

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

FOR PUBLIC RELEASE

SIZE APPEAL OF:

Hamilton Alliance, Inc.

Appellant,

Appealed From
Size Determination No. 03-2015-081

SBA No. SIZ-5698

Decided: December 8, 2015

APPEARANCES

William S. Shook, Esq., The Law Offices of William A. Shook, PLLC, Washington, D.C., for Appellant

Lawrence J. Sklute, Esq., Sklute & Associates, Potomac, MD, for L& J Building Maintenance, LLC

R. Annette Taylor, Contracting Officer, for the Government

DECISION¹

I. Procedural History and Jurisdiction

On September 11, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2015-081, finding Hamilton Alliance, Inc. (Appellant) is not an eligible small business for the procurement at issue.

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 Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal, and affirm the size determination.

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

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 March 18, 2015, the U.S Navy Naval Facilities Engineering Command (NAVFAC) Mid Atlantic Public Works Department issued Solicitation No. N40085-15-D-7904 seeking a contractor to provide refuse collection and processing, and collection, processing and sale of recyclable waste at NSA Crane and Glendora facilities. The Contracting Officer set the procurement totally aside for Service Disabled Veteran Owned Small Business Concerns, and designated North American Industry Classification System (NAICS) code 562119, Other Waste Collection, with a corresponding \$38.5 million annual receipts size standard, as the appropriate code for the procurement.

On July 17, 2015, the CO notified unsuccessful offerors that Appellant was selected for award. On July 24, 2015, L&J Building Maintenance, LLC (L&J) filed a size protest with the CO, alleging Appellant was unusually reliant upon its ostensible subcontractors, Subcontractor (Subcontractor) and Waste Management, Inc. (WMI), both of which are large businesses.

The Solicitation's Performance Work Statement (PWS) states the objective of this procurement is to “provide NSA Crane and Glendora test facility with refuse and recycle services.” PWS, at 1. The contractor will be responsible for providing collection and processing of refuse and recyclable waste, with the contractor also responsible for any labor, supplies, materials, equipment, transportation, facilities, utilities, supervision and management necessary to perform these services. The solicitation contains “data such as inventories, maps, floor plans, and tables to represent the type, quantity and location of services to be provided.” *Id.* at 2. Section 2 of the PWS contains the Management and Administration requirements offeror must follow if awarded the contract. There are numerous requirements, including the obligation of the contractor to “manage the total work effort associated with the services required herein to meet the performance objectives and standards.” *Id.*, Section 2.6. The key personnel required by the solicitation consist of: (i) Program Manager (PM); (ii) Quality Control Manager (QCM); (iii) Site Safety and Health Officer (SSHO); and (iv) Environmental/Energy Manager. *Id.*, Section 2.7-2.7.1.4.

Section 3 of the PWS details the duties required of the contractor regarding waste removal. The contract shall properly collect and dispose of solid waste and recyclables. This requires the contractor to “remove solid waste from containers and ensure it is properly disposed of”; “remove recyclable waste from containers to ensure it is properly collected”; “dispose of residential, commercial, and industrial solid waste to ensure compliance with all applicable local, state, and federal laws and regulations”; “process and sell all recyclable material”; “recycle solid waste to ensure compliance with the installation's waste reduction policy”; and “provide containers suitable for the collection and disposal of solid waste and recyclables.” *Id.*, Section

3.1.1-3.4. The contractor must also provide a schedule for the collection and disposal of refuse waste.

The PWS stipulates that proposals will be evaluated on the following factors: (i) Experience; (ii) Management Approach; (iii) Past Performance; and (iv) Safety. Solicitation, at 10. These evaluation factors are to be rated Acceptable or Unacceptable. Further, the PWS indicates that Experience, Management Approach, and Past Performance are all to be given equal importance when evaluating. The Government will make an award based on the lowest price proposal that has an overall non-cost/price rating of Acceptable. *Id.*, at 12.

B. Size Determination

On September 11, 2015, the Area Office issued its size determination finding Appellant is not a small business concern for the procurement at issue. The Area Office found Appellant is owned 51% by James Edwards, President and CEO, and 49% by Yong Edwards, his wife. The Area Office found no affiliates.

The Area Office examined the solicitation, and found it an Indefinite Delivery/Indefinite Quantity contract with Firm Fixed Price task orders. The contractor must provide all labor, supplies, equipment, facilities, and management to provide for the collection and processing of refuse and collection and processing and sale of recyclable waste at NSA Crane. The contractor must provide containers at specified locations, and pick up, transport and dispose of the refuse left therein to certain specified locations, for recycling or disposal, as appropriate.

The Area Office concluded that the primary purpose of this procurement is refuse collection, and not the management of the contract, or the design of a program for refuse collection. The Area Office found Appellant would not be performing any of the work itself. The subcontractor will provide the trucks and drivers to service the waste and recycling containers that Appellant would lease. The Area Office further found that Appellant did not have the equipment to perform the contract and had no plans to purchase the required equipment. Appellant is solely reliant upon the subcontractor for the equipment for this contract, including the refuse containers, which it will lease from its subcontractors. Appellant will not direct the drivers; they will provide the subcontractors with a schedule. Appellant proposes to take refuse to a Landfill and recyclables to a Recovery facility. The Area Office discovered through Internet research that both facilities were owned by the subcontractor. The Area Office noted that the subcontractor is responsible for preparing and submitting invoices, procuring and maintaining insurance coverage, complying with all applicable laws and regulations, obtaining and maintaining required permits required for waste transporters. The subcontractor, along with supervising employees such as drivers, maintenance and material handlers, is also responsible for obtaining documentation and training required for vehicles and personnel to have access to Government locations.

The Area Office found Appellant was providing most of the project management, although the RFP did not call for the identification of key personnel, which indicates management was not a significant evaluation factor. The Area Office further found all relevant past performance experience was by the subcontractor, not Appellant. The Area Office also found Appellant was the direct interface to the Government and is responsible for managing

schedules, documenting and reporting results to the Government. However, because the Service Provider Subcontract states the subcontractor shall perform as an independent contractor, and have complete control over its employees, the Area Office found the statement Appellant was in complete control of the contract inaccurate and misleading. Rather, the Area Office found supervision and management were only two of the nine requirements listed in the solicitation.

Relying upon two cases which it states had similar fact patterns, *Size Appeal of Onopa Management Corp.*, SBA No. SIZ-5302 (2011) and *Size Appeal of Shoreline Svcs., Inc.*, SBA No. SIZ-5466 (2013), the Area Office thus concluded that the subcontractor was performing the primary and vital requirements of the solicitation, and that Appellant was unduly reliant upon its subcontractor and therefore affiliated and was other than small for this procurement.

C. Appeal Petition

On September 25, 2015, Appellant filed the instant appeal. Appellant argues the Area Office erred by finding Appellant in violation of the ostensible subcontractor rule and requests that OHA reverse the size determination.

Appellant contends the size determination contained numerous factual errors that warrant a reversal. Appellant states that contrary to the size determination findings, the solicitation does require the contractor to implement a management program and the evaluation factors consider any extra effort in an offeror's quality control procedures. Appeal, at 4-5. Appellant argues the solicitation required offerors to meet or exceed the performance objectives, and Appellant's proposal did just that.

The size determination states that Appellant lacks the resources to perform the contract. Appellant disputes this allegation by stating that the key personnel will be Appellant's employees, and Appellant is leasing the containers necessary to perform the contract. *Id.* at 7. Appellant further challenges the size determination's finding that Subcontractor is involved in all the contract requirements. The subcontract agreement between Appellant and Subcontractor limits the scope of work to be performed by Subcontractor, and Subcontractor is only responsible for managing their employees, including the drivers, and assigned duties, under the direction of Appellant. *Id.* at 7-8. Contrary to the size determination, Appellant's past performance was evaluated based on its own past contracts where Appellant served as a prime contract, and not based on Subcontractor's experience. Similarly, the claim that Subcontractor is performing all labor, supplies, material, equipment, transportation, and facilities requirements is incorrect. Appellant reasons that it is performing all duties related to the management of the contract, the primary and vital requirement, the labor as reflected by the key personnel being Appellant employees, devising a managing plan for refuse and recycle collection, and leasing the containers. Thus, Appellant's sole role in managing the contract contradicts the size determination's findings. *Id.* at 8-9.

Appellant argues that although the solicitation requires refuse and recycling services, the contractor's real duty is to ensure that that waste and recycle items are 'properly' collected and disposed of. *Id.* at 11. Because the responsibility for properly collecting and disposing of waste falls upon Appellant, not Subcontractor, Appellant argues the Area Office erred in finding that

Section 3 of the PWS will be performed by Subcontractor and ignoring the management requirements found in Section 2 of the PWS. *Id.* The Appellant argues the Area Office exceeded its authority when it found that Appellant lacked the previous experience to perform the contract and managing waste services contracts was not part of the evaluation factors; Appellant contends the CO is responsible for determining whether an offeror meets the requirements of a solicitation. *Id.* at 12. Appellant adds that a previous size determination performed on Appellant, which involved nearly identical requirements, found it to not violate the ostensible subcontractor. The Area Office ignored the previous size determination which contradicts its claim that Appellant did not have experience in performing duties similar to the instant solicitation. *Id.* at 13.

Next, Appellant contends the Area Office's reliance on *Size Appeal of Shoreline Services*, SBA No. SIZ-5466 (2013) is misplaced because the facts in that case are dissimilar to the ones found here. Specifically, in *Shoreline Services* the solicitation did not require managing or designing a program for refuse and recycling, whereas the solicitation in question “requires the contractor to manage and design a refuse and recycling program.” *Id.* at 14. This means that the contractor had to create a pick up schedule and design an approach for managing the contract which one of the four technical evaluation factors weigh in order to determine contractor capability.

Appellant asserts the Area Office failed to consider other factors that go into any analysis of the ostensible subcontractor rule, such as: (i) identity of the incumbent contractor; (ii) ability of the prime contractor to perform the contract; (iii) employer of proposed key employees; (iv) clarity of role by prime contractor and subcontractor; (v) percentage of work assigned between contractor and subcontractor. *Id.* at 16. According to Appellant, the Area Office did not give sufficient weight to these factors since Appellant, not Subcontractor, prepared the proposal, has shown it has the ability to perform the contract, will provide all the key employees, will perform the specific tasks, including all of the management requirements from Section 2 of the PWS, account for XX% of the cost of labor for managing the contract, and Appellant is the incumbent contractor. *Id.* at 16. Appellant concludes that although collecting and disposing refuse and recycling items are a ‘substantial part of the solicitation’, the primary and vital requirements are “to manage the many requirements associated with the refuse stream generated at NSA Crane while also having the contractor exceed the minimum requirements.” *Id.* at 17; citing *Size Appeal of Maywood Closure Company, LLC & TPMC-Energy Solutions Environmental Services 2009, LLC*, SBA No. SIZ-5499 (2013).

D. L&J's Response

On October 21, 2015, L&J filed a response to the appeal. L&J contends the Area Office did not err in finding Appellant affiliated with its subcontractor, and requests OHA affirm the size determination.

L&J first asserts the Area Office properly found Subcontractor is actually performing the refuse collection and disposal and recycling services required by the solicitation. L&J quotes the solicitation's statement that its intent is to provide NSA Crane and Geldora test facilities with refuse and recycle services. The solicitation requires the contractor to manage the work effort

associated with the services required. L&J argues the primary and vital requirements are the refuse and recycling services, not management of the contract. L&J maintains it is the goods and services which the procuring agency actually seeks to acquire, and not goods or services the contract must perform to deliver those services, which determine the primary and vital tasks of the contract, citing *Size Appeal of Anadarko Industries, LLC*, SBA No. SIZ-4708 (2005). L&J argues contract management is ancillary to a contract's primary purpose. *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575 (2014). L&J also points to *Shoreline Services.*, as a controlling precedent here, where a contractor providing only management for a refuse removal contract was held not to be performing the primary and vital functions of the contract.

L&J further argues the Area Office properly found the solicitation's primary and vital requirements are not managing and designing a refuse and recycling program. L&J argues the solicitation does not include a requirement that the contractor devise a management solution for trash collection and disposal, because evaluation factor 2, "Management Approach", does not discuss managing the government's refuse program, but requires a feasible approach for managing the entire project.

As in *Shoreline Services*, the contractor has no involvement in deciding how materials are collected and placed into containers by the government, and little discretion to design its own approach for performance. Similar to *Shoreline Services*, the solicitation does not include any discussion of managing or designing a refuse and recycling program, instead requires the establishment of a minimum collection frequency. This solicitation is a commercial items procurement, as was *Shoreline Services*. This contract calls for the subcontractor to perform all trash and recycling collections. Appellant's proposal states it will control and manage the contract, as did the challenged concern in *Shoreline Services*.

L&J concludes Appellant was unduly reliant on Subcontractor for this contract, because Subcontractor will perform the primary and vital requirements of refuse and recycling collection.

E. CO's Response

On October 21, 2015, the CO filed her response to the appeal.

The CO explains that refuse collection and disposal is an unquestioned aspect of the contract, but "the prime contractor would be responsible for the many requirements associated with the management of the refuse stream." CO's Response, at 1. According to the CO, the contract's primary and vital requirements extend beyond refuse collection, with the "many management requirements stated in the solicitation" properly characterized as primary and vital in order for the Navy to obtain the proper refuse collection it seeks. *Id.* The CO states Appellant's proposal shows that the planning and management of the contract is under the control of Appellant, not Subcontractor. Appellant is also responsible for quality assurance, communicating with the government, inspecting, and safety and sustainability duties. Security requirements for employees is also under Appellant's purview, while the PWS requires the contractor to manage the entire work force.

The CO maintains this contract is more than the pickup and disposal of garbage, as Appellant will perform the essential task of daily management of the contract. The CO adds that over XX% of the work required to perform this contract will be performed by Appellant. *Id.* at 3. Offerors were evaluated based on their capability to perform the contract and whether the offeror could perform all of the solicitation's requirements, not just refuse collection and disposal. Regarding subcontractor work, the CO explains that subcontractors are not prohibited, and here Appellant's use of a subcontractor allowed it to propose "services at a lower price through use of a subcontractor that serves the Navy's needs for cost effective collection of refuse and recycling." *Id.* In addition, the CO argues the Area Office ignore the management requirements of the PWS that are part of any relevant project experience analysis. The contractor will not only have to collect and dispose of waste, but must comply with all the management requirements of the solicitation. This is supported by the solicitation's evaluation Factor 2— Management Approach. Offerors are required to propose a managing approach for controlling the entire project, which includes a detailed management plan. *Id.*

The CO disputes the Area Office's determination that contract management, while important, is performed on every contract. The CO states that it seeks a contractor that will "manage the refuse stream and not government personnel." *Id.* at 4. The CO adds that part of the evaluation was finding an offeror with the ability to provide more than adequate high quality performance, which Appellant's proposal did by proposing "services that would better serve the goals of NAVFAC and therefore meeting the acceptability rating as determined by the Navy evaluation team and source selection authority." *Id.* The CO concludes that Appellant offered a high quality management and "proposed a committed relationship with the incumbent recycling contractor to lease the required containers, and provide drivers and trucks." *Id.* However, the solicitation is more than just refuse collection and disposal because the solicitation did not provide an exact schedule, instead opting to provide a number of dumpsters and locations where the collection and disposal would take place. The solicitation's goal was to seek management of a refuse stream by small businesses, and the CO reasons that this management work encompasses XX% of the overall work required. *Id.* at 5.

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. Discussion

Under SBA regulations, 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). In determining whether the ostensible subcontractor rule is violated, the area office must examine all aspects of the relationship, including the terms of the proposal and any agreements, between the prime contractor and its subcontractor. *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). OHA has previously stated that 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 PWS clearly states “[t]he intent of this solicitation is to provide NSA Crane and Glendora test facility with refuse and recycle services.” The Area Office thus properly found that the contract's primary and vital requirements are the collection and processing of refuse and recyclable waste. This is the principal purpose of the solicitation and the crux of any ostensible subcontractor analysis. The Area Office found Appellant would not be providing the personnel responsible for collecting and processing the waste, and that managing the contract was not the primary and vital contract requirement, despite Appellant's claims otherwise. I agree. Appellant is leasing the containers from its subcontractor, who additionally is providing the trucks and drivers in order to perform the contract. The solicitation is clear in that it seeks a contractor that will collect and process refuse and recyclable waste, not that it seeks a contractor to manage those responsible for performing these services. Appellant has failed to show the contract is one for management of the services, not the actual services themselves.

Here, the record is clear that the subcontractor is providing the trucks, drivers, containers, and facilities for the performance of the contract, while Appellant provides the management. However, as OHA has previously stated, “it is the goods or services which the procuring agency actually seeks to acquire, and not those goods or services which the contractor must perform or provide in order to deliver those goods or services, which determine what the primary and vital tasks of the contract are.” *Size Appeal of Anadarko Industries, LLC*, SBA No. SIZ-4708, at 10 (2005), *recons. denied*, SBA No. SIZ-4753 (2005) (PFR). The CO and Appellant's attempts to paint this solicitation as one for management are not substantiated by the record.² Of course the contractor must manage this contract, as all contracts require management. But here the solicitation requires the contractor to provide the personnel and equipment to perform the refuse and recycling collection and processing. The Navy seeks the refuse and recycling services for the identified installations, not an overall plan for refuse and recycling. It is without question that the primary and vital requirements are not to provide management of refuse collection and process. The management duties that the CO and Appellant highlight, evidenced by the Management Approach evaluation factor, while important, are simply those that must be performed for all contracts.

Appellant's assignments of error in the size determination are largely based on its contention that management is the primary and vital task of this contract, and are expressions of

² OHA recognizes that some weight can be given to a CO's remarks regarding the primary and vital requirements, but it has also made clear that a contract's primary and vital requirements are ascertained from the solicitation itself, and not from comments by the procuring agency. *Size Appeal of iGov Techs. Inc.*, SBA No. SIZ-5359, at 6, 13 (2012).

opinion, rather than factual assertions. As such, I must reject these claims of error because they are not supported by the record. Further, even if Appellant is in compliance with the limitations on subcontracting, OHA has explained that “a concern may contravene the ostensible subcontractor rule even if it complies with limitations on subcontracting.” *Size Appeal of Red River Computer Co., Inc.*, SBA No. SIZ-5512, at 16 (2013). Appellant argues that it will be responsible for XX% of the cost of labor for managing the contract. However, OHA has found violation of the ostensible subcontractor rule even when the prime contractor is responsible for 53% of contract services. *Size Appeal of Professional Security Corporation*, SBA No. SIZ-5548 (2014).

Appellant further contends, and is supported by the CO, that its proposal exceeded the solicitation's performance objective, thus adding credence to its contention that implementing a management program is the primary and vital requirement. *Supra*, Section II.C & E. Once again, I disagree. OHA does not review proposals in order to determine whether it meets or exceeds a solicitation's performance objective. OHA's review of a proposal is to determine whether the subcontractor is performing the primary and vital requirements. It is clear that here, the subcontractor is responsible for collecting and processing of refuse and recyclable waste, the requirements the Area Office, and now OHA, have found to be the contract's primary and vital requirements.

Accordingly, I find the principal purpose of this procurement is the collection and processing of refuse and recyclable waste, and that Appellant's proposal violates the ostensible subcontractor rule, because its subcontractor is performing all the primary and vital functions. It is undeniable that Appellant is not performing any of the collection or processing duties. Instead, Appellant relies upon its subcontractor to perform these duties. Appellant is contributing the contract management. Despite Appellant's argument to the contrary, the situation here is very similar to that of *Shoreline Services*. There, OHA held a prime contractor does not perform the primary and vital requirements merely by supervising subcontractors in their performance of work. *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013); citing *Size Appeal of Competitive Innovations LLC*, SBA No. SIZ-5369 (2012), *recons. denied*, SBA No. SIZ-5392 (2012) (PFR) Similarly, in *Size Appeal of Onopa Management Corp.*, SBA No. SIZ-5302, OHA found a violation of the ostensible subcontractor rule when the subcontractor, similar to the facts here, was providing the collection, transportation, and disposal of trash in a refuse disposal contract.

Although Appellant is responsible for all management duties, characterizing this contract as one for management instead of refuse services is defeated by a simple reading of the solicitation. As stated previously by OHA, allowing “a prime contractor to merely supervise its subcontractor's performance—while performing no part itself—of the contract's primary and vital requirements” is a violation of the ostensible subcontractor rule. *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013) Therefore, I find the Area Office did not err in finding that Appellant's subcontractor is responsible for the performance of the contract's primary and vital requirements, in clear violation of the ostensible subcontractor rule. As a result, Appellant and its subcontractor are affiliated as joint venturers for this contract, and their sizes must be aggregated for the purpose of determining size. Because Subcontractor is a large business, Appellant is not an eligible small business for this procurement.

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