United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Estrategy Consulting, LLC, Appellant, Appealed From Size Determination No. 05-2021-15	SBA No. SIZ-6109 Decided: July 15, 2021

APPEARANCE

Timothy J. Turner, Esq., Whitcomb, Selinsky, PC, Denver, Colorado, for the Appellant

DECISION[1]

I. Introduction and Jurisdiction

On February 19, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2021-15, concluding that Estrategy Consulting, LLC (Appellant) is not an eligible small business for the subject procurement. The Area Office found that Appellant is affiliated with its proposed subcontractor, Trilogy MedWaste, LLC (Trilogy), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(2). On appeal, Appellant contends 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 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.

[1] This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

II. Background

A. The RFQ

On December 28, 2020, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. 36C24821Q0276 for "Regulated Medical Waste Pickup and Disposal Services" at the North Florida/South Georgia Veterans Health System. (RFQ at 1.) The RFQ was structured as an acquisition of commercial items under Federal Acquisition Regulation (FAR) part 12, and contemplated the award of "an annual full-service contract for a base year plus four option years." (*Id.*) According to the RFQ, VA would select an awardee through a "tiered evaluation" approach, with Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) enjoying first priority. (*Id.* at 1, 28.) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 562112, Hazardous Waste Collection, with a corresponding size standard of $41.5 million average annual receipts. (*Id.* at 1.)

The RFQ's Statement of Work (SOW) explained that the contractor must:

> furnish all labor, equipment, containers appropriately labeled (except for Government-furnished "Sharps" needle containers), supplies, materials, transportation and supervision required to provide pick-up, transport, incineration and/or Autoclave of biohazard medical waste, and Government "Sharps" containers, from [19 different VA medical facility locations in Florida and Georgia].

(*Id.* at 5.) The contractor will be required to:

> treat and/or dispose of bio-hazardous medical waste in accordance with State and Federal (U.S. Environmental Protection Agency - EPA) guidelines, VA infectious medical waste requirements, and all other Federal, State and local regulations. The [contractor] will maintain all necessary medical waste permits and licenses for the disposal and treatment of such waste. The [contractor] will also have an assigned [EPA] authorization and identification number, necessary Department of Transportation permits, including insurance prior to transport and/or disposal of subject waste.

(*Id.*) Upon award, the contractor must provide copies of required licenses to the CO. (*Id.* at 6.)

The RFQ included a table outlining the required schedule of services and the numbers and sizes of containers, and providing estimated pounds of waste per month at each location. (*Id.* at 8.) According to the table, the contractor will collect and dispose of an estimated total of 40,750 pounds of waste monthly. (*Id.*) The majority of the estimated volume of waste — 27,800 pounds per month — will originate from the Malcom Randall VA Medical Center (VAMC) in Gainesville, Florida, followed by an estimated 4,100 pounds per month at the Lake City VAMC in Lake City, Florida. (*Id.*)

The RFQ reiterated that the contractor must provide various medical waste disposal containers, which must include:

> one closed roll off, top load capable container each to the Malcom Randall VAMC and Lake City VAMC (addresses listed above), and appropriate containers/ totes and red bags to the other listed sites. Inspection for leaks will be performed routinely by [VA].

(*Id.* at 6.) If VA determines that the condition of the contractor's containers or supplies poses a health or safety hazard, the contractor must "remove the supplies from the VA installation and [] immediately replace [them] with supplies which are approved by the VA facility." (*Id.*)

The RFQ stated that VA would evaluate quotations based on three factors: Technical Approach, Past Performance and Price. (*Id.* at 28.) Quotations were due January 29, 2021. (RFQ, Amendment 0001, at 2.)

B. Appellant's Quotation

Appellant timely submitted its quotation on January 29, 2021, and requested that Appellant be considered for award as an SDVOSB. The quotation did not indicate whether Appellant planned to utilize any subcontractors for this procurement, nor did the quotation make any mention of Trilogy.

The quotation stated that Appellant will pick-up and transport "all waste to a certified and registered storage, transfer, or treatment facility," and will maintain appropriate records and documentation. (Quotation at 7.) Waste will be destroyed at a "Licensed Incineration Facility," and the remaining ash thereafter will be "taken to an approved and permitted sanitary landfill." (*Id.* at 9.) According to the quotation:

> As a fully licensed and properly trained partner, [Appellant] will be able to take all of the waste that your facility disposes through all waste streams. Including, but not limited to regulated medical waste, sharps waste, incinerate waste, hazardous waste, pharmaceutical waste, universal waste. Solid waste, recyclable materials, and secured document destruction waste.

(*Id.* at 4.)

The quotation asserted that Appellant will "always provide the correct containers needed by your business." (*Id.* at 2.) Appellant proceeded to list "the most common needs associated with the vendor relationship in regard to infectious waste," which included bins for regulated medical waste and incinerate waste, reusable sharps program containers, Resource Conservation and Recovery Act (RCRA) hazardous pharmaceutical waste containers, and non-RCRA hazardous pharmaceutical waste containers. (*Id.* at 3.) Appellant noted that it would have access to additional containers at a "local warehouse." (*Id.* at 11.)

The quotation described the vehicles that will be used for transporting waste as follows:

> [Appellant] has dedicated, company owned, and federal D.O.T. inspected cargo vehicles for the purpose of transporting all waste identified in this [quotation]. These vehicles have cargo areas that shall serve as the primary containment area aboard the vehicle. These vehicles have a separate driver cab that prevents any driver or passenger from coming in contact with any loaded waste, at any time.

(*Id.* at 8.) Transported waste "will not be unloaded, except at an approved facility." (*Id.* at 7.) Further, Appellant will "*enforce[] a ZERO TOLERANCE policy for any [] driver involved in accidents, or vehicular violations resulting in citations*." (*Id.* at 24, emphasis in original.)

The quotation indicated that an employee of Appellant, Mr. Jeffrey Jaeckle, would serve as Project Manager. (*Id.* at 2.) The quotation did not discuss Mr. Jaeckle's duties or qualifications, and did not address Appellant's approach to managing the contract.

C. Protest

On February 1, 2021, the CO filed a protest with the Area Office challenging Appellant's size.[2] The CO alleged that Appellant is affiliated with Trilogy under the ostensible subcontractor rule. In particular, the CO observed, the Area Office had recently found, in Size Determination No. 05-2021-002 issued October 29, 2020, that Appellant was not small for a similar VA contract due to Appellant's proposed use of Trilogy as a subcontractor. (Protest at 3.) For the instant procurement — which the CO described as being for "Regulated Medical Waste Pickup and Disposal Services" — Appellant likewise proposed to utilize Trilogy as its sole subcontractor. (*Id.* at 2-3.) The CO explained that each offeror was required to provide a certification that the offeror will comply with limitations on subcontracting restrictions. In its certification, Appellant stated that it planned to subcontract 25% of contract value to Trilogy. (*Id.* at 3.) No other subcontractors were identified. (*Id.*) According to the System for Award Management, Trilogy is not an SDVOSB. The CO noted that Appellant's certification was signed by its Director of Contracting, Ms. Danielle Golden, who also appears to hold the same position at Trilogy. (*Id.*)

By letter dated February 2, 2021, the Area Office forwarded the CO's protest to Appellant for response. Recognizing that it had recently found Appellant not small in Size Determination No. 05-2021-002, the Area Office instructed Appellant to address "all and any changes to your status as of the previous size determination." (Letter from M. Fagley to D. Golden (Feb. 2, 2021), at 1.) The Area Office further directed that Appellant provide "[a] description of the tasks that will be performed by [Appellant] [on the instant procurement] and the tasks that will be performed by each subcontractor, including which company is a registered medical waste transporter in the State[s] of Florida and Georgia, which company is providing the containers, and which company will be performing the pickup, transportation and disposal of the medical waste, and any other duty listed in the solicitation." (*Id.* at 1-2.) In addition, Appellant must furnish a "[c]ompleted SBA Form 355 for [Appellant] as of January 29, 2021"; Appellant's own "Federal income tax returns for the last three / five completed fiscal years"; a completed SBA

[2] A CO's protest is always timely. *See* 13 C.F.R. § 121.1004(b).

Form 355 for Trilogy; and "Federal income tax returns for the last three / five completed fiscal years for [Trilogy] and all affiliates and any other subcontractor." (*Id.* at 2.)

D. Protest Response

On February 8, 2021, Appellant responded to the protest. Appellant maintained that it is a verified SDVOSB "based in Albuquerque, New Mexico with substantial experience in providing the kinds of services required by the RFQ." (Protest Response at 1.) Appellant is "100% owned and operated" by Mr. Duone Jackson, a service-disabled veteran. (*Id.*) Mr. Jackson previously sold certain assets to Trilogy, but has retained ownership of Appellant. (*Id.*) Mr. Jackson also owns 100% of Marine Kellogg Consulting, LLC, but this latter concern "has not earned revenue or hired any employees." (*Id.* at 2.)

In response to the Area Office's request that Appellant address the respective responsibilities of Appellant and its subcontractor(s) for the instant procurement, Appellant stated:

> [Appellant] will be the administrator of the contract and the point of contact for all day-to-day management. All customer service, scheduling, billing, etc. will be done by [Appellant]. [Appellant] will also supply all containers needed for the service of this contract. Trilogy is strictly a subcontractor that is registered and licensed in Florida and Georgia.

(*Id.*) Appellant denied that Trilogy will be an ostensible subcontractor for this procurement. (*Id.* at 1-2.) Further, according to Appellant, "receipts from [Appellant] and Trilogy combined still fall under the size standard for the subject NAICS Code" assigned to the RFQ. (*Id.* at 1.)

With its response to the protest, Appellant provided the Area Office a copy of a "Service Agreement" between Appellant and Trilogy, dated August 12, 2019 and effective for a period of 36 months. (Protest Response, Exh. 9.) According to the Service Agreement, Trilogy will "regularly pick up" Appellant's infectious waste from various facilities in the state of Georgia, and will transport such waste to a "licensed and/or permitted medical waste treatment facility where waste materials will be treated by steam sterilization (autoclaving), or incineration in accordance with all applicable federal, state, or municipal regulations. Treated medical waste will then be disposed of in a permitted sanitary landfill." (*Id.* at 2, 4.) The agreement stated that Trilogy has the "necessary qualifications, experience and abilities to provide services to [Appellant]." (*Id.* at 1.) Trilogy also is obligated to:

> provide containers for the transport of infectious waste. [Appellant] will compensate [Trilogy] in accordance with the agreed upon service and rates. [Appellant] will ensure that all infectious waste deposited in the containers conforms to all local, state and federal laws and is properly labeled in appropriate containers; i.e. pathological waste packaged in labeled boxes, chemotherapy waste in labeled containers, etc. [Trilogy] may at its sole discretion refuse to collect containers that are improperly packaged, labeled, wet or leaking.

(*Id.* at 2.) Ms. Golden, in her capacity as Appellant's Director of Contracting, signed the Service Agreement on behalf of Appellant. (*Id.* at 1, 4.)

Appellant provided the Area Office a copy of an unsigned Subcontract between Appellant and Trilogy for the instant procurement. (Protest Response, Exh. 8.) The Subcontract indicated that "[Trilogy] has the appropriate permits and licenses for the acceptance and disposal of the waste streams." (*Id.* at 1.) Furthermore:

> [Trilogy] will be responsible for transportation and treatment of medical waste. [Appellant] will be responsible for all other aspects such as, training, contract administration, project management, invoicing, reporting and quality control.

(*Id.*) The Subcontract was not signed or dated by either Appellant or Trilogy. (*Id.*)

Accompanying its response, Appellant re-submitted the signed SBA Form 355, dated October 19, 2020, which Appellant previously provided to the Area Office for Size Determination No. 05-2021-002. (Protest Response, Exh. 2.) Appellant stated that it was "modif[ying] its answer to Question 2" (*i.e.*, whether Appellant had been the subject of a prior size determination) from "No" to "Yes," but was not otherwise making changes to its responses. (Protest Response at 2-3.) Appellant also provided the Area Office a completed SBA Form 355 for Trilogy Medwaste, Inc., dated October 21, 2020; income tax returns for Trilogy Medwaste, Inc. for the years 2017-2019; and other financial records for Trilogy Medwaste, Inc. covering the "9 months ending Wednesday, Sep 30, 2020." (Protest Response, Exh. 10.)

E. Size Determination

On February 19, 2021, the Area Office issued Size Determination No. 05-2021-015, concluding that Appellant is not an eligible small business for the instant procurement. The Area Office found that Appellant is affiliated with its proposed subcontractor, Trilogy, under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(2). (Size Determination at 6.)

The Area Office first considered whether Appellant or Trilogy will perform the "primary and vital" contract requirements, which the Area Office described as "waste removal services." (*Id.* at 5.) The Area Office found that Trilogy, rather than Appellant, will perform this work. (*Id.*) Indeed, Trilogy alone possesses the required licenses and permits for handling, transporting, and disposing of infectious medical waste in the states of Florida and Georgia. (*Id.* at 4, 6.) Although Appellant claimed that Appellant will manage the contract and will perform certain administrative functions — including customer service, billing, and training — these tasks are not primary and vital requirements. (*Id.* at 4-5.) Further, OHA has long recognized that "a prime contractor does not perform the primary and vital requirements merely by supervising subcontractors in their performance of work." (*Id.* at 5, quoting *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698, at 9 (2015).) The Area Office observed that, in addition to performing the waste removal services, Trilogy also will provide essential equipment, including the mobile trucks, without which the contract cannot be performed. (*Id.*)

The Area Office addressed Appellant's contention that Appellant will furnish waste collection containers, and thereby will be responsible for a majority of the contract dollar value. This argument, though, is contradicted by the Service Agreement, which stated that Trilogy will supply all necessary containers. (*Id.* at 4.) Moreover, the instant contract does not primarily call for the provision of containers, but for "waste removal services, which the subcontractor will perform." (*Id.* at 5.)

Having concluded that Appellant is affiliated with Trilogy for the instant procurement, the Area Office turned to the question of whether the combined receipts of Appellant and Trilogy exceed the size standard. (*Id.* at 6-7.) The Area Office found that it could not fully assess this issue, however, "because ownership information for [Trilogy] was not provided." (*Id.* at 6.) The Area Office explained that "[b]ased on information gathered from general Internet searches, [Trilogy] appears to be owned or controlled by Triton Investors LLC, [which in turn is] owned and controlled by KKR Co., Inc." (*Id.*) In its earlier decision, Size Determination No. 05-2021-002, the Area Office instructed Appellant to address the relationship between Trilogy and these other concerns, but Appellant failed to do so. The Area Office therefore drew an adverse inference in Size Determination No. 05-2021-002 that Trilogy was not small. Likewise, in the instant case, the Area Office again "specifically requested information on the average annual receipts of [Trilogy] and all affiliates on February 02, 2021, via its letter [notifying Appellant of the protest]," but "[t]his information was not provided." (*Id.* at 7.) Instead, Appellant merely re-submitted the same information Appellant had previously provided for Size Determination No. 05-2021-002, which the Area Office had already found to be inadequate. Accordingly, although Appellant timely responded to the instant protest, the Area Office found that "SBA Form 355 and Federal tax returns from [Trilogy] and KKR Co., Inc. ([Trilogy's] parent company) were not provided." (*Id.* at 2.) The Area Office drew an adverse inference that the missing ownership and tax information would have shown that Trilogy is not small. (*Id.* at 7, citing 13 C.F.R. §§ 121.1008(d) and 121.1009(d).) Because Appellant and Trilogy are affiliated for the instant procurement, and Trilogy is not small, Appellant is not an eligible small business for this procurement. (*Id.*)

F. Appeal

On March 8, 2021, Appellant filed the instant appeal. Appellant argues that the Area Office's decision represents "a clear departure" from OHA precedent. (Appeal at 4.) In particular, Appellant maintains, the instant case is closely analogous to OHA's decision in *Size Appeal of NEIE Med. Waste Servs., LLC*, SBA No. SIZ-5547 (2014), which also involved a VA medical waste disposal procurement. (*Id.* at 5-6.) Appellant asserts that, in *NEIE*, the prime contractor "lacked the requisite licenses to transport and dispose [of] medical waste," so the subcontractor, which did possess such licenses, was responsible for "picking up the medical waste, transporting it to an approved facility, and disposing of it." (*Id.* at 5.) According to Appellant, the prime contractor in *NEIE* "merely provided the necessary employees, at least two, tasked with supervising the subcontractor's work, leading a yearly training session, and otherwise serving as the primary point of contact for the contract." (*Id.* at 6.)

Here, as in *NEIE*, Appellant engaged a subcontractor, Trilogy, "to pick up, transport, and properly dispose of medical waste" from VA hospitals and other medical facilities. (*Id.* at 7.)

Further, as in *NEIE*, Trilogy alone possesses the state licenses necessary to perform the work, although Appellant is in the process of seeking appropriate licenses that "will eventually allow [Appellant] to transport medical waste directly." (*Id.*) Trilogy, though, will have no role in managing the contract, and "all the key employees on the contract work for the prime contractor — [Appellant]." (*Id.*) Appellant insists that it has ample experience with "medical waste management" to oversee the instant contract. (*Id.* at 8 n.6.) Thus, "[w]hile [Appellant] is reliant on [Trilogy] to timely transport and dispose/incinerate the medical waste," Appellant nevertheless remains responsible for "overall contract administration." (*Id.*)

Appellant argues that the Area Office also improperly based its decision on the "Service Agreement" and the "Subcontract," which Appellant provided the Area Office in response to the protest. (*Id.* at 8.) The Service Agreement applies only to certain VA locations in the state of Georgia and thus is not directly applicable to the instant procurement, which primarily calls for work in and around Gainesville, Florida. (*Id.* at 9.) Further, after the Service Agreement was signed, Appellant "adjusted its previous business model to take an even more active role in managing medical waste disposal contracts than it has in the past." (*Id.* at 11.) The Subcontract, meanwhile, is unsigned, and in any event confirms that Appellant will manage the contract. (*Id.* at 10.) Appellant renews its contention that the Subcontract is "analogous to the subcontracting agreement upheld" in the *NEIE* case. (*Id.*)

Appellant reiterates that, for the instant procurement, Appellant will provide "necessary containers for *all* facilities under the [RFQ]." (*Id.* at 11, emphasis Appellant's.) Further, pending approval by the state of Florida of Appellant's application for a medical waste disposal license, Appellant would be willing to "commit to providing at least a portion of the trucks and drivers necessary to service" the instant contract. (*Id.*)

Lastly, Appellant disputes the Area Office's finding that Appellant did not provide sufficient information about Trilogy and its affiliates. (*Id.* at 3, n.1.) Contrary to the size determination, Appellant did submit a completed SBA Form 355 for Trilogy as well as tax records spanning three years. (*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 finding 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 non-similarly-situated subcontractor is performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon a non-similarly-situated subcontractor, the firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(2). 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

I find no merit to this appeal. Appellant's principal argument in this case is that, although Appellant's subcontractor, Trilogy, will perform all medical waste collection and disposal for the instant procurement, Appellant nevertheless will be responsible for the "primary and vital" contract requirements by managing the contract. Section II.F, *supra*. As the Area Office correctly recognized, however, the instant RFQ did not primarily call for managerial services, but rather for medical waste collection and disposal services. Thus, the RFQ stated that the contractor must provide all labor and equipment necessary to perform the "pick-up, transport, incineration and/or Autoclave of biohazard medical waste." Section II.A, *supra*. The contractor must hold "all necessary medical waste permits and licenses for the disposal and treatment of such waste." *Id.* Further, the RFQ specified a mandatory schedule of services, as well as exact numbers and sizes of containers, and thus gave the contractor little discretion to "manage" such matters. *Id.*

While the RFQ itself is clear that the principal purpose of this procurement is medical waste collection and disposal services, OHA also "will give weight to the CO's opinion of what constitutes the primary and vital requirements, as reflected in the assigned NAICS code or otherwise." *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 10 (2018). Here, the CO assigned NAICS code 562112, Hazardous Waste Collection, to the RFQ, and stated in his protest that the purpose of this procurement is "Regulated Medical Waste Pickup and Disposal Services." Sections II.A and II.C, *supra*. These facts further bolster the conclusion that the primary purpose of this procurement is medical waste collection and disposal services, not managerial services. It also is worth noting that Appellant's own quotation made no mention of Appellant's plan for managing the contract, and named only a single individual, Mr. Jaeckle, who would serve as Project Manager, but whose role and qualifications were not defined. Section II.B, *supra*.

Given this record, then, the Area Office appropriately concluded that the primary purpose of this contract is medical waste collection and disposal services. Section II.E, *supra*. Appellant, by its own admission, will subcontract all such work to Trilogy. Sections II.D and II.F, *supra*. Indeed, it does not appear that Appellant could legally self-perform such services, as Appellant itself lacks the requisite licenses and permits to handle, transport, and dispose of infectious medical waste. Sections II.D and II.E, *supra*. The Area Office thus did not err in concluding that Trilogy, rather than Appellant, will perform the primary and vital aspects of this contract, in contravention of the ostensible subcontractor rule. It is well-settled law that "a prime contractor

does not perform the primary and vital requirements merely by supervising subcontractors in their performance of work." *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698, at 9 (2015); *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 9-10 (2013).

On appeal, Appellant contends that the size determination is inconsistent with OHA's decision in *Size Appeal of NEIE Med. Waste Servs., LLC*, SBA No. SIZ-5547 (2014). This argument fails because *NEIE* is readily distinguishable from the instant case. In *NEIE*, OHA found that the prime contractor would perform "all the medical waste collecting duties," which OHA deemed to be "the most complex and delicate part of the contract," such that the prime contractor's "performance of this portion of the contract should be given particular weight in determining whether it is performing the primary and vital function of the contract." *NEIE*, SBA No. SIZ-5547, at 8. Unlike the situation presented in *NEIE*, Appellant here proposed to subcontract all waste collection, in addition to waste disposal, to Trilogy.

Appellant also argues that, upon approval of Appellant's application for appropriate licenses from the state of Florida, Appellant will commit to performing "at least a portion" of the instant contract. Section II.F, *supra*. Appellant's size, though, is assessed as of January 29, 2021, the date of Appellant's self-certification as small in its quotation for this procurement. 13 C.F.R. § 121.404(d). As of January 29, 2021, Appellant did not propose to perform any portion of the waste collection and disposal. Subsequent changes of approach occurring after January 29, 2021, the date to determine size, do not affect Appellant's compliance with the ostensible subcontractor rule because size is assessed as of that specific date. *Size Appeal of Warrior Serv. Co., LLC*, SBA No. SIZ-6046, at 7 (2020); *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).

Lastly, the Area Office did not err in applying an adverse inference to conclude that Trilogy is not a small business. At the time the instant protest was filed, the Area Office had recently issued another size determination, No. 05-2021-002, during the course of which the Area Office had directed Appellant to address the relationship between Trilogy and two other concerns, Triton Investors LLC and KKR Co., Inc. Section II.E, *supra*. Appellant failed to do so, and the Area Office therefore applied an adverse inference in Size Determination No. 05-2021-002 that the missing information would have shown that Trilogy is not small. *Id.* Upon receipt of the instant protest, the Area Office invited, and instructed, Appellant to address any changes of circumstance since the prior size determination. Section II.C, *supra*. Appellant, though, chose to remain silent with regard to Triton Investors LLC and KKR Co., Inc., and instead re-submitted the same information pertaining to Trilogy that Appellant had previously provided for Size Determination No. 05-2021-002. Section II.D, *supra*. Given that Appellant declined to provide any new or updated information concerning Trilogy, the Area Office had no basis to reach a different conclusion than it did in its previous determination.

IV. Conclusion

Appellant has not shown clear error of fact or law in the size determination. 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).

KENNETH M. HYDE
Administrative Judge