the majority of the direct labor cost is unsupported and erroneous because the Area Office never examined the 1099 issue. *Id.*

Notwithstanding the errors associated with STOPSO's direct labor costs, Appellant asserts the Area Office is conflating two different legal standards and analysis: the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and the limitations on subcontracting and performance of work requirements, 13 C.F.R. § 124.510, applicable to the subject solicitation under FAR 52.219-14. Appeal at 7. Appellant explains the ostensible subcontractor analysis is an affiliation rule and focuses on whether the prime contractor is unusually reliant on the subcontractor to perform the primary and vital requirements of the contract. *Id.* Appellant distinguishes the ostensible subcontractor rule from the limitations on subcontracting clause which requires that an offeror agree that at least 50% of the cost of the contract performance incurred for personnel be expended for employees of the small business concern. *Id.* Appellant asserts its size protest “challenges STOPSO's size and is based on the ostensible subcontractor rule, not whether STOPSO agreed to comply with the limitations on subcontracting requirement.” *Id.* Appellant argues that under OHA case law, even if STOPSO is performing the majority of the labor or providing more FTEs, STOPSO's relationship with Sotera contravenes the ostensible subcontractor rule. *Id.* (citing *Size Appeal of Red River Computer Co., Inc.* SBA No. SIZ-5512, at 16 (2013), *Size Appeal of Dover Staffing, Inc.* SBA No. SIZ-5300 (2011), and *Size Appeal of RTL Networks, Inc.* SBA No. SIZ-4923 (2008)).

Appellant continues that the Area Office erred as a matter of law because it did not adequately identify the primary and vital requirements of the procurement. Appeal at 8. Appellant suggests the Area Office offered a summary conclusion that the primary and vital requirements are “the provision of employees to perform operational support for TSC.” *Id.* at 8 (quoting Size Determination at 4). Appellant asserts a review of the solicitation and SOW demonstrates the primary and vital requirements include 24/7 operational support services in all eight distinct work units and the Area Office's interpretation of the primary and vital requirements of the procurement would ignore the majority of personnel providing services in seven other units. *Id.* Appellant argues the Area Office's failure to address the requirements of the TSC units demonstrates the Area Office failed to consider all aspects of the relationship between STOPSO and its large business subcontractor. *Id.*

Additionally, Appellant contends the Area Office erred in not considering Sotera as the incumbent, STOPSO's lack of experience, and STOPSO's hiring of incumbent employees. Appellant argues the Area Office erred in relying on the solicitation's identification of Sava Workforce Solutions (Sava) as the incumbent where Appellant, STOPSO, and the FBI identified Sotera as the incumbent. *Id.* at 9-10. Appellant asserts STOPSO has never performed a contract of this type and will be unusually reliant on Sotera. *Id.* at 10. Finally, Appellant argues the Area

Office failed to discuss whether other key employees will be hired from Sotera or other subcontractors. *Id.* at 12.

F. STOPSO's Response

On September 17, 2014, STOPSO responded to the appeal. STOPSO maintains that the size determination is correct and should be affirmed.

STOPSO argues the Area Office articulated and applied the correct legal standard in considering a potential violation of the ostensible subcontractor rule under 13 C.F.R. § 121.103(h)(4). STOPSO states the Area Office explained it would “examine ‘all aspects of the relationship,’ including ‘the percentage of subcontracted work,’ to determine whether the prime contractor proposes to perform the ‘primary and vital requirements of the contract,’ and whether the prime contractor is ‘unusually reliant’ upon the subcontractor.” STOPSO Response at 2 (quoting 13 C.F.R. § 121.103(h)(4)). STOPSO argues Appellant's challenges to the Area Office's finding of the primary and vital requirements are flawed because the Area Office did find the primary and vital requirements encompassed all operational support personnel, not just the TSOC unit, and the Area Office adequately documented its rationale. *Id.* at 3. STOPSO states the Area Office clearly explained that the solicitation was for 116 FTEs to support the TSC and the Area Office did not distinguish between units of support. *Id.* at 4 (citing the Size Determination). STOPSO argues the rationale for the Area Office's decision is self-evident and Appellant “has not provided any reason for OHA to second-guess the Area Office's determination.” *Id.* STOPSO asserts having found the primary and vital requirements of the contract were the provision of employees to perform operational support for the entire TSC, the Area Office then correctly determined STOPSO will perform 50% of the work and is not unduly reliant on Sotera. *Id.* at 4-5. STOPSO argues the Area Office's determination was based on the STOPSO proposal and response and not on an application of the limitation on subcontracting clause. *Id.* at 5. STOPSO maintains the Area Office based its decision on STOPSO managing the contract with its own employees. *Id.* at 6.

STOPSO asserts, despite Appellant's arguments to the contrary, it is in compliance with the limitation on subcontracting clause. *Id.* STOPSO argues Appellant makes much from a single sentence appearing in STOPSO's price proposal suggesting STOPSO might classify the industrial hygienist as a 1099 if doing so would provide a reasonable rate for the government. *Id.* at 7. STOPSO states compliance with the limitation on subcontracting clause would be a prerequisite to any subsequent decision to reclassify the industrial hygienist as a 1099. *Id.* at 7-8.

STOPSO argues the Area Office did not err in finding that STOPSO is not unduly reliant on Sotera. *Id.* at 8. STOPSO asserts “past experience was a pass/fail criterion, in which a proposal stating no relevant past experience would receive a rating of neutral/pass.” *Id.* (citing solicitation at § M.5.1.). STOPSO states since an offeror with no relevant experience would not be eliminated from an award there is no basis to argue STOPSO is unduly reliant on Sotera's past experience. *Id.* at 8-9. Moreover, STOPSO states the FBI specifically solicited the biometric capability that the Area Office identified as relevant STOPSO experience. *Id.* at 9-10. STOPSO argues Appellant's interpretation of relevant past experience as “watchlist experience” would be absurdly anticompetitive. *Id.* at 9-10.

Finally, STOPSO asserts it does not impact the outcome if Sotera is considered the incumbent contractor. *Id.* at 11. STOPSO states the Area Office found STOPSO will manage the contract and perform the majority of the work. *Id.* STOPSO asserts incumbency alone is insufficient to establish unusual reliance. *Id.* (citing *Size Appeal of Maywood Closure Co., LLC & TPMC EnergySolutions Envtl. Servs. 2009, LLC*, SBA No. SIZ-5499 (2013)).

G. Supplemental Appeal

On September 17, 2014, Appellant requested leave to supplement its appeal based on information in the record before OHA which was not previously available to Appellant.

Appellant included its supplemental appeal with its request. Appellant's supplemental appeal reasserts Appellant's concerns regarding: the Area Office's lack of consideration of the 1099 issue; the Area Office's failure to adequately identify the primary and vital requirements of the procurement; and the Area Office's failure to acknowledge Sotera as the incumbent. Supplemental Appeal at 2-5.

Appellant also cites the record provides several indicia of undue reliance between STOPSO and Sotera that the Area Office failed to consider. *Id.* at 5. Appellant states STOPSO presented no evidence that its past performance was relevant to the procurement whereas STOPSO's submission for Sotera was directly relevant. *Id.* Appellant asserts the record also demonstrates STOPSO is heavily reliant on large business subcontractors, Sotera and BAE, for managerial support. *Id.* at 6. Appellant states STOPSO intends to hire large numbers of incumbent employees to perform its 50.13% of the work. *Id.* at 7. Appellant states STOPSO's proposal indicates of the 63 incumbent employees, 48 are Sotera employees, 3 are BAE employees, 11 are Sava employees, and 1 is a ManTech employee. *Id.*

H. STOPSO Response to Supplemental Appeal

On September 26, 2014, STOPSO responded to the supplemental appeal. STOPSO maintains that the size determination is correct and should be affirmed.

STOPSO asserts STOPSO has not proposed to hire its key personal from Sotera. Response to Supplemental Appeal at 3. STOPSO states the Area Office reasonably concluded that STOPSO would manage the contract. *Id.* STOPSO argues its proposal placing STOPSO, Sotera, and BAE personnel in leadership positions is not evidence that STOPSO will not manage the contract and therefore the Area Office did not err. *Id.* at 4. Additionally, STOPSO argues the hiring of incumbent personnel is not evidence of error and cites OHA case law encouraging the hiring of incumbent personnel. *Id.* at 5 (quoting *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 at 15 (2013)).

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 “asks, 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 Company*, SBA No. SIZ-5151, at 7 (2010). 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, the Area Office recognized that the “primary and vital requirements of the contract are the provision of employees to perform operational support for the TSC” and, based on STOPSO's proposal, the Area Office determined STOPSO: has relevant experience; will perform more than 50% of the contract labor with its own employees; will manage the contract with long-term STOPSO employees; and will not be reliant on its subcontractor for financial assistance. Size Determination at 4-5. The record contains no indication that STOPSO is dependent upon its subcontractor either to win or to perform the contract. To the contrary, the Area Office noted STOPSO's past performance was presented first and is particularly relevant to this contract because it includes performance of “biometric, technology, and other technical management services to a government customer.” *Id.* at 5. The Area Office also noted the program and transitional manager are STOPSO employees and that STOPSO's president and CEO will hold regular meetings with the government. *Id.* Based on a thorough review of the record, and acknowledging STOPSO would hire “roughly half of the incumbent workforce and provid[e] the other half from other sources,” the Area Office did not find STOPSO unduly reliant on Sotera. *Id.* Appellant's assertions that the Area Office failed to consider all aspects of the relationship between STOPSO and Sotera are without merit.

The Area Office explained the primary and vital purpose of the solicitation is for 116 FTEs to support the TSC, and found that STOPSO is performing the majority of the work.

Appellant attempts to argue that there are multiple primary and vital purposes of this contract, and that the Area Office should have examined the positions in more detail. However, OHA has held that there can be only one primary and vital purpose of a contract. *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312 (2012). A review of the record establishes that the Area Office correctly found the primary purpose of the contract, to provide personnel for the TSC, and the Area Office did not err in its finding.

Appellant's argument the Area Office confused the limitations on subcontracting clause with the ostensible subcontractor rule is meritless. While it is true the two are not the same, the Area Office did not confuse the two rules. The size determination clearly discusses the requirements of the contract and the proposal, and the Area Office conducted an ostensible subcontractor analysis. The Area Office did not limit itself to discussion of the proportion of the work each firm would perform, but also considered that STOPSO would manage the contract, be the government's primary point of contact, had relevant experience, and provided past performance.

Appellant's argument the Area Office erred in never examining STOPSO's proposal to staff an industrial hygienist under the contract as a 1099 independent contractor is unpersuasive. STOPSO's proposal indicates the industrial hygienist position is a part-time position and will be attempted to be sourced as a 1099, if STOPSO can provide a highly qualified position at a reasonable rate. Proposal at § 3.6.13. The possibility of the industrial hygienist being hired as a 1099 independent contractor is not indicative of a violation of the limitation on subcontracting or of error in the Area Office's decision.

As to whether Sotera is the incumbent, the Area Office recognized the confusion regarding Sotera's incumbency in the size determination and explained the Area Office's rationale:

We note that both the [Appellant] and STOPSO appear to accept that Sotera is the incumbent contractor. The FBI's solicitation, however, states that a separate concern, Sava Workforce Solutions, is the incumbent. It is undoubtedly true that Sotera performed significant work on the predecessor contract. But the provision in the ostensible subcontractor rule regarding an incumbent contractor does not hold the same weight when the subcontractor is not identified by the agency as the incumbent.

Size Determination at 5 (citing *Size Appeal of HX5, LLC*, SBA No. SIZ-5331 (2012) (the incumbent is the firm identified in the solicitation as the incumbent). The Area Office's reliance on the FBI's solicitation does not constitute clear error.

Moreover, even considering Sotera as the incumbent does not substantiate reversal of the Area Office decision. Although a subcontractor's incumbency is a factor to be considered in an ostensible subcontractor analysis, 13 C.F.R. § 121.103(h)(4), incumbency does not, by itself, establish undue reliance *per se*. *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 at (2013) (“Thus, the mere fact that STGi is the incumbent contractor cannot establish unusual reliance.”) OHA has repeatedly held that engaging the incumbent as a subcontractor leads to heightened

scrutiny of the arrangement, but is not a *per se* violation. *Size Appeal of HX5, LLC*, SBA No. SIZ-5331, at 11 (2012).

Similarly, given that Executive Order 13,495 encourages the hiring of incumbent non-managerial personnel, OHA has found that it is not problematic for STOPSO to hire from subcontractor workforce, like Sotera, BAE, Sava, and ManTech, provided that personnel are reviewed individually rather than unilaterally transferred or hired *en masse*. *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12 (2011) (“In light of widespread industry practice and the Executive Order, OHA has opined that the hiring of incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance.”); *Size Appeal of Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277, at 7 (“The hiring of incumbent personnel is expected, required by Executive Order 13,495, and does not constitute undue reliance.”); *Size Appeal of Spiral Solutions and Techs., Inc.*, SBA No. SIZ-5279, at 28 (2011); *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260, at 7 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR) (“I recognize that, as a result of this [Executive] Order, the hiring of incumbent employees can no longer be considered a meaningful indicia of unusual reliance.”). Such a practice does not establish unusual reliance, particularly when the managerial personnel remain under the supervision and control of the prime contractor. *Size Appeal of J.W. Mills Management, LLC*, SBA No. SIZ-5416, at 8 (2012).

I agree with the Area Office and STOPSO that none of the issues raised by Appellant is compelling to show that STOPSO is unduly reliant upon Sotera. In sum, the Area Office reasonably concluded that STOPSO will be performing the majority of the contract's primary and vital requirements. Although Sotera will be involved in contract performance, the appeal does not establish STOPSO's undue reliance on Sotera, 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 STOPSO, the prime contractor. STOPSO is performing most of the work, is managing the contract, is the government's primary point of contact, has relevant experience, and provided past performance. This establishes compliance with the ostensible subcontractor rule. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290 (2011). Appellant's arguments all constitute mere disagreement with the findings of the Area Office, and these do not establish clear error.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge