United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Leumas Residential, LLC, Appellant, Appealed From Size Determination No. 02-2020-127	SBA No. SIZ-6091 Decided: March 16, 2021

APPEARANCES

Jonathan D. Shaffer, Esq., Daniel H. Ramish, Esq., Smith Pachter McWhorter PLC, Vienna, Virginia, for Appellant

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DECISION[1]

I. Introduction and Jurisdiction

On November 10, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2020-127 (Size Determination), finding Leumas Residential, LLC (Appellant) other than small. On November 24, 2020, Appellant filed the instant appeal from that size determination. Appellant argues that the size determination is clearly erroneous, and requests that OHA reverse it, and find Appellant is an eligible small business. For the reasons discussed *infra*, I grant the appeal, and remand the Size Determination.

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 a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

II. Background

A. Solicitation

On October 17, 2019, the U.S. Navy (Navy) issued Request for Proposals (RFP) No. N4008019R2506 for grounds maintenance services for NSA South Potomac Dahlgren, VA, Pumpkin Neck Annex, VA, Indian Head, MD, Stump Neck Annex, MD, and the NRL Satellite Location. The Contracting Officer (CO) designated the RFP under North American Industry Classification System (NAICS) code 561730, Landscaping Services, with a corresponding $7 million annual receipts size standard. However, SBA had raised this size standard to $8 million, effective August 19, 2019. 84 Fed. Reg. 34261, 34276 (July 18, 2019). The procurement was entirely set aside for 8(a) firms. The CO anticipated awarding an indefinite delivery indefinite quantity contract.

The Performance Work Statement (PWS) for the RFP identifies five major components that must be included in all proposals: Phase-In Transition Plan, Workforce Management, Key Personnel, Environmental, Security, and specific questions pertaining to pest control and grounds maintenance. (RFP, at 67.) The RFP also includes a Past Performance Questionnaire which requires information on work performed by the offeror as the prime contractor, subcontractor, and joint venture. (RFP, at 70.) Additionally, an offeror's past performance information may be retrieved through the Past Performance Retrieval System, using all CAGE/DUNS numbers of team members, i.e., "partnership, joint venture, teaming arrangement, or parent company/subsidiary/affiliate" identified in the offeror's proposal. (*Id.*, at 68.)

B. Proposal

On December 23, 2019, Appellant submitted its proposal. Under the Proposal, Appellant is the 8(a) prime contractor and ProDyn, LLC (ProDyn) is the subcontractor. (Technical Proposal, at 2; Price Proposal, at 2.) The Proposal refers to a prime-sub teaming agreement having been established for the management of the contractual requirements should Appellant seek to partner with ProDyn for a procurement. (Technical Proposal, at 5.) The Proposal contains a Master Subcontractor Agreement between Appellant, the prime contractor, and ProDyn, the subcontractor, outlining their contractual relationship and duties in the instance Appellant desires to retain ProDyn as Appellant's subcontractor. (*Id.*, at 9-15.) The Proposal states that "Leumas-ProDyn does not intend to hire subcontractors to perform on this contract. . . ." (*Id.*, at 24.) The Proposal states ProDyn is the majority partner of PD&E, the incumbent contractor at NSA South Potomac Dahlgren and Indian Head. Appellant and ProDyn will be "working together under a teaming agreement and subcontractor agreement" to provide quality service for the contract. (*Id.*, at 56.)

The Leumas-ProDyn team proposed to hire two Project Managers from the incumbent contractor, PD&E. (*Id.*, at 30). The Leumas-ProDyn leadership will provide the Project Managers with "direction, guidance, policies, procedures, and process to excel." (*Id.*, at 22.) The Proposal states all equipment would be provided by the Leumas-ProDyn team. (*Id.*, at 39-50.) For its past performance, Appellant provided experience of PD&E for grounds maintenance at

Dahlgren Naval, Indian Head Naval, and the U.S. Naval Academy; Leumas-ProDyn JV for grounds maintenance at Tyndall Air Force Base and multiple Marine Corps air stations in South Carolina; and ProDyn for grounds maintenance at Moody Air Force Base and NASA's Lyndon B. Johnson Space Center. (*Id.*, at 57-62.)

On September 15, 2020, the CO notified all unsuccessful offerors that Appellant was the apparent awardee.

C. Protest and Size Determination

On September 22, 2020, DSA, LLC (DSA) filed a timely protest alleging that Appellant is unduly reliant on its subcontractor, ProDyn, LLC (ProDyn) to qualify for and perform the contract in violation of the ostensible subcontractor rule. (Protest, at 1.) Specifically, DSA argued ProDyn will be performing the primary and vital requirements of the work and will be supplying equipment and personnel for the contract.

On November 10, 2020, the Area Office determined Appellant was generally affiliated with ProDyn and is other than small for the applicable size standard. (Size Determination, at 9.)

The Area Office first assessed whether Appellant and ProDyn, its subcontractor for the instant procurement, are affiliated as joint venturers. First, the Area Office notes that "[Appellant] and ProDyn currently have a formal joint venture together, ProDyn is [Appellant's] teaming partner/subcontractor," the equipment to be used for performance will be provided by the Leumas-ProDyn, LLC joint venture, and employees will be hired from the incumbent contractor, PD&E. (*Id.*, at 5.) PD&E is a joint venture of which ProDyn is a member, where the other member of PD&E is the relative of ProDyn's owner, Mr. Jason Burton. (*Id.*)

The Area Office further noted that the existence of a joint venture does not shield firms from being found affiliated for activity outside of the joint venture. (*Id.*) ProDyn conceded that it is not a small business concern. The Area Office found that Appellant's proposal "makes it clear that [Appellant] is not the actual offeror." (*Id.*) The Area Office noted that Appellant identified the prime/sub team as "Leumas-ProDyn" which is the same name as the formal joint venture between Appellant and ProDyn, and the entire proposal is written as if the joint venture is offering despite the proposal being submitted under Appellant's name only. (*Id.*)

The Area Office stated, "the past performance section [of the Proposal] does not provide any past experience for Appellant." (*Id.*, at 6.) Appellant provided two examples for past performance for PD&E, two examples for Leumas-ProDyn, and two examples of past performance for ProDyn. The Area Office opined, "[i]t is clear that the proposal relies entirely on the past performance of ProDyn, either under its own name or as part of PD&E, Mr. Burton's joint venture with his immediate family member's firm." (*Id.*)

The Area Office determined the actual offeror for the instant procurement is Leumas-ProDyn, the joint venture, and not Appellant on its own, based on the teaming arrangement in the Proposal. (*Id.*) The Area Office also concluded the joint venture is mainly controlled by ProDyn as a member of the incumbent contractor that is the source of all managerial personnel hired by

Appellant for the instant procurement. The Area Office finds the use of equipment provided by the Leumas-ProDyn joint venture "does nothing to mitigate the nature of this relationship" and it is clear that Appellant is entirely dependent on ProDyn's assistance. (*Id.*)

The Area Office found that Appellant and ProDyn are generally affiliated and stated, "the Area Office will not address whether the ostensible subcontractor rule was violated as it is moot." (*Id.*, at 7.) Because ProDyn conceded it is not a small firm for the applicable size standard and Appellant is generally affiliated with ProDyn, the Area Office determined Appellant is not a small business for the applicable size standard of $8 million.

F. The Appeal

On November 24, 2020, Appellant filed the instant appeal. Appellant argues the Area Office improperly concluded Appellant was other than small based solely on joint venture affiliation and was not based on a finding of an ostensible subcontractor relationship, "nor any other basis set forth at 13 C.F.R. § 121.103(h)." (Appeal, at 2.) Appellant contends the Area Office unreasonably treated the Proposal submitted by Appellant as if it had been submitted by Leumas-ProDyn — the joint venture between Appellant and ProDyn - which warrants a finding of clear error and a reversal of the Size Determination. Additionally, the Size Determination contains an erroneous recitation of the facts relevant to an ostensible subcontractor analysis.

Appellant describes itself as having a "fast-growing past performance repertoire and has a bright future as a federal Government contractor." (*Id.*, at 4.) Appellant states it proposed to subcontract with ProDyn, an established government contractor and graduate of the 8(a) program, for the instant procurement. Appellant submitted its offer "in its own name, not as part of Leumas-ProDyn, LLC, or any other joint venture." (*Id.*, at 9.) Though joint venturers may be found generally affiliated if they violate the 3-in-2 rule, the Area Office did not conclude such in this instance. (*Id.*) Members of a joint venture may be found affiliated based on a totality of the circumstances, but the Area Office did not reach this conclusion regarding Appellant and ProDyn. (*Id.*, at 10.) Appellant asserts the only basis for treating a prime contractor and subcontractor as affiliated stems from the ostensible subcontractor rule. The Area Office treating Appellant's proposal as if it had been submitted on behalf of the Leumas-ProDyn joint venture is reversible error. (*Id.*)

Appellant contends the Area Office's factual bases for finding affiliation were contradicted by the record. (*Id.*, at 11.) First, the Area Office erred in determining that Appellant is not the actual offeror because the prime-sub team has the same name as the joint venture. (*Id.*) The Area Office erred in stating that Appellant will hire the incumbent managers where Appellant will manage and control the managers. The Size Determination also erroneously states Appellant provided no past performance of its own in the Proposal and relied solely on that of ProDyn, though Appellant did submit its own past performance on a project where it performed more than 50% of the work and employed the project managers for those projects. (*Id.*, at 12.) Appellant disputes the Area Office's statement that Appellant is entirely dependent on ProDyn for assistance, since the equipment for the instant procurement would be provided by the Leumas-ProDyn joint venture, of which Appellant owns 51%. (*Id.*, at 13.)

Appellant argues it does not have an ostensible subcontractor relationship with ProDyn. Appellant is an established and experienced contractor, having performed contracts of size and scope similar to the instant procurement. (*Id.*, at 15.) Appellant will perform the primary and vital requirements of the contract, will perform 61% of the work, and proposed to perform the majority of the grounds maintenance services encompassing the principal purpose of the procurement. (*Id.*, at 16.) Appellant will supply the majority of the labor and equipment through the Leumas-ProDyn JV, which is 51% owned by Appellant. (*Id.*, at 16-17.) Appellant is not unusually reliant on ProDyn, as Appellant does not plan to hire ProDyn's employees *en masse*, but instead would hire former employees of PD&E, as required by FAR 52.222-17. (*Id.*, at 17-18.) Appellant asserts it plans to hire a large number of additional employees recruited from other sources and all managerial personnel will be overseen by Appellant's corporate leadership. (*Id.*, at 18.) Appellant heavily cites to a declaration submitted with its response to the initial size protest submitted to the Area Office in asserting its arguments on appeal.

G. DSA's Response

On December 10, 2020, DSA responded to the appeal. DSA asserts Appellant has failed to show reversible error by the Area Office. Specifically, the Proposal demonstrates Appellant intended to bid as a joint venture with ProDyn and Appellant is unduly reliant on ProDyn. (Response, at 2.)

DSA contends, "while the Area Office did not expressly address whether the ostensible subcontractor rule was violated, the Area Office's analysis shows that this is exactly what it found, as a simple review of Leumas-ProDyn's proposal demonstrates that it bid on this work as, for all intents and purposes, a joint venture." (*Id.*, at 4.) DSA argues OHA has explained that a proposal that does not explicitly identify itself as a joint venture is not dispositive. (*Id.*, citing *Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004).) DSA cites to the Proposal as evidence of Appellant's ostensible subcontractor relationship with ProDyn. (*Id.*, at 4-9.) ***5** DSA alleges the declaration provided by Appellant in response to the initial size protest contradicts Appellant's proposal and should be given no weight by OHA. (*Id.*, at 10-13.)

H. Reply and Sur-Reply

On December 22, 2020, 12 days after the close of record, Appellant filed a reply. Appellant requested leave to address the DSA Response, which "includes material factual errors, omissions and mischaracterizations of the record." (Motion, at 1.) On December 31, 2020, DSA filed an Opposition and Sur-reply to Appellant's motion and reply.

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 that 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. Preliminary Issues

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. 13 C.F.R. § 134.225(b). Here, Appellant's reply was filed well after the close of record and elaborates upon legal points raised in the appeal petition. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. Because I am excluding Appellant's reply, DSA's surreply is also EXCLUDED.

C. Analysis

DSA's sole allegation against Appellant is that there exists a relationship between Appellant and its subcontractor, ProDyn, in violation of the ostensible subcontractor rule. Because the Area Office failed to directly address the central question before it, I must remand the size determination.

For the instant Proposal, Appellant presented itself as the prime contractor and ProDyn was its subcontractor. It provided a teaming agreement and throughout the Proposal, it clearly states that the prime contractor is "Leumas Residential, LLC." Thus, a full analysis, that requires an assessment of a possible ostensible subcontractor relationship, should have been completed.

A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. 13 C.F.R. § 121(h)(2). An analysis of a concern based on the ostensible subcontractor rule requires an assessment of (1) whether a concern will perform the primary and vital requirements of the subject procurement, and (2) whether the prime contractor is unusually reliant on its subcontractor to perform the functions required under the contract. To determine if a concern will perform the primary and vital requirements of the contract, an Area Office must first determine what requirements constitute the principal purpose of the acquisition. *See e.g., Size Appeal of Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, at 20 (2020). Additionally, OHA caselaw provides a clear framework for determining whether a concern is unusually reliant on its subcontractor. *See Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) (outlining four key factors to consider in conducting an undue reliance analysis).

The Area Office possessed sufficient information to conduct an ostensible subcontractor analysis but fell short of doing so. In fact, the Area Office determined an ostensible subcontractor analysis was not required because the Area Office determined Appellant was generally affiliated with ProDyn. However, because Appellant submitted the Proposal as the prime contractor and ProDyn as the subcontractor, it was necessary for the Area Office to conduct an analysis of Appellant's relationship with ProDyn based on the ostensible subcontractor rule.

DSA cites to *Size Appeal of ePerience*, to bolster its claim for finding a joint venture relationship between Appellant and its subcontractor. However, the Area Office

in *ePerience* conducted a proper ostensible subcontractor analysis to determine that the appellant was unduly reliant on its subcontractor. The size determination found that the appellant's relationship with its subcontractor was in violation with its subcontractor, which is the basis for determining that the concerns' relationship was that of a joint venture. The Area Office here did not conduct such an analysis. Thus, DSA's reliance on this case in support of its claims is unfounded.

OHA has extensive case law providing guidance on how to assess affiliation, whether based on an allegation of an ostensible subcontractor relationship or other findings of affiliation, yet the Area Office's analysis contains not one reference to an OHA case in reaching its conclusion of affiliation. OHA's case law has been issued with the objective of providing guidance, transparency, and predictability to small business concerns on how their size will be determined, should a dispute over their status arise. The size determination lacks a comprehensive analysis of the relationship between Appellant and ProDyn for the instant procurement. Thus, I find that the Area Office clearly erred in not completing an assessment of Appellant's size based on the ostensible subcontractor rule.

C. Remand

Because Appellant proposed as the prime contractor and ProDyn as its subcontractor, the Area Office must specifically address whether Appellant is affiliated with ProDyn in violation of the ostensible subcontractor rule in a new size determination.

IV. Conclusion

Appellant has established that the size determination is based upon a clear error of law. Accordingly, I GRANT the instant appeal, and I REMAND the size determination for a complete assessment of whether Appellant is in violation of the ostensible subcontractor rule.

CHRISTOPHER HOLLEMAN
Administrative Judge