United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF: CWU, Inc. and U.S. Department of Homeland Security Appellants Solicitation No. HSFLGL-09-R-00004 Department of Homeland Security Federal Law Enforcement Training Center Glynco, GA	SBA No. SIZ-5118 Decided: March 26, 2010

APPEARANCES

Jon M. Devore, Esq., Birch, Horton, Bittner and Cherot, P.C., Washington, D.C., for CWU, Inc.

Barbara J. Dubberly, Branch Chief and Contracting Officer, for the U.S. Department of Homeland Security.

Lars E. Anderson, Esq., Justin J. Wortman, Esq., and Maria A. del-Cerro, Esq., Venable LLP, Washington, D.C., for Greystones Consulting Group, LLC.

DECISION

I. Introduction & Jurisdiction

On February 4, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2010-27 (Size Determination) finding that CWU, Inc. (Appellant) is not an eligible small business for the instant procurement. Specifically, the Area Office found Appellant is affiliated with RAMCOR Services Group, Inc. (RAMCOR) due to a violation of the ostensible subcontractor rule. On February 19, 2010, Appellant filed an appeal of the Size Determination with the SBA Office of Hearings and Appeals (OHA). On February 22, 2010,[1] the U.S. Department of Homeland

[1] Homeland Security's appeal is dated February 19, 2010, and the OHA fax report

Security (Homeland Security) also filed an appeal of the Size Determination. On February 25, 2010, the two appeals were consolidated for disposition.

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 its appeal within fifteen days of receiving the Area Office's Size Determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Homeland Security filed its appeal one business day after the time period for filing expired, so it is untimely. *Id.* Accordingly, Homeland Security's appeal must be dismissed, and only Appellant's appeal is properly before OHA for decision. For the reasons discussed below, Appellant's appeal is denied.

II. Background

A. Findings of Fact

1. On July 29, 2009, Homeland Security issued Solicitation No. HSFLGL-09-R-00004 (RFP) to acquire support for law enforcement officer training at its Federal Law Enforcement Training Center in Glynco, GA. The Contracting Officer (CO) issued the RFP as an 8(a) Program set-aside and designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of $35.5 million in average annual receipts.

2. On August 6, 2009, Greystones Consulting Group, LLC (Greystones) appealed the NAICS code designation to OHA claiming it was improper for the work required under the solicitation.

3. On August 13, 2009—as a result of the Greystones NAICS appeal—the CO issued Amendment 1 to the RFP, which changed the NAICS code to 561990, All Other Support Services, with a corresponding size standard of $7 million in average annual receipts. The Amendment also changed the project title to "Roleplayer Support for Law Enforcement Officer Training Services."

4. Relevant RFP provisions include:

a. Clause L.9, Submission of Proposal, which identifies the requirements for the various submissions each offeror must provide:

i. Clause L.9, subparagraph c provides that offerors are required to describe how they will accomplish the work; among other things, they are required to summarize their role playing experience and provide management personnel qualifications;

ii. Clause L.9, subparagraph d provides that offers are required to

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indicates it was received at OHA at 5:44 p.m. on February 19, 2010. Any filing received at OHA later than 5:00 p.m. is deemed filed as of the following business day (here, February 22, 2010). 13 C.F.R. § 134.204(b)(2).

address their present and past performance relevant to the requirements of the RFP; and

iii. Clause L.9, subparagraph f provides that award will be based upon a determination of best value in accordance with the factors and subfactors in the RFP.

b. Section M, Evaluation Factors for Award, which provides in relevant part:

i. Clause M.1, Evaluation of Proposals, describes how the Government will makes its best value determination and notes that proposals will be evaluated against evaluation criteria set forth in the RFP, without regard for the relative strengths and weaknesses of competing proposals;

ii. Clause M.7, Elements of the Evaluation Process, sets forth the price and non-price factors for proposal evaluation. The first Non-Price Factor is Technical, and it includes: (1) Method of Operation; (2) Quality Control Plan; (3) Management and Administration; (4) Management Personnel Qualifications; and (5) Management Effectiveness. The second Non-Price Factor is Past Performance. As described later in Clause M.7, Technical Factors 1 – 4 are of equal importance and collectively are significantly more important that Technical Factor 5. In turn, Technical Factors 1 – 5 are significantly more important than Past Performance. The Non-Price Factors, collectively, are considered significantly more important than price. The RFP notes the tradeoff process will necessarily become subjective, and the more equal the Non-Price Factors become, the more important price becomes. Clause M.7 also contains the requirements for proposals so that they may be evaluated against the Non-Price Evaluation Factors. Among other things, offerors are required to identify key personnel and their qualifications. Offerors are also notified that specific relevant past performance involving role playing services is advantageous, and a failure of key employees to have this experience could result in a neutral rating, which could result in an unsuccessful proposal.

5. RAMCOR is the incumbent contractor, and its average annual receipts exceed the $7 million size standard, rendering it ineligible to compete for the instant procurement.

6. On September 21, 2009, Appellant submitted its proposal to the CO. Relevant portions of Appellant's proposal in response to the RFP include:

a. The title page to each volume of the proposal provides that the proposal was prepared by "TEAM CWU (CWU, Inc and Ramcor Services Group, Inc.)";

b. Volume I – Price Proposal proposes a price exceeding $6 million, under various line items, for the base year (10/01/2009 to 09/30/2010). Appellant also priced four option years in excess of $6 million;

c. Volume II – Technical Proposal, contains paragraph 1.0, Teaming Arrangement, which provides:

> Through a formal business evaluation with industry leaders in government training support services, CWU, Inc (CWU) elected to form Team CWU by

> encompassing expertise in role player support services (RPSS), foreign language linguistic support, and exercise planning support through a teaming agreement with the incumbent, Ramcor Services Group, Inc (RAMCOR). By leveraging our combined knowledge, experience and resources we reduce training operations risk to achieve the mission. Team CWU has numerous role player resources available; including, but not limited to former law enforcement officers, a cultural diverse team of foreign language speakers (i.e.: Arab, Dari, Pashto, Russian, Spanish, etc), and military veterans from the intelligence and special operations communities. Team CWU's experience supporting US Government law enforcement and military training exercise contracts at the local and strategic levels is the best in the industry.
>
> The contract will be executed by our team with CWU as the prime and RAMCOR performing 49% of the requirement. Both CW and RAMCOR have extensive experience providing RPSS, intelligence service and support, linguistics, in addition to government operational and training support personnel. **Our team presents the government a no risk option in the source selection process for the FLETC Role Player Support for Law Enforcement Officer Training (RS4LEOT) Services Contract.**

d. Appellant's Introduction emphasizes its experience in providing RPSS to FLETC in Georgia, Arizona, New Mexico, and South Carolina. Appellant closes its introduction by saying: "Team CWU's past performance on this contract and similar contracts supporting the Department of Homeland Security, FLETC, and Department of Defense demonstrates low performance risk, *no transition risk*, and a high return on investment." (emphasis added);

e. Appellant emphasizes its experience in RPSS to the FLETC, especially in providing RPSS at the Glynco, Georgia facility;

f. Appellant's proposal does not differentiate between the work it will perform and the work RAMCOR will perform (except to identify current RAMCOR employees who would fulfill roles as part of Team CWU);

g. Appellant's staffing plan relies upon RAMCOR employees, including Mr. Paul Creary, as FLETC RPSS Project Manager. (Proposal, Vol. II, at 7-13.) Mr. Creary, is responsible, among other things, for hiring employees, managing the contract budget, etc. (Proposal Vol. II, at 70, 78.) All other managerial and key staff identified by Appellant as being on-site in Georgia were, as of the time of the proposal, RAMCOR employees. (Proposal, Vol. II, at 8, 80-89.);

h. Appellant's role playing hiring procedures (Proposal, Vol. II, at 15-16) emphasizes RAMCOR's database and hiring experience at FLETC Gynco, Georgia;

i. Appellant's proposal emphasizes "an incumbent workforce of trained experienced managers and role players." Appellant also states it will continue to provide role player service, which could only be a reference to RAMCOR's experience as the incumbent

(Volume II, pages 25-26); and

j. The overwhelming majority of corporate experience offered by Appellant, as measured by revenue earned, was that of RAMCOR. (Proposal, Vol. III, at 2.)

7. On December 24, 2009, the CO notified the unsuccessful offerors, including Greystones, that the contract had been awarded to Appellant.

8. On December 31, 2009, Greystones filed a protest challenging Appellant's size on the basis that Appellant would be unduly reliant upon RAMCOR in performing the contract.

9. On January 21, 2010, Appellant submitted its response to the Greystones protest, including relevant documentation, to the Area Office. On January 25, 2010, Appellant submitted additional supplemental documents requested by the Area Office.

B. The Size Determination

On February 4, 2010, the Area Office issued its Size Determination finding that Appellant is not an eligible small business for this procurement due to a violation of the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). The Area Office first addresses the nature of Appellant's proposal overall. The Area Office observes that CWU and RAMCOR entered into a teaming agreement for the purpose of submitting a joint offer for this RFP. Relying on *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003), the Area Office determines that "one factor [OHA] has consistently held to support a finding of unusual reliance is when the prime contractor's proposal constantly identifies itself and its ostensible subcontractor as a team," and that "[t]he entire tenor of [Appellant's] proposal is that of a team." (Size Determination 3.)

Specifically, the Area Office points to various sections of the proposal that emphasize "Team CWU's" experience as the incumbent. These sections reference the team's known management team, its incumbent workforce, and its proposed Project Manager, who is, according to the Area Office, a RAMCOR employee who has worked on the contract for twelve years. These sections highlight Team CWU's ability to achieve continuous operation and a seamless transition of the contract. (Size Determination 3-4.)

The Area Office next focuses on Appellant's proposed key personnel. Aside from the Project Manager, Team CWU will provide eleven other managers. The Area Office indicates that all of the key personnel resumes provided in the proposal are from RAMCOR employees, with the exception of Appellant's President. Additionally, the Area Office concludes that the role of Appellant's employees is "miniscule and without authority in comparison to the RAMCOR employees" because none of Appellant's employees in supervisory positions will be on site. Instead, only RAMCOR employees will be responsible for overseeing the daily operations of the contract. (Size Determination 3-4.)

The Area Office then reviews the past performance information offered in support of Appellant's proposal. The Area Office notes that Appellant has provided role players as a

subcontractor on a $2.6 million contract and as a prime contractor on a $68,190 contract. The Area Office concludes that Appellant's President has the requisite experience necessary to perform his role under the contract. However, the Area Office also concludes that Appellant's primary source of revenue (72%) is the embellishment of uniforms, and clothing sales is "the company's dominant field of operation." (Size Determination 4.) Because the primary service required under this contract is the provision of role players (and all supplies necessary to support their operations), and in light of the weight given to the technical factors under the solicitation and the emphasis in Appellant's proposal on RAMCOR's abilities as the incumbent, the Area Office concludes that it is RAMCOR that has the relevant experience and technical ability to perform this contract. (Size Determination 5.)

The Area Office goes on to discuss the division of work between Appellant and RAMCOR. The proposal provides that RAMCOR will perform 49% of the work, and the teaming agreement provides that the division of actual tasks will be determined on a task order basis. According to the Area Office, though, "it is clear from the proposal that the majority of management and key employees performing the more detailed and complex responsibilities will be performed by RAMCOR. RAMCOR will perform the primary and vital portions of the contract." (Size Determination 5.)

Finally, the Area Office analyzes all of this information in the context of the totality of the circumstances test applicable to the ostensible contractor rule. 13 C.F.R. § 121.103(h)(4) ("All aspects of the relationship between the prime and subcontractor are considered . . . ."); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 14 (2006) ("[T]he Area Office must evaluate the totality of the circumstances . . . ."). The Area Office finds there will be a commingling of personnel because there is no delineation of tasks to be performed by Appellant and RAMCOR, all of the resumes provided for the key management positions are for RAMCOR employees (except for one—Appellant's President), and the proposal emphasizes the experience of RAMCOR as the incumbent. Moreover, the Area Office cites a letter from Appellant to RAMCOR explaining the expected percentage of profit to result from the contract. This leads the Area Office to conclude that the firms are operating as joint venturers because it seems as though Appellant is sharing the profit with RAMCOR. (Size Determination 5-6.)

Based on the totality of the circumstances, the Area Office concludes that Appellant would be unduly reliant on "RAMCOR's extensive experience, qualifications and incumbent status to perform on the contract." Due to its violation of the ostensible subcontractor rule, the Area Office aggregated the receipts of Appellant with those of RAMCOR and determined that Appellant is other than small under the applicable size standard. (Size Determination 6-8.)

C. The Appeal Petition

On February 19, 2010, Appellant filed the instant appeal alleging the Area Office overlooked evidence of its ability to perform the contract and misconstrued its proposal, thereby erroneously concluding that Appellant's relationship with RAMCOR violates the ostensible subcontractor rule. Appellant first notes that ostensible subcontractor inquiries are highly fact-specific because the analysis is based upon the specific solicitation and the specific proposal at issue. *Size Appeal of C.E. Garbutt Constr.*, SBA No. SIZ-5083 (2009). Appellant argues the

facts in this case indicate that it is "an independent, experienced, stable small business that is fully capable of performing the contract." (Appeal Petition 3.)

Appellant asserts that it is not affiliated with or unduly reliant upon RAMCOR. Appellant contends that it independently prepared its proposal and did not contact RAMCOR until after its initial proposal had already been completed. Only at that time did Appellant and RAMCOR enter into a Teaming Agreement, which "clearly delineates the working relationship between the companies,"—*i.e.*, that of prime contractor-subcontractor. (Appeal Petition 3.)

Appellant next claims that the Area Office erred in identifying the key management personnel as RAMCOR employees and concluding RAMCOR employees would be performing the primary and vital aspects of the contract. Appellant acknowledges that many of these employees "performed comparable tasks for RAMCOR" under the previous contract, but explains that it hired all of the management personnel as full time employees as of January 1, 2010, and RAMCOR no longer has any control over these employees. Appellant contends the Area Office "wrongly attributes the abilities and experiences detailed in [Appellant's] proposal to RAMCOR rather than the management personnel." Appellant argues that because the managers are currently employees of Appellant, whether they were employed by RAMCOR in 2009 is irrelevant. (Appeal Petition 4.)

Appellant points to *Size Appeal of Greenleaf Constr. Co.. Inc.*, SBA No. SIZ-4663 (2004), *Size Appeal of Greenleaf Constr. Co. Inc.*, SBA No. SIZ-4765 (2006), and *Size Appeal of TCE Inc.*, SBA No. SIZ- 5003 (2008), in support of its argument that it did not violate the ostensible subcontractor rule. In each of those cases, OHA reversed or remanded an area office determination finding that the protested firm had violated the rule. Appellant argues that in the *Greenleaf* cases, OHA determined that the prime contractor and subcontractor were not affiliated despite the fact that thirty-two of forty-four proposed contract staff members were employed by the subcontractor. In the *TCE* case, OHA placed little weight on the fact that the subcontractor was to perform up to 49% of the work and provide four of eight key employees. Instead, OHA found the prime contractor and subcontractor were not affiliated because the proposal carefully delineated tasks for each firm, the prime contractor was to perform 53% of the work, and the prime contractor was not financially dependent upon the subcontractor. (Appeal Petition 4-5.)

Appellant argues this case is similar to *Greenleaf* and *TCE* because its Teaming Agreement makes clear that all management and administrative functions are solely within Appellant's purview. RAMCOR will provide only 49% of the indefinite-delivery indefinite-quantity (IDIQ) role player positions, which makes up only 34% of the total contract. Additionally, all of the key on-site management employees responsible for performing the complex, day-to-day operations under the contract are Appellant's current employees as of January 1, 2010. (Appeal Petition 5.)

Furthermore, Appellant alleges the Area Office made "a clear factual error in not accounting for [Appellant's] management who are exclusively and directly responsible for every aspect of performance and control under the contract." These three individuals are off-site managers (employed by Appellant prior to January 1, 2010) to whom the on-site managers report directly concerning all contract matters. According to Appellant, the Area Office did not place

enough weight on their management experience. (Appeal Petition 5.)

Appellant next argues that the Area Office's conclusion that the use of the term "Team CWU" throughout its proposal is indicative of undue reliance is baseless. Appellant again cites the *Greenleaf* and *TCE* cases in support of the proposition that referring to a prime contractor and subcontractor as a team is not necessarily indicative of affiliation. In this case, Appellant claims, the Teaming Agreement clearly evinces that Appellant is solely responsible for the management of the contract. (Appeal Petition 6.)

Appellant goes on to contend the Area Office failed to adequately consider its relevant experience. Specifically, Appellant claims the Area Office disregarded the extensive management and technical experience of its President and its Vice President, "who have over 56 years combined experience in program and business management with the U.S. Army Special Operations Command, the State Department, and the civilian business sector." Additionally, Appellant notes that it has specific relevant experience in providing role player support services and cites *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075 (2009), in which OHA reversed an area office's finding of a violation of the ostensible subcontractor rule where the prime contractor was a relatively new company. Appellant argues that the Area Office focused on RAMCOR's longer performance record in erroneously concluding that RAMCOR will perform the primary and vital elements of the contract. "The mere fact that a proposed subcontractor has significant experience in a given field does not invalidate the experience of the prime contractor." (Appeal Petition 6-7.)

Finally, Appellant asserts the Area Office also disregarded its ability to independently secure complete financing and bonding for this contract. Appellant explains that it has its own working capital, and it obtained an SBA loan, a separate line of credit, and a 20% bid bond. Based on the totality of the circumstances, Appellant contends it is not affiliated with RAMCOR, and RAMCOR should not be considered its ostensible subcontractor. Appellant is not unduly reliant upon RAMCOR, and it controls all key personnel and management functions under the contract. Appellant requests that OHA reverse the size determination. (Appeal Petition 7-8.)

D. Greystones's Response

On March 8, 2010, Greystones filed its response to the appeal. Greystones argues Appellant has failed to meet its burden to prove the Area Office's determination is based upon a clear error of fact or law, and the Area Office properly concluded that RAMCOR is Appellant's ostensible subcontractor. (Response 5.)

First, Greystones contends the Area Office's determination that Appellant is unduly reliant upon RAMCOR is in accord with the facts of the case. Most importantly, at the time Appellant submitted its proposal, all eleven key management personnel were employees of RAMCOR performing the same functions as they would be under this contract. In relation to this, Greystones points out that Appellant attempts to introduce new evidence (namely, its management employment agreements and payroll records) to support its arguments that these managers are actually employed by Appellant and that the Area Office erred in concluding otherwise. Because these records were not before the Area Office, and because Appellant failed

to file a motion showing good cause for their admittance, Greystones urges OHA to exclude them pursuant to 13 C.F.R. § 134.308(a). (Response 6-7.)

Based on the Record before the Area Office, Greystones argues it is clear that Appellant would be unduly reliant upon RAMCOR. Greystones agrees with the Area Office's interpretation of Appellant's proposal as emphasizing RAMCOR's past performance instead of its own. Greystones quotes extensively from Appellant's proposal in an effort to demonstrate that Appellant highlighted RAMCOR's management experience, both as the incumbent contractor and on other role player contracts, while downplaying its own lack of experience. In particular, Greystones notes that Appellant executed delegations of authority to allow RAMCOR managers to represent and act on behalf of Appellant in matters related to the contract. Greystones concludes that it is clear from Appellant's own proposal that Appellant would be reliant upon RAMCOR's management personnel to perform the contract. (Response 7-11.)

Although RAMCOR argues that OHA should not consider Appellant's evidence that the RAMCOR managers are now Appellant's own employees, it argues in the alternative that even if OHA does consider the evidence, the facts only confirm that the Size Determination was proper. Greystones asserts Appellant only hired the RAMCOR managers after it filed its protest alleging Appellant would be unduly reliant upon RAMCOR. Additionally, Greystones alleges RAMCOR's Project Manager (who will serve the same function under this contract) is only a part time employee of Appellant, and RAMCOR's Operations Manager (who will serve the same function under this contract) is still a RAMCOR employee. Greystones cites *Size Appeal of InfoTech Enters., Inc.*, SBA No. SIZ-4346 (1999), and *Size Appeal of Bus. Control Sys., Inc.*, SBA No. SIZ-3959 (1994), to illustrate that Appellant and RAMCOR should be considered affiliates because Appellant hired all of RAMCOR's incumbent managers. (Response 12-13.)

Greystones also disputes Appellant's argument that the Area Office did not adequately consider its management and technical experience. Greystones asserts the Area Office did take Appellant's experience into account but simply determined that RAMCOR's role in performance of the contract would be so essential that the firms should be affiliated. Greystones points out that the Area Office concluded that Appellant's President has the experience to perform his supervisory role, but that the role of Appellant's employees "is miniscule and without authority in comparison to the RAMCOR employees." (Size Determination 4.) Greystones argues the Size Determination itself makes clear that the Area Office did consider Appellant's experience, and the fact that Appellant disagrees with the Area Office's conclusions about that experience does not constitute clear error. (Response 14.)

Second, Greystones claims the Area Office's determination that Appellant is unduly reliant upon RAMCOR is in accord with the law applicable to the case. Greystones asserts the cases cited by Appellant are inapposite here. With regard to the *Greenleaf* cases, Greystones takes issue with how Appellant presented the facts and contends "OHA's decision [in the second *Greenleaf* case] did not turn on the facts that [Appellant] cites in its argument." According to Greystones, the *Greenleaf* decision was based primarily on the fact that the prime contractor would perform the primary and vital elements of the contract, and the subcontractor would perform only 19% of the work. In contrast, RAMCOR is assured 49% of the work under this contract, which is in line with other OHA cases where an ostensible subcontractor relationship

has been found, and RAMCOR will perform virtually all of the management functions under the contract, which constitute the primary and vital aspects of the contract. (Response 15-17.)

Greystones also argues that the *TCE* case provides no support for Appellant's argument because the facts are too dissimilar. For instance, the subcontractor in *TCE* was not the incumbent contractor, whereas RAMCOR is the incumbent in this case. Greystones points out that in *TCE*, OHA specifically noted that the prime contractor-subcontractor relationship is subject to heightened scrutiny where the subcontractor is the incumbent. Additionally, unlike this case, in *TCE* there was no evidence the prime contractor's key employees were former employees of the subcontractor, and the Area Office could not conclude the subcontractor was performing the more costly and complex tasks under the contract. Also, in *TCE*, tasks under the contract had been specifically delineated to the prime contractor and subcontractor. Here, there is no such delineation, and the Teaming Agreement provides that work will be determined on a task order basis. "Moreover, to the extent that the proposal describes specific tasks to be performed, RAMCOR's management team is proposed to perform the vast majority of those tasks." (Response 17-19.)

Greystones next argues the Area Office properly applied OHA precedent to this case in rendering its Size Determination. Specifically, Greystones asserts that the *SecTek* case supports the Size Determination because Appellant's proposal refers almost exclusively to "Team CWU" throughout its explanation of how the contract will be performed. Greystones notes that although repetitive use of the term "team" does not require a finding of affiliation, it can nonetheless be indicative of affiliation. *See Size Appeal of ACCESS Sys., Inc.*, SBA No. SIZ-4843 (2007); *Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004). Greystones asserts the Area Office's finding of affiliation based in part on the pervasive references to "Team CWU" was appropriate and in line with OHA precedent. (Response 19-20.)

Greystones also claims the *ACCESS Systems* and *ePerience* cases support a finding of a violation of the ostensible subcontractor rule in this case. In *ACCESS Systems*, as here, the subcontractor was the incumbent, references to the "team" pervaded the proposal, most of the proposed key employees were employees of the subcontractor at the time the proposal was submitted, the subcontractor was to perform 49% of the work, and discrete tasks were not assigned. OHA affirmed the area office's finding that such a relationship violated the ostensible subcontractor rule. In *ePerience*, as here, the subcontractor was the incumbent, would participate in management of the contract, and many of the proposed key employees were employees of the subcontractor when the proposal was submitted. As in *ACCESS Systems*, OHA affirmed the Area Office's finding of affiliation. Based on the similarities between the facts of these cases and those in the instant case, Greystones urges OHA to affirm the Area Office's finding of affiliation between Appellant and RAMCOR. (Response 20-22.)

Finally, Greystones argues that if OHA accepts Appellant's new evidence into the Record, OHA should request additional documentation from Appellant because "[t]here can be little doubt that, if key provisions in the Team CWU proposal . . . are compared to RAMCOR's then-incumbent contract, they will be essentially identical." Greystones seeks all documents related to Appellant's initial proposal, all documents related to RAMCOR's participation in drafting the Appellant's proposal, and all documents related to RAMCOR's previous proposal,

contract, and management structure. (Response 22-23.)

Greystones concludes that Appellant has failed to meet its burden to who the Area Office committed a clear error of fact or law. Rather, the Record supports the Area Office's determination that the relationship between Appellant and RAMCOR violates the ostensible subcontractor rule. Greystones requests that OHA affirm the Size Determination and recommends that the CO terminate the award of the contract to Appellant.

III. Analysis

A. Standard of Review

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314. It is the appellant's burden to prove that the area office committed an error. *Id.* Clear error means the position of an area office lacks reason or is contradicted by the evidence in a record. Under the clear error standard, then, the Administrative Judge must affirm the judgment of an area office unless he 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 10-11 (2006). The Administrative Judge may not substitute his own judgment for that of an area office, regardless of whether he may have come to a different conclusion based on the existing record. The Administrative Judge may only overturn a size determination if the appellant establishes the area office made a patent error based on the record before it.

B. New Evidence

13 C.F.R. § 134.314(a) provides:

> Evidence not previously presented to the Area Office which issued the size determination being appealed will not be considered by a Judge unless:
> (1) The Judge, on his or her own initiative, orders the submission of such evidence; or
> (2) A motion is filed and served establishing good cause for the submission of such evidence. The offered new evidence must be filed and served with the motion.

As Greystones emphasizes, Exhibit B to the Appeal Petition, Appellant's management employment agreements, and Exhibit C to the Appeal Petition, Appellant's payroll records, were not part of the Record before the Area Office. Although not discussed by Greystones, Exhibit D, an Affidavit of Appellant's President attesting to the fact that all the on-site and off-site managers on the contract are Appellant's employees (as well as to the accuracy of Exhibits B and C), is also absent from the Record below.

Appellant includes these documents with its Appeal Petition, but it has not filed a motion to admit this evidence, which Appellant is using to demonstrate that the former RAMCOR managers are now Appellant's own employees, nor has Appellant offered an explanation as to

why it did not present this evidence to the Area Office. Most of the agreements included in Exhibit B were signed on January 1, 2010.[2] The payroll records are for checks dated January 15, 2010, for the period between January 1 and January 8, 2010. Appellant submitted its initial response to the protest to the Area Office on January 21, 2010, and submitted additional supplemental documentation to the Area Office on January 25, 2010. (Fact 8.) The Area Office did not issue its Size Determination until February 4, 2010.

In the absence of any clarification as to whether the new evidence Appellant now submits was unavailable to it at the time the Area Office performed its Size Determination or as to why it failed to present such evidence to the Area Office, I find Appellant has failed to establish good cause for admission of the new evidence, and I will not accept it into the Record. *See, e.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073 (2009). Accordingly, Exhibits B, C, and D to the Appeal Petition are EXCLUDED.

C. Merits of the Appeal

1. The Ostensible Subcontractor Rule

13 C.F.R. § 121.103(h)(4), the regulation that embodies the ostensible subcontractor rule, 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.

The intent of the ostensible subcontractor rule is to prevent firms that are other than small from circumventing the size regulations. In order to determine whether a prime contractor-subcontractor relationship violates the rule, the Area Office must evaluate "[a]ll aspects of the relationship." 13 C.F.R. § 121.103(h)(4); *see also Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082, at 12-13 (2009) (explaining that area offices should apply only the all aspects standard to when analyzing the ostensible subcontractor rule and should make no size determination relying upon the outmoded seven factor test). As Appellant notes, ostensible subcontractor inquiries are intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue. *See, e.g., Size Appeal of C.E. Garbutt Constr.*, SBA No.

[2] Of twelve agreements included in Exhibit B, nine were signed on January 1, 2010, one was signed on January 19, 2010, one was signed on February 1, 2010, and one was signed on February 5, 2010.

SIZ-5083 (2009).

2. Appellant is Unusually Reliant Upon RAMCOR, and the Area Office Committed No Error

a. Elements Requiring Consideration: Incumbent Status and Division of Work

The presence of an incumbent as a subcontractor is a fact an area office must consider when making an ostensible subcontractor evaluation. 13 C.F.R. § 121.103(h)(4). Although the regulation does not mandate that an area office find a violation of the ostensible subcontractor rule when a prime contractor subcontracts with the incumbent, area offices must apply a heightened level of scrutiny in such a situation, for incumbency can be probative of unusual reliance. *Id.*; *see also Size Appeal of TCE Inc.*, SBA No. SIZ- 5003 (2008) (referencing "the heightened scrutiny the regulation requires," but noting it was inapplicable in that case).

In the present instance, Appellant's proposal unambiguously claims that RAMCOR will perform 49% of the work. (Fact 6.c.) Further, Appellant's proposal does not detail of what work RAMCOR's 49% share will consist or what work Appellant itself will perform. (Fact 6.f.) Appellant's representation that RAMCOR will perform almost half the work is particularly important, as the percentage of subcontracted work is also a fact 13 C.F.R. § 121.103(h)(4) requires the Area Office to consider. The fact that Appellant has not described what work it or RAMCOR will perform only lends further support to the notion that the percentage of subcontracted work is indicative of undue reliance in this case. OHA has found in previous cases that the percentage of subcontracted work and failure to delineate work are factors probative of a violation of the ostensible subcontractor rule. *See, e.g., See Size Appeal of ACCESS Sys., Inc.*, SBA No. SIZ-4843, at 15 (2007).

In addition to the factors set forth in the regulation, it is important to consider the proposal in light of the evaluation factors set forth in the solicitation. Here, Appellant was required by the RFP to include a description of its experience and qualifications, and the RFP makes the various Non-Price Factors, which include Management Personnel Qualifications and Past Performance, more important than price. (Fact 4.b.) Appellant's proposal emphasizes or makes repeated references to experience and qualifications that can only stem from RAMCOR. (Fact 6.d-j.) Based upon Appellant's numerous references to RAMCOR's experience and past performance history, a reasonable person can only conclude Appellant thought it needed to claim RAMCOR's experiences and qualifications to gain award of the contract under the evaluation criteria. When I consider these references with Appellant's failure to differentiate between work it would perform verses work RAMCOR might perform, (Fact 6.f), I find it hard to conclude Appellant was a necessary party to the proposal except to lend its size status.

In consideration of the foregoing I hold that: (1) RAMCOR's incumbency; (2) Appellant's representation that RAMCOR would perform 49% of the work; (3) Appellant's failure to differentiate the work to be performed by itself or RAMCOR; and (4) Appellant's clear reliance upon RAMCOR's qualifications and experience in its proposal are more than sufficient to establish unusual reliance, and thus a violation of the ostensible subcontractor rule, apart from any other facts that may be true in this appeal. Nevertheless, there are further indicators of undue reliance in this case worthy of discussion.

b. Management Employees

One of Appellant's primary contentions is that the Area Office erred in identifying the on-site key management personnel as RAMCOR employees. Appellant explains that the RAMCOR management employees actually became employees of Appellant as of January 1, 2010. However, as discussed in Part III.B, *supra*, this information was not part of Appellant's Technical Proposal nor was it provided to the Area Office. Rather, the Area Office had only Appellant's proposal, which indicated that the managers were RAMCOR employees. (Fact 6.g.) It is well-settled that the Area Office cannot have erred on the basis of evidence that was not before it at the time it rendered its Size Determination. *See, e.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073 (2009); *Size Appeal of The Refinishing Touch*, SBA No. SIZ-4615 (2004). Based on the Record before it, the Area Office did not err in concluding that the key management employees to perform the contract were in fact employees of RAMCOR. The fact that Appellant needed to hire all of RAMCOR's on-site managers, is also highly indicative of unusually reliance upon RAMCOR.

Furthermore, an ostensible subcontractor analysis is undertaken on the basis of the solicitation and the proposal at issue. Upon review, Appellant's proposal plainly indicates the managers are RAMCOR employees. There is no indication in the proposal that Appellant planned to hire RAMCOR's managers. There are no letters of commitment from these employees to Appellant. There is no indication that Appellant will provide any on-site managers of its own. Rather, the proposal indicates that RAMCOR is the incumbent subcontractor, and RAMCOR's employees will continue to manage the contract as they did under the previous contract. Moreover, because the proposal is the information Appellant intended the Contracting Officer rely on in making award of the contract, both the Area Office and I must give it controlling weight. Accordingly, I cannot allow Appellant to attempt to contradict its proposal with facts or documents created or supplied after its submission.

Appellant argues that in the *Greenleaf* cases, OHA determined that the prime contractor and subcontractor were not affiliated despite the fact that thirty-two of forty-four proposed contract staff members were employed by the subcontractor. Again, Appellant misses the point. First, and most importantly, the appellant in that case was doing most of the primary and vital work. Second, the problem here is not that some of Appellant's proposed managers are (or were at the time) employed by RAMCOR. It is that *all* of the on-site managers are RAMCOR employees and will be performing the same work as they did under the previous contract. It does not appear, therefore, that Appellant has much to offer under this contract.

Appellant also argues that the Area Office erred in failing to consider the fact that Appellant's own management employees (those employed by Appellant prior to January 1, 2010) are "exclusively and directly responsible for every aspect of performance and control under the contract." Appellant explains that these three individuals—Appellant's President, who will act as Contract Manager, Appellant's Vice President, who will act as Financial Manager, and a third employee, who will act as Quality Control Manager—are off-site managers to whom the on-site managers report directly concerning all contract matters, as per Appellant's Technical Proposal.

However, I agree with Greystones that the Size Determination itself indicates that the Area Office did consider this information. The Area Office specifically concluded that Appellant's President possesses the requisite experience necessary to perform his role under the contract. The Area Office also specifically concluded that the role of Appellant's Quality Control Manager "is miniscule and without authority in comparison to the RAMCOR employees, especially since neither of [Appellant's] employees will be on-site." (Size Determination at 4.) There is no explicit mention of the role of Appellant's Vice President, but given the discussion of the other two of Appellant's management employees, it would be difficult to conclude that the Area Office failed to recognize or consider the entire management structure under the proposal. The Area Office's primary critique of the management structure was that all of the on-site employees are (or were at the time) RAMCOR employees. The only role any of Appellant's employees had under this contract was off-site supervision, not daily management and control. The same is true of Appellant's Vice President. Thus, I conclude that even if the Area Office failed to explicitly consider the role of Appellant's Vice President, such an error was harmless.

In addition, the RFP required Appellant to identify key employees. (Fact 4.b.ii.) Thus, the presumption would be that when Appellant identified prospective employees in its proposal, they were key employees. The resumes of the on-site employees that Appellant provided with its proposal established that the proposed on-site managers were all RAMCOR employees. (Fact 6.g.) Further, as explained in RFP Clause M.7, role playing service experience was important, and the failure of key employees to have this experience could result in an unsuccessful proposal. (Fact 4.b.) Under the terms of the RFP, then, it appears Appellant needed RAMCOR's management employees (or similarly qualified employees) and their role playing experience to have a realistic chance of being awarded the contract. Thus, Appellant's proffer of these employees is a strong indicator of unusual reliance. These facts demonstrate Appellant was unusually reliant upon RAMCOR when it proposed utilizing all RAMCOR employees as its key employees.

c. Preparation of Appellant's Proposal and Effect of the Teaming Agreement

With regard to its proposal, Appellant first claims that it independently prepared its initial proposal and did not contact RAMCOR until after that initial proposal had already been completed. First, the proposal itself states it was prepared by itself and RAMCOR. (Fact 6.a.) Second, there is no evidence in the Record to support Appellant's assertion that its initial proposal was completed before it contacted RAMCOR. Third, even if this is true, the Area Office did not base its finding of affiliation upon Appellant's cooperating with RAMCOR to submit the proposal. Nowhere in the Size Determination does the Area Office even allege that Appellant may have worked closely with RAMCOR on the proposal.[3] Rather, it is Appellant's next arguments that present the crux of the Area Office's problem with the proposal.

[3] In its recitation of the facts, the Area Office notes that Appellant "refutes the allegation that [it] received management expertise and assistance from RAMCOR in creating the proposal." (Size Determination 2.) However, this merely sets forth an allegation from the Greystones protest, and this allegation is not addressed in the analysis or relied upon by the Area Office.

Appellant contends the Teaming Agreement between it and RAMCOR clearly sets forth the relationship between the firms as that of prime contractor and subcontractor. Appellant emphasizes that in the *TCE* case, the subcontractor was to perform up to 49% of the work, and OHA found no violation of the ostensible subcontractor rule because the proposal carefully delineated tasks for each firm. Appellant argues this case is similar to *TCE* because its Teaming Agreement makes clear that Appellant will perform all management and administrative functions, and RAMCOR will provide only 34% of the total contract.

The Teaming Agreement between Appellant and RAMCOR does not clearly delineate tasks. Instead, the Teaming Agreement provides that the relationship between Appellant and RAMCOR is one of prime contractor-subcontractor, but there are no details concerning the actual division of work under the contract. Nor is any explicit division of work between Appellant and RAMCOR found in Appellant's proposal. (Fact 6.f.) Nowhere does it say whose employees will be performing what work under the contract. The only place where even a broad division of work is found is Attachment 16 to Exhibit 1 of the Appeal Petition—RAMCOR Subcontracting Pricing Structure—which indicates that RAMCOR will perform 34% of the total contract value. The origins of this document are unclear and because it materially differs from Appellant's proposal (Fact 6.c), upon which Appellant intended the CO to rely, I can give it no weight. Regardless, this document is insufficient to constitute a careful delineation of tasks such as that found in *TCE*.

Appellant also contends that the Area Office's reliance on Appellant's use of the term "Team CWU" throughout its proposal to find undue reliance is meritless. I disagree. It is true, as Appellant argues, that the use of the term "team" does not compel a finding of undue reliance. *Greenleaf Constr. Co., Inc.*, SBA No. SIZ-4663 (2004) ("Under any circumstances, the mention of 'team' and 'partnering' does not equate with a mandatory finding of an ostensible subcontractor relationship."). However, as the Area Office and Greystones correctly determined, persistent identification of the "team" over the prime contractor is one factor that can be used to support a finding of undue reliance. *See, e.g., See Size Appeal of ACCESS Sys., Inc.*, SBA No. SIZ-4843, at 15 (2007) ("Appellant's proposal makes no differentiation between itself and [its subcontractor]. Instead, it constantly refers to the [prime contractor-subctontractor] team, to 'we' to describe effort or plans and to 'our' this or that. Given the pervasive nature of these references, I find these references are probative evidence of unusual reliance." (citation omitted)); *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003). This is especially true when the proposal emphasizes the experience of the subcontractor over the experience of the prime contractor, as Appellant did in this instance.

Here, the Area Office found that the consistent use of "Team CWU" throughout the proposal rendered the tenor of the proposal that of a team. I cannot find the Area Office erred in this conclusion given that the first page of every proposal volume indicates it was prepared by "Team CWU (CWU, Inc. and RAMCOR)" (Fact 6.a), and nearly every reference explaining how the work will be performed is to "Team CWU." Additionally, the Area Office found (and Greystones argues) that the proposal greatly emphasized the fact that RAMCOR is the incumbent contractor because it repeatedly highlights "Team CWU's" incumbent management team, lack of transition time, and continuity with the previous contract operations. (Fact 6.c-e.)

I agree with this assessment of the proposal. Based on these factors, I find no flaw with the Area Office's determination that Appellant's proposal is indicative of unusual reliance.

The Area Office also found that Appellant's profit and G&A structure was indicative of a joint venture. (Size Determination at 6.) Specifically, the Area Office found that Team CWU's (CWU and RAMCOR) Profit and G&A was a unitary 10.6%, *i.e.*, CWU will share its profit with RAMCOR. The Area Office concluded this profit sharing indicated the two were acting as a joint venture and not a prime and subcontractor. Appellant did not challenge this conclusion. Hence, I find the Area Office made no error in concluding Team CWU's profit sharing indicates a joint venture and not a prime subcontractor relationship.

d. Experience & Capabilities

Another major contention in the Appeal Petition is that the Area Office failed to adequately consider its relevant experience. I have already addressed this contention with regard to the management experience of Appellant's President and Vice President in Part III.C.2.a, *supra*. Appellant also argues the Area Office did not adequately consider its technical experience in providing role player support services. Appellant contends the Area Office erroneously discounted its experience simply because RAMCOR had more experience. Appellant points to *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075 (2009) for support.

To the contrary, the Size Determination indicates that the Area Office did explicitly consider Appellant's past performance record. The Area Office noted that Appellant was a subcontractor on a $2.6 million role player contract and a prime contractor on a $68,190 role player contract. (Proposal Vol. III, at 2.) Nonetheless, the Area Office also pointed out that 72% of Appellant's revenues are generated from clothing sales. As a result, the Area Office concluded that Appellant's dominant field of operation is in clothing sales. The Area Office relied in part on this finding in concluding that Appellant would be forced to rely upon RAMCOR's extensive experience in providing role player services in performing this contract.

In *Fischer Business Solutions*, OHA found the area office erroneously "relied upon its judgment Appellant was insufficiently experienced to perform this contract." Essentially, the area office performed a responsibility determination, which is solely within the purview of the CO. Here, the Area Office merely noted that Appellant's primary experience is not in the field required by the contract. It considered this factor, but did not rely heavily upon it, as indicated by the brief discussion on this matter. Thus, I find Appellant's argument that the Area Office failed to consider its experience to be without merit, and I find Appellant's reliance upon *Fisher Business Solutions* to be misplaced.

Appellant also asserts the Area Office disregarded its ability to independently secure complete financing and bonding for this contract. Appellant is correct that there is no discussion of these facts in the Size Determination. Although the Area Office could have included a discussion of Appellant's bonding and financing in the Size Determination, I nonetheless conclude that not doing so does not constitute clear error in light of all the other strong indicators of undue reliance in the Record. That is, the evidence of an improper ostensible subcontractor

relationship is overwhelming in this case, and consideration of Appellant's ability to finance the contract would not have changed the outcome.

e. Summary

I have carefully considered all of Appellant's Arguments. Based upon my review of the Record, I hold the Area Office properly considered all aspects of the relationship between Appellant and RAMCOR (the totality of the circumstances) and properly determined that the relationship between Appellant and RAMCOR violates the ostensible subcontractor rule. Appellant: (1) hired the incumbent contractor; (2) proposed giving the incumbent 49% of the work; (3) did not delineate tasks it would perform or that RAMCOR would perform on either a task or a cost basis; and (4) proposed to keep all of the incumbent's on-site management employees in the same positions as under the previous contract. Appellant also did not provide any of its own on-site employees or any letters of commitment from the incumbent's employees. Finally, Appellant's proposal emphasized the incumbent contractor's experience as well as the team's ability to achieve a seamless transition, and the evidence indicates Appellant is sharing profits with RAMCOR. In sum, there is little evidence that Appellant planned to contribute anything to the contract other than its size. Under these facts and circumstances, I cannot find the Area Office committed clear error.

IV. Conclusion

For the foregoing reasons, Homeland Security's Appeal is DISMISSED, CWU's appeal is DENIED, and the Size Determination is AFFIRMED.

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

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THOMAS B. PENDER
Administrative Judge