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

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| SIZE APPEAL OF:<br><br>Warrior Service Company, LLC,<br><br>Appellant,<br><br>Appealed From<br>Size Determination No. 1-SD-2020-02 | SBA No. SIZ-6046<br><br>Decided: January 24, 2020 |

APPEARANCE

Frank V. Reilly, Esq., Fort Lauderdale, Florida, for Appellant

DECISION[1]

I. Introduction and Jurisdiction

On November 22, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination No. 1-SD-2020-02, concluding that Warrior Service Company, LLC (Appellant) is not a small business under the size standard associated with the subject procurement. More specifically, the Area Office found that Appellant is affiliated with its subcontractor, [Subcontractor], under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). 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 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 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. 4.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

## II. Background

### A. The Solicitation

On July 9, 2018, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C24618R0507 for home oxygen delivery services in Virginia and North Carolina, with possible, infrequent service in neighboring states. The RFP explained that "[t]he contractor shall provide all supplies, materials, equipment, transportation of equipment, equipment services, labor, supervision, patient education, safety management, and infection control, as necessary, for patients on home respiratory care therapy." (RFP at 48.) In particular, the contractor must deliver and set up home oxygen systems; instruct and educate patients on the proper use of those systems; and monitor, maintain, and repair the systems. (*Id.* at 48-72.) The RFP contemplated the award of a single indefinite-delivery/indefinite-quantity (ID/IQ) contract with a base year and four option years. (*Id.* at 6, 105, 161.) There were six evaluation factors: (1) Corporate Experience, (2) Personnel Qualifications/Staffing, (3) Technical Capability Approach, (4) Equipment Capability, (5) Past Performance, and (6) Price. (*Id.* at 165.) For the Corporate Experience factor, the RFP stated that "[t]he Offeror must demonstrate at least a minimum of ten (10) years of experience in providing Home Oxygen delivery services." (*Id.* at 166.)

The Contracting Officer (CO) originally set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 532283, Home Health Equipment Rental, with a corresponding size standard of $32.5 million average annual receipts. RFP Amendment 1, issued July 19, 2018, revised the RFP to establish a tiered evaluation scheme, with SDVOSBs enjoying first consideration. Offers were due August 3, 2018.

### B. Appellant's Proposal

Appellant's proposal identified Appellant as the prime contractor and [Subcontractor] as Appellant's sole subcontractor and teaming partner. (Proposal at 2.) According to the proposal, Appellant was founded in 2012 and specializes in "[XXXXXXXXXXX]." (*Id.*) For the instant procurement, Appellant is "[XXXXXXXXX]" by partnering with [Subcontractor]. [XXXXXXXXXXXXXXXX] The proposal stated that [Subcontractor], which is referred to throughout the proposal as "[XXXXX]," "has agreed to transfer staff, equipment, and Technical Capability to [Appellant] as needed." (*Id.* at 2.) The proposal provided several examples of [Subcontractor's] recent experience providing home oxygen services. (*Id.* at 2-4.)

The proposal indicated that Appellant will manage the contract and will self-perform various administrative functions. (*Id.* at 5-10.) The proposal also delineated several functions that would be performed by [Subcontractor]. [XXXXXXXXXXXXXXXXXXXXXXX]

### C. Responsibility Determination

Appellant was selected as the apparent awardee, but on October 3, 2019, the CO determined that Appellant was nonresponsible. The CO found that Appellant has no relevant experience and lacks the financial resources necessary to perform the work. (CO's Memo at 1-2.)

Further, based on his review of Appellant's proposal, the CO determined that [Subcontractor], rather than Appellant, would be "providing most of the necessary personnel, skills, expertise, equipment, technical capability and experience needed to successfully perform the vital and primary functions of the requirement." (*Id.* at 1.) As a result, the CO concluded, Appellant's approach contravenes limitations on subcontracting requirements. (*Id.* at 3-4.)

The CO noted that, in response to an inquiry from the CO, Appellant had claimed that it will self-perform [a majority] of the work. (*Id.* at 1.) The CO found this assertion not credible, because Appellant's proposal had identified [Subcontractor] as providing "[XXXXXXX]." (*Id.*) The CO reiterated that Appellant "has never performed home oxygen delivery services and does not have the necessary experienced, qualified personnel, equipment and capital to be able to perform the required service." (*Id.*)

D. Certificate of Competency

The CO referred the question of Appellant's responsibility to SBA for a Certificate of Competency (COC). During the COC review, Appellant submitted a document entitled "Certificate of Competency (COC) Proposal," dated October 23, 2019.

According to the COC Proposal, Appellant will self-perform [a majority] of the work and [Subcontractor] the remaining [XX]%. (COC Proposal, at 7.) The COC Proposal stated that, in addition to managing the contract and overseeing [Subcontractor], Appellant will be responsible for [XXXXXXXXXXXXX]. (*Id.* at 6-7.) [Subcontractor] will provide [XXXXXXXXXXXX]. (*Id.* at 7.)

E. Size Determination

On November 22, 2019, the Area Office issued Size Determination No. 1-SD-2020-02 finding that Appellant is not a small business due to affiliation with [Subcontractor] under the ostensible subcontractor rule. The Area Office examined Appellant's size as of August 2, 2018, the date of Appellant's proposal for the instant procurement. (Size Determination at 3.)

The Area Office first explained that Appellant is 100% owned by Mr. Alex Presman, a service-disabled veteran. (*Id.*) Mr. Presman also wholly-owns Reliable Vets LLC (RV), so Appellant and RV are affiliated. (*Id.*) The combined receipts of Appellant and RV do not exceed the applicable $32.5 million size standard. (*Id.*)

Turning to the ostensible subcontractor rule, the Area Office found Appellant in violation of the rule for several reasons. First, Appellant relied entirely upon [Subcontractor] to meet the RFP's requirement of at least 10 years' experience in home oxygen delivery. (*Id.* at 5.) Based on Appellant's proposal and the CO's non-responsibility determination, the Area Office found that Appellant "only has experience with Durable Medical Equipment (DME) delivery services contracts" but lacks "any home oxygen delivery services contract experience." (*Id.*) Appellant therefore would not have been eligible for the instant award without [Subcontractor]. (*Id.*)

Second, Appellant will rely upon [Subcontractor] for servicing centers/warehouse facilities. (*Id.*) Appellant does not already have such facilities, and Appellant represented to the Area Office that "[Appellant] will [XXXXXXXXXXX]." (*Id.* at 5-6.)

Third, Appellant will rely upon [Subcontractor] to obtain the necessary equipment and oxygen supplies for the contract. (*Id.* at 6.) Appellant acknowledged that [Subcontractor] will provide [XXXXXXXXX]. (*Id.*) In addition, [Subcontractor] will be responsible for [XXXXXXXX]. (*Id.*)

Fourth, the Area Office found that Appellant will rely upon financial assistance from [Subcontractor]. (*Id.*) During the size review, Appellant disclosed that it will obtain a $[XX] loan from [Subcontractor] to cover [XXXXXX]. (*Id.*) [Subcontractor] is "not in the business of lending" so the loan can only be considered a form of financial assistance from [Subcontractor] to Appellant. (*Id.*)

Fifth, the Area Office found that Appellant will rely upon [Subcontractor] to perform the primary and vital contract requirements. (*Id.*) The proposal stated that Appellant will manage the contract and will perform certain administrative functions. The primary and vital requirements of the contract, though, involve delivering and maintaining oxygen equipment and supplies, and educating patients. (*Id.* at 7.) Such work will be performed by [Subcontractor], not by Appellant. Specifically, "[XXXXXXXXXXXXXXXX]." (*Id.*) The Area Office rejected the notion, stated in the COC Proposal, that [Subcontractor] will perform only [XX]% of the work. (*Id.* at 7, n.6.)

The Area Office noted that, in a line of cases stemming from *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), OHA has identified "four key factors" that may contribute to findings of unusual reliance. (*Id.* at 7.) Some of these four factors are not applicable here as "[Subcontractor] is not the incumbent contractor" and "[Appellant] does not plan to hire the large majority of its workforce from [Subcontractor]." (*Id.*) Nevertheless, Appellant did rely upon [Subcontractor's] experience and expertise to win the contract, and also must rely upon [Subcontractor] for financial assistance. (*Id.* at 7-8.) Moreover, [Subcontractor] will perform a majority, if not all, of the primary and vital contract requirements because Appellant "intends[s] to subcontract [XXXXXX] to [Subcontractor]." (*Id.*)

The Area Office concluded that Appellant is affiliated with [Subcontractor] under the ostensible subcontractor rule. (*Id.* at 8.) [Subcontractor] is not a small business, so the combined receipts of Appellant and [Subcontractor] exceed the $32.5 million size standard applicable to this procurement. (*Id.*)

F. Appeal

On December 2, 2019, Appellant filed the instant appeal. Appellant contends that the size determination is based on clear errors of fact and law and should be reversed.

Appellant argues that the Area Office clearly erred by disregarding the assertions in the COC Proposal that [Subcontractor] will be responsible for only [XX]% of the work. (Appeal at 2-3.) Had the Area Office recognized that Appellant will self-perform the large majority of the

procurement, the Area Office could not properly have found any violation of the ostensible subcontractor rule. (*Id.* at 3-4.)

Appellant attacks each of the issues discussed in the size determination. Contrary to the size determination, Appellant is experienced with Durable Medical Equipment contracts, so the Area Office incorrectly found that Appellant has no relevant experience. (*Id.* at 4.) Further, an offeror cannot be evaluated unfavorably if it lacks relevant past performance. (*Id.*) Appellant therefore could not have been excluded from consideration for award for this reason.

Next, Appellant argues that the Area Office incorrectly concluded that Appellant relied upon [Subcontractor] for servicing centers/warehouse facilities. (*Id.* at 5.) The RFP did not require offerors to lease warehouse space prior to submitting a proposal. Further, such facilities are fungible and "can easily be obtained with or without this particular subcontractor." (*Id.*) Additionally, close coordination between a prime contractor and a subcontractor adds value to the Government and is common in many industries. (*Id.*)

Appellant maintains that the Area Office erroneously determined that Appellant will rely on [Subcontractor] for equipment, oxygen supplies, and financing. (*Id.*) The RFP did not require that the prime contractor itself provide these items. (*Id.*) Further, because the equipment is "not unique" and is instead ""fungible and available," Appellant could have obtained comparable equipment from many different sources, not just [Subcontractor]. (*Id.*)

Appellant argues that it was reasonable for it to obtain a $[XX] loan from [Subcontractor] because "no subcontractor would release $[XX] in equipment without any collateral." (*Id.* at 5-6.) Additionally, Appellant could have secured financing from SBA instead of [Subcontractor], so Appellant is not dependent upon [Subcontractor] for financial assistance. (*Id.* at 6.)

Lastly, Appellant insists that [Subcontractor] will not perform all, or nearly all, of the primary and vital contract requirements. (*Id.*) In support, Appellant points to its COC Proposal, where [Subcontractor] "is only proposed to perform [XX]% of the work, not 100%." (*Id.*) It is not improper for a prime contractor to subcontract [a minority] of a contract to another concern. (*Id.*)

## 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 when the prime contractor is

unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The rule "asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor." *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Ostensible subcontractor inquiries are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

B. Analysis

Appellant's principal argument in this case is that the Area Office should have attached greater weight to Appellant's claim that Appellant will self-perform [a majority] of the contract work. 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 its proposal for the subject procurement. In the instant case, Appellant submitted its proposal on August 2, 2018, and there were no subsequent proposal revisions. *See* Section II.A, *supra*. The Area Office thus determined Appellant's size as of August 2, 2018, and Appellant has not disputed that August 2, 2018 was the correct date to determine size. Sections II.E and II.F, *supra*.

As of August 2, 2018, Appellant's proposal did not indicate that Appellant will self-perform [a majority] of the work. Section II.B, *supra*. Indeed, other than managing the contract, the proposal failed to ascribe Appellant any significant role in contract performance. *Id.* Conversely, the proposal identified numerous tasks that would be performed solely by [Subcontractor], including [XXXXXXXXXXXXX]. *Id.* OHA has long held that a prime contractor cannot comply with the ostensible subcontractor rule merely by supervising a subcontractor in its performance of the work. *E.g., Size Appeal of Jacob's Eye, Inc.*, SBA No. SIZ-5955, at 12 (2018); *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698, at 9 (2015); *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 10 (2013). Accordingly, based on Appellant's proposal of August 2, 2018, the Area Office did not err in concluding that Appellant did not comply with the ostensible subcontractor rule, because [Subcontractor] would be performing all, or nearly all, of the primary and vital contract requirements.

In asserting that Appellant will self-perform [a majority] of the contract, Appellant points to the document entitled "COC Proposal," dated October 23, 2019. Section II.D, *supra*. The COC Proposal, though, did not exist as of August 2, 2018, the date to determine size, and Appellant has not attempted to explain how the COC Proposal can be reconciled with Appellant's proposal of August 2, 2018. It is well-settled law that changes of approach occurring after the date to determine size do not affect a firm's compliance with the ostensible subcontractor rule because size is assessed as of that specific date. *Size Appeal of Greener Constr. Servs., Inc.*, SBA No. SIZ-5782, at 5 (2016); *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 of August 2, 2018, while ignoring any planned changes of approach occurring after August 2, 2018.

Appellant also argues that it should not be found reliant upon [Subcontractor] for equipment, facilities, financial assistance, corporate experience, or technical expertise, because Appellant could instead have chosen to obtain such support from different subcontractors (or in the case of financial assistance, from the SBA itself). Again, such arguments fail because size is determined as of August 2, 2018. As of that date, Appellant planned to obtain support only from [Subcontractor], and there was no indication that Appellant would utilize any other subcontractors. Section II.B, *supra*.

## 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 of August 2, 2018, the Area Office appropriately found that Appellant would rely upon [Subcontractor] to perform all, or nearly all, of the home oxygen delivery services. 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