Cite as: *Size Appeal of Veteran Elevated Solutions, LLC*, SBA No. SIZ-6350 (2025)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Veteran Elevated Solutions, LLC, Appellant, Re: Pelican Residences, LLC Appealed from Size Determination No. 03-2025-018	SBA No. SIZ-6350 Decided: April 15, 2025

APPEARANCES

Haley M. Strokman, Esq., Matthew T. Schoonover, Esq., John M. Mattox II, Esq., Timothy J. Laughlin, Esq., Schoonover & Moriarty, LLC, representing Appellant Veteran Elevated Solutions, LLC

Aron C. Beezley, Esq., Bradley Arant Bault Cummings, LLP, representing Pelican Residences LLC

DECISION[1]

I. Introduction and Jurisdiction

On January 10, 2025, the Small Business Administration (SBA), Office of Government Contracting — Area III (Area Office) issued Size Determination No. 03-2025-018, concluding that Pelican Residences, LLC (Pelican or Respondent) qualified as a small business under Department of the Air Force Solicitation No. FA480124Q0007. Veteran Elevated Solutions, LLC (Appellant or VES) timely appealed, alleging the Area Office committed clear error by failing to adequately investigate Pelican's alleged ostensible subcontractor relationship with Otis Elevator Company (Otis), under 13 C.F.R. § 121.103(h)(3). For the reasons explained *infra*, this appeal is GRANTED, and the determination is REMANDED.

OHA adjudicates this appeal pursuant to the Small Business Act, 15 U.S.C. §§ 631 et seq., and 13 C.F.R. Parts 121 and 134. The appeal was timely filed within 15 days after

[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.

Appellant received the size determination. 13 C.F.R. § 134.304(a). Therefore, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On August 1, 2024, the Department of the Air Force issued Solicitation No. FA480124Q0007, seeking comprehensive maintenance, repair, and inspection services for Vertical Transportation Equipment (VTE) at Holloman Air Force Base, New Mexico. (Solicitation at 3.) The procurement was set aside exclusively for small businesses under NAICS code 238290, Other Building Equipment Contractors, with a corresponding $22 million annual receipts size standard. (Solicitation at 1; CO Memorandum.) Proposals were due by August 25, 2024, and Pelican was announced as the apparent successful offeror on December 4, 2024. (Solicitation at 1; Size Determination at 1.)

The Solicitation's Performance Work Statement (PWS) explicitly required contractors to provide all management, tools, supplies, equipment, parts, labor, and timely responses to both routine and emergency calls for the maintenance, inspection and repair of the VTE at Holloman Air Force Base. (PWS at Sections 1.0 and 1.1 and 6.0.) It mandated that contractor personnel possess proper licensing and certification, specifically ASME QEI-1 certification. (PWS at Sections 4.5 and 8.6.)

B. Protest

On December 11, 2024, Appellant timely protested Pelican's size, asserting Pelican was in violation of the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(3). Appellant contended Pelican improperly relied on Otis, a large business, to perform the primary and vital elevator maintenance contract requirements. (Size Protest at 4-5.) Appellant highlighted Pelican's absence of demonstrated elevator maintenance experience and lack of qualified internal personnel. (*Id.* at 5.) "Pelican is solely reliant on Otis, a large subcontractor, to provide elevator services necessary to satisfy the requirements of the Solicitation. Pelican does not meet the essential criteria to be recognized as a legitimate elevator company. It lacks qualified mechanics, appropriate tools, and the capability to repair or maintain elevators. Furthermore, Pelican does not possess the industry specific insurance and licensing." (*Id.*)

In sum, Appellant argued that Pelican's unusual reliance on its subcontractor manifested itself in various ways:

> Pelican relied exclusively on Otis' (or other subcontractor's) technical experience, past performance, and elevator licenses to qualify for the award; Pelican will pass along all primary and vital work to Otis (or another subcontractor); and Pelican will rely on Otis to satisfy the service call requirements. The reality is that Pelican's involvement is merely that of a small business, serving no other purpose than to pass through work to its subcontractor, a large business.

(*Id.*)

As a result, Appellant argued Pelican designated its subcontractor Otis, a large business, to perform the contract's primary and vital requirements and was unusually reliant on Otis to perform the work. (*Id.*) For both these reasons, Appellant asserts Otis was Pelican's ostensible subcontractor, with whom it was affiliated. Pelican thus exceeded the size standard for the instant procurement. (*Id.*)

C. Pelican's Response to Protest

On December 30, 2024, Pelican filed a Response to the Protest. In regard to the Protest, Pelican disputed all allegations made by Appellant as frivolous and inaccurate. First, Pelican argued Appellant's allegation that Pelican had "less than 6 employees was inaccurate and entirely speculative. . . . In reality, Pelican has a team of eleven employees and 1099 contractors operating in seven states." (*Id.* at 2.) Pelican contested Appellant's assertion Pelican has "no federal contracting experience inspecting, maintaining, or otherwise repairing VTEs." Pelican countered that it, contrary to VES's assertion, "had been awarded two additional vertical transportation equipment ('VTE', i.e., elevator, contracts)." (*Id.*)

Pelican maintains in addition to its experience on these three elevator projects, "Mr. Vivin Vaid, owner and president of Pelican and Pelican National Contracting, brings with him a multitude of experience." (*Id.*, at 2.) Pelican disputes Appellant's claims that "Pelican: (a) will not perform the primary and vital requirements; (b) cannot meet the primary and vital requirements on its own; and (c) is 'unusually reliant upon' Otis. . . . In truth, however, Pelican employs experienced leadership with over 25 years of experience in managing various projects in the federal sphere including its owner Mr. Vaid who has experience overseeing the installation, modernization, testing trials, and inspection of elevators for more than a decade." (*Id.*, at 2-3.) Moreover, Pelican has favorable past performance on federal VTE contracts. (*Id.*) Finally, "contrary to VES's speculative and self-serving assertion, Otis will not perform the Solicitation's primary and vital requirements." (*Id.*) In reality, "Pelican will be managing the contract and undertaking the primary and vital requirements of the work required by the Solicitation." (*Id.* at 3-4.)

In conclusion, Pelican asserts that the allegations in Appellant's protest are "baseless," and that Pelican is not "affiliated" with Otis by virtue of the "ostensible subcontractor rule or by virtue of any other rule, for that matter." (*Id.*) Pelican maintains the Area Office correctly relied on proposal assertions identifying Subcontractor A and finding that Pelican met the size standard. (*Id.* at 3).

Pelican emphasized its compliance with the ostensible subcontractor rule by asserting it retained direct oversight and control of contract execution, and that "Otis will not perform the solicitation's primary and vital requirements. In reality, Pelican will be managing the contract in undertaking the primary and vital requirements of the work required." (*Id.*) Pelican further argued that Appellant provided no credible documentary evidence to substantiate the claim that Otis was performing the contract requirements. (*Id.*)

Pelican also highlighted its internal resources and capability, noting specifically that it had personnel available with significant experience in elevator management oversight and coordination of services and a 24 hour a day, seven days a week call center and customer care center to ensure that all routine emergency service calls are answered and addressed within contractually required time frames, ensuring compliance with contract terms. (*Id.* at 4.) In conclusion, Pelican argued it was "not affiliated with Otis by virtue of the 'ostensible subcontractor rule' or by virtue of any rule." (*Id.*)

D. Pelican's Response to Supplemental Information Request

In requests for additional information, dated January 3 and January 7, 2025, the Area Office asked Pelican's owner Mr. Vaid if Liftworks was in fact "Subcontractor A" and if Pelican had actually used Liftworks as a subcontractor. (Emails, J. Gaskins to V. Vaid January 3rdand January 7th, 2025. In response, Mr. Viad stated "Liftworks elevator company is not a subcontractor or a joint venture with Pelican Residences. We had some initial discussions with this company to collaborate to provide services for this contract, however we opted to work with Otis due to their technical superiority and to provide this service to the Air Force Base. Besides, Otis has been maintaining these VTE since last 10 years and base staff was pleased with the performance. . . .We do not have certification to perform elevator work in NM. However, our vendor 'Otis' is certified to perform elevator maintenance in NM. . . . Otis Elevator Company will perform the maintenance work whereas Pelican residences will handle other functions of the contract. . . . Since the contract commenced on Dec. 1, 2024, Otis has already done the Dec. service at the Base as well as the initial inspection and the January service has already been planned in coordination with the Base staff. . . . Liftworks Elevator Company is not our subcontractor" (Email, V. Vaid to J. Gaskins, Jan. 7, 2025.)

E. Size Determination

On January 10, 2025, the Area Office issued Size Determination No. 03-2025-018, finding Pelican was an eligible small business for this procurement. The Area Office based its determination on representations within Pelican's proposal that a concern the Area Office identified as "Subcontractor A" would serve as a similarly situated subcontractor performing the primary and vital contract functions. (Size Determination at 5-6.)

The Area Office began its analysis by outlining the applicable regulation governing affiliation, specifically noting that: "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or when a third party controls or has the power to control both." (*Id.* at 3, citing 13 C.F.R. § 121.103(a)(1).) The Area Office noted that affiliation may arise under the ostensible subcontractor rule if the prime contractor is unusually reliant on a subcontractor or if the subcontractor is performing the primary and vital requirements of the contract. (*Id.* at 3-4.)

The Area Office explained that under the ostensible subcontractor rule, SBA considers all aspects of the relationship between the prime contractor and its subcontractor, including the terms of the proposal, agreements between the parties, and the relative experience and

capabilities of the entities involved. The prime contractor cannot merely act as a conduit for the subcontractor's performance. (*Id.* at 4.) Further, the Area Office reasoned:

> Pelican is a small business for the size standard of the subject procurement. Subcontractor A, not Otis Elevator, was identified in Pelican's proposal as the subcontractor. Pelican notes it did not have a subcontract in place at the time of the proposal, but did discuss utilizing NAICS 238290 during discussions with Subcontractor A for the subject procurement. Subcontractor A's first SAM profile became active on September 11, 2024, and was utilized as no other data was available prior to this date. Size of a firm requires an average of receipts for the five previous years in accordance with 13 CFR § 121.104. A self-certification in 2024 would include the years of measurement relevant for size at any time between January 1 — December 31, 2024. Subcontractor A's SAM Representations and Certifications note it is small for the solicitation NAICS code of 238290 with a size standard of $22.0 Million. SB status was required by the prime to be eligible for the subject procurement. Consequently, Pelican and Subcontractor A are considered similarly situated entities.

(*Id.*, at 5.)

Further, the Area Office noted the ostensible subcontractor rule applies ". . . when a subcontractor that is not a similarly situated entity is performing the primary and vital requirements of the contract." (*Id.*; citing 13 C.F.R. § 121.103(h)(3)), emphasis in the Area Office original) The Area Office found that since Pelican and Subcontractor A are similarly situated entities, the ostensible subcontractor rule does not apply. Consequently, "the Area Office finds Pelican and Subcontractor A are not affiliated based on the ostensible subcontractor rule." (*Id.*)

The second allegation the Area Office addressed was that Pelican's size when combined with its alleged affiliate Otis Elevator exceeded the size standard for the procurement. (*Id.* at 7.) While the Area Office did not specifically address this point here, the Area Office had previously found that Otis was not Pelican's subcontractor for this procurement. The Area Office determined Pelican's size as of August 25, 2024, the date of its initial proposal submission which included price. (There were no further rounds of offers.) (*Id.*) Pelican provided its 2019 to 2023 federal tax returns to support the review. (*Id.*) Upon review of Pelican's federal tax returns the Area Office found under the size standard assigned to the instant procurement Pelican's size was small. (*Id.*)

The Area Office concluded that based on Pelican's proposal, Subcontractor A was a similarly situated subcontractor. (*Id.* at 5-6.) The Area Office did not request or review payroll records, subcontract agreements, technician logs, or other documentation to verify Subcontractor A's actual involvement in Pelican's contract performance. (*Id.*)

D. Appeal

On January 27, 2025, Appellant filed the instant appeal, emphasizing its allegation the Area Office's investigation into Pelican's actual subcontracting arrangement was inadequate and the absence of independent verification that Subcontractor A was actually a small business that met the size standard for the instant contract. Appellant asserts Pelican is relying on Otis, a large business, rather than Liftworks, to perform the contract, contrary to the Area Office's conclusion. (Appeal at 1.) Appellant identified Liftworks as the presumptive awardee by the Area Office at the proposal stage based on its SAM's profile:

> SBA's finding was based on clear legal error because Pelican failed to present any credible evidence that established its size as a small business concern for this procurement and, thus, did not carry its burden to show that it was a small business. In addition, [the Area Office] made a factual error in calculating Pelican's size based upon an alleged subcontractor [(Subcontractor A)] relationship between Pelican and Liftworks ... instead of the subcontractor relationship with Pelican's actual subcontractor, Otis Elevator Company ("Otis").

(*Id.*)

Appellant argued that while Pelican's proposal apparently referenced Liftworks as its subcontractor, the Area Office erred by not requiring Pelican to support that assertion with any contemporaneous evidence. (*Id.*, at 5.) "Instead, the Area Office allowed Pelican to reference undefined and unsworn 'discussions' with Liftworks but apparently did not require Pelican to provide evidence of those discussions. Neither did the Area Office require Pelican to provide any type of agreement, either a subcontract or teaming agreement, or even a sworn declaration that memorializes the parties' commitment to perform this work as a prime/subcontractor team." (*Id.*)

In addition, Appellant continues, the Area Office's failure to require evidence of Pelican's relationship with Liftworks was problematic as without it, Pelican could not establish that Liftworks was a similarly situated entity. "Under SBA's regulations, to qualify as a similarly situated entity, a proposed subcontractor must satisfy two criteria: first, it must share the prime contractor's small business program status; second, it 'must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.' 13 C.F.R. § 125.1. This definition requires that a subcontract actually exist between the parties. But here, there was no subcontract (or even a teaming agreement) between prime and subcontractor so, definitionally, Liftworks could not be considered a similarly situated entity." (*Id.* at 6.)

Accordingly, Appellant asserts the Area Office committed clear error in its determination that Pelican and its subcontractor were not in violation of the ostensible subcontractor rule:

> . . . the Area Office failed to determine who the actual subcontractor would be so that it could scrutinize whether affiliation arose under the ostensible subcontractor rule. That failure carried demonstrably negative results: Pelican is using a large, multinational subcontractor (Otis) to perform the Solicitation's primary and vital requirements (just as VES had alleged). . . . The Area Office clearly erred when

> determining that Pelican is not affiliated with Otis. While the Size Determination does not name the company referred to as "Subcontractor A," as [Liftworks] that subcontractor is Liftworks. But as our contemporaneous evidence shows, Liftworks is not performing under the contract. [Individual 1] Decl., ¶ 4. Rather, Otishas assigned one of its mechanics to perform the work going forward. [Individual 2] Decl., ¶ 3. So, it is Otis who is actually Pelican's subcontractor, not Liftworks.

(*Id.* at 7-8.)[2]

Pelican did not respond to the Appeal, or the Supplemental Motions Appellant introduced into the record.

III. Discussion

A. Standard of Review and New Evidence

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 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.)

Appellant seeks to submit new evidence on appeal. Because this evidence speaks directly to the issues here, does not unduly enlarge the issues and clarifies the facts on appeal, I ADMIT the new evidence into the record. *Size Appeal of Hometown Veterans Medical, LLC*, SBA No. SIZ-6343, at 7-8 (2025).

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[2] In its Appeal, Appellant moved to admit additional evidence. First, on January 27th, in a Motion to Admit New Evidence two declarations from [Individual 1] and [Individual 2] were admitted bolstering that Otis and not Liftworks personnel were performing on the Pelican contract.

On February 13, 2025, in a separate Motion to Supplement its Appeal Appellant provided affidavits from industry personnel who stated they observed Otis employees, rather than Liftworks employees, performing substantial contract tasks onsite, contradicting Pelican's alleged representation regarding Liftworks as its subcontractor.

In addition, on February 13, 2025, in a Motion to Admit New Evidence, Appellant entered a Declaration from the CEO of Appellant that [Individual 3] (Partner at Liftworks) told him Liftworks was not performing under the contract, and a screenshot of [Individual 3] LinkedIn profile to show that he was a Partner at Liftworks. Exhibit 1. "Because [Individual 3] is a Partner at Liftworks, he is in a position to confirm whether Liftworks is performing under the Contract. The Area Office's mistaken belief that [Individual 3] was performing under the Contract led the Area Office to conclude that Liftworks was Pelican's subcontractor." (*Id.*)

B. Analysis

SBA's regulations provide that a contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. An ostensible subcontractor is a firm which is not a similarly situated entity, and which will perform the primary and vital requirements of the procurement, or upon which the challenged concern is unusually reliant. 13 C.F.R. § 121.103(h)(3). An analysis of a concern based on the ostensible subcontractor rule thus requires an assessment of (1) whether a concern will perform the primary and vital requirements of the subject procurement, or (2) whether the prime contractor is unusually reliant on its subcontractor to perform the functions required under the contract. *Id., Size Appeal of Diversified Elevator and Equipment Co.*, SBA No. SIZ-6283, at 11 (2024).

An ostensible subcontractor analysis is "extremely fact specific and is undertaken on basis of the solicitation and the proposal at issue." *Id., Size Appeal of High Desert Aviation, LLC*, SBA No. SIZ-6179, at 9 (2022). All aspects of the relationship between the prime and the subcontractor are to be considered, including, but not limited to the proposal's terms, agreements between the prime and the subcontractor, whether the subcontractor is an ineligible incumbent and whether the prime contractor relies solely upon the subcontractor's experience. 13 C.F.R. § 121.103 (h)(3)(i). OHA has emphasized the importance of examining the relationship between the prime contractor and subcontractor to determine compliance with the ostensible subcontractor rule. *Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103 (2021).

The first step in an ostensible subcontractor analysis is to determine the primary and vital requirements of the subject solicitation. Here, the primary and vital requirements are clear, the maintenance, inspection and repair of the elevators at Holloman Air Force Base. In its January 6thand 7thresponses to the information request from the Area Office, Pelican disclosed that Otis was in fact maintaining the VTEs for Pelican under the contract. Section II.F, *supra*. It is therefore clear from Pelican's responses to the Area Office that it is Otis which is performing this work.

Here, the Area Office found that Liftworks was Pelican's Subcontractor A, and that Otis Elevator was not Pelican's subcontractor. The problem is that these conclusions of fact are directly contrary to the information in the record. Pelican's Proposal contains no mention of Liftworks as subcontractor and there is no agreement with Liftworks in the record. Further, Pelican informed the Area Office that they were not in a subcontractor relationship with Liftworks but were in fact subcontracting with Otis Elevator. Pelican, despite the assertions made in its Protest Response, informed the Area Office that it was not certified to perform elevator maintenance and repair in New Mexico, the state where Holloman AFB is located, and that Otis was. Pelican informed the Area Office that Otis would be performing the work, and that Pelican would perform the administrative functions.

Accordingly, I find that the Area Office made an error of fact, by coming to the conclusion that Liftworks was Pelican's subcontractor and that Otis was not, when this

conclusion is not supported by the record, and is indeed, the opposite of what the record clearly states.

The Area Office made an error of law, by finding Pelican had not violated the ostensible subcontractor rule. A prime contractor must perform a significant portion of the primary and vital contract work to avoid a finding of affiliation under the ostensible subcontractor rule. *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012).

Here, Pelican has admitted it is not performing the primary and vital requirements, and that Otis, which is a large firm and thus not similarly situated, is performing those requirements. Pelican should therefore be found affiliated with Otis under the ostensible subcontractor rule and thus, other than small.

I therefore must conclude that the instant Size Determination is based upon error of fact and law. I must VACATE the Size Determination and REMAND this case to the Area Office for a new size determination consistent with this decision. The Area Office should obtain whatever agreements exist between Pelican and Otis and, if possible, Liftworks.

IV. Conclusion

For the above reasons, I GRANT the instant appeal, VACATE the size determination and REMAND this case to the Area Office for a new size determination consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge