

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

SIZE APPEAL OF:

Veterans Care Medical Equipment, LLC,

Appellant,

RE: Mid-Cities Home Medical Service,
LLC, d/b/a Mid-Cities Medical

Appealed From
Size Determination No. 05-2022-017

U.S. Department of Veterans Affairs
Solicitation No. 36C26221R0082

SBA No. SIZ-6176

Decided: October 25, 2022

APPEARANCES

David F. Dowd, Esq., Potomac Law Group, PLLC, Washington, D.C. for Veterans Care Medical Equipment, LLC

Peter B. Ford, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C. for Mid-Cities Home Medical Delivery Service, LLC d/b/a Mid-Cities Medical

DECISION¹

I. Introduction and Jurisdiction

On September 13, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2022-017, concluding that Mid-Cities Home Medical Delivery Service, LLC d/b/a Mid-Cities Medical (Mid-Cities Medical) is a small business for the subject procurement. On appeal, Veterans Care Medical Equipment, LLC (Appellant), which had previously protested Mid-Cities Medical's size status and eligibility, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed

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. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

infra, the appeal is granted, Size Determination No. 05-2022-017 is vacated, and the matter is remanded to the Area Office for further review.

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).

II. Background

A. The Solicitation

On May 8, 2021, the U.S. Department of Veterans Affairs issued Request for Proposals (RFP) No. 36C26221R0082 for in-home oxygen and ventilator services for VA patients in Arizona. (Solicitation, at 1.) The RFP's Performance Work Statement (PWS) explained that the contractor will “provide all the labor, facilities, transportation, and management necessary to perform in-home oxygen and in-home ventilator services for the following healthcare systems: Phoenix VA Health Care System (PVAHCS) and Northern Arizona VA Health Care System (NAVAHCS).” (*Id.*, at 13.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 621610, Home Health Care Services, with a corresponding size standard of \$16.5 million average annual receipts. (*Id.*, at 1.) The deadline for initial proposals was extended to June 9, 2021. (Solicitation, Amendment 0002, at 1.) Final proposal revisions were due November 1, 2021. (Solicitation, Amendment 0006, at 1.) Mid-Cities Medical and Appellant submitted timely proposals, and Mid-Cities Medical submitted a revised proposal on November 1, 2021. (Mid-Cities Medical Revised Proposal, at 1.)

B. Protest

On April 25, 2022, the CO notified all offerors that Mid-Cities Medical was awarded the RFP. On May 2, 2022, Appellant filed a protest challenging Mid-Cities Medical's size and eligibility. (Protest, at 1.)

Appellant alleged Mid-Cities Medical is not a small business for the purposes of this RFP, due to its undue reliance on a subcontractor. (*Id.*, at 4-6.) Specifically, Mid-Cities Medical relies on a non-SDVOSB subcontractor to oversee calls between the Agency, the incumbent contractor, and the new servicer. (*Id.*, at 4.) Appellant alleged that Mid-Cities Medical does not supervise the calls nor hold an administrative role in the contract, and is therefore unduly reliant on the subcontractor. (*Id.*, at 5.) Appellant further asserted that Mid-Cities Medical lacked a “physical footprint” in the Phoenix and Prescott areas of Arizona, the location of contract performance. (*Id.*, at 6.) Absent a location in Phoenix and Prescott, Mid-Cities Medical would be unduly reliant on a subcontractor. Appellant concluded that the Area Office should have considered Mid-Cities Medical affiliated with the subcontractor under the ostensible subcontractor rule, and the CO should have reassessed Mid-Cities Medical's size. (*Id.*)

C. Size Determination

On August 23, 2022, the Area Office informed Mid-Cities Medical of the protest and instructed it to provide any joint venture or subcontracting agreements related to the RFP, status of subcontractor, description of equipment and the party's providing the equipment, individuals providing onsite management, and organization documents. On September 13, 2022, the Area Office issued a size determination, denying Appellant's protest and finding Mid-Cities Medical to be an eligible small business concern for the procurement. (Size Determination, at 1.)

The Area Office used the date Mid-Cities Medical submitted its size representation with its initial offer including price to determine size. (*Id.* at 3, citing 13 C.F.R § 121.404(a).) Because Mid-Cities Medical submitted its initial offer and price on June 9, 2021, the Area Office used this date to determine size for this procurement. (*Id.*) Using Mid-Cities Medical's size as of June 9, 2021, the Area Office determined that Mid-Cities Medical's average annual receipts did not exceed the \$16.5 million size standard, and therefore Mid-Cities Medical was small for the purposes of this procurement. (*Id.*)

The Area Office determined Mid-Cities Medical will perform the primary and vital requirements of the contract and is not unduly reliant on the subcontractor. Therefore, the Area Office determined Mid-Cities Medical's intended subcontractor is not an ostensible subcontractor, and thus should not be treated as a joint venturer. (*Id.*, at 3-5.)

D. Appeal

On September 27, 2022, Appellant filed the instant size appeal and contends that the Area Office did not consider all allegations. (*Id.*, at 4.) Specifically, the protest alleged Mid-Cities Medical delegated work to another entity that it does not manage. (*Id.*, at 5.) Appellant asserts that the Area Office failed to consider Mid-Cities Medical's practice “to cede performance and abdicate management oversight over critical elements of contract performance by region.” (*Id.*) According to Appellant, Mid-Cities Medical delegated work by region without providing oversight. (*Id.*)

Appellant further alleges that Mid-Cities Medical divided the work by area, giving the subcontractor control over certain areas and suggesting that Mid-Cities Medical did not demonstrate how it is the concern that will perform the scope of work for the entire contract area. (*Id.*, at 6-7.) Appellant contends that the contract calls for extensive network of facilities and staff to provide timely services to Veterans; and Mid-Cities Medical does not have the capacity to meet contract requirements without delegating primary and vital requirements to the subcontractor. (*Id.*, at 7.) Lastly, Appellant contends that the Area Office solicited additional information regarding description of the equipment necessary to perform the contract, but failed to consider this information in the determination. (*Id.*) Appellant conclusively asserts this is an error of fact and law. (*Id.*, at 8.)

E. Mid-Cities Medical's Response

On October 20, 2022, Mid-Cities Medical filed a response in this appeal and asserts that the Area Office reasonably found that it was not in violation of the ostensible contract rule. (Mid-Cities Medical's Response, at 3.) Specifically, Mid-Cities Medical contends that it does not rely on the subcontractor and Appellant's allegations stem from a separate contract awarded in a different geographical region in 2021. (*Id.*) Mid-Cities Medical further alleges that the Area Office reasonably determined from the record that Mid-Cities Medical would perform the primary and vital requirements of the procurement. (*Id.*, at 4.)

Mid-Cities Medical denies Appellant's argument that it violates limitations on subcontracting and alleges this argument is based on an erroneous premise because the size determination confirmed Mid-Cities Medical would perform the majority of the work. (*Id.*, at 5.) Lastly, Mid-Cities Medical argues that the Area Office requested information on the equipment necessary to complete the work and “there is nothing to indicate that the Area Office failed to consider this and what, if any, this purported failure has on the Size Determination” (*Id.*, at 6.)

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).

B. Analysis

The regulation governing ostensible subcontractor relationships provides that a prime contractor is affiliated with its subcontractor on a particular procurement if the prime contractor is unusually reliant upon the subcontractor or if the subcontractor would perform the primary and vital requirements of the contract. 13 C.F.R. § 121.103(h)(2). In a size protest pertaining to a procurement, the size of a concern is generally determined “as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.” 13 C.F.R. § 121.404(a). If, however, this size protest pertains to compliance under the ostensible subcontractor rule, then size is determined “as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.” 13 C.F.R. § 121.404(d).

It is well-settled law that compliance with the ostensible subcontractor rule is assessed as of the date of its final proposal revision for the subject procurement. *Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6073, at 9 (2020); *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 6 (2014); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011) (“[a]n ostensible subcontractor analysis is extremely fact-specific and is undertaken on the basis of the RFP and the proposal at issue . . . [t]he Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal.”)

Here, Mid-Cities Medical submitted its initial proposal for the instant procurement on June 9, 2021; however, Mid-Cities Medical also submitted a revised proposal on November 1, 2021, in response to VA's request for final proposal revisions. Sections II.A, *supra*. Therefore, the Area Office was required under SBA regulation to examine Mid-Cities Medical's size eligibility as of November 1, 2021, the day Mid-Cities Medical submitted its revised proposal. However, the Area Office states in its size determination that it considered Mid-Cities Medical's size at the time of its initial offer including price, on June 9, 2021. This is an incorrect date to determine Mid-Cities Medical's size.

I therefore must conclude that the Area Office's size determination was based upon clear error of law, because it used the wrong date to determine Mid-Cities Medical's size. This case turns upon the ostensible subcontractor rule, and thus size must be determined as of November 1, 2021, the date of final proposal revisions. Accordingly, I GRANT the instant appeal, VACATE the size determination, and REMAND this matter to the Area Office for a new size determination, consistent with this opinion. Appellant may present its arguments to the Area Office upon remand.

IV. Conclusion

For the above reasons, the appeal is GRANTED, Size Determination No. 05-2022-017 is VACATED, and the matter is REMANDED to the Area Office for a new size determination.

CHRISTOPHER HOLLEMAN
Administrative Judge