United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Junius J. Dion d/b/a Risen Video Production, Appellant Appealed From Size Determination No. 06-2024-034	SBA No. SIZ-6306 Decided: August 12, 2024

APPEARANCE

Junius J. Dion, Owner, Risen Video Production, Woodland Hills, California

DECISION[1]

I. Introduction and Jurisdiction

On June 3, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2024-034, concluding that Junius J. Dion d/b/a Risen Video Production (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant is affiliated with its large business subcontractor, SpecialtyCare, Inc. (SpecialtyCare), under the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(3). 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 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 15 days after 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 provisions of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

II. Background

A. The RFP

On March 12, 2024, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C25924R0066 for "On-site Intraoperative Neuromonitoring and Instrumentation Services" at the Rocky Mountain Regional VA Medical Center in Aurora, Colorado. (RFP, SF 1449.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of $10 million in average annual receipts. (*Id.*)

The RFP explained that the contractor will provide Intraoperative Neuromonitoring (IONM) technicians and associated instrumentation to support and monitor complex surgical procedures. (RFP at 8-10.) The technicians will utilize "electrophysiological methods such as electroencephalography (EEG), electromyography (EMG), and evoked potentials to monitor the functional integrity of certain neural structures (e.g., nerves, spinal cord and parts of the brain) during surgery." (*Id.* at 7.) The goal of such work is to "reduce the risk to the patient of iatrogenic damage to the nervous system, and/or to provide functional guidance to the surgeon and anesthesiologist." (*Id.*) The RFP estimated that IONM technicians will perform approximately 72 "neuro monitoring services" cases each year. (RFP, Amend. 0002.)

The RFP stipulated that IONM technicians must be board-certified or board-eligible through the American Board of Registration of Electroencephalographic and Evoked Potential Technologists. (RFP at 7.) In addition, "[e]ach surgical case must be supported with real-time data interpretation from a licensed MD." (*Id.*) Contractor personnel "will report directly to the Chief, Surgical Services" at the Medical Center. (*Id.* at 8.)

The RFP stated that VA would evaluate proposals based on three evaluation factors: (1) Technical Capability; (2) Past Performance; and (3) Price. (*Id.* at 64.) For the Technical Capability factor, VA would examine whether proposed IONM technicians possess relevant experience within the preceding three years, and whether the technicians are properly licensed; board-certified or board-eligible; proficient in spoken and written English; and have completed life-support training. (*Id.* at 65.)

Proposals were due March 29, 2024. (RFP, SF 1449.) Appellant and Spartan Medical, Inc. (Spartan) submitted timely offers.

B. Appellant's Proposal

Appellant's proposal, dated March 20, 2024, explained that Appellant is an SDVOSB established in 2009. (Proposal at 13.) Appellant will serve as the prime contractor, responsible for "all project management services." (*Id.*) The proposal stated that Appellant will engage SpecialtyCare as its sole subcontractor. (*Id.* at 14.) SpecialtyCare is a large business. (*Id.* at 9.)

According to the proposal, SpecialtyCare "performs over ***150,000 cases annually***, employs 500 Neurophysiologists, 2,300 Surgeons supported with IONM, 30 years of IONM experience, and the most Advanced-Degreed & Certified (Masters, Ph.D., DABNM) staff in the industry." (*Id.* at 14 (emphasis in original).)

Appellant's proposal identified Appellant's owner, Mr. Junius J. Dion, Jr., as the proposed "Project Manager." (*Id.* at 105.) No other employees of Appellant are discussed in the proposal. Of the four proposed IONM technicians, all are employees of SpecialtyCare. (*Id.* at 25-38.) All of the proposed remote monitoring physicians also are SpecialtyCare employees. (*Id.* at 25, 40-98.)

C. Protest

On April 10, 2024, the CO notified unsuccessful offerors, including Spartan, that Appellant was the apparent awardee. On April 15, 2024, Spartan filed a protest with the CO, challenging both Appellant's size and SDVOSB status. In accordance with 13 C.F.R. §§ 121.1003 and 134.1001(c), the CO directed the size portion of Spartan's allegations to the Area Office, and the status portion to OHA. On June 24, 2024, OHA issued its decision in *VSBC Protest of Spartan Medical, Inc.*, SBA No. VSBC-366-P (2024), sustaining the status protest.

In the size protest, Spartan contended that Appellant will be unduly reliant upon SpecialtyCare to perform the instant contract. (Protest at 1-2.) Spartan alleged that Appellant will pay "far more than 50%" of contract dollar value to SpecialtyCare since all of the IONM services will be performed by SpecialtyCare. (*Id.*) Furthermore, according to Spartan, Appellant already has been awarded at least 10 contracts nationwide for similar IONM services, partnering with SpecialtyCare in each instance. (*Id.* at 2.)

D. Protest Response

On April 26, 2024, Appellant responded to the protest. Appellant highlighted that it will be the prime contractor for this procurement, and that it qualifies as small under the applicable $10 million size standard. (Protest Response at 1.)

Appellant noted that it has 13 active IONM-related contracts, under all of which Appellant subcontracts work to SpecialtyCare. (*Id.* at 2.) Although Appellant again will utilize SpecialtyCare for the instant procurement, Appellant "remains fully accountable for the performance and outcomes of the contract quality performance standards." (*Id.* at 3.) Appellant claimed that it will be paid [XXXXXXXXX] per case/procedure for this procurement, and will pay SpecialtyCare [XXXXXXXXXXX]. (*Id.* at 4.) Accordingly, since the amount paid to SpecialtyCare does not exceed 50% of contract value, Appellant will be compliant with limitations on subcontracting restrictions. (*Id.*) Appellant also questioned whether the protestor, Spartan, is small. (*Id.* at 5-8.)

On May 22, 2024, Appellant supplemented its protest response. Appellant sought to clarify its position and further address some of the Area Office's concerns. (Supp. Response at 3.)

Appellant argued that its relationship with SpecialtyCare qualifies for the exception to affiliation at 13 C.F.R. § 121.103(b)(4). (*Id.*) According to Appellant, SpecialtyCare is a Professional Employer Organization (PEO) "primarily engaged in leasing employees to other businesses." (*Id.*) Regardless, Appellant maintained that it was not in violation of the ostensible subcontractor rule because the SpecialtyCare employees will report to Appellant. (*Id.* at 6.) Furthermore, Appellant alone will manage the contract. (*Id.*) Appellant asserted that it won the award "on its own merits" without dependence upon SpecialtyCare. (*Id.* at 7.)

E. Size Determination

On June 3, 2024, the Area Office issued Size Determination No. 06-2024-034, concluding that Appellant is not small for the instant procurement. The Area Office found that Appellant will be unusually reliant upon SpecialtyCare to perform this contract. (Size Determination at 13.) The Area Office noted that, on March 12, 2024, for an unrelated procurement, the Area Office previously found Appellant other than small for running afoul of the ostensible subcontractor rule. (*Id.* at 2.)

The Area Office explained, first, that Appellant is a sole proprietorship in the state of California, 100%-owned by Mr. Dion. (*Id.* at 5.) Mr. Dion has the power to control Appellant through his ownership interest. (*Id.*) Mr. Dion holds no ownership or managerial interest in any other concerns. (*Id.*)

Turning to the protest allegations, the Area Office noted that under 13 C.F.R. § 121.103(h)(3), "SBA may find affiliation based on ostensible subcontracting when a subcontractor is not a similarly situated entity and **performs primary and vital requirements of a contract**, or of an order, or is a **subcontractor upon which the prime contractor is unusually reliant**." (*Id.* at 9 (emphasis Area Office's).) The first step in an ostensible subcontractor analysis is to assess whether the prime contractor will self-perform the ""primary and vital" requirements of the contract. (*Id.* at 11.) In the instant case, the Area Office determined, SpecialtyCare will perform the primary and vital contract requirements. (*Id.*) In support, the Area Office observed that all of the IONM technicians identified in Appellant's proposal are employees of SpecialtyCare. (*Id.*) Accordingly, SpecialtyCare, not Appellant, will be the one performing the IONM services requested in the RFP. (*Id.*)

Next, the Area Office considered whether Appellant will be unusually reliant upon SpecialtyCare to perform the contract, based on the "four key factors" that OHA has found to be strongly indicative of unusual reliance:

> (1) the proposed subcontractor is the incumbent that is ineligible to compete for the procurement;
>
> (2) the prime contractor intends to hire the large majority of its workforce from the subcontractor;
>
> (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and

(4) the prime contractor lacks relevant experience and must rely on its subcontractor to win the contract.

(*Id.* at 11-12, citing *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016).) Applying this test, the Area Office found that neither the first nor third factors are met because there is no incumbent contractor. (*Id.* at 12.) However, the second factor is met because "[t]he medical professionals identified in the proposal are employees of the subcontractor." (*Id.* at 13.) Appellant's own role for this procurement apparently will be limited merely to project management. (*Id.*) The fourth factor also is met because Appellant lacks relevant experience in self-performing the required services, and has no employees that could perform the requested medical services. (*Id.* at 13.) The Area Office concluded that Appellant will be unusually reliant on SpecialtyCare, a large business, to perform the contract. (*Id.*)

The Area Office noted that a prime contractor may be found to comply with the ostensible subcontractor rule when it can show that it will not pay more than 50% of the contract value to a non-similarly-situated subcontractor. (*Id.* at 13-14, citing 13 C.F.R. § 121.103(h)(3)(iii).) Appellant, though, provided a breakdown of its anticipated payments for this contract, and the Area Office found that Appellant did not persuasively show that it will meet this exception. (*Id.* at 14.) Accordingly, the Area Office determined that Appellant is not small for this procurement due to affiliation with SpecialtyCare under the ostensible subcontractor rule. (*Id.*)

F. Appeal

On June 13, 2024, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred in finding Appellant in violation of the ostensible subcontractor rule. (Appeal at 2.)

Appellant disputes the Area Office's determination that project management is not a primary and vital component of the contract. (*Id.*) Appellant argues that its role as project manager will "enhanc[e] operational efficiency and regulatory compliance" while also "fostering innovation, adaptability, and continuous improvement within government contracting." (*Id.* at 3.) Appellant references several articles that describe the importance of effective project management. (*Id.* at 3-4.)

Appellant acknowledges that it will not utilize its own personnel to perform the contract but instead will "purchase" such services from SpecialtyCare. (*Id.* at 4.) However, SpecialtyCare employees will work approximately three hours per procedure, with an estimated 72 procedures per year. (*Id.* at 4-5.) Appellant, on the other hand, must be available 24/7 to manage the contract. (*Id.* at 5.) If unforeseen circumstances occur, it would be up to Appellant, the prime contractor, to address the problem. (*Id.*) Under this reasoning, Appellant urges that SpecialtyCare will be providing only [a minority] of total contract labor hours. (*Id.*) The Area Office therefore erred in concluding that SpecialtyCare will be responsible for more than 50% of the contract value. (*Id.* at 6.)

Lastly, Appellant renews its contention that SpecialtyCare is a PEO. (*Id.*) The Area Office should have determined that the exception to affiliation at 13 C.F.R. § 121.103(b)(4) is applicable here. (*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 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).

The "ostensible subcontractor" rule provides that when a subcontractor is 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)(3). 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. 13 C.F.R. § 121.103(h)(3)(i); *Size Appeal of C&C Int'l Computs. and Consultants, Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006).

B. Analysis

I find no merit to this appeal. The Area Office determined, and Appellant does not dispute, that Appellant's large business subcontractor, SpecialtyCare, will perform all of the required Intraoperative Neuromonitoring (IONM) services. Sections II.E and II.F, *supra*. Indeed, all of the proposed IONM technicians, as well as all of the proposed remote monitoring physicians, will be employees of SpecialtyCare. Section II.B, *supra*. Furthermore, apart from managing the contract, the proposal did not ascribe Appellant any role in contract performance. *Id.*

On appeal, Appellant concedes that SpecialtyCare, not Appellant, will perform all "clinical services." Section II.F, *supra*. Appellant maintains, however, that the Area Office nevertheless erred in finding Appellant in violation of the ostensible subcontractor rule, because Appellant alone will be responsible for managing the contract. *Id.* This argument fails, since OHA has ""consistently held that a prime contractor does not perform the primary and vital requirements of a contract merely by supervising its subcontractors in their performance of work." *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 12 (2018); *see also Size Appeal of Hamilton All., Inc.*, SBA No. SIZ-5698, at 9 (2015); *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 9-10 (2013). Nor does the RFP support the conclusion that project management is a "primary and vital" requirement of this contract. Notably, the RFP calls for "On-site Intraoperative Neuromonitoring and Instrumentation Services," not managerial services. Section II.A, *supra*. The RFP did not instruct offerors to propose any managerial personnel, nor

are any specific managerial tasks discussed in the RFP. *Id.* The fact that the CO assigned the RFP NAICS code 621399, Offices of All Other Miscellaneous Health Practitioners, further connotes that the principal purpose of this procurement is medical support services. *See* 13 C.F.R. § 121.402(b) (each procurement must be assigned "the single NAICS code which best describes the principal purpose of the product or service being acquired"). Accordingly, the Area Office correctly concluded that Appellant did not propose to self-perform any portion of the primary and vital contract requirements, let alone a majority of such requirements. Section II.E, *supra*.

Appellant's remaining arguments on appeal are equally unpersuasive. Appellant maintains that its dependence upon SpecialtyCare may be excused because SpecialtyCare is a Professional Employer Organization (PEO), but this contention is unavailing. Appellant offers no evidence, beyond bare assertion, that SpecialtyCare is, in fact, a PEO.[2] Nor has Appellant shown that its relationship with SpecialtyCare here is anything other than a prime contractor/subcontractor relationship. Notably, Appellant's proposal for this procurement defined SpecialtyCare as Appellant's "subcontractor." Section II.B, *supra*.

Appellant also maintains that it will comply with limitation on subcontracting restrictions, and therefore is eligible for the exception to ostensible subcontractor affiliation set forth at 13 C.F.R. § 121.103(h)(3)(iii). OHA, though, considered, and rejected, this argument, with regard to the same procurement, in *VSBC Protest of Spartan Med., Inc.*, SBA No. VSBC-366-P (2024). There, OHA explained that Appellant did not establish that [XXXXXXXXXX] constitutes the full amount of the payments that Appellant would make to SpecialtyCare. *Spartan*, SBA No. VSBC-366-P, at 6-7. Furthermore, even assuming, for purposes of argument, that the claimed [XXXXXXXXX] to SpecialtyCare were accurate, this amount still represents more than 50% of the services aspects of the procurement. *Id.* Appellant thus has not demonstrated that it will comply with limitations on subcontracting restrictions.

IV. Conclusion

It is well-settled that "[t]he ostensible subcontractor rule is violated when a prime contractor will have no meaningful role in performing the contract's primary and vital requirements." *Size Appeal of Warrior Serv. Co., LLC*, SBA No. SIZ-6046, at 8 (2020); *see also Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575, at 8 (2014); *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). Such is the case here, because Appellant's role in the instant procurement is limited to project management, which is not a primary and vital contract requirement. The Area Office's conclusion that Appellant will not self-perform the primary and vital requirements of this contract therefore was reasonable based on the record before it.

[2] Pursuant to the *NAICS Manual*, a PEO is an establishment "primarily engaged in providing human resources and human resource management services to client businesses and households." *NAICS Manual* at 489.

For the above reasons, 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