

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

SIZE APPEAL OF:

National Sourcing, Inc.

Appellant,

Appealed From
Size Determination No. 3-2011-111

SBA NO. SIZ-5305

Decided: December 7, 2011

APPEARANCES

Antonio R. Franco, Esq., and Steven J. Koprince, Esq., Piliero Mazza PLLC,
Washington, D.C., for Appellant

DECISION¹

I. Introduction and Jurisdiction

On September 15, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-111 finding National Sourcing, Inc. (Appellant) other than small for the procurement at issue. The Area Office determined that Appellant's relationship with Booz Allen Hamilton (BAH) violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the Area Office committed several errors. 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. 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.

¹ This decision was initially issued on November 29, 2011. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity 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.

II. Background

A. Solicitation

On June 6, 2011, the U.S. Department of the Army, Mission and Installation Contract Command in Fort Knox, Kentucky (Army) issued Solicitation No. W9124D-11-R-0031 (RFP) seeking administrative support services. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 561990, All Other Support Services, with a corresponding size standard of \$7 million in average annual receipts.

The Performance Work Statement (PWS) explains that the successful contractor must provide support services required by the Army Continuing Education System (ACES), which aims to “vigorously promote lifelong learning opportunities to sharpen the competitive edge of the Army by providing and managing quality self-development programs and services.” (PWS ¶¶ 1.1.1, 1.1.3.) The contractor is responsible for all “planning, programming, administration, management, supervision, and execution necessary to provide specified services.” (PWS ¶ 1.1.4.1.) The PWS identifies nine functional areas under which support services will be provided: contract operations management, administrative and program support for the education services career program, business analysis for management and program support, ACES office operations support, Army personnel testing (APT), GoArmyEd² program support, postsecondary school management, tuition management team support, and school invoice processing. (PWS ¶¶ 1.1.4.4, 5.1-5.9.)

Required support functions could include, but were not limited to: researching cases and processing inquiries within specified timeframes; management, tracking, and reporting of escalated calls or inquiries; researching cases and formulating recommendations on next course of action; drafting and preparing decision documents for Government approval, receiving, researching, recommending, and tracking various financial activities associated with the payment/reimbursement of tuition assistance funds; and researching, drafting, and preparing response to inquiries from Congress, other Government officials, soldiers, private citizens, and educational institutions. (PWS ¶ 1.1.4.5.) The contractor must provide qualified personnel to perform all the required support tasks. (PWS ¶ 1.2.5.) The contractor is also responsible for preparing various documents and reports, including standard operating procedures, contractor manpower reports, and monthly status reports. (PWS ¶ 1.2.7.) The Government is to provide all mission essential supplies, facilities, and equipment. (PWS ¶¶ 3, 4.)

The PWS sets forth in detail numerous specific tasks required under each functional area identified above. (PWS ¶¶ 5.1-5.9.) The requirements include a wide array of primarily administrative requirements, such as: attending and scheduling meetings, coordinating deadlines, interfacing with Army staff, preparing and reviewing documents and reports, conducting research, answering telephone calls, ordering supplies, maintaining records, reviewing policies

² GoArmyEd.com “gives Soldiers virtual access to request Army Tuition Assistance (TA) online” and “provides a one-stop location for managing college education and TA benefits.” (PWS ¶¶ 5.5.1.)

and procedures, making recommendations and providing guidance on various matters, managing inventory, managing user accounts for online systems, responding to various types of records requests, processing checks and reviewing financial reports, and tracking information in databases. *Id.*

Offerors were instructed to submit a proposal consisting of four volumes: contract, price, mission capability, and past performance. (RFP 39.) The price proposal was to contain pricing information for the base year and four option years. (RFP 41.) Offerors were instructed to provide a pricing table for each CLIN to identify such information as the labor category, wage rate, hours, benefits, corresponding PWS task, and total price for each employee with relation to that CLIN. (RFP 41-42.) Offerors were also required to submit a “cost/price rationale” that contained narrative explanations used in deriving price. (RFP 41.) The mission capability proposal was to be organized by three subfactors: staffing plan, management plan, and experience. (RFP 43.) The staffing plan was required to set forth the proposed organizational structure and to include “resumes including relevant experience for personnel proposed for leadership positions.” *Id.* The management plan was to explain the offeror's management strategy and include a quality control plan. *Id.* The experience section had to include an explanation of how the offeror's relevant contracts were similar to the PWS. The offeror was also instructed to “include experience data of its proposed major subcontractors.” *Id.* The solicitation specified that “[s]ubcontractor experience may not be substituted for experience of the offeror in overall management of a project.” *Id.*

Evaluation was based on three factors: mission capability, past performance, and price. (RFP 45-47.) The mission capability factor was composed of three subfactors: staffing plan, management plan, and experience. Each of the three mission capability subfactors received a rating of acceptable or unacceptable, and if any subfactor received an unacceptable rating, the offeror would be ineligible for award. (RFP 45-46.) Past performance information was assessed based on recency and relevancy. To be recent, a project must have been performed within the previous three years. To be relevant, the effort must have been “similar in complexity and scope.” (RFP 46.) Past performance would be rated low risk, moderate risk, high risk, or neutral if the offeror had no relevant past performance. (RFP 47.) Award was to be made to the responsible offeror whose proposal met the solicitation requirements and represented the lowest priced technically acceptable offer. (RFP 45.)

B. Appellant's Proposal

On July 5, 2011, Appellant submitted its completed proposal, self-certifying as a small business. The proposal identifies Appellant as the prime contractor and BAH as the subcontractor, and refers to both firms collectively as “Team NSI.” (Proposal Vol. II, at 1-4.) The first section of the price proposal includes a spreadsheet for each contract line item number (CLIN) for the base year and all option years. (Proposal Vol. II, Section 1.) Each spreadsheet includes twenty-three full time equivalents (FTEs), lists the functional area in which the FTE will be involved, identifies which firm (Appellant or BAH) will staff each position, gives the fully loaded labor rates for each position, indicates how many hours each employee will spend performing the work required by the CLIN at issue, and provides what percentage of each CLIN will be performed by Appellant and by BAH. *Id.*

Each spreadsheet identifies six positions to be filled by BAH: (1) deputy program manager; (2) team lead for APT program support, postsecondary school management, and Army/American Council on Education Registry Transcript System (AARTS) support; (3) school support/transcript specialist for APT program support, postsecondary school management, and AARTS support; (4) team lead/casualty notification for GoArmyEd program support; (5) support specialist/customer relationship management (CRM) case manager for GoArmyEd program support; and (6) support specialist/exception to policy (ETP) for GoArmyEd program support. *Id.* The spreadsheets for the base year CLINs provide that the labor rate for the program manager is \$[XXXX], and the labor rate for the deputy program manager is \$[XXXX]. The final spreadsheet is a summary of all CLINs over the base year and all option years and indicates that, as a percentage of total dollar value, Appellant will perform approximately 66% of the work, and BAH will perform approximately 34%. *Id.*

The price proposal also includes BAH's own sanitized cost proposal, Appellant's explanation of its cost/price rationale, and Appellant's firm fix rate development spreadsheet, which illustrates Appellant's cost build up information. (Proposal Vol. II, Sections 2-4.) BAH's cost proposal confirms that BAH will provide six FTEs and breaks down the cost of those employees for each year of performance. (Proposal Vol. II, Section 2.) Appellant's cost rationale provides information on Appellant's compliance with the Service Contract Act, wage determination labor categories, base pay, health and welfare benefits, holiday and vacation benefits, taxes and insurance, general and administrative expenses, and profit. (Proposal Vol. II, Section 3.) Appellant also specifies that it will perform over 50% of the work required by the contract. *Id.* The firm fix rate development spreadsheets present the same information in table format for each period of performance. (Proposal Vol. II, Section 4.)

Appellant's mission capability proposal includes a staffing plan, a management plan, and a summary of experience, as required by the RFP. The staffing plan indicates that Appellant and BAH will staff the leadership roles, as well as several support positions, and the remaining support positions will be filled by the incumbent contractor's staff. (Proposal, Vol. III, at 2.) The staffing plan includes an organizational chart, which depicts the program manager at the top, with the deputy program manager directly beneath him. The narrative explanation accompanying the chart provides that the program manager is responsible for "overall performance of the contract and all task areas and is the primary contact for the ACES leadership," whereas the deputy program manager supports the program manager and "is involved with the day-to-day performance of the functional task areas and overall quality control." (Proposal, Vol. III, at 3.) The staffing plan includes the resumes of several proposed key personnel: the program manager, the deputy program manager, the team lead for GoArmyEd, and an information technology (IT) support employee. The proposed program manager was employed by [XXXXXX] at the time the proposal was submitted, and his resume indicates he has over twenty-six years of experience in [XXXX] management and planning. (Proposal, Vol. III, at 2-A.) Except for the proposed program manager, each of the other proposed key personnel was employed by BAH at the time the proposal was submitted. (Proposal, Vol. III, at 2-B to 2-D.)

The management plan states that the program manager reports directly to Appellant's executive management and "possesses the authority to respond directly to ACES leadership on

any program matter.” (Proposal, Vol. III, at 5.) The management plan provides a description of how Appellant and BAH will manage each task set forth in the PWS: program operations management, support for the education services career program, ACES office operations support, APT program support, postsecondary school management, and AARTS support, GoArmyEd program support, tuition management team support, and school invoice processing support. (Proposal, Vol. III, at 6-20.) The management plan also includes a quality control plan. (Proposal, Vol. III, at 3-A to 3-C.)

The experience section of the mission capability proposal sets forth contracts Appellant believes demonstrates its own and BAH's experience in performing tasks similar to those required by the PWS. The proposal details four contracts on which Appellant was the prime contractor and three contracts under which BAH performed work similar to that required by the PWS. (Proposal, Vol. III, at 21-24.) The past performance proposal contains more detailed information about these same contracts. (Proposal Vol. IV.) The past performance proposal also emphasizes Appellant's experience in managing contracts covered by the Service Contract Act under which Appellant “served as prime contractor for diverse subcontractor delivery teams that include large companies.” (Proposal, Vol. IV, at 1.)

C. Contract Award and Protest

On August 3, 2011, the CO notified all offerors that Appellant was the apparent successful offeror. On August 5, 2011, MES, Inc. (MES) a disappointed offeror, protested Appellant's size. MES alleged that Appellant is other than a small concern for the applicable size standard and that Appellant is affiliated with a number of different entities. MES's primary contention was that Appellant is affiliated with the incumbent contractor, Science Applications International Corporation (SAIC), for purposes of this procurement under the ostensible subcontractor rule. MES also alleged that Appellant is affiliated with BAH and other firms that are listed on Appellant's website as business partners.

D. Size Determination

On September 15, 2011, the Area Office issued its size determination. After rejecting most of MES's protest claims, the Area Office examined the teaming agreement and the prime/subcontractor arrangement between Appellant and BAH.³ The Area Office noted that Appellant receives no financial assistance from BAH and that neither firm has any direct control over the other. (Size Determination 3.) The teaming agreement identifies Appellant as the prime contractor and BAH as the subcontractor and provides that Appellant will prepare the proposal, with assistance from BAH as requested. The subcontract agreement indicates that BAH will provide six employees to staff the contract, including the deputy program manager.

The Area Office next analyzed Appellant's proposal. The proposal explains that twenty-three full time employees will be needed to perform the contract requirements. The proposal indicates that Appellant will provide seventeen employees, including the program manager. Of

³ The Area Office did not refer to BAH by name, but instead referenced only Appellant's “large business teammate/subcontractor” for the subject procurement.

the four key personnel for whom resumes were provided, all are employed by BAH, except the proposed program manager. The Area Office explained that the proposed program manager was employed by [XXXXXX] at the time the proposal was submitted and was not hired by Appellant until after the date to determine size.

The Area Office next observed that, according to Appellant's price proposal, the program manager and deputy program manager would be paid similar salaries, which "implies that their importance/duties/skills are very similar, if not equal." (Size Determination 4.) The Area Office also found that the proposal indicates that Appellant will provide one team lead, and BAH would provide two team leads, both of whom are more highly paid than Appellant's team lead. The remaining required employees are administrative and support personnel, and the proposal states that Appellant will provide fifteen of these employees. The proposal also provides that Appellant plans to fill these positions with incumbent contractor staff, but if negotiations are unsuccessful, the positions will be filled by "NSI Team individuals." The Area Office determined that "there is no real guarantee that all 15 will actually be [Appellant's] employees." *Id.*

Based upon these facts, the Area Office reasoned that even though BAH would provide only six employees, three of those employees would hold positions of control, and the relationship between Appellant and BAH is similar to a joint venture because management of the contract would be shared. The Area Office thus concluded that Appellant would be unusually reliant upon BAH to perform the contract, and the firms are affiliated for purposes of the procurement at issue. Therefore, Appellant's average annual receipts must be combined with BAH's average annual receipts to determine size. Because BAH is known to be a large business, the Area Office determined Appellant is other than small under the applicable size standard.

E. Appeal Petition and Motion to Admit New Evidence

On September 29, 2011, Appellant filed its appeal petition and a Motion to Admit New Evidence. Specifically, Appellant seeks to admit: (1) an email from its proposed program manager authorizing Appellant to submit his resume with the proposal, and (2) a memorandum from BAH providing that the deputy program manager will be paid an annual salary of \$[XXXX]. Appellant claims these documents respond to allegations first made in the size determination: (1) that Appellant's proposed program manager was not employed by Appellant as of the date to determine size and (2) that the program manager and deputy program manager will be paid equivalent salaries. Appellant argues that good cause exists to admit these documents because it never had the opportunity to respond to the allegations set forth above. Appellant explains that the Area Office only asked whether the proposed program manager was currently Appellant's employee, not whether he had committed to working for Appellant before the proposal submission date. Appellant also asserts that the Area Office never asked Appellant about the respective salaries of the program manager and deputy program manager. Accordingly, Appellant requests that the documents described above be admitted to refute these new factual allegations.

In its appeal petition, Appellant sets forth the history of this matter and contends that the size determination contains several clear errors. First, Appellant challenges the Area Office's reasoning that because the labor rates for the program manager and deputy program manager are

similar, the positions must be similar in terms of responsibility and importance. Appellant argues it was improper for the Area Office to infer from compensation levels that the deputy program manager will share control over the contract. Appellant emphasizes that, as set forth in its proposal, the program manager is responsible for all aspects of contract performance.

Appellant also explains that the rates in its price proposal are not salaries, but rather fully loaded labor rates, which include benefits and overhead costs. Appellant contends that the program manager will actually be paid a higher salary than the deputy program manager; their salaries are \$[XXXX] and \$[XXXX], respectively. Appellant also emphasizes that its proposed program manager has over twenty years of relevant experience. Appellant relies heavily on *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011), to conclude that the Area Office erred in inferring that the program manager would rely upon the deputy program manager.

Appellant also disputes the Area Office's conclusion that Appellant would share management of the contract with BAH. Appellant argues that it will maintain exclusive control over the contract. Appellant notes that the ostensible subcontractor rule does not prohibit sharing of the management function, as long as ultimate control remains with the prime contractor. Appellant highlights the organizational chart in its proposal, which indicates that deputy program manager reports to the program manager, who in turn reports to Appellant's management. Appellant also claims that the fact that BAH will provide two team leads, whose resumes were submitted with the proposal, does not support a finding of a violation of the ostensible contractor rule because those employees too report to the program manager. Further, Appellant maintains that it is providing three other employees who are on the same hierarchical level as BAH's two team leads. Appellant explains that the solicitation did not require it to submit resumes for those individuals, so it should not be penalized for failing to do so.

Appellant next contends the Area Office erred in determining that the proposed program manager was required to be Appellant's employee at the time the proposal was submitted. On the contrary, Appellant asserts that neither the ostensible subcontractor nor OHA case law contains any such requirement. In fact, Appellant argues it would be impractical to hire employees to staff a contract before the firm is awarded the contract. Appellant emphasizes that its proposed program manager is not a former employee of BAH, so hiring him cannot demonstrate undue reliance on BAH. Appellant distinguishes this case from *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR), where the challenged firm had not received commitment from a proposed managerial employee prior to submitting its proposal and OHA found unusual reliance. Appellant explains that the instant solicitation did not require a letter of commitment, so it did not submit one with its proposal, but Appellant did have an agreement with its proposed program manager to employ him should the firm be awarded the contract. Moreover, the proposed program manager is now employed by Appellant.

As indicated in the proposal, Appellant agreed to negotiate with incumbent employees to staff the contract. Appellant claims it was erroneous for the Area Office, based on that fact, to expect a "guarantee" that Appellant would staff the contract with its own employees. Appellant argues that whether or not it hires the incumbent employees, the proposal indicates that the

contract will be staffed predominantly with individuals employed by Appellant, and BAH will provide only limited support personnel. Appellant also points out that, pursuant to a recent executive order,⁴ it was required to offer positions to incumbent employees. Appellant contends it should not be penalized for complying with the executive order, especially where BAH was not the incumbent contractor.

Finally, Appellant contends the Area Office failed to examine all aspects of the relationship between Appellant and BAH. Specifically, Appellant points to several factors it claims mitigates the Area Office's conclusion that Appellant violated the ostensible subcontractor rule: Appellant is not receiving financial assistance from BAH; BAH will provide only 26% of the total contract staff (*i.e.*, six of twenty-three FTEs); the teaming agreement between the firms does not give BAH the ability to control Appellant; BAH is not the incumbent contractor; Appellant was primarily responsible for the proposal; the subcontract between Appellant and BAH confirms that Appellant will control the contract; Appellant will not hire any BAH employees to perform the contract; and Appellant has sufficient experience to manage the contract. Although the Area Office recognized many of these facts, it still erroneously concluded that Appellant and BAH violated the ostensible subcontractor rule, according to Appellant. Appellant requests that OHA reverse the size determination.

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. New Evidence

New evidence is admissible before OHA if the party seeking to admit the evidence files a motion and establishes good cause for the admission. 13 C.F.R. § 134.308(a)(2). Appellant contends due process requires admission of the new evidence it offers. With regard to the memorandum from BAH providing the deputy program manager's salary, there is no evidence in the record that the Area Office ever asked Appellant about the salary of the deputy program manager. Because Appellant was never given the opportunity to respond to the Area Office's contention that the program manager and the deputy would be paid similar salaries, there is good cause to admit Appellant's rebuttal evidence.

With regard to the email that supports Appellant's contention that the proposed program manager agreed to work for Appellant before the proposal submission date, the record reflects

⁴ Exec. Order No. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009).

that the Area Office expressed concern about the proposed program manager's employment status: "His resume indicates that he works for [XXXXXX] and not for [Appellant] or BAH. Who are the key personnel for this procurement from [Appellant] and BAH and what are their positions?" Appellant responded: "Program manager ... works for [Appellant] directly the only other position we considered key is the Deputy who works for BAH." Email exchange between [XXXXXXXX], Size Specialist, U.S. Small Business Administration, and Steve Bracciale, Vice President for Business Development, National Sourcing, Inc. (Sept. 8, 2011). Later, Appellant submitted information indicating that the proposed program manager was employed by Appellant as of August, 2011.

Accordingly, I find no evidence in the record that the Area Office ever specifically requested confirmation that the proposed program manager had committed to employment with Appellant. Additionally, the communications clearly evince that Appellant thought it had sufficiently responded to the Area Office's concerns, and the Area Office did not ask any follow up questions with regard to the proposed program manager's employment status. Consequently—and because Appellant's new evidence will not enlarge the issues or result in unfair prejudice—I find there is good cause to admit the evidence. Accordingly, I GRANT Appellant's motion and ADMIT the new evidence.

C. Analysis

The "ostensible subcontractor" rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). To determine whether 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. *Id.*; *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). The purpose of the 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). Ostensible subcontractor inquiries are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

In this case, there is no dispute that Appellant would be performing the "primary and vital" contract requirements. The Area Office based its determination solely on the grounds that Appellant "is unduly reliant on [its] large business subcontractor." (Size Determination at 4.) Furthermore, Appellant and BAH would be performing the same types of services under the contract, but Appellant would manage the contract and perform the majority of the work. Under such circumstances, OHA has repeatedly concluded that the prime contractor is performing the primary and vital requirements. *Size Appeal of Spiral Solutions and Techs., Inc.*, SBA No. SIZ-5279, at 20-21 (2011) (citing *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 6-7 (2011); *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 8-9 (2010)).

In finding that Appellant would be unusually reliant upon BAH to perform the subject contract, the Area Office focused primarily upon Appellant's management and staffing plans. First, the Area Office emphasized that the proposed program manager was not employed by Appellant at the time Appellant submitted its proposal. Rather, that individual was employed by [XXXXXX] and was identified as a contingent hire who would join Appellant upon award of the contract. Appellant argues it would have been impractical to hire the proposed program manager before contract award, but it did receive a commitment from him to serve as program manager upon award. In support of this assertion, Appellant submits with its appeal an email exchange dated June 28, 2011, between Appellant's Vice President for Business Development and the proposed program manager. (Appeal Petition Ex. A.) Via email, Appellant's Vice President for Business Development requested that the proposed program manager submit his resume for inclusion in Appellant's proposal. The proposed program manager responded by sending his resume to Appellant. Appellant also notes that the proposed program manager did in fact subsequently join Appellant's staff.

I agree with Appellant that the mere fact that Appellant identified a contingent hire—who has no connection at all with the proposed subcontractor— as program manager does not signify that Appellant is reliant upon that proposed subcontractor. OHA has recognized that undue reliance may be found when a prime contractor chooses to employ key personnel from a subcontractor, “rather than proposing to use its own employees or to hire new employees for the positions.” *Size Appeal of Alutiiq Educ. and Training, LLC*, SBA No. SIZ-5192, at 11 (2011) (finding unusual reliance where the challenged firm proposed to hire two key employees from the alleged ostensible subcontractor). In the instant case, though, the proposed program manager was an employee of [XXXXXX] and thus was not associated with BAH. Hiring a program manager from [XXXXXX] does not demonstrate Appellant's reliance upon BAH, and this factor does not support the conclusion that BAH is Appellant's ostensible subcontractor.

The Area Office also determined that because the labor rates for the program manager and the deputy program manager are similar, the positions entail similar responsibilities. This conclusion is erroneous and unreasonable. The fact that a contractor plans to invoice the Government for two positions at similar labor rates in no way establishes that the two positions must perform the same duties or exercise the same degree of control over a project. The proposal distinguishes the responsibilities of each position. The program manager is responsible for overall contract management, serves as the primary contact for ACES, and is authorized to interact directly with ACES on any program matter. (Proposal, Vol. III, at 3, 5.) The deputy program manager supports the program manager, is involved with day-to-day contract performance, and is responsible for quality control. (Proposal, Vol. III, at 3.) It was clearly erroneous for the Area Office to conclude that the two positions were equivalent based solely on their relative labor rates and without any analysis of their substantive duties and responsibilities.

Furthermore, as Appellant explains, the Area Office's conclusion is based on the incorrect premise that the program manager and the deputy program manager “are being paid very similar amounts.” (Size Determination 4.) Appellant's proposal, however, contains fully-loaded labor rates, not salaries, for each employee. (RFP 41-42; Proposal Vol. II, Section 1.) With its appeal petition, Appellant now submits documentation showing that the deputy program manager will be paid substantially less than the program manager. (Appeal Petition Ex. B.) Thus, the Area

Although it is true that BAH will provide some of the managerial personnel, Appellant's proposal and the subcontract between the firms nevertheless make clear that Appellant will maintain exclusive control over the contract. The proposal provides that the program manager will have exclusive control over contract performance and will report to Appellant's executive management. (Proposal, Vol. III, at 5.) The organizational chart included in the proposal supports this. The chart depicts the program manager alone at the top of the contractor's team, with the deputy program manager directly beneath him and mid-level leaders (including BAH's two team leads) below the deputy. (Proposal, Vol. III, at 3.) The mid-level leaders are identified by the functional area(s) of the PWS for which each position would be responsible. *Id.* The fact that BAH is supplying the deputy program manager and two mid-level team leads cannot support the conclusion that BAH could control the contract when Appellant itself will employ the program manager, who will have complete control over contract performance.

The Area Office also took issue with Appellant's staffing plan. The Area Office noted that seventeen of the twenty-three positions under the contract would be non-managerial, and Appellant had proposed to fill fifteen of those positions with its own personnel. (Size Determination 4.) The proposal indicated that Appellant planned to fill these positions by hiring incumbent employees if possible, but if that effort were unsuccessful, the positions would then be filled by other “NSI Team individuals.” (Proposal, Vol. III, at 2.) The Area Office remarked that “there is no real guarantee that all 15 will actually be [Appellant's] employees.” *Id.*

The size determination does not clearly articulate why the Area Office considered

Appellant's staffing plan to be problematic. It appears, however, that the Area Office was troubled by Appellant's stated intention to hire the incumbent workforce. Appellant counters that:

nothing in the ostensible subcontractor rule, or OHA's case law, requires a small business to staff a contract with employees who were on the contractor's payroll as of the date of proposal submission. Such a requirement would be illogical and impractical, as it would force a small business to hire its employees before submitting its proposal and retain the employees throughout the proposal evaluation process—which can take months—even if the small business had no work for the employees to perform.

(Appeal Petition 12-13.)

I agree with Appellant that the Area Office had no reasonable grounds to object to Appellant's staffing plan. OHA has long recognized that it is common practice in Government services contracts for successor companies to hire an incumbent's employees. *E.g. Size Appeal of Ideal Servs., Inc.*, SBA No. SIZ-3317 (1990). Further, the recently-promulgated Executive Order 13,495 specifically encourages contractors to offer a right of first refusal of employment to qualified incumbent non-managerial employees. In light of widespread industry practice and the Executive Order, OHA has opined that the hiring of incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance. *Size Appeal of Bering Straights Logistics Servs., LLC*, SBA No. SIZ-5277, at 7 (“The hiring of incumbent personnel is expected, required by Executive Order 13,495, and does not constitute undue reliance.”); *Spiral Solutions*, SBA No. SIZ-5279, at 28 (“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.”); *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260, at 7 (2011) (“I recognize that, as a result of this [Executive] Order, the hiring of incumbent employees can no longer be considered a meaningful indicia of unusual reliance.”)

Moreover, the Area Office appears to have overlooked the crucial fact that BAH is not the incumbent contractor and did not employ the incumbent personnel. In case decisions prior to Executive Order 13,495, OHA recognized that the hiring of incumbent personnel from the alleged ostensible subcontractor might be evidence of undue reliance. *E.g., Size Appeal of The Analysis Group, LLC*, SBA No. SIZ-4814, at 6 (2004) (“This Office has held that where the ostensible subcontractor is the incumbent and the challenged firm proposes to hire a substantial number of the incumbent's employees, this constitutes strong indicia of affiliation.”); *Size Appeal of Kira, Inc.*, SBA No. SIZ-4360, at 8 (1999); *Size Appeal of InfoTech Enters., Inc.*, SBA No. SIZ-4346, at 13-14 (1999). OHA has not, however, previously determined that hiring of incumbent personnel from organizations that are not associated with the alleged ostensible subcontractor could be probative of undue reliance upon the subcontractor.⁵ Accordingly, the

⁵ In *Four Winds*, OHA found a violation of the ostensible subcontractor rule and noted that the prime contractor had proposed to hire the incumbent workforce of a firm that was not the alleged ostensible subcontractor. There were, however, many other factors that contributed to the result in that case. OHA specifically determined that the subcontractor “will perform the [cont.]

fact that Appellant planned to hire incumbent employees from sources other than BAH does not establish that Appellant would be unusually reliant upon BAH.

Finally, I agree with Appellant that the Area Office failed to fully consider aspects of the relationship between the firms that weigh against finding a violation of the ostensible subcontractor rule. In particular, the Area Office ignored Appellant's relevant corporate experience. The experience section of the mission capability proposal and the past performance proposal both include information on four of Appellant's own recent and relevant contracts. (Proposal, Vol. III, at 21-23; Proposal Vol. IV.) Also, the solicitation specified that subcontractor experience could not be substituted for the prime contractor's experience. (RFP 43.) The Area Office should have taken Appellant's experience into account in evaluating all aspects of the relationship between Appellant and BAH. Based upon all of this information, I find the record does not support the Area Office's conclusion that BAH is Appellant's ostensible subcontractor for this procurement.

IV. Conclusion

Appellant successfully demonstrated that the size determination was based upon material errors. The Area Office improperly concluded that Appellant would be unusually reliant upon BAH to carry out the contract. I therefore GRANT this appeal and REVERSE the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

primary and vital contract tasks,” and there was “absolutely no evidence in the record supporting the conclusion that [the prime contractor] *will* perform any of the work required by this contract.” *Four Winds*, SBA No. SIZ-5260, at 5, 7.