OSTENSIBLE SUBCONTRACTOR

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The Small Business Administration ("SBA") has a long history of looking behind company organizational charts to see who will really perform the work on a government contract. Today, the SBA applies the "ostensible subcontractor" rule to determine if a small business is really small, or is simply relying on the skills and talents of a large company—in which case it will be considered "not small." *GaN Corp.,* SBA No. SIZ-5658 (May 20, 2015) is a good example of a size appeal that featured the ostensible subcontractor rule. The rule provides that when a subcontractor is actually performing the "primary and vital" requirements of the contract, or the prime contractor is "unusually reliant upon the subcontractor," the two firms are affiliated for purposes of the procurement at issue. 13 CFR § 121.103(h)(4). Of course, if the subcontractor is a large contractor, then the prime contractor will also be deemed "not small" because of the affiliation.

GaN Corp. submitted an offer on the Army Evaluation Center Omnibus contracts. The solicitation identified 72 different labor categories and provided minimum qualifications and job descriptions for each labor category, including General Engineer V, Program/Systems Analyst III and Systems Engineer III. Offerors were required to delineate subcontractor information for each factor, and one of the task orders on which GaN proposed considered these three labor categories. The solicitation stated that one resume should be provided for each of these labor categories.

Machine Systems Assessment, Inc. protested that GaN was affiliated with its subcontractor under the ostensible subcontractor rule. The SBA Area Office expressed concerned that all three of GaN's key personnel on the task order were subcontractor employees, stating that this constituted strong indicia of affiliation, cited the ostensible subcontractor rule. The Area Office also determined that the particular task order, which was expected to be $10.2 million, was "5 times larger than the largest contract that GaN has listed in the government's procurement database." Based on these two findings, the Area Office held that GaN was unusually reliant and affiliated with its subcontractor under the ostensible subcontractor rule.

The Office of Hearings and Appeals ("OHA") did not agree. OHA noted clear errors of fact, including that the Area Office had relied on GaN's initial proposal, and never considered its proposal after proposal revisions. Furthermore, GaN's response to the protest included data that GaN was already performing several procurements that were each over $24 million, much greater than the task order's price, so it possessed the requisite experience. Finally, OHA held that the Area Office misunderstood the restrictions on offerors' proposals. Offerors could only submit one, and only one resume for each of the three labor categories, and GaN had submitted resumes for the subcontractor employees, but also proposed its own personnel in these three labor categories. GaN also proposed its own employees for the managerial positions of Program Manager and Deputy Program Manager.

OHA, having carefully considered the record, concluded that it did not show that GaN was unusually reliant on its subcontractor. However, it remanded the case to the Area Office to review the GaN's final proposal, since that had never been considered by the Area Office.