

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

SIZE APPEAL OF:

Brown & Pipkins LLC,

Appellant,

Appealed From
Size Determination No. 3-2014-060

SBA No. SIZ-5621

Decided: December 8, 2014

APPEARANCES

Stephen J. Kelleher, Esq., S. Gregory Joy, Esq., Smith, Currie & Hancock LLP,
Washington, D.C., for Appellant

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration,
Washington, D.C.

DECISION¹

I. Introduction

This is an appeal from a size determination issued by the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) finding that Brown & Pipkins LLC (Appellant) is large for Department of Health and Human Service, National Institute of Health (NIH), Solicitation No. NIHOF2012487. The Contracting Officer (CO) set the procurement aside for participants in the 8(a) Business Development (BD) program, and designated North American Industry Classification System code 561720, Janitorial Services, with a corresponding \$16.5 million annual receipts size standard, as the appropriate code for the procurement. The Area Office determined Appellant is large for this procurement due to affiliation with Able Services (Able) based on the ostensible subcontractor rule.

For reasons discussed below the appeal is denied.

¹ Pursuant to 13 C.F.R. § 134.205, 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.

II. Background

A. Solicitation

On April 17, 2012, NIH issued Solicitation No. NIHOF20124087, for janitorial services at the National Institute of Environmental Health Science (NIEHS) facilities at the Research Triangle in North Carolina. The procurement called for a contractor to furnish all necessary labor, supervision, transportation, equipment and supplies to provide janitorial services for the NIEHS. Performance Work Statement (PWS) at 1. The successful contractor is to maintain all NIEHS facilities free from filth and pathogens and enhance the cleanliness and appearance of the site. *Id.* The services are to be performed on the designated spaces including halls, restrooms, offices, laboratories, work areas, entryways, lobbies, storage areas, and virtually every other space at the NIEHS campus. *Id.*

Initial offers were due on June 5, 2012, and final proposals were submitted November 1, 2013. On June 23, 2014, unsuccessful offerors were notified that Brown & Pipkins, LLC (Appellant) was the awardee. On June 24, 2014, Diversified Service Contracting, Inc., filed a size protest with the CO. The CO referred the protest to SBA's Area Office.

B. The Size Determination

On July 23, 2014, the Area Office issued its size determination finding Appellant to be large for this procurement. The Area Office found Appellant was affiliated with Alkin International, Worldwide Business Group, Inc., Acsential, Inc., Acsential Technologies, Inc. (Acsential) and Courtney S. Collins d/b/a Autogistics under the common ownership and identity of interest rules. The Area Office further found that Appellant, together with these affiliates, is within the applicable size standard. Appellant does not dispute these findings.

The Area Office then turned to the issue of whether Appellant is affiliated with Able, a large business and Appellant's principal subcontractor on this procurement, under the ostensible subcontractor rule. On June 6, 2012, Appellant submitted its initial proposal including price. Appellant submitted its final proposal on November 1, 2013.

The Area Office found that Able supplied 70% of the past performance information in the proposal because Appellant had no relevant past performance in specialized janitorial services for medical and laboratory settings. Able will be responsible for recruitment, training, and employee documentation. Able will be responsible for the transitional requirements. Able will offer discounts for use of existing on site equipment or purchase the equipment necessary to perform the contract. Able will supply the quality control software. While Appellant's personnel will fill the key positions, Able will provide an advisor and mentor for each position. The Area Office further found that Able will provide all the custodial staff which represents approximately 37% of the contract's labor cost.

The Area Office concluded Able will perform the primary and vital portions of the contract, recruiting and training personnel, purchasing equipment, supplying quality control software, advisors and mentors to key personnel, 50% of the employees and all the custodial

staff. Further, the Area Office concluded Appellant was unusually reliant upon Able, because Able provides all of the relevant past performance, advised and assisted in preparation of the proposal, will recruit and train personnel and provide the technical expertise with advisors to Appellant's staff.

C. The Appeal

On August 7, 2014, Appellant filed the instant appeal. Appellant argues that under OHA precedent, there can be only one principal purpose of an acquisition, citing *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312 (2012). Appellant argues the Area Office failed to identify the primary and vital requirements of the solicitation, and instead focused on multiple non-vital tasks. Appellant asserts the primary and vital task here is to provide janitorial services, and that recruitment, equipment purchasing, and quality control software are all merely ancillary to that purpose.

Appellant maintains it will perform the primary and vital requirement of this procurement. Appellant asserts it will provide the vast majority of and control the personnel for janitorial services, which is the primary and vital requirement of the contract. Appellant disputes as clearly wrong the Area Office finding that Able would be performing the primary and vital function. Appellant noted the Area Office found Able would be responsible for recruitment, training, employee documentation, transition team oversight, and providing discounts for the equipment and software. In addition, the Area Office found Able will provide 50% of the employees and all of the custodial staff which represents approximately 37% of labor costs of the contract. Appellant argues these findings are factually incorrect and wrong as a matter of law.

Appellant argues that, as a matter of law, there can be only one principal purpose for a contract, and the Area Office failed to identify the true primary and vital requirements. Appellant maintains the primary vital purpose here is janitorial services, not ancillary activities such as recruitment and acquiring equipment and software.

Appellant further argues that it would provide the majority of the personnel for janitorial services, management, and administrative support. Appellant points to an administrative cost breakdown it submitted to the Area Office, which shows Able providing only the custodians, for this contract, accounting for only 29% of the labor cost, and 31% of the Full Time Equivalents (FTEs). Appellant provides the management, day porters, and floor technicians. Appellant's employees would represent 69% of the FTEs and 71% of the contract's labor costs. The day porters and floor technicians would also provide janitorial services. Able employees represent only 31% of the FTEs and 29% of the total labor cost, not the 37% stated by SBA.

Appellant argues it will be managing the contract. The contract administrator will be Appellant's employee. An employee of Appellant will handle human resources and payroll with assistance from an Able employee. The Operations Director, Operations Manager, Quality Control Manager, and Assistant Project Manager will be Appellant's employees. Appellant argues that the Area Office's suggestion that Able's provision of advisors to Appellant's managers means Able controls the management is without foundation.

Appellant further argues it is not unusually reliant upon Able. Appellant argues that the standard for unusual reliance is that the proposal must present the challenged firm and ostensible subcontractor as a team, or the ostensible subcontractor must be the incumbent and provide substantial input in preparing the proposal based on in-depth knowledge of the requirement, citing *ePerience, Inc.*, SBA No. SIZ-4668 (2004). Able is not the incumbent here, and did not provide substantial input into the proposal. Appellant has experience in providing custodial services. While Appellant planned to have Able provide ongoing training and mentoring during performance, this does not establish unusual reliance.

Appellant noted that OHA has articulated other standards for unusual reliance, emphasizing the challenged firm's reliance upon the ostensible subcontractor's area of expertise, and the proportion of work allocated to the ostensible subcontractor. *Size Appeal of Infotech Enterprises, Inc.*, SBA No. SIZ-4346 (1999). Appellant asserts these factors are not present here. Appellant asserts the Area Office was in error when it found Able provided all of the relevant past performance documentation. Appellant submitted past performance information on its own custodial contracts with its proposal. The Area Office also erred in relying upon Appellant's use of the word "team" in its proposal as indicative of unusual reliance.

D. SBA Comments

On September 23, 2014, I requested SBA file comments on whether Appellant was an eligible 8(a) BD business.

On October 3, 2014, SBA filed comments and asserted Appellant is an eligible 8(a) BD participant for this procurement. On June 18, 2014, the Deputy District Director in SBA's Georgia District Office notified the CO that Appellant was eligible to receive NIH's 8(a) BD award. SBA asserts that the eligibility of an 8(a) BD participant may not be challenged as part of a protest. 13 C.F.R. § 124.517(a).

SBA asserts SBA's size determination accurately described the facts in the record and the determination should be upheld. SBA points out the NIH solicitation included a clause, "Nondisplacement of Qualified Workers" which required the contractor and subcontractor to offer non-managerial employees on the predecessor contract a right of first refusal for employment on this contract. SBA asserts Appellant's proposal will perform human resources services, including compliance with the nondisplacement clause. Able will transition the contract, and offer employment to all recommended employees pursuant to its screening policies. SBA argues the proposal identifies Able as exclusively responsible for examining staffing requirements. The proposal provides the transition will end with an orientation to Able that will allow staff to become comfortable and trust the Able program.

SBA also determined that Able is responsible for recruiting, processing, and screening employees and developing HR policies. Able is also responsible for retaining employees. Able will comply with the collective bargaining agreement and interface with the union. Able will train the employees in their job, including safety procedures. Able will provide the safety protocol for the project.

SBA argues Able will be responsible for the equipment because the proposal states Able will purchase the majority of the equipment, and will offer discounts by utilizing current equipment as desired. SBA asserts Able is responsible for maintaining the equipment, based on the sentence “Able has a maintenance program to support these systems that will keep them clean and effective over time.” SBA Comments at 4-5 (quoting Appellant's proposal). The proposal advertises Able's Janus online management system for tracking performance, entering orders, and quality control.

SBA further asserts Able provides the Cleaning Industry Management Standard (CIMS) certification, a certification Appellant lacks. The proposal emphasizes Able's qualifications and experience, including sustainability, recycling, and energy and water saving strategies.

SBA points to the Area Office finding that Able provided 8 of the 10 past performance items in Appellant's proposal. Six of these were through corporate experience and two through the experience of Able's vice president.

SBA concludes that Able will provide both the personnel and the equipment to perform the contract. Able will be exclusively responsible for human resources functions and the most important operational functions. Able will control quality control tracking, safety compliance, and sustainability measures. Able holds the requested CIMS certification and provided the vast majority of past performance submitted with the proposal.

SBA asserts the proposal does not assign Appellant any significant operational tasks. SBA characterizes as a “red herring” Appellant's argument that it will provide the vast majority of personnel, because under the nondisplacement clause, all or most of the personnel already work on the contract. SBA points to emails in the record that refer to three personnel coming from Appellant, its two owners and a manager who was not hired until after proposal submission.

SBA also asserts the proposal language referring to Able as a “mentor” is an indicia that Able is not a subcontractor. No law or regulation classifies a mentor as a subcontractor. These firms submitted a proposal as mentor/protégé even though SBA rejected their mentor/protégé application. SBA argues granting this appeal would be a green light for firms to go ahead with mentor/protégé teams without SBA approval.

E. Appellant's Reply

On October 10, 2014, Appellant replied to the Agency Response. Appellant asserts it will perform the primary and vital requirements on the contract. Appellant asserts the Area Office's findings that Able would perform the primary and vital requirements are based on Able's responsibility for recruitment, training, and employee documentation, as well as overseeing the transition and performing all custodial staff. Appellant argues these findings are wrong as a matter of law and fact.

First, Appellant argues SBA misidentified the primary and vital requirement of the contract. There can be only one principal purpose as a matter of law, and the Area Office failed

to define one here. Appellant asserts the primary and vital purpose here is to provide janitorial services, not ancillary activities such as recruitment and equipment purchasing

Second, Appellant asserts it will provide the vast majority of and control the personnel for janitorial services, the primary and vital requirements of the contract. Appellant asserts the Area Office finding that Able would provide 50% of all employees and all the custodial staff which represent 37% of the labor cost is clearly wrong. Appellant will provide the vast majority of personnel for janitorial services and management and administrative support. Appellant submitted a cost breakdown on request from SBA which showed Able with 29% of labor cost for custodians and Appellant with all the remaining labor cost. Appellant argues the day porters and floor technicians employed by Appellant would provide janitorial services. Appellant argues OHA has held that an offeror performing the primary and vital functions of a contract and a majority of labor costs is performing the primary and vital functions of the contract, citing *Size Appeal of the Patrick Wolf Group, Inc.*, SBA No. SIZ-5235 (2011).

Appellant argues it established it will provide contract management in a July 8, 2014 email to the Area Office. Further, the proposal sets out the duties of the operations director and project manager, both Appellant's employees. Appellant points out the Area Office acknowledged the project manager and assistant project manager will be Appellant's employees. Appellant argues there is no evidence its managers would not be managers, or that Able's consultants would do more than advise. Appellant further asserts it will provide and implement the quality control plan.

Appellant also argues it does not meet the test of unusual reliance. Able is not the incumbent contractor, and Able's proposal input was not substantial. Appellant asserts it is not reliant upon Able's knowledge, and it has experience with custodial services. Appellant argues the Area Office erred in finding it relied upon Able for past performance, when Appellant provided information on its experience with custodial contracts. Appellant further asserts its use of the term "team" is not an indicator of unusual reliance.

III. Discussion

A. Timeliness and Standard of Review

Appellant filed this appeal within 15 days of its receipt of the size determination. Therefore, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the 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

Because Appellant, with its acknowledged affiliates, is small, the only issue in this appeal is whether Appellant's proposal violates the ostensible subcontractor rule, thus creating affiliation between Appellant and Able. Under the ostensible subcontractor rule, 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).

To determine whether firms have violated the ostensible subcontractor rule, all aspects of the relationship between the firms must be considered. *Id.* Appellant's size is determined as of June 6, 2012; the date Appellant submitted its initial proposal which includes price. 13 C.F.R. § 121.404(a). In addition, when determining whether affiliation exists under the ostensible subcontractor rule, SBA determines the size status of a concern as of the date of the final proposal revision submitted by the concern for the procurement. 13 C.F.R. § 121.404(d). Appellant submitted its final proposal including price on November 1, 2013. Any events occurring after that date are irrelevant. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010).

An ostensible subcontractor analysis is extremely fact-specific and is undertaken on the basis of the solicitation and the proposal at issue. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010). The Area Office must base its ostensible subcontractor determination solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal and anything submitted therewith. Any assertions not in accord with the proposal are, therefore, immaterial.

The Area Office reviewed the solicitation and Appellant's proposal and found Appellant's relationship with Able violates the ostensible subcontractor rule. The Area Office determined Able will perform the primary and vital contract requirements: recruiting and training personnel, purchasing equipment, supplying quality control software, providing advisors and mentors to key personnel, and supplying 50% of the employees and all of the custodial staff. Size Determination at 7. The Area Office concluded that Appellant, according to the proposal, will provide no employees to the primary and vital portions of the contract. Additionally, the Area Office determined Appellant would be unusually reliant upon Able to perform the contract because Able "has provided all of the relevant past performance, advised and assisted in the preparation of the solicitation, will recruit and train personnel and provide the technical expertise with advisors and mentors to [Appellant's] staff." Size Determination at 8.

Appellant contends the Area Office failed to properly identify the primary and vital contract task, janitorial services, and instead focused on ancillary tasks, such as recruitment and acquiring equipment and software. Appellant relies on *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312 (2012), to support its argument that, by law, there can be only one primary purpose. In *Santa Fe Protective Services*, OHA did not accept an argument for two primary and vital requirements, fire services and security services; the decision explains: "OHA has generally found, however, that there is only one principal purpose of an acquisition, although there could be multiple requirements associated with that principal purpose." *Santa Fe Protective*

Services, Inc., SBA No. SIZ-5312 at 10. *Santa Fe Protective Services* does not stand for the proposition that there is always only one primary purpose.

There is no doubt NIH is contracting for janitorial services, but Appellant's perspective that the primary and vital requirement is limited to the daily specifications of disposing of trash, dusting, and vacuuming is too narrow. PWS at § 5. NIH is seeking a contractor to manage their janitorial services, to secure reliable employees to comply with specific requirements for cleaning, to supply the materials and equipment necessary to successfully clean to an established standard, to follow distinct procedures for restricted rooms, and to provide quality assurance and surveillance. PWS at §§ 3-10. The record, including Appellant's proposal, demonstrates Able's ability to fulfill NIH's need and Appellant's reliance on Able for this procurement.

The PWS from the solicitation provides: "The Contractor shall furnish all necessary labor, supervision, transportation, equipment, and supplies to provide janitorial services for [NIEHS]. Contractor shall maintain all NIEHS facilities in a manner which is free from filth and pathogens and enhances the appearance and cleanliness of the site as a whole." PWS at 1.

The solicitation identified three evaluation factors: technical approach, past performance, and price. Technical approach includes five subfactors: (1) comprehension of contract requirements, (2) key personnel, (3) method of operation, (4) Cleaning Industry Management Standard (CIMS) certification, and (5) related experience.

Throughout Appellant's proposal it is Able's expertise that is highlighted. Able will perform human resources services, recruit, process, screen, train, and be responsible to retain employees. Able will provide safety protocols. Able will be responsible for equipment. Appellant's proposal touts the benefits of Able's Janus online management system which will allow tracking of performance electronically, the ability to enter additional tasks, and timely monitoring of quality control. Able also provides the CIMS certification. In addition to Able's strong influence on Appellant's technical approach, as noted in the size determination, Appellant's proposal relies heavily on Able's past performance. A challenged firm's reliance upon the subcontractor for past performance and for an important certification support a finding of unusual reliance. *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011); *Size Appeal of Sure-Way Systems, Inc.*, SBA No. SIZ-4972 (2008).

I find no error in the Area Office's conclusion that Appellant will not perform the primary and vital contract requirements. Able will provide the equipment and material, human resources, CIMS certification, quality control, and the custodial staff which will perform the primary and vital functions of janitorial services here. The purpose of the contract is the provision of these services, and Able will take the lead role in performing them.

It seems clear that Appellant and Able originally intended to compete for this contract as mentor and protégé, and thus take advantage of the exclusion from affiliation afforded by 13 C.F.R. § 121.103(h)(3)(iii). The proposal is replete with references to Able as a "mentor." Most tellingly, Appellant's key employees charged with executing the contract each have an Able "mentor" assigned to them. However, there is no approved mentor/protégé relationship here and Appellant and Able are presenting themselves as contractor and subcontractor. A contractor

should not require “mentors” for its key employees to perform their tasks. The fact that these mentors are assigned indicates that Able is deeply involved in the management of this contract, and indeed that Appellant requires Able's assistance to manage the contract. This supports the Area Office's finding of unusual reliance.

Based upon all these factors, Appellant has failed to meet its burden of proving an error of fact or law. As determined by the Area Office and demonstrated by Appellant's proposal, Appellant will not provide those services, which constitute the primary contract requirements. Moreover, Appellant's relationship with Able is clearly more extensive than simply a subcontractor. Appellant will use Able's procedures, people, quality control program, and equipment to conduct contract responsibilities. Able will be performing the primary and vital contract requirements.

Accordingly, Able is Appellant's ostensible subcontractor, and Appellant is other than small for this procurement.

IV. Conclusion

Appellant did not meet its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is DENIED, and the size determination is AFFIRMED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge