

Small Business Administration (S.B.A.)
Office of Hearings and Appeals

[Size Appeal]

THE ANALYSIS GROUP, L.L.C., APPELLANT
SIZ-2006-09-12-52
Solicitation No. W91QF4-05-R-0011
Department of the Army
Army Contracting Agency
Fort Leavenworth, Kansas
October 17, 2006

Appearances

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For Appellant

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For RhinoCorps Ltd., Co. & ALATEC, Inc.

DIGEST

A size appeal is not moot when the contracting officer has stopped performance on an awarded contract.

Where none of the proposed core personnel on a contract are employees of the challenged firm, and five of the six are current employees of the incumbent ostensible subcontractor, and there is no identification of the discrete tasks that each firm will perform, the challenged firm is unduly reliant upon its ostensible subcontractor for the primary and vital requirements of the contract.

DECISION

HOLLEMAN, Administrative Judge:

Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 et seq., and 13 C.F.R. Parts 121 and 134.

Issues

Whether a size appeal is moot when a contracting officer has stopped performance on an awarded contract.

Whether, where none of the proposed core personnel on a contract are employees of the challenged firm, and five of the six are current employees of the ostensible subcontractor, which is the incumbent, and there is no identification of the discrete tasks that each firm will perform, the challenged firm is unduly reliant

upon its ostensible subcontractor for the primary and vital requirements of the contract.

I. BACKGROUND

A. The Solicitation

On August 30, 2005, the Contracting Officer (CO) for the U.S. Army Contracting Agency, Northern Region Contracting Center in Fort Leavenworth, Kansas (Army) issued the subject Request for Proposals (RFP) as a total small business set-aside. The purpose of the procurement is to provide support for the mission of the U.S. Army Training and Doctrine Command Analysis Center (TRAC or the Army) at White Sands Missile Range, New Mexico (WSMR). The CO initially designated North American Industry Classification System (NAICS) code 541710 (Research and Development in the Physical, Engineering, and Life Sciences) with a size standard of 500 employees. On October 12, 2005, following NAICS Appeal of RhinoCorps, Ltd., SBA No. NAICS-4736 (2005), the CO issued Amendment 0003, which changed the NAICS code to 541511 (Custom Computer Programming Services), to conform to that decision. Following a series of court appeals involving the NAICS code, the CO issued Amendment 0011, which indicated that NAICS code 541511 would remain and the proposal due date was April 10, 2006. See *Advanced Systems Tech, Inc. v. United States*, No. 05-1167C (Fed. Cl. Jan. 31, 2006) (remand order); NAICS Appeal of Advanced Systems Tech., Inc., SBA No. NAICS-4774 (2006).

B. The Protest

On July 12, 2006, the CO issued a notice that The Analysis Group, L.L.C. (Appellant) was the apparent successful offeror. On July 19, 2006, an attorney for two unsuccessful offerors, ALATEC, Inc. (ALATEC) and RhinoCorps, Ltd. (Rhino) (Protestors), filed a size protest alleging that Appellant was not a small business due to affiliation with other entities including Sparta, Inc., Titian Corporation, SAIC, Lockheed Martin, IT Spatial, and Semantic Research, Inc. In addition, Protestors assert that Appellant is affiliated with its ostensible subcontractor, Advanced Systems Technology, Inc. (AST), the incumbent contractor and large concern. Protestors assert that Appellant is unduly reliant on AST because it is the incumbent contractor for this procurement and will be providing key personnel to perform the primary and vital requirements of the contract.

On July 24, 2006, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting - Area II in Philadelphia, Pennsylvania (Area Office). On July 27, 2006, the Area Office informed Appellant of the protest and requested it submit a response, a completed SBA Form 355, and certain other information.

On August 1, 2006, Appellant responded to the protest and argued that SBA should dismiss the protest. Appellant asserts it is not unduly reliant upon AST and that FAR β 52.237-3 encourages the contractor to hire personnel of the incumbent contractor to ensure continuity of services. Appellant maintains it: (1) chased the contract from the outset and signed a Teaming Agreement with AST in December 2004; (2) possesses the requisite background and experience to carry out the contract and has performed on projects under the applicable NAICS code with other federal agencies; (3) will manage the contract; and (4) will perform at least 51% of the work, although difficult to calculate because of the nature of an IDIQ contract, and 100% of the work in the most senior and expensive labor categories. In addition, Appellant asserts that the use of the word "partners" on its website merely described a relationship and is insufficient to establish a legal partnership with Sparta, Inc., Titian Corporation, SAIC, Lockheed Martin, IT Spatial, or Semantic Research, Inc.

C. Size Determination No. 2-2006-88 & 89

On August 18, 2006, the Area Office issued Size Determination No. 2-2006- 88 & 89, finding that Appellant is not a small business for the procurement. The Area Office determined that Appellant is engaged in a joint venture and is affiliated with AST, a large concern under the applicable NAICS code, in violation of the ostensible subcontractor rule. See 13 C.F.R. § 121.103(h)(3). The Area Office found no affiliation between Appellant and Sparta, Inc., Titian Corporation, SAIC, Lockheed Martin, IT Spatial, or Semantic Research, Inc.

The Area Office found Appellant unduly reliant upon AST because the teaming agreement did not assign discrete tasks to AST and the technical proposal did not clearly define the current employees of AST that would be hired as Appellant's employees. On July 21, 2006, the Area Office requested that when the Army forwarded the size protest, it also state what would be considered the primary and vital parts of the solicitation. On July 24, 2006, the CO stated that the primary and vital parts of the solicitation were the personnel qualifications of the core personnel required under Section C.5.4. Appellant's proposal provided resumes for the six core positions, and five of the six individuals (including the Senior Program Manager) were current AST employees. The proposal also contained numerous references not only to Appellant's team, but to AST's prior involvement with this procurement. Due to Appellant's reliance in its Technical Proposal on AST's experience and expertise as the incumbent and the fact that the majority of the core personnel were AST employees, the Area Office found Appellant unduly reliant on AST and other than small for this procurement.

D. Award of the Contract & GAP Protest

Due to a size specialist being on leave and a high caseload, the Area Office failed to issue a formal size determination within ten business days from receipt of the protest. Therefore, on August 16, 2006, the Army awarded the contract to Appellant after determining that continued delay would be disadvantageous to the Government pursuant to FAR § 19.302(h)(2). On August 30, 2006, ALATEC filed a protest of the award with the U.S. Government Accountability Office (GAO).

E. The Appeal

On September 12, 2006, Appellant filed the instant appeal. Appellant asserts that the ongoing GAO protest, and the related automatic stay, gives rise to a continuing, live controversy. Accordingly, notwithstanding the Army's award of the contract, Appellant asserts the size determination is not moot and the appeal is proper.

Appellant asserts the Area Office erred in criticizing Appellant for failing to assign discrete tasks to AST. Appellant argues the Area Office ignores the unique circumstances of an IDIQ contract, where the task orders will not be issued until after award, making it difficult to assign discrete tasks.

Appellant further argues it "has the demonstrated experience and capability to perform the work - and retains sufficient control - to ensure that it is in charge and functions fully as the prime contractor, and that AST is not an ostensible subcontractor." Appeal Petition, at 5. Appellant asserts that the key AST personnel will be under the direct control of Appellant's President, Mr. Kevin Wilshire, and that the Teaming Agreement provides Appellant will be solely responsible for "[P]rogram [M]anagement and other management responsibilities." In addition, Appellant will perform a minimum of 51% of the work, while the Teaming Agreement provides that AST will only perform 36% of the work.

Further, Appellant asserts the Area Office erred in criticizing Appellant for its references to AST in its Technical Proposal, arguing "it is completely appropriate and proper for a small business to bolster its technical proposal by hiring the incumbent workforce and engaging the incumbent as a subcontractor." Appeal Petition, at 9. Appellant argues the references to AST in its Technical Proposal in no way changes the fact Appellant is in control of the contract and not unduly reliant upon AST.

F. Protestors' Response

On September 25, 2006, the Protestors responded to the appeal. Protestors argue that Appellant clearly violates the ostensible subcontractor rule by not only utilizing the staff and resources of the incumbent contractor, AST, but also AST's incumbent subcontractor, Unitec.

Protestors reiterate that five of the six core personnel are AST employees and guaranteeing 36% of the contract effort to AST for unspecified activities results in a joint venture.

II. DISCUSSION

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; Size Appeal of Proceadyne Corp., SBA No. SIZ-4354, at 4-5 (1999). This Office will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in key findings of law or fact. Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-4775, at 11 (2006).

C. Procedural Matters

Under this Office's precedent, a size appeal is not moot when the contracting officer has stopped performance on an awarded contract. Size Appeal of B.L. Harbert International LLC, SBA No. SIZ-4525, at 8-9 (2002). This is because it remains uncertain whether the condition for mootness, that the contract will remain in place with the awardee regardless of the outcome of the appeal (and thus that the appeal is purely academic), is fulfilled. Size Appeal of Spectrum Landscape Services, Inc., SBA No. SIZ-4313 (1998). The CO awarded the contract to Appellant on August 16, 2006. The CO then stayed performance without issuing a stop-work order because the contract was an IDIQ contract and the GAO protest occurred before any task orders were issued. Thus, because it remains uncertain whether the contract will remain with Appellant, a ruling on Appellant's size is not merely an academic matter. Accordingly, this appeal is not moot.

D. Ostensible Subcontractor Rule

The ostensible subcontractor rule is an independent basis for finding affiliation between two concerns. 13 C.F.R. § 121.103(h)(4). The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade

SBA's size requirements. The ostensible subcontractor rule permits the Area Office to determine a subcontractor and a prime have formed a joint venture (and are thus affiliates) for determining size. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4). In determining whether a subcontractor performs primary and vital requirements or that the prime is unusually reliant, the Area Office must consider all aspects of the prime-subcontractor relationship including, but not limited to, the terms of the proposal, agreements between the prime and the subcontractor (such as teaming agreements), and whether the subcontractor is an incumbent contractor and is ineligible to submit a proposal because it exceeds the size requirements for the solicitation. *Id.*

The "seven factors test" is an earlier way of encapsulating what has become the ostensible subcontractor rule codified in 13 C.F.R. § 121.103(h)(4). These seven factors are now almost twenty years old; they are neither exclusive nor exhaustive, nor do they address "all aspects" of the prime contractor/subcontractor relationship required by 13 C.F.R. § 121.103(h)(4). Instead, Area Offices must, at a minimum, consider the aspects listed in 13 C.F.R. § 121.103(h)(4) and should analyze factors outside of the seven factors if relevant. See *Size Appeal of FDR, Inc.*, SBA No. SIZ-4781 (2006); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006). In their analyses, Area Offices may choose to concentrate on one factor if it is dominant or persuasive. See *Size Appeal of Ahuska Int'l Security Corp.*, SBA No. SIZ-4752 (2005). Therefore, while it is acceptable to consider the seven factors, the Area Office must evaluate "all aspects" of the prime contractor/subcontractor relationship (or the totality of the circumstances) to determine if the ostensible subcontractor rule applies. See 13 C.F.R. § 121.103(a)(5).

E. Appellant's Affiliation

The CO informed the Area Office that the "primary or vital parts of the solicitation would be the Personnel Qualifications of the "core" personnel required under Section C.5.4." These core personnel included: (1) one senior program manager; (2) two project leaders; (3) one senior operations research/systems analyst; (4) one combat operations analyst/team leader; (5) one simulation interactor III; and (6) one senior systems administrator. Solicitation, Section C.5.4. In Appendix B of Appellant's Technical Proposal, Appellant provided the resumes of its proposed core staff. Five of the six core personnel were current AST employees and the proposed senior systems administrator was a current employee of Unitec, AST's incumbent subcontractor. Therefore, none of the proposed core personnel were current employees of Appellant. This Office has held that where the ostensible subcontractor is the incumbent and the challenged firm proposes to hire a substantial number of the incumbent's employees, this constitutes strong indicia of affiliation. See *Size Appeal of Business Control Systems, Inc.*, SBA No. SIZ-3959, at 7-8 (1994); *Size Appeal of Infotech Enterprises, Inc.*, SBA No. SIZ-4346 (1999). Notwithstanding Appellant's assertion that all the incumbent employees will be under the control of Appellant through Appellant's President, Kevin Wilshere, Appellant is nonetheless relying on the qualifications of its incumbent subcontractor to perform the primary and vital requirements of the solicitation. See *Size Appeal of Business Control Systems, Inc.*, SBA No. SIZ-3959 (1994) (affiliation found when the subcontractor's participation enhanced the competitive status of the proposal and the key employees (including the Program Manager) were the incumbent subcontractor's employees).

Appellant's Teaming Agreement provides that Appellant is solely responsible for program management and that the subcontractor will perform a minimum of 36% of the total labor. Teaming Agreement, Exhibit A. However, Appellant's Technical Proposal

and Teaming Agreement fail to identify discrete tasks that each firm would perform, which also indicates unusual reliance. Size Appeal of SectTek, Inc., SBA No. SIZ-4558 (2003).

Appellant asserts that the failure to identify discrete tasks is merely a product of the nature of an IDIQ contract, where task orders will not be issued until after award. However, this is belied by Appellant's own proposal, which enumerates many discrete tasks which the team of Appellant and AST will perform. Yet Appellant has made no effort to identify which tasks each firm will perform, even though this information must be available. Accordingly, I must take its failure to make such an identification as a strong indicium of undue reliance.

Thus, the Record demonstrates that Appellant is unduly reliant upon AST for the performance of the primary and vital requirements of the solicitation since AST's participation clearly enhances the competitive status of the proposal.

The Area Office did not commit a clear error of fact or law when it determined Appellant was unusually reliant upon AST and thus affiliated with them under the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). Moreover, the Record shows that AST will perform primary and vital requirements of the contract. Therefore, I hold the totality of the circumstances supports a finding that AST will perform primary and vital requirements of the contract and that Appellant is unusually reliant upon AST. See 13 C.F.R. § 121.103(h)(4). Accordingly, Appellant is other than a small concern for the instant procurement.

III. CONCLUSION

For the above reasons, the Administrative Judge AFFIRMS the Area Office's size determination and DENIES the instant appeal.

This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(b).

Christopher Holleman

Administrative Judge

SBA No. SIZ-4814, 2006