United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
RTL Networks, Inc.	SBA No. SIZ-4923
Appellant	Decided: April 2, 2008
Appealed from Size Determination No. 5-2008-001	

APPEARANCES

Theodore P. Watson, Esq., Denver, Colorado, for Appellant

Robert S. Gardner, Esq., Colorado Springs, Colorado, for Infinity Technology Services, LLC.

DECISION

HOLLEMAN, Administrative Judge:

I. 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.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Solicitation and Performance Work Statement

On July 30, 2007, the Department of the Air Force, 50 CONS/LGCB, at Schriever AFB, Colorado (Air Force), issued Solicitation No. FA2550-07-R-2003 for technical security support services. The Air Force set the procurement aside for Service-Disabled Veteran-Owned (SDVO) Small Business Concerns (SBCs) and designated North American Industry Classification System (NAICS) code 541519, Other Computer Related Services, which has a size standard of $23

million, as the applicable NAICS code. Initial offers were due on August 24, 2007. There were no final proposal revisions.

In addition to the Price Proposal, offerors were to prepare Past Performance Information for up to ten recent contracts. For each contract, the solicitation (as amended) requires a "[d]escription of the contract supported, technical complexity, size/scope of the effort supported, and performance requirements (timeliness and quality of work) and how it compares (relevancy) with the services to be provided on this contract." Offers would be "evaluated on a performance price trade-off in which past performance history will be evaluated on a basis approximately equal to cost or price considerations." There were no technical proposals.

The Performance Work Statement (PWS) requires the contractor to provide technical support to perform Sensitive Compartmented Information (SCI) and Special Access Program (SAP) security oversight functions for the SCI/SAP Physical Security, Personnel Security, and Information Assurance Security Programs at Schriever AFB. The contractor will manage each of the three programs.

a. Physical Security Program. The seven specific tasks include: reviewing, maintaining, and updating accreditation documentation; providing SCI/SAP physical security technical guidance, Emanations Security guidance, emergency action plans and standard operating procedures; and providing staff assistance security reviews and training.

b. Personnel Security Program. The eight specific tasks include: updating SCI Billet Structure and Joint Personnel Access System databases; updating and maintaining personnel security files, processing SCI and SAP eligibility requests and visit certifications; training SCI billet monitors; and preparing billet reports, correspondence, and related documentation.

c. Information Assurance Security Program. The fifteen specific tasks are to:

1. Ensure Automated Information Systems (AIS) accreditation packages are accurate, complete, and submitted;
2. Provide technical support to the Site Information Assurance Manager (IAM) and Information Assurance Officers (IAOs);
3. Conduct annual staff assistance security reviews;
4. Ensure all SCI/SAP systems are accredited and maintained;
5. Ensure IAOs comply with Intelligence Community Vulnerability Assessment reporting requirements;
6. Develop and provide monthly training material;
7. Provide technical support on the levels of concern for data confidentiality, integrity, and availability;
8. Provide technical support in developing procedures for clearing, purging, declassifying, and releasing system memory, media, and output;
9. Maintain system accreditation/certification documentation and modifications;
10. Review and forward to the Command IAM quarterly site baseline reports;
11. Provide technical support to develop protective and corrective measures when an Information System (IS) incident or vulnerability has been discovered;

12. Provide technical support in the development and implementation of IS security education, training, and awareness program;
13. Provide technical support in the development and implementation of procedures for authorizing the use of hardware/software on an IS;
14. Provide technical support in responding to security incidents, and for investigating and reporting security violations; and
15. Serve on configuration management boards.

The PWS also noted that effective performance requires contractor technical expertise in SCI/SAP physical, personnel, and information assurance security disciplines.

B. The Teaming Agreement

The Teaming Agreement between RTL Networks, Inc. (Appellant) and ManTech[1] provides that Appellant will be the prime contractor and ManTech the subcontractor for any contract resulting from the instant solicitation. Further, Appellant will prepare and submit any proposals to the Government with assistance from ManTech on selected Statement of Work tasks, related experience information, tailored resumes on key personnel, and cost information. Appellant will have overall project management responsibility, and will make assignments of tasks to all team personnel.

The Teaming Agreement provides that Appellant's responsibilities will include overall project management and control, including, without limitation, quality assurance, project planning and control, and change control functions. Appellant has final decision making authority for all project matters, including, without limitation, assignment of all personnel. Appellant is also the primary client interface in all matters which could change the goals and objective established in the prime contract.

Under the Teaming Agreement, ManTech will provide one subject matter expert in the area of physical security, personnel security, or computer security, as long as this fits into the cost structure. ManTech will also be given the option to fill the next growth position on the contract, as long as Appellant is still able to maintain 51% of the contract revenue and fulfill its obligations as prime contractor.

C. Appellant's Proposal

Appellant submitted its proposal on August 24, 2007, proposing ManTech as its subcontractor. Appellant proposed as staff the three individuals who are currently working for ManTech under the incumbent contract. Appellant assured the CO that it would be performing at least 51% of the work.

[1] The Teaming Agreement identifies ManTech Command Control Systems Corporation as the subcontractor. Appellant's proposal lists contracts performed by that company and by a sister company, ManTech Security & Mission Assurance Corporation. Both are subsidiaries of ManTech International Corporation.

For Past Performance Information, the proposal describes three of Appellant's prior contracts and seven of ManTech's. Appellant's three listed contracts show that Appellant has performed work similar to five of the specific tasks for the Information Assurance Security Program (Nos. 3, 7, 11, 13, and 14) set out in the PWS; but no work similar to any specific task set out for either the Physical Security Program or the Personnel Security Program. One of Appellant's contracts has a larger annual value than the proposed work; the others are smaller.

ManTech's seven listed contracts include its incumbent contract at Schriever AFB, on which it has worked ten years and has performed all of the specific tasks set out in the PWS for the Physical Security, Personnel Security, and Information Assurance Security Programs. Another listed contract, of like scale, includes work similar to all specific tasks for the Information Assurance Security Program, all but one specific task for the Physical Security Program, and four of the eight specific tasks set out for the Personnel Security Program. A third, much larger, contract includes work similar to all specific tasks set out for the Physical Security Program, and work similar to several tasks for the other two programs. The four other ManTech contracts include scattered coverage of the specific tasks set out for the three programs.

D. The Protest and the Area Office's Investigation

On September 24, 2007, the Contracting Officer (CO) notified unsuccessful offerors that RTL Networks, Inc. (Appellant), was the apparently successful offeror. On October 1, 2007, Infinity Technology Services, LLC (ITS), another offeror, timely filed a size protest with the CO against Appellant. ITS alleged violation of the ostensible subcontractor rule in that ManTech would perform the primary and vital requirements on the contract and Appellant would be unduly reliant on ManTech, an other than small firm.

ITS set out its factual allegations using the "seven factors test" outlined in *Size Appeal of D.P. Associates,* SBA No. SIZ-2719 (1987). Specifically, ITS alleged: (1) Based on information from Appellant's own website, Appellant is a network and computer hardware contractor with no experience in physical and personnel security and, therefore, Appellant is dependent on ManTech for the requisite past performance background and expertise to qualify for and perform this contract; (2) ManTech's consistent strategy is to team with small businesses for follow-on contracts it is otherwise ineligible for; (3) ManTech is the incumbent; (4) ManTech will perform a significant percentage of the work and will have management responsibility for that work; (5) Given the size of the contract, ManTech "must necessarily be given" primary and vital work; (6) ManTech pursued this contract, and took the lead in drafting and marketing the Proposal; and (7) ManTech will effectively manage the contract because of Appellant's lack of expertise.

On October 1, 2007, the CO referred the protest to the Small Business Administration (SBA), Office of Government Contracting, Area V, in Fort Worth, Texas (Area Office) for a size determination. On October 3, 2007, the Area Office notified Appellant of the protest, instructing Appellant to submit an SBA Form 355, certain information about Appellant and its Proposal, copies of any subcontractor agreements, and "A response to the specifics in the protest. If possible, please address the 7 factors." Area Office Initial Notification Letter.

On October 8, 2007, Appellant provided to the Area Office its company information, copies of its Proposal and the Teaming Agreement with ManTech, and its arguments in response to the protest. In its response, Appellant noted several times that ITS has not proven particular points of its protest allegations. Appellant also distinguished its situation from the facts in *Size Appeal of Lance Bailey & Associates, Inc.,* SBA No. SIZ-4817 (2006), cited by ITS, noting that the challenged firm in *Lance Bailey* derived 70% of its revenue from and was 45% owned by the ostensible subcontractor, both facts not present here. Appellant also asserted ITS has not shown that Appellant and ManTech share profits and losses, citing 13 C.F.R. § 121.401(k) (1995).[2]

Next, Appellant asserted the protest second-guesses the CO, who has already looked at the capabilities and risks in awarding the contract and who, by law, must recognize teaming agreements. The CO did not construe it as a joint venture, and neither should SBA. Further, ITS first has to prove ManTech is an ostensible subcontractor before it can be deemed "in control," and has not done so. The Teaming Agreement clearly gives Appellant control of the project.

Appellant arranged much of its response in the order of the "seven factors test" and corresponding to the order of the allegations in the protest. Addressing contract management, Appellant asserted first that, under the Teaming Agreement, Appellant is the sole interface with the government, that Appellant will make all decisions on changes or modifications, and that ManTech has no management authority. Addressing specific roles each company will have, Appellant stated it will have overall responsibility for program management, will perform work on most of the principal task areas itself, and will assign specific, discrete, tasks to its own or to the subcontractor's team. Additionally, Appellant will do project management, qualify assurance, and tech support, thus "bearing more than 51% (closer to 75%) of labor costs." Appellant's Response to Area Office at 9.

As for ITS' allegation that Appellant lacks and ManTech has the needed experience, Appellant noted past performance only has to be relevant, not exact. Further, past performance is an evaluation issue for the CO and a protest should be addressed to the agency or to GAO, not to SBA. Appellant also noted that, under the Teaming Agreement, ManTech will provide one subject-matter expert in this project. Appellant also stated:

> This contract initially requires three people. All three will be RTL employees. There are speculations for two additional people. If more employees are hired they will be subcontractors via ManTech. Proposed employees for RTL would be employees salaried by RTL. ManTech's employees under the subcontract will be salaried by ManTech.

Appellant's Response to Area Office at 6. Appellant also argued that teaming with an ineligible incumbent and proposing the incumbent employees as contingent hires are not improper actions.

Regarding who chased the contract, Appellant stated it tracked this procurement as an SDVO SBC set-aside through agency forecasting tools, pursued the contract throughout the process, and selected ManTech, the incumbent, as its subcontractor. Appellant also noted it is

[2] Appellant must mean 13 C.F.R. § 121.401(*l*)(1) (1995).

allowed to involve prospective subcontractors in its marketing efforts to agencies, and any suggestion that ManTech recruited Appellant as a "front" is meritless. Appellant stated it was responsible for overall pricing, cost, and technical aspects of its proposal. Appellant did consult with ManTech, but did a large percentage of the work on the proposal itself.

On October 10, 2007, the Area Office requested that Appellant: (1) comment on whether, if it did not hire ManTech's personnel, would it have others who could have done this work, and (2) compare the requirements of one of its prior contracts with the instant procurement, to help the Area Office understand it has the experience to handle it. That same day, Appellant's President responded to those requests. Regarding the first request, Mr. Lewis stated he could have hired numerous other qualified people for this contract and provided four sample resumes, but also noted he had already given offer letters to the three currently-working contractors, who would become his full-time employees. He added that if Schriever adds one or two additional, non-key resources to this contract (as expected), these would be subcontracted to ManTech, which then would have the opportunity to perform up to 40% of the work on this contract.

Regarding the second request, Mr. Lewis reiterated some points made in the Proposal, and added that he himself has thorough knowledge of the activities and duties associated with this contract, as a former Air Force Security Systems Officer. He noted, however, that he is not personally executing the contract but, rather, leveraging his knowledge and experience to grow Appellant.

E. The Size Determination

On October 19, 2007, the Area Office issued its size determination, concluding that Appellant was in violation of the ostensible subcontractor rule and that, therefore, Appellant was ineligible for the instant procurement. The Area Office found Appellant, by itself, was a small business under the applicable size standard but, when its receipts are combined with those of its other than small subcontractor ManTech, Appellant would be other than small.

The size determination summarized the Solicitation, the Teaming Agreement, the past performance information in the Proposal, the protest, Appellant's response to the protest, and Mr. Lewis' responses to the Area Office's two additional questions. With respect to the sample resumes, the Area Office noted that, although those individuals appear qualified, it could not determine whether they would or could have been hired for this contract. The Area Office pointed out that Appellant provided no evidence (resumes) that any of its current employees was qualified or available for this contract.

The Area Office found that ManTech is the incumbent for this contract, but was unable to bid on it as it did not qualify under the set-aside. The contract calls for three people to perform it. All three proposed will be Appellant's employees; however, they are currently ManTech employees performing the incumbent contract. If the Air Force elects to hire one to two additional employees, ManTech will provide them. The Area Office also found evidence that ManTech had assisted in proposal preparation, but does not identify that evidence.

In analyzing the proposal, the Area Office noted that past performance was a significant evaluation factor for award, equal to cost or price considerations. ManTech has more past performance relevant to this contract than did Appellant. ManTech has relevant experience in all three security areas covered by the contract, while Appellant has experience in only one of those areas -- the SCI/SAP Information Assurance Security Program. The Area Office also noted that Mr. Lewis "has some relevant security experience," but will not be involved in day-to-day management of the contract, overseeing it from off-site. Therefore, because the "scope, breadth, and dollar value of the ManTech contracts . . . far outweigh that of RTL," the Air Force's evaluation relied heavily on past performance (most of which came from ManTech), and ManTech assisted RTL in preparing certain portions of the proposal, the Area Office concluded "RTL was unduly reliant upon ManTech in the proposal stage." Size Determination at 7.

In analyzing contract management and performance, the Area Office noted that, under the Teaming Agreement, Appellant has overall project management and decision-making authority on the contract, will maintain client interface, and will oversee the contract (albeit from off-site). Although Appellant considered other individuals to staff the contract, it chose to hire ManTech's three incumbent employees (including the on-site Project Manager) who will become Appellant's employees. Appellant also chose not to bring any of its own employees to the contract. Further, if the Air Force needs two additional people, they will be ManTech's employees. Thus, the Area Office found Appellant "unduly reliant upon ManTech's employees to perform the contract."

Citing *Size Appeal of Eagle Research Group, Inc.,* SBA No. SIZ-4429 (2001) and *Size Appeal of InfoTech Enterprises, Inc.,* SBA No. SIZ-4346 (1999), the Area Office stated where the primary and vital purpose of the contract is in the incumbent ostensible subcontractor's area of expertise, but not that of the challenged firm, and the challenged firm proposes that all of its key employees be hired from the ostensible subcontractor, the challenged firm is unduly reliant upon the ostensible subcontractor. The Area Office concluded that this principle applied here, and that Appellant was unduly reliant upon ManTech for this contract, and therefore, under the ostensible subcontractor rule, the two firms must considered to be engaged in a joint venture and aggregated for size purposes. Thus aggregated, the joint venture is other than small.

F. The Appeal

On October 21, 2007, Appellant received the size determination and, on October 31, 2007, filed the instant appeal. Appellant includes with its appeal petition a motion to admit new documents and 29 exhibits. All but one of these exhibits are in the record that was before the Area Office. The new exhibit, Exhibit 28, is an affidavit by Appellant's president.

Appellant's arguments fall into seven different points. These include its challenge to the sufficiency of the protest, its core argument that its relationship with ManTech on the instant contract does not run afoul of the ostensible subcontractor rule, and five other arguments. As relief, Appellant requests OHA to reverse the Area Office's finding that Appellant is in violation of the ostensible subcontractor rule, and to conclude that Appellant is engaged in a legitimate prime-subcontracting relationship with ManTech, thus making Appellant eligible for the instant contract.

1. Protest Sufficiency

Appellant asserts that ITS's protest was insufficiently specific and contained unsubstantiated allegations. Citing FAR 19.302(c), Appellant asserts that ITS failed to present any evidence with its protest; therefore, the Area Office should have dismissed the protest and not issued a size determination.

2. Ostensible Subcontractor

Regarding its relationship with ManTech on this contract, Appellant asserts the record evidence shows it was not a joint venture but a legitimate prime-subcontractor relationship as permitted by SBA regulations and OHA case law. The Area Office, however, either ignored or failed to give weight to evidence supporting Appellant's position. For instance, like the firms in *Size Appeal of Greenleaf Construction Co., Inc.*, SBA No. SIZ-4663 (2004),[3] Appellant and ManTech had no past business connections, have never shared facilities, and are completely separate firms. Further, the Teaming Agreement gave Appellant the responsibility for overall pricing, costs, and technical aspects of the proposal, required separation of each party's proprietary information, and contained nothing that relinquishes Appellant's control of the contract to ManTech. Moreover, ManTech's input into the proposal was permitted, insubstantial, and did not cover key areas. Also, the proposal contains no references to an RTL-ManTech "team" and Appellant, not ManTech, chased the contract. The Area Office erred in not considering all of this evidence.

Appellant also argues the Area Office improperly speculated about ManTech's responsibility for key components of the contract, about Mr. Lewis's ability to oversee the contract from off-site, and in considering that two ManTech employees may be added in the future. On staffing, Appellant asserts that the test is whether all key personnel and most of the non-key personnel will be derived from the subcontractor, citing *Size Appeal of InfoTech Enterprises, Inc.,* SBA No. SIZ-4346 (1999). Appellant points out the evidence does not show this. Further, the Area Office incorrectly counted employees on the contract, since Appellant will maintain contact with the Government, perform quality assurance, and do administrative and other duties with its own staff.

Citing *Size Appeal of Lance Bailey & Associates, Inc.,* SBA No. SIZ-4817 (2006), Appellant also argues that violation of the ostensible subcontractor rule (and consequent deeming of a joint venture) should happen when vital parts of the contract are within the subcontractor's area of expertise but not within the prime's. Further, the fact Appellant has not performed several prior contracts in this area does not mean the tasks are not within its expertise. Moreover, the solicitation did not require "exact" past contracts, only "relevant" ones. Appellant notes that it is "no stranger" to this type of work and has performed other government contracts, and that Mr. Lewis himself has other relevant security experience.

[3] Following remand, OHA found no ostensible subcontractor rule violation. *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4765 (2006).

Appellant also notes that the solicitation required past performance to be considered on a basis approximately equal to cost or price considerations and that past performance, therefore, was not such a significant (*i.e.,* "more than 50%") part of the evaluation that the Area Office should have focused on it. Appellant also asserts error in the Area Office's finding that ManTech's past performance history outweighed Appellant's. Citing *Client Network Services, Inc. v. United States*, 64 Fed. Cl. 784 (2005) (*CNSI*), Appellant asserts that SBA erred in overturning the CO's determination that Appellant's past performance is acceptable, because that determination was not an abuse of the CO's discretion.

3. Other Arguments

Appellant asserts repeatedly that the Area Office erred in failing to defer to the CO's judgment in making the award, citing *CNSI*. Appellant argues that SBA must defer to the CO unless the CO acted in bad faith or his action is unjustifiably inconsistent with his agency's need for certainty.

Next, Appellant asserts the Area Office erred in failing to consider whether the Teaming Agreement called for a sharing of profits and losses under 13 C.F.R. § 121.401(k) (1995).

Appellant asserts the Area Office erred by imputing ManTech's receipts from information on its website, rather than relying on ManTech's income tax returns, as required by the regulations.

Appellant also asserts the Area Office ignored Appellant's argument that the facts in *Lance Bailey* are distinguishable from its own case and that, therefore, the outcome of the ostensible subcontractor analysis should be different.

Finally, Appellant faults the Area Office for specifically requesting Appellant to address the "seven factors" in its response to the protest and then, after Appellant had complied with that request, basing its size determination on a totality of the circumstances test. Appellant further asserts that the majority of the seven factors were in its favor and, as in *Size Appeal of Greenleaf Construction Co., Inc.*, SBA No. SIZ-4663 (2004), the Area Office abruptly changed course, leaving Appellant to wonder what test was used to determine its size.

G. The Protester's Response to the Appeal

On November 27, 2007, Infinity Technology Services, LLC (ITS), the protestor, responded to the appeal. ITS asserts that its protest was specific as to its grounds, namely that Appellant and ManTech were affiliated under the ostensible subcontractor rule.

ITS points out the Area Office relied on extensive supporting evidence to determine that Appellant was unduly reliant on ManTech. Further, there was adequate evidence in the file to support a finding ManTech was other than small. ITS also argues that the size determination is supported by this Office's precedents.

IV. Discussion

A. Preliminary Matters

1. Timeliness

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

2. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant 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). OHA will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

3. New Evidence

New evidence not in the record before the area office may be admitted in a size appeal on motion establishing good cause for its submission. 13 C.F.R. § 134.308(a). The appeal contains new evidence in the form of a three-page affidavit by Appellant's president, Mr. Lewis (Exhibit 28). The accompanying motion, however, fails to establish good cause for its submission. Therefore, I EXCLUDE from consideration this proffered new evidence.

B. The Merits

1. Sufficiency of Protest

Appellant's first argument attacks the protest. However, in reviewing it, I find ITS's protest was sufficiently specific under the SBA regulations. The protest identified a particular procurement, and included sufficient facts (*i.e.,* the observation that Appellant's own website shows Appellant's line of business is different from that suggested by the procurement's requirements) to provide adequate notice of the basis for the protest, here, that Appellant and ManTech are affiliated under the ostensible subcontractor rule. *See* 13 C.F.R. § 121.1007.

The SBA regulations do not require a protestor to provide conclusive proof of affiliation. *See Size Appeal of Emergency Beacon Corporation*, SBA No. SIZ-4813, at 14 (2006). To the contrary, SBA regulations place the burden of establishing small business size status on the concern whose size status is under consideration, here Appellant. *See* 13 C.F.R. § 121.1009(c). That is why the Area Office asked Appellant (and not ITS or anyone else) to submit information and to respond to the protest allegations. *See* 13 C.F.R. § 121.1008(c). Thus, I must dismiss this argument.

2. Ostensible Subcontractor Affiliation

a. The Ostensible Subcontractor Rule

The issue in this appeal is whether Appellant's relationship with ManTech is in violation of the ostensible subcontractor rule. The applicable regulation provides:

> A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4).

As the text of the rule indicates, affiliation treatment is required if a subcontractor either "performs primary and vital requirements of a contract" or is a subcontractor "upon which the prime contractor is unusually reliant." Further, to determine whether a prime-subcontractor relationship has run afoul of the ostensible subcontractor rule, area offices must consider "all aspects" of the relationship between the prime and the subcontractor. Although the purpose of the ostensible subcontractor rule is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements, *Size Appeal of ACCESS Systems, Inc.*, SBA No. SIZ-4843, at 14 (2007), there is no requirement that the violation be intentional. The "seven factors" test is not the exclusive or only method used to determine if a firm is unusually reliant upon its ostensible subcontractor:

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

> As explained in *Size Appeal of Lance Bailey & Associates, Inc.,* SBA No. SIZ-4817, at 16-17 (2006), "all aspects" is equivalent to considering the totality of the circumstances, but unlike a finding of affiliation based upon the totality of the circumstances under 13 C.F.R. § 121.103(a)(5), affiliation based on the ostensible subcontractor rule applies only to the contract at issue and not to the concern's status for future procurements.

Size Appeal of TKTM Corporation, SBA No. SIZ-4885, at 9 (2008).

b. Analysis

Appellant's core argument is that its relationship with ManTech on the instant contract is a proper prime-subcontractor relationship that does not violate the ostensible subcontractor rule. In its appeal, Appellant cites much evidence in its favor, for example, that the Teaming Agreement did not relinquish Appellant's control of the contract to ManTech, and the fact that it gave Appellant control over the proposal.[4]

Appellant, however has not been able to overcome the two dominant aspects of its proposal that cause it to run afoul of the ostensible subcontractor rule: (1) the proposed wholesale hiring of ManTech's incumbent staff; and (2) its unusual reliance on ManTech's past performance history. The regulation itself puts special scrutiny on an arrangement where the proposed subcontractor is the incumbent contractor and ineligible to submit an offer for a follow-on contract.

i. Wholesale Hire of Subcontractor's Incumbent Staff

Here, ManTech is the incumbent on the instant contract, but was ineligible to offer on this procurement because it had been set-aside for SDVO SBCs and ManTech is not an SDVO SBC. OHA has consistently held over the years that a challenged firm which hires all, or nearly all of the staff of the incumbent contractor, when that contractor is also the challenged firm's ostensible subcontractor, has demonstrated unusual reliance upon, and thus affiliation with, its ostensible subcontractor. *Size Appeal of Access Systems, Inc.*, SBA No. SIZ-4843, at 15 (2007); *Size Appeal of InfoTech Enterprises, Inc.*, SBA No. SIZ-4346, at 13-14 (1999). Appellant has here demonstrated unusual reliance on ManTech by its wholesale hiring of its staff, and this supports the Area Office's finding of affiliation with ManTech. I am unaware of any precedent, and Appellant has not suggested any, where a challenged firm has hired wholesale the staff of the incumbent ostensible subcontractor, and not been found affiliated.

[4] Appellant also correctly identifies inappropriate speculations made by the Area Office, for example, in considering that two ManTech employees may be added in the future. Compliance with the ostensible subcontractor rule is determined as of final proposal revisions. 13 C.F.R. § 121.404(d). Speculation as to future changes in the contract, the exercise of options, etc., are not an appropriate basis for any finding or analysis in a size determination. *Size Appeal of Ahuska International Security Corporation*, SBA No. SIZ-4752, at 10 (2005). However, because these small errors factors are outweighed by the facts which support the Area Office's determination, they are harmless error. *Size Appeal of TKTM Corp.*, SBA No. SIZ-4885, at 10 fn. 2.

ii. Unusual Reliance on Subcontractor's Past Performance History

Appellant's argument that past performance was not a "significant" factor in the evaluation because it does not constitute at least 51% of the evaluation is risible. The solicitation explicitly states past performance will be evaluated on a basis approximately equal to price. Solicitation, Clause 52.212-2, p. 9. It is thus clear that past performance was a vital factor in the evaluation process for this award.

The past performance submittals from ManTech emphasized experience in all three areas of the contract, the SCI/SAP Physical Security Program, the SCI/SAP Personnel Security Program, and the SCI/SAP Information Assurance Security Program. As for itself, Appellant could point to some experience relevant to only five specific task areas (out of fifteen) in the SCI/SAP Information Assurance Security Program. Appellant's proposal gave no evidence of any experience at all as to the other two areas. Appellant therefore was unusually reliant on ManTech to qualify under the past performance criteria. Further, OHA precedent holds where the primary and vital purpose of the contract is in the incumbent's area of expertise, but not the challenged firm's, and the all the key employees are to be hired from the ostensible subcontractor, the challenged firm is unduly reliant. *Size Appeal of InfoTech Enterprises, Inc.*, SBA No. SIZ-4346, at 9, 11 (1999).

While Appellant relies on *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4765 (2006), that was a fact-specific decision that the challenged firm was not unduly reliant on its ostensible subcontractor, and thus has no relevance here. There, the ostensible subcontractor was performing only one discrete task of the contract, which represented only 19% of the contract cost. Here, however, Appellant has hired ManTech's employees wholesale, and it is not clear what tasks ManTech will perform. Indeed, the proposal's failure to identify the discrete tasks which each contractor will perform is another indicia of unusual reliance. *Size Appeal of KIRA, Inc.*, SBA No. SIZ-4360, at 8 (1999).

3. Appellant's Other Arguments

Appellant's other arguments are without merit. First, regarding deference to the CO's award decision, Appellant's reliance on *CNSI* is misplaced. *CNSI* has nothing whatever to do with the SBA's unique regulatory obligation to conduct size determinations following timely and specific size protests. Appellant misunderstands the process here, which is that the CO conducts the procurement and makes award, and SBA reviews any challenge to the size status of a prospective awardee. *See* FAR 19.302; 13 C.F.R. §§ 121.1001-121.1009. Neither the Area Office nor OHA has the authority to rule on whether a contracting officer has abused his or her discretion.

Appellant's second argument concerns shared profits and losses, and is based on a test that SBA eliminated from the joint venture regulations in 1996. *See* 61 Fed. Reg. 3280, 3288 (Jan. 31, 1996) and 13 C.F.R. § 121.103(h) (2007). Thus, this argument is meritless.

Third, Appellant's attempt to argue that ManTech is not other than small is contradicted by the record. ManTech's own report in its Central Contractor Registration profile lists annual

receipts far in excess of the applicable size standard, and its own Representations and Certifications, ManTech self-certified as "not a small business concern." The record is clear that ManTech is an other than small business concern.

Fourth, regarding Appellant's argument (both here and before the Area Office) that *Lance Bailey* can be distinguished on its facts, Appellant probably meant to cite *Size Appeal of Faison Office Products, LLC,* SBA No. SIZ-4834 (2007) (*Faison Products*). There, the challenged firm's subcontractor owned 45% of the challenged firm and also accounted for 70% of that firm's revenue over five years, facts which Appellant here correctly asserts do not apply to its own case. *Faison Products* carefully examined three separate and distinct grounds for affiliation under the size regulations: identity of interest, ostensible subcontractor, and totality of the circumstances. The discussion on ostensible subcontractor affiliation did not consider or even mention the subcontractor's 45% ownership of the challenged firm or its 70% share of revenues. *See Faison Products* at 14-15. Those facts were considered only in the discussions of the other two grounds of affiliation. *Id.* at 13-14; 16-18. Therefore, Appellant's attempt to distinguish *Faison Products* (or *Lance Bailey*) on the basis of these two facts is meritless.

Fifth, concerning the Area Office's request that Appellant address the "7 factors" in its initial notification letter to Appellant, it must be noted that ITS's protest allegations were arranged in the order of the "seven factors test" and that one way to ensure that each protest allegation received adequate response would be to ask that each factor be addressed. Thus, I find that the Area Office's request for "A response to the specifics in the protest. If possible, please address the 7 factors." within a list of requests for other pertinent information, was made in good faith to help Appellant assemble its response to the protest, rather than as an attempt to mislead Appellant. Thus, Appellant's argument to that end must fail.

Accordingly, because all of Appellant's arguments in its Appeal Petition are without merit, Appellant has not satisfied its burden to demonstrate that the Area Office committed clear error in determining Appellant is unusually reliant upon ManTech and thus in violation of the ostensible subcontractor rule. The Area Office's conclusion that Appellant is other than small with respect to the instant contract must be affirmed.

V. Conclusion

Accordingly, the Area Office size determination is AFFIRMED, and the appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge