

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

SIZE APPEAL OF:

GaN Corporation,

Appellant,

Appealed From
Size Determination No. 3-2015-035

SBA No. SIZ-5658

Decided: May 20, 2015

APPEARANCES

J. Dale Gipson, Esq., J. Clark Pendergrass, Esq., Lanier Ford Shaver & Payne, P.C.,
Huntsville, Alabama, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On February 26, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2015-035 finding that GaN Corporation (Appellant) is not a small business under the size standard associated with the subject task order. The Area Office determined that Appellant's relationship with its subcontractor, [Subcontractor], violated the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the size determination is flawed and should be overturned. For the reasons discussed *infra*, the appeal is granted, the size determination is vacated, and the matter is remanded to the Area Office for further review.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Proposal

On April 18, 2014, the U.S. Army Contracting Command (Army) issued Request for Proposals (RFP) No. W91CRB-13R-0009 for the Army Evaluation Center Omnibus contracts.² The RFP stated that the Army planned to award multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts. The RFP identified 72 different labor categories that might be used during contract performance, and provided minimum qualifications and job descriptions for each labor category. (RFP at 30-60.) Among these labor categories were General Engineer V, Program/Systems Analyst III, and Systems Engineer III. (*Id.* at 40-41, 50-51, 57.)

With the RFP, the Army invited offerors to submit proposals for five task orders. (RFP, Section J.) For Task Order 3 (TO 3), the contractor would support the Ballistic Missile Defense Evaluation Directorate by providing “technical services in support of planning, execution, analysis, reporting, system assessment/evaluation, and field support.” (TO 3, PWS, § 1.3.) TO 3 was set aside entirely for small businesses, and was assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with the exception for Military and Aerospace Equipment and Military Weapons, which at that time utilized a size standard of \$35.5 million in average annual receipts. (TO 3, Proposal Instructions, at § 1.1.)

Under the heading “Proposal Content and Page Limitations,” the TO 3 proposal instructions stated:

3.1 Proposals shall be as brief as possible but sufficiently detailed to completely and adequately describe what is proposed.

3.2 If applicable, delineate subcontractor information for each factor. For example, if a subcontractor will perform a task under subfactor F2 below, address the subcontractor's role. Furthermore, the price template includes a column to identify the Prime or Subcontractor.

(*Id.* at § 3.)

In discussing the evaluation criteria, the TO 3 proposal instructions directed offerors to:

4.2.1.1 See Section C of the [RFP] for job descriptions and qualification requirements for the key labor category positions and other labor categories included in the pricing template.

...

² Although the RFP is not in the record developed by the Area Office, the Contracting Officer provided a copy to OHA after appeal was filed.

4.2.1.2 Key personnel for Task Order 3 are General Engineer V, Program/Systems Analyst III, and Systems Engineer III. One resume should be provided for each of these labor categories.

4.2.1.3 Resume evaluation shall consist of an evaluation of applicable education and similar experience.

4.2.1.4 To get an acceptable rating for Factor 1, Personnel Credentials, Experience and Qualifications, the offeror shall meet the qualifications and experience identified in Section C, Labor Category Criteria, for each of the key personnel listed above.

(*Id.* at § 4.) The TO 3 proposal instructions indicated that the proposed resumes would be evaluated on a pass/fail basis with a rating of “Acceptable” meaning that “All key labor position resumes are acceptable” and a rating of “Unacceptable” meaning that “Not all key labor position resumes are acceptable.” (*Id.* § 4.2.1.5.)

Appellant submitted its initial proposal for the base contract and TO 3 on June 17, 2014. Appellant's TO 3 proposal stated that “[p]eople and related expertise and experience are key discriminators setting [Appellant's] Team apart from [its] competitors.” (Appellant's TO3 Proposal, at 1.) Appellant's proposal included a table listing three “key personnel for [TO 3],” which were in the “key labor categories” of General Engineer V, Program/Systems Analyst III, and Systems Engineer III. (*Id.*) [XX] individuals were employees of [Subcontractor]. Appellant's proposal also provided the resumes for each of the three individuals identified in the table. (*Id.* at 1-9.)

Appellant's TO 3 proposal also included a table of the total number of hours by labor category that would be performed by each member of Appellant's team. (*Id.* at 53 (Table 12).) The table indicated that Appellant's personnel would perform a majority of the total hours, and that both Appellant and [Subcontractor] would supply employees for the General Engineer V, Program/Systems Analyst III, and Systems Engineer III labor categories. (*Id.*)

Final proposal revisions for TO 3 were due on October 28, 2014, and the CO informed OHA that Appellant did revise its proposal. Appellant's final proposal revisions are not in the record and are not addressed in the size determination.

B. Protests

On January 6, 2015, the CO announced that Appellant was the apparent awardee of TO 3. On January 9, 2015, a size protest was received from an unsuccessful offeror, MAN-Machine Systems Assessment, Inc. (MSA), alleging that Appellant is affiliated with [Subcontractor] under the ostensible subcontractor rule. (MSA Size Protest.) MSA's size protest was dismissed as untimely by the Area Office on January 27, 2015. The Area Director then initiated her own size protest against Appellant, adopting MSA's allegations.

The Area Office acknowledged that Appellant proposed its own personnel as Technical Director and Assistant Program Manager. (*Id.* at 5.) However, Appellant “did not include those two individuals within its key labor positions for the task order.” (*Id.*) The Area Office highlighted that an important issue in ostensible subcontractor cases is which concern will

manage the contract and which concern will provide the key employees. Here, [XX] proposed key personnel are employees of [Subcontractor], and no other key personnel were identified in the proposal. (*Id.*) The Area Office asserted that “the Area Office properly considered the fact that [Appellant] will be hiring its key employees from [Subcontractor] as a strong indicia that [Appellant] was unusually reliant upon [Subcontractor] for performance of this contract.” (*Id.*)

The Area Office also determined that the value of TO 3 was \$10.2 million for the base year and one option year, which according to the Area Office “is approximately 5 times larger than the largest contract that [Appellant] has listed in the Government's procurement database, [Federal Procurement Data System — Next Generation (FPDS-NG)].” (*Id.*) Based on this issue and the key personnel proposed by Appellant for TO 3, the Area Office determined that Appellant is unusually reliant upon and affiliated with [Subcontractor] under the ostensible subcontractor rule. (*Id.* (citing 13 C.F.R. § 121.103(h)(4)).) Although Appellant itself is a small business under the \$35.5 million average annual receipts size standard, Appellant exceeds the size standard once its receipts are aggregated those of [Subcontractor]. (*Id.* at 6.)

D. Appeal

On March 13, 2015, Appellant appealed the size determination to OHA.

Appellant asserts that it is an award-winning small business with more than 200 employees and offices in Alabama, Texas, New Mexico, Arizona, Utah, and Maryland. (Appeal at 3.) Further, Appellant “has successfully executed 23 prime contracts and hundreds of task orders with exceptional results.” (*Id.*) Appellant states it has particular experience with T&E, and that “[Appellant's] primary business since its inception in 2004 has been T&E.” (*Id.* at 3-4.)

Appellant highlights that the size determination is based solely on the notion that Appellant is “unusually reliant” upon [Subcontractor]. (*Id.* at 5.) This finding in turn is based on two issues: (1) the value of TO 3 is purportedly five times larger than Appellant's next largest contract; and (2) [XX] key personnel proposed by Appellant for TO 3 are [Subcontractor] employees. (*Id.* at 5-6.) Neither of these issues is valid, Appellant insists, so the size determination must be overturned.

Appellant argues the Area Office committed clear factual error in concluding that TO 3 is five times larger in value than Appellant's largest contract. (*Id.* at 7.) Appellant states that evidence available to the Area Office demonstrated that TO 3 is smaller than many of Appellant's existing contracts, so the Area Office's determination is “simply inaccurate.” (*Id.*) Specifically, Appellant asserts that, in its response to the protest, Appellant provided data describing Appellant's current T&E contracts and their respective values. (*Id.*) The data indicated that Appellant currently acts as the prime contractor on “one contract with a value of \$25,041,353.47 and another with a value of \$24,468,662.00.” (*Id.*) Contrary to the size determination, then, TO 3 is substantially smaller in value than many of Appellant's existing contracts, and TO 3 is “well within [Appellant's] competency” in both size and subject matter. (*Id.* 7-8.)

Appellant asserts that the Area Office also erred in finding that Appellant proposed [XX] of its key personnel from [Subcontractor]. (*Id.* at 8.) Appellant explains that the TO 3 proposal instructions required offerors to submit only one resume for each of three specific labor categories: General Engineer V, Program/Systems Analysis III, and Systems Engineer III. (*Id.*) Appellant states that, although Appellant was not permitted to provide additional resumes for these labor categories, Appellant's TO 3 proposal nevertheless made clear that Appellant would be providing its own employees in these same labor categories to perform the task orders. (*Id.* at 10.) Appellant argues that the Area Office misunderstood the RFP and confused the concept of key labor categories with individual key personnel. (*Id.*)

Moreover, although the Area Office expressed concern about which firm would manage the task order, the Area Office failed to consider the fact that Appellant alone will manage TO 3 because Appellant's employees will serve as the Program Manager and Deputy Program Manager. (*Id.* at 10-11.) In addition, the TO 3 proposal instructions did not ask offerors to identify managerial personnel for TO 3, so the Area Office's complaint that Appellant did not submit its management personnel as key personnel is not valid. Appellant reiterates that it was the Army that decided, through the RFP, which labor categories should be discussed in offerors' proposals, "and those labor categories did not include program management personnel." (*Id.* at 11.)

Appellant maintains that the two cases cited by the Area Office — *Size Appeal of The Analysis Group*, SBA No. SIZ-4814 (2006) and *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR) — have no similarity to the circumstances presented here, because Appellant in this case will perform a majority of the work with its own personnel, and Appellant will manage TO 3 through its Program Manager and Deputy Program Manager. (*Id.* at 9.) According to Appellant, "the facts are that [Appellant] is a highly experienced T&E prime contractor, that it will perform the majority of the work under [TO 3], that it will control, supervise and manage [TO 3], and that it will perform the primary and vital Task Order requirements." (*Id.*)

Finally, Appellant concludes the Area Office found no other facts to suggest that Appellant's relationship with [Subcontractor] contravenes the ostensible subcontractor rule. (*Id.* at 11.) Appellant highlights that [Subcontractor] is not the incumbent contractor; Appellant receives no financial support from [Subcontractor]; and Appellant is an experienced T&E prime contractor with the ability to perform and manage TO 3.

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).

The “ostensible subcontractor” rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or 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). To determine whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, the Area Office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Id.*; *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). Generally, “[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule.” *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 13 (2011).

B. Analysis

I find it appropriate to remand this case for further review. A principal problem here is that the record does not contain Appellant's final proposal revisions for TO 3, although the CO advised OHA that Appellant did revise its TO 3 proposal in October 2014. Section II.A, *supra*. Similarly, the size determination refers only to Appellant's initial proposal from June 2014. *See* Section II.C. Pursuant to 13 C.F.R. § 121.404(d), however, compliance with the ostensible subcontractor rule is assessed as of the date of final proposal revisions. *Size Appeal of WG Pitts Company*, SBA No. SIZ-5575 (2014). Accordingly, in order to properly examine Appellant's compliance with the ostensible subcontractor rule, the Area Office should have obtained and reviewed Appellant's complete proposal, including proposal revisions. Given that Appellant's final proposal revisions are not in the record, and were not considered in preparing the size determination, the appropriate course is to remand for further review and investigation. *E.g.*, *Size Appeal of IAP World Services, Inc.*, SBA No. SIZ-5480 (2013) (remanding case and explaining that area office must obtain the challenged firm's entire proposal, not merely portions of it); *Size Appeal of DynaLantic Corporation*, SBA No. SIZ-5125 (2010).

Appellant argues persuasively that the facts as found by the Area Office do not suffice to show that Appellant is unusually reliant upon [Subcontractor]. Appellant emphasizes that the Area Office based its determination on only two findings, both of which are highly questionable. First, the Area Office found that the value of TO 3 is five times greater than Appellant's largest contract listed in FPDS-NG. Section II.C, *supra*. Second, the Area Office found that Appellant proposed [Subcontractor] employees for [XX] of the key personnel positions for TO 3. *Id.*

With regard to the value of TO 3 relative to Appellant's other contracts, Appellant's response to the protest included data indicating that Appellant is already performing significantly larger procurements than TO 3. Specifically, Appellant provided a list of nine active contracts for T&E services for which Appellant is the prime contractor. Appellant also offered corroborating details about these procurements, such as contract numbers and the identities of the procuring agencies. Among the nine contracts were procurements valued at \$25,041,353.47 and

\$24,468,662.00, both substantially exceeding the estimated value of TO 3 (\$10.2 million). Section II.D, *supra*. Under 13 C.F.R. § 121.1009(b), an area office must consider the challenged firm's response to the protest in preparing the size determination. The size determination here, though, does not address the information Appellant provided or explain why the Area Office instead relied solely on FPDS-NG to ascertain the value of Appellant's other contracts. I therefore agree with Appellant that the Area Office clearly erred in disregarding Appellant's protest response without explanation. Moreover, based on the available record, it appears incorrect to conclude that Appellant lacks experience performing contracts comparable in size to TO 3.

With regard to Appellant's key personnel for TO 3, it appears that the Area Office may have misunderstood the restrictions on offerors' proposals that were imposed by the procuring agency. In particular, the TO 3 proposal instructions made clear that offerors were to submit one, and only one, resume for each of three labor categories: General Engineer V, Program/Systems Analyst III, and Systems Engineer III. *See* Section II.A, *supra*. Appellant submitted resumes for [XX] [Subcontractor] employees, although Appellant also proposed its own personnel in these same labor categories. Section II.D, *supra*. Thus, on this record, it does not appear that Appellant is dependent upon [Subcontractor] to fill these labor categories. Nor does Appellant appear to be reliant upon [Subcontractor] to manage the task order, as Appellant proposed its own employees for the managerial positions of Program Manager and Deputy Program Manager. *Id.* Although personnel in the three labor categories could be considered mid-level managers, they would seem to be subordinate to Appellant's Program Manager and Deputy Program Manager, and thus would not establish reliance on [Subcontractor]. *E.g., Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011) (finding no unusual reliance when subcontractor would supply mid-level managers who were subordinate to the prime contractor). Thus, viewed in the larger context of this procurement, I agree with Appellant that the submission of resumes of [XX] [Subcontractor] employees does not demonstrate unusual reliance.

In sum, the findings in the size determination do not suffice to show that Appellant is unusually reliant upon [Subcontractor]. Nevertheless, as noted above, Appellant's final proposal for TO 3 has not been reviewed, and may reveal new or different issues regarding Appellant's compliance with the ostensible subcontractor rule that have yet to be explored. As this information was not available to the Area Office in preparing the size determination, the appropriate course is to remand the matter to the Area Office for further review.

C. Remand

On remand, the Area Office should expand the record to include Appellant's entire proposal, including any revisions subsequent to the initial proposal. The Area Office should use Appellant's final revised proposal in determining Appellant's compliance with the ostensible subcontractor rule.

IV. Conclusion

For the above reasons, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office to issue a new size determination upon review of Appellant's final revised proposal for TO 3.

KENNETH M. HYDE
Administrative Judge