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

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| SIZE APPEAL OF:<br><br>CymSTAR Services, LLC,<br><br>Appellant,<br><br>RE: ProActive Technologies, LLC<br><br>Appealed From<br>Size Determination No. 3-2012-23 | SBA No. SIZ-5329<br><br>Decided: March 2, 2012 |

## APPEARANCES

Christopher C. Bouquet, Esq., Alexandria, Virginia, and

Wayne A. Keup, Esq., Washington, D.C., for CymSTAR Services, LLC

Alfred M. Wurglitz, Esq., Daniel S. Koch, Esq., Emily A. Higgs, Esq., Miles & Stockbridge PC, Rockville, Maryland, for ProActive Technologies, LLC

Jonene Johanson, Contracting Officer, for the Department of the Air Force

## DECISION[1]

This is an appeal of a size determination in which the Area Office concluded that ProActive Technologies, LLC, is an eligible small business. For the reasons discussed below, I affirm the Area Office and deny the appeal.

## I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

[1] This Decision originally was issued under a Protective Order. I ordered each party to file a request for redactions if it desired 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. Issue

Whether the Area Office clearly erred in concluding the protested concern's proposal was in compliance with the ostensible subcontractor and nonmanufacturer rules and, therefore, that it was an eligible small business for the instant procurement. *See* 13 C.F.R. § 134.314.

## III. Background

### A. Solicitation and Protest

On June 29, 2010, the Department of the Air Force, 508 Air craft Sustainment Wing, Hill Air Force Base, Utah (Air Force), issued Request for Proposals No. FA8223-10-R-0001 (RFP) for the B-52 Training Systems Contractor Logistics Support (CLS), Training Systems Support Center (TSSC) Services, and future Engineering Change Proposals (ECPs). The Contracting Officer (CO) issued the procurement as a 100% small business set-aside, and designated North American Industry Classification System (NAICS) code 336413, Other Aircraft Part and Auxiliary Equipment Manufacturing, with a corresponding 1,000 employee size standard, as the appropriate code for this procurement. The apparent successful offeror is ProActive Technologies, LLC (ProActive).

On November 14, 2011, CymSTAR Services, LLC (Appellant) filed a size protest with the CO, alleging ProActive is other than small because it is unusually reliant upon its ostensible subcontractor, The Boeing Company (Boeing), to perform the primary and vital functions of the contract, and because ProActive is in violation of the nonmanufacturer rule. Appellant attached to its protest the portion of the RFP titled “Industry Day 1 Questions”, and the Declaration of Francis Witt, who is Appellant's Executive Vice President (Witt Declaration).

Question 104 of the “Industry Day 1 Questions” (posted Nov. 17, 2009) is: “Day to day operations and mods split as far as $300-350M range of total contract?” The Air Force's response to Question 104 is: “CLS is expected to be approximately 40% of the total contract value with mods expected to be 60%.”

The Witt Declaration states Mr. Witt met with a Boeing official to discuss teaming on the instant RFP, and was told that Boeing would consider teaming with Appellant only if Boeing performed all the major/complex TS modification work including all modifications associated with the Avionics Combat Network Communications Technology (CONECT) Avionics upgrades. Further, the major/complex modification work is about 80% of the total TS modification work. Boeing also wanted to house and control the SIL.

On November 15, 2011, the CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting - Area III in Atlanta, Georgia (Area Office). The Area Office notified ProActive, and on November 19, 2011, ProActive responded to the protest.

B. The Size Determination

On December 13, 2011, the Area Office issued Size Determination No. 3-2012-23 (Size Determination), concluding that Appellant is small for this procurement.

The Area Office first reviewed the solicitation, finding that the CLS portion of the requirement makes available the training devices to B-52 aircrews, and the TSSC supports the effort serving as the data library and minor training device modification center. ECPs are major modification efforts, outside the capability of the TSSC. ECPs will not be awarded as part of the initial contract, but are a future possibility.[2]

The Area Office reviewed ProActive's ownership, its shareholders' interests, and the number of its employees, and concluded that ProActive is a small business with no affiliates.

The Area Office then considered whether ProActive is affiliated with its subcontractor Boeing under the ostensible subcontractor rule.

The Area Office relied upon an October 30, 2011, email from the CO. The CO stated that the CLS and TSSC services are the primary and vital requirements of the contract. The CO further stated that ECPs are major modification efforts, outside the capabilities of the TSSC. The ECPs are possible future requirements. Modifications and upgrades made to the aircraft flow down to the training devices, and so modifications to the trainers will likely be required to stay current with the changes to the aircraft. ECPs may be required to address training device obsolescence issues (mainly software). The CO further stated that the Air Force considers this contract a service effort, with some supply. NAICS code 336413 is the Air Force's preferred code for aircrew training systems service procurements.

The Area Office found that ProActive's proposal states that ProActive will perform all of the CLS services and nearly all of the TSSC services with its own personnel. Boeing will be performing a considerable percentage of the work on the ECPs, but these are not primary and vital requirements. Further, ECPs will not be awarded as part of the initial award. The Area Office noted that ProActive's proposal states that even with Boeing performing a considerable percentage of the work on potential future ECPs, Boeing will not perform more than 49% of the total labor required on this procurement.

The Area Office found that ProActive has extensive relevant experience over ten years in design, integration, production, installation, and testing of training modifications in a major Air Force aircraft program, the E-3 AWACS. ProActive used its own staff of engineers to design, test, produce, and install over 50 major and minor modifications to the AWACS training systems.

The Area Office further found that ProActive was totally responsible for preparing this

[2] Section B of the RFP reserves specific Contract Line Item Numbers (CLINs) for TS modification work. *E.g.*, CLINs 0035 - 0047 (for base year).

proposal, and that Boeing only provided input and assistance relevant to its areas of performance. ProActive has not hired and does not plan to hire any Boeing employees. ProActive will provide all key employees for the procurement.

The Area Office therefore concluded that ProActive is not affiliated with its subcontractor Boeing under the ostensible subcontractor rule.

The Area Office then turned to the nonmanufacturer rule issue. The Area Office concluded that, although the CO has stated that the procurement was primarily for services with some supply, the Area Office would have apply the nonmanufacturer rule because the assigned NAICS code is a supply or manufacturing NAICS code. 13 C.F.R. § 121.406(b)(3).

The Area Office found that the end item here is the modified training system. The Area Office further found ProActive's proposal established it has the necessary experience, skill, and production facilities to produce the end item, as well as to take the dominant role in the integration, production and manufacturing of the modified training system. The Area Office further found ProActive's proposal showed it will be performing virtually all of the integration, production, and manufacturing process for all TSSC modifications, and doing so with its own employees.

The Area Office further found that for future modifications ordered under potential ECPs, ProActive will provide a substantial portion of the design, development, integration, production, and manufacture of the ECP modifications. ProActive has the technical capabilities, both in facilities and personnel, to perform the future modifications. The Area Office concluded that ProActive is the overall manufacturer of the modified training systems and is thus in compliance with the nonmanufacturer rule.

The Area Office concluded that because ProActive is not affiliated with Boeing under the ostensible subcontractor rule, and is in compliance with the nonmanufacturer rule, ProActive is a small business for this procurement.

## C. The Appeal

On December 13, 2011, Appellant received the Size Determination. On December 22, 2011, Appellant filed the instant appeal.

Appellant reasserts and amplifies the arguments made in its protest. As for its ostensible subcontractor allegation, Appellant asserts Performance Work Statement (PWS) ¶ 1.1 states that TS modification work is a “key element” of this contract. Further, the RFP requires the awardee to host and operate Systems Integration Laboratories (SILs) for both the Weapon Systems Trainers (WST) and the Communications Part Task Trainers (Comm PTT). *See* CLINs 0013, 0018, and 0051. Moreover, PWS ¶ 5.0 requires the SILs to accomplish the ECPs. Thus, the SILs are essential to the development of the modifications and upgrades to the B-52 training systems as part of TS modification work.

Appellant also points to the RFP's Communication Upgrade Sample Task (Sample Task),

which requires offerors to address its requirements in their proposals to provide a means to evaluate offerors' responses to future modification requirements. The Sample Task is an ECP, and it is one of the most important criteria in the award decision.

Appellant argues that the TS modification work is among the most sophisticated required by the contract. It involves requirements analysis, system architecture development, design and design review, software programming, procurement and manufacture of hardware, integration of hardware and software, integration testing, contractor verification testing, and support of customer verification and validation testing. In sum, Appellant argues that modification work (ECPs) is a primary and vital portion of the contract. First, the Air Force advised offerors that it would represent 60% of the work under the contract. Second, Section M advised offerors that the proposed Sample Task was one of the most important criteria in the evaluation. Third, it is among the most sophisticated work required by the procurement.

Appellant dismisses the CO's October 30, 2011, email to the Area Office as a *post hoc* rationalization, and asserts that the Air Force's response to Question 104 stating that ECPs represented 60% of the total work more accurately reflects the weight to be given the ECPs in determining the primary and vital tasks of the contract. Further, the listing of the Sample Task for TS modification work as the first evaluation subfactor directly contradicts the Area Office's finding that the ECPs are not considered primary and vital requirements.

Recalling the Witt Declaration and Question 104, Appellant asserts that because Boeing had insisted on doing what amounts to 80% of the total TS modification work (ECP), and that the TS modification work is 60 % of all work, Boeing was thus demanding almost 50% of the contract work (80% x 60%). Boeing also required control of and housing the SILs.

Appellant asserts the Area Office erred in not addressing whether Boeing had insisted on a similar work share with ProActive. Appellant asserts it is almost a certainty that Boeing received its demanded share of the work from ProActive. Appellant asserts the Size Determination failed to examine ProActive's Teaming Agreement with Boeing, and did not fully consider the Witt Declaration. Appellant further asserts that the Area Office erred in accepting the CO's representation that ECPs are not primary and vital requirements. Appellant argues that even if Boeing's work share on the contract is less than 50%, the importance of the major modifications Boeing will perform means it is performing the primary and vital functions of the contract, citing *Size Appeal of Alutiiq Education and Training LLC*, SBA No. SIZ-5192 (2011) (more sophisticated work being performed by the subcontractor resulting in a finding of affiliation under the ostensible subcontractor rule).

As for its nonmanufacturer rule allegation, Appellant further asserts that all the major modification (ECP) work will be performed by Boeing, and this work necessarily involves software development and procurement, manufacture and system integration of hardware. Appellant argues the Area Office erred in failing to account for the manufacture and system integration of the hardware by Boeing. Appellant argues that the Area Office thus erred in finding ProActive in compliance with the nonmanufacturer rule.

D. The Contracting Officer's Response

On December 30, 2011, the CO responded to the appeal. The CO asserts that proposals were evaluated in accordance with the criteria set forth in Section M of the RFP, and that no subfactor was evaluated as more important than any other and no significance was attached to the numbering of the subfactors.

The CO further states that the solicitation does not use the phrase “primary and/or vital requirements”, but refers to her October 30, 2011, email to the Area Office, where she identified the CLS and TSSC services as the primary and vital requirements of the contract. The CO further stated that in response to industry questions, the Air Force stated that this is a service contract that includes several types of services, but primarily CLS in support of aircraft training requirements, citing Response to Industry Question No. 51 (posted Nov. 23, 2009).

The CO characterizes the contract as requiring the provision of CLS services to the B-52 simulator program, and management of the simulator systems and TSSC services. The contractor is responsible for making modifications to the simulators that exceed the scope of the TSSC to meet required training enhancements. These modifications typically would be accomplished through ECPs. ECPs, however, are contingent upon the government having an established requirement, funding for the requirement, and a finding that it is in the government's best interest to pursue a modification ECP under the contract rather than compete the modification outside the contract. There is no guarantee that any ECPs for modifications will be awarded to the successful offeror during the life of the contract. Pointing to Response to Industry Question No. 51 (posted Nov. 17, 2009), the CO noted the Air Force may elect to meet these needs through competition and award outside the contract.

The CO asserts that Appellant misunderstands the Sample Task. It is not a contract requirement or an awardable task. Rather, it is a sample task used for technical evaluation purposes only. RFP Section L, 5.2 # 6 states that it will not be priced.

The CO further states that Appellant's use of the terms “contract value” and ““contract work” interchangeably is misleading. The CO refers to Appellant's reliance upon the response to Question No. 104 that modifications were expected to be 60% of the contract value. The CO states that contract value is not the same as contract work, and it is incorrect to assume, based upon estimated dollar value, the actual work performed for ECPs will represent 60% of the contract effort. The CLS and TSSC work represents a mature, well-defined requirement funded under the contract. The ECPs are unknown and contingent on funding and the Air Force's determination to include them as ECPs under the contract.

The CO states that ProActive's proposal clearly shows that ProActive will perform all CLS activities, nearly all of the TSSC operations (97%), and will do [xx]% of the ECP workload with Boeing doing the rest. ProActive's proposal demonstrates its own capability to acquire, integrate, and assemble the components necessary to operate, maintain, and modify aircrew training devices. ProActive will house the SIL in its facility and perform the TSSC operations.

The CO further disputes Appellant's contention that 80% of the modification work will be comprised of major modifications. The Air Force has never stated that 80% of the modifications required will be major or complex modifications.

E. ProActive's Response

On January 18, 2012, ProActive responded to the appeal. ProActive asserts Appellant's ostensible subcontractor allegation is narrowly focused, arguing only that Boeing will perform the primary and vital contract requirements. Further, Appellant does not challenge that ProActive will perform the primary and vital requirements as to CLS and TSSC services. Rather, Appellant contends only that future ECPs constitute another primary and vital requirement, which Boeing will perform.

ProActive asserts the ECPs are not a primary and vital requirement of the contract. The RFP's stray mention of the ECPs as a "key element" is too insubstantial. The Air Force described the CLS services for the already deployed B-52 Training Systems as the primary effort under the contract, citing Question No. 51 (Nov. 23, 2009) and the Declaration of Robert F. Acevedo (Acevedo Declaration), ¶ 20.[3] ProActive asserts the choice of words at one point in a 51-page document is not determinative.

Echoing the CO, ProActive asserts Appellant mischaracterizes the evaluation criteria. Mission Capability is not the most important evaluation factor; it is equal to past performance. The ECPs are at most one-sixth of the non-price evaluation criteria, which is not suggestive of primary and vital requirements. Further, despite the Air Force's response to Question No. 104, it is not certain that ECPs will amount to 60% of contract value. Only the CLS and TSSC services have been priced and will definitively be performed. There are no ECPs on the PWS, and none are guaranteed. ECPs are by definition change proposals, the Air Force is under no obligation to order them, and the Air Force has reserved the right to compete them as separate procurements, citing Question No. 51 (Mar. 26, 2009). There is no certainty that budgetary requirements will permit any modifications.

ProActive further asserts that even if the ECPs were primary and vital requirements, ProActive would be performing appreciable parts of the work. Appellant assumes Boeing would perform as much of the work with ProActive as prime contractor as Boeing would with Appellant as prime; however, ProActive asserts it will perform substantially more of the ECP work than Boeing offered Appellant, it will house the SIL, and will perform more than 50% of the work in any event.

Pointing to § 3.1 of the Proposal, Roles and Responsibilities, ProActive asserts that if no ECPs are issued, Boeing would perform only a small portion of total work, since its share of

[3] ProActive submitted two declarations to the Area Office from its President, Robert F. Acevedo, in response to the protest. While these declarations are not as probative as the RFP and the Proposal, they do provide more information to illuminate the issues here, and where they do not conflict with the proposal, may be relied upon.

CLS work is 0% and its share of TSSC work is 3%. If ECPs are issued, subcontracting to Boeing would depend on size and timing, but because the Proposal sets ProActive's share of ECPs at [xx]% and Boeing's at [xx]%, even if ECPs account for 60% of contract value, Boeing would perform no more than [xx]% of the contract. Further, the Teaming Agreement provides that Boeing will not exceed 49% of the labor on this contract.

Again pointing to its Proposal, ProActive asserts it has directly relevant past performance experience designing, engineering, and manufacturing modifications to aircraft training systems. (Vol. III, Past Performance, at 3-3). ProActive has a staff of engineers who have designed, tested, and installed more than 50 modifications for the E-3 AWACS aircraft. ProActive will also provide all key employees, and will hire no Boeing employees. Further, ProActive asserts it will control the SIL and [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. (Vol. IV, Cost/Price § 4.3.11, at 10; Acevedo Declaration ¶¶ 23, 24.) ProActive has overall responsibility for the proposal, and prepared it with relatively little input from Boeing.

As for the nonmanufacturer rule allegation, ProActive asserts, first, that the nonmanufacturer rule should not apply, because the Air Force considers this to be a services procurement.

Second, ProActive asserts that even if nonmanufacturer rule analysis is warranted, only ProActive can be considered the manufacturer. The Area Office correctly found that the end item here is the modified training system, and notes Appellant does not challenge this finding. The Area Office found that ProActive will perform virtually all of the integration, production, and manufacturing for the TSSC modifications. Whether ECPs will ever be ordered is conjectural. Even if Boeing is to be found the manufacturer of the ECPs, Boeing is not the manufacturer for this contract, because the ECPs might not be ordered. Further, ProActive is providing [xx]% of the work on the ECPs. ProActive will also assemble and integrate any ECPs ordered at its SIL and several government sites. Proposal Vol. II, Mission Capability and Proposal Risk, at 95, Fig. 7-3, B-52 Functional Organization Chart.

Further, the design and development of the ECPs must be considered part of the manufacturing. *Size Appeal of D.K. Dixon & Co.*, SBA No. SIZ-4047 (1995). If ECPs are ordered, ProActive will control design implementation, perform substantial engineering design and development work, and will assign to Boeing the portions of the work it will perform. ProActive asserts the nonmanufacturer rule was meant to prevent “front” business from bidding on contracts, and then furnishing the suppliers of a large concern. This is not the case here.

F. Appellant's Supplemental Argument

On January 18, 2012, Appellant filed its supplemental argument, after its counsel's review of the administrative record.

Appellant asserts the Area Office erred in failing to consider that ProActive will be providing only [xx]% of the ECP work, with Boeing performing [xx]%. Appellant relies on a chart in ProActive's proposal, which designates [[xxxxxxxxxxxxxxxxxxxxxxxxx], to establish Boeing's role in contract performance. Proposal, Vol. II, Figure 7-3, p. 95. All [xxxxxxxxxxx

xxxxxxxxxx] functions are Boeing's exclusive responsibility. Boeing has control of the ECP [[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] efforts, and for the integration of [[xxxx xxxxxxxxxxxxxxxxxxxxxx]. Appellant asserts ProActive's role in the ECP process is limited to production. Boeing will perform the design, integration, and testing.

Appellant reasserts its argument that ECPs will account for 60% of the contract value, dismissing ProActive's assertions about funding limitations as mere speculation. ProActive's assertion that the Air Force has reserved the right to conduct a competition for the ECP work is "cherry picking" a statement from the response to Question No. 51 (Nov. 17, 2009).

Appellant further asserts the Teaming Agreement between Boeing and ProActive provides that Boeing will furnish up to 100% of all labor and materials necessary to perform the modifications required by the PWS. Appellant notes again that Boeing will perform [xx]% of the ECP work, and as much as [xx]% of all work if every major training system modification is ordered by the Air Force. Appellant argues that even if a subcontractor is performing less than 50% of the contract work, the importance of the work it is performing may result in a finding it is performing the primary and vital functions of the contract.

Appellant also asserts that the nonmanufacturer rule applies to this procurement because the supply NAICS code designated by the solicitation governs. Appellant argues that Boeing is to perform so much of the ECP production that it must be accounted the manufacturer here.

G. Additional Pleadings

On January 23, 2012, ProActive replied to Appellant's supplemental argument. ProActive asserts Appellant presented only a selective portion of the chart at Fig. 7-3 of the Proposal. ProActive also asserts it has complete management and technical control of all ECP modifications. ProActive personnel will perform the production, integration, and assembly of actual ECP modifications. ProActive asserts the work will be performed in the SIL facility it will lease and control. Proposal, vol. II, p. 95. The full chart shows that the ECP team reports the ProActive Program Manager, and is under the technical direction and oversight of other ProActive managers. Proposal, vol. II, Fig. 7-4, p. 96. ProActive manages and provides most of the [xxxxxxxxxxxxxxxxxxxxxxxxxxx], which controls all training system modifications, including ECPs. Proposal, vol. II, § 7.2.13, pp. 98-99. ProActive's [xxxxxxxxxxx] evaluates potential ECPs and allocates ECP tasking among the team members. The [xxxxxxxxxxx] oversees all training system modifications. ProActive asserts its overall management of the work ensures that it is responsible for the ECPs.

On January 27, 2012, Appellant responded to ProActive's reply. Appellant asserts that the Acevedo Declaration should not be considered, as it was prepared in response to the protests, and that ProActive's proposal should be relied upon in deciding this appeal. Appellant returns to the chart at vol. II, Fig. 7-3, which it asserts establishes that the ECP team is headed by a Boeing Project Manager, responsible for [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. In addition the Boeing Manager has direct oversight of the [[xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx], all of which teams are headed by Boeing. Appellant asserts that ProActive's involvement with the ECPs is limited to [xxxxxxx

xxxxxxxxx]. Further, Boeing's ECP Project Manager does not report to the [xxxxxxxxxxxx].

Appellant renews its assertion that "it is undisputed" ECPs would constitute 60% of the work in this procurement, that this is more complex work, and that ProActive will assign [xx]% of this work to Boeing. Appellant asserts this establishes that ProActive will be dependent upon Boeing for the primary and vital requirements of this procurement.

Appellant asserts the Area Office erred in finding that the ECPs are not the primary and vital requirements of the contract, that merely because Boeing would not perform more than 49% of the work that Boeing was not an ostensible subcontractor and that ProActive would provide a substantial portion of the ECP work.

On February 3, 2012, ProActive filed its final pleading. ProActive asserts it has always disputed that ECPs will comprise 60% of the contract work. ProActive reasserts that all modifications are controlled by ProActive's Program Manager, and by the [xxxxxxxxxxxxx xxxxxxxxxxxxxxxx] is in overall charge of ECP modifications. ProActive is substantially participating in such work by supplying engineering and labor for the ECPs.

ProActive further asserts that Appellant's contentions regarding total ECP value are merely disputed speculation. ProActive disputes Appellant's contention that 60% of the work will be ECPs is based upon a single reference in an RFP question and answer. ProActive asserts that Appellant's claim that 80% of the training modifications will be major modifications is based upon speculation, and refuted by the CO in her response. ProActive asserts that, under the ostensible subcontractor rule, it is not unusually reliant upon Boeing.

ProActive asserts its proposal lays out the roles and responsibilities of ProActive and Boeing in the contract. ProActive will perform 100% of the CLS portion of the contract, 97% of the TSSC portion, and [xx]% of the work on the ECPs. Boeing will perform 3% of the TSSC work, and [xx]% of the work on the ECP modifications. Proposal, vol. III, p 3-4, Fig. 3. Appellant does not contest this.

## IV. Discussion

### A. Timeliness and Standard of Review

Appellant filed its appeal within fifteen days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

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 on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

## B. The Merits of the Appeal

### 1. The Ostensible Subcontractor Rule Issue

Under SBA's "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4), a prime contractor and its subcontractor may be treated as affiliates if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. To apply the ostensible subcontractor rule, the Area Office must consider all aspects of the relationship between the prime and subcontractor, including the terms of the proposal, agreements between the firms (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract. *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).[4] 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 Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). SBA determines compliance with the ostensible subcontractor rule in negotiated procurements as of the date of the final proposal revision. 13 C.F.R. § 121.404(d). An ostensible subcontractor case must be analyzed on the basis of the RFP and proposal at hand. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011).

The Performance Work Statement (PWS) defines the tasks and performance requirements for the CLS support for the B-52 Aircrew Training Devices (ATDs) and modification management for the B-52 ATDs and Maintenance Training Devices. This includes all CLS and modification support of any developmental systems or assets and supporting equipment. Total B-52 Training Systems Support relies on several key elements: Program Management, Engineering and Technical Management, Operations, Maintenance and Logistics Support, which includes the TSSC and ECP modifications and upgrades. PWS, ¶ 1.1. The TSSC's primary purpose is to provide lifecycle sustainment of the B-52 Training Systems to include hardware/software and documentation support. The TSSC also supports configuration management functions, engineering development, and feasibility studies and is the repository for the Technical Data Package. PWS, ¶ 4.2.

The Contractor will provide the resources necessary to accomplish minor and major modifications and upgrades to the Training Systems that exceed the scope of the TSSC and are required to meet weapon system/training system concurrency and required training enhancements. PWS, ¶ 5.0. The modifications will be executed via separately priced ECPs or Contractor Change Proposals and shall be accomplished using the SILs to the fullest extent possible. *Id.* The contractor shall prepare proposals as directed by the CO, within 30 days of the receipt of tasking authority from the CO. PWS, ¶ 5.1. The contractor will design, develop, document, and install modifications in accordance with the ECP's performance work statement. PWS, ¶ 5.3. The Sample Task is to implement an ECP, a communications upgrade into an ATD. PWS, Sample Task.

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[4] The seven factors test is no longer applicable. *C&C Int'l Computers and Consultants*, at 12-13.

Section M of the proposal provides the evaluation factors for award. There are three factors, Mission Capability, Past Performance, and Cost/Price. RFP, § M 1.0. Mission Capability is equal in importance to Past Performance and each is individually more important than Cost/Price. *Id.* Mission Capability has three equally weighted subfactors: (1) the Sample Task ECP, (2) Operations, Maintenance, and Logistics Support (OM&S), which requires offers to demonstrate an effective and efficient plan for maintaining the TSSC, and (3) Management, which requires offerors to demonstrate management expertise and capability. RFP, § M 2.0, 2.1.

As noted by ProActive, the Air Force reserved the right to compete all future modifications and upgrades, rather than order them under this contract. Question No. 51 (March 26, 2009). In the answer to another question, the Air Force described the CLS services as the primary effort under the contract. Question No. 51 (Nov. 23, 2009).

A review of ProActive's proposal establishes that ProActive will perform all the CLS on-site support, and 97% of the TSSC support, with Boeing performing 3% of this work. ProActive Proposal, vol. III, p. 3-4, fig. 3. On the ECP modifications, which represent one of the three subfactors, covered by the sample task, ProActive will be perform [xx]% of the work, and Boeing [xx]% of the work. *Id.*

A review of the Teaming Agreement between ProActive and Boeing establishes that ProActive is to have the primary responsibility for proposal preparation, and is to be the sole interface with the Air Force. Teaming Agreement, ¶ 4.01. The Agreement further provides that ProActive is to perform no less than 51% of the contract work, and Boeing no more than 49%. *Id.*, Attachment A, ¶ 2.0. The Teaming Agreement provides that neither company will hire the other's employees. *Id.*, ¶ 6.04. Further, all of ProActive's work will be performed by ProActive employees, and all key personnel identified in the proposal are ProActive employees. Proposal, vol. II, p. 38-9, Table 5-7; Declaration of Robert Acevedo, President, ProActive, at ¶ 12. The ECP work will be performed in ProActive's SIL facilities. Proposal, vol. IV, Cost/Price ¶ 4.3.11.

A review of ProActive's past performance submission establishes that ProActive had extensive experience for CLS and modification with the E-3 AWACS aircraft, and thus was not overly reliant upon Boeing for past performance. Proposal, vol. III.

The real basis of Appellant's argument is that the ECPs constitute the primary and vital requirements of this contract. Appellant grounds this argument in the Air Force's answer to Question No. 104, in which the Air Force estimated that “CLS is expected to be approximately 40% of total contract value with mods expected to be 60%”, and the estimate of Appellant's Executive Vice President, submitted with the size protest, that major training system modification work would constitute 80% of the modification work required by the proposal. Witt Declaration, ¶ 7.

The Witt Declaration is only Mr. Witt's own opinion, is not supported by the RFP, and the CO explicitly rejects it in her pleading. I therefore discount Mr. Witt's estimate as without weight.

The matter of the Air Force's response to one question, which gives an estimate, is a rather slender thread upon which to hang a finding that the ECPs are the primary and vital requirement of the contract. The contract itself makes clear that the ECPs are modifications of the contract, changes to be ordered at the Air Force's discretion. There is no guarantee that the Air Force will order any set number of ECPs, or any at all. Further, the Air Force carefully reserved the right to conduct separate procurements for the ECPs, rather than to order them under this contract. Question No. 51 (March 26, 2009). Further, in another question and answer exchange, the Air Force identified the CLS services as the primary and vital requirements of the contract. Question No. 51 (November 23, 2009).

I find that the Area Office correctly determined that the weight of the evidence here is against Appellant's position. ProActive prepared the proposal, is the sole interface with the Air Force, and its key personnel will manage the contract. These are all factors which support a finding that there is not unusual reliance. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 10-11 (2011). ProActive will perform nearly all the work on the CLS and TSSC portions of the contract, with very little participation by Boeing. Only on the ECP portion will Boeing perform most of the work. ProActive has thus assigned Boeing a discrete task within the contract, another factor which supports a finding of no unusual reliance. *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010). ProActive's past performance submission establishes that it has the experience necessary to perform the contract. Where a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital functions of the contract, and there is no violation of the ostensible subcontractor rule. *Paragon TEC, Inc.*, SBA No. SIZ-5290, at 11.

Appellant's argument that the ECPs are the primary and vital tasks of this contract is not supported by the record. The ECP Sample Task is only one of the three equal Mission Capability evaluation subfactors, equal to the other two, and all three together equal to past performance. In evaluating proposals, the ECP Sample Task was not as important as the other Mission Capability subfactors taken together, and Past Performance was equal to Mission Capability as a whole. The evaluation factors thus do not cast the ECP work as the primary and vital requirement of the contract. Further, while Question No. 104 contained an estimate that ECPS would comprise 60% of the work, the RFP itself makes clear that the ECPs will, by definition, be change orders, and guarantees no minimum number of them. They will be ordered as the Air Force directs. In answers to other questions, the Air Force carefully reserved to itself the right to conduct separate procurements for the ECPs, and characterized the CLS services as the most important part of the procurement. The solicitation and ProActive's proposal simply cannot be read to find that the ECPs are the primary and vital requirement to this contract.

Further, even if I were to find that the ECPs constitute 60% of the contract work, ProActive is performing [xx]% of that work, in its own SIL facilities. While the information on the organizational chart Appellant points to shows Boeing leading teams working on ECP, that still represents only [xx]% of this one portion of the contract, with ProActive performing virtually all the other work. ProActive would be performing about 60% of the work, and would be managing the contract. There is still no basis for an ostensible subcontractor finding.

Appellant argues the fact that ProActive is performing most of the work does not save it from a finding that the ECPs are the primary and vital requirement, relying upon *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011), where there was a finding of affiliation under the ostensible subcontractor rule even though the ostensible subcontractor was not providing most of the personnel for contract performance. Appellant's reliance is misplaced. In *Alutiiq*, the ostensible subcontractor was providing half of the key management employees for contract performance, and virtually all of the employees for key tasks required by the contract, the tasks more heavily weighted in evaluating the proposal. *Alutiiq*, at 9-10. The prime contractor in that case was performing tasks that were clearly less technical. *Id.* Here, ProActive is providing all the key employees, and is performing the very technical CLS and TSSC work, as well as a substantial portion of the ECP work. ProActive is far more directly involved than the challenged firm in *Alutiiq*, and thus that case is inapposite.

I therefore conclude that the Area Office did not err in finding that Appellant was not affiliated with Boeing under the ostensible subcontractor rule.

2. The Nonmanufacturer Rule Issue

To qualify as a small business concern for a small business set-aside contract for manufactured products, an offeror must be either the manufacturer of the end item (and manufacture the item in the United States), or supply the end item of a domestic manufacturer in compliance with the nonmanufacturer rule. 13 C.F.R. § 121.406(a), (b). There can be only one manufacturer of the end item acquired. 13 C.F.R. § 121.406(b)(2). The manufacturer is the concern that, with its own facilities, performs the primary activities transforming substances into the end item so that it possesses characteristics it did not have before. *Id.*; *Size Appeal of Fernandez Enterprises, LLC*, SBA No. SIZ-4863, at 6 (2007). In determining whether a concern is a manufacturer, SBA will consider: (1) the proportion of total value in the end item added by the concern; (2) the importance of the elements added by the concern to the function of the end item; and (3) the concern's technical capabilities, *i.e.*, plant, facilities and equipment. 13 C.F.R. § 121.406(b)(2)(i).

Here, the Air Force asserts that this is primarily a services contract, but the NAICS code is a supply NAICS code, and so the nonmanufacturing rule applies.[5] 13 C.F.R. § 121.406(b)(3). The end item the Air Force seeks to procure is the trainers, with the order modifications. There is no question that ProActive is performing 97% of the modifications on the TSSC trainers. Proposal, vol. II, p. 92, 97, 98. This effort includes the design, integration and manufacturing of in-scope modifications to the Training Systems. PWS, ¶ 4.2.1. It is thus clear that ProActive is the manufacturer of the modifications delivered under the TSSC portion of the contract.

Once again, we come to Appellant's contention that the ECPs are the primary and vital requirement of the contract. Appellant argues that Boeing must be the manufacturer of the ECPs.

[5] The Air Force's selection of a manufacturing NAICS code for an RFP which largely seeks to procure services is questionable, but because no timely NAICS appeal was filed it is that NAICS code which governs this procurement, and thus makes the nonmanufacturing rule applicable.

First, I have already found that the ECPs are not the primary and vital requirement of the contract. The Air Force's demand for them is too conjectural to say that these modifications are the product the Air Force is procuring, to the exclusion of the TSSC modifications, which the Air Force is certain to order through this contract. As to the ECPs, ProActive will rely on Boeing for the design efforts. Acevedo Declaration, Dec. 7, 2011, ¶ 34. Nevertheless, ProActive personnel will produce, assemble, and integrate these ECPs in ProActive's SIL and in government sites in the field. Proposal, vol. II fig. 7-3, Acevedo Declaration ¶¶ 38-52. OHA's precedent establishes that a concern which assembles and configures the components of an item, and installs it at the procuring agency's site is the end item's manufacturer. *Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447, at 7 (2001); *Size Appeal of Nordic Sensor Technologies, Inc.*, SBA No. SIZ-4373, at 4 (1999). I thus conclude that Appellant has not met its burden of establishing that the Area Office erred in finding that ProActive is the manufacturer of the end item being procured by this RFP.

I therefore conclude, after reviewing the record before me, that ProActive is not unusually reliant upon its subcontractor Boeing for performance of this contract, nor that Boeing will be performing the primary and vital functions of this contract. Further, ProActive is the manufacturer of the end item being procured. Appellant has failed to establish any clear error of fact or law by the Area Office, and I must affirm the Size Determination.

## V. Conclusion

The record on appeal supports the Area Office's conclusion that ProActive is not unusually reliant upon its subcontractor Boeing for performance of the instant contract, and is the manufacturer of the end item being procured. The Size Determination is AFFIRMED and the Appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge