

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

The Frontline Group,

Appellant,

RE: DAK Resources, Inc.

Appealed From

Size Determination No. 3-2017-019

SBA No. SIZ-5835

Decided: June 14, 2017

APPEARANCES

Joseph A. Whitcomb, Esq., Whitcomb, Selinsky, McAuliffe, PC, Denver, Colorado, for Appellant

Eric S. Crucius, Esq., Elizabeth N. Jochum, Esq., Rodney M. Perry, Esq., Holland & Knight LLP, Tysons, Virginia, for DAK Resources, Inc.

DECISION¹

I. Introduction and Jurisdiction

On March 8, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2017-019 finding that DAK Resources, Inc. (DAK) is a small business for the subject procurement. The size investigation was initiated by the Area Director after the Area Office dismissed a size protest filed by The Frontline Group (Appellant) as untimely. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted and the matter is remanded to the Area Office for further review.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more requests for redactions and considered such requests 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 prior to receiving the size determination but within fifteen days of learning its outcome, so the appeal is timely.² 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. RFP

On September 23, 2016, the U.S. Department of the Air Force (Air Force), Air Education and Training Command, issued Request for Proposals (RFP) No. FA3016-16-R-0072 for alteration and fitting of uniforms. (RFP, Attachment 3, §§ 1 and 5.) The RFP contemplated the award of a single indefinite-delivery requirements contract with a one-year base period and two one-year options. (*Id.* §§ 1.10.2 and 1.10.3.)

The RFP's Performance Work Statement (PWS) required the contractor to “designate a Contract Manager and alternate” who “will be the central point of contact for the [Air Force] and shall have full authority to act for the [c] ontractor on contractual matters relating to the daily operation of this contract.” (*Id.* § 1.4.2.) In addition, the “[c]ontractor shall provide a sufficient staff of qualified personnel to perform alterations and fittings.” (*Id.* § 1.4.5.) The RFP also required the contractor to “develop and maintain an effective quality control program documented in a Quality Control Plan (QCP).” (*Id.* § 1.5.)

The Air Force conducted the acquisition under Federal Acquisition Regulation subpart 13.5, Simplified Procedures for Certain Commercial Items, stating that it would award the contract to the offeror with the lowest price technically acceptable proposal. (RFP, at 41.) Technical acceptability would be assessed based on two subfactors: (1) Quality Control Plan; and (2) Continuation of Essential Contractor Services Plan. (*Id.* at 42-43.) Technical proposals were limited to a maximum of 40 pages. (*Id.* at 38.)

The RFP instructed offerors to propose unit prices for various services, based on estimated quantities provided by the Air Force.³ Offerors were to enter their unit pricing into the following table:

² Appellant explains that when it inquired into the status of the Area Director's protest on March 10, 2017, the Area Office responded that it “had determined that DAK was small and had considered violations of the ostensible subcontractor rule.” (Appeal at 2.) However, because Appellant's protest had already been dismissed, the Area Office did not transmit a copy of the size determination to Appellant. (*Id.*) Appellant filed its appeal with OHA on March 24, 2017.

³ The estimates for the option years are the same as those for the base period.

	Service	Service Quantity	Service Unit	Service Unit Price	Service Total Amount
1	All garments fitted by tailor	410,004	Each	\$	\$
2	Mark/Cut/Hem trousers, slack skirts	123,000	Each	\$	\$
3	Waist seat let-out/take-in trousers	7,200	Each	\$	\$
4	Double dart waist/seat	72	Each	\$	\$
5	Let out/take in side or back seams	4,800	Each	\$	\$
6	Shorten/lengthen sleeves of Service Coat	38,400	Each	\$	\$
7	Hem service jacket sleeve liner	3,000	Each	\$	\$
8	Shorten bottom of service coat	120	Each	\$	\$
9	Shorten/Lengthen Sleeves AWC	5,400	Each	\$	\$
10	Shorten bottom of all-weather coat	480	Each	\$	\$
11	Shorten/Lengthen shirt/blouse sleeves	2400	Each	\$	\$
12	Alter side seams shirt/blouse	2,400	Each	\$	\$
13	Adjust/Move buttons	3,600	Each	\$	\$
14	Sti[t]ch USAF and Name Tape (Set)	164,000	Each	\$	\$
15	Shorten/Lengthen sleeves ABU/RABU Coat	3,600	Each	\$	\$
16	Special measurements	144	Each	\$	\$
17	Miscellaneous minor alterations	6,000	Each	\$	\$
18	Weight Gains/Losses	720	Each	\$	\$
19	Service beyond normal operating hours	48	Each	\$	\$
20	Add padding to service coat	2,280	Each	\$	\$
21	Alter trousers/slacks Inseam	48	Each	\$	\$
22	Alter side seams ABU/RABU	3,600	Each	\$	\$
23	Shorten/Lengthen Sleeves LightWeight Jacket	72	Each	\$	\$

	CLIN 0001	Estimated Amount (12 LOTS)	\$
		UNIT PRICE (Each LOT)	\$

(RFP, Attachment 1.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 811490, Other Personal and Household Goods Repair and Maintenance, with a corresponding size standard of \$7.5 million average annual receipts. Proposals were due October 27, 2016. DAK and Appellant submitted timely proposals, self-certifying as small businesses.

B. DAK's Proposal

DAK stated in its proposal that it has teamed with Tech Systems, Inc. (TSI) to perform the contract. DAK represented that TSI currently is performing military uniform alterations services for the U.S. Marine Corps, and also was previously the incumbent for the subject Air Force contract from 2003 — 2013. (Proposal, Vol. II, § 1.0.) However, due to the size standard assigned to the RFP, “[xxxx].” (*Id.*) Throughout the proposal, DAK referred to itself and TSI collectively as “Team DAK.”

As part of its Quality Control Plan, DAK proposed assigning a “Team DAK employee to serve as [xxxx].” (*Id.*)

DAK's proposal did not describe which functions that would be performed by DAK and TSI respectively, nor delineate how staffing would be divided between the companies.

C. Teaming Agreement

On October 11, 2016, DAK and TSI entered into a teaming agreement, under which DAK would be the prime contractor and TSI the principal subcontractor for the instant procurement. (Teaming Agreement at 1.) “Awarded work under this program”, the teaming agreement provided, “may include any combination of work specified in the RFP. The specific areas of support will be finalized once the solicitation has been released.” (*Id.*, Attachment A.) The teaming agreement continued, “[i]t is understood that DAK will not be using other subcontractors for work under this program and any share offer in this section will comply with the . . . Limitations on Subcontracting.” (*Id.*) As a result, “[w]ork will be offered to [TSI] with the intent of achieving a workshare of . . . [less than 50%].” (*Id.*) The teaming agreement also contained a provision requiring TSI to “provide proposal support consisting of input into project execution strategy, previous experience, past performance information, and if required, resumes of personnel along with Technical volume documentation, and pricing support.” (*Id.*)

D. Protest and Size Investigation

On February 2, 2017, the CO announced that DAK was the apparent awardee. Appellant acknowledged receipt of this notification on February 7, 2017. In a post-award debriefing,

Appellant learned that its proposal was technically acceptable but not lowest-priced. (Letter from B. Jewett to R. Levine (Feb. 13, 2017).)

On February 15, 2017, Appellant protested DAK's size. Appellant argued that it had standing to protest because it was an offeror on the subject RFP and is the incumbent contractor. (Protest at 2.) Appellant maintained that DAK is not an eligible small business for the instant procurement because TSI will perform the contract's primary and vital requirements, in contravention of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). To support this charge, Appellant asserted that TSI was previously the incumbent contractor, "DAK has no public record of past performance in alterations", and TSI "has performed millions of dollars in government contracts performing clothing alterations." (*Id.* at 3.)

On February 17, 2017, the Area Office dismissed Appellant's protest as untimely. (Size Determination No. 3-2017-018.) The Area Director, though, adopted the protest allegations and initiated her own size investigation, pursuant to 13 C.F.R. § 121.1001(a)(1)(iii). (Letter from C. Thompson to D. Moorefield (Feb. 17, 2017).)

On February 22, 2017, DAK responded to the protest. DAK argued that it would perform the majority of the contract's primary and vital requirements, which it identified as alterations and fitting services, repairs of clothing items, issuing and receipt of items, and stock inventory. Further, "overall management, control and staffing of the contract in accordance with the limitation on subcontracting regulation remain in the favor of DAK." (Protest Response at 16, citing *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5609 (2014).)

On February 24, 2017, the Area Office requested a detailed breakdown of the functions to be performed by DAK and TSI. (E-mail from K. Silvia to D. Moorefield (Feb. 24, 2017).) DAK's owner initially responded "I am the prime contractor and therefore will handle all the administration, financial, and operation of the contract. I will have [more than half] of the personnel and [TSI] will have [less than half] of the personnel. [xxxx] will work for us while [xxxx] will work for [TSI]." (E-mail from D. Moorefield to K. Silvia (Feb. 24, 2017).) The Area Office requested additional detail regarding TSI's "tasks in the contract beside[s] providing [xxxx]." (E-mail from K. Silvia to D. Moorefield (Feb. 24, 2017).) DAK responded that DAK will "provide [xxxx] and [xxxx] for actual contract execution" and that "TSI will provide [xxxx] and a complement of [xxxx] and [xxxx] who will be under the operational control of [DAK]." (E-mail from D. Moorefield to K. Silvia (Feb. 25, 2017).) "[xxxx]," DAK represented, "will be tracking production and serve as the assistant site manager and will be TSI's senior representative on the contract and will report to the DAK site manager." (*Id.*) DAK indicated that a "contracting staffing document shows the breakout of DAK and [TSI] [employees]." (*Id.*)

E. Size Determination

On March 8, 2017, the Area Office issued Size Determination No. 3-2017-019 finding that DAK is a small business. The Area Office explained that Mr. David Moorefield is DAK's president and sole owner, so he alone has the power to control DAK. Mr. Moorefield and his spouse have no other business interests, and they have no familial relationship with the owner of TSI. (Size Determination at 5.)

The Area Office then determined that DAK is not in violation of the ostensible subcontractor rule because DAK will perform the contract's primary and vital requirements and it is not unduly reliant on TSI. Based on comments from the CO, the Area Office found that the contract's primary and vital requirements are “services related to the fitting of and alterations to United States Air Force uniforms.” (*Id.*) The Area Office observed that, according to the teaming agreement, DAK will perform [the majority] of the work for the contract. (*Id.*) DAK will also provide [xxxx]. Meanwhile, TSI “will provide [xxxx].” (*Id.*) Further, TSI is not the incumbent contractor. (*Id.*) As a result, DAK is not in violation of the ostensible subcontractor rule and is not affiliated with TSI. (*Id.* at 5-6.)

The Area Office then calculated DAK's size. DAK's average annual receipts for fiscal years 2013 — 2015 do not exceed the \$7.5 million standard, so DAK is a small business. (*Id.* at 6.)

F. Appeal

On March 24, 2017, Appellant filed the instant appeal. Appellant argues that the size determination is clearly erroneous and should be reversed.

Appellant contends that DAK has violated the ostensible subcontractor rule because TSI is the previous incumbent, and “DAK has no public record of past performance in alterations.” (Appeal at 6.) TSI, on the other hand, “has performed millions of dollars in government contracts performing clothing alterations.” (*Id.*)

Appellant argues that the Area Office incorrectly found that TSI is a small business. Appellant notes that TSI recertified its size in the System for Award Management (SAM) on March 1, 2017, and in doing so, did not certify as a small business for any NAICS code with a size standard at or below \$7.5 million. Appellant asks that OHA “[r]everse the Area Office's determination that [TSI] was small for NAICS [code] 811490 at the time DAK submitted its proposal.” (*Id.* at 8.)

G. DAK's Response

On April 21, 2017, DAK responded to the appeal. DAK contends that the size determination is correct and should be affirmed.

DAK argues that it will perform the majority of the contract work and will manage contract performance. “TSI's role is limited to providing a minority of [xxxx] that will be performing under the contract, along with [xxxx].” (Response at 6.) TSI is not the incumbent contractor and is a small business under the \$7.5 million size standard. (*Id.* at 7.) In addition, DAK cannot be unduly reliant on TSI's experience because past performance was not one of the RFP's evaluation criteria. (*Id.*) OHA case law, then, does not support finding DAK in violation of the ostensible subcontractor rule. (*Id.* at 5-7, citing *Size Appeal of Logistics & Techs. Servs., Inc.*, SBA No. SIZ-5482 (2013).)

H. Supplemental Appeal

On April 18, 2017, after reviewing the record and size determination under the terms of a protective order, Appellant moved to supplement its appeal. Appellant argues that the record does not support, and in some cases contradicts, the Area Office's findings. (Supp. Appeal at 1.)

Appellant asserts that DAK violates the ostensible subcontractor rule because it is unduly reliant on TSI for funding of payroll and benefits. (*Id.* at 2-3, citing *Size Appeal of J.W. Mills Mgmt.*, SBA No. SIZ-4955 (2008).) Appellant notes that, according to DAK's owner, TSI will “[xxxx].” (*Id.* at 2, quoting E-mail from D. Moorefield to K. Silvia (Feb. 25, 2017).) Thus, “[i]ncluding [DAK's owner], DAK will be supplying [xxxx] of the total number of employees required to perform this contract.” (*Id.*) The Air Force has estimated that 42 personnel will be used in the performance of this contract. (*Id.*) As a result, Appellant reasons, a large majority of the workforce will be TSI employees, such that “TSI will be funding [more than 50%] of the annual salary required for the performance of this contract.” (*Id.*)

DAK is also reliant on TSI for subject matter expertise and proposal preparation, Appellant claims. Appellant notes that DAK's proposal refers to “Team DAK” throughout, and the teaming agreement states that “TSI will provide proposal support.” (*Id.* at 3-4.)

In addition, TSI is performing the contract's primary and vital requirements. Because TSI is paying the salaries of [the majority] of the employees performing fitting and alterations services, DAK is merely managing TSI's performance of the primary and vital requirements. DAK, then, is in violation of the ostensible subcontractor rule. (*Id.* at 4-5, citing *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799 (2016).)

Appellant criticizes the Area Office for giving only “a cursory review of whether DAK was performing the primary and vital requirements of the contract” and likewise providing no “meaningful discussion as to whether DAK was unduly reliant on TSI for performance of the contract.” (*Id.* at 5.)

I. Supplemental Response

On May 4, 2017, DAK responded to the supplemental appeal. DAK argues that Appellant has not met its burden of proving that the size determination is clearly erroneous.

Appellant's contention that DAK is unduly reliant on TSI lacks merit because it “is entirely based on erroneous and immaterial factual conclusions.” (Supp. Response at 2.) For example, TSI will not provide all [xxxx], as Appellant argues. Instead, “TSI will provide [xxxx].” (*Id.* at 3-4.) Further, DAK will not merely provide [xxxx] of the total contract workers, but “will employ [the majority] of all Contract workers.” (*Id.* at 4.) Nor was DAK unduly reliant on TSI for proposal preparation because, as the teaming agreement makes clear, DAK would be responsible for preparing the proposal, and TSI's role is limited to providing support. (*Id.*)

As for the complaint that the proposal refers to DAK and TSI jointly as “Team DAK,” such references do not indicate unusual reliance. (*Id.* at 5, citing *Size Appeal of InGenesis, Inc.*,

SBA No. SIZ-5436 (2013).) DAK highlights that it does not fall afoul of the factors discussed in *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017). Appellant's failure to address these factors suggests that Appellant itself recognizes that DAK is not unusually reliant on TSI. (*Id.* at 6.)

DAK contends that it will perform the contract's primary and vital requirements. Contrary to Appellant's claim that TSI will employ [xx]% of the contract workers, TSI in actuality will provide [less than half] of contract personnel. Because DAK and TSI are performing the same type of work, but DAK will provide the majority of personnel, DAK is performing the primary and vital requirements. (*Id.* at 6-7, citing *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798 (2016).)

DAK rejects the notion that the size determination was superficial, arguing instead that “the Area Office properly considered the full scope of DAK and TSI's relationship—including, but not limited to, the teaming agreement between the parties. The Area Office requested, and was provided, sufficient information to determine that DAK will perform the primary and vital requirements of the Contract.” (*Id.* at 8.)

J. Supplemental Comments

On May 11, 2017, OHA reopened the record and invited the parties to submit comments as to whether TSI is a “similarly situated entity” as DAK pursuant to recent revisions to 13 C.F.R. §§ 121.103(h)(4) and 125.1.

DAK submitted comments on May 19, 2017. DAK asserts that “TSI will perform [less than half] of the contract work and almost all contract work falls under NAICS code 811490,” which has a \$7.5 million size standard. (DAK's Comments at 2.) [xxxx]. (*Id.* at 3.) Therefore, DAK maintains, DAK and TSI are similarly situated for purposes of this procurement.

On May 25, 2017, Appellant submitted comments. Appellant highlights that TSI does not currently represent itself as a small business for any size standard under \$18 million. (Appellant's Comments at 2.) Moreover, while DAK focuses on the revenues of TSI itself, “TSI could be ‘other than small’ by some measure other than its three most recent tax return averages, such as affiliation based on stock ownership, identity of interests, or common management.” (*Id.* at 1.) Appellant urges OHA to conclude that TSI is not a small business and that TSI and DAK are not similarly situated.

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

The record in this case is not sufficient to conclude that DAK, the prime contractor, will self-perform a majority of this contract. As a result, I find it appropriate to remand this matter to the Area Office for further review.

As discussed above, DAK's proposal was silent as to the division of labor and contractual responsibilities between itself and TSI. Section II.B, *supra*. Although the teaming agreement stated that TSI would be assigned [a minority] of the work, DAK itself later undermined this representation in correspondence with the Area Office by suggesting that TSI would contribute the bulk of the contract workforce. Specifically, DAK remarked that “TSI will provide [xxxx] and a complement of [xxxx] and [xxxx] who will report to [DAK].” Section II.D, *supra*. Moreover, apart from contract management, DAK identified only [xxxx] and [xxxx] as DAK's own personnel, notwithstanding that the Area Office repeatedly requested a detailed breakdown of the functions to be performed by DAK and TSI. *Id.*

As the challenged firm, it was DAK's responsibility to establish that it is a small business. 13 C.F.R. § 121.1009(c). Accordingly, while DAK's comments do not rule out the possibility that both DAK and TSI would contribute personnel to perform the contract, it is unclear from the existing record whether DAK would self-perform a majority of the contract's primary and vital requirements. Insofar as TSI would primarily perform the contract with minimal oversight or participation from DAK, such an approach is plainly contrary to the ostensible subcontractor rule, as it is well-settled that a prime contractor cannot comply with the ostensible subcontractor rule merely by overseeing a subcontractor in its performance of the work. *E.g.*, *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698 (2015); *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466 (2013). Thus, further investigation and review is needed.

An additional issue here is whether DAK and TSI qualify as similarly situated entities. Effective June 30, 2016, SBA amended the ostensible subcontractor rule to state that “[a]n ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in § 125.1 of this chapter. . . .” 13 C.F.R. § 121.103(h)(4); 81 Fed. Reg. 34,243 (May 31, 2016). Section 125.1 in turn defines “similarly situated entity” as “a subcontractor that has the same small business program status as the prime contractor. This means that . . . for a small business set-aside, partial set-aside, or reserve a subcontractor that is a small business concern.” 13 C.F.R. § 125.1. The regulation continues, “In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.” *Id.* In the instant case, the Area Office did not consider whether DAK and TSI are similarly situated, nor did the Area Office determine whether TSI was a small business as of the date of proposal submission. Section II.J, *supra*. As a result, OHA cannot ascertain whether the exception for similarly situated entities is applicable here.

C. Remand

On remand, the Area Office should obtain relevant contemporaneous evidence, such as contract staffing information,⁴ to determine the respective contributions of DAK and TSI in performing this contract. If the Area Office determines that DAK is not in compliance with the ostensible subcontractor rule, the Area Office also should consider whether DAK and TSI are exempt from the rule as similarly situated entities. Alternatively, the Area Office may begin its analysis by considering whether DAK qualifies for the exemption to the ostensible subcontractor rule. DAK and Appellant may submit comments to the Area Office to facilitate this review. *Size Appeal of Patriot Constr., Inc.*, SBA No. SIZ-5439, at 5 (2013) (recognizing that the proponent “may submit [new] information to the Area Office for consideration as part of the remand process”).

IV. Conclusion

Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further review and investigation consistent with this decision.

KENNETH M. HYDE
Administrative Judge

⁴ DAK's correspondence with the Area Office alluded to a “contracting staffing document [that] shows the breakout of DAK and [TSI] [employees].” Section II.D, *supra*. This document is not in the record before OHA. It therefore appears that DAK did not provide this document to the Area Office.