

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Greener Construction Services, Inc.,

Appellant,

Appealed From
Size Determination No. 2-2016-016

SBA No. SIZ-5782

Decided: October 12, 2016

APPEARANCE

Kenneth K. Sorteberg, Esq., Huddles Jones Sorteberg & Dachille, LLP, Columbia, Maryland, for Appellant

DECISION¹

I. Introduction

On July 20, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2016-016 concluding that Greener Construction Services, Inc. (Appellant) is affiliated with its subcontractor, EnviroSolutions, Inc. (ESI), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant contends that the size determination is clearly erroneous, and requests that the SBA Office of Hearings and Appeals (OHA) reverse. 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 within 15 days after 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 offered Appellant the opportunity to propose redactions to the decision, but no redactions were requested. Therefore, OHA now issues the decision for public release.

II. Background

A. Solicitation and Protest

On September 10, 2015, the U.S. Army Contracting Command (Army) issued Request for Proposals (RFP) No. W911QX-15-T-0130 for solid waste diversion, disposal, and related waste stream management utility services at the Adelphi Laboratory Center (ALC) and the Blossom Point Research Facility (BPRF). The Contracting Officer (CO) set aside the procurement entirely for 8(a) Business Development program participants, and assigned North American Industry Classification System (NAICS) code 562111, Solid Waste Collection, with a corresponding size standard of \$38.5 million average annual receipts. The RFP was structured as a procurement of commercial items pursuant to Federal Acquisition Regulation part 12. Offers were due September 15, 2015.

According to the Performance Work Statement (PWS), the contractor would “dispose of refuse from ALC and BPRF and reduce quantities of material disposed of in landfills by increasing diversion by any legal process that avoids landfill disposal.” (PWS, § C.2.) The contractor would provide “all personnel, equipment, supplies, facilities, transportation, tools, materials, and supervision” necessary to perform the required services. (*Id.* § C.3.1.1.) The recyclable materials to be collected and disposed of would include mixed paper, commingled materials, cardboard, and scrap metal. (*Id.*) In addition to providing collection containers, the contractor would be responsible for their appropriate placement. (*Id.* § C.3.1.8.) In addition, the contractor would provide the Army monthly reports, a pick-up schedule, a safety program plan, a quality control plan, damage reports, training to “explain [] the procedures and benefits of diversion”, and a compost plan. (*Id.* § C.4.) The only required key personnel was a contract manager “who will be responsible for overall management of the work performed under this contract.” (*Id.* § C.6.1.)

On September 25, 2015, the CO announced that Appellant was the apparent awardee. On October 20, 2015, RJ's Disposal Services, Inc. (RDS), an unsuccessful offeror, protested Appellant's size. RDS claimed that Appellant is affiliated with ESI and Eastern Trans-Waste of Maryland, Inc. (ETW), a subsidiary of ESI, under the ostensible subcontractor rule. The CO forwarded the protest to the Area Office for review.

In response to the protest, Appellant noted that ETW holds no ownership interest in Appellant, and has no power to control Appellant. With regard to the instant procurement, Appellant stated that ETW will be a subcontractor to Appellant, but not a joint venture partner. (Protest Response, at 1.) Appellant maintained that it “intends to handle all of the contract management, including control of operations, customer service, billings, etc.”, with ETW's role “intended to be related solely to trucking.” (*Id.* at 2.) Appellant further stated that “[a]s soon as this protest is resolved, [Appellant] intends to take ownership of the containers required for this solicitation.” (*Id.*)

B. Proposal and Teaming Agreement

Appellant's proposal identified itself as the prime contractor, and ESI as Appellant's partner in performing the required work. According to the proposal, "ESI and [Appellant] have partnered on many projects in the past." (Proposal at 12.²) No other subcontractors or teaming partners were mentioned in the proposal. The proposal identified five proposed key personnel at ALC. This list was comprised of Appellant's President/CEO and four employees of ESI. (*Id.* at 17.)

The proposal stated that "[d]uring the initial month of the contract period, ESI supervisory personnel will be onsite to assist in the training of drivers to locate and service the containers." (*Id.* at 18). Any issues "requiring immediate attention are reported immediately to the ESI Contract Manager." (*Id.* at 20.) The proposal indicated that the District Manager, an ESI employee, "will confirm each day that the driver personnel and their equipment are available and operating as required." (*Id.* at 18.) Further, "ESI dispatch will monitor the progress of the drivers throughout each operating day and will deploy additional resources to address any situations that may occur." (*Id.*) The proposal stated that "ESI will provide front load containers as specified in the solicitation", and that "ESI will return all containers to their original location after servicing." (*Id.* at 18, 24.) The proposal included pictures of a "[t]ypical ESI Front Load truck" and a "[t]ypical ESI Roll off truck". (*Id.* at 19.) According to the proposal, "[t]ruck maintenance and repairs are managed by ESI's shop manager." (*Id.* at 24.) The proposal stated that "ESI has implemented a comprehensive quality control and safety program throughout all operations." (*Id.* at 20.)

The record includes a Teaming Agreement between Appellant and ESI for the procurement at issue. There, Appellant and ESI agreed that ESI would act as Appellant's subcontractor. (Teaming Agreement ¶ 2.1.) The Teaming Agreement stipulated that "[t]he team is comprised solely of [Appellant] and [ESI]. [Appellant] shall not add any other third party to the team without the prior written consent of [ESI]." (*Id.* ¶ 2.3.) In addition, "[Appellant] shall not solicit from any third party the scope of work that [ESI] is proposed to perform, unless the [Army] will not approve [ESI] as a subcontractor, despite the Parties' best efforts to have [ESI] approved." (*Id.* ¶ 2.2.)

C. Size Determination

On July 29, 2016, the Area Office issued Size Determination No. 2-2016-016 finding that Appellant is not a small business for the instant procurement.

The Area Office determined that the primary and vital requirements of the contract "are the Diversion, Disposal, and related waste stream management utility services of Solid Waste." (Size Determination, at 5.) The Area Office observed that prior OHA cases have held that a prime contractor cannot comply with the ostensible subcontractor rule merely by overseeing a subcontractor in its performance of the work. (*Id.*; citing *Size Appeal of Hamilton Alliance, Inc.*,

² Most of Appellant's proposal was not page numbered, so OHA assigned page numbers beginning from the first page of the document.

SBA No. SIZ-5698 (2015) and *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013).) Here, the contract calls for the diversion and disposal of waste, and the operation of a waste stream process. “Trucking is a vital component of this objective”, and trucking will be handled entirely by Appellant's subcontractor, ESI. (*Id.*)

Similar to the facts in *Shoreline Services*, Appellant here will provide no trucks or drivers to perform the required services, so Appellant is unable to perform a primary and vital requirement without ESI. Even if Appellant were to take ownership of the containers used to transport the waste, as Appellant claimed in response to the protest, “ESI would *still* be performing a vital requirement of the contract, a requirement that [Appellant] cannot complete on its own and relies on ESI to perform.” (*Id.* at 6, emphasis in original.) The Area Office concluded that trucking is an essential part of this contract and simply supervising these tasks, without performing any of the actual work, is insufficient to show Appellant will perform the contract's primary and vital requirements. Therefore, Appellant and ESI are affiliated under the ostensible subcontractor rule.

After examining Appellant's and ESI's annual receipts, the Area Office determined that ESI is not a small business. (*Id.* at 7.) Thus, Appellant and ESI together exceed the applicable size standard.

D. Appeal

On July 29, 2016, Appellant filed the instant appeal. Appellant disputes the Area Office's findings and requests that OHA reverse the size determination.

Appellant states it has no exclusive arrangements with ESI, and only utilized ESI for the instant RFP because of its pricing. (Appeal at 3.) Appellant regularly conducts business with other haulers besides ESI, and for the instant procurement Appellant will engage Joseph Smith & Sons (JSS) for metal waste and Georgetown Paper (GP) for cardboard. (*Id.*) Appellant adds that, as explained in its protest response, Appellant plans to purchase the containers needed for this contract “as soon as this size protest is resolved.” (*Id.*)

Appellant contends that, once Appellant acquires the requisite containers, Appellant will be “responsible for the *collection* of waste”, because ESI will merely transport Appellant's containers to and from the waste disposal location. (*Id.* at 4-5, emphasis in original.) Moreover, JSS and GP also will perform hauling duties, so ESI will be “just one of three haulers” utilized by Appellant for this effort. (*Id.* at 5.)

Appellant urges that “because the primary and vital requirements would be divided up among several entities”, Appellant is not reliant upon ESI to perform the contract. (*Id.* at 5-6.) As a result, the Area Office erred in concluding that Appellant is affiliated with ESI under the ostensible subcontractor rule. (*Id.* at 6.)

E. New Evidence and Supplemental Appeal

Between August 8, 2016, and August 16, 2016, Appellant filed several exhibits to its appeal and supplemented its appeal. Appellant submitted Exhibits B through D without any explanation as to how the documents support Appellant's claim that the size determination was erroneous. Exhibit B is an e-mail from Wastequip, Inc. dated August 1, 2016, in which Appellant is quoted a price for containers to be used at ALC. Exhibits C and D are letters from SBA's Baltimore District Office confirming Appellant's continued participation in the 8(a) program.

On August 16, 2016, the date of the close of record, Appellant filed a supplement to its appeal in which Appellant alleged that RDS is affiliated with several other concerns, and therefore lacked standing to bring a size protest against Appellant. Appellant attached Exhibits E through L in support of these contentions. Appellant does not dispute that RDS was an offeror on the instant procurement, and does not argue that RDS was ever excluded from the competition.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

I find no merit to this appeal. Appellant's principal argument is that the Area Office should have considered that Appellant will engage JSS and GP, in addition to ESI, to perform waste hauling, and should have considered that Appellant will own the containers in which waste is transported. The problem for Appellant is that, pursuant to 13 C.F.R. § 121.404(d), Appellant's compliance with the ostensible subcontractor rule is determined as of the date of final proposal revisions. In the instant case, Appellant submitted its proposal on September 15, 2015, and there were no subsequent proposal revisions. *See* Section II.A, *supra*. As of September 15, 2015, Appellant's proposal made no mention of JSS, GP, or any other subcontractors besides ESI, and the Teaming Agreement between Appellant and ESI precluded Appellant from adding "any other third party to the team without the prior written consent of [ESI]." Section II.B, *supra*. Further, Appellant's proposal stated that "ESI will provide front load containers as specified in the solicitation". *Id.* Accordingly, the arguments advanced by Appellant on appeal are inconsistent with, and contradicted by, Appellant's proposal and Teaming Agreement.

OHA has repeatedly explained that changes of approach occurring after the date of final proposals do not affect a firm's compliance with the ostensible subcontractor rule because size is determined as of the date of final proposal revisions. *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575, at 8 (2014); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011); *Size*

Appeal of Earthcare Solutions, Inc., SBA No. SIZ-5183, at 6 (2011) (“The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by [the offeror’s] proposal (and anything submitted therewith, including teaming agreements). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant.”). I therefore conclude that the Area Office properly based its decision on Appellant’s proposal and Teaming Agreement, while ignoring any planned changes of approach occurring after September 15, 2015.

Appellant’s contention that RDS lacked standing to file the underlying size protest is equally meritless. SBA regulations permit that, on a competitive 8(a) set aside, a size protest may be filed by “[a]ny offeror that the contracting officer has not eliminated from consideration for any procurement related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range.” 13 C.F.R. § 121.1001(a)(2)(i). Here, Appellant does not allege, and the record contains no reason to believe, that RDS was not an offeror on the procurement or that RDS was ever eliminated from the competition. Hence, RDS had the right to protest Appellant’s size pursuant to 13 C.F.R. § 121.1001(a)(2)(i).

IV. Conclusion

The ostensible subcontractor rule is violated when a prime contractor will have no meaningful role in performing the contract’s primary and vital requirements. *E.g.*, *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). In this case, based on Appellant’s proposal and Teaming Agreement, the Area Office appropriately found that Appellant would rely upon ESI to perform the primary and vital contract requirements. As a result, 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).

KENNETH M. HYDE
Administrative Judge