REDACTED DECISION FOR PUBLIC RELEASE

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF:	
Greenleaf Construction Company, Inc.	Docket Nos. SIZ-2004-12-17-76 (RMD) SIZ-2004-08-13-52
Appellant	
Solicitation No. R-OPC-22505 Department of Housing and Urban Development Office of the Chief Procurement Officer Washington, DC	Decided: February 16, 2006

APPEARANCES

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for Appellant

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DIGEST

A challenged firm is not unduly reliant upon, and thus not affiliated with, its ostensible subcontractor when the ostensible subcontractor is performing only 19% of the work of the contract, and the challenged firm is performing over 50% of the work, and supervising the subcontractors performing the remainder of the work; and the portion of the work performed by the challenged firm includes the majority of the primary and vital requirements of the contract.

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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.[1]

Issue

Whether a challenged firm is unduly reliant upon, and thus affiliated with, its ostensible subcontractor when the ostensible subcontractor is performing only 19% of the work of the contract, and the challenged firm is performing over 50% of the work, and supervising the subcontractors performing the remainder of the work; and the portion of the work performed by the challenged firm includes the majority of the primary and vital requirements of the contract.

I. BACKGROUND

A. The Remand Decision

The background of this case is discussed in *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4663 (2004) (*Greenleaf I*). Briefly, on August 6, 2003, the Department of Housing and Urban Development (HUD) issued the instant Request for Proposals (RFP) for the management and marketing of single-family properties. On July 8, 2004, the Contracting Officer (CO) notified the offerors that Greenleaf Construction Company, Inc. (Appellant) was the apparent successful offeror. On July 14, 2004, Chapman Law Firm (Chapman) filed a size protest against Appellant. Chapman alleged that Appellant was other than small because its relationship with its ostensible subcontractor, Michaelson, Connor & Boul, Inc. (MCB) (MCB is also the incumbent contractor) was really that of a joint venture.

On July 29, 2004, the Small Business Administration (SBA) Office of Government Contracting - Area IV (Area Office) in Chicago, Illinois, issued Size Determination No. 4-2004-

[1] The Small Business Administration (SBA) has revised its regulations governing the small business size determination program and its regulations governing size appeals. 69 Fed. Reg. 29192 (May 21, 2004). Because the solicitation was issued before June 21, 2004, the effective date of this rule, the revised regulations do not apply to this appeal.

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60 (size determination). The Area Office found that, although Appellant's receipts were below the size standard, because Appellant was engaged in a joint venture with MCB, and therefore MCB's receipts had to be combined with those of Appellant, Appellant was other than small for this contract. On August 13, 2004, Appellant filed an appeal with this Office. On November 1, 2004, this Office issued *Greenleaf I*, remanding the case to the Area Office for a new size determination.

There, in addition to finding the size determination conclusory and based on only a superficial review of the evidence, the Administrative Judge found the Area Office had been unclear as to the test it was applying on the ostensible subcontractor issue, and ordered the Area Office, on remand, to use only the "unusual reliance" test provided in the regulation, and not the "seven factors" test. She also ruled the mention of "team" and "partnering" between Appellant and MCB, in Appellant's proposal, did not mandate an ostensible subcontractor relationship.

B. The Size Determination on Remand

1. The RFP

On December 2, 2004, the Area Office issued Size Determination No. 4-2004-60 (R) (the Remand Determination), which reaffirmed its earlier determination that Appellant was engaged in a joint venture with MCB, and was thus other than small. The Area Office began by finding that Appellant's sole shareholder is Bryon L. McIntosh. Mr. McIntosh's wife and son own Pillar Construction (Pillar), an inactive corporation. The Area Office found Appellant affiliated with Pillar, due to the family ties. The Area Office also found that Appellant and its affiliate Pillar, taken together, are small under the applicable size standard.

The RFP seeks to acquire Management and Marketing (M&M) services to manage, market, and sell single-family properties in connection with HUD's property disposition program. The specific contract Appellant seeks, covering Michigan and Ohio, is a cascading set-aside for small business. The Area Office found that RFP's three primary performance areas are: (1) ensuring mortgagee compliance, (2) property management, and (3) marketing and sales. There is also a general tasks area, which relates to each primary performance area. Nowhere in the RFP are the three primary performance areas ranked against each other in importance.

The Area Office found that RFP identifies three objectives of the property disposition program, and each objective relates to one of the three primary performance areas. These objectives are: (1) mortgagee compliance with HUD's property conveyance requirements; (2) maintain HUD-owned and custodial properties in a manner that preserves communities and maintains the value of the properties; and (3) market and sell HUD-owned properties to maximize net return, minimize holding time, and expand homeownership. Nowhere in the RFP are the three objectives ranked against each other or against the "general tasks" in importance.

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The Administrative Judge's own review of the RFP reveals five Contract Line Item Numbers (CLINs) which correspond to five areas of performance. CLIN 0001 is Property Management involving the management and maintenance of the HUD-owned single-family homes. CLIN 0002 is Vacant Lot Management, performing the same services for HUD-owned vacant lots. CLIN 0003 is Marketing, involving the marketing and sale of the HUD-owned properties. CLIN 0004 involves the management of those properties HUD is holding off the market. CLIN 0005 is custodial work at properties managed by, but not owned by, HUD. Each CLIN represents a fixed fee per property. Solicitation, ¶ B.7.

2. Appellant's Proposal

The Area Office reviewed Appellant's proposal's Organizational Management and Structure and addressed the responsibilities performed. The organizational chart identifies 23 individuals by name. Of these 23, assuming all commitment letters and agreements are fulfilled, 10 are Appellant's employees, 12 are MCB employees, and 1 is employed by another firm. The proposal also includes resumes of 21 other individuals, 20 of whom would be MCB employees. As a result, nearly 73% of the individuals identified in the proposal will be MCB employees. The Area Office found the Director of Administration will be an MCB employee, and four of Appellant's employees will report to him. In addition, at least two high-level MCB managers will be advising Appellant's CEO.

The five key personnel the proposal identifies for contract management are Appellant's CEO, and MCB's CEO, Vice-President, Secretary/Treasurer and Chief Operating Officer. The Area Office also pointed out that HUD had noted in its written negotiation items that Appellant had little experience in single-family property management and Appellant's reply emphasized the participation of MCB management The Area Office therefore found that MCB would play a significant role in contract management.

In reviewing the Distribution of Work under the proposal, the Area Office found that Appellant would distribute work tasks to give 95% of the [CONTRACT TASK AREA A] work, 90% of the [CONTRACT TASK AREA B] work, and 25% of the General Requirements work to MCB; and handle 75% of the [CONTRACT TASK AREA C] and General Requirements work, 5% of the [CONTRACT TASK AREA A] work, and 10% of the [CONTRACT TASK AREA B] work itself. Appellant would give 25% of [CONTRACT TASK AREA C] work to other subcontractors. The Area Office further found Appellant will perform 52% to 56% of the total contract dollars, MCB will perform 19%, and 29% will be performed by other subcontractors. As to facilities, Appellant and MCB will be located in different suites of the same building.

The Area Office reviewed Appellant's past performance, and found none of its examples were similar to this procurement in size or overall scope of work, nor were they for HUD.

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Conversely, all of MCB's examples are HUD contracts similar to the instant procurement. The proposal provides 16 examples of problems solved, but 13 of them by MCB. Further, MCB's examples of problems solved (protecting HUD assets in an area with severe weather) was more relevant to this contract than Appellant's (handling plumbing problems). Thus, the Area Office found MCB had experience in Property Management, Marketing & Sales, and Mortgagee Compliance, while Appellant's experience is only in Property Management, with little in Marketing & Sales, and none in Mortgagee Compliance.

The Area Office also found much of the proposal is written in the voice of MCB. The references to MCB are in the first person, and those to Appellant are in the third person. Further, the proposal presents Appellant and MCB as a single united force, a "team." The Area Office concluded that MCB played a major role in proposal preparation, and without MCB's efforts, Appellant would not or could not be able to perform this contract.

3. The Area Office Size Determination on Remand

Because MCB will be performing nearly all of two of the three tasks considered to be the primary and vital requirements of the contract, Appellant is unusually reliant upon MCB to perform the primary and vital requirements of the contract. Therefore, Appellant is engaged in a joint venture with MCB, and is thus affiliated with it for this contract, and is thus other than small.

C. The Appeal from the Remand Determination

On December 2, 2004, Appellant received the Remand Determination and on December 17, 2004, Appellant filed the instant appeal.

Appellant contends that the work items identified by the Area Office as primary performance areas are simply summary titles for the detailed tasks outlined in the RFP. Further, the Area Office completely disregarded that the General Requirements portion of the contract which HUD considers as important as the Mortgagee Compliance, Property Management, and Marketing and Sales portions of the contract. The Area Office should have deferred to the CO's judgment concerning the Government's requirements.

The [CONTRACT TASK AREA A] duties that Appellant proposes to subcontract to MCB represent only 2% of the total contract cost, and will be performed by only 1.2 FTEs (Full Time Equivalents). Further, MCB's [CONTRACT TASK AREA B] duties are also only a small proportion of the contract, representing just 17% of total contract cost and only 4.75 FTEs. In addition, Appellant's employees will be performing at least some of these duties, and managing the rest. While Appellant lacks experience in these areas, they are only a small portion of the contract, and one in which very few small firms have experience.

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Appellant asserts that the fact that MCB has significant experience with the tasks required by this contract does not mean that Appellant lacks it.

Appellant disputes that Area Office's findings of fact regarding the Organizational Management and Structure for this contract. The Area Office's calculations regarding the numbers of employees are incorrect as they do not take into account the number of Appellant's employees which are yet to be hired. Appellant asserts that it has 59 employees on this contract to 7.2 for MCB, and thus considerably outnumbers MCB. Appellant offers charts with its appeal which purport to document this breakdown of employees.

Appellant also asserts that resumes for a number of MCB employees were included because they are principals of its major subcontractor, and will lend their support to Appellant during the contract. That MCB has more high management employees listed with titles such as President, Vice-President, and Chief Operating Officer merely indicates that, as a large business it has more employees with such titles, and HUD requested the names of its executives.

Appellant also asserts that the Area Office unduly emphasizes the "voice" of the proposal and the use of joint logos and the reference to Appellant and MCB as a "team" despite the fact that this Office's earlier decision emphasized that a proposal prepared this way does not support a finding of affiliation. The proposal was originally conceived as a joint venture, and then modified as a prime/subcontractor relationship, which accounts for the style of proposal preparation.

Appellant further asserts that the fact it will share facilities with MCB does not indicate unusual reliance, as it was Appellant who demanded these locations from MCB for economy in contract performance.

Appellant also argues that the Area Office was incorrect to emphasize the importance of MCB's past experience in managing property, while denigrating that of Appellant. Simply put, plumbing expertise will be at least as important to this contract as dealing with extreme weather conditions. In fact, Appellant has more experience than MCB with the important maintenance duties of the contract, because MCB has subcontracted this work in the past. Similarly, the work MCB will perform will represent only 19% of the total contract cost.

Appellant also asserts that the Area Office gave undue weight to a statement in the proposal which provided that MCB would do whatever it took to get the contract up and running, but which did not say that MCB would manage the contract. Rather, this statement is merely the assurance that the incumbent would provide a smooth transition.

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While [CONTRACT TASK AREA A] is an important portion of the contract, it does not follow that by performing it, MCB is performing all the primary and vital portions of the contract. Here, these duties require only 2 FTEs, out of 66.2 FTEs required to perform the entire contract. Appellant will be performing the more labor-intensive, costly, and risky functions of the contract - [CONTRACT TASK AREA C] XXXXXXXX. Appellant is performing over 77% of the contract value and managing the overall effort. The most important factor in the marketing and sale of a HUD home is the condition of the home, and this is the function Appellant will perform itself. The Area Office erred in not considering this.

The Area Office also erred in presuming all listed MCB employees would be working full time. Appellant had been required to list all personnel who would be working on the contract, regardless of the amount of time spent on it. Appellant had raised this issue in its initial appeal, but the Area Office failed to clarify this on remand. The Area Office also failed to recognize that much of Appellant's work will be performed by individuals who can not be identified until after the contract award. These are [CONTRACT TASK AREA C] XXXXXX personnel who will be recruited after award.

Appellant argues that a challenged firm need only demonstrate that it has most of the requisite skills and experience to perform the contract, that it will perform the primary and vital portions of the contract itself, and that it has the management, financial, and bonding capacity to manage and perform the work itself. Appellant has the means to finance its own contract startup and performance, and the bonding capacity required by the RFP. The Area Office gave undue weight to small, specialized portions of the performance work statement in making its finding about the primary and vital requirements of the contract. A procurement for multi-family housing maintenance is a broad enough category to avoid giving undue weight to the performance of a single task over the many others in contract requirements. The Area Office should have applied equal weight to the contract performance functions consistent with their proportion of the total contract cost and labor requirements, and considered the procuring agency's intent with respect to which duties were appropriate for contracting out.

Appellant asserts that many of the facts that have been found in past cases to be indicia of unusual reliance on the ostensible subcontractor are absent here. Appellant is not dependent upon MCB, and there is no intermingling of responsibility, employees, or resources between the two companies.

D. Chapman's Response to the Appeal

Chapman contends that the Area Office's Remand Determination was correct and this appeal should be denied. Chapman asserts that Appellant, acting alone, has no present ability to service this requirement. Chapman asserts Appellant had ample opportunity to provide the information and explanations on which it bases its appeal to the Area Office, and it failed to do

so. That Appellant was ready to explain its submission further is no grounds for overturning the Area Office decision. Chapman states that Appellant's repeated assertions that the Area Office was responsible for making sure Appellant provided the necessary information to prove its case demonstrates that Appellant failed to provide adequate documentation to the Area Office. Appellant cannot now remedy this on appeal. Appellant's assertions that it complies with the Limitations on Subcontracting Clause are irrelevant to the issue of whether it has met the requirements of the ostensible subcontractor rule. Chapman further asserts Appellant's emphasis on the percentages of work it will perform ignore this Office's precedent that these figures are not determinative in ostensible subcontractor cases.

II. DISCUSSION

A. Procedural Matters

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).

Appellant has submitted with its appeal evidence not presented to the Area Office. This Office will not accept new evidence unless a motion is filed offering good cause for its submission, or the Judge orders its submission. 13 C.F.R. § 134.308(a). Appellant has made no such motion here.

Further, Appellant's submission includes charts which purport to show that most of the employees working on this contract will be Appellant's employees, not MCB's. These charts were not included either in Appellant's proposal or the record before the Area Office (although a less complete chart was part of the appeal in *Greenleaf I*). A review of the proposal Appellant submitted reveals that this chart contains information not submitted to the Area Office. Indeed, this information differs significantly from that submitted to the Area Office.

An appeal to this Office is not the appropriate forum to revise a proposal, or to present information not present or apparent in the proposal. In making a size determination, the Area Office must rely upon the proposal as presented to the CO. In our cases dealing with the ostensible subcontractor rule it is the challenged firm's proposal which the Area Office reviews and which this Office analyzes in order to determine whether the ostensible subcontractor rule applies. *See Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004) (*ePerience*). In deciding whether the Area Office made an error of fact or law this Office may not consider information that was not available to the Area Office at the time it made its determination.

Accordingly, the Administrative Judge EXCLUDES from consideration that information Appellant has submitted with its appeal.

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B. The Ostensible Subcontractor Rule

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 Procedyne Corp.,* SBA No. SIZ-4354, at 4-5 (1999).

The issue here is not whether Appellant is itself a small business, as it clearly is, but whether its reliance upon its ostensible subcontractor, MCB, is such that the two firms must be treated as joint venturers, and thus affiliated.

SBA's regulations treat as affiliates firms submitting offers as joint venturers on a small business set-aside. 13 C.F.R. § 121.103(f)(2) (2003). A contractor may be treated as a joint venturer with its subcontractor if the contractor is found to be "unusually reliant" upon the ostensible subcontractor, or if the subcontractor is performing the "primary and vital requirements of a contract." 13 C.F.R. § 121.103(f)(4) (2003). This Office determines whether a contractor is engaged in a joint venture with its subcontractor based upon the totality of the circumstances in each case. *See Size Appeal of SecTek, Inc.,* SBA No. SIZ-4558, at 5 (2003) (*SecTek*).

C. The Merits of the Appeal

Here, a review of the RFP and Appellant's proposal establish several errors which dramatically undercut the Area Office's conclusion of undue reliance. First, MCB will be performing only 19% of the contract work. It is true that the fact a challenged firm is performing over 50% of the work of the contract and has complied with the Limitations on Subcontracting Clause does not preclude a finding of unusual reliance. *SecTek*, at 6; *Size Appeal of Mathews Construction Company*, SBA No. SIZ-3592, at 10 (1992). Nevertheless, 19% is a rather small proportion of the work to be considered the primary and vital requirement of the contract. In cases where this Office has found the ostensible subcontractor's relationship with the challenged firm violated the rule, even though it the subcontractor was not performing the majority of the work, the subcontractor nevertheless performed a much larger proportion of the contract work than MCB does here. *SecTek*, at 6 (teaming agreement allocated up to 49% of the work to the ostensible subcontractor); *Size Appeal of InfoTech Enterprises, Inc.*, SBA No. SIZ-4346, at 14-15 (1999) (teaming agreement required ostensible subcontractor to perform as close to 49% of the work as possible); *Size Appeal of KIRA, Incorporated*, SBA No. SIZ-4360, at 8 (1999) (teaming agreement requires ostensible subcontractor to perform 49% of the work). Where the amount of work to be performed by the ostensible subcontractor is as small a proportion of the work as it is here, the Area Office must establish that it is that work which is the primary and vital requirement of the contract.

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Second, the Area Office's characterization of the procurement as split into only three areas of performance, all of equal weight, is not supported by a review of the RFP and Appellant's proposal in response to it. The Area Office ignored the "General Requirements" performance area and Appellant's large role in performing those tasks. Appellant dominates two out of four performance areas, not one out of three, as the Area Office found. Moreover, unlike the Area Office, the RFP does not assign equal weight to reach of the four areas. To the contrary, the RFP does not explicitly rank the four performance areas against each other. However, the RFP does contain information revealing the relative importance of the CLINs, in the Incentives and Disincentives clause, and Appellant's proposal reveals each CLIN's percentage of the contract cost.

A review of Appellant's cost proposal reveals that CLINs 0002, 0004, and 0005 (for vacant lots, held off market properties, and custodial maintenance) to be performed by Appellant will represent less than 1% of contract cost for the first year. They are small tasks applying to fewer than 2% of the properties in Michigan and Ohio. They are relatively insignificant. On the other hand, CLINs 0001 and 0003 apply to each property. [CONTRACT PRICING LINE D] [CONTRACT TASK AREA B], to be performed mainly by MCB, is, as noted above, 19% of contract cost. [CONTRACT PRICING LINE E] [CONTRACT TASK AREA C], represents 80% of the contract cost. Appellant will perform 51% of this CLIN itself, and the remaining 29% will be performed by various subcontractors, whose performance will be managed and monitored by Appellant. Appellant will thus be performing 52% of the contract cost itself, managing subcontractors who will be performing 29%, and MCB will perform only 19%.

HUD's priorities in this contract are revealed in the incentives and disincentives it established in the RFP. The contractor may earn an incentive or incur a disincentive based on a Special Property Inspection Score, which evaluates its performance in Property Management. The contractor may also earn an incentive in Marketing, based upon its performance on this CLIN, which will be measured using factors such as amount of net proceeds, average net holding time, and sales to owner occupants. Solicitation, ¶ B.9. HUD's decision to award the incentives and disincentives to these two CLINs clearly indicate that it considers these two CLINs to be the important requirements of the contract. Further, of the two is it clear that Property Management is the more vital, given the greater effort it requires and the incentive/disincentive clauses HUD has applied to it. The Area Office erred in finding three primary areas. It confused the three objectives of the entire property disposition program with the primary and vital requirements of this contract.

Essentially, it is clear that this contract has two primary and vital requirements. HUD requires first, that its properties be managed and maintained, and second, that they be sold. Appellant is fully in charge of the maintenance of the properties, either performing the work itself or doing the difficult tasks of supervising the various subcontractors who will assist it.

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MCB is only performing one of the two tasks, and the one which represents less than one-fifth of the contract cost. Appellant is performing the primary and vital requirement which constitutes the majority of the contract cost. MCB's performance will be limited to only [CONTRACT PRICING LINE D] [CONTRACT TASK AREA B], which, while vital, represents only one-fifth of the contract cost, and is dwarfed by the other vital requirement, [CONTRACT TASK AREA C], which Appellant will perform.

The Area Office also erred when it emphasized the "voice" of the proposal as being that of MCB. This Office has already held in *Greenleaf I* that the proposal's references to Appellant and MCB as a team were not indicia of affiliation. The Area Office's emphasis on the participation of MCB personnel in the management of the contract overlooks the fact that MCB will only be managing its one [CONTRACT PRICING LINE D] [CONTRACT TASK AREA B]. The remainder will be handled by Appellant, and managed by Appellant.

The Area Office also erred in its count of Appellant's employees, in not considering the substantial additional number of employees Appellant will require to perform the property management function. In addition, the Area Office erred when it discounted Appellant's past performance in property management as less relevant to this contract, when the largest portion of the work, and the most important work, is the Property Management CLIN.

The Administrative Judge concludes that the Area Office's Remand Determination is based upon a clear error of fact, in that it failed to find that Appellant was responsible for the majority of the primary and vital requirements of the contract, and MCB responsible for only one requirement which represented only 19% of the contract value. Appellant is clearly not unduly reliant upon MCB, and will performing most of the primary and vital requirements itself.

Accordingly, the Administrative Judge concludes that the Remand Determination is in error, that Appellant is not unduly reliant upon its subcontractor MCB, and is thus not affiliated with it under the ostensible subcontractor rule. Since Appellant is otherwise indisputably small, the Administrative Judge finds Appellant to be a small business. The instant appeal is GRANTED, the Remand Determination below is REVERSED, and Appellant is found to be an eligible small business.

III. CONCLUSION

For the above reasons, the Administrative Judge REVERSES AND VACATES the Area Office's Remand Determination and GRANTS the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge