Cite as: *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Spiral Solutions and Technologies, Inc.	SBA No. SIZ-5279
Appellant	Issued: September 15, 2011
Appealed from Size Determination No. 4-2011-47	

APPEARANCES

John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., and M. Clay Hamrick, Esq., Smith Pachter McWhorter PLC, Vienna, Virginia, for Appellant.

Jonathan T. Williams, Esq., Steven J. Koprince, Esq., and Kathryn V. Flood, Esq., Piliero Mazza PLLC, Washington, D.C., for Nova Technologies, Inc.

Blake B. Gibson, Contracting Officer, Hill Air Force Base, Utah, for the U.S. Department of the Air Force.

Alison M. Mueller, Esq., Office of General Counsel, Washington, D.C., for the U.S. Small Business Administration.

DECISION[1]

I. Introduction & Jurisdiction

On June 30, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 4-2011-47 finding Spiral Solutions and Technologies, Inc. (Appellant) other than small for the procurement at issue. The

[1] This Decision was initially issued on September 1, 2011, under two Protective Orders, each designed to prevent the disclosure of confidential or proprietary information. I also issued an Order for Redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published Decision. OHA received one or more timely requests for redactions and considered any requests in redacting the Decision. OHA now publishes a redacted version of the Decision for public release.

Area Office determined that Appellant violated the "ostensible subcontractor" rule, set forth at 13 C.F.R. § 121.103(h)(4). Appellant maintains that the size determination is flawed in numerous respects. For the reasons discussed below, the appeal is granted, and the size determination is reversed.

SBA's Office of Hearings and Appeals (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. The record reflects that Appellant received the size determination on July 5, 2011. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On November 5, 2010, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA8217-10-R-5022 (RFP) seeking proposals for the Mission Planning Support Contract II (MPSC II). The RFP contemplated award of a single indefinite-delivery indefinite-quantity (IDIQ) contract. The guaranteed minimum contract value is $50,000, and the maximum contract value is $350 million. Specific requirements are to be defined in individual task orders issued after award of the base contract. The Contracting Officer (CO) set aside the procurement for service-disabled veteran-owned small business concerns (SDVO SBCs) and designated North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, with a corresponding size standard of $25 million in average annual receipts.

MPSC II is the successor to MPSC I, an earlier procurement for similar services. TYBRIN Corporation, Inc. (TYBRIN) is the incumbent prime contractor on MPSC I, and Appellant and BAE Systems, Inc. (BAE) are subcontractors to TYBRIN. TYBRIN is a large business and is not eligible to submit a proposal as a prime contractor on MPSC II.

The Performance Work Statement (PWS) for MPSC II provides that the contractor will ensure that adequate sustainment infrastructure is in place to support mission planning systems (MPS). (PWS 2.)

> Sustainment of MPS includes providing configuration management and control, drafting and publishing of technical documentation, system checkout, fielding, supply, maintenance and repair, training support, customer assistance visits, a twenty-four (24) hour / seven (7) day a week help line, international support and training, combined test force support, Mission Planning Central (MPC) development and management, deploy and manage the MPS System Support Representatives (SSRs) at worldwide locations, transition to follow-on systems and support of all wing / unit level planning requirements and related efforts.

Id. The contractor must provide technical expertise, training, support, and logistics management to sustain mission planning software and hardware throughout the planning, execution, and post-mission phases of a specific mission, battle, or war. (PWS, at 2, 4.) The contractor must also provide a workforce to meet Mission Planning System Support Facility (MPSSF) requirements worldwide and must be able to continuously adapt its services to meet changing mission requirements. (PWS 4.) Accordingly, performance of MPSC II is to take place in numerous worldwide locations. The PWS lists several mission planning systems that the contractor must operate and support. *Id.* The PWS also provides specifications for each of the requirements set forth above (various support activities, training, the provision of SSRs, etc.).

According to the RFP, proposals would be evaluated on the basis of three evaluation factors: technical acceptability, price, and past performance. (RFP 45-50.) The technical acceptability factor consisted of three subfactors: program management, support of MPSSF, and SSRs. (RFP 46-47.) The RFP states that the Air Force would first evaluate offerors' proposals for technical acceptability on a "pass/fail" basis. (RFP 45.) Next, the Air Force would "rank all technically acceptable offers by Price" from lowest to highest. (RFP 47.) Then, "[a]fter being determined to be technically acceptable and . . . ranked by the lowest cost/price, past performance will be evaluated on all technically acceptable offers." (RFP 48.) In making the final award selection, a tradeoff analysis would be conducted using only the past performance and price factors. "[C]ompeting offerors' past performance history will be evaluated as significantly more important than price; however, price will contribute substantially to the selection decision. . . . Tradeoffs will be made only between price and past performance among those offerors who have been determined technically acceptable." (RFP 45.)

With regard to the past performance evaluations, the RFP instructed offerors to identify examples of prior contracts that the offeror considered relevant to MPSC II. Offerors were directed to provide "three (3) relevant contracts for the prime offeror, and three (3) for each key partner and/or each subcontractor." (RFP 48, 39 – 40.) The RFP did not limit "relevant" past performance by dollar value or otherwise. However, the RFP indicated that "Offerors are required to explain what aspects of the contracts are deemed relevant to the proposed effort and to what aspects of the proposed effort they relate." (RFP 39.) The RFP stated that, in conducting the past performance evaluation, the Air Force would first assess the prior contracts identified by the offeror to establish the degree of relevance to MPSC II and would assign an adjectival rating ranging from "Not Relevant" to "Highly Relevant." (RFP 49.) Next, the Air Force would evaluate the quality of performance on the projects (*i.e.*, how well the firm had previously performed) using data from reference questionnaires and other information and would assign a "Quality Assessment Rating" such as "Exceptional" or "Very Good." (RFP 49-50.) Lastly, the Air Force would consider both the relevance and quality evaluations to arrive at "an integrated performance confidence assessment rating" for the factor as a whole. (RFP 50.) The highest "Performance Confidence" rating was "Substantial Confidence," meaning that "[b]ased on the offeror's performance record, the Government has a high expectation that the offeror will successfully perform the required effort." (RFP 50.)

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B. Appellant's Proposal

On January 3, 2011, Appellant submitted its proposal, self-certifying as an SDVO SBC. The proposal identifies Appellant as the prime contractor for MPSC II and TYBRIN as Appellant's subcontractor and teaming partner. The executive summary highlights that "Team Spiral" (*i.e.*, Appellant and TYBRIN) offers a low risk option because TYBRIN's incumbency signifies knowledge retention, personnel retention, and a seamless transition. (Proposal Vol. I, at 1-3.) Furthermore, Appellant is currently a subcontractor to TYBRIN on MPSC I. (Proposal Vol. II, at 11.) The logos of both Appellant and TYBRIN appear on nearly every page of the proposal.

The technical proposal highlights Team Spiral's extensive managerial experience, including the current MPSC I contract and Appellant's prior contracts. The proposal explains that Team Spiral will leverage techniques proven successful by TYBRIN during performance of MPSC I, such as scheduling, recruiting, training, and deployment. The proposal also provides that Team Spiral will utilize an innovative "AgileStaff" methodology to manage each aspect of the contract. (Proposal Vol. II, at 2.) The proposal includes an organizational chart, which connects the program manager to Appellant by a solid vertical line, but also connects TYBRIN by a dotted perpendicular line to the vertical line connecting the program manager to Appellant, specifically between the program manager and Appellant. (Proposal Vol. II, at 3, 55.)

The technical proposal sets forth a detailed human resource plan, including processes for recruiting, hiring, training, and staffing. (Proposal Vol. II, at 10-48.) The proposal indicates that Team Spiral employs [XX]% of the current MPSC I contract manpower and that Team Spiral already employs [XX]% of the workforce needed for MPSC II. (Proposal Vol. II, at 3, 10.) The proposal also sets forth an organizational conflict of interest (OCI) plan. (Proposal Vol. II, at 49-54.) This section of the proposal explains that "as a small business [Appellant] does not have any contracts that raise OCI issues with MPSC II." (Proposal Vol. II at 49).) Therefore, "any tasking that might create even a perceived OCI is retained by [Appellant] and not subcontracted to TYBRIN." *Id.* Appellant is the prime contractor and "communication [with the Air Force] is conducted through the MPSC II Program Manager directly to [Appellant's] President." *Id.*

The technical proposal also includes an information assurance plan, which aims to maintain the team currently working on the MPSC I contract, "apply the existing, proven processes that govern the current MPSC I contract," and apply continuous improvement processes and agile staffing concepts to ensure the best practices are preserved. (Proposal Vol. II, at 66.) The proposal includes a transition plan, which again repeatedly highlights the low transition risk of Team Spiral because TYBRIN is the incumbent prime contractor, Appellant is a current subcontractor to TYBRIN on the MPSC I contract, and the firms have already begun the transition process. (Proposal Vol. II, at 69-76.) The proposal also includes a security clearance plan, which indicates that Team Spiral has a unique understanding of the necessary requirements "[a]s a direct result of our first-hand experience on MPSC I." (Proposal Vol. II, at 77.)

Next, the technical proposal offers its MPSSF support plan. (Proposal Vol. II, at 83-129.)

The proposal explains that no other offeror has direct experience with the central operations of the MPSSF. "Our team leverages the proven experiences gained from nearly 10 years of knowledge of the existing systems and processes used for MPSC I while making prudent modifications, as appropriate, to further enhance the effectiveness of the staff." (Proposal Vol. II, at 83.) The proposal explains that Team Spiral will employ the [XXXXXXXXXXXXXXXX XXXX], which was developed by and is currently maintained by TYBRIN, to support the MPSSF. (Proposal Vol. II, at 84-95.) The proposal sets forth a [XXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX], as well as an [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXX]. (Proposal Vol. II, at 96-129.) This entire section of the proposal consistently emphasizes that Team Spiral understands the contract requirements and offers a low risk solution for the Air Force because Team Spiral is the only offeror that has direct experience performing these requirements on the MPSC I contract.

Finally, the technical proposal sets forth Appellant's SSRs plan. (Proposal Vol. II, at 130-44.) The proposal explains: "[w]e understand that the customer is happy with the level of service currently provided by TYBRIN on MPSC I; however, we also understand . . . the contractual and process limitations of MPSC I . . . have led to some [XXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX]." (Proposal Vol. II, at 132.) The proposal further explains that Team Spiral's worldwide support plan "ensures continued exceptional SSR service and coverage while reducing numbers and creating efficiencies." *Id.* Accordingly, the proposal sets forth Team Spiral's detailed plan for keeping worldwide SSR positions staffed, trained, and supported. (Proposal Vol. II, at 132-44.) This section of the proposal emphasizes both TYBRIN's experience on the MPSC I contract and Appellant's own experience performing a large military contract.

The technical proposal also includes extensive staffing tables, which set forth the numbers and categories of anticipated contractor full time equivalents (FTEs) in each location for each contract year. The sheets do not specify whether the prime contractor or a subcontractor will provide each of the FTEs.

The past performance proposal includes three past contracts for Appellant and three for TYBRIN. The largest of the three contracts cited for Appellant has a value of approximately $[XXXXX]. (Proposal Vol. III, at 11.) The past performance proposal also indicates that of the total work to be performed under the contract, Appellant will perform [XX]%, and TYBRIN will perform [XX]%.[2] (Proposal Vol. III, at 2.) The same percentage breakdown applies to two of the technical subfactors: MPSSF and SSRs. *Id.* The third technical subfactor, program management, is split [XXXX] between the two firms. *Id.*

The price proposal explains Appellant's estimating system and methodology, purchasing

[2] The specific breakdown of the work between Appellant and TYBRIN has been redacted at Appellant's request. However, for purposes of clarity, it is noted that Appellant proposed to perform more than 50% of the contract, with TYBRIN performing the remainder.

system, accounting system, and escalation rates. (Proposal Vol. IV, at 2-12.) The price proposal contains tables similar to the staffing tables in the technical proposal, but the FTEs are replaced by dollar values. Again, the sheets do not indicate whether the prime contractor or a subcontractor will perform the work.

The contract documentation section of the proposal indicates that the only individuals authorized to negotiate with the Air Force are employees of Appellant. (Proposal Vol. V, at 34.) This volume of the proposal reiterates that Appellant will perform [XX]% of MPSC II work, and TYBRIN will perform the remaining [XX]%. (Proposal Vol. V, at 36.)

Appellant's proposal did not include a copy of a subcontract between Appellant and TYBRIN. However, in response to an inquiry from the Area Office, Appellant submitted a teaming agreement between itself and TYBRIN. The teaming agreement indicates that it was executed on March 8, 2010, and modified on May 12, 2010.[3] The teaming agreement confirms that Appellant would be prime contractor for MPSC II, and TYBRIN would be the subcontractor. Appellant, "as the prime contractor, will resolve any performance or allocation issues." (Teaming Agreement, Exhibit A.) According to the agreement, TYBRIN is expected to perform [XX]% - [XX]% of the MPSC II effort and "will participate in all functional areas." *Id.* The agreement states that the two companies are not forming a joint venture with one another. (Teaming Agreement ¶ 9.2.)

C. Protest and Size Determination

On June 7, 2011, the CO notified all offerors that Appellant was the apparently successful offeror. On June 13, 2011, Nova Technologies, Inc. (Nova) timely protested Appellant's size. The Area Office issued its size determination on June 30, 2011. The Area Office rejected Nova's protest allegations as "false" and "speculative at best," but determined that Appellant was not a small business under the "ostensible subcontractor" rule.

The Area Office highlighted that TYBRIN is the other than small incumbent prime contractor who performed the MPSC I contract, a fact that must be considered when applying the ostensible subcontractor rule. 13 C.F.R § 121.103(h)(4); *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 13 (2010). The Area Office also emphasized that an ostensible subcontractor analysis is undertaken primarily on the basis of the proposal and other documents that predate the size protest and reflect the relationship of the parties at the time the proposal was submitted. *Size Appeal of EarthCare Solutions, Inc.*, SBA No. SIZ-5183, at 6, 9 (2011).

The Area Office went on to analyze Appellant's proposal. The Area Office recognized that Appellant would perform [XX]% of the MPSC II contract and [XX]% of two of the

[3] The signature page of the teaming agreement indicates that it was signed by a TYBRIN representative on May 11, 2010, and by Appellant's representative on June 17, 2010. Regardless of the precise date, the teaming agreement was executed well before the proposal was submitted in January 2011.

technical subfactors (support for MPSSF and SSRs). Appellant would perform only 50% of the third technical subfactor, program management, because Appellant will provide the program manager, and TYBRIN will provide the deputy program manager. The Area Office explained that the proposed program manager had been the deputy program manager for MPSC I since April 2011, whereas the proposed deputy program manager is the current MPSC I program manager. Although the Area Office noted that the proposed program manager was employed by the Air Force for twenty-four years before joining Appellant, the Area Office concluded that because the proposed program manager had only been performing on the MPSC I contract for two months, he would necessarily rely on his deputy program manager's experience and expertise. (Size Determination 4-5.)

The Area Office also determined that TYBRIN's corporate experience surpasses that of Appellant. The Area Office noted that of Appellant's three past relevant contracts described in the proposal, only one exceeded $[XXXXX] in value, whereas the maximum value of the MPSC II procurement is $350 million. Of TYBRIN's three prior relevant contracts listed in the proposal, the MPSC I contract was valued at $375 million, and the two others were valued at $[XXXXX] and $[XXXXX]. Furthermore, the Area Office explained that MPSC II requires a large workforce to perform at a minimum of 145 locations worldwide. The Area Office noted that although TYBRIN has experience in managing a large workforce of over [XXX] employees, Appellant employs only [XXX] people. The Area Office found it "reasonable to assume that if [Appellant] were able to note performance on contracts of a similar magnitude, it would have done so." (Size Determination 6.) The Area Office also "question[ed] whether [Appellant] would have been rated as highly without TYBRIN, the incumbent, as its subcontractor." *Id.*

The Area Office noted that the proposal refers to "Team Spiral" throughout and that there are scant references to tasks or responsibilities to be performed by Appellant alone. The Area Office also cited numerous examples from Appellant's technical proposal referring to systems, routines, and techniques originally developed by TYBRIN that will be adopted by Appellant. Based upon its review of Appellant's proposal, the Area Office thus concluded that Appellant would be unusually reliant upon TYBRIN to perform the MPSC II contract, and TYBRIN is, therefore, Appellant's ostensible subcontractor. The Area Office explained that Appellant's own average annual receipts do not exceed the applicable size standard, but Appellant is other than small for purposes of this procurement when its receipts are combined with TYBRIN's.

D. Appeal Petition

On July 19, 2011, Appellant filed its appeal petition. Appellant first contends that the Area Office failed to properly notify Appellant that it was analyzing the relationship between Appellant and TYBRIN under the ostensible subcontractor rule. Appellant points out that Nova's protest made no such allegation, and the Area Office determined the protest allegations to be meritless. Appellant concedes that, after the protest was filed, the Area Office requested information about TYBRIN, but contends the Area Office did not reveal the purpose of these requests and did not give Appellant sufficient time to respond. Appellant contends this was a *per se* violation of 13 C.F.R § 121.1007(b) and (c) and requires reversal of the size determination. *See Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069 (2009). Appellant claims

that if it had known the Area Office was considering the ostensible subcontractor rule, both Appellant and the Air Force could have provided relevant information to demonstrate that there is no ostensible subcontractor relationship between Appellant and TYBRIN.

Alternatively, Appellant challenges the merits of the size determination. Appellant contends the Area Office failed to give proper weight to a declaration from Appellant's Chief Executive Officer, which was designed to assist the Area Office in navigating the proposal. Appellant also disputes the Area Office's reliance upon the fact that TYBRIN is the incumbent prime contractor. Appellant contends that, rather than considering all relevant factors, the Area Office improperly presumed that TYBRIN is Appellant's ostensible subcontractor.

Appellant next asserts that the Area Office misinterpreted the proposal and misapplied the law. Appellant claims that the proposal excerpts cited in the size determination (which purported to show that Appellant would utilize techniques and practices developed by TYBRIN) were taken out of context. Appellant attaches to its appeal petition a document in which Appellant explains why each of these cited passages fails to support the Area Office's conclusion that Appellant is reliant upon TYBRIN. Appellant also argues that the OHA decisions cited by the Area Office are inapposite. Appellant attempts to distinguish the facts at issue from each of these cases, emphasizing that Appellant will perform the majority of the work required by the MPSC II contract.

Appellant maintains that it possesses the relevant experience, past performance, and capability to perform the MPSC II contract. Appellant contends that the Area Office undervalued Appellant's experience. Specifically, Appellant claims the Area Office erroneously assumed that Appellant lacks relevant experience because only one of its past performance examples had a value greater than $[XXXXX]. According to Appellant, more than 80% of the task orders issued under MPSC I were less than $[XXXXX] in value. (Appeal Petition 11.) Appellant explains that that it was not the dollar value of a firm's past performance that was to be evaluated pursuant to the RFP, but the similarity of the work. Appellant also notes that the RFP required Appellant to submit past performance information for its subcontractors and disputes the Area Office's suggestion that Appellant would not have been rated as highly without TYBRIN, claiming the Area Office "appl[ied] its own newly developed source selection criteria." *Id.*

Appellant also contends that the $350 million maximum potential value of the MPSC II contract is irrelevant to this analysis. Appellant explains that the CO set the size standard based upon market research, yet the Area Office apparently concludes that a firm that has not previously performed contracts comparable to this ceiling value could not perform the contract. Appellant asserts this reasoning would preclude small business participation. Additionally, Appellant observes that MPSC II is an IDIQ contract, so the actual contract value is unknown.

Appellant also challenges the Area Office's statement that the MPSC II contractor must have experience managing a large workforce. Appellant argues this was not an RFP requirement or evaluation criteria, and the Area Office's arbitrary application of this standard was a clear error. Appellant highlights that OHA has previously warned that responsibility determinations

are within the province of the CO, not the Area Office. Appellant contends the Area Office relied upon uninformed speculation in making its determination when it should have sought more information from the Air Force, which has far greater knowledge and expertise with regard to the RFP requirements, if it had questions about Appellant's capabilities. Appellant concludes the Area Office improperly usurped the role of the Air Force by making erroneous judgments contrary to the proposal and the Air Force's evaluation.

Appellant next asserts that use of the term "Team Spiral" in the proposal is not indicative of unusual reliance, and the Area Office distorted the meaning of such language. Appellant explains that teaming arrangements are permissible, common, and desirable from both a Government and an industry perspective. *See generally* Federal Acquisition Regulation (FAR) subpart 9.6. Appellant also claims its use of techniques developed by TYBRIN does not support a finding of affiliation. Appellant explains that this practice is also common and acceptable and allows an offeror to provide a feasible and compliant proposal.

Appellant argues that the hiring of incumbent personnel cannot constitute undue reliance because it is not unusual and is in fact required by Executive Order 13,495. Appellant explains that new contractors frequently hire large numbers of incumbent personnel to minimize disruption in service, reduce the risks associated with turnover, and ensure the availability of properly qualified personnel. Appellant also notes that many of the incumbent employees it will hire are not TYBRIN employees, but employees of BAE (another TYBRIN subcontractor on MPSC I). Appellant vehemently disputes that the hiring of incumbent personnel is in any way indicative of an ostensible subcontractor relationship.

Appellant next contends the Area Office erred in determining that Appellant is not primarily responsible for program management. Appellant explains that it will have full control over contract performance and program management. Appellant asserts that the managers of the MPSSF support team and the SSR team are Appellant's own employees and will report directly to Appellant's own program manager. (Appeal Petition 18.) Appellant acknowledges that the proposal indicates that program management will be split [XXXX] between Appellant and TYBRIN, but argues that this merely reflects that the MPSC I program manager and deputy program manager would both be "returning to the MPSC II contract for continuity and smooth transition." *Id.* Appellant insists that there will be no joint management or decision-making. Appellant also points out that by the time MPSC II performance begins, Appellant's proposed program manager will have spent eight months as deputy program manager on the MPSC I contract and will not need to rely upon the experience of the current MPSC I program manager.

Finally, Appellant asserts the Area Office failed to consider several important factors that contradict the Area Office's finding of affiliation. Appellant provides a detailed factual background and supporting argument to demonstrate that Appellant pursued the MPSC II contract on its own, that it is capable of performing the contract, that it led the proposal effort, that it would perform the majority of the work, that it would perform the key contract requirements, and that it does not rely on TYBRIN for "financial support, bonding, facilities, or any other support." (Appeal Petition 5.) Appellant concludes that TYBRIN is not its ostensible subcontractor, and the size determination should be reversed.

Additionally, Appellant filed with its appeal petition a Motion to Supplement the Appeal File. Appellant seeks to admit a second declaration of its Chief Executive Officer to elaborate upon an earlier declaration he submitted to the Area Office. Appellant contends there is good cause to admit the declaration because Appellant did not have the opportunity to specifically address several factors relevant to the ostensible subcontractor rule before the Area Office. Because Appellant has established good cause for admission of the declaration, and because it will not unduly enlarge the issues at hand, I GRANT Appellant's motion and ADMIT the evidence into the record. 13 C.F.R. § 134.308(a)(2).

E. CO's Response

On August 4, 2011, the CO filed his response to the appeal. The CO states that "the [Air Force] strongly disagrees with the [Area Office's] determination that an ostensible subcontracting relationship exists between [Appellant] and its subcontractor, TYBRIN." (CO Response 5.)

The CO explains that the MPSC II contractor will provide critical hardware and software maintenance and support services—including configuration management, technical publications, the provision of subject matter experts and SSRs, deficiency investigation, software engineering, and system security services—both centrally, at Hill AFB, and on-site, by providing SSRs worldwide. The CO further explains that disruption of the MPSC II contract may impede the MPSSF's and the SSRs' ability to sustain mission planning weapons systems for the Air Force, the Army, and foreign allies.

The CO agrees with Appellant's argument that the Area Office erred in relying on the dollar values of Appellant's past contracts and the number of people Appellant previously employed to determine Appellant's ability to perform the MPSC II contract. The CO emphasizes that the RFP did not employ past contract value as a criteria in evaluating the relevancy of an offeror's past performance. The CO explains that based upon the Air Force's market research, the Air Force recognized that there were SDVO SBCs who could perform the MPSC II contract as a prime contractor but would likely not have past experience with contracts of the same magnitude. Accordingly, the Air Force purposely chose not to include the magnitude of a firm's past contracts in assessing the relevancy of its past performance. The CO also explains that the Area Office's comparison of the number of Appellant's employees ([XXX]) to the number of personnel employed on the MPSC I contract ([XXX]) is not valid because the MPSC II contract will require far fewer personnel, as demonstrated by Appellant's proposal, which proposes [XXX] employees, an [XXX]% reduction. The CO also emphasizes that the Air Force assumed that the successful contractor would hire a large portion of incumbent employees, and the RFP did not set forth any minimum employee requirements with regard to whether an offeror's past contracts were considered relevant. (CO Response 3.)

The CO next highlights that, prior to issuance of the MPSC II RFP, the Air Force's market research indicated that at least two SDVO SBCs could submit successful proposals. Thus, the Air Force decided to set aside the procurement for SDVO SBCs. The CO explains

that, in assessing whether SDVO SBCs would be capable to perform MPSC II, the factors the Air Force found most useful were: the ability to obtain start up costs for contract performance; experience in managing, or a viable plan to manage, over 300 employees worldwide; and the ability to grow. The CO explains that Appellant, as well as other prospective offerors, successfully met these criteria.

The CO next contends the Area Office incorrectly assumed that because Appellant is teaming with TYBRIN, TYBRIN is Appellant's ostensible subcontractor. The CO claims the Air Force has a high expectation that Appellant is capable of successfully performing the MPSC II contract without undue reliance upon TYBRIN. The CO explains that the Air Force reviewed Appellant's past performance record and found it to be strong, independent of the firm's proposal to team with TYBRIN. Additionally, the Air Force reviewed Appellant's proposal regarding the management of a large workforce and found it to be sound and reasonable. Furthermore, the CO highlights that Executive Order No. 13,495 encourages the hiring of incumbent personnel to reduce disruption and ease transition.

The CO next challenges the Area Office's finding that Appellant is reliant upon TYBRIN because Appellant planned to adopt systems, routines, approaches, and techniques currently employed in performance of the MPSC I contract. The CO explains that the MPSC I contract has been in place for nine years, and the Air Force fully expected that systems, routines, approaches, and techniques developed under MPSC I would be continued on MPSC II, "regardless of which successful offeror was awarded MPSC II." (CO Response 6.) In fact, the Air Force instituted a formal process to allow the successful contractor to capture the best practices currently in use. "It does not make sense to assume that the [Air Force] would want to continually relearn lessons from the past; and, [Appellant] reasonably assumed that it would be a positive business practice to incorporate successes from past experiences implemented under MPSC I into their proposal for MPSC II." *Id.*

The CO agrees with Appellant that the Area Office erred in finding that Appellant would not be primarily responsible for program management. The CO explains that the Air Force chose to request only a staffing plan in lieu of the resumes of specific individuals. The CO points out that Appellant's proposal indicated that the proposed program manager has twenty-four years of Air Force experience and would have eight months of experience as MPSC I deputy program manager by the time MPSC II performance begins. The CO also refutes the Area Office's finding that Appellant proposed to perform only half of the program management subfactor. The CO explains that the Area Office came to this conclusion because Appellant will provide one of the two program management personnel. However, because there are only two program management personnel, Appellant could only perform 100%, 50% or 0% of that particular subfactor. The Air Force again opposes the Area Office's application of different evaluation standards than were stated in the RFP and argues that the Area Office's determination would improperly exclude Appellant from award.

Finally, the CO emphasizes that Appellant's teaming arrangement with TYBRIN was established only after Appellant formed the intent to bid on the procurement. The CO claims this is bolstered by the fact that TYBRIN was not among Appellant's initial list of potential

teammates, and the CO argues Appellant would have pursued this contract irrespective of TYBRIN's participation. Furthermore, the CO points out that Appellant demonstrated its ability obtain start up costs for the first two months of contract performance without TYBRIN's assistance. The CO contends the Air Force's evaluation of Appellant's proposal as the best value for the Government was valid and requests that OHA reverse the size determination so the Air Force may proceed with awarding the MPSC II contract to Appellant.

F. Nova's Response

On August 4, 2011, Nova filed its response to the appeal petition. Nova claims the appeal should be denied because there is no clear error in the size determination. Nova disputes Appellant's assertion that the Area Office failed to provide notice that it was investigating a potential violation of the ostensible subcontractor rule. Nova contends this argument is not credible because the size protest referred to Appellant's relationship with TYBRIN, and the Area Office questioned Appellant about its relationship with TYBRIN in multiple email exchanges, specifically seeking contract-specific information such as the teaming agreement between Appellant and TYBRIN and the share of the contract work to be performed by each firm. Nova asserts that Appellant's responses to these inquiries evidence the firm's understanding that the ostensible subcontractor rule was at issue because Appellant provided a step-by-step rebuttal using the (now defunct) "seven factors" test.

Furthermore, contends Nova, the fact that Appellant retained counsel who should have, and did, understand the need to respond to the Area Office's ostensible subcontractor inquires diminishes Appellant's argument that it did not have an adequate opportunity to respond to those allegations. Nova also point outs that 13 C.F.R § 121.1007(b) and (c) relate to the specificity of Nova's protest, but 13 C.F.R § 121.1009 allows the Area Office to go outside the protest allegations in performing a size determination.

Nova next argues the Area Office properly found that TYBRIN is Appellant's ostensible subcontractor. Nova contends the fact that TYBRIN is a ten-year incumbent contractor is itself persuasive evidence of unusual reliance and, when combined with the other indications of affiliation, supports an ostensible subcontractor finding. *See Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984 (2008). Nova asserts the Area Office did not err in relying on this issue.

Nova also supports the Area Office's conclusion that the repeated use of "Team Spiral" throughout Appellant's proposal is suggestive of a joint venture between Appellant and TYBRIN. According to Nova, Appellant and TYBRIN will combine their resources to perform the MPSC II contract. The proposal exhibits the logos of both companies appear on every page, refers to the "seamless integration" of the team, refers to the team's decade of experience on the MPSC I contract, and generally blurs the lines between the two firms. Nova insists that such persistent identification of the team over the individual firms can be evidence of affiliation, and the Area Office did not give undue weight to this factor, as Appellant claims.

Nova also emphasizes that Appellant will adopt many of TYBRIN's policies and practices with only slight changes or innovations, thereby demonstrating its reliance upon

TYBRIN. Nova finds Appellant's attempts to explain why each of the Area Office's proposal citations do not support a finding of unusual reliance to be insufficient. Instead, Nova concludes Appellant's attempts are contradicted by the proposal itself, which clearly evinces an ostensible subcontractor violation. Nova also notes that Appellant's reliance on FAR subpart 9.6 is misplaced because the fact that Appellant complied with FAR provisions that permit teaming arrangements does not preclude the conclusion that Appellant and TYBRIN are engaged in a joint venture.

Nova asserts the Area Office properly concluded that Appellant lacks relevant experience. Nova first explains it was appropriate for the Area Office to consider Appellant's experience because it is relevant to whether Appellant would be unusually reliant upon TYBRIN. *E.g., Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228 (2011). Nova points out that Appellant's SBA Form 355 and financial statements do not indicate that the firm has generated any revenue in NAICS code 541513, the NAICS code assigned to the MPSC II procurement. Nova argues Appellant's prior military contract calls primarily for the provision of spare parts, which is unrelated to the work required by MPSC II. Nova also contends Appellant's proposal demonstrates that Appellant relied on TYBRIN's experience to obtain the MPSC II contract. Nova concludes that TYBRIN possesses all of the relevant experience, and Appellant has none. Nova also highlights that "the proposal does not demonstrate that [Appellant] has any experience managing and performing a contract of this type or scope." (Nova Response 12.) Nova argues the fact that the MPSC II contract is an IDIQ contract is irrelevant, because Appellant must still be prepared to satisfy all the task orders, something Nova claims Appellant is incapable of handling. Nova also submits that the Air Force's market research conducted prior to issuance of the RFP can have no impact on whether Appellant entered into an ostensible subcontractor relationship.

Nova next argues the Area Office properly evaluated Appellant's reliance upon TYBRIN's personnel because Appellant's plans go beyond making job offers to incumbent personnel; Appellant and TYBRIN "have devised a plan to transfer incumbent personnel from TYBRIN to [Appellant] in order to take advantage of [Appellant's] size status." (Nova Response 14.) Additionally, according to Nova, TYBRIN will also transfer the lease for the facility where the MPSC I contract is being performed, as well as equipment and data. Appellant contends this transferring is indicative of unusual reliance. *See Size Appeal of Leonardo Techs., Inc.*, SBA No. SIZ-4597 (2003). Furthermore, Nova contends that Appellant's proposal identifies eight key TYBRIN personnel that will be transferred from MPSC I to MPSC II but does not identify even one of Appellant's own employees for MPSC II contract performance. Nova also notes that Executive Order No. 13,495 does not require a contractor to make offers to incumbent management employees. Nova emphasizes that although "there is no question that any successful offeror would make offers to incumbent personnel," the entire incumbent workforce would not have been transferred to other offerors without any of the offeror's own management personnel. (Nova Response 15.)

Nova also contends the Area Office correctly determine that TYBRIN will play a significant role in program management. Nova asserts that the proposal demonstrates that Appellant is relying upon TYBRIN for hiring, which was identified by the CO as a primary and

vital function of the MPSC II contract.[4] Nova claims the proposal affirms the Area Office's conclusion that Appellant will split the program management function with TYBRIN because the proposal provides that TYBRIN will perform program management "in conjunction with" Appellant and that TYBRIN will "mentor" Appellant. Nova also argues the proposal demonstrates that TYBRIN will lead the transition process. Nova concludes Appellant's assertion that it will control contract performance and management is belied by the proposal itself.

Finally, Nova asserts that neither the proposal nor the teaming agreement assigns discrete tasks to TYBRIN. Rather, the proposal indicates that all contract tasks will be shared. Nova argues that without a breakdown of the work to be performed by each party, Appellant's conclusory statement that it will perform [XX]% of the work is meaningless. Nova also contends that several provisions in the teaming agreement support a finding of unusual reliance. For instance, the agreement provides that TYBRIN may terminate the agreement if the RFP is not issued as a small business set-aside so that TYBRIN may compete on its own. Nova contends this arrangement is evidence of unusual reliance. *See Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009). Additionally, the teaming agreement prohibits Appellant from soliciting TYBRIN's employees, which, according to Nova, allows TYBRIN to control which employees will perform the MPSC II contract. Based upon these factors, Nova concludes this case presents a textbook example of an ostensible subcontractor relationship. Nova urges OHA to deny the appeal.

G. SBA Response

On August 16, 2011, SBA timely intervened[5] and filed its response to the appeal petition. SBA remains silent on the merits of the size determination, but disputes Appellant's contention that it was denied due process. SBA contends the record contains substantial evidence that Appellant was on notice that the Area Office was considering the ostensible subcontractor rule. Specifically, SBA argues the Area Office's questions to Appellant after the size protest was filed and Appellant's subsequent responses demonstrate Appellant's awareness that the ostensible subcontractor rule was at issue. The questions related to Appellant's relationship with TYBRIN (including the teaming agreement between the firms), Appellant's proposed contract management, and Appellant's plans relating to the incumbent personnel.

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[4] When asked to explain the primary and vital requirements of MPSC II, the CO responded: "The primary and vital requirements of this procurement are that the prime contractor is able to hire and retain qualified personnel to meet the requirements as set forth in the Performance Work Statement. The majority of the effort must be performed by the SDVOSB prime contractor." Email from Blake Gibson, Contracting Officer, U.S. Air Force to David Gordon, Size Specialist, U.S. Small Business Administration (June 27, 2011).

[5] "SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first." 13 C.F.R. § 134.210(a).

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SBA notes that in response to these questions, Appellant submitted a declaration intended to assist the Area Office in evaluating the relationship between Appellant and TYBRIN. Furthermore, the declaration conformed precisely to the "seven factors" test formerly used to evaluate ostensible subcontractor relationships. Thus, SBA argues, although the Area Office did not make "explicit use of the phrase 'ostensible subcontractor,'" Appellant nevertheless understood that the Area Office was undertaking such an analysis. (SBA Response 5.)

SBA also challenges Appellant's arguments that Appellant should have had further opportunity to respond and that the Area Office should have contacted the Air Force for more information. Finally, SBA distinguishes this case from *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069 (2009), because the Area Office sought detailed information from Appellant about its relationship with TYBRIN, Appellant provided its proposal and was aware that the Area Office was evaluating its relationship with TYBRIN, and none of the Area Office's follow-up questions related to Appellant's or TYBRIN's financial information. SBA thus submits that Appellant knew that the ostensible subcontractor rule was at issue and was given a meaningful opportunity to address the Area Office's concerns relating to that issue.

H. Appellant's Reply

On August 23, 2011, more than two weeks after the close of record, Appellant filed a motion to reply to Nova's response, claiming that Nova mischaracterizes the facts at issue. Nova opposes the motion; SBA did not respond. Nova asserts that the reply should be rejected because it is untimely and because replies are not routinely accepted by OHA. Nova contends Appellant failed to establish good cause for the admission of its reply because the reply merely repeats the arguments already presented in the appeal petition. Nova also opposes the admission of a third declaration from Appellant's CEO, which was attached to Appellant's reply. Nova claims this evidence was not before the Area Office and is not relevant to the ostensible subcontractor analysis at issue. Upon review, I find that, although the reply was submitted after the close of record, it does not raise new issues, but addresses alleged factual errors in Nova's response. I therefore GRANT Appellant's motion to reply and accept Appellant's reply into the record. The third declaration from Appellant's CEO likewise responds to Nova's allegations in this appeal concerning Appellant's teaming agreement with TYBRIN. Accordingly, Appellant's motion to admit the declaration is also GRANTED.

In the reply, Appellant reiterates its claim that it did not have proper notice that the Area Office was considering the ostensible subcontractor rule and was not afforded a reasonable amount of time to respond to the Area Office's questions. Appellant argues it was materially prejudiced because it was forced to guess why the Area Office was asking for certain information and documentation, when fundamental fairness required the Area Office to explicitly notify Appellant that the ostensible subcontractor was at issue.

Appellant goes on to refute the allegations in Nova's response. Appellant contends there is no evidence that it teamed with TYBRIN to circumvent the SBA's size regulations, as Nova suggests. Instead, Appellant emphasizes that it demonstrated its intent to pursue the MPSC II contract before it had any communications with TYBRIN and that its past performance is

relevant based on the RFP criteria, which required experience similar in complexity and scope, not merely dollar volume.

Appellant argues that Nova places undue weight on the fact that TYBRIN is the incumbent subcontractor and ignores the fact that Appellant is an incumbent subcontractor. According to Appellant, it "was a highly successful subcontractor under the incumbent MPSC I contract and gained knowledge and understanding of current work processes and used that incumbent knowledge in writing its proposal here." (Reply 7.) Appellant claims Nova and the Area Office improperly treat TYBRIN's incumbent status as a *per se* bar to TYBRIN's participation on the MPSC II contract. Appellant concludes it is not reliant upon TYBRIN, but rather engaged TYBRIN as a subcontractor to mitigate risk and to benefit the Air Force.

Appellant next challenges Nova's claim that Appellant's proposal is reflective of a joint venture. Appellant asserts there is no sharing of profits between it and TYBRIN, Appellant will unilaterally assign contract tasks as the prime contractor, and the firms do not share bonding assistance, management, or bank accounts. Appellant emphasizes that the use of "Team Spiral" and "we" in the proposal is not indicative of which entity will perform the majority of the contract work, but rather is common industry practice. Appellant also claims Nova improperly assumed that Appellant planned to maintain the MPSC I status quo because it proposed a "zero-cost transition." Appellant again emphasizes that it is an incumbent subcontractor and notes it is willing to spend its own funds in executing the transition to provide a free transition to the Air Force. Appellant also claims Nova's criticism of the fact that TYBRIN will "mentor" Appellant is improper because the SBA encourages large businesses to mentor small firms.

Appellant strenuously disputes Nova's contention that Appellant lacks any relevant experience. Appellant asserts it is not a "front" for a large firm, and it has relevant experience on MPSC I as well as other contracts. Instead, according to Appellant, the Area Office erroneously relied upon a dollar value comparison of its past contracts to the MPSC II maximum instead of viewing its past performance according to the criteria set forth in the RFP. Appellant highlights that under the terms of the RFP, the dollar value of the firm's past contracts was not a factor in determining relevancy of an offeror's past performance. Appellant also points out that the maximum value of an IDIQ contract provides little information regarding the scope of the work or the skills required to perform it. Appellant emphasizes that its past performance proposal was designed to respond to the RFP requirements, and Nova's assertion that Appellant is inexperienced and unqualified is incorrect. Appellant also notes than any business that had previously performed a $350 million contract would likely be unable to qualify as a small business.

Appellant also contests Nova's assertion that a large military contract included in Appellant's past performance proposal is not relevant to MPSC II. Appellant contends that the contract requires a variety of services similar to those required by the MPSC II contract, not merely the provision of spare parts, as Nova claims. Appellant insists that the Air Force considered this contract relevant, and it is not the role of the Area Office to disturb that finding. Appellant also rejects Nova's claim that Appellant's past performance is not relevant because it was not performed under the same NAICS code employed by the MPSC II contract. Appellant

notes that the RFP did not request NAICS code information as part of an offeror's past performance proposal and argues that NAICS codes are not rigid categories. Rather, Appellant explains, work performed under one NAICS code often could also fall within other NAICS codes, and Appellant has performed work relevant to the MPSC II contract under other codes.

Appellant asserts Nova erroneously assumed that the RFP required the identification of certain key personnel. Instead, claims Appellant, the RFP contained no key personnel requirements. The Air Force did not require any resumes or any identification of individuals who would perform key contract roles. Appellant explains the only identification of key personnel required by the RFP was in the past performance proposal. The Air Force requested information regarding what individuals had performed on an offeror's past contracts who would also perform on the MPSC II contract. Appellant emphasizes that the proposed project manager is Appellant's own employee and was never an employee of TYBRIN.

Appellant next challenges Nova's assertion that TYBRIN will "transfer" its personnel to Appellant. Appellant explains that it will hire the MPSC II contract personnel from a pool of TYBRIN and BAE workers who performed on MPSC I, as well as new hires. Appellant emphasizes that it is not transferring the entire incumbent workforce, but will negotiate terms of employment with each individual employee. Appellant also points out that nearly half of the BAE employees had agreed to work for Appellant before award. Appellant notes that its approach to staffing the contract was part of the Air Force's source selection evaluation and should not be challenged by the Area Office. Appellant also notes TYBRIN's lease of the MPSC I facilities cannot be transferred, and Appellant must establish a new lease. Appellant contends the cases upon which Nova relies to supports its arguments regarding Appellant's hiring of incumbent employees are inapposite.

Appellant claims Nova misinterprets its organizational chart. Appellant contends the chart clearly illustrates that Appellant alone is primarily responsible for program management because Appellant's own employee, the proposed project manager, sits atop the chart. The deputy program manager, TYBRIN's employee, will merely support the program manager, and there is nothing in the chart to indicate that the TYBRIN employee will oversee the actions of the program manager, contrary to Nova's claims. Appellant emphasizes that the teaming agreement clearly provides that Appellant alone is responsible for allocation decisions, and the [XXXX] split of the program management task in the proposal was intended only to signify that each contractor would manage its own personnel in performance of the [XX]%-[XX]% work split. Appellant concludes that it alone would control the MPSC II contract.

Appellant contends that Nova falsely suggests that the Area Office found that TYBRIN would perform the primary and vital contract requirements when, in fact, the Area Office made no such finding. Rather, Appellant asserts the proposal makes clear that Appellant will provide the majority of the contract effort. Appellant also highlights that the RFP did not require a specific breakdown of tasks between the contractors, and the teaming agreement between the firms provides that Appellant is responsible for task allocation. Appellant also explains that the tasks required by the MPSC II contract are still unknown, and pre-assigning discrete tasks would be premature.

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Finally, Appellant contends Nova misinterpreted its teaming agreement with TYBRIN. Appellant claims it led the proposal and negotiation efforts, even though the teaming agreement allowed for TYBRIN to perform 70% of the proposal support, at Appellant's discretion. Appellant also asserts that TYBRIN did not dictate the terms of the teaming agreement, as Nova claims, and the fact that TYBRIN could cancel the agreement if the RFP were solicited as a full and open procurement is a common business arrangement. Appellant also disputes Nova's allegation that TYBRIN could control contract staffing through the teaming agreement. Appellant concludes it is not unusually reliant upon TYBRIN, and its proposal supports this conclusion. Appellant again requests that OHA grant its appeal because the size determination is based upon clear errors of fact and law, and there is no evidence of an ostensible subcontractor relationship between Appellant and TYBRIN.

I. Nova's Surreply

On August 26, 2011, Nova filed its opposition to Appellant's motion for leave to reply. Alternatively, Nova responds to Appellant's reply. Because I have accepted Appellant's reply into the record, Nova's rebuttal is also accepted.

Nova contends Appellant's reply only supports the conclusion that OHA should affirm the size determination. Nova challenges Appellant's assertion that it is an incumbent subcontractor on the MPSC I contract. Nova claims that Appellant's involvement was minor because Appellant provided only six positions as a subcontractor to TYBRIN, the only incumbent prime contractor. Nova argues it was "hyperbolic and misleading" for Appellant to claim that it gained wide-ranging experience as an incumbent subcontractor. (Nova Surreply 3.) Nova also contends that Appellant did not obtain the MPSC I subcontract until after it began negotiating a teaming agreement with TYBRIN for the MPSC II contract.

Nova asserts Appellant's reply confirms that it is engaged in a joint venture with TYBRIN. Nova highlights that Appellant emphasized the "seamless integration" its proposal offered the Air Force, conceded that TYBRIN will work in all functional areas of the contract, and acknowledged that discrete tasks have not been assigned to TYBRIN. Although the teaming agreement between Appellant and TYBRIN gives Appellant the authority to allocate contract tasks, Nova reiterates that this ability is restricted because the teaming agreement inhibits Appellant's ability to hire TYBRIN's personnel without TYBRIN's consent, thereby granting TYBRIN some measure of control over how the parties will perform the contract work. Nova also argues Appellant's reply confirms that TYBRIN will mentor Appellant and that TYBRIN's program manager from the MPSC I contract will perform on the MPSC II contract. Nova asserts all these facts are indicative of affiliation.

Finally, Nova again disputes Appellant's claim that it was not afforded reasonable notice that the Area Office was considering the ostensible subcontractor rule. Nova urges OHA to deny the appeal.

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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. 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. Due Process

Appellant first argues that the Area Office erred by failing to notify Appellant that it was considering the ostensible subcontractor rule. Furthermore, this issue was not raised in Nova's protest. Appellant contends that it was prejudiced as a result, because it was not afforded a reasonable opportunity to respond to the Area Office's concerns. To support its position, Appellant relies heavily on *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069 (2009). In that case, OHA vacated a size determination after finding

> no evidence the Area Office informed Appellant it was considering a violation of the ostensible subcontractor rule . . . . Instead, the Area Office requested information from Appellant without explaining why it wanted this information. Accordingly, the Area Office committed clear error in denying Appellant due process granted it by 13 C.F.R. § 1007(b) and (c).

Alutiiq Int'l, SIZ-5069, at 3.

An Area Office is permitted to base its size determination on grounds other than those set forth in the protest. 13 C.F.R. § 121.1009(b). Accordingly, although it is true that Nova did not raise the ostensible subcontractor issue in the protest, this alone is not a valid basis to reverse the size determination. Nor is there any requirement that the information upon which a size protest is based ultimately prove to be accurate. *Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828, at 8 (2006) (citing *Size Appeal of Emergency Beacon Corp.*, SBA No. SIZ-4813, at 12 (2006)). Therefore, the fact that the Area Office subsequently found Nova's protest allegations to be meritless is immaterial.

The record establishes that the Area Office requested detailed information regarding Appellant's relationship with TYBRIN on the MPSC II procurement; thus, Appellant was on notice that its relationship with TYBRIN was at issue. Moreover, Appellant's communications with the Area Office clearly demonstrate that Appellant was aware that the Area Office was considering the ostensible subcontractor rule. In one of its responses to the Area Office, Appellant systematically addressed each element of the "seven factor test" formerly used to analyze ostensible subcontractor rule issues.

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Accordingly, I find the instant case distinguishable from *Alutiiq International*. Although the Area Office could have expressed its concerns more directly, the record demonstrates that Appellant nevertheless understood the nature of the concerns and had ample opportunities to respond. Contrary to Appellant's assertions, therefore, I find that Appellant was not denied due process and suffered no material prejudice.

C. Ostensible Subcontractor Rule

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 the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, the Area Office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Such analysis is inherently fact-specific. *Size Appeal of C.E. Garbutt Constr. Co.*, SBA No. SIZ-5083, at 5 (2009). The purpose of the ostensible subcontractor rule is to "prevent other than small firms from forming relationships with small firms to evade SBA's size requirements." *Size Appeal of Fischer Bus. Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009).

In this case, Appellant's proposal repeatedly states that Appellant will perform [XX]% of the total MPSC II contract work, and TYBRIN will perform the remaining [XX]%. The proposal also provides that Appellant will perform [XX]% of the work associated with two of the technical subfactors (operating the MPSSF and providing the SSRs), while TYBRIN will perform [XX]% of the effort. These two subfactors are associated with a large majority of the MPSC II work, both in terms of dollar value and FTEs. The third technical subfactor, program management, is split equally between the two firms. The teaming agreement executed by Appellant and TYBRIN prior to submission of the proposal confirms that TYBRIN will perform only [XX]% to [XX]% of the work. This division of labor further conforms to legal requirements for small business set-asides, which mandate that a small business acting as the prime contractor on a set-aside must perform at least 50% of the contract cost. *See* FAR 52.219-14; 13 C.F.R. § 125.6(a)(1).

Because Appellant and TYBRIN will both perform the same types of work on MPSC II (*i.e.*, both firms will perform each of the technical subfactors), the firm that will perform the majority of the total contract must be deemed to be performing the "primary and vital" contract requirements. *See Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 6-7 (2011) (upholding the Area Office's determination that the subcontractor was not performing the primary and vital contract requirements where the primary contract requirement was to provide training instructors, and both the prime contractor and the subcontractor would provide instructors, but the prime contractor would supply the majority of instructors); *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 8-9 (2010) (finding, where there was only one contract line item and the prime and subcontractor would perform identical services, that the prime contractor was performing the primary and vital contract requirements

because the prime contractor was performing a majority of the work). Thus, it is clear that Appellant, which will perform [XX]% of the total MPSC II work, is performing the primary and vital requirements. Accordingly, the only possible basis to find violation of the ostensible subcontract rule would be if Appellant were unusually reliant upon TYBRIN. For the reasons discussed below, I find that the Area Office erroneously determined that Appellant would be unusually reliant upon TYBRIN to perform MPSC II.

1. Appellant's Past Performance

In finding Appellant to be unduly reliant upon TYBRIN, the Area Office cited, as a principal consideration, Appellant's purported lack of corporate experience. Specifically, the Area Office expressed concern that only one of Appellant's three contracts identified in the past performance proposal exceeded $[XXXXX] in dollar value, whereas each of TYBRIN's three contracts exceeded $[XXXXX]. The Area Office also found it to be problematic that, based upon Appellant's proposal, Appellant seemingly had not previously managed as large a workforce as would be needed to perform MPSC II, whereas TYBRIN had done so. These issues led the Area Office to "question whether [Appellant] would have been rated as highly without TYBRIN, the incumbent, as its subcontractor." (Size Determination 6.) On appeal, Nova agrees with the Area Office that Appellant relied on TYBRIN's experience to secure the MPSC II award and observes that Appellant has generated no revenues under the particular NAICS code assigned to the MPSC II procurement.

In response, Appellant asserts that the Area Office misevaluated Appellant's corporate experience using different criteria than were set forth in the RFP. Appellant argues that the RFP required past performance of similar contract work, but not similar dollar values. The CO explains that in setting aside the procurement for small businesses, the Air Force purposefully did not include the dollar value of a firm's past contracts in assessing the relevancy of its past performance. Appellant also disputes the Area Office's finding that the MPSC II contractor must have experience in managing a large workforce. Again, Appellant argues this was not part of the RFP evaluation criteria. The CO likewise emphasizes that the RFP did not set forth any minimum employee requirements with regard to whether an offeror's past contracts would be considered relevant.

I agree with Appellant and the CO that the Area Office erroneously determined that Appellant lacks the experience to perform the MPSC II contract. There were two principal problems with the Area Office's analysis. First, the Area Office made unreasonable assumptions about the breadth and depth of Appellant's corporate experience. Second, the Area Office created its own criteria, which were not reflected in the RFP, concerning what experience was essential in order to perform the contract. In so doing, the Area Office improperly conducted its own assessment of Appellant's responsibility.

Under the terms of the RFP, offerors were instructed to submit three examples of past performance for the prime contractor and three for each subcontractor.[6] These examples would

[6] The RFP repeatedly warned that additional examples were not permitted.

be evaluated for (1) relevance to MPSC II and (2) quality of performance (*i.e.*, how well the firms had previously performed). Thus, the RFP did not seek a comprehensive description of the depth and breadth of an offeror's corporate experience. Further, offerors were given wide latitude to propose examples of past performance that they considered relevant, provided that they "explain what aspects of the contracts are deemed relevant to the proposed effort." (RFP 39.) The RFP did not indicate that the dollar value of an offeror's past contracts or the number of employees previously managed by the offeror would be significant in determining the relevance of that offeror's past performance.

Appellant's proposal was written to respond to the requirements set forth in the RFP. Thus, for both itself and TYBRIN, Appellant gave three examples of prior contracts that Appellant considered relevant to MPSC II and on which the firms had performed well. Because the RFP did not request past performance of any particular dollar threshold, Appellant would have had no reason to limit itself to large dollar contracts. Upon reviewing Appellant's proposal, the Area Office determined that "it is reasonable to assume that if [Appellant] were able to note performance on contracts of a similar magnitude, it would have done so." (Size Determination 6.) This assumption is unfair and invalid. Because offerors had discretion to propose any examples they considered relevant, the fact that Appellant chose to propose only one example of a larger dollar value contract does not establish that no other experience exists. Indeed, Appellant represents that, if it had known that the dollar value of prior contracts would be significant, it could have proposed eight other examples. (Appeal Petition 12.)

Similarly, the Area Office determined (based on the three examples in Appellant's proposal) that Appellant would be unable to manage a workforce as large as that contemplated by the MPSC II contract because Appellant apparently had not previously done so. Again, however, the Area Office lacked proper grounds to reach this conclusion. The RFP did not request that offerors detail all of their relevant corporate experience, and it did not state that the number of personnel previously employed by an offeror would be used to assess that offeror's past performance. Thus, based on the RFP, Appellant would have had no reason to propose examples of past performance involving management of large numbers of employees, or even to address that issue in its proposal.[7] The Area Office merely assumed that Appellant did not have such experience although data about such experience was not sought by the RFP.

The Area Office's determination is further marred by the underlying premise that "[a] contract of this magnitude, in terms of dollars, number of employees, [and] number of locations, inevitably demands experience running contracts of similar size." (Size Determination 6.) As Appellant and the CO point out, the Air Force itself did not consider the dollar value of prior contracts, or number of employees previously supervised, to be significant in assessing offerors' ability to perform MPSC II. Although MPSC II has a maximum value of $350 million over a

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(RFP 48, 39-40.)

[7] In the size determination, the Area Office complained that "[n]one of the contracts that [Appellant] listed [in its proposal] even mentioned the number of employees involved." (Size Determination 6.)

period of several years, specific work is defined in individual task orders, many of which are far more modest in size. Appellant observes that, under the predecessor contract, the vast majority (more than 80%) of orders were less than $[XXXXX] in value. (Appeal Petition 11.) Furthermore, MPSC II is an IDIQ vehicle with a guaranteed minimum of only $50,000. Thus, the actual value of MPSC II is unknown and ultimately may be very different than the ceiling. Accordingly, although MPSC II has a large dollar ceiling, it does not follow that performance of MPSC II "inevitably demands" experience with contracts of a magnitude comparable to that ceiling.

In any event, the determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contractor responsibility. *See generally* FAR 9.104-1 (to be determined responsible, contractor must "[h]ave the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them"). As OHA has previously and repeatedly explained, a responsibility determination lies firmly within the CO's purview. *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 7 (2011) ("A broad inquiry into a firm's 'capabilities,' however, is the nature of a responsibility determination, and therefore is the province of the CO, not the Area Office."); *Size Appeal of Public Commc'ns Servs., Inc.*, SBA No. SIZ-5008, at 8 (2008) (noting the Area Office may not "step into the CO's shoes" to examine a firm's responsibility); *Size Appeal of TCE Inc.*, SBA No. SIZ-5003, at 9 (2008) (finding the Area Office erred by "substitut[ing] its own judgment of Appellant's ability and experience to perform this contract (a responsibility determination) for that of the CO"). In this case, the Area Office in effect conducted its own responsibility determination based upon criteria that the Air Force specifically chose not to use and that were not identified in the RFP. Accordingly, the Area Office erred by substituting its own judgment about the experience and capabilities necessary to perform MPSC II for that of the Air Force.

The Area Office further conjectured that Appellant's proposal would not have been rated as highly without TYBRIN's participation. This assumption too was unwarranted. The past performance proposal describes three of Appellant's past contracts and three of TYBRIN's past contracts, as required by the RFP. The RFP stated that the relevancy and quality of each of the past contracts would be evaluated. Thus, the Air Force presumably did consider TYBRIN's past performance, but the record offers no evidence to support the conclusion that the Air Force based its evaluation predominantly on the TYBRIN contracts. *See Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 12 n.4 (2011) (finding that "[t]he record reflects no reason to believe the Air Force assessed Appellant's past performance based solely on [the subcontractor's] experience").

Using the evaluation scheme set forth in the RFP, the Air Force determined that Appellant could successfully perform the contract. The Air Force assessed past performance proposals based upon the relevance and quality of each offeror's past contracts. Appellant received an overall rating of "substantial confidence," the highest possible rating. According to definitions in the RFP, this rating meant that "[b]ased on the offeror's performance record, the Government has a high expectation that the offeror will successfully perform the required effort." (RFP 50.) The Air Force judged each offeror's human resources plan to determine

whether it offered "a sound, feasible, and compliant approach to the processes for recruiting, hiring, training, and staffing." (RFP 46.) Based upon these criteria, the Air Force determined that Appellant's proposal was technically acceptable.

The Area Office gave no weight to the Air Force's evaluation and, instead, apparently concluded that Appellant could not perform the MPSC II contract because the proposal did not indicate that Appellant had previously performed contracts of similar value or supervised a similar workforce. As explained above, these conclusions rest on ill-founded assumptions about the breadth and depth of Appellant's corporate experience and, therefore, are clearly erroneous. In addition, the Area Office improperly conducted its own assessment of Appellant's responsibility, based on criteria that were not included in the RFP.

2. Program Management

The Area Office attached significance to Appellant's approach to program management. The Area Office determined that because Appellant's proposed program manager (the current MPSC I deputy program manager) had been performing on the MPSC I contract for only two months at the time of the size determination, he would necessarily rely on the experience of his deputy program manager (the current MPSC I program manager and a TYBRIN employee). The Area Office also took issue with the fact that Appellant proposed to perform 50% of program management because it would only supply one of two management officials. Nova claims that Appellant's proposal supports the Area Office's conclusion that TYBRIN would play a vital role in program management. Nova further contends that Appellant's proposal identifies eight key TYBRIN personnel that will be transferred from MPSC I to MPSC II, but fails to identify any of Appellant's own personnel that will perform on MPSC II.

Appellant counters that, as the prime contractor, it will have full control over contract performance and program management. Appellant asserts that the proposed managers of the MPSSF support team and the SSR team are Appellant's own employees and will report directly to Appellant's program manager, pursuant to the organizational chart in its proposal. Appellant points out that the proposed program manager has extensive experience with the procuring agency and that, by the time the MPSC II contract begins, he will have spent eight months working on the MPSC I contract. Appellant emphasizes that the teaming agreement between it and TYBRIN provides that Appellant alone is responsible for personnel allocation decisions. Appellant also highlights that the RFP did not require offerors to identify any key personnel in their proposals. Rather, offerors were instructed to identify individuals who had performed on contracts listed in the past performance proposal who would also perform on the MPSC II contract. (RFP, Attachment L-2, ¶ I ("Specify, by name, any key individual(s) who participated in this program and are proposed to support the instant acquisition.").)

I find the Area Office erroneously concluded that Appellant will not control program management. The Area Office offered almost no justification for its conclusion that Appellant's proposed program manager would be unusually reliant upon the proposed deputy program manager. Although it is true that the proposed deputy program manager has more experience on the predecessor contract than the proposed program manager, this does not establish that the

proposed program manager will be unable to discharge his program management duties. Rather, the proposed program manager's own experience supports the conclusion that he is capable of managing the project. The proposed program manager was employed by the Air Force for twenty-four years before joining Appellant—a fact the Area Office acknowledged but then apparently ignored—and will have been working on the MPSC I contract for eight months before taking over the MPSC II contract.

The Area Office also placed undue weight on the fact that Appellant proposed to split the program management task equally with TYBRIN. As the CO points out, considering that there are only two program management positions, an offeror could perform 0%, 50%, or 100% of the program management functions based on labor alone. However, an examination of factors other than the quantity of labor clarifies that Appellant will control program management. It is clear from the organizational chart in the proposal that the proposed program manager, Appellant's own employee, will be primarily responsible for managing the contract. Appellant proposes to provide the managers of the MPSSF support team and the SSR team.[8] The teaming agreement between Appellant and TYBRIN identifies Appellant as the prime contractor and indicates that Appellant will "resolve any performance or allocation issues." (Teaming Agreement, Exhibit A.)

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[8] The organizational chart included in the technical proposal reflects that the MPSSF and SSR managers are connected to the program manager by a solid line. (Proposal Vol. II, at 55.) In its appeal petition, Appellant explains:

> The chart shows [Appellant's proposed program manager] has a solid and direct line reflecting management and control of both primary and vital requirements of the contract. Any TYBRIN role is reflected with a dotted line. This standard organizational chart practice demonstrates that [Appellant] will directly manage all aspects of contract performance. [Appellant's] supervisory managers report directly to [Appellant's proposed program manager]. The managers of the MPSSF and SSR teams (the primary and vital requirements) are [Appellant's] employees who report directly to the [proposed program manager] on a solid line basis. The [proposed deputy program manager] serves off to the side on a dotted line basis.

(Appeal Petition 17-18.) Based on this explanation, the chart demonstrates that the MPSSF and SSR managers will be Appellant's own employees. Nova argues, citing a website for support, that a dotted line in an organizational chart indicates a strong working relationship with an employee who may supervise projects. Nova thus concludes that TYBRIN's deputy program manager "will play an outsize management role." (Nova Response 16.) I see no merit to Nova's argument. A plain reading of the chart supports the conclusion that the deputy program manager's role is secondary to that of the program manager.

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With regard to Nova's argument that Appellant failed to identify its own personnel who would work on the MPSC II contract, Appellant may not be penalized for failing to identify key personnel in its proposal when such information was not requested. Appellant did identify in its past performance proposal eight TYBRIN employees who worked on the MPSC I contract and who would stay on for the MPSC II contract. (Proposal Vol. III, at 10.) However, the inclusion of this information in the past performance proposal does not serve as an indication that Appellant itself will not also staff important contract positions. I conclude the Area Office did not have valid grounds to conclude that Appellant will be unusually reliant upon TYBRIN for program management.

3. "Team Spiral" and Use of MPSC I Practices

The Area Office based its determination in part on the fact that Appellant's proposal includes the logos of both Appellant and TYBRIN on each page and refers to Appellant and TYBRIN collectively as 'Team Spiral." The Area Office also expressed concern that the proposal indicated that Appellant planned to adopt certain techniques and approaches that were developed by TYBRIN during performance of MPSC I.

Appellant contends that use of the term "Team Spiral" is not indicative of unusual reliance, and the Area Office placed undue weight on this factor. Appellant claims that such language is standard industry practice, as is continuing existing systems or techniques from a predecessor contract in an effort to facilitate a smooth transition. The CO agrees, arguing that the Air Force fully expected that the systems, routines, approaches, and techniques that were proven successful in MPSC I would also be used to satisfy the MPSC II contract. Appellant further emphasizes that it does not receive financial assistance from TYBRIN, and it will not share the contract decision-making function with TYBRIN.

OHA case precedent has been inconsistent with regard to whether the use of "team" language and logos may support a finding of unusual reliance. Some cases have dismissed such issues as meaningless puffery. *Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082, at 14 (2009) (rejecting the use of "team" language as a factor supporting unusual reliance where the offeror itself could perform the contract requirements); *Size Appeal of Public Commc'ns Servs., Inc.*, SBA No. SIZ-5008, at 8 (2008) (rejecting the argument that the appearance of the subcontractor's logo on the proposal was indicative of affiliation). However, other cases indicate that the use of "team" language is a legitimate factor to support a finding of affiliation. *See Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010) ("[P]ersistent identification of the 'team' over the prime contractor is one factor that can be used to support a finding of undue reliance.") (citing *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.")). I agree with Appellant that it is very common for offerors to emphasize a "team" in procurement proposals because the offeror is attempting to make itself as attractive as possible to the procuring agency, and the combined talents of multiple firms is often more impressive than a

single firm alone. Accordingly, the use of "team" language, particularly if it does not imply that the proposed subcontractor is the dominant partner,[9] does not establish which entity will perform the contract, nor does it illuminate whether one firm will rely on another to perform the contract. Therefore, the repeated use of the phrase "Team Spiral" is not indicative of a joint venture between Appellant and TYBRIN.

With regard to the systems, techniques, and approaches to be adopted by Appellant, the CO emphasizes that the Air Force intended any successful offeror to adopt the best practices being used for the MPSC I contract. There is no indication that the techniques and systems are proprietary to TYBRIN or that Appellant could not have proposed such techniques without TYBRIN as its subcontractor. The MPSC II contract requires a transition period, and the Air Force apparently expected TYBRIN to relay best practices from MPSC I to the incoming contractor, regardless of the identity of that contractor. Additionally, the Area Office ignored the fact that Appellant is an incumbent subcontractor and would already have been acquainted with the techniques and approaches at issue. Thus, Appellant is not simply appropriating another firm's unfamiliar practices. Rather, Appellant would continue to employ successful techniques it had already witnessed or performed during MPSC I.

The Area Office correctly observed that Appellant's proposal does emphasize a team effort and does contemplate the use of existing MPSC I practices. However, these facts do not establish that Appellant is reliant upon TYBRIN. The use of "team" terminology in the proposal is superficial and has no bearing on the substantive question of reliance. With regard to Appellant's use of MPSC I best practices, the Area Office failed to consider that Appellant is itself an incumbent MPSC I subcontractor and that the Air Force intended any successful contractor to coordinate with TYBRIN to ensure a smooth transition.

4. Incumbent Status

The Area Office also relied upon the fact that TYBRIN is the incumbent prime contractor. The ostensible subcontractor rule requires consideration of this factor. 13 C.F.R. § 121.103(h)(4). Thus, Nova asserts the Area Office properly relied on TYBRIN's incumbency as a factor that supports a finding of an ostensible subcontractor violation.

Appellant maintains that the Area Office failed to recognize that Appellant itself is an incumbent subcontractor on MPSC I. Appellant asserts it engaged TYBRIN as a subcontractor to mitigate risk, which is not in violation of the ostensible subcontractor rule. Appellant and the CO both argue that the Area Office improperly treated TYBRIN's incumbent status as a *per se* bar to TYBRIN's participation on the MPSC II contract.

OHA has determined that subcontracting to the incumbent prime contractor warrants a heightened level of scrutiny. *See Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 13 (2010). Thus, incumbency may be considered evidence of unusual reliance. However, Appellant is correct to

[9] "Teaming" language would be more disturbing if, for example, the proposal had referred to "Team TYBRIN" instead of "Team Spiral".

point out that incumbency itself does not automatically constitute a violation of the ostensible subcontractor rule. Incumbency is only one of several factors that the Area Office must review in making its determination.

Furthermore, the Area Office should have taken into account the fact that Appellant is an incumbent subcontractor on the predecessor contract for similar services. This fact substantially weakens TYBRIN's incumbent status as a factor upon which to base a finding of unusual reliance because Appellant too has obviously demonstrated experience with the contract requirements. Thus, although it was not error for the Area Office to find that TYBRIN's incumbent status is suggestive of unusual reliance, this factor is weakened under the circumstances presented here and cannot alone justify the Area Office's conclusion that TYBRIN is Appellant's ostensible subcontractor.

5. Incumbent Workforce

Appellant and Nova argue at length about whether Appellant's plans for hiring TYBRIN's incumbent non-management personnel is indicative of undue reliance.[10] Appellant maintains that the hiring of incumbent personnel does not constitute undue reliance because it is required by Executive Order 13,495 and because it is common industry practice. The CO agrees that the Air Force expected the successful contractor to hire much of the incumbent workforce. Nova allows that "there is no question that any successful offeror would make offers to incumbent personnel," but maintains that Appellant's approach is problematic because Appellant plans to transfer the entire incumbent workforce from TYBRIN—as well as its facility lease and government furnished equipment (GFE)—pursuant to Appellant's proposal. Appellant disputes this allegation and asserts that it will negotiate terms of employment with each individual employee and will sign its own facilities lease.

Executive Order 13,495 encourages service contractors to offer a right of first refusal of employment to qualified employees performing under a predecessor contract for similar services at the same location. Exec. Order No. 13,495, "Nondisplacement of Qualified Workers Under Service Contracts," 74 Fed. Reg. 6103 (Feb. 4, 2009). The Executive Order states that "[t]he Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees." *Id.* Accordingly, insofar as OHA may have previously suggested that the hiring of incumbent non-management personnel is indicative of undue reliance under the ostensible subcontractor rule, such an interpretation plainly is no longer sensible in light of Executive Order 13,495.

Nonetheless, Nova claims that Appellant plans not only to offer a right of first refusal to TYBRIN's employees, but to transfer the entire incumbent workforce from TYBRIN. I see no

[10] It does not appear that the Area Office based its decision on this issue. The Area Office merely mentioned that TYBRIN's MPSC I personnel were not guaranteed employment under the MPSC II contract and that TYBRIN would retain some of its own employees for performance of the MPSC II contract. (Size Determination 5.) Accordingly, whether or not Appellant plans to hire other non-management incumbent TYBRIN personnel is ultimately immaterial to deciding whether the Area Office's determination is clearly erroneous.

merit to this argument. The RFP required Appellant to propose a transition plan that addressed personnel. (RFP 38.) Appellant's proposal does use the word "transfer" in explaining its transition plan with regard to personnel, facilities, and equipment. (Proposal Vol. II, at 69.) However, a fair reading of the proposal indicates that Appellant plans to retain incumbent employees, not merely "transfer" them unilaterally without any input from the employees themselves. Appellant plans to utilize incumbent SSRs (employed by Appellant, TYBRIN, and BAE), transition much of the current MPSC I workforce to MPSC II, and hire new personnel to replace employees who are not transitioned to MPSC II. (Proposal Vol. II, at 10-13, 71-76.) Appellant recognizes that some "loss of employees who do not want to work for the winning contractor" is possible, but contends it offers a low risk of losing employees. (Proposal Vol. II, at 11.) The fact that Appellant anticipates that some incumbent employees may not be transitioned to the MPSC II contract supports the conclusion that Appellant plans to offer positions to employees individually, and those employees may choose to accept or reject those offers.

Appellant's proposal identifies the capture of qualified incumbent staff as a top priority. (Proposal Vol. II, at 13.) The proposal indicates that Team Spiral is in the best position to retain incumbent staff because Appellant and TYBRIN together employ [XX]% of the MPSC I workforce. The proposal emphasizes that this offers "a larger pool of previously qualified MPSC-experienced workforce and a lower transition risk due to ensured talent pool." (Proposal Vol. II, at 13.) This supports Appellant's claim that it will hire employees individually for the MPSC II contract from the incumbent workforce pool (employed by Appellant, TYBRIN, and BAE). There is nothing in the proposal to indicate that Appellant plans to merely transfer employees en masse from TYBRIN.

Nova also contends that several provisions in Appellant's teaming agreement with TYBRIN support a finding of unusual reliance. In particular, the agreement provides that TYBRIN may terminate the agreement if the RFP was not issued as a small business set-aside. Appellant counters that this arrangement is common and was advantageous to Appellant because Appellant potentially could secure subcontract work from TYBRIN if the procurement was not a set-aside. Nova also asserts the teaming agreement prohibits Appellant from soliciting TYBRIN's employees without TYBRIN's consent, which may allow TYBRIN some measure of control over how the MPSC II contract will be performed. Appellant explains that the provision merely requires that Appellant cannot fill MPSC II positions with TYBRIN employees until those employees have terminated employment with TYBRIN.

With regard to Nova's first argument, the provision in question provides that the teaming agreement will be terminated if the RFP

> is changed from a set-aside to full and open competition. In this event, if TYBRIN elects to compete as a prime contractor, it will execute a new teaming agreement with [Appellant] as a small business strategic team member and provide [Appellant] with a minimum level of effort requirement of [XX] – [XX] percent of the revenue to support this effort.

(Teaming Agreement ¶ 5.1(4).) I see no basis to conclude that this provision establishes that Appellant is reliant upon TYBRIN. Rather, as Appellant points out, the provision appears to be intended to guarantee that Appellant would receive a sizable subcontract if TYBRIN were to be awarded the MPSC II prime contract. I cannot conclude that Appellant's efforts to protect its own business interests somehow indicate that TYBRIN will control the contract now that it has been awarded to Appellant.

With regard to Nova's argument that TYBRIN can control the contract by prohibiting Appellant from hiring its incumbent employees, the provision in question provides as follows:

> Unless otherwise agreed to in writing, the Parties hereto agree that during the term of this Agreement and for a period of one (1) year after the expiration or termination of this Agreement, neither Party shall knowingly solicit for employment any person employed by the other working under the Agreement or any contract and/or subcontract that may be awarded as a result of this Agreement.

(Teaming Agreement ¶ 14.) Nova correctly observes that this provision restricts Appellant from soliciting personnel currently employed by TYBRIN without TYBRIN's consent. There is, however, no reason to believe that TYBRIN plans to refuse consent for Appellant to hire TYBRIN's MPSC I personnel now that Appellant has been awarded the MPSC II prime contract. Moreover, as Appellant points out, even assuming TYBRIN were to do so, this provision would merely require that individual employees cease employment with TYBRIN before Appellant seeks to hire them. Employee separation from TYBRIN might occur through natural expiration of the MPSC I contract. Supposing, however, that Appellant were prevented from hiring any of TYBRIN's MPSC I employees, it still does not follow that Appellant would be reliant upon TYBRIN. Rather, Appellant could then find other personnel to perform the MPSC II contract and not hire as large a percentage of the incumbent workforce as originally anticipated. Accordingly, I am unpersuaded by Nova's arguments that the teaming agreement demonstrates that Appellant is unusually reliant upon TYBRIN.

6. Division of Work

Nova asserts that neither the proposal nor the teaming agreement assigns discrete tasks to TYBRIN. Appellant counters that the record clearly demonstrates that Appellant commits to performing [XX]% of the total work, as well as [XX]% of each of the crucial functions (operating the MPSSF and providing the SSRs). Furthermore, the specific tasks required by the MPSC II contract will only be defined in individual task orders issued after award of the base contract, so pre-assigning discrete tasks would be premature if not completely pointless. Indeed, the Area Office itself acknowledged that because MPSC II is an IDIQ contract, "it is effectively impossible to know precisely what work is required in what locations" until task orders are issued. (Size Determination 5.)

Nova cites *Size Appeal of The Analysis Group, LLC*, SBA No. SIZ-4814 (2006), which

also involved an IDIQ contract. In *The Analysis Group*, the failure to assign discrete tasks was a factor used to support a finding of unusual reliance. However, OHA observed that the prime contractor did not assign discrete tasks to its subcontractor, despite the fact that discrete tasks were identified in the proposal. Thus, the prime contractor "made no effort to identify which tasks each firm will perform, even though this information must be available." *Id.* at 6-7.

In contrast, Appellant's proposal did not identify specific discrete tasks, but focused on the broad functions of providing SSRs and MPSSF support. Accordingly, although Nova is correct that a prime contractor's failure to assign discrete tasks to its subcontractor can support a finding of unusual reliance, I agree with Appellant and the Area Office that in the case of an IDIQ contract such as the one at issue, the lack of assigned discrete tasks is less significant because the specific required tasks simply are not known.

IV. Conclusion

Appellant has established that the size determination is clearly erroneous. Appellant, the prime contractor, will perform the "primary and vital" contract requirements, and the record does not support the conclusion that Appellant would be unusually reliant upon TYBRIN. I therefore find that the Area Office clearly erred in concluding that Appellant and TYBRIN share an ostensible subcontractor relationship. Accordingly, this appeal is GRANTED, and the size determination is REVERSED. Because Appellant is not affiliated with TYBRIN, and Appellant's own receipts do not exceed the applicable size standard, Appellant is an eligible small business for this procurement.

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

KENNETH M. HYDE
Administrative Judge