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

| | |
|---|---|
| SIZE APPEAL OF:<br><br>Santa Fe Protective Services, Inc.,<br><br>Appellant,<br><br>RE: Chenega Security & Support Solutions, LLC<br><br>Appealed From<br>Size Determination No. 2-2011-161 | SBA No. SIZ-5312<br><br>Decided: January 10, 2012 |

## APPEARANCES

Johnathan M. Bailey, Esq., Bailey & Bailey, P.C., San Antonio, Texas, for Appellant Santa Fe Protective Services, Inc.

William K. Walker, Esq., Walker Reausaw, Washington, D.C., for Chenega Security & Support Solutions, LLC

Ellen Lamp, Contracting Officer, for the National Aeronautics and Space Administration

## DECISION[1]

### I. Introduction & Jurisdiction

On September 29, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-161 finding Chenega Security & Support Solutions, LLC ($CS^3$) to be an eligible small business for a procurement that was set-aside for small businesses. On October 14, 2011, Santa Fe Protective Services, Inc. (Appellant), which had originally protested $CS^3$'s size, appealed the size determination. Appellant contends that $CS^3$'s proposal violates the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). Additionally, Appellant maintains that the Area Office improperly refused to consider whether $CS^3$ and its parent Alaskan Native Corporation (ANC)

[1] This decision was initially issued on December 22, 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 withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

meet the requirements of 13 C.F.R. § 124.109(c)(3)(ii). For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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.

## II. Background

### A. Solicitation, Proposal, and Protest

On February 22, 2011, the National Aeronautics and Space Administration (NASA) issued Solicitation No. NNK11361110R (RFP) for protective services at Kennedy Space Center (KSC), Florida. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services, with an associated size standard of $18.5 million in average annual receipts. Initial proposals were due April 22, 2011, and final proposal revisions were due August 31, 2011. $CS^3$ self-certified as a small business in its proposal.

The RFP included a detailed Performance Work Statement (PWS) describing contractual requirements. (RFP Attachment J-01.) The PWS indicates that the contractor will perform a variety of services including "physical security operations; personnel security; badging; 911 dispatch center; fire fighting, fire prevention and fire protection engineering; aircraft rescue and fire fighting (ARFF); advance life support (ALS) ambulance services; emergency management; [and] federal law enforcement and law enforcement training." (*Id.* at 1.) The primary objective of the contract is "to provide efficient and effective protection of human and property resources" at KSC. (*Id.*)

The PWS divided the required services into five sections: Program Management (PWS Section 1.0); Emergency Management and Protective Services Communications Center (PWS Section 2.0); Fire Services (PWS Section 3.0); Security Services (PWS Section 4.0); and NASA Protective Services Training Academy and KSC Internal Security Training (PWS Section 5.0). In addition to carrying out the requirements set forth in the PWS, the contractor also was expected to comply with minimum acceptable performance standards. (RFP Attachment J-03.) There was one performance standard for PWS Section 1.0; five standards for PWS Section 2.0; four standards for PWS Section 3.0; eight standards for PWS Section 4.0; and one standard for PWS Section 5.0. (*Id.*)

Section L.4 of the RFP advised offerors that, in proposing subcontracting or teaming arrangements, they must comply with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). On June 20, 2011, the CO prepared an analysis of $CS^3$'s proposal to examine compliance with the rule. (Memorandum for Record (MFR) at 1.) The CO noted that $CS^3$ was established in January 2011 and is a wholly-owned subsidiary of Chenega Corporation (Chenega), an ANC. For the instant procurement, $CS^3$ proposed G4S Secure Solutions (G4S) as

its principal subcontractor.[2]

In her analysis, the CO stated that "[a]ccording to the KSC Chief of Protective Services, the primary and most vital requirements of the [contract] is the Security Services portion" set forth in Section 4.0 of the PWS. (MFR at 3.) The CO prepared a table which summarized the proposed labor for $CS^3$ and G4S across each section of the PWS. The table indicates that Section 4.0 of the PWS accounts for more than half of total labor, and that $CS^3$ itself would perform more than 80% of the labor associated with Section 4.0:

| | | Percent of [Labor] | [CS3's] Share | [G4S's] Share |
|---|---|---|---|---|
| PWS 1.0 | Program Management | 3.24% | 100% | |
| PWS 2.0 | Emergency Management and PSCC | 5.89% | 81.88% | 18.12% |
| PWS 3.0 | Fire Services | 35.66% | | 100% |
| PWS 4.0 | Security Services | 51.42% | 80.07% | 19.93% |
| PWS 5.0 | Training | 3.79% | 60.86% | 39.14% |
| | | 100% | | |

(*Id.* at 3.) The CO determined that, across the contract as a whole, $CS^3$ would perform 51.55% of labor, and G4S would perform the remaining 48.45%. (*Id.* at 4.) When costs in addition to labor were considered, $CS^3$ was responsible for 58% of total costs, and G4S was responsible for the remaining 42% of total costs. (*Id.* at 5.)

The CO concluded that $CS^3$ would be performing the "primary and vital" contract requirements. (*Id.* at 6.) She summarized her findings as follows:

> · $CS^3$ will perform the more complex and costly contract functions.
>
> · 52% of the total proposed [labor] and 58% of the total proposed cost represent the prime [*i.e.*, $CS^3$].
> · The more complex and costly contract function is PWS [Section] 4.0 —' Security Services.
> · PWS [Section] 4.0 represents 42% of the total proposed cost and 51% of the total proposed [labor].
> · $CS^3$ will perform 80% of the [labor] under PWS [Section] 4.0.
> · [G4S] will perform 20% of the [labor] under PWS [Section] 4.0.

[2] Until recently, G4S was known as Wackenhut Services, Inc. (WSI). For simplicity, this decision refers to the firm only as G4S.

(*Id.* at 5.)

On September 9, 2011, the CO notified unsuccessful offerors that CS$^3$ was the apparent successful offeror. On September 16, 2011, Appellant filed a protest challenging CS$^3$'s size. Appellant asserted three grounds of protest. First, Appellant alleged that CS$^3$'s arrangement with G4S violated the ostensible subcontractor rule. Second, Appellant alleged that CS$^3$ is dependent upon and affiliated with another Chenega subsidiary, Chenega Security & Protective Services, LLC (CSPS). Third, Appellant alleged that CS$^3$ is in violation of 13 C.F.R. § 124.109(c)(3)(ii), which restricts ANCs from owning multiple subsidiaries with the same primary NAICS code. On September 19, 2011, the CO forwarded the protest to the Area Office for a size determination.

B. The Size Determination

On September 29, 2011, the Area Office issued its size determination rejecting each of Appellant's protest allegations.

With regard to the ostensible subcontractor allegation, the Area Office reviewed the CO's June 20, 2011 analysis, and noted that the CO had determined that "the primary and vital requirements of this contract are security services under PWS [Section] 4.0." (Size Determination at 8.) Her conclusion was supported by the KSC Chief of Protective Services. The Area Office also conducted its own review of the RFP and "agree[d] that security services are the primary and vital requirement in the contract." (*Id.*) The Area Office reached its conclusion based, in part, on a sample report attached to the RFP, and on "workload indicators" (*i.e.*, estimated quantities of various recurring tasks) provided by NASA in Attachment L-08 of the RFP. After determining that security services are the primary and vital contract requirements, the Area Office found that CS$^3$ will perform the large majority of those tasks. The Area Office again considered the CO's analysis, and noted that CS$^3$ and G4S submitted separate cost/price proposals to NASA. Based on those proposals, the Area Office concluded that G4S will be performing only a small portion of the security services work. (*Id.* at 9.)

The Area Office also found that CS$^3$ is not unusually reliant on G4S. The Area Office stated that CS$^3$'s technical proposal "barely mentions" G4S with the exception of the discussion on fire services and subcontractor management. (*Id.* at 10.) For past performance, the Area Office noted that CS$^3$ and G4S each submitted past performance references. CS$^3$'s past performance related to two of its employees rather than the business entity's experience, but the Area Office found that this did not suggest unusual reliance on G4S. (*Id.*) Additionally, in reviewing the cost/price proposal, the Area Office found no evidence of undue reliance. The Area Office determined that CS$^3$ will be performing a majority of the contract labor and between 78% and 80% of the security services. CS$^3$'s proposed program manager is a current G4S employee, and the Area Office considered this probative of unusual reliance; however, when balanced against all other aspects of the relationship between CS$^3$ and G4S, the Area Office found the use of a subcontractor employee as program manager was not sufficient to establish affiliation. The Area Office was not concerned with CS$^3$'s intent to hire non-managerial incumbent employees, and observed that the incumbent employees are not primarily G4S employees and that Executive Order 13,495 encourages successor contractors to hire the incumbent workforce.

The Area Office also determined there is no affiliation between $CS^3$ and CSPS. Both $CS^3$ and CSPS are subsidiaries of the Chenaga ANC, and SBA regulation provides that ANC subsidiaries are not considered to be affiliated with one another based on common ownership, common management, or common administrative services. 13 C.F.R. § 121.103(b)(2)(ii). The Area Office found no evidence of economic dependence between $CS^3$and CSPS. (Size Determination at 14.) Instead, the Area Office stated that $CS^3$ relies on its parent, Chenega, for "office space, financial resources, and staff support." (*Id.*) The Area Office also rejected Appellant's contention that $CS^3$ relied upon CSPS's past performance, noting that CSPS is not a subcontractor to $CS^3$ for this procurement.

Finally, the Area Office stated it would not render a decision on Appellant's allegation that $CS^3$ is operating in violation of 13 C.F.R. § 124.109(c)(3)(ii), which restricts an ANC from owning more than one subsidiary with the same primary NAICS code. The Area Office noted that the regulation is applied at the time an 8(a) application is received from an ANC-owned firm and "does not affect awards of small business set-asides." (*Id.* at 15.) The Area Office indicated that it is responsible for examining size and that it will not render an opinion on the eligibility of firms for the 8(a) program.

Having rejected each protest allegation, the Area Office concluded that $CS^3$ is an eligible small business for the instant procurement.

## C. Appeal Petition

On October 14, 2011, Appellant filed its appeal petition asserting that the Area Office's decision is based upon clear errors of fact and law. Appellant argues two bases for appeal: (1) the Area Office failed to identify fire services as a primary and vital requirement of the contract and (2) the Area Office erred in refusing to determine whether $CS^3$ is in violation of 13 C.F.R. § 124.109(c)(3)(ii). Appellant states that it is not appealing the Area Office's determination that $CS^3$ is not affiliated with CSPS. (Appeal at 4, n.3.)

Appellant argues the Area Office erroneously concluded that security services were the only primary and vital requirements of the solicitation. Appellant asserts that the CO's analysis, which was relied upon by the Area Office to determine the primary and vital requirements of the solicitation, was created to determine the appropriate NAICS code, and that determining the primary and vital requirements of a solicitation involves a different type of analysis. Appellant asserts that in most cases a solicitation includes more than a single primary and vital requirement. (Appeal at 6.) Appellant argues the evidence before the Area Office clearly demonstrated that both security services and fire services are primary and vital requirements of the solicitation. Appellant states that, in its own proposal, fire services constituted approximately 49% of labor. Appellant asserts the Area Office failed to recognize the level of effort required for fire services and erroneously relied on the CO's opinion.

Appellant argues that the PWS demonstrates that fire services are primary and vital requirements. Appellant states Section 3.0 of the PWS is devoted entirely to fire services. Appellant asserts the fire services requirements are extensive, complex, and specialized, and

nearly as long as the security services portion of the PWS. Thus, argues Appellant, fire services are not ancillary, comprise a large portion of the contract, and are primary and vital. Using data in the PWS, Appellant performs its own computations in an effort to demonstrate that the labor required for fire services may even be greater than that required for security services. Appellant observes that the Fire Chief is designated as one of only three key personnel, on par with the Chief of Security.

Appellant asserts the Area Office also incorrectly calculated the cost of performance for personnel. Appellant argues the Area Office overlooked two key facts that were in the record: the proportion of the total contract security services represents; and the proportion of the total cost of personnel allocated to $CS^3$ versus G4S. Appellant states the Area Office should have considered whether G4S's performance in security services plus fire services would exceed the overall limitation of 49% of the total cost of personnel. Appellant argues in its own proposal fire services accounted for a greater percentage of the overall cost of performance for personnel than did security services. Appellant asserts the Area Office should have relied more on the manpower requirements set forth in the PWS rather than a sample headcount and workload indicators. Accordingly, Appellant argues the Area Office erroneously failed to recognize that both security services and fire services are primary and vital requirements.

Additionally, Appellant argues the Area Office has the authority to determine if $CS^3$ complies with 13 C.F.R. § 124.109(c)(3)(ii). Appellant asserts the Area Office has the power to determine primary NAICS codes and has the authority to review facts and apply regulations relating to size. Appellant states it did not expect the Area Office to determine the 8(a) BD status of $CS^3$, but rather to determine if $CS^3$ qualifies under the regulations to be exempt from affiliation with Chenega and CSPS.

With its appeal petition, Appellant also seeks to introduce a summary of NASA's rationale for award. Appellant asserts the document was not discussed in Appellant's protest because the document did not exist at that time and that the summary is being offered as rebuttal evidence to support Appellant's contention that fire services are a primary and vital requirement of the solicitation.

## D. Responses to the Appeal

### 1. NASA

On October 28, 2011, the CO responded to the appeal. The CO asserts that, notwithstanding Appellant's arguments to the contrary, the effort required for security services is greater than fire services. The CO provides a table summarizing the required annual productive hours as defined in the solicitation. The CO states that security services requires 41,440 more annual productive hours than fire services, or 35,600 more annual productive hours if optional services are ordered. (CO Response at 2.) The CO stated that NASA estimates indicates that security requirements represent approximately 53% of contract personnel whereas the fire requirements represent approximately 37% of personnel. (*Id.* at 2-4)

The CO disputes Appellant's contention that NASA, in its evaluation of proposals, treated

fire services as a primary and vital function. The CO explains that "[t]he [a]gency developed findings based on [the evaluation criteria] and did not limit findings to only 'primary and vital' requirements. A finding in a particular requirement does not indicate the importance of that underlying requirement." (*Id.* at 3.)

The CO acknowledges that the security, fire, and emergency management requirements identified in the PWS are all important requirements. The CO reiterates her view that CS$^3$will perform the majority of the vital and primary requirements. (*Id.* at 4.)

2. CS$^3$

On November 2, 2011, CS$^3$ responded to the appeal. CS$^3$ argues that Appellant has abandoned its allegation that CS$^3$ is unusually reliant upon G4S. (CS$^3$ Response at 4, 6.) CS$^3$further contends that Appellant's remaining arguments are meritless. According to CS$^3$, Appellant's ostensible subcontractor arguments fails because fire services are not primary and vital contract requirements, and Appellant's argument that CS$^3$ is in violation of 13 C.F.R. § 124.109(c)(3)(ii) fails because the CS$^3$ and CSPS have different primary NAICS codes.

CS$^3$ contends that Appellant's suggestion that both fire services and security services are primary and vital contract requirements is soundly refuted by the CO's response. CS$^3$ states that the CO reiterated and documented that security services alone are the primary and vital requirements. CS$^3$ argues that the CO's view of a solicitation's primary and vital requirements is entitled to deference, and that Appellant "has not (and cannot) cite a single case where SBA has failed to follow the designation of primary and vital requirements made by a Contracting Officer." (*Id.* at 7.) According to CS$^3$, "Appellant would invite OHA to adjudicate that the [CO] failed to understand her own procurement and that it was appropriate for SBA to second guess and overrule her analysis on this point." (*Id.*) CS$^3$asserts that the only instances where OHA has found multiple primary and vital requirements are situations where the procuring agency first made this determination. CS$^3$further maintains that Appellant relies on superficial considerations, such as the number of pages in each section of the PWS, to support its view that fire services are primary and vital requirements.

CS$^3$ asserts there is no evidence in the record to support Appellant's allegation that CS$^3$ and CSPS have the same primary NAICS code. CS$^3$ states that, despite Appellant's speculations to the contrary, a review of SBA profiles shows CSPS has a primary NAICS code of 561612. CS$^3$ notes that the sworn SBA Form 355 submitted by CS$^3$ identifies CS$^3$'s primary NAICS code as 561621. Thus, CS$^3$ argues, there can be no violation of 13 C.F.R. § 124.109(c)(3)(ii) because CS$^3$ and CSPS do not have the same primary NAICS code. Furthermore, CS$^3$ asserts that there is no legal basis to find affiliation through common primary NAICS code, that 8(a) regulations do not apply because the instant procurement is not an 8(a) set-aside, and that CS$^3$ was not admitted to the 8(a) program as of August 31, 2011, when CS$^3$'s final revised proposal was submitted. (*Id.* at 12.)

CS$^3$ objects to Appellant's additional evidence as irrelevant to the issues on appeal. CS$^3$maintains that the issue before OHA is whether CS$^3$ is performing the primary and vital contract requirements, and that source selection and evaluation documents are "meaningless for a

primary and vital contract requirement claim." (*Id.* at 6.) CS[3] asserts that, if the determination of primary and vital contract requirements were somehow dependent on the evaluation of proposals, the result would likely be different for each offeror depending on that particular offeror's strengths and weaknesses. (*Id.* at 5.)

## 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 that 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

Appellant moves to supplement the record with additional evidence. Specifically, Appellant seeks to introduce a summary of NASA's rationale for award. Appellant contends that this document supports the conclusion that fire services are a primary and vital requirement of the solicitation because NASA identified strengths in CS[3]'s proposal pertaining to fire services, which in Appellant's view suggests that "the agency in making its award decision considered Fire services as vital to the contract." (Appeal at 10.) CS[3] opposes the motion on grounds that the new evidence is irrelevant to the issues on appeal. The CO emphasizes that NASA did not limit its evaluation findings only to primary and vital requirements.

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009)("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Engineering Technologies, LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, Appellant has failed to show that the proffered new evidence is relevant to these proceedings. As the CO explains, NASA evaluated proposals in accordance with the evaluation criteria stated in the RFP. Thus, "[a] finding in a particular requirement does not indicate the importance of that underlying requirement." (CO Response at 3.) Stated differently, the fact that there may be evaluation findings related to fire services does not establish that NASA considered those aspects of the RFP to be primary and vital. Accordingly, the new evidence is irrelevant. Appellant's motion to supplement the record is DENIED. The additional

evidence is not admitted into the record, and I have not considered it in preparing this decision. 13 C.F.R. § 134.308(a).

## C. Analysis

Appellant's protest challenged CS[3]'s size on three separate grounds, each of which was rejected by the Area Office. First, Appellant alleged that CS[3]'s relationship with G4S violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). Second, Appellant asserted that CS[3] was dependent upon CSPS, another subsidiary of the Chenega ANC. Third, Appellant contended that CS[3] is operating in violation of 13 C.F.R. § 124.109(c)(3)(ii). On appeal, Appellant does not dispute the Area Office's determination on the second protest allegation (*i.e.*, the assertion that CS[3] is dependent upon CSPS). (Appeal at 4, n.3.) Accordingly, that issue is not discussed *infra*. Appellant does seek to overturn the Area Office's determination on the remaining two protest counts.

### 1. Ostensible Subcontractor

SBA's "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, the Area Office determined that CS[3]'s relationship with G4S did not violate the ostensible subcontractor rule. Based largely on input from the procuring agency, the Area Office found that security services (PWS Section 4.0) are the "primary and vital" requirements of the contract, and that CS[3], as the prime contractor, will perform the large majority (approximately 80%) of those requirements. The Area Office further concluded that CS[3] would not be unusually reliant upon G4S for performance. In its appeal, Appellant does not allege any error in the Area Office's analysis of unusual reliance; I therefore find that Appellant has abandoned that portion of its claim.[3] The central issue presented, therefore, is whether the prime contractor, CS[3], will perform the primary and vital contract requirements.

Appellant contends that the Area Office erred in concluding that only security services (PWS Section 4.0) are "primary and vital" requirements. Rather, Appellant maintains that

[3] Pursuant to 13 C.F.R. § 134.316(c), OHA will not adjudicate issues which have been abandoned. *See also Size Appeal of Falcon, Inc.*, SBA No. SIZ-5239, at 3 n.1 (2011).

"both the Security services and the Fire services [PWS Section 3.0] were 'primary and vital requirements' of this Solicitation." (Appeal at 7, emphasis in original.) Appellant argues that "a [s]olicitation may, and in most cases does, include more than a single 'primary and vital requirement."' (Appeal at 6.) Appellant further contends that the RFP made clear in numerous respects that fire services are an important requirement. Appellant observes that fire services are discussed before security services in the PWS, and that the PWS devotes a comparable number of pages to each. Appellant also takes issue with NASA's determination that security services will consume the preponderance of contract labor. Using data provided in the PWS, Appellant performs its own computations in an effort to demonstrate that there are more labor hours associated with the fire services requirements than with the security services requirements. (Appeal at 8-9.)

OHA has recognized that "the primary and vital requirements are those associated with the principal purpose of the acquisition." *Size Appeal of Onopa Mgm't Corp.*, SBA No. SIZ-5302, at 17 (2011). Thus, identifying the primary and vital requirements of a contract requires a comprehensive assessment of the entire solicitation in order to ascertain the principal purpose. Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value. It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098, at 6 (2009) (recognizing that primary and vital requirements may be "measured by either quantity or quality"). "Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital."*Onopa Mgm't*, SBA No. SIZ-5302, at 17.

In arguing that both fire services and security services are "primary and vital," Appellant contends that there can be multiple primary and vital requirements. (Appeal at 6.) OHA has generally found, however, that there is only one principal purpose of an acquisition, although there could be multiple requirements associated with that principal purpose. Thus, in determining the primary and vital requirements, OHA first examines the solicitation as a whole to identify the principal purpose of the acquisition; requirements that are not associated with that principal purpose are not primary and vital, even though they may account for a sizable portion of the contract. *Onopa Mgm't*, SBA No. SIZ-5302, at 14-17 (primary and vital requirements were trash collection and disposal, not recycling services);*Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 9-10 (2011) (primary and vital contract requirement was production of electronic testing systems, not the provision and tracking of spare parts); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 9 (2011) (primary and vital requirement was deployment of rapid response teams to address environmental emergencies, not clean-up of hazardous materials).

Appellant argues that OHA did find multiple primary and vital requirements in *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009) and *Size Appeal of Greenleaf Constr. Co., Inc.*, SBA No. SIZ-4765 (2006). In both cases, however, requirements associated with the principal purpose of the acquisition were found to be primary and vital, and OHA rejected arguments that the primary and vital requirements should be expanded beyond this core set of requirements. In *Smart Data*, the solicitation called for "weather forecasting and observation services while maintaining airfield weather equipment at various military sites."

OHA determined that these activities were the primary and vital requirements, but declined to consider program management and transition to be primary and vital, as argued by the challenged firm. In *Greenleaf*, OHA held that the maintenance and sale of Government-owned properties were the primary and vital requirements, but not ensuring mortgagee compliance with property conveyance requirements, as determined by the Area Office. In both cases, then, the crux of OHA's analysis was on identifying the requirements associated with the principal purpose of the acquisition.

In this case, the CO, in consultation with the KSC Chief of Protective Services, determined that the security services alone are the primary and vital contract requirements. According to NASA's analysis, security services account for 51% of labor and 42% of total contract cost, substantially larger than any other portion of the PWS. Furthermore, NASA considered that the security services are the most complex aspect of the procurement. The "workload indicators" and performance requirements attached to the RFP confirm that the security services involve the largest number and variety of tasks. NASA did not find fire services to be the principal purpose of the acquisition, nor did NASA deem the fire services and security services to be inherently related such that they should logically be treated as a single set of requirements. In the size determination, the Area Office conducted its own review of the RFP and "agree[d with NASA] that security services are the primary and vital requirement in the contract." (Size Determination at 8.) The Area Office correctly recognized that a CO's evaluation of the procurement's principal purpose and "primary and vital" requirements is entitled to significant weight. On this record, then, I cannot conclude that the Area Office erred in finding that security services alone are the primary and vital contract requirements.

Appellant's remaining arguments are insufficient to show error on the part of the Area Office. The number of pages devoted to each requirement in the PWS, and the relative order in which they are discussed, are entirely superficial factors which have no bearing on the substantive question of which requirements are primary and vital. Appellant's contention that there are more labor hours associated with the fire services requirements than with the security services requirements is refuted by the CO, who continues to emphasize that security services account for the bulk of the contract labor.

2. 13 C.F.R. § 124.109(c)(3)(ii)

Appellant also argues that $CS^3$ is operating in violation of 13 C.F.R. § 124.109(c)(3)(ii) because both $CS^3$ and CSPS are wholly-owned subsidiaries of the Chenega ANC, and both firms reportedly have the same primary NAICS code. The regulation provides that:

> A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern .... For purposes of this paragraph, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

13 C.F.R. § 124.109(c)(3)(ii).

$CS^3$ counters that the two firms actually have similar, but different, primary NAICS codes. $CS^3$ states that its primary NAICS code is 561621, Security Systems Services (except Locksmiths), whereas CSPS's is 561612, Security Guards and Patrol Services. $CS^3$ further contends that the issue is one of 8(a) eligibility, not size, and therefore is beyond the scope of Area Office's review. Indeed, the Area Office declined to investigate the issue on precisely these grounds, explaining that "we are responsible only for verifying a firm's self-certification that it is a small business. Thus, we will not render any opinion on the eligibility of any firms for the SBA 8(a) program." (Size Determination at 16.) The Area Office indicated that it would instead refer the issue to SBA's Alaska District Office, which is charged with overseeing the 8(a) participation of Chenega and its subsidiaries.

I find that Appellant has not established reversible error on the part of the Area Office. As $CS^3$ emphasizes, Appellant's argument rests on the premise that $CS^3$ and CSPS have the same primary NAICS code, a contention which appears to be factually incorrect. Although the codes may be similar and within the same NAICS subsector, the regulation makes clear that "the same primary NAICS code means the six digit NAICS code."

Even supposing that $CS^3$ and CSPS did have the same six-digit primary NAICS code, I agree with the Area Office and $CS^3$ and that this issue is not within the scope of the Area Office's review. SBA's size regulations provide that subsidiaries of an ANC are not affiliated with their parent ANC, nor are they affiliated with other subsidiaries of the same ANC on the basis of common ownership, common management, or common administrative services. 13 C.F.R. § 121.103(b)(2). Appellant suggest that $CS^3$ might have waived or forfeited this exemption from affiliation by failing to comply with 13 C.F.R. § 124.109(c)(3)(ii), but the regulations do not indicate that this would be the consequence. Rather, if there were evidence that $CS^3$ and CSPS did have the same six-digit primary NAICS code, this could potentially interfere with $CS^3$'s 8(a) eligibility. The Area Office properly concluded that it is responsible only for examining size, not for determining the eligibility of firms for the 8(a) program. *Size Appeal of SES-TECH Global Solutions*, SBA No. SIZ-4951, at 5 (2008) ("The 8(a) program's regulations apply to a size determination or size appeal only when the procurement is an 8(a) procurement. The 8(a) regulations are otherwise irrelevant to the case.").

## IV. Conclusion

Appellant failed to prove that the size determination was based upon clear error of fact or law. Accordingly, this appeal is DENIED, and the size determination is AFFIRMED.

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

KENNETH M. HYDE
Administrative Judge