United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Residential Enhancements, Inc., Appellant, Appealed From Size Determination Nos. 3-2018-027, -028, -029, -030, -031, -032, -033, and -034	SBA No. SIZ-5931 Decided: June 11, 2018

APPEARANCES

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Antonio R. Franco, Esq., Michelle E. Litteken, Esq., Ambika J. Biggs, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Owen REO, LLC.

DECISION[1]

I. Introduction and Jurisdiction

On March 8, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 3-2018-027, -028, -029, -030, -031, -032, -033, and -034, concluding that Residential Enhancements, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Specifically, the Area Office found that Appellant is affiliated with its subcontractor, [Subcontractor], under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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, so the appeal is timely. Accordingly, this matter is properly before OHA for decision.

II. Background

A. RFP

On August 22, 2017, the U.S. Department of Housing and Urban Development (HUD) issued Request for Proposals (RFP) No. DU204SB-17-R-0003 for Asset Management services.[2] The RFP stated that HUD planned to award a single Indefinite Delivery / Indefinite Quantity (ID/IQ) contract in each of three geographic areas of the United States: 7A (Georgia); 1D (Colorado, New Mexico, North Texas, and Utah); and 5P (Delaware, Maryland, Pennsylvania, Virginia, District of Columbia, and West Virginia). (RFP § B.2.) Each contract would have a base performance period of approximately eight months, and two one-year options. (*Id.* § B.3.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 531210, Offices of Real Estate Agents and Brokers. Following a successful NAICS code appeal at OHA, the CO issued Amendment 000005, changing the assigned NAICS code to 531390, Other Activities Related to Real Estate, with a corresponding size standard of $7.5 million in annual receipts. *NAICS Appeal of BLB Resources, Inc.*, SBA No. NAICS-5855 (2017). Proposals were due November 28, 2017. (RFP, Amendment 000008.)

The RFP's Performance Work Statement (PWS) stated that HUD seeks a contractor "to provide Asset Management services for HUD's Real Estate Owned [(REO)] properties." (PWS, § 1.1.) The required services include "marketing and sales, inspection services, data updates, customer service, reports, and training." (*Id.*) The contractor, also referred to as the "Asset Manager," is responsible for analyzing market and property conditions, and developing a marketing strategy for the pricing and disposition of HUD-owned properties. (*Id.* § 1.4.) According to the PWS, "[t]he Contractor is required to utilize the services of local real estate professionals, whose primary place of business is within reasonable proximity to the listed property, including the use of small and small disadvantaged businesses, to list properties for sale." (*Id.* § 1.3.19.) The contractor must "ensure listing brokers are vetted and registered, perform required inspections, and that properties are advertised on industry standard listing sites." (*Id.*)

The PWS divided the required services into eight task areas: (1) Transition In; (2) Marketing and Sales; (3) Inspections; (4) Data Updates; (5) Customer Service; (6) Required Reports; (7) Training; and (8) Transition Out. (*Id.* §§ 1.4 and 5.) Under Marketing and Sales, the

[2] On September 28, 2017, the CO issued Amendment 000007, which included a conformed copy of the RFP. Unless otherwise indicated, citations to the RFP refer to the conformed copy.

contractor will "list, market, select the best offer, execute sale documents, oversee the closing process, and ensure that sale proceeds are delivered to HUD in [] no more than one (1) business day." (*Id.* § 5.2.) "The Contractor shall properly exercise its authority to sell properties in a manner that is consistent with the requirements of the PWS, achieves the greatest net return to the government, and minimizes holding time." (*Id.*) In addition, the contractor must develop a Comprehensive Marketing Plan explaining how the contractor will market properties, advertise to potential customers, conduct buyer seminars, perform "Real Estate Broker Outreach Activities" and "Lender Outreach Activities," and continuously analyze market conditions. (*Id.* § 5.2.2.)

Under the Inspections task, the contractor will perform various property inspections, or ensure that such inspections are performed by the listing broker. (*Id.* § 5.3.) Under Data Updates, the contractor will promptly update HUD's P260 case management system with records of actions taken for marketing and sales. (*Id.* § 5.4.) Under the Customer Service task, the contractor shall promote HUD's objectives with the public and customers, maintain a satisfactory response time to inquiries, have a toll-free phone number, and notify HUD of any request for information from an elected official. (*Id.* § 5.5.) For Training, on a monthly basis, the contractor shall provide: (i) training on benefits of purchasing a HUD home; (ii) real estate broker training on sales of HUD homes; (iii) buyer select closing entities training; (iv) training on FHA appraisers; and (v) broker/agent training. (*Id.* § 5.7.)

The PWS stated that "[t]he Contractor shall provide a Contract Manager, Project Manager, and Quality Control Manager, or Third-Party Quality Control Vendor who shall be responsible for the performance of work." (*Id.* § 4.5.) "These Key Personnel, other than the Third-Party Quality Control Vendor, if applicable, shall each be an employee of the Contractor." (*Id.*) Further, "[t]he Contract Manager, Project Manager, Quality Control Manager (if employee of the prime) and their alternates shall have full authority to act on all contract matters relating to daily operations of the contract." (*Id.*) Each of the Key Personnel must have at least five years of relevant real estate experience in such disciplines as "analyzing market and property conditions, developing marketing strategies for the pricing and disposition, listing, marketing, selecting the best offer, executing sales documents, overseeing the closing process, and ensuring that sales proceeds are delivered in a timely manner in relation to NAICS code 531390". (*Id.*)

The PWS also required that the Contractor must "establish and maintain a complete quality control program that shall ensure services are performed in accordance with this contract." (*Id.* § 4.7.) More specifically, the Contractor must "develop and implement procedures to identify, prevent, and ensure non-reoccurrence of defective services. The Contractor's quality control program is a means by which he assures himself that his work complies with the requirements of the contract." (*Id.*)

The RFP stated that HUD would award each contract to the offeror with the lowest-price technically-acceptable proposal. (RFP § M.1.) To determine technical acceptability, HUD would consider the offeror's technical approach, quality control plan, marketing plan, management plan, and key personnel. (*Id.* § M.3.) Past performance was not an evaluation factor. (*Id.* § M.2.)

B. Appellant's Proposal

On November 28, 2017, Appellant submitted its proposal, self-certifying as a small business. Appellant's proposal identified itself as the prime contractor, and [Subcontractor] as "[XXXXXXXXXXXXXXXXX]." (Technical Proposal, Section 2, at 15.) [Subcontractor] "[XXXXXXXXXXXXXXXXXXXXX]." (*Id.*) The proposal described [Subcontractor's] role on the effort as follows:

[XXXXXXXX]

(*Id.*, Section 5, at 41.)

The proposal stated that the Project Manager will report to Appellant's Senior Vice President (SVP) of HUD Operations, who in turn reports to an executive committee. (*Id.*, Section 4, at 1.) The Quality Control Manager will be a [Subcontractor] employee. (*Id.*) The proposal identified the following key personnel for Areas 1D and 5P: (i) Project Manager; (ii) Quality Control Manager; (iii) Contract Manager; (iv) Marketing and Bid Manager (Alternate Contract Manager); and (v) Sales and Closing Manager (Alternate Project Manager). (*Id.* at 3-4.) According to the proposal, the Project Manager "[XXXXXXXXX]." (*Id.* at 4-5.) The Quality Control Manager, provided by [Subcontractor], will report to Appellant's SVP, not to the Project Manager. The proposal explained that:

[XXXXXXXXXXX]

(*Id.*, Section 5, at 5.) The proposal stated that [Subcontractor] "[XXXXXXXX]." (*Id.*, Section 4, at 6.)

Appellant proposed [XXXX], a current [Subcontractor] employee, as its Project Manager for Area 1D. (*Id.*, Section 5, at 6.) The proposed Alternate Project Manager for Area 1D was Ms. Tanesha T. Lanier-Gamory, Appellant's CEO. (*Id.* at 9.) [XXXXXX] was proposed as Contract Manager, and she is currently a [Subcontractor] employee. (*Id.* at 12.) The proposed Alternate Contract Manager was [XXXXXXX], also currently employed by [Subcontractor]. (*Id.* at 15.) Each of the proposed key personnel for Area 1D signed a letter of commitment agreeing that they "will fulfill the Key Personnel role" for which they were proposed in the event that Appellant were awarded the contract. (*Id.* at 6-16.)

For Area 5P, Appellant proposed [XXXXXXX], currently employed by [Business Concern 1], as Project Manager. (*Id.* at 17.) [XXXX]'s resume stated that he also was employed by [Subcontractor] from "9/2010-Present". (*Id.*) The proposed Alternate Project Manager for Area 5P was [XXXXX], currently employed by [Business Concern 1]. (*Id.* at 20.) [XXXX] is also a former [Subcontractor] employee. (*Id.*) The proposed Contract Manager for Area 5P was [XXXXXX], currently employed by [Business Concern 2]. (*Id.* at 23.) [XXXX] is also a former [Subcontractor] employee. (*Id.*) [XXXXXX] was the proposed Alternate Contract Manager, and she is currently employed by [Business Concern 1]. (*Id.* at 26.) [XXXX] is also a former [Subcontractor] employee. (*Id.*) Each of the proposed key personnel for Area 5P signed a letter

of commitment agreeing that they "will fulfill the Key Personnel role" for which they were proposed in the event that Appellant were awarded the contract. (*Id.* at 17-28.)

Apart from the key personnel, Appellant proposed [XXX] full-time equivalents (FTEs) per year for Area 1D, and [XXX] FTEs per year for Area 5P. (Business Proposal, at 26-30.) The proposed non-managerial staff for Area 1D consisted of [XXX] General Clerk II personnel and [XXX] Accounting Clerk II personnel. (*Id.*) The proposed non-managerial staff for Area 5P were [XXX] General Clerk II personnel and [XXX] Accounting Clerk II personnel. (*Id.*)

C. Size Determination

On January 11, 2018, the CO announced that Appellant was the apparent awardee for Areas 1D and 5P. Eight unsuccessful offerors then filed size protests with the CO challenging Appellant's size: (i) BAPM Texas, Inc. d/b/a Best Assets; (ii) Electronic Real Estate Services, LLC; (iii) First Resource Consulting, LLC; (iv) KMM/Cityside JV, LLC; (v) MAAG, LLC; (vi) Owen REO, LLC (Owen); (vii) Raine & Company, LLC; and (viii) Wallace Asset Management, LLC. The protesters alleged that Appellant is affiliated with [Subcontractor] under the ostensible subcontractor rule. The CO forwarded the protests to the Area Office for review.

On March 8, 2018, the Area Office issued Size Determination Nos. 3-2018-027, -028, -029, -030, -031, -032, -033, and -034, sustaining the protests. The Area Office agreed with the protesters that Appellant is affiliated with [Subcontractor] under the ostensible subcontractor rule. The Area Office noted that [Subcontractor] is a large business formerly known as [XXXXXXX]. (Size Determination, at 2.)

The Area Office explained that Appellant is wholly-owned and controlled by Ms. Lanier-Gamory, who also serves as Appellant's CEO and is its sole officer and the sole member of its board. (*Id.* at 4.) Ms. Lanier-Gamory also holds controlling interests in [Affiliate 1], [Affiliate 2], and [Affiliate 3]. (*Id.* at 4.) As a result, Appellant is affiliated with [Affiliate 1], [Affiliate 2], and [Affiliate 3] through common ownership and common management. (*Id.* at 4-5.)

Next, the Area Office found that Ms. Lanier-Gamory's husband, [XXXX], is the sole owner of [Affiliate 4]. Appellant acknowledged that [Affiliate 4] provides services such as payroll assistance, project management, and technical assistance to Appellant. The Area Office concluded that, due to the familial identity of interest between their respective principals, and the business dealings between Appellant and [Affiliate 4], Appellant and [Affiliate 4] are affiliates. (*Id.* at 5-6.)

In analyzing whether Appellant and [Subcontractor] are affiliated under the ostensible subcontractor rule, the Area Office stated that, according to the CO, the RFP's primary and vital requirements are "to provide Asset Management services in support of HUD's Real Estate Owned (REO) property inventory. The required services include marketing and sales, inspection services, data updates, customer service, reports, and training." (*Id.* at 6.) The Area Office found that the major duties described in the PWS are: "(1) Pre-Conveyance Activity; (2) Conveyance Activity; (3) Claim Review Activity; (4) Management Activity; (5) Marketing Activity; (6) Closing Activity; and (7) Oversight Monitoring." (*Id.* at 7.)

The Area Office determined that Appellant proposed three key personnel positions for each geographic area: (i) Project Manager; (ii) Quality Control Manager; and (iii) Contract Manager. For Area 1D, Appellant proposed current [Subcontractor] employees to serve as Project Manager and Contract Manager. The alternate Contract Manager also would be a current [Subcontractor] employee. In addition, [Subcontractor] will be responsible for Quality Control functions. (*Id.* at 8.) For Area 5P, the Project Manager is currently employed by [Subcontractor] and [Business Concern 1], a business concern previously found to be affiliated with [XXXX]. (*Id.*, citing [XXXXXXXXXXXX].) The other proposed key personnel likewise are currently employed by [Business Concern 1] and/or are former employees of [Subcontractor]. (*Id.* at 8-9.) As a result, the Area Office found, Appellant "will be hiring its key employees from the subcontractor [Subcontractor] for the performance of this contract." (*Id.* at 9.)

The Area Office stated that the services sought here are the responsibility of the Project Manager, who has the power to act on all contractual matters and holds operational control, including serving as the main point of contact with HUD. (*Id.*) The fact that "the Project Manager is being hired from [Subcontractor]" is therefore suggestive of unusual reliance. (*Id.*) Furthermore, [Subcontractor] "owns proprietary software technology that is essential for this procurement as it has been developed to interface with HUD's database, which is a requirement of the contract." (*Id.*) The Area Office found that "[w]ithout this software, [Appellant] cannot perform the contract functions and interface with HUD's system." (*Id.*) The Area Office rejected Appellant's claim that it would license the software, noting that Appellant did not provide information on who will manage and monitor the use of the software. The Area Office added that Appellant's proposal described the Quality Control Manager as a peer of the Project Manager. (*Id.* at 10.) "Therefore, the role of [Subcontractor] according to [Appellant] is as important as the Project Manager." (*Id.*)

The Area Office concluded that Appellant is unusually reliant upon [Subcontractor] to perform the contract, because Appellant "will be relying on [Subcontractor's] extensive experience, qualifications, proprietary software and employees". (*Id.* at 10.) In addition, "[Subcontractor] will be performing the primary and vital requirements of the contract since the key employees, Program and Contract Manager, for both areas are coming from the subcontractor including the proprietary software." (*Id.* at 11.) Although the combined receipts of Appellant and its other affiliates — [Affiliate 1, Affiliate 2, Affiliate 3, and Affiliate 4] — do not exceed the size standard, [Subcontractor] is a large business. (*Id.*) Therefore, because Appellant and [Subcontractor] are affiliated under the ostensible subcontractor rule, Appellant is not a small business for the instant procurement.

D. Appeal

On March 23, 2018, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred in finding Appellant affiliated with [Subcontractor].

Appellant maintains that the Area Office first erred by ignoring the fact that [Subcontractor] is not the incumbent prime contractor. Appellant points to past OHA cases in which OHA has reversed an ostensible subcontractor determination in this situation. (Appeal at

5, citing *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011), *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075 (2009), and *Size Appeal of LynxNet, LLC*, SBA No. SIZ-5612 (2014).) By overlooking this issue, Appellant contends, the Area Office's analysis was fundamentally flawed.

Next, Appellant argues that Appellant is not hiring the majority of its workforce from [Subcontractor]. Although Appellant did propose to hire as key personnel certain individuals who are currently employed by [Subcontractor], these individuals signed letters of commitment to become Appellant's employees upon contract award. (*Id.* at 6.) Once contract performance commences, all but two of the key personnel (*i.e.*, the two Quality Control Manager positions) will be Appellant's employees. Further, "[Subcontractor's] only involvement in the performance of the Contract is serving as [Appellant's] designated QC Vendor." (*Id.*)

Appellant states that, when examining all of Appellant's proposed key personnel for all three geographic areas, only [XX] of the 15 key positions would be filled by current [Subcontractor] personnel. In other words, less than 50% of the proposed key personnel will be coming from [Subcontractor]. (*Id.* at 7.) By contrast, OHA has found a violation of the ostensible subcontractor rule when a large majority of the proposed personnel are hired from the alleged ostensible subcontractor that is also the incumbent contractor. (*Id.*, citing *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016).) In addition, the key personnel hired from [Subcontractor] will remain under the supervision and control of Appellant, specifically Ms. Lanier-Gamory, Appellant's SVP/HUD Program Manager. (*Id.* at 8.) [Subcontractor] will have no role in the management of the contract. (*Id.*)

Appellant complains that the Area Office disregarded Appellant's proposal as it relates to Area 7A. Although Appellant ultimately did not win this geographic area, the Area Office nevertheless was required to consider all aspects of Appellant's relationship with [Subcontractor], to include the entirety of Appellant's proposal. (*Id.* at 9.) Appellant also disputes the Area Office's decision to treat employees of [Business Concern 1] as employees of [Subcontractor]. Appellant argues that [Business Concern 1] is not a proposed subcontractor here, and may no longer even be in existence. In Appellant's view, Appellant "cannot be unduly reliant upon [Subcontractor] by hiring employees from [Business Concern 1], [which] is neither a proposed subcontractor nor, apparently, still in business." (*Id.*)

Appellant contends that its lack of experience performing HUD Asset Management prime contracts does not establish that Appellant has no relevant experience. Appellant explains that Ms. Lanier-Gamory has nine years of experience in Asset Management functions, as well as over 15 years of experience as a licensed realtor, broker and real estate instructor. Further, Appellant has previously managed HUD contracts worth millions of dollars. (*Id.* at 10.) In addition, the key personnel proposed for the contract, a majority of whom will not be hired from [Subcontractor], exceed the RFP's requirement that key personnel have at least five years' of experience. Appellant states that, as the Quality Control vendor, [Subcontractor] "is not responsible for performing any of the principal [Asset Management] services". (*Id.* at 11.) Rather, Appellant will self-perform all contract requirements apart from quality control.

Appellant argues that the Area Office exaggerated the significance of Appellant's decision to license software from [Subcontractor]. In particular, the RFP did not require the contractor to use any software except for software provided by HUD. (*Id.*) While Appellant does plan to license software from [Subcontractor] in order to support tracking assets and managing vendor tasks, "these capabilities were not specifically detailed in [Appellant]'s proposal nor do they interface with HUD's database." (*Id.*) Because this software was not an RFP requirement, it could not have been a determining factor in HUD finding Appellant's proposal technically acceptable.

Appellant next challenges the Area Office's determination that [Subcontractor] will perform the primary and vital contract requirements. The Area Office did not articulate which requirements it considered to be primary and vital. (*Id.* at 12.) This omission, though, is immaterial here, because Appellant will self-perform all of the core Asset Management services. (*Id.*) The RFP identified eight areas of Asset Management services that will need to be performed, only one of which involves quality control. (*Id.* at 13.) While [Subcontractor] is responsible for quality control, Appellant "is responsible for providing ***all other services required by the Contracts***." (*Id.*, emphasis in original.) Given this record, the Area Office could not reasonably find that [Subcontractor] will perform the primary and vital requirements. "It is utterly irrational to conclude that merely tracking and measuring [Appellant's] performance of the core [Asset Management] services could constitute the primary and vital requirements of these Contracts." (*Id.* at 15.)

Appellant argues that the Area Office also misinterpreted the fact that Appellant's proposal described the Quality Control Manager as a "peer" of the Project Manager. The Quality Control Manager and Project Manager are peers due to their similar places in the proposed organizational structure, as both report directly to Appellant's SVP/HUD Program Manager. This is not a reflection of the Quality Control Manager's overall importance, or level of authority, on the project. (*Id.* at 14.)

Appellant highlights that its proposal stated that Appellant will provide [XXX] FTEs for Area 1D and [XXX] FTEs for Area 5P. (*Id.* at 15.) Only the Quality Control Manager in each area would be a [Subcontractor] employee, so Appellant will provide a large majority of the contract labor for both geographic areas. In addition, from a dollar value standpoint, [Subcontractor] will receive less than [XX]% of the marketing fee revenue for Areas 1D and 5P. (*Id.* at 15-16.) These facts bolster the conclusion that Appellant is not unusually reliant upon [Subcontractor], nor will [Subcontractor] be performing the bulk of the effort.

E. Owen's Response

On April 10, 2018, Owen, one of the original protesters, responded to the appeal. Owen maintains that Appellant has not shown clear error in the size determination. Therefore, the appeal should be denied.

Owen contends that the Area Office correctly found Appellant will be unusually reliant upon [Subcontractor] to perform the contract. Despite Appellant's insistence that [Subcontractor] is not the incumbent prime contractor, Owen argues that "[w]hile incumbency is a factor that

area offices must consider, it is not dispositive in an ostensible subcontractor rule analysis." (Response, at 8 (emphasis in original).) Owen highlights that OHA has previously found violations of the ostensible subcontractor rule even when the alleged ostensible subcontractor is not the incumbent prime contractor. (*Id.*, citing *Size Appeal of Brown & Pipkins LLC*, SBA No. SIZ-5621 (2014), *Size Appeal of Alutiiq Educ. & Training, LLC*, SBA No. SIZ-5192 (2011), and *Size Appeal of Anadarko Industries, Inc.*, SBA No. SIZ-4708 (2005).) Thus, the Area Office did not err by failing to note that [Subcontractor] is not the incumbent contractor.

Owen disputes Appellant's claims that the majority of the key personnel will not be [Subcontractor] employees and that the key employees Appellant will hire from [Subcontractor] will become Appellant's employees once contract performance begins. (*Id.* at 9.) According to Owen, OHA precedent has established that hiring key personnel from a proposed subcontractor, even if the key personnel become employees of the prime contractor, may be indicative of unusual reliance. (*Id.*, citing *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and *Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984 (2008).) Particularly, in *Video Masters*, "OHA rejected the appellant's argument that the ostensible subcontractor analysis should focus on the hiring plan for the contract, as opposed to the employment records of the proposed personnel." (*Id.*) Here, Owen argues, for Areas 1D and 5P, Appellant proposed to hire four out of the five key personnel from [Subcontractor] or from [Business Concern 1], a [Subcontractor] affiliate. Although [Business Concern 1] is not a proposed subcontractor, Owen asserts that the relationship between [Subcontractor] and [Business Concern 1] is "too great to ignore", and as such, shows Appellant's unusual reliance on [Subcontractor] to staff the instant procurement. (*Id.* at 10-11.) Even if it were improper for the Area Office to have considered employees of [Business Concern 1], Owen contends that five of Appellant's ten key personnel for Areas 1D and 5P were [Subcontractor] employees at the time of proposal submission. OHA case law indicates that an analysis of the ostensible subcontractor rule will consider whether a prime contractor is relying on its subcontractor for a "substantial number" of personnel. (*Id.* at 11, quoting *Alutiiq Education & Training*, SBA No. SIZ-5192, at 11.)

Next, Owen contends that Appellant's proposal shows it lacks the relevant experience to perform the contract. Past performance was not an evaluation factor, but key personnel were required to have relevant and substantial experience. (*Id.* at 12.) Because Appellant apparently did not have key personnel that possessed the requisite experience, Appellant had to rely on key personnel from [Subcontractor] in order to meet the RFP's requirements. Furthermore, Appellant has acknowledged that it will license proprietary software from [Subcontractor], sublease office space from [Subcontractor], and that Appellant collaborated with [Subcontractor] on the technical proposal. (*Id.* at 14.) These factors also suggest reliance upon [Subcontractor].

Owen challenges the notion that [Subcontractor] will only perform quality control duties that are not part of the contract's primary and vital requirements. Owen argues that because Appellant proposed to hire nearly all of its key personnel from [Subcontractor], Appellant "is not bringing anything to the table other than its small business status" and thus is not performing the primary and vital requirements. (*Id.* at 15.) Moreover, the importance of quality control services should not be discounted, as the Quality Control Manager was identified as a key personnel position in the RFP, the quality control plan comprises nearly a quarter of the technical proposal, and HUD evaluated the quality control plan in order to determine technical acceptability. (*Id.* at

16.) In Owen's view, Appellant's proposal likewise emphasized the importance of quality control, as Appellant placed the Quality Control Manager on the same level as the Project Manager in its proposed organizational structure.

F. Appellant's Reply

On April 12, 2018, two days after the deadline specified by OHA for the close of record, Appellant moved to reply to Owen's response and submitted its proposed reply. A reply is warranted, Appellant asserts, to refute errors and address new legal issues raised by Owen. (Motion, at 1.) Owen opposes the motion.

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge so directs. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct Appellant to file a reply, the proposed reply was filed after the close of record, and Appellant has not persuasively explained why a reply is necessary. Accordingly, the motion is DENIED, and the reply is EXCLUDED from the record. *E.g., Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 7 (2015); *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 14 (2015).

G. New Evidence

Accompanying its appeal, Appellant submitted a declaration from [XXXX] concerning his prior employment. Appellant maintains that the declaration clarifies an error in Appellant's proposal. Specifically:

> [XXXX] was not, as suggested by the proposal, employed by both [Business Concern 1] and [Subcontractor] from September 2010 to the then present. Rather, [XXXXX]'s employment with [Subcontractor] ended in July 2016, shortly before joining [Business Concern 1] in September 2016.

(Appeal at 6, internal citations omitted.)

On April 10, 2018, Owen moved to strike [XXXX]'s declaration. Owen highlights that the declaration was not made available to the Area Office during the size review, and that Appellant did not file a motion to introduce the declaration as new evidence. (Motion at 2.) Appellant was, or should have been, aware that the Area Office would review the employment history of Appellant's proposed key personnel. (*Id.* at 3.) As a result, Owen argues, Appellant could have submitted the declaration to the Area Office during the size investigation.

On April 17, 2018, Appellant opposed Owen's motion. Appellant asserts that the declaration "serves to merely clarify that [XXXX]'s employment with [Subcontractor] ceased several months prior to joining [Business Concern 1]." (Opp. at 2.) As such, the declaration clarifies the facts on appeal and is relevant to a significant issue in the case. Although Appellant did not file a separate motion to supplement the record, the appeal petition itself established good cause to admit the declaration. Further, Appellant could not have provided the declaration to the Area Office because the error in the proposal was not discovered until after Appellant received

the size determination. (*Id.*) Nor could Appellant have anticipated that the Area Office would treat [Business Concern 1] employees as if they were [Subcontractor] employees. (*Id.*)

I find there is good cause to admit the declaration. The Area Office referenced [XXXX]'s employment with [Subcontractor] as a reason for finding unusual reliance, so the declaration is relevant and does not enlarge the issues on appeal. Further, although OHA generally will not accept new evidence that was not first presented to the area office during the size review, Appellant persuasively argues here that it could not have addressed this issue during the size review, because it was unaware of the error at that time. *See, e.g., Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 12 (2017). For these reasons, Owen's motion to strike is DENIED and the declaration is ADMITTED into the record.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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's 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).

The "ostensible subcontractor" rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The rule "asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor." *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Generally, "[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule." *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011).

B. Analysis

Having reviewed the record, OHA case precedent, and the arguments of the parties, I agree with Appellant that the Area Office clearly erred in finding Appellant affiliated with [Subcontractor] under the ostensible subcontractor rule. As a result, this appeal must be granted.

OHA has explained that "[t]he initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the contract's primary and vital requirements." *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018). The "primary and vital" requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. *Id.* Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value. *Size Appeal of Social Solutions Int'l, Inc.* SBA No. SIZ-5741, at 12 (2016); *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012). It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. *Id.* OHA has long held that "it is the goods or services which the procuring agency actually seeks to acquire, and not those goods or services which the contractor must perform or provide in order to deliver those goods or services, which determine what the primary and vital tasks of the contract are." *Size Appeal of Anadarko Industries, LLC*, SBA No. SIZ-4708, at 8 (2005), *recons. denied*, SBA No. SIZ-4753 (2005) (PFR).

Here, OHA determined in a prior NAICS code appeal that the instant RFP primarily calls for the performance of real estate asset management services. *NAICS Appeal of BLB Resources, Inc.*, SBA No. NAICS-5855 (2017). The CO likewise advised the Area Office that the RFP's primary and vital requirements are real estate asset management services. Section II.C, *supra*. Based on Appellant's proposal, it is evident that Appellant, the prime contractor, will self-perform all, or nearly all, of these primary and vital requirements. Thus, Appellant's proposal stated that [XXX] of the [XXX] FTEs for Area 1D, and [XXX] of the [XXX] FTEs for Area 5P, would be Appellant's own employees. Section II.B, *supra*. Further, the proposal made clear that [Subcontractor] would have no operational role during contract performance, and that [Subcontractor's] responsibilities instead would be limited only to quality control. *Id.* In order for [Subcontractor] to be performing the "primary and vital" requirements of this procurement, then, quality control would have to be considered a primary and vital task. As discussed above, though, while it is true that the RFP required that the prime contractor establish a quality control program, quality control is not the major purpose of this procurement. Rather, the RFP described quality control as an ancillary function in support of the real estate asset management services, enabling the prime contractor "to identify, prevent, and ensure non-reoccurrence of defective services." Section II.A, *supra*.

Accordingly, the record establishes that [Subcontractor] will not perform any, let alone a majority, of the real estate asset management services that are the principal purpose of this contract. Although [Subcontractor] will be responsible for quality control, this is an ancillary function, not a primary and vital requirement, and Appellant could appropriately delegate this work to [Subcontractor]. Indeed, the RFP expressly permitted that a prime contractor could subcontract the quality control function to a "Third-Party Quality Control Vendor". *Id.* As a result, the Area Office clearly erred in concluding that [Subcontractor] will perform the primary and vital requirements of this procurement. *E.g., Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 11 (2016) (explaining that it was not improper for the prime contractor to delegate discrete functions to a subcontractor, "given that [the prime contractor] still will perform the

majority of the primary and vital requirements"); *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 13 (2015) (finding no violation of the ostensible subcontractor rule because the services subcontracted, although "important", were not the primary and vital requirements).

In its determination, the Area Office appears to have been persuaded that quality control was a particularly crucial function because Appellant's proposal referred to the Quality Control Manager as "a peer" of the Project Manager. Section II.C, *supra*. This conclusion, though, reflects a misinterpretation of the proposal. When read in context, Appellant's proposal merely indicated that the Quality Control Manager — unlike all other personnel on the contract — would not ultimately report to the Project Manager. Section II.B, *supra*. Appellant explained that it structured its approach in this manner so as to "ensure the QC/QA function ... operates independently in performing its oversight." *Id.* Contrary to the size determination, then, the reporting structure outlined in Appellant's proposal does not demonstrate that quality control is a primary and vital requirement.

The Area Office also determined that Appellant will be unusually reliant upon [Subcontractor] to perform the contract. As Appellant observes, prior OHA case decisions have identified "four key factors" that contribute to findings of unusual reliance: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 15 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716, at 12 (2016); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548, at 8 (2014); *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390, at 9 (2012). In addition, violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform 40% or more of the contract. *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 10 (2016).

Almost none of these factors are present in the instant case. The first factor plainly is not met because the proposed subcontractor, [Subcontractor], is not the incumbent contractor. Likewise, the second factor is not met because there is no indication that Appellant would hire the majority of its workforce from [Subcontractor]. Nor will [Subcontractor] perform 40% or more of the instant procurement. Although the parties debate whether or not Appellant has relevant experience of its own, the record does not, in any event, support the conclusion that Appellant relied upon [Subcontractor] to win the contracts. This is true because the RFP did not include past performance as an evaluation factor, and further specified that awards would be made on a lowest-price technically-acceptable basis. Section II.A, *supra*. Under such circumstances, OHA has recognized that the inclusion of a more experienced proposed subcontractor "could not have materially enhanced [the offeror's] prospects for award." *Size Appeal of Emergent, Inc.*, SBA No. SIZ-5875, at 9 (2017) (quoting *J.W. Mills Mgmt.*, SBA No. SIZ-5416, at 9). I therefore cannot conclude that the fourth factor is met.

The factor that most strongly supports a determination of unusual reliance is that Appellant plans to hire many of its key personnel from [Subcontractor]. *E.g., Size Appeal of*

Alutiiq Educ. and Training, LLC, SBA No. SIZ-5192, at 11 (2011). Nevertheless, as Appellant emphasizes, the Area Office's findings on this issue are marred by two significant errors.

First, for Area 5P, many of the key personnel in question are not in fact [Subcontractor] employees, but rather are employees of [Business Concern 1]. *See* Section II.B, *supra*. [Business Concern 1], though, is not a proposed subcontractor on this procurement. *Id.* Given that only one of the proposed key personnel for Area 5P (*i.e.*, the proposed Quality Control Manager) was a current employee of [Subcontractor], it was clear error to conclude that Appellant was reliant upon [Subcontractor] to staff these positions. Further, the record does not establish that [Business Concern 1] and [Subcontractor] can reasonably be treated as one entity. Although OHA did find in a prior decision that [Business Concern 1] was affiliated with [XXXX], a predecessor of [Subcontractor], the date to determine size in that case was [XXXXXXXXXXXXXXX]. The Area Office cited no reason to believe that [Business Concern 1] still would be affiliated with [XXXX] and/or [Subcontractor] several years later, when Appellant self-certified for the instant procurement.

Second, OHA has held on numerous occasions that "when key personnel, even if hired from the subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule." *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 10 (2015); *see also Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692, at 9 (2015); *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 12 (2015); *Size Appeal of Maywood Closure Co., LLC & TPMC-EnergySolutions Envt'l. Servs. 2009, LLC*, SBA No. SIZ-5499, at 9 (2013); *J.W. Mills Mgmt.*, SBA No. SIZ-5416, at 8. Here, Appellant's proposal included signed letters of commitment from each of the proposed key personnel (other than the proposed Quality Control Manager) to become Appellant's employees upon contract award. Section II.B, *supra*. Moreover, the proposal made clear that Appellant's SVP of HUD Operations will oversee the effort and that both the Project Manager and the Quality Control Manager will report to her. *Id.* Because Appellant will retain ultimate control and decision-making, then, the fact that Appellant proposed to hire several of its key personnel from [Subcontractor] does not demonstrate unusual reliance, particularly in the absence of other strong indicia of reliance.

Lastly, I agree with Appellant that the Area Office illogically found that [Subcontractor] "owns proprietary software technology that is essential for this procurement as it has been developed to interface with HUD's database, which is a requirement of the contract." Section II.C. While it is true that the RFP did require the prime contractor to update HUD's P260 case management system, it does not follow that Appellant could accomplish this task only by using [Subcontractor]'s proprietary software.

IV. Conclusion

Appellant has established that the Area Office clearly erred in concluding that Appellant is affiliated with [Subcontractor] under the ostensible subcontractor rule. It is undisputed that the combined receipts of Appellant and its other affiliates do not exceed the size standard, so Appellant qualifies as a small business if it is not affiliated with [Subcontractor]. Section II.C, *supra*. Accordingly, this appeal is GRANTED, and the size determination is REVERSED.

Appellant is an eligible small business for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge