

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

Alutiiq Education & Training, LLC,

Appellant,

Appealed From  
Size Determination No. 6-2011-009

SBA No. SIZ-5192

Decided: February 8, 2011

APPEARANCES

S. Lane Tucker, Esq., Stoel Rives LLP, Anchorage, Alaska, for Appellant

Amy L. O'Sullivan, Esq., Angela B. Styles, Esq., and Puja Satiani, Esq., Crowell & Moring LLP, Washington, D.C., for Foxmar, Inc. d/b/a Education & Training Resources

DECISION<sup>1</sup>

I. Introduction & Jurisdiction

On November 24, 2010, the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2011-009 finding Alutiiq Education & Training, LLC (Appellant) other than small for the procurement at issue because its relationship with ResCare, Inc. (ResCare) violates the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). On December 7, 2010, Appellant filed an appeal of the size determination.

On January 10, 2011, SBA's Office of Hearings and Appeals (OHA) dismissed the appeal pursuant to 13 C.F.R. § 121.1101(b), which prevents OHA from hearing appeals based upon contract-specific issues where the contract has been awarded. On January 25, 2011, OHA issued an order reopening the case for reconsideration pursuant to 13 C.F.R. § 134.227(c) because a

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<sup>1</sup> This Decision was originally issued under a Protective Order. On February 8, 2011, I issued an Order for Redactions directing each party to file a request for redactions if that party desired any information redacted from the published Decision. No party requested any redactions. Thus, OHA now publishes the Decision in its entirety.

case pending before the U.S. Court of Federal Claims put the finality of the award of the contract in doubt. *See Size Appeal of Controlled Sys.*, SBA No. SIZ-5039, at 3 (2009).

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 size determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

## II. Background

### A. Solicitation and Protest

On January 7, 2010, the Contracting Officer (CO) for the U.S. Department Labor, Office of Assistant Secretary for Administration and Management (DOL) issued Solicitation No. DOLJ11UA00037 (RFP) for the continued operation of the Turner Job Corps Center in Albany, Georgia. The CO set the procurement totally aside for small business and designated North American Industry Classification System (NAICS) code 611519, Job Corps Centers, with a corresponding size standard of \$35.5 million in average annual receipts.

On October 22, 2010, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror. On October 28, 2010, Foxmar, Inc. d/b/a Education & Training Resources (ETR) filed a protest alleging Appellant is other than small. Specifically, ETR alleged Appellant is affiliated with its large subcontractor, ResCare, because: (1) Appellant is economically dependent on and shares an identity of interest with ResCare, (2) Appellant would be unusually reliant upon ResCare to perform the instant contract, and (3) the totality of the circumstances evidences affiliation between the firms.

### B. Size Determination

On November 24, 2010, the Area Office issued its size determination finding that Appellant's relationship with its subcontractor, ResCare, violates the ostensible subcontractor rule and that Appellant is other than a small firm for this procurement. The Area Office first explained that Appellant is a wholly-owned subsidiary of Alutiiq, LLC, which is a wholly-owned subsidiary of Afognak Native Corporation (Afognak), which is an Alaska Native Corporation (ANC). The Area Office noted that Alutiiq, LLC and Afognak have many other subsidiaries, but that those entities are not affiliated with Appellant because 13 C.F.R. § 121.103(b)(2) exempts ANCs and subsidiaries thereof from affiliation.

The Area Office next addressed ETR's allegation of affiliation based upon an identity of interest between Appellant and ResCare. *See* 13 C.F.R. § 121.103(f). Although ETR argued that Appellant is economically dependent upon ResCare, the Area Office concluded that there was insufficient evidence to support a finding of economic dependence. The Area Office found the primary operations of the firms fall within different NAICS codes. The Area Office also accepted Appellant's representations that it has only one other subcontract with ResCare and does not share office space, infrastructure, ownership, or employees with ResCare. As a result, the Area Office concluded Appellant does not share an identity of interest with ResCare.

The Area Office then discussed ETR's allegation that Appellant's relationship with ResCare violates the ostensible subcontractor rule for the procurement at issue. *See* 13 C.F.R. § 121.103(h)(4). The Area Office concluded, based upon its analysis of all aspects of the relationship between the firms, that Appellant would be unusually reliant upon ResCare to perform the instant contract. The Area Office first set forth the solicitation requirements and the evaluation criteria specified in the RFP. The Area Office explained that the scoring criteria used to evaluate proposals were based upon a 100 point scale. The elements worth the most points were: technical proposal (42 points), past performance and experience (25 points), and staffing resources proposal (20 points). The Area Office then outlined Appellant's proposal in light of these evaluation factors.

Based upon Appellant's proposal, the Area Office concluded Appellant depended upon ResCare's qualifications to win the contract. The Area Office found six of ten proposed key employees were employed by ResCare at the time of the proposal, and the proposed general manager is a former ResCare employee. The Area Office also determined ResCare will provide 87 employees to staff the job corps center. The Area Office quoted language from Appellant's proposal that highlights ResCare's past experience and emphasizes that Appellant and ResCare will work as a team to fulfill the contract at issue.

The Area Office noted that each offeror's technical proposal was worth 42 points in the scoring criteria. Within the technical proposal, the categories worth the most points were career development period (14 points) and career preparation period (12 points). The Area Office points out that Appellant itself provided in its response to the protest: "Under this contract, ResCare will be performing a majority of the academic and career technical tasks, and there is no question that the work is one of the primary and vital requirements of the contract."

The Area Office also found there was some evidence that ResCare, rather than Appellant, pursued the instant procurement. The Area Office determined ResCare assisted with the preparation of Appellant's proposal and attended the pre-proposal conference. Additionally, the Area Office calculated that ResCare's subcontract represents 23% of the total proposal cost and concluded the responsibilities of Appellant and ResCare are not clearly defined. Based on all of these factors, the Area Office determined Appellant is unusually reliant upon ResCare.

Finally, the Area Office rejected ETR's assertion that Appellant is generally affiliated with ResCare based upon the totality of the circumstances. *See* 13 C.F.R. § 121.103(a)(5). The Area Office noted there are some indicia of general affiliation but concluded those factors are insufficient to prove the firms are affiliated for all purposes.

Because the Area Office concluded Appellant is affiliated with ResCare for the purposes of the contract at issue, it aggregated Appellant's average annual receipts with those of ResCare. Appellant acknowledged that ResCare's receipts exceed the applicable size standard. Accordingly, the Area Office determined that Appellant is other than small under the size standard applicable to this procurement.

### C. Appeal Petition

On December 7, 2010, Appellant filed the instant appeal claiming the size determination is based upon factual and legal errors. Appellant claims it has the experience necessary to perform this contract, and the Area Office's conclusion that it is unusually reliant upon ResCare is unsupported by the record and clearly erroneous. Appellant contends the Area Office failed to evaluate all aspects of the relationship between Appellant and ResCare and instead improperly focused on the introductory paragraphs found in each section of Appellant's technical proposal. Appellant argues the CO was required to evaluate Appellant's relevant experience when he awarded the contract to Appellant, and the Area Office should not substitute its judgment for that of the CO.

Appellant asserts its proposal clearly demonstrates that it is qualified to perform this contract, and it is not unusually reliant upon ResCare's experience. Appellant notes the Area Office did not specify how many points within each evaluation criteria it examined (technical proposal, past performance and experience, and staffing resources proposal) it determined to be attributable to ResCare rather than Appellant. Appellant does not dispute the Area Office's conclusion that the points available for the career development period and career preparation period (26 points of the 42 total points available for the technical proposal) were attributable to ResCare, but does note that the other 16 points were attributable to its own work and that it is capable of performing the career services.

Appellant disputes the Area Office's conclusion that Appellant's score in the area of past performance and experience could be attributable to ResCare because Appellant included only its own past performance information in the proposal, consistent with the solicitation's requirements. Appellant thus concludes it alone could have earned the 25 available points for past performance and experience. Appellant contends the Area Office improperly relied on references to the "Alutiiq/ResCare team"—instead of thoroughly evaluating the entire proposal—to conclude that Appellant is reliant upon ResCare's experience. Appellant asserts it and its family of companies is indisputably capable of performing complex and costly contracts such as the one at issue.

Appellant next challenges the Area Office's conclusion that the staffing resource plan supports a finding of unusual reliance. Appellant contends there is no rational basis for concluding that it is reliant upon a subcontractor that will provide 87 of over 297 employees (29%) and whose services represent only 23% of the contract. Appellant also explains the solicitation did not identify any specific "key personnel." Rather, it required position descriptions for staff "responsible for significant key areas," and Appellant submitted an organizational chart including the center director and ten other employees responsible for key areas. Appellant asserts that of these eleven proposed employees, only three are current ResCare employees, and only one will remain a ResCare employee under the contract. Appellant claims its chain of command and management infrastructure demonstrate that it will retain control over the contract. Appellant further argues the Area Office failed to consider these factors and never explained how ResCare would be able to exert control over the contract.

Finally, Appellant attempts to demonstrate that OHA case law supports its position. Appellant contends that a finding of unusual reliance on a subcontractor is generally based upon the determination that the prime contractor would be unable to perform the subcontracted tasks. *See Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 21-22 (2009). Appellant also asserts the facts here are very similar to those in the *Size Appeal of TCE Inc.*, SBA No. SIZ-5003 (2008), where OHA reversed the Area Office's finding of unusual reliance. In fact, according to Appellant, the facts at issue are more even favorable to it: only three of eleven key personnel are subcontractor employees, and Appellant is not an “unproven” company. *See TCE Inc.*, SBA No. SIZ-5003, at 10 (citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006)). Additionally, Appellant emphasizes OHA's discussion in the *TCE* case indicating that responsibility determinations are within the jurisdiction of the CO, not the Area Office. *Id.* at 9-11. Appellant also highlights that describing the prime and subcontractor as a “team” is not necessarily evidence of affiliation, and the fact that a subcontractor will perform a large percentage of the work is not alone determinative of the ostensible subcontractor issue. *See Size Appeal of Greenleaf Contr. Co., Inc.*, SBA No. SIZ-4663 (2004).

Appellant also claims the Area Office's decision suggests that a small business cannot work regularly with a large subcontractor without jeopardizing its size status. Appellant argues a decision affirming the size determination will discourage small businesses from forming lasting relationships from which the government can benefit. Appellant contends it is impractical for a contractor to attempt to meet all complex contract requirements without any subcontractors. Appellant concludes there is nothing unusual or improper about its relationship with ResCare with regard to the contract at issue, nor is there any other indicia of affiliation between the firms. Appellant requests that OHA reverse the size determination because it is conclusory and not legally sound.

#### D. ETR Response

On January 28, 2011, ETR filed its response to the appeal petition.<sup>2</sup> ETR first argues that OHA lacks jurisdiction to hear the instant appeal. ETR claims that if OHA takes jurisdiction, such an action “would create a loophole allowing bidders who are found other than small based on a contract-specific finding to circumvent the plain language of OHA's jurisdictional limits by simply boot-strapping their OHA appeal with a subsequent bid protest.” (ETR Response 5.) ETR contends this case is distinguishable from the *Controlled Systems* case because there the protestor filed a size protest and a Government Accountability Office (GAO) protest simultaneously, and the size protest was resolved in favor of the contract awardee. *Size Appeal of Controlled Systems*, SBA No. SIZ-5039 (2009). Thus, ETR explains, the size determination had no effect on the GAO protest (which was related only to the contracting agency's evaluation and award) or the agency's award of the contract. ETR asserts that because Appellant's bid protest at the U.S. Court of Federal Claims relates only to DOL's termination of its contract before the issuance of OHA's decision in this matter, *Controlled Systems* is inapposite.

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<sup>2</sup> Apparently, on January 25, 2011, Appellant filed a request for a Protective Order, and on January 26, 2011, ETR filed a Motion for a Protective Order, and a Request for an Extension. These motions were not received in time for action because of technical difficulties (since remedied) with OHA's electronic filing system.

In the event that OHA finds it does have jurisdiction over the instant appeal, ETR submits substantive arguments as well. ETR first contends the Area Office properly evaluated all aspects of the relationship between Appellant and ResCare and correctly determined that the firms are affiliated. ETR points to the proposal language quoted in the size determination and asserts the repeated references to ResCare's expertise and experience were intended to emphasize ResCare's critical role in performing the contract. ETR also highlights that the proposal provides: "Alutiiq Youth Services is pleased to provide this proposal." ETR contends this is problematic because it is Appellant who is the awardee of the contract at issue. ETR explains that "Alutiiq has combined the capabilities, resources, and experience of [Appellant] and [Alutiiq Professional Services] into [Alutiiq Youth Services], making it difficult to determine which personnel and experience belong to which entity." (ETR Response 9.) ETR concludes Appellant's own contributions to the performance of this contract would be minimal, and Appellant is thus unusually reliant upon ResCare.

ETR next addresses Appellant's experience and past performance. The proposal indicates that the team brings over 100 years of combined experience in operating job corps centers. However, ETR points out that Appellant was only formed in September, 2007, and can only have contributed three years to the 100 year total. ETR asserts that as of the date Appellant's size was determined, Appellant had only one contract (for operation of a much smaller job corps center), and ResCare was its subcontractor on that contract as well. ETR points out that the proposal and the appeal petition continuously emphasize Appellant's longstanding partnership with ResCare for the operation of numerous job corps centers. Based on the fact that Appellant has only one contract, ETR contends Appellant improperly claims APS's experience as its own, despite the fact that the solicitation indicates DOL will only consider past performance of contracts on which the offeror proposed as prime contractor. Further, ETR asserts Appellant's automated past effectiveness report for the job corps center Appellant does operate as a prime contractor includes ResCare's performance because it rates the operation as a whole. ETR points out that Appellant has never performed a contract without ResCare and contends Appellant's past performance is inextricably linked to ResCare.

ETR then moves on to the issue of management and key personnel. ETR emphasizes that of eight individuals described as leading the performance of this contract, four are current ResCare personnel, and one is a former ResCare employee. Notably, it appears none of these identified personnel are managers or employees of Appellant. Rather, they are managers or employees of Alutiiq, LLC or Alutiiq Youth Services. Additionally, the proposed center director—the most senior contract position with responsibility over all job corps center operations—is a current ResCare employee, and two of the three most highly compensated proposed personnel (the center director and the social development director) are current ResCare employees. *See Size Appeal of PHE/Maser, Inc.*, SBA No. SIZ-3570 (1992). Thus, ETR argues the Area Office properly identified and weighed the proposed key personnel, and ResCare would share at least equally in the management of the job corps center, which is indicative of undue reliance. *See Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004).

Finally, ETR expresses support for a number of the Area Office's conclusions— first, that Appellant's proposal does not delineate clear responsibilities between Appellant and ResCare.

ETR contends Appellant and ResCare will share not only overall management of the contract, but also the general and administrative services provided in support of the contract. ETR also notes Appellant has not challenged the Area Office's indication that there is some evidence ResCare chased the contract and assisted in proposal preparation. ETR next notes that the Area Office did acknowledge Appellant's representations that ResCare's subcontract represents 23% of the total contract cost and that ResCare will provide approximately 40% of the contract staff. ETR argues Appellant urges OHA to rely on these numbers instead of considering all aspects of the relationship, as required by regulation. 13 C.F.R. § 121.103(h)(4). ETR also contends these numbers are incorrectly calculated, and ResCare is actually performing a larger share of the work. ETR concludes the Area Office committed no error of fact or law, and the size determination must be affirmed.

### III. Discussion

#### A. 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 size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. Consequently, OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Jurisdiction

Although this procurement has been awarded, I conclude that OHA retains jurisdiction to review the appeal. It is true that 13 C.F.R. § 121.1101(b) provides that OHA will not review appeals where the contract has been awarded and where the issues raised are contract-specific. However, OHA has noted that where an award is cancelled or terminated, this regulation is inapplicable. *Size Appeal of El Poco Enters., Inc.*, SBA No. SIZ-4986, at 5 (2008). OHA has also found § 121.1101(b) does not apply where a CO has stated that a challenged firm has not commenced performance, and the award will be cancelled. *Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984, at 15 (2008). Where a bid protest at the GAO puts the finality of contract award into doubt, OHA has held that 13 C.F.R. § 121.1101(b) does not apply. *Size Appeal of Controlled Sys.*, SBA No. SIZ-5039, at 3 (2009). Here, the litigation at the U.S. Court of Federal Claims has resulted in a suspension of the contract that puts the final award into doubt. Accordingly, I conclude 13 C.F.R. § 121.1101(b) is inapplicable here, and OHA may decide this case.

#### C. Analysis

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 affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). To determine whether firms have violated the ostensible subcontractor rule, all aspects of the relationship between the firms must be

considered. 13 C.F.R. § 121.103(h)(4). Appellant's proposal is dated March 10, 2010, so Appellant's size is determined as of that date. 13 C.F.R. § 121.404(a). Thus, any events occurring after that date are irrelevant. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010). Additionally, an ostensible subcontractor analysis is extremely fact-specific and is undertaken on the basis of the solicitation and the proposal at issue. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010).

Upon review of the record, I conclude the Area Office did not err in finding that ResCare is Appellant's ostensible subcontractor for the instant procurement. I concur with the Area Office's finding that Appellant is unusually reliant upon ResCare. Further, I find ResCare would perform the primary and vital requirements of the contract if it were awarded to Appellant. I do find the size determination contained errors, which are described below, but because those errors favored Appellant, they are immaterial to the outcome of this case.

The Area Office concluded that Appellant would be unusually reliant upon ResCare in performing the instant contract. The Area Office based this conclusion primarily on the following factors: the proposal highlights ResCare's past experience, six of ten proposed key employees were employed by ResCare at the time of the proposal, and ResCare will perform the academic and career technical tasks (specifically, the career development period and career preparation period). ETR supports these findings. Conversely, Appellant argues it is indisputably qualified to perform the instant contract and is not reliant upon ResCare.

#### 1. Past Performance and Experience

The Area Office concluded the proposal highlights ResCare's past experience and the fact that Appellant and ResCare will work as a team to perform the instant contract. As required by the solicitation, the past performance and experience section of Appellant's proposal includes a list of Appellant's relevant contracts. This list is organized by the job corps center (JCC) services that Appellant purports to have experience providing under these various contracts. These services include: outreach/admissions, career preparation, career development, career transition services, management of multidiscipline programs, facility maintenance and administrative support, facility operations and maintenance, financial management, and safety and security.

Unfortunately, only one of these contracts is actually held by Appellant. The vast majority of them are held by Alutiiq Professional Services (APS) and other Alutiiq entities (such as Alutiiq, LLC). According to the list of contracts, Appellant itself has one JCC contract (with ResCare as its subcontractor) to operate the Detroit JCC and provide the career development program there. APS holds two contracts for outreach and admissions at JCCs (one as a subcontractor to ResCare), operates the Flint/Genesee JCC (with ResCare as a subcontractor) and provides the career development services for that JCC and the Treasure Island JCC (as a subcontractor to ResCare), has provided career transition services for a number of JCCs, and provides facilities maintenance and administrative support services for the Pinellas JCC (as a subcontractor to ResCare). A number of other contracts (demonstrating capability in management of multidiscipline programs, facilities operation and maintenance, and safety and security) are listed and attributed only to "Alutiiq," so it is not clear which entities are actually performing these contracts.

Thus, according to Appellant's own past performance proposal, Appellant has only one previous contract (awarded in 2008) relevant to this procurement. Appellant operates the Detroit JCC, with ResCare as its subcontractor. The only service we can be sure Appellant itself provides (because it is the only one listed) is the career development program. I therefore find Appellant's argument that the 25 evaluation points allotted to past performance can only have been earned by Appellant itself to be somewhat disingenuous. Beyond the one contract, Appellant relies upon contracts held by APS to establish its experience with all the other core requirements of this contract. Most importantly, the majority of APS's JCC contracts are also performed in conjunction with ResCare. The past performance section of Appellant's proposal also includes a narrative statement, which explains that “[t]he partnership between Alutiiq and ResCare extends to a variety of Job Corps Centers . . . and enables [the team] to offer an extensive array of corporate resources, expertise, and tools.” (Past Performance and Experience Proposal 1.) The statement goes on to explain the past successes of the Alutiiq/ResCare team in operating various job corps centers (JCC). It is thus clear from Appellant's proposal that ResCare and the combined Alutiiq entities have formed a strategic alliance to compete for JCC contracts.<sup>3</sup>

It is also evident from the proposal that Appellant itself does not have sufficient relevant experience to perform this contract. Instead, Appellant relies upon the experience of ResCare and the web of Alutiiq entities. The Area Office should have further investigated the relationship between Appellant and the other Alutiiq entities, particularly APS and Alutiiq Youth Services (AYS). The first page of the technical proposal provides: “Alutiiq Youth Services is pleased to provide this proposal. . . .” The past performance section of Appellant's proposal provides: “[AYS], an element of Alutiiq, LLC's Logistics, Operations & Maintenance Division provides management oversight of Job Corps activities within [APS] and [Appellant].” (Past Performance and Experience Proposal 1.) Thus, not only does Appellant lack the relevant experience to perform this contract, it is not even clear what entity would be performing this contract.<sup>4</sup> The question here is not whether Alutiiq, LLC and all of its subsidiaries combined could perform the contract. The contract was awarded to Appellant, and it is Appellant that must demonstrate it would not be unusually reliant upon its large subcontractor to perform.

I find the fact that Appellant relied almost entirely upon the experience of other entities to establish its relevant experience to be probative evidence that Appellant would be unusually reliant upon ResCare, its large subcontractor, to perform the contract at issue.<sup>5</sup> *See Size Appeal of*

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<sup>3</sup> It appears these contractual ties are enough to establish an identity of interest between some Alutiiq entities (possibly including Appellant) and ResCare. However, because that issue is not before me at this time, I will not discuss it here.

<sup>4</sup> ETR's point that ANCs can be found affiliated for reasons other than common ownership or management is well-taken. However, whether the various Alutiiq entities are affiliated is not a question before me at this time.

<sup>5</sup> I find Appellant's reliance on *Size Appeal of TCE Inc.*, SBA No. SIZ-5003 (2008), to be misplaced. There, OHA reversed a finding of unusual reliance and reiterated that responsibility determinations are within the jurisdiction of the CO. Unlike the circumstances here, OHA emphasized in *TCE* that the challenged firm had no previous relationship with its large [cont]

*Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 21-23 (2009). Additionally, upon consideration of Appellant's proposal as a whole, I find it was not clear error for the Area Office to conclude that Appellant relied upon ResCare's experience to obtain the contract at issue. The first paragraph of the technical proposal mentions that Appellant will “utilize the expertise of ResCare” to manage the academic portions of the contract. The technical proposal's introduction also notes that the “Alutiiq/ResCare team” brings 100 years of experience to the contract, of which, as ETR points out, Appellant can provide only three years. The same introduction emphasizes the successes of the Alutiiq/ResCare team in operation other JCCs. (Technical Proposal 1.) The technical proposal highlights the variety of elements that ResCare will bring to the contract. (E.g., Technical Proposal 4-5, 21-22.) At one point, the technical proposal explains that Appellant and ResCare “have adopted a philosophy that values the inclusion of community partners and have consistently demonstrated this throughout our Job Corps, youth services, and workforce development divisions.” (Technical Proposal 8.) The past performance proposal includes a list of best practices, “which represent a compilation of resources from Alutiiq and ResCare.” (Past Performance and Experience Proposal, at 1.) Companies do not develop joint philosophies or combined best practices without working unusually closely together. Moreover, I agree with ETR that Appellant's own past effectiveness rating, which the proposal heavily emphasizes, necessarily takes ResCare's performance into account because it rates the entire operation of the Detroit JCC. Based upon the foregoing facts and circumstances, it was not clear error for the Area Office to determine that Appellant was unusually reliant upon ResCare's experience to obtain award of this contract.

## 2. Employees

Regarding key employees, the Area Office focused on the introduction to the technical proposal, which provides the names of eight important members of the “Alutiiq/ResCare team.”<sup>6</sup> These include four employees of Appellant (or other Alutiiq entities) and four ResCare employees. The staff resources proposal identifies eleven key staff positions. According to the resumes included in the proposal, the proposed center director is a current ResCare employee, but he has submitted a certification of commitment to serve as center director of the Turner JCC

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subcontractor and had performed as prime contractor on several contracts similar to the one at issue. The Area Office found a violation of the ostensible subcontractor rule in *TCE* simply because the large subcontractor had more experience than the small prime contractor. Here, I do not find a violation of the rule because ResCare has more experience than Appellant. Rather, I find Appellant itself has no experience in most of the services to be provided under the contract. I am not performing a responsibility determination, but merely garnering from Appellant's own proposal that it as an entity has either never performed the services required under this contract or has performed them under only one previous contract.

<sup>6</sup> The mere fact that Appellant's proposal refers to the “Alutiiq/ResCare Team” is not, in itself, an indicia of affiliation. *See Size Appeal of Greenleaf Constr. Co., Inc.*, SBA No. SIZ-4663, at 9-10 (2004). Here, it is what the term describes that leads to a finding of unusual reliance. The references to the “Alutiiq/ResCare Team” refer not merely a team formed to pursue a particular contract, but to a longstanding strategic alliance that demonstrates dependence by Appellant on ResCare for its past performance rating and performance of the most important tasks required by this contract.

if Appellant is awarded the contract. Similarly, the proposed social development director is a current ResCare employee who submitted a certification of commitment. These are the only two resumes provided in the staff resources proposal. As ETR notes, the solicitation required only the resume of the proposed center director, but encouraged offerors to submit other resumes. (RFP 123.) It is therefore notable that Appellant provided only two resumes, both employees of its large subcontractor at the time the proposal was submitted. Also notable is that the proposed center director is the only position specifically weighted in the evaluation criteria. Although the proposed center director's credentials are only worth two of the twenty total points available for the staffing proposal, the fact that Appellant proposes a ResCare employee to fill the only specifically weighted position is one factor that supports a finding of unusual reliance in this case. (RFP 141.)

Appellant contends it is irrelevant that its proposed center director and social development director are current ResCare employees because Appellant will hire them if awarded the contract. Appellant is incorrect. The fact that Appellant relied upon ResCare to provide these key employees, rather than proposing to use its own employees or to hire new employees for the positions, is evidence of unusual reliance. *See Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010) (finding no error in the conclusion that the proposed management employees were employees of the large subcontractor because the proposal contained no evidence that the small prime contractor would hire those employees, but still noting: “[t]he fact that [the small prime contractor] needed to hire all of [the large subcontractor's] on-site managers is also highly indicative of unusual reliance upon [the large subcontractor]”); *Smart Data Solutions*, SBA No. SIZ-5071, at 23 (“At the time [the small prime contractor] submitted its Proposal . . . [the small prime contractor] employed no key personnel capable of managing the work required by the RFP. Instead . . . [the small prime contractor] intended to hire current employees of [its large subcontractors] for all the key positions it would need to perform the contract.”). Here, although Appellant proposes its own employees (or those of other Alutiiq entities) for some important positions, the fact that the only two resumes included with the proposal are those of two ResCare employees is indicative of unusual reliance, even if Appellant planned to hire those ResCare employees upon award of the contract.

Perhaps most importantly, one of those ResCare employees would hold the highest position at the JCC (center director) according to the organizational chart included in the proposal. The position description for the center director provides that the center director reports to the director of operations for AYS. The AYS organizational chart provides that the AYS director of operations reports to the AYS vice president, who, Appellant explains, is also Appellant's general manager. Appellant argues this structure amply demonstrates that Appellant will retain control over the contract. However, it is indisputable that the center director holds the most important on-site position. The center director “serves as chief executive officer and is directly responsible for the overall operation of the center.” (Staff Resources Proposal A-9.) Hiring a ResCare employee to perform this critical function undoubtedly evidences Appellant's unusual reliance upon ResCare. *See Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984, at 19 (2008).

Additionally, ResCare will provide approximately 32% of the personnel required to operate the JCC. According to the staffing chart, (Cost Proposal FPR 43-51), ResCare will

provide 24 academic personnel, 35 career technical training personnel, 12 career success personnel, 11.5 medical/dental personnel, 13 career preparation and career transition readiness services personnel, and 1 administrative personnel. Thus, of 299.49 total personnel, ResCare will provide 96.5 staff members, Appellant will provide 191 staff members, and 11.99 staff members will be provided by other contractors.<sup>7</sup> Although the number of staff members being provided by ResCare does not represent the majority of employees, it is still a substantial number, it represents almost all the academic and career technical tasks required by the contract, it does not include the key management personnel discussed above who are currently employed by ResCare, and it provides further support for a finding of unusual reliance when taken in conjunction with the other evidence thereof.

### 3. Academic and Career Technical Tasks

Finally, the Area Office found, and Appellant acknowledged in its response to the protest, that ResCare will perform the majority of the academic and career technical tasks required by the contract. The staffing chart included in the staff resources section of the cost proposal breaks the staff into categories. The personnel required for those categories related to academic and career technical tasks are divided as follows: academic personnel (ResCare will provide 24 of 25 staff members, Appellant will provide 1), career technical training personnel (ResCare will provide 35 of 43 staff members, another subcontractor will provide 8), and career preparation and career transition readiness services personnel (ResCare will provide 13 of 13 staff members).<sup>8</sup> (Cost Proposal FPR 43-51.) The Area Office considered the fact that ResCare will perform nearly all of the academic and career technical tasks to be indicative of unusual reliance.

I agree with the Area Office. The evaluation criteria set forth in the solicitation provides that these tasks—which are represented by the career development period (14 points) and career preparation period (12 points)—were the two areas worth the most points out of the 42 total points allotted for the technical proposal. (RFP 142.) If ResCare is to provide in full the two most important technical areas required by the contract, Appellant would undoubtedly be unusually reliant upon ResCare to perform.

This amounts to a finding that ResCare will provide the primary and vital functions of the contract. In its response to the protest, Appellant contended the academic and career technical functions represent only one primary and vital contract task, along with: “social, employability and independent living skills training, (2) providing health care, counseling, and other support services, and (3) maintaining a setting that is clean, well maintained and safe.” (Protest Response 14.) However, Appellant cannot dispute that the career development period and career

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<sup>7</sup> It appears the totals listed in the staffing chart do not accurately reflect the staffing charts themselves. The totals listed there are as follows: of 297.49 total staff, 198.5 will be provided by Appellant, 87 will be provided by ResCare, and 11.99 will be provided by other contractors.

<sup>8</sup> ResCare will provide 12 of 98 staff members under the “career success personnel” category, and Appellant will provide 86. This category consists primarily of residential and recreation specialists who do not provide academic or technical career services, so I have not included these positions in this discussion of academic and career technical tasks.

preparation period were the most heavily weighted elements of each offeror's technical proposal, indicating that the DOL considered these to be the most important elements to be performed. The contract requires the operation of a job corps center. Although such operation requires many ancillary tasks, such as maintaining a safe setting and providing health care, the primary function of a job corps center is undoubtedly to provide academic and career training. Further, the fact that Appellant's technical proposal dedicates 69 of 97 pages to describing the career development period and career preparation period in detail supports the notion that these are the most important contract tasks. I therefore conclude ResCare would be responsible for the primary and vital contract tasks if the contract were awarded to Appellant. *See Size Appeal of Al Procurement, LLC*, SBA No. SIZ-5121, at 7-10 (2010) (finding that although the challenged firm was to perform a large number of contract tasks, these were ancillary to the primary and vital work required by the contract, which was to be performed by the ostensible subcontractor). I also find no error with the Area Office's conclusion that the fact that ResCare would perform these primary and vital functions constitutes evidence that Appellant would be unusually reliant upon ResCare.

Appellant argues that because ResCare's subcontract to perform these tasks represents only 23% of the total proposal cost, it cannot be unusually reliant upon ResCare. I disagree. The fact that the services ResCare will provide do not make up the majority of the proposal cost does not render them any less vital to contract performance. Cost is only one factor to be taken into consideration when analyzing an ostensible subcontractor issue and 23% is still a substantial portion of the contract. Appellant could not perform the contract without ResCare's performance of these vital tasks. Appellant also objects to the size determination on policy grounds, claiming that finding an ostensible subcontractor rule violation in this case will discourage small businesses from forming lasting relationships with subcontractors. Again, I disagree with Appellant's interpretation of the situation. Small businesses are free to subcontract with other businesses, even large concerns. However, when such subcontracting reaches a level where, as here, the large subcontractor could exercise control over the contract through its critical role and its extensive experience in performing similar contracts (as compared to Appellant's own lack of experience), there is a violation of the rules set up to protect small concerns.

Here, all the evidence taken together supports the findings that Appellant is unusually reliant upon ResCare and that ResCare would perform the primary and vital contract requirements. Appellant does not have the experience necessary to perform the contract at issue, and the proposal emphasizes ResCare's role in the contract. Appellant's proposed center director was a ResCare employee at the time the proposal was submitted, and the only resumes Appellant submitted for consideration with its proposal were those of two ResCare employees. Finally, ResCare would provide the employees and services necessary to offer the career development and career preparation periods required by the contract, the two most heavily-weighted sections of each offeror's proposal. Accordingly, I affirm the Area Office's finding that ResCare is Appellant's ostensible subcontractor, and Appellant is other than small for the procurement at issue.

IV. Conclusion

Appellant failed to prove the Area Office based its size determination upon clear error. Accordingly, this appeal is DENIED, and the size determination is AFFIRMED.

Further, because this decision disposes of this appeal on its merits, *Size Appeal of Alutiiq Education and Training, LLC*, SBA No. SIZ-5182 is VACATED.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge