

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

SIZE APPEAL OF:

Four Winds Services, Inc.

Appellant

RE: Shiloh Services, Inc.

Appealed from
Size Determination Nos. 5-2011-56 & 57

SBA No. SIZ-5260

Decided: July 18, 2011

APPEARANCES

Denis M. Carson, Chief Executive Officer, Four Winds Services, Inc., Altus, Oklahoma, for Appellant.

Johnathan M. Bailey, Esq., and Christopher G. Burwell, Esq., Bailey & Bailey PC, San Antonio, Texas, for Shiloh Services, Inc.

DECISION

I. Introduction & Jurisdiction

On June 9, 2011, the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area V (Area Office) issued a size determination in case numbers 5-2011-56 and 5-2011-57 finding that Shiloh Services, Inc. (Shiloh) is an eligible small business for the procurement at issue. On June 14, 2011, Four Winds Services, Inc. (Appellant), the incumbent contractor and one of the original protestors, appealed the size determination. For the reasons discussed below, I conclude PMI is Shiloh's ostensible subcontractor for this procurement, and this matter is remanded to the Area Office for a calculation of Shiloh's size in accordance with this decision.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination. Thus, the appeal is timely, 13 C.F.R. § 134.304(a), and this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On October 5, 2010, the U.S. Department of the Air Force issued Solicitation No. FA8601-11-R-0005 (RFP) seeking fuels management services at Wright Patterson Air Force Base in Ohio. The Contracting Officer (CO) set the procurement aside for small businesses and designated North American Industry Classification System (NAICS) code 488190, Other Support Activities for Air Transportation, with a corresponding size standard of \$7 million in average annual receipts. Appellant self-certified as a small business when it submitted its initial offer on November 3, 2010.

On May 4, 2011, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror. On May 6, 2011, LOGMET, LLC (LOGMET), a disappointed offeror, filed a protest challenging Shiloh's size. LOGMET alleged Shiloh's relationship with its subcontractor for this procurement, Phoenix Management, Inc. (PMI) violates the ostensible subcontractor rule. On May 9, 2011, Appellant, the incumbent offeror, filed a similar protest.

B. Size Determination

On June 9, 2011, the Area Office issued its size determination concluding Shiloh is eligible for the contract at issue. The Area Office determined that PMI will not have day-to-day control over the contract. The Area Office explained that the RFP calls for only one line item: fuels management. Shiloh will perform the day shift work and manage the contract, and PMI will perform the night shift work. The Area Office concluded that Shiloh will perform the majority of the primary and vital contract requirements and that its relationship with PMI does not constitute a violation of the ostensible subcontractor rule. The Area Office cited *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155 (2010), which involved similar facts, in support of its determination.

The Area Office found that although PMI has more extensive experience than Shiloh in fuels management services, Shiloh could have obtained the contract with another subcontractor and is not unusually reliant upon PMI. The Area Office explained that the proposed contract manager is Mr. Donald Gale, who is currently employed at another Air Force Base, but will be a Shiloh employee. The proposed assistant contract manager is Mr. John Yinger, who is a PMI employee. The Area Office also explained that of five other proposed key lab employees, two are PMI employees and three are employees of Appellant that Shiloh plans to hire. The PMI employees will perform the work to be subcontracted to PMI. The Area Office acknowledged that both Shiloh and PMI attended the pre-proposal site visits, but decided that fact was not an indication that PMI would control the contract. The Area Office pointed out that the teaming agreement between the firms provides that PMI will assist in hiring personnel and will provide management assistance, but Shiloh will be responsible for communicating with the Government. The Area Office noted that the firms do not share offices or employees and thus rejected any contention that the firms are affiliated based upon the totality of the circumstances.

The Area Office also rejected any indirect contention by the protestors that Shiloh and PMI share an identity of interest. The Area Office recognized that the firms have cooperated on five contracts, but concluded the relationship has not risen to the level of economic dependence because Shiloh has been the prime contractor in all but one such instance of cooperation. Upon calculating Shiloh's average annual receipts for 2007, 2008, and 2009, the Area Office concluded Shiloh meets the size standard applicable to the RFP and is eligible for award.

C. Appeal Petition

On June 14, 2011, Appellant filed the instant appeal. Appellant challenges the size determination on three bases. First, Appellant contends Shiloh has absolutely no experience in fuels management and would be entirely reliant upon PMI to perform the contract.

Second, Appellant claims the Area Office erroneously allowed Shiloh to submit as evidence the names and resumes of new proposed managers (Mr. Gale and Mr. Yinger) who were not the same personnel proposed in Shiloh's proposal. Appellant also claims Shiloh improperly included in its proposal the names and resumes of several of Appellant's current employees as Shiloh's own proposed key employees without knowledge or approval of the individual employees themselves. Appellant argues that a firm's proposed key employees are an important factor in award, that the resumes of these employees should have been removed from Shiloh's proposal because they were submitted without authorization, and that Shiloh's proposal should have been deemed nonresponsive as a result. Appellant acknowledges that hiring incumbent employees is typical, but emphasizes that Shiloh misrepresented its relationship with its proposed key employees.

Finally, Appellant disputes the Area Office's finding that Shiloh could have obtained the contract with another subcontractor. Appellant asserts such a determination is speculative and has no factual basis. Appellant reiterates that Shiloh has no fuels management experience and could not have earned the contract based upon its own experience, especially considering Shiloh did not offer any of its own employees as key contract employees. Additionally, Appellant notes that Shiloh's past performance is primarily in transient alert services, not fuels management. Appellant emphasizes that two of the five proposed key lab employees are PMI employees, as is the proposed assistant contract manager. Appellant concludes Shiloh would be unusually reliant upon PMI to perform the contract and requests that OHA reverse the size determination.

D. Shiloh's Response

On July 1, 2010, Shiloh filed its response to the appeal. Shiloh claims Appellant failed to meet its burden of proving a clear error by the Area Office and relied upon unsupported allegations of affiliation. Shiloh asserts Appellant merely disagrees with the Area Office's conclusions but cannot demonstrate any clear error therein.

Shiloh disputes Appellant's argument that Shiloh has no relevant past performance. Instead, Shiloh explains that it has performed several relevant transient aircraft services contracts. According to Shiloh, its prior contracts included many functions relevant to fuels management, and those contracts were significant in size. Additionally, Shiloh's proposed

project manager for the subject contract has significant fuels management experience and is not connected to PMI. Shiloh also points out that transient alert services are procured under the same NAICS code as fuels management services. Shiloh acknowledges that it used PMI's experience "to bolster its competitive standing," but asserts it did not rely upon PMI's experience for eligibility. *LOGMET*, SIZ-5155, at 9.

Shiloh next challenges Appellant's contention that Shiloh is reliant upon PMI for key personnel. Shiloh explains that its proposal included only two resumes: those of Mr. Gale and Mr. Yinger. Shiloh recruited Mr. Gale to serve as contract manager after he leaves government service. Shiloh further explains that although it submitted Mr. Yinger's name as the assistant contract manager, Shiloh's preference is to hire one of Appellant's employees for the position. Shiloh asserts that because Appellant forbade its employees from providing resumes to competitors, the Government "directed offerors to submit resumes of other qualified individuals to show that they were capable of providing persons with sufficient qualifications, even if they intended to hire [Appellant's] incumbent personnel after award." (Shiloh Response 3-4.)

Shiloh also disputes Appellant's assertions that it submitted the resumes of several of Appellant's employees with its proposal. Shiloh claims it does not possess resumes of the individuals identified in the appeal and submission of those resumes was not required. Rather, Shiloh explains, it submitted professional certifications for those individuals because they were proposed as laboratory technicians, and Shiloh intends to hire those individuals upon award. Shiloh contends it is common practice to hire incumbent employees, and "[s]ince those persons will be unemployed unless they accept Shiloh's offer, it is not an unreasonable assumption on Shiloh's part that they will accept." (Shiloh Response 4.)

Finally, Shiloh notes that offerors were not barred from substituting equally qualified personnel for those listed in the proposal after award of the contract. In support of this statement, Shiloh quotes excerpts from the Government's responses to solicitation questions. Shiloh concludes it was permitted, but not required to propose incumbent personnel, and it was permitted to substitute personnel after award. Shiloh urges OHA to deny the appeal because it is not unduly reliant upon PMI, and Appellant failed to sustain its burden.

III. Discussion

A. Standard of Review

The standard of review for this appeal is whether the Area Office based the size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the record before it. It is Appellant's burden to prove, by a preponderance of the evidence, that the Area Office committed an error. 13 C.F.R. § 134.314. Consequently, OHA may not disturb the Area Office's size determination unless the administrative judge has a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. Analysis

Appellant argues that Shiloh's proposal violates the ostensible subcontractor rule. The rule provides that a prime contractor is affiliated with its subcontractor on a particular procurement if the prime contractor is unusually reliant upon the subcontractor or if the subcontractor will perform the primary and vital requirements of the contract. 13 C.F.R. § 121.103(h)(4). To determine whether firms have violated the ostensible subcontractor rule, all aspects of the relationship between the firms must be considered. *Id.* This rule also embodies the ideal that "a concern must bring more to a procurement than its status as a small business." *Size Appeal of Smart Data Solutions LLC T/A SDSE, LLC*, SBA No. SIZ-5071 (2009).

Appellant's argument that Shiloh has absolutely no experience in fuels management and would be entirely reliant upon PMI to perform the contract is inaccurate. Shiloh's proposal establishes that it has experience in performing transient alert services contracts at a number of Air Force bases. These contracts included the performing of such tasks as coordination of fuel delivery, performing refueling and defueling, and inspection and servicing of aircrafts as required, including fuels, oil, oxygen, and hydraulic fluids. (Proposal, Vol. III, at 5-6, 8, 10.) Therefore, Shiloh has some experience in functions relevant to fuels management, even if the firm has not performed a contract requiring solely fuels management. On this basis, the Area Office, as well as the CO, could reasonably conclude that Shiloh possesses some experience relevant to the subject contract.

Appellant's argument that Shiloh failed to propose Mr. Gale and Mr. Yinger as contract managers is also meritless, as Shiloh's proposal does include the resumes of those individuals. (Proposal, Vol. I, at 6, 10.) Regarding Appellant's allegation that Shiloh improperly submitted the resumes of Appellant's employees without the authorization of those employees, Appellant's proposal reflects that it submitted only professional certifications for those employees. The propriety of such submissions is not an issue within OHA's purview.

I also agree with Shiloh that the division of labor between the day shift and the mid/night shifts is not itself a sufficient ground on which to conclude that PMI is performing the primary and vital contract requirements. In *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155 (2010), the challenged firm was performing the day shift work, which constituted 51% of the required work, and the subcontractor was performing the night shift work, which represented 49% of the work. OHA reasoned that the challenged firm could perform the primary and vital contract requirements and merely apportioned the work for its own management purposes, while retaining responsibility for the majority of the work. *Id.* at 9.

The difference between *LOGMET* and this case is that it is not clear that Shiloh itself will perform the primary and vital contract requirements. As explained above, I do not take issue with the Area Office's finding that Shiloh *could* perform this contract based upon its past experience. However, there is absolutely no evidence in the record supporting the conclusion that Shiloh *will* perform any of the work required by this contract.

In a letter responding to questions from the CO, Shiloh asserts that it will provide the contract manager, the assistant contract manager, the fuels accountant, and the day shift fuels

specialists, which represents a total of 52% of the contract labor according to the organizational chart in Appellant’s proposal. PMI will provide a laboratory technician, mid shift fuels specialists, and night shift fuels specialists, for a total of 48% of the contract labor.¹ Shiloh claims it will perform the day shift work, handle contacts with the Government, and manage the contract, while PMI performs the mid shift work and the night shift work. (Proposal, Vol. I, at 22; Teaming Agreement, Attachment 1; Letter from Jeff Hughes, President, Shiloh Services, Inc. to Susan Hashemi, Contracting Officer, U.S. Department of the Air Force (Dec. 10, 2010).)

Appellant complains that Shiloh has not proposed any of its own employees as key contract employees and, in particular, that Shiloh’s proposed assistant contract manager, Mr. Yinger, is currently a PMI employee. I find, based upon my examination of the record, that Appellant is correct. Shiloh has not proposed to provide any current employees as key contract employees,² and it is unclear whether Shiloh proposed to provide any contract employees at all. This constitutes evidence of a violation of the ostensible subcontractor rule. *See Size Appeal of Access Sys., Inc.*, SBA No. SIZ-4843 (2007) (finding a violation of the ostensible subcontractor rule in part because the challenged firm did not offer any of its own employees as key contract employees). If Shiloh cannot provide contract employees, it cannot be performing the primary and vital contract requirements.

First, Shiloh’s proposed contract manager, Mr. Gale, is a contingent hire and is not currently employed by Shiloh. This fact itself may not be evidence of unusual reliance upon PMI, but it does validate Appellant’s argument that Shiloh has not offered any of its own employees to perform the contract at issue.

With regard to Mr. Yinger, Shiloh’s proposal provides that Shiloh intends to hire Appellant’s incumbent assistant contract manager in lieu of Mr. Yinger. However, Shiloh could not provide the resume of that employee because Appellant forbade its employees from communicating with other contract offerors. (Proposal, Vol. I, at 5.) In the letter to the CO referenced above, Shiloh indicated that the proposed assistant contract manager will be a Shiloh employee. It thus appears Shiloh attempted to assure the CO that its proposed assistant contract manager—whether or not that person is Mr. Yinger—would be a Shiloh employee.

Nevertheless, “an ostensible subcontractor analysis is undertaken on the basis of the solicitation and the proposal at issue.” *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010). Shiloh’s proposal clearly indicates that Mr. Yinger is an employee of PMI and provides no indication that Shiloh planned to hire Mr. Yinger. There is no letter of commitment from Mr. Yinger in the record or any other type of agreement between Mr. Yinger and Shiloh. OHA cannot base its analysis on the assumption that a firm will be able to hire an employee at a later date. Rather, OHA must examine the relationship between Shiloh and PMI at the time of the

¹ It is notable that this breakdown of labor does not appear in Appellant’s proposal.

² Although the RFP does not specify which employees are “key employees,” it is reasonable to assume that the positions for which the RFP required resumes and professional certifications are key contract employees. Shiloh contends it will be responsible for providing three such employees: the contract manager, assistant contract manager, and fuels accountant.

proposal to evaluate potential violations of the ostensible subcontractor rule. *Id.* At the time of the proposal, Mr. Yinger was Shiloh's proposed assistant contract manager and was also an employee of PMI.

Thus, I have no choice but to conclude that Shiloh relied upon PMI to provide its proposed assistant contract manager. Consequently, because PMI will provide the assistant contract manager, PMI will also provide over 50% of the required contract labor according to Shiloh's own organizational chart. Because PMI will be performing the majority of the contract work, and because a PMI employee will hold the second most important contract position, I am forced to conclude that PMI will perform the primary and vital contract requirements in violation of the ostensible contractor rule.

Even if Shiloh were to hire Mr. Yinger, it is still problematic that none of the other proposed employees are Shiloh employees. Shiloh indicates that it plans to hire the incumbent fuels accountant from Appellant, but again, there is no letter of commitment in the record. Shiloh's assertion that it can safely assume the incumbent personnel will accept its employment offers is unpersuasive. It is entirely possible, even if unlikely, that each incumbent employee will reject Shiloh's offer of employment. As of the date of the proposal, then, it appears Shiloh could not provide its own fuels accountant. The record thus clearly reflects that none of the proposed key contract personnel (contract manager, assistant contract manager, and fuels accountant) are currently employees of Shiloh. Because Shiloh is not providing any of its own employees to perform the key roles required by this contract, it stands to reason that PMI could exercise control over the contract.

Moreover, it is also unclear whether Shiloh intends to supply any employees at all, aside from the key employees, to perform this contract. The only remaining positions Shiloh contends it will provide are the day shift fuels specialists. Shiloh's proposal does not indicate who is responsible for providing these specific employees, but it does indicate that Shiloh will offer a right of first refusal to the incumbent's employees. (Proposal, Vol. I, at 5.) This is in accordance with the policy expressed in the President's January 30, 2009, Executive Order, which announced that "[t]he Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees." Exec. Order No. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009). I recognize that, as a result of this Order, the hiring of incumbent employees can no longer be considered a meaningful indicia of unusual reliance. However, if Shiloh is proposing to hire all incumbent employees for day shift fuels specialists (something that cannot readily be discerned from Shiloh's proposal), the necessary conclusion is that Shiloh has proposed not one of its own current employees to perform the work required by this contract. If that is the case, it is clear that Shiloh is bringing nothing to this procurement but its small business status.

The record reflects that PMI will perform the primary and vital contract tasks because, according to Shiloh's proposal, PMI will perform the majority of the contract labor, and a PMI employee will hold the second most influential contract position. I therefore conclude that PMI is Shiloh's ostensible subcontractor for the instant procurement. Accordingly, Shiloh is affiliated with PMI for the purposes of this procurement. 13 C.F.R. § 121.103(h)(4). The record contains

no information related to PMI's size. Therefore, I must remand this matter to the Area Office for a determination as to whether Shiloh is an eligible small business under the applicable size standard when its receipts are combined with those of PMI.

IV. Conclusion

PMI is Shiloh's ostensible subcontractor for the instant procurement. This matter is remanded to the Area Office for a calculation of Shiloh's size in accordance with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge