Cite as: *Size Appeal of TCE Incorporated*, SBA No. SIZ-5003 (2008)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
TCE Incorporated	SBA No. SIZ-5003
Appellant	Decided: September 24, 2008
Appealed from Size Determination No. 2-2008-103	

APPEARANCES

Pamela J. Mazza, Esq., Jonathan T. Williams, Esq., and Kelly E. Buroker, Esq., Piliero Mazza, PLLC, for TCE Incorporated.

Hopewell H. Darneille III, Esq., Ryan K. Manger, Esq., and Allison N. Manger, Esq., Thompson Coburn LLP, for CMW & Associates, Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals 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 concluding that Appellant is in violation of the ostensible subcontractor rule was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

REDACTED DECISION FOR PUBLIC RELEASE

III. Background

A. The Solicitation and Statement of Work

On January 29, 2008, the Department of Labor (DOL), Employment and Training Administration (ETA), in Washington, D.C., issued Solicitation No. DOL-08-1R-P20142 for additional staff to perform the initial application processing for the Foreign Labor Certification (FLC) program. This procurement is an 8(a) competitive set-aside and the designated North American Industry Classification System (NAICS) code is 561311, Employment Placement Agencies, which has an annual receipts size standard of $6.5 million. TCE Incorporated (TCE or Appellant) submitted its initial offer on March 21, 2008, and its revised cost information on June 18, 2008.

The Statement of Work (SOW) requires the contractor to expand staffing at DOL/ETA's National Processing Centers (NPCs) in Chicago and Atlanta. These NPCs process employer applications for Permanent Labor Certification, and H-2A (agricultural) and H-2B (non-agricultural) Temporary Labor Certifications that are required for foreign nationals to work in the United States. After processing, a DOL official will decide to grant or deny each application based on the employer's recruitment efforts and compliance with DOL regulations.

The contractor will supply staff to supplement existing federal and contractor staff at both NPCs. The SOW specifies a total of 208 staff positions, including eight positions designated as key staff. These key positions are, for each NPC:

- 1 Project Manager (paid at the GS-13 level);
- 1 Assistant Project Manager (paid at the GS-12 level); and
- 2 System Analysts (paid at the GS-12 level).

The other 200 positions are, for each NPC:

- 25 Analyst I (paid at the GS-5 level); and
- 75 Analyst II (paid at the GS-11/12 level).

Initial staffing includes all key positions and 100 of the others. The remaining positions will be filled as the Government directs. The offeror must provide in its proposal the resumes and letters of commitment for its entire proposed key staff. For the others, the proposal must show the offeror's proposed recruitment plan and its knowledge of the local labor market.

Although the Government will provide office space, computers, equipment, supplies, and other items for contractor staff who process applications, the contractor must provide for temporary office space, furnishings, and equipment at each location (separate from the NPCs) for its start-up activities, such as recruitment, screening, and hiring of the initial staff. The offeror must include in its proposal its plan for these start-up activities.

B. The Teaming Agreement

On January 15, 2008, Appellant and HeiTech Services, Inc. (HeiTech) executed a Teaming Agreement for the purpose of responding to the instant solicitation. Among other terms, they agreed that Appellant would submit the proposal as the prime contractor with HeiTech the subcontractor and team member, that HeiTech would receive "up to 49%" of total contract revenue per year, and that Appellant would handle all communications with DOL/ETA. Further, HeiTech would furnish to Appellant materials pertinent to its assigned tasks for inclusion in the proposal but HeiTech's detailed cost and pricing data would be submitted directly to DOL/ETA. Appellant would not reimburse HeiTech's costs for costs related to proposal development. There are provisions for handling each firm's proprietary information and separate non-disclosure agreements.

C. Appellant's Proposal

The proposal sets out the proposed key staff as follows:

Location and Position	Name	Employer	Past Employer
Chicago - Project Manager	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Atlanta - Project Manager	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Chicago - Assistant Project Manager	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Atlanta - Assistant Project Manager	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Chicago - System Analyst	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Chicago - System Analyst	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Atlanta - System Analyst	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]
Atlanta - System Analyst	[xxxxxxxxx]	[xxxxxx]	[xxxxxx]

TCE and HeiTech will each employ one Project Manager, one Assistant Project Manager, and two System Analysts. Thus, each firm will employ four of the eight key staff members, with an even distribution among job type and location. One Project Manager and one Assistant Project Manager have prior work experience with TCE; the other six key employees are new hires.

The proposal sets out the other proposed staff as follows:

Location and Position	TCE to Hire	HeiTech to Hire
Chicago - Analyst II	[##]	[##]
Chicago - Analyst I	[##]	[##]
Chicago - Total	[##]	[##]
Atlanta - Analyst II	[##]	[##]
Atlanta - Analyst I	[##]	[#]
Atlanta - Total	[##]	[##]

TCE will employ more of the other proposed staff at each level and at each location than HeiTech will employ.

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An important component of Appellant's Project Management Approach is its establishment of the "[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]" ([XXX]) as an indirect cost center. The [XXX] is to [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] in Washington, D.C. The [XXX]'s proposed composition is as follows:

[XXX] Function	Name	Employer
[xxxxxxxxxxxxxxxxxx]	G. Bassette	TCE
[xxxxxxxxxxxxxxxxxx]	[xxxxxxxxx]	[xxxxxx]
[xxxxxxxxxxxxxxxxxx]	[xxxxxxxxx]	[xxxxxx]
[xxxxxxxxxxxxxxxxxx]	[xxxxxxxxx]	[xxxxxx]
[xxxxxxxxxxxxxxxxxx]	[xxxxxxxxx]	[xxxxxx]
[xxxxxxxxxxxxxxxxxx]	[xxxxxxxxx]	[xxxxxx]
[xxxxxxxxxxxxxxxxxx]	[xxxxxxxxx]	[xxxxxx]

The [xxxxxxxxx] and [xxxxxxxxxxxxxx] are the only [XXX] members who are directly billable to the contract; the other members are all part of indirect costs. The [XXX] actually began its work right after the decision to submit an offer, in order to begin such pre-award activities as the recruitment of professional staff.

Of the five past performance experiences presented in the Proposal, three were TCE's own contracts. These three are:

Contract No.	Pertinent Dates	Agency	Dollar Amount
DOLJ06A20430	Oct. 1, 2006 - Dec. 31, 2007	DOL/ETA	$1,059,123
DOLJ051A20206	July 1, 2005 - June 30, 2007	DOL/ETA	$3,400,000
DTMA1D04004	Sept. 1, 2004 - Dec. 31, 2007	DOT/MARAD	$2,800,000

D. The Protest and the Area Office's Investigation

On July 10, 2008, the Contracting Officer (CO) notified unsuccessful offerors that Appellant was the apparently successful offeror. On July 16, 2008, CMW & Associates, Inc. (CMW), another offeror, timely filed a size protest with the CO against Appellant. CMW asserted Appellant has limited experience, personnel and financial capability. Thus, in violation of the ostensible subcontractor rule, Appellant would be unduly reliant on HeiTech, an other than small firm, to perform this contract. CMW also provided Dun & Bradstreet (D&B) Reports on Appellant and HeiTech, and two reports by the DOL's Inspector General (IG) regarding Contract No. DOLJ051A20206.

On July 18, 2008, the CO referred the protest to the Small Business Administration (SBA), Office of Government Contracting, Area II, in Philadelphia, Pennsylvania (Area Office), for a size determination. On July 21, 2008, the Area Office notified Appellant of the protest. On July 30, 2008, Appellant provided to the Area Office its completed SBA Form 355, company

documents, the Teaming Agreement, the Technical and Cost Proposals for the instant procurement, a list of the specific tasks to be performed by Appellant and HeiTech (with cost breakout, as requested by the Area Office), a Declaration by Appellant's president, and Appellant's arguments in response to the protest allegations.

The information provided to the Area Office shows that Appellant, by itself, is a small business under the applicable size standard, and that HeiTech is other than small. The Declaration stated that Appellant has had no business relationships with HeiTech other than their teaming for the instant procurement, and set out a lengthy list of factual assertions tending to show there is absolutely nothing in common between the two companies other than their collaboration on this proposal. The Declaration also noted Appellant has no mentor-protégé agreement, and it summarized Appellant's own previous contracts (including the three presented in the proposal as past experience), none of which has involved HeiTech as either a prime or a subcontractor.

Appellant's response to the protest asserted Appellant and HeiTech would be in a legitimate prime-subcontractor relationship in which Appellant is clearly in control. Pointing to the regulatory criteria for ostensible subcontractor analysis, Appellant noted that HeiTech is not incumbent on this contract, that Appellant has previously performed for DOL/ETA the exact same tasks now being solicited, and that management control of the contract rests with Appellant under the [xxxxxxxxxxxxxxxxxxxxx] ([XXX]) described in the proposal. Further, the proposal specifically places HeiTech in a supporting role as subcontractor; and, of the eight key employees specified in the solicitation, the resumes in the proposal clearly show that two had previously worked for Appellant, six were new hires, and none had ever worked for HeiTech.

Appellant also noted the Teaming Agreement lacked a complete list of tasks to be subcontracted to HeiTech because those tasks were not known at the time the Teaming Agreement was drawn up. Instead, Appellant pointed to the Technical Proposal itself and the summary of specific tasks requested by the Area Office. As for the clause in the Teaming Agreement providing HeiTech would receive "up to 49%" of contract revenue, Appellant notes that percentage is a ceiling, not a floor. Finally, Appellant emphasized that the OIG reports found no wrongdoing on Appellant's part and that the D&B Reports are outdated and irrelevant to the ostensible subcontractor allegation.

E. The Size Determination

On August 22, 2008, the Area Office issued Size Determination No. 2-2008-103, 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 that Appellant, by itself, was a small business but that when its receipts are combined with those of its other than small subcontractor HeiTech, Appellant would be other than small.

The size determination briefly summarized the solicitation, the Teaming Agreement, the Cost Proposal (CP), the Technical Proposal (TP), the protest allegations, Appellant's response to the protest, and the Declaration. In many places, the size determination points out facts suggesting Appellant and HeiTech would be in a legitimate contractor-subcontractor

relationship. However, the Area Office also found a number of adverse facts and findings. Because these adverse facts and findings must have weighed heavily in the Area Office's ultimate, adverse conclusion they are set out here in some detail.

Among the 26 bulleted facts, the Area Office includes:

> The CP reflects that TCE is incurring 51% of the contract cost;
>
> The CP reflects that TCE is incurring 51% of the labor cost;
>
> The TCE Team, which is frequently mentioned in the proposal, is comprised of TCE and HeiTech;
>
> It was stated that TCE and HeiTech will work together through their corporate recruitment teams to find qualified candidates for employment;
>
> Between the [XXX] and field locations (Atlanta and Chicago), HeiTech is providing 7 key staff members and TCE is providing 6 key staff members;
>
> The DOL IG report provided by the protestor stated that on DOL Contract No. J051A20206 that was a series of task orders valued at about $3.4 million, TCE only performed about 32% of the work;

In all, the Area Office cited information from the DOL IG report in 4 of its 26 bulleted facts.

In discussing Appellant's past experience, the Area Office stated:

> [I]t is noted that the majority of these contracts were valued below $1 million. Therefore, the Area Office cannot state that TCE lacks expertise in providing the services required in the solicitation. However, it can be reasonably stated that TCE's expertise does not rise to the level of HeiTech's contract experience.

In its Findings section, in connection with the fact Appellant will incur about 51% of the cost and HeiTech about 49%, the Area Office cites *Size Appeal of Crown Support Services, Inc.*, SBA No. 3294 (1990) for the proposition that it is "indicative of unusual reliance" that a prime contractor and subcontractor will perform essentially equal portions of the contract, where the evidence fails to show that the prime either will perform the more costly and complex tasks, or is able to perform the full range of tasks and the proposal stresses the subcontractor's background and experience. This scenario strongly suggests the prime would not have received award without the subcontractor. Here, Appellant and HeiTech are each providing the same services, but Appellant is reliant on HeiTech for recruitment, quality assurance, and compliance.

Further, in *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), OHA held that in a procurement of significant value, an unproven or questionable firm's capacity can be questioned, and responsibility could only be based on the subcontractor's experience. Here, Appellant "is not a proven entity for any contract above $3 million"; this is a $15 million

procurement; Appellant's only contract over $3 million "was the subject of a DOL IG report that indicated TCE only performed about 32% of the work."

In consequence of other Facts found earlier in its size determination, the Area Office also notes in its Findings section that HeiTech has more contract experience, and that "HeiTech is providing the majority of key personnel," in that it contributes three of the five [XXX] members.

After summing up its adverse facts and findings, the Area Office presented its ultimate conclusion that Appellant and HeiTech are affiliates and that Appellant is therefore other than small and ineligible for the instant procurement.

F. The Appeal

On August 25, 2008, Appellant received the size determination, and on September 5, 2008, filed the instant appeal. Appellant asserts the size determination is "rife" with inconsistencies and sets out several examples. Appellant asserts the Area Office committed clear errors of fact and law in reaching its conclusion that Appellant and HeiTech are affiliated under the ostensible subcontractor rule. Amongst these errors is the Area Office's erroneous determination that the individuals working in the [XXX] are "key personnel."

Appellant also asserts the Area Office's ostensible subcontractor analysis was flawed, citing various OHA decisions finding ostensible subcontractor affiliation on different facts. Appellant asserts it has the experience necessary to successfully perform the contract; comparing Appellant's experience on similar contract tasks at Dallas with HeiTech's experience. Appellant assails the Area Office's finding that Appellant "is not a proven entity for contracts above $3 million." on two grounds: (1) the $6.5 million size standard does not permit Appellant or any other offeror to have many large contracts; and (2) in making this statement, the Area Office was improperly trying to substitute its judgment for that of DOL which selected Appellant as the best qualified offeror.

Appellant also contests the Area Office's finding that the Appellant is unduly reliant on HeiTech for key contract areas of personnel recruitment, quality assurance, and compliance, contending that none of these three areas is a key task area and/or that Appellant's proposal set out that each is jointly performed.

Appellant also takes issue with the Area Office's finding that HeiTech is providing more than discrete assignments as a subcontractor and with the Area Office's reference to the proposal's use of the "TCE Team."

As relief, Appellant requests OHA to overturn the size determination and to find Appellant is a small business eligible for award.

G. The Protester's Response to the Appeal

On September 23, 2008, CMW filed a response in opposition to the appeal. CMW alleges the issue here is the instant procurement, and not whether HeiTech generally controls

Appellant. CMW accepts as correct and relies upon the Area Office's findings of fact. CMW asserts Appellant's proposal treats the two firms as partners, sharing an equal work load. CMW asserts HeiTech controls the [XXX] which, CMW asserts, manages the contract. CMW further asserts Appellant's proposal places heavy emphasis on HeiTech's expertise, and asserts Appellant's lack of experience makes it unusually reliant on HeiTech. CMW also asserts Appellant's poor financial condition further supports the conclusion Appellant is unusually reliant upon HeiTech.

IV. Discussion

A. Timeliness and Standard of Review

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

Appellant has 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).

B. The Merits of the Appeal

As noted above, the Area Office size determination concluded that Appellant's proposal violated the ostensible subcontractor rule despite the existence of many facts (which the Area Office noted) that are actually in Appellant's favor.

The ostensible subcontractor 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 found to be engaged in joint venture, and thus affiliated. 13 C.F.R. § 121.103(h)(4). All aspects of the relationship between the two concerns are considered, including the terms of the proposal (such as contract management, technical responsibilities, and percentage of subcontracted work, agreements between the concerns (such as teaming agreements, bonding or financial assistance) and whether the subcontractor is the incumbent and is now ineligible. *Id.*

The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements. The Area Office must evaluate "all aspects" of the relationship between the two concerns to determine whether the ostensible subcontractor rule applies. *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006).

Here, the Area Office reviewed the proposal and the relationship between the two firms. The Area Office reviewed Appellant's declaration that it had no previous affiliation with HeiTech; that the two firms had separate operations and did not share space or resources;

Appellant is not financially dependent on HeiTech, having its own independent financing for this procurement; Appellant has its own financial manager; has performed on several contracts as a prime contractor; and the instant procurement will be the first time the two firms have worked together. The Area Office's findings did not contradict any of these assertions in Appellant's declaration.

The Area Office made its own findings after reviewing the record. Notable among these findings:

> CMW, not HeiTech, is the incumbent contractor. Appellant is incurring 51% of the contract cost, and 51% of the labor cost. The proposal frequently mentioned the "TCE Team", composed of Appellant and HeiTech.
>
> There was no evidence Appellant's employees for this procurement were former HeiTech employees. Both firms would provide four key employee each to Atlanta and Chicago, Appellant would the Project Manager to Chicago and Assistant Project Manager to Atlanta, while HeiTech would do the reverse. Appellant would provide 7 key employees for these two regions, HeiTech 6.
>
> Appellant has relevant experience in the functional tasks of this contract. Further, Appellant has assigned discrete tasks to the subcontractor. The Area Office further noted that it could not conclude that HeiTech was performing the more complex and costly tasks for this procurement. Indeed, the Area Office found that most of the work and most of the cost would be performed by Appellant.

And yet, in the face of all of this evidence that Appellant was not unusually reliant upon HeiTech, and that Appellant would be performing most of the primary and vital tasks of the contract, the Area Office found Appellant unduly reliant upon HeiTech.

The Area Office's main reason for doing so is HeiTech's greater experience in this field, and the emphasis upon that experience in Appellant's proposal, in contrast to what it characterizes as Appellant's inexperience. In doing so, the Area Office comes perilously close to making a responsibility determination, in making its own judgments as to Appellant's capacity to perform the contract. These judgments are outside the purview of the size appeal process, and are more properly the province of the CO, who presumably has already made a responsibility determination.

The Area Office relied heavily upon *Size Appeal of Crown Support Services, Inc.*, SBA No. SIZ-3294 (1990) for its conclusion. That case held that where a contractor and subcontractor will perform substantially equal portions of the contract, and the evidence fails to show either that the contractor would perform the more costly and expensive tasks, where the subcontractor would directly interface with the government, and there was substantial cooperation and collaboration on the proposal; and where great emphasis was placed in the proposal on the subcontractor's background and skills; that the contractor was unduly reliant upon the subcontractor.

This case is inapposite here. As noted above, there is no showing whatever that HeiTech will perform the more costly and complex functions of the contract, nor that HeiTech will interface directly with the Government, when Appellant will clearly be managing the contract. Thus, not all of the factors which that case relied upon to find a violation of the ostensible subcontractor rule are present here. The Area Office erred as a matter of law in citing *Crown Support Services* as authority here.

The Area Office also erred in relying upon *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006). While that case found it appropriate to consider the challenged firm's experience as part of the ostensible subcontractor analysis, the firm there was truly "unproven", having only recently begun work and reported income. Here, Appellant has experience over several years in performing this type of contract, as the Area Office itself noted. Further, the challenged firm in *Taylor* relied far more heavily on its ostensible subcontractor for key personnel than does Appellant. *Taylor* was thus also an inapposite case here.

Conversely, the factual record before the Area Office contained many indicia establishing that the relationship between Appellant and HeiTech is not an ostensible subcontractor relationship. HeiTech is not the incumbent contractor on this contract. The tasks that both firms will perform are carefully assigned, and HeiTech will perform discrete tasks, as required of a subcontractor under the rule. *Size Appeal of Sectek, Inc.*, SBA No. SIZ-4558 (2003). Appellant has experience in performing this type of work, as the Area Office itself found. Appellant is not financially reliant on HeiTech for funding, bonding, or in any other way. Appellant will manage the contract.

The Area Office also erred in finding that [xxxxxxxxxxxxxxxxxxxxxxxxx] ([XXX]) will manage the overall procurement for Appellant, that the [XXX] employees are the key employees, and that HeiTech will provide a majority of the key employees. The proposal states that the [XXX] is established to [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].[1] The key employees, as described in the SOW, are not the staff of the [XXX] but the staff identified as key in the solicitation, the Project Manager, Assistant Project Manager, and two System Analysts at each NPC. These employees will be half Appellant's, and half HeiTech's. The Area Office erred in its finding of which employees were key personnel, and what proportion of the key personnel were Appellant's. Project management will be performed by Appellant, as described in the proposal and the Teaming Agreement, which provides that all communication with the Government will be made through Appellant.

Further, the Area Office failed to note in discussing the breakdown on proportion of the contract performed by each party, that Appellant will perform 53%, not merely 51%, of the direct labor costs with its own employees.

[1] Even if the [XXX] were the management center for the procurement, the two most important positions ([xxxxxxxxxxxxxxxxx] and [xxxxxxxxxxxxxxxxx]) are filled by Appellant's employees.

The Area Office also erred in finding Appellant had never managed more than a $3 million contract at one time. Appellant's President's Declaration establishes that Appellant handled two DOL contracts of that magnitude simultaneously between 2004 and 2007.

While Appellant described itself as a "team" with HeiTech in its proposal, and used logos to that effect in the proposal, and there is some older precedent that this is an indicia of affiliation, OHA has since held that this of type language in the proposal is not an indicia of affiliation. *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4663 (2004).

The Inspector General reports referenced by the Area Office do not concern the instant procurement. There were two reports from one investigation on one contract. The reports found no wrongdoing by Appellant, and describe a contract which was satisfactorily completed. I conclude these reports are not relevant to this procurement, especially where in this case, Appellant has carefully delineated which personnel from each firm will hold each identified position. The Area Office erred in relying on these reports to support a finding of undue reliance by Appellant.

CMW's response to the appeal largely repeats the Area Office's findings, and attempts to add additional facts to support the size determination. However, these facts and arguments do nothing to cure the errors and inconsistencies in the Area Office determination, or to change the fact that Appellant's proposal complies with the requirements of the ostensible subcontractor rule.

In sum, the size determination is based on significant errors of fact and law. Its analysis fails to take account of facts favorable to the Appellant which the Area Office itself noted in the size determination. The size determination fatally relies upon inapposite case law. Appellant's proposal carefully delineates the discrete tasks (the number of employees) each firm will perform or provide. Appellant will perform the majority of the work, and has not delegated the more costly or complex work to its subcontractor. Appellant is not reliant for financial assistance on HeiTech. Further, HeiTech, the subcontractor, is not the incumbent (there is no incumbent) therefore the heightened scrutiny the regulation requires for an incumbent subcontractor is inapplicable here. There are simply not sufficient indicia of affiliation for the ostensible subcontractor rule to apply here.

The Area Office relied heavily upon its judgment Appellant was insufficiently experienced to perform this contract. The Area Office substituted its own judgment of Appellant's ability and experience to perform this contract (a responsibility determination) for that of the CO. However, Appellant's experience and competency are a matter of record, and responsibility determinations are beyond the jurisdiction of the size determination process. To place too much emphasis on the challenged firm's prior experience in making an ostensible subcontractor determination runs the risk of closing the door on new small firms entirely. Appellant here has presented a carefully drawn proposal which, while it makes use of a large subcontractor, stays within the established parameters of the ostensible subcontractor rule, and is not unusually reliant upon HeiTech. In making its determination to the contrary, the Area Office made errors of fact and law. For these reason, I must reverse the size determination.

V. Conclusion

Accordingly, the Area Office size determination is REVERSED, and the appeal is GRANTED. Appellant TCE Incorporated is an eligible small business for the instant procurement.

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

CHRISTOPHER HOLLEMAN
Administrative Judge