

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

BCS, Inc.,

Appellant,

RE: Accelerated Development and Support
Corp.

Appealed From
Size Determination No. No. 2-2015-001

SBA No. SIZ-5654

Decided: April 22, 2015

APPEARANCES

Devon E. Hewitt, Esq., Protorae Law, PLLC, Tysons Corner, VA, for Appellant

J. Scott Hommer, III, Esq., Nathaniel S. Canfield, Esq., Melanie Jones Totman, Esq.,
Venable LLP, Tysons Corner, VA, for Accelerated Development and Support Corp.

DECISION¹

I. Introduction and Jurisdiction

On January 22, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2015-001, finding that Accelerated Development and Support Corp. (ADSC) is an eligible small business for the procurement at issue.

BCS, Inc. (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

¹ Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions to the published decision. OHA received one or more timely requests and I considered them in redacting the Decision. I now issue the redacted version of the Decision for public release.

ADSC to be an ineligible small business for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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 and Protest

On December 13, 2013, the Department of Energy (DoE), issued Solicitation No. DE-SOL-0005044 (RFQ), seeking a contractor to provide technical and management support services in support of the Office of Fossil Energy (OFE). The Contracting Officer (CO) issued the procurement as a Small Business Set-Aside, Indefinite Delivery/Indefinite Quantity (IDIQ) contract, and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding \$14 million annual receipts size standard.

The Performance Work Statement (PWS) states the contractor will be responsible for implementing “professional engineering, technical and programmatic approaches to provide timely, responsive services” in support of the OFE and its staff. PWS § 1.2, at 2. The types of engineering services the contractor will provide include planning, analysis, budget, and technology communications. The contractor will need to provide staff that meets the DoE's needs and who are trained in engineering, technical and management disciplines. The RFP requires the contractor to support the research, development and demonstration of the OFE, which would require delivering services in the following task areas: (i) Special Studies and Reports (estimated annual level of effort by hour: 2820); (ii) Planning and Budget (2249); (iii) Planning, Analysis, and Evaluation Support (5098); (iv) System Engineering and Integration Support (1396); (v) Conference Management Support (3150); (vi) Program Execution Support Office Assistance (4106); (vii) Information and Business Management Support (9734); (viii) OFE Environment, Safety, and Health Activities Support (6497). *Id.* § 2.1, at 3.

Special Studies and Reports requires the contractor to perform studies and analyses; Under Planning and Budgeting the contractor will provide research, development, and deployment of energy and environmental planning support; Planning, Analysis and Evaluation will require the contractor to assist in analysis support in the evaluation of existing and potential energy technology research. This includes reviewing program activities, generating and collecting information, preparing technical reviews, analyzing technical and economic data, recommending technology programs, estimating risk potential for technology development, conducting comparative engineering and economic assessments, evaluating new or proposed technologies, compiling information on technology deployment, monitoring market developments, gathering data for policy and regulatory analysis, consulting on environmental laws and regulations, conducting analysis of environmental impacts, reviewing alternatively prepared analysis, and analyzing the performance of OFE's management.

The System Engineering and Integration Support task requires the contractor to provide support for wide-ranging system engineering and integration. Required work may include designing, developing, and assisting in the implementation of systems engineering processes and systems deemed appropriate, as well as any relevant cross-cutting functions, which include planning, analyzing and managing of programs. Conference Management Support states that the contractor will need to assist in the planning of conferences, which includes logistical and conference management services. Under Program Execution Support Office Assistance, the contractor will be delivering administrative functions in order to meet the management and technical/analytical support requirements; supporting OFE's daily operations will also fall under this task.

Lastly, Information and Business Management Support entails the contractor will be providing a wide-range of support services. These include the design, development, implementation, maintenance and documentation of new business systems. This will require the contractor to perform research and development management, recommend resource requirements, develop systems alternatives and solutions, and implement system's alternatives and solutions. In addition, the contractor will be responsible for business process engineering, supporting information resources management and technical services, and public affairs and communication support. *Id.* §§ 3.1-3.7, at 3-8.

The two key personnel for the instant contract are the Program Manager and Senior Engineer. RFP § I.108., at 65. Both positions require a Bachelor's degree in engineering. The following labor categories constitute the contract's non-key personnel responsible for contract performance: (i) Chemical Engineer (estimated annual level of effort by hour: 336); (ii) Oracle Program Manager (1152); (iii) Petroleum Engineer (480); (iv) Subject Matter Specialist/Classifier (160); (v) General Engineer (540); (vi) Technical Analyst (240); (vii) Environmental Analyst (1900); (viii) Economist (336); (ix) Senior Management Analyst (4320); (x) Management Analyst (6579); (xi) Data Analyst (6085); (xii) Graphic Artist (1208); and (xiii) Admin/Clerical/Support Specialist (9520). *Id.* § B.2., at 6.

The RFP stated that proposals would contain three volumes: Volume (I) Offer and Other Documents; Volume (II) Technical Proposal; and Volume (III) Cost Proposal. Volume (II) Technical Proposal would be evaluated under four criteria, in descending order of importance: (i) Technical Approach; (ii) Staffing Approach; (iii) Relevant Corporate Experience; and (iv) Past Performance. For the relevant corporate experience, offerors needed to provide “a discussion of relevant work experience in similar size, scope and complexity to that described in the PWS, performed in the last three (3) years as a prime or subcontractor.” *Id.* § L.31 at 89. The RFP maintains that DoE will choose proposal that provides the best overall value, while stating that the technical evaluation criteria is more important than cost.

On September 16, 2014, the CO notified all unsuccessful offerors that ADSC had been selected for award. On September 22, 2014, Appellant, an unsuccessful offeror, filed a protest with the CO, claiming that ADSC was unduly reliant on its subcontractors, Subcontractor #1 and Subcontractor #2. Appellant alleged ADSC was in violation of the ostensible subcontractor rule.

B. ADSC's Proposal

On February 5, 2014, ADSC submitted its proposal in response to the RFP. The proposal states ADSC will serve as the prime contractor while five other firms will serve as subcontractors. Proposal, Volume II, at 9. The proposal maintains that ADSC will perform work on all eight task areas, while Subcontractor #1 will perform on Special Studies and Reports; Planning and Budget; Planning, Analysis, and Evaluation Support; System Engineering and Integration Support; Conference Management Support; Program Execution Support Office Assistance; Information and Business Management Support; and OFE Environment, Safety, and Health Activities Support. Subcontractor #2 will perform on the same task areas as Subcontractor #1, but will additionally be involved in the performance of Conference Management Support, and Information and Business Management Support. *Id.* at 12-30. For the two key personnel positions, the proposal establishes that ADSC will fill the PM position and Subcontractor #1 will provide the Senior Engineer. *Id.* at 38. Additionally, of the thirteen labor categories identified by the RFP, ADSC employees will perform in 6 of them.

The proposal goes on to list ADSC's relevant corporate experience in performing contracts of similar magnitude. ADSC highlights three other contracts that required similar work as sought by the RFP in this case, including a Navy contract where ADSC is the prime contractor that manages 10 subcontractors. *Id.* at 55. Additionally, Subcontractor #1 and Subcontractor #2 provided examples of relevant corporate experience in performing the type of work it has agreed to perform as a subcontractor for the instant procurement. ADSC's proposal also contained a Teaming Agreement between ADSC and Subcontractor #1. The agreement lists ADSC as the prime contractor and Subcontractor #1 as a subcontractor for the RFP at issue. The agreement also stipulates that any work assigned to Subcontractor #1 will depend on ADSC performing at least 51% of the RFP's direct labor. *Id.*, Volume I. ADSC also included a similar Teaming Agreement with every other subcontractor anticipated in its proposal.

C. Size Determination

On January 22, 2015, the Area Office issued its size determination finding ADSC was not in violation of the ostensible subcontractor rule and thus eligible for the procurement at issue.

The Area Office found Mr. Garry Perkins ***, and serves as President and CEO. ADSC's other officers are Ms. Traci Ince, Vice-President, Mr. Jeff Franklin, Vice-President, and Ms. Amanda Hollins, Vice-President. In its SBA Form 355, ADSC reported that it had no affiliates. Size Determination, at 2. In responding to Appellant's protest claims, ADSC stated that it will perform over 60% of the labor hours on the contract and maintain control over contract management. Particularly, ADSC will employ the Management Analyst, Data Analyst, and Administrative/Support Analyst, who will in turn perform the contract's most essential duties. ADSC also states that it will provide the Program Manager (PM), and has relevant experience in performing similar work under other government contracts. *Id.*

After reviewing the solicitation and ADSC's proposal, the Area Office requested the CO identify the contract's primary and vital requirements. In response, the CO stated that, in descending order of importance, the following tasks were the contract's primary and vital

requirements: Planning, Analysis and Evaluation Support; Program Execution Support Office Assistance; and System Engineering and Integration Support. The CO added that the work performed by the Senior Management Analyst, Management Analyst, and Data Analyst; Admin/Clerical/Support Specialist; and Chemical Engineer, Petroleum Engineer, General Engineer, and Subject Matter Specialist are of vital importance to the contract. *Id.* at 5-6. The Area Office determined that contrary to Appellant's assertions, the work performed by engineers represents but a small portion of the contract's primary and vital requirements.

Turning to ADSC's proposal, the Area Office found that ADSC will share the primary and vital contract requirements with its subcontractors, with ADSC responsible for over 60% of the total labor hours, while Subcontractor #1 and Subcontractor #2 will be responsible for less than 15% each. *Id.* at 6. A DoE estimate shows that Senior Management Analyst, Management Analyst, Data Analyst, and Admin/Clerical/Support Specialist account for 84% of the work associated with the three task areas considered primary and vital. As a result, the Area Office determined that ADSC "has the ability to perform the work because the majority of the employees proposed to perform the primary and vital requirements will be [ADSC] employees." *Id.* at 7. In addition, ADSC will have control over contract management as no other subcontractor is performing a majority of the work.

In finding that ADSC is not unduly reliant upon Subcontractor #1 or Subcontractor #2 in performing the contract, the Area Office found that ADSC's proposal states the PM is "responsible for ensuring deliverables, directing personnel, and interfacing with customer." *Id.* All subcontractors will be reporting to the PM, who is an ADSC employee and was not hired from either Subcontractor #1 or Subcontractor #2. Even though the Senior Engineer, a key employee alongside the PM, will be a Subcontractor #1 employee, the Area Office notes that he will be subordinate to the PM, thus ADSC is not unduly reliant upon Subcontractor #1 for contract performance. *Id.*

Next, the Area Office examined ADSC's past performance experience. The Area Office notes the solicitation simply requires the offerors to have experience "that demonstrates both the quality and success of performance relative to the scope, size, complexity and duration of the work described in the PWS." *Id.* at 8; citing Solicitation at 90. Accordingly, the Area Office maintains that any determination analyzing ADSC's experience in performing specific contract tasks is an issue of responsibility, which falls under the purview of the CO and not the Area Office. Thus, the Area Office found that ADSC's past experience in management services similar to the tasks described in the RFP shows ADSC is not unduly reliant upon Subcontractor #1 or Subcontractor #2 for past performance. *Id.* The Area Office proceeded to evaluate ADSC's teaming agreements with Subcontractor #1 and Subcontractor #2. Upon review of the teaming agreements, the Area Office notes that ADSC is recognized as the prime contractor and is responsible for proposal preparation, thus not overreliance on Subcontractor #1 or Subcontractor #2 is found.

Lastly, the Area Office considered ADSC's size by reviewing its federal tax returns. The Area Office found ADSC did not exceed the \$14 million size standard.

D. Appeal Petition

On February 6, 2015, 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 erred in finding the primary and vital contract requirements are management and analytical support services and not engineering and technical services. According to Appellant, the solicitation requires technical and management support services that assist the OFE's mission, which is responsible for energy research and development activities. The PWS requires the contractor to provide “‘engineering services’, ‘sound professional engineering, technical and programmatic approaches’, and “professional staff, well-trained in engineering technical and management disciplines.”” Appeal at 5; citing PWS at § 1.2.

Appellant further contends the Area Office misinterpreted the CO's statements regarding the contract's primary and vital requirements. Appellant notes that OHA precedent provides that requirements which are a substantial part of the procurement, need not be the primary and vital requirements, that there can be only one primary and vital requirement, and that in this case it cannot be both engineering and management services. *Id.* at 6; citing *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312, at 10 (2012). As the CO's response to the Area Office explains, the most important task is Planning, Analysis, and Evaluation Support, which requires the contractor to perform technical and engineering duties and will require the largest anticipated level of effort. This task will require performance by the Senior Engineer, a key personnel position, as well as the Subject Matter Specialist and General Engineer, both non-key personnel positions. *Id.* at 7.

In addition, the PWS estimates the Information & Business Management Support task, which was not identified by the CO as one of the primary and vital requirements, will require over 9,700 performance hours. This task will require a majority of hours estimated for the Senior Engineer. Therefore, according to the Appellant, engineering services are the “key aspect of this task.” *Id.* at 8-9. Similarly, the OFE Environment, Safety, and Health Activities Support task will also require more performance hours than the three primary and vital tasks identified by the CO and will require technical services in order to complete.

Next, Appellant asserts the RFP requires both key personnel, the PM and Senior Engineer, to have degrees in engineering, and will require them to spend more hours performing engineering, rather than program management duties. The RFP's Level of Effort chart states the PM will perform 294 hours to the contract while the Senior Engineer is estimated to perform 1,900 hours. *Id.* at 9-10. Thus, Appellant argues the solicitation requires more engineering services than management services. Further, Appellant challenges the Area Office's finding that engineering services are not the primary and vital contract requirements, as the solicitation itself was given NAICS code 541330, Engineering Services. Appellant argues because CO's are required to assign a NAICS code that represents the primary purpose of the service sought, the CO “believed then and believes now that the Solicitation's most important and highly valued requirements are engineering-related.” *Id.* at 10.

Appellant next argues that ADSC will not be performing the contract's primary and vital requirements. Because the engineering services required by the RFP are more complicated and require experienced and educated personnel, Appellant contends the fact that ADSC employees will perform the majority of the performance hours is not indicative of ADSC performing the contract's primary and vital requirements. Following the size determination, Appellant asserts ADSC will not provide any engineer or technical personnel, while one of the subcontractors is providing the Senior Engineer, who in turn will perform a higher level of anticipated effort. *Id.* at 13. Furthermore, Appellant maintains the Area Office's finding that ADSC's past performance meets the RFP's requirements is in error. Appellant argues the RFP states an offeror's past performance must show experience performing the work described in the PWS, which falls under engineering and technical services. Appellant contends ADSC "needs its subcontractors to demonstrate its team has past experience with fossil energy and it needs its subcontractors to perform the contract's engineering and technical tasks." *Id.* at 15.

On February 25, 2015, Appellant filed a supplement to its appeal. After reviewing ADSC's proposal, Appellant asserts "the loaded labor rates for the engineering and technical personnel were far higher than those proposed for the analysts or management and administrative personnel." Supplement, at 4. Given that the labor categories that account for the highest hourly rates require the individuals to have engineering or technical expertise, Appellant argues engineering and technical services are the most complex tasks and for the contract's primary and vital requirements.

ADSC's proposal further shows that it will not perform the primary and vital contract requirements because its subcontractors will provide the Senior Engineer, Chemical Engineer, Petroleum Engineer, Subject Matter Specialist, General Engineer, Technical Analyst, Environmental Analyst, and Economist labor categories. Appellant thus contends that contrary to the Area Office's findings, ADSC does not share in the performance of the primary and vital contract requirements. The fact that the loaded hourly rates for personnel provided by ADSC's subcontractors exceeds those provided by ADSC gives proof that ADSC is unduly reliant on its subcontractors for contract performance. *Id.* at 5-6.

Turning to ADSC's cost proposal, Appellant argues ADSC is reliant upon its subcontractors for providing a majority of the personnel needed to perform the contract. Of the 39 people required to perform the contract requirements, only 12 are ADSC employees. *Id.* at 7. ADSC's subcontractors will provide all of the personnel in the engineering and technical labor categories.

Finally, Appellant asserts ADSC lacks the corporate experience in performing the primary and vital contract requirements. The three past performance examples included in ADSC's proposal demonstrate ADSC lacks experience in performing work relating to engineering and technical work. Two of ADSC's past performance references do not involve any engineering or technical services, and the third required ADSC to perform work focused on "analysis, management, and administrative services." *Id.* at 8. The services ADSC stated it will perform have no relation to the "complex technical tasks" required by the instant solicitation. *Id.* at 9.

E. ADSC's Response

On February 27, 2015, ADSC filed its response to the appeal. ADSC argues the size determination is not based on a clear error of fact or law and requests OHA affirm the size determination.

ADSC proposes that the contract's primary and vital requirements are to provide management and technical support services for OFE. ADSC argues the PWS makes clear that technical and management services are the vital tasks sought by DoE, while engineering personnel are responsible but for "a small proportion of work." Response, at 3. The RFP provides that engineering personnel will be responsible for 16,280 of the total 175,730 hours DoE estimates will be performed. ADSC adds that analyst personnel and administrative/clerical/support personnel combine for 82% of the total hours, while Chemical Engineer, Petroleum Engineer, General Engineer, and Economist are part-time positions with discrete task areas. *Id.* Further, only the engineering positions and PM are required to have an engineering degree. ADSC surmises that based on the RFP's description of the work sought and the minimum labor hours required for engineering services, "engineering services simply do not make up a significant portion of the services to be provided under this contract." *Id.*

Next, ADSC disputes BCS's allegations that the work sought under the Planning, Analysis and Evaluation Support task, described by the CO as the most important contract task, requires extensive engineering services. The list of potential responsibilities to be performed under the Planning, Analysis and Evaluation Support task falls squarely under analysis support services, as the Area Office properly found. *Id.* at 4; citing PWS § 3.3. ADSC argues Appellant chose to select only certain potential tasks in order justify their argument, but a clear and full reading of this task "shows that the nature of these tasks is the marshalling of data and rendering it useful for the Agency." *Id.* at 5. According to ADSC, the Planning, Analysis and Evaluation Support task involves engineering personnel performing 17% of the labor hours required. In contrast, 79.5% of the labor hours under this task will be performed by analyst and administrative/clerical/support personnel. Thus, the PWS anticipates that the majority of the work required by this task area will be in performing non-engineering work. *Id.* ADSC asserts the same is true for the entire contract, as only a small fraction of contract performance requires engineering services.

ADSC further argues that contrary to BCS's claims, the labor hours required for the Senior Engineer under the Information & Business Management Support task do not establish that engineering services are the contract's primary and vital requirements. ADSC asserts that after analyzing the Information & Business Management Support task description, it is clear that business systems, business and management processes, and information resources management, not engineering services, are the primary work required. *Id.* at 6. In addition, the requirement that the PM and Senior Engineer, the two key personnel, have engineering degrees is irrelevant in determining the contract's primary and vital requirements as their duties require them to perform mostly management duties. The Senior Engineer in turn has most of the labor hours allocated under the Information & Business Management Support task, which largely concerns management, not engineering, services. *Id.*

ADSC contends the RFP has multiple references to the CO's characterizations of the services sought under this solicitation. Despite Appellant's argument the NAICS code chosen by the CO further shows that engineering services are the primary and vital requirements, ADSC argues technical and management support services are the true services sought by the solicitation. As OHA has stated in the past, a CO may sometimes choose a NAICS code that is not perfect thus it can provide guidance but not be dispositive. *Id.* at 7; citing *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546 (2014). ADSC concludes that “the NAICS code assigned to this procurement cannot be considered conclusive.” *Id.* ADSC asserts its proposal makes clear that ADSC employees will perform the majority of the contract's estimated labor hours, including the labor hours that fall under the tasks highlighted by the CO as the contract's primary and vital requirements, as well as manage the contract, thus proving that ADSC is not in violation of the ostensible subcontractor rule.

ADSC further challenges Appellant's claim that ADSC's past performance fails to demonstrate its capabilities to perform the contract. ADSC's proposal contained three examples of its past performance experience performing contracts with similar requirements, specifically technical and management support. ADSC's corporate experience performing similar work, stressed in its proposal, shows that it is not unduly reliant on Subcontractor #1 or Subcontractor #2 to perform the contract requirements. *Id.* at 10-11. Therefore, the Area Office properly found that ADSC has the capacity to perform his contract based on its past performance references, and Appellant once again has failed to show any clear error of fact or law in the instant size determination.

E. Motion for New Evidence

On February 6, 2015, Appellant filed a motion for new evidence. Specifically, Appellant seeks to introduce a summary of Appellant's proposal by DoE highlighting Appellant's strengths and weaknesses. Appellant argues that there is good cause to admit this evidence because it shows DoE considers an offerors proposed personnel's experience in evaluating proposals. Motion at 2. Appellant argues the evidence demonstrates the Area Office's interpretation of what past performance offerors had to submit was erroneous and incompatible with the solicitation. Appellant also argues that even though it received the comments before it submitted its protest, DoE was not able to explain the comments until after the protest was filed. Appellant was also concerned about providing the notes because it feared they could potentially be disclosed to ADSC.

ADSC opposes the motion. ADSC argues that Appellant had the opportunity to submit the notes from DoE at the time it filed its protest but failed to do so. ADSC argues that Appellant's justifications as to why the notes should be allowed are unpersuasive. ADSC argues Appellant does not explain why the notes needed to be placed into context by DoE “in order for [Appellant] to appreciate its putative significance.” Opposition, at 2. Next, ADSC argues that Appellant's concern over the note's potential of being disclosed is meritless. According to ADSC, 13 C.F.R. § 121.1008(d) prohibits the Area Office from releasing information obtained as a result of a size determination if it violates Federal law. *Id.* Thus, Appellant's second reason for not submitting the notes during the size protest process also fails to meet OHA's test for allowing new evidence.

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. New Evidence

OHA's review of size appeals is based upon the evidence in the record at the time the Area Office made its determination. Therefore, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). The administrative judge could admit new evidence on appeal judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The party proposing the new evidence must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

Here, Appellant's proffered new evidence was available at the time it filed its protest, and could have been submitted to the Area Office. OHA has consistently held it will not accept new evidence when the material in question was not submitted to the Area Office when it was available for submission. *Size Appeal of Product Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Appellant's concern about confidentiality is meritless, because the regulation provides that information submitted will not be disclosed except as required by law. 13 C.F.R. § 121.1008(d). Accordingly, I EXCLUDE Appellant's proffered new evidence.

C. Analysis

Under SBA regulations, the ostensible subcontractor rule offers 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's purpose is to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). In any ostensible subcontractor rule analysis, we must examine 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. *Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012).

An area office, in ascertaining whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, 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).

Here, there is the issue of what are the primary and vital requirements of this contract, that is, what is the principal purpose of the acquisition. *Size Appeal of Maywood Closure Co., LLC & TPMC-Energy Solutions Envtl. Servs.*, SBA No. SIZ-5499, at 6 (2013). The requirements must be determined from the text of the solicitation itself, although SBA will give some weight to the contracting officer's identification of the primary and vital requirements. *Size Appeal of Paragon TEC, Inc.* SBA No. SIZ-5290 (2011).

The instant solicitation's stated objective is to obtain a broad spectrum of technical and management support services. PWS at § 1.2. The contractor is to provide engineering services, but the purpose of these services is to support planning, analysis, budget and technology communication. *Id.*, at § 1.2. The CO identified the primary and vital requirements as first, PWS § 3.3, Planning, Analysis and Evaluation Support, which requires a broad range of tasks requiring research, evaluation, and technical writing. This section has an extensive list of various tasks to be performed, including reviewing programs, generating and collecting information, preparing and supporting independent technical reviews and assessments, analyzing existing technical and economic data, estimating risk potential, preparing literature searches and reviews of technologies, conducting comparative engineering and economic assessments of technologies, evaluating new or proposed technologies, reviewing publicly and privately funded energy technology programs, compiling information on the deployment and marketing of potential technologies, monitoring energy technology developments, gathering data for policy and regulatory analyses, providing consultation on environmental laws and regulations, analyzing impacts of energy technology, reviewing documents prepared by other sources, and analyzing the performance of the OFE's management and quality control and assurance systems. *Id.* at § 3.3.

Second in importance is PWS § 3.6 Program Execution Support Office Assistance, which is largely administrative and logistical support, and third, PWS § 3.4, System Engineering and Integration Support, including planning analysis and management of programs, projects, and capital assets. The following labor categories, which support the three primary and vital task areas, were identified by the CO as being vital to the performance of the contract: Senior Management Analyst; Management Analyst; Data Analyst; Admin/Clerical/Support Specialist; Chemical Engineer; Petroleum Engineer; General Engineer; and Subject Matter Specialist. The Area Office's examination of the solicitation led it to conclude the primary objective of the procurement is the provision of personnel to perform the tasks identified in PWS §§ 3.3, 3.4 and 3.6. The record supports this conclusion, and CO's identification of these tasks provides additional support. The other tasks are PWS § 3.5, Conference Management Support, PWS § 3.2

Planning and Budgeting, PWS § 3.7, Information and Business Management Support, and PWS § 3.8, Environment, Safety, and Health Activities Support. None of these emphasize engineering.

As ADSC points out, the solicitation's estimated level of effort for engineering is a relatively small percentage of the total effort, just over 9%. ADSC's proposal provides it will have shared responsibility with the subcontractors for the primary and vital tasks. Analyst personnel make up 55% of the total hours, and administrative/clerical support make up just over 27% of the hours. Engineering services are thus only a portion of the services provided here.² In this case, ADSC's subcontractors will each be responsible for less than 15% of the labor hours expected under the three primary task areas. Size Determination, at 6. In the past, OHA has held that a violation of the ostensible subcontractor rule occurs when a prime contractor will have no meaningful role in performing the contract's primary and vital requirements. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). That is not the case here.

As the Area Office correctly concluded, the purpose of the RFP is to provide management and technical support services, in which a broad and wide ranging list of tasks is expected to be performed by the contractor. However, to find that the solicitation's primary and vital requirements are engineering services runs counter to the detailed tasks stated in the PWS, tasks that clearly establish the need for a comprehensive collection of personnel. The need for engineers in order to perform the contract is stated in the PWS and by the CO, but engineering personnel have a small expected level of effort compared to the rest of the personnel needed to fill the labor categories specified by the PWS.

The engineering services provided here are thus an important part of this procurement, but are not the whole of it or even the sole primary and vital function. The fact the procurement has an engineering NAICS code designation is not dispositive of its primary and vital requirement. *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546, at 16 (2014) (“While a NAICS code also can provide some guidance, it is certainly not conclusive, and OHA recognizes NAICS codes are not perfect.”) Here, the majority of the engineering tasks are focused on the Information & Business Management Support task, which was not identified by the CO as a primary and vital task. Appellant's appeal rests on its own interpretation of the RFP which concludes that engineering services are the primary and vital contract requirements. Appellant also attempts to, unsuccessfully, argue that the primary task the CO identified as the most important for contract performance is primarily engaged in engineering services. This is a complete misconstruction of the required contractor duties under the Planning, Analysis and Evaluation Support task. Undoubtedly, there is an engineering component to the performance of this task, but as ADSC correctly points out, the PWS's Level of Effort chart clearly shows that

² Appellant relies upon *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312 (2012) for the proposition that a procurement cannot have multiple primary and vital requirement. OHA has since clarified that in *Santa Fe* this statement was qualified as “generally” the case, and OHA rejects the proposition that there may be only one primary and vital requirement for a procurement, especially in the era of bundled procurements. *Size Appeal of Brown & Pipkin, LLC*, SBA No. SIZ-5621 (2014).

the overwhelming majority of this task will be performed by analysts and administrative personnel.

As ADSC points out, the most relevant line of cases here is that beginning with *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010). In that case, OHA held a subcontractor who provided the sandwiches for a box lunch was not performing the primary and vital requirement of the contract, which was to provide, serve, and clean up after a complete lunch. The sandwich was but one part of the total package of goods and services for which the government was contracting. Similarly, in *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546 (2014), a protestor maintained the fact that a challenged concern was subcontracting out the provision of hotel rooms meant the subcontractor was performing the primary and vital requirement. OHA rejected this argument, because the contract not only called for the provision of hotel rooms for personnel, but the coordination of the rooms, transportation of the personnel, and accounting of the personnel. Again, the hotel rooms were only a portion of the services to be contracted for, and so the challenged concern did not violate the ostensible subcontractor rule. Here, the engineering services, while important, are only a portion of the package of services the required by the contract. Accordingly, ADSC's proposal is not in violation of the ostensible subcontractor rule, because the engineering services subcontracted do not represent only a part of the overall planning, analysis and evaluation services ADSC will provide under this contract.

Appellant attempts to argue that even though the majority of the labor hours associated with the solicitation will be performed by non-engineering personnel, the primary and vital contract requirements are engineering services. At the same time, Appellant argues the Senior Engineer will perform more labor hours than the PM, thus indicating that engineering services are the primary and vital contract requirements. It appears that Appellant is making one argument while immediately countering that argument in trying to justify its position.

Regardless, I find Appellant's attempt to play both sides unconvincing. Here, the PM will have complete supervisory control over the contract, and the majority of the labor hours will be concentrated in tasks that do not require engineering services.

Further, I conclude the Area Office did not err in finding ADSC would perform primary and vital requirements here. The solicitation allocated the positions of PM, Senior Engineer, Chemical Engineer, Subject Matter Specialist, General Engineer, Senior Management Analyst, Data Analyst and Administrative/Clerical Support Specialist to PWS §§ 3.3, 3.6 and 3.4 in its estimated level of effort. The Area Office's findings that ADSC would perform 60% of the work for those positions, and the subcontractors no more than 15% each, is supported by ADSC's proposal.

Lastly, Appellant's argument that ADSC is unduly reliant on its subcontractors because it lacks the proper past performance related to the engineering services required by the solicitation and experience with fossil energy is also meritless. As discussed *supra*, engineering services are an important part of the solicitation's requirements, but it is not the contract's sole primary and vital requirements. Appellant's contention that the contract requires past fossil energy experience is not supported by the solicitation, which includes no such requirement. Conversely, ADSC supplied examples of its own past performance on contracts for the Office of Naval Research

which include planning and analysis services similar to those required under this contract. Thus, Appellant's contention that ADSC is unusually reliant on its subcontractors' past performance is not supported by the record.

OHA has consistently held that where a concern has the ability to perform the contract, will perform the majority of the work, will manage the contract, and will perform the primary and vital requirements; there is no violation of the ostensible subcontractor rule. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290 (2011). Here ADSC has established all these elements, and thus has not violated the rule.

I therefore conclude that Appellant has failed to establish any error in the Area Office's determination that ADSC's proposal here is not in violation of the ostensible subcontractor rule.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, 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).

Christopher Holleman
Administrative Judge