

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

SIZE APPEAL OF:

HX5, LLC,

Appellant,

Appealed From
Size Determination No. 3-2012-020

SBA No. SIZ-5331

Decided: March 12, 2012

APPEARANCES

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC,
Vienna, Virginia, for Appellant

John E. Jensen, Esq., Daniel S. Herzfeld, Esq., Evan D. Wesser, Esq., Nicole Y. Beeler,
Esq., Clare M. Cavaliero, Esq., Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia, for
Computer World Services Corporation

Chris Pettigrew, Contracting Officer, for the National Guard Bureau

DECISION¹

This is an appeal of a size determination in which the Area Office concluded that HX5 LLC, is not an eligible small business. For the reasons discussed below, I reverse the Area Office and grant the appeal. HX5, LLC, is an eligible small business for this procurement.

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.

II. Issue

Whether the Area Office clearly erred in concluding that Appellant's Proposal violated the ostensible subcontractor rule. *See* 13 C.F.R. § 134.314.

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 I considered these requests in redacting the Decision. OHA now publishes a redacted version of the Decision for public release.

III. Background

A. Solicitation

On April 25, 2011, the National Guard Bureau (NGB) issued Request for Proposals No. W9133L-11-R-0030 (RFP). The RFP requires the contractor to provide the services of 64 Systems Support Representatives (SSRs) for the Air National Guard (ANG) at numerous locations nationwide. The solicitation will result in a firm fixed-price non-commercial services contract. The Contracting Officer (CO) set the procurement aside for HUBZone concerns and designated North American Industry Classification System (NAICS) code 541519, Other Computer Related Services, with a corresponding \$25 million annual receipts size standard, as the appropriate code for the procurement.

The Performance Work Statement (PWS) requires each SSR to have at least a Bachelor's degree in Computer Science, Information Systems, Engineering, Business, or related discipline. SSRs must have an understanding of various elements of the Air National Guard's mission including aircraft performance factors, airspace, airways, airports, navigational aids and other flight information details, threats to aircraft, weather as it impacts mission planning, and a basic understanding of the related systems. The SSRs will provide support to the ANG for a number of software systems in overall support of the Guard's mission.

The primary duties of the SSRs are to support "Mission Spectrum" systems, including Portable Flight Planning System (PFPS)/Falconview, Mission Planning System (MPS), JMPS, Next Generation Mission Planning Software (XPlan), etc., and ancillary systems as designated by the Operations/Intelligence Group Commander. The SSRs are to maintain computer hardware and software, and oversee aircraft/weapon/electronic suite procurement upgrades. They are also to apply advanced technical training and professional expertise in application of computerized Ground Support Equipment for aircraft weapon systems requiring Data Transfer Device initialization using specialized software and hardware systems identified as MPS, PFPS, JMPS or XPlan. They must establish user account profiles and system defaults, modify access and execution permissions (as required) and implement and refine security procedures and practices. The SSRs must define, implement and maintain procedures and practices for loading new or updated data. They must analyze software, hardware and system problems to provide resolutions. The SSRs must also create and deliver technical briefings for Air Force personnel, and support unit exercises and training missions. SSRs must have knowledge of computer security procedures, must be able to accomplish basic file download and operation, and must be able to provide system recovery from crashes.

SSRs will support the Joint Precision Airdrop Systems/Improved Container Delivery System, the Briefing Room Interactive system, and others.

The evaluation criteria consist of four factors. Technical and Management, Plans and Résumés, and Past Performance are all of equal importance. The Price Factor is the least important factor. RFP, § M, ¶ 1.2, p. 60. Technical and Management will evaluate the offeror's ability to perform all the required technical and management requirements. Plans and Résumés

will evaluate three equal subfactors: Quality Control Plan, Recruiting and Retention Plan, and Résumés. RFP, § M, ¶ 2, pp. 60-61. The Government will evaluate Past Performance to assess relative risk associated with offeror's likelihood of achieving success. RFP, § M, ¶ 4, pp. 62-63. The Government will evaluate the offeror's relevant and recent performance as obtained from any and all sources. *Id.* The Government will evaluate similar tasks that are analogous to those tasks defined in the PWS, and will evaluate an “offeror's relevant and recent performance”, requiring offerors to provide information on similar tasks analogous to those tasks defined in the PWS. RFP, § M, at 62-63.

B. Appellant's Proposal

In its first pages, the Proposal emphasizes Appellant's own past performance in managing similar contracts. Appellant's subcontractor TYBRIN Corporation (TYBRIN) is the incumbent. The Proposal also mentions Appellant's mentor/protégé agreement with TYBRIN, but concedes that SBA had not yet approved it at the time of Proposal submission. Tab B, at 2. The Proposal also emphasizes that TYBRIN is the major developer of PFPS software, Joint Mission Planning System Joint Precision Airdrop System and many of the aircraft/weapons/electronics that require support from the SSRs this contract will provide. Tab B, at 4.

The Proposal states that the contract will be managed by the Program Manager (PM), [Proposed PM], who reports directly to Appellant's Chief Operations Officer (COO), [Appellant's COO]. While the Proposal does discuss the role of the PM, it also provides that the COO will have overall management of the contract.

Appellant's Past Performance submission includes [xxx] contracts for itself, and [xxx] for TYBRIN. Appellant emphasize its contracts in support of the U.S. Army Corps of Engineers Engineer Research and Development Center (ERDC). The first was a large contract where Appellant managed over [xxx] personnel performing at [xxx] different sites in [xxx] states. Most of the personnel performed in the Information Technology field. The second contract also involved managing a large number of technically proficient personnel. Past Performance at 5-8. The Past Performance submission does mention TYBRIN's experience and past ratings, and TYBRIN's incumbent status. *Id.*, at 3, 4.

Appellant's subcontract with TYBRIN provides that Appellant's Program Manager has responsibility for day-to-day technical and operational direction and Appellant's Contracts Administrator has responsibility for contract direction. Subcontract, ¶¶ D.8, E.7.3. Appellant's employee will perform as Program Manager for the entire program. Subcontract, ¶ E.7.4. Appellant is the sole point of contact with the Government; TYBRIN has no authority to take action which might affect a change in the contract without Appellant's written authorization. *Id.* Appellant will determine the allocation of all work between itself and TYBRIN. Subcontract, ¶ E.7.1. Appellant will perform all day-to-day management activities. Subcontract, ¶ E.7.2. [xxx] of the six Team Leads will be Appellant's employees. *Id.* The subcontract identifies by location a number of SSR positions TYBRIN will fill. Subcontract, Appendix 2.

Appellant's Teaming Agreement with TYBRIN references the mentor/protégé agreement

stated in a December 8, 2011, email to the Area Office that the primary requirement is for support services to provide training, develop and present briefings, install and upgrade software, and provide maintenance of military specific computer systems. The Area Office noted that RFP Section M states that technical and management, plans and résumés, and past performance are all of equal importance in evaluation.

The Area Office found the Proposal describes and puts more emphasis on TYBRIN's incumbency than Appellant's one management employee, [Appellant's COO], the COO. The PM, [Proposed PM], worked on the predecessor contract for nine years as a TYBRIN employee. Appellant's Proposal describes the PM as central point of contact and responsible for management of the contract, and has supervisory authority over all team actions and management personnel. Proposal Tab B 36, Section 7. The Area Office found the Proposal describes the PM as responsible for administering vital contract functions, citing Tab A6 1.1.6, Fig. 1-1.

After reviewing the Proposal, the Area Office further found that TYBRIN, as the incumbent, has the relevant and technical ability to perform this contract, and has the principal experience.

The Area Office further noted the Proposal emphasizes the mentor/protégé relationship between Appellant and TYBRIN, and provides that Appellant will “leverage” TYBRIN's experience and knowledge to support strong subcontract management. Tab B 35. Appellant had asserted to the Area Office that its mentor/protégé agreement with TYBRIN was submitted to SBA for approval prior to the decision to make the procurement a HUBZone set-aside. The Area Office stated this is not true because the solicitation issued on April 25, 2011 and mentor/protégé agreement was executed on April 28, 2011. At the time of the execution of that agreement, TYBRIN knew it was large and ineligible for a HUBZone set-aside.

The Area Office found that Proposal's Past Performance was unusually reliant upon TYBRIN, stressing TYBRIN's incumbency status, as well as its technical abilities and management skills, and prior evaluations. Past Performance 3, 4 summary. The Area Office found that Appellant's past performance submission does not demonstrate any experience on the vital contract requirements of support services to provide training, develop and present briefings, install and upgrade software, and provide maintenance of military computer systems.

The Area Office thus based its determination Appellant was unusually reliant upon TYBRIN upon TYBRIN's incumbent status, Appellant's reliance on TYBRIN's past performance, appointment of a TYBRIN employee as program manager, and the references to the pending mentor/protégé agreement between Appellant and TYBRIN.

The Area Office concluded that Appellant was unusually reliant upon TYBRIN and would not have received the contract without its participation. The Area Office then noted six points on which to distinguish this case from a recent OHA decision involving TYBRIN as a subcontractor, *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011) (*Spiral*).

First, while in *Spiral* the area office improperly placed decisional emphasis on the value and magnitude of the past performance examples, the Area Office here based its decision on the breadth of Appellant's reliance on TYBRIN's past performance. Appellant shows no past performance in any of the vital contract requirements, and is entirely reliant upon TYBRIN.

Second, in *Spiral* the program manager was from the challenged concern, and reliant on a deputy from the subcontractor. Here, the PM is a TYBRIN employee, and the Proposal emphasizes his role in contract management, even though he reports to one of Appellant's employees.

Third, in *Spiral*, the area office improperly relied upon the use of the word “team” in the Proposal. The Area Office is not doing so here. Fourth, here, TYBRIN is the incumbent contractor; in *Spiral*, it was not.

Fifth, the size determination in *Spiral* had improperly relied on the challenged concern's use of the incumbent's workforce. Here, it is not the use of the incumbent's workforce that the Area Office is relying upon for its determination. Sixth, in *Spiral*, the failure to assign discrete tasks did not establish undue reliance where the contract was an ID/IQ contract. This contract is a firm fixed price contract.

The Area Office found that Appellant and TYBRIN were affiliated under the ostensible subcontractor rule, and that Appellant is thus other than small for this procurement.

E. The Appeal

On December 19, 2011, Appellant received the Size Determination. On January 3, 2012, Appellant filed the instant appeal.

Appellant argues, because the protest was not based upon the ostensible subcontractor rule, that the Area Office should not have raised the issue *sua sponte*.

Appellant asserts that it is not a “front”, but has been in business for over seven years and has performed a similar type of contract. Appellant argues the Area Office has applied the ostensible subcontractor rule in an overly restrictive manner, where there is no affiliation or joint venture relationship between Appellant and TYBRIN.

Appellant argues that its mentor/protégé agreement with TYBRIN is unrelated to this procurement, and the Area Office erred in using this as one of the bases for finding an ostensible subcontractor violation.

Appellant further argues the Area Office erred in applying a *per se* rule that because TYBRIN was the incumbent contractor, there was an ostensible subcontractor violation.

Appellant asserts the Area Office failed to consider the relevant agreements. The Teaming Agreement between Appellant and TYBRIN shows no ostensible subcontracting. Appellant is to be the prime contractor, has the primary contact with the customer, has

responsibility for Proposal preparation and marketing, and will perform [xxx] % of the contract.

Appellant argues that its subcontract with TYBRIN provides that Appellant will solely determine the allocation of all work between the firms and coordinate all operational management activities. The Program Manager will be Appellant's employee and the sole interface with the government and be responsible for overall contract performance. Appellant's personnel will have the core management support positions. Appellant will employ [xxx] of 6 Team Leads.

Appellant disputes the Area Office's implication that its citations to its mentor/protégé agreement with TYBRIN were in any way intended to mislead SBA with regard to the status of the relationship. Appellant asserts the Area Office's finding that because the mentor/protégé agreement was not yet approved, Appellant was not entitled to the exemption from affiliation for joint ventures is irrelevant, because Appellant is not engaged in a joint venture with TYBRIN on this contract.

Appellant further argues that it is not prohibited from referring to its mentor/protégé relationship in its Proposal, and this does not demonstrate usual reliance. Rather it establishes increased stability and a strong relationship between team members, qualities a potential customer would desire. Appellant asserts SBA encourages concerns to establish mentor/protégé relationships. Appellant argues there is nothing improper about citing to a mentor/protégé agreement that is pending approval if the concern is not seeking to take advantage of the joint venture exception.

Appellant asserts the Area Office usurped the CO's role in determining Appellant's ability to perform the contract. These issues are in the nature of a responsibility determination, and are the province of the CO, not the Area Office, citing *Spiral* and *Size Appeal of Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235 (2011). Appellant argues that the Area Office based its conclusion on a cursory review of the Proposal, without reference to the RFP criteria or the procuring agency's decisions. The Area Office's evaluation was flawed because it did not match the RFP's evaluation criteria.

Appellant asserts it has relevant past performance on a contract larger in scope, involves more personnel, is just as complicated, and has a higher dollar value. This is the Corps of Engineers ERDC contract. Appellant argues that it was fully qualified to bid on this contract.³ Finding relevant past performance is the job of the procuring agency's source selection team, not the Area Office. Appellant argues that like the area office in *Spiral*, the Area Office gave no weight to the procuring agency's evaluation and improperly conducted its own assessment of Appellant's responsibility, based on criteria not included in the RFP.

Appellant asserts that Section M of the RFP does not require offerors to have acceptable past performance only on the same tasks as those defined in the PWS, but may have experience

³ Appellant attempts to introduce hearsay from the CO about its technical scores. This was not presented to the Area Office, and I must exclude it.

on similar tasks analogous to those defined in the PWS. Appellant argues that the Area Office did not evaluate its past performance based upon the RFP, but upon an email from the CO requiring experience on certain named military computer programs, when this requirement was not in the RFP. Appellant argues it did have past performance experience on similar tasks, and the Area Office erred in not relying strictly upon the RFP.

Appellant asserts its past performance establishes that it has the experience necessary to perform this contract. The submission included three contract references for Appellant, as well as three for TYBRIN. Appellant's first reference, its ERDC contract, established its capabilities. Proposal, Past Performance at 1, 5-6, Technical Management, Tab B at 35, 40.

Appellant further asserts the Area Office ignored the requirements in the past performance questionnaires the RFP required offerors to answer. These required responses on Management, Quality of Services, Cost Control, and Responsiveness to Customers.

Appellant further argues the Area Office improperly determined that [Proposed PM] was the sole individual responsible for the primary and vital contract requirements, based on its erroneous conclusion that a TYBRIN employee will serve as Program Manager. While [Proposed PM] is presently employed by TYBRIN, Appellant will employ him to perform this contract. Tab 3, Wade Employment Agreement. Appellant argues nothing in the RFP required offerors to identify which company proposed the Program Manager. The subcontract identified Appellant as the company responsible for program leadership and required that as condition of the contract, Appellant be permitted to hire [Proposed PM] as Program Manager. This hiring is consistent with the policy in Executive Order No, 13,495 that promotes the hiring of incumbent personnel.

Appellant argues the Area Office further erred in assuming the primary and vital requirements of a contract with more than 64 personnel could be fulfilled by [Proposed PM] alone. Appellant argues the Area Office should have examined the Subcontract under Appendix 2 — Program Structure and Subcontractor Operating Instructions, which lays out the structure of contract performance. The Area Office erred when it asserted the Proposal puts more emphasis on TYBRIN than Appellant's management employee at Tab A6 1.1.6 of the Proposal. This Tab deals with only one requirement — Quality Control. The Area Office erred in relying only on this Tab. The Area Office also made errors of fact, [[Proposed PM] will be Appellant's employee, [xxxxxxxxxxxxx] will remain a TYBRIN employee.

Appellant argues by focusing only on Quality Control, the Area Office neglected to give any weight to [Appellant's COO], who will play the lead role in contract performance. Appellant notes [Appellant's COO]'s extensive education and experience in leading and managing DoD technical support services contracts. The Area Office also ignored Appellant's overall program management support structure, virtually identical to the one Appellant uses to perform the ERDC contract, a contract larger than the instant procurement. Past Performance at 7. Under this program, the Program Manager reports directly to [Appellant's COO], and is assisted by a deputy, and administrative assistant, and multiple site heads.

Appellant further asserts its personnel will perform the primary and vital requirements.

The RFP requires one full time SSR at each of 64 locations listed in the RFP. RFP, Amendments 2, Q&A No. 4. Offerors had to propose 64 SSRs with comparable skills at the designated locations. Appellant argues that where both contractors perform the same type of work, the firm that will perform the majority of the contract must be deemed to be performing the primary and vital requirements, citing *Spiral and Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 6-7 (2011). Here, Appellant's employees and TYBRIN's employees will be performing the same type of work and Appellant will perform a majority of it. Appellant solely determines the allocation of work between the prime and subcontractors, performs all day-to-day management, and is sole interface with the Government. Appellant's employee is Program Manager, and Appellant employs [xxx] of six Team Leads. Appellant asserts it is performing the primary and vital functions of the contract, and the Area Office erred in finding otherwise.

On January 3, 2012, Appellant also filed a motion for the admission of new evidence, together with that evidence.

F. The Contracting Officer's Response

On January 19, 2012, the CO responded in support of the appeal. The CO states that the Area Office erred in finding that Appellant's past performance did not support a finding that it had any experience on the vital contract requirements. The CO states that the Government did not expect any HUBZone firm would have the precise experience the Area Office looked for on this contract. The RFP states that the Government was seeking past performance relevant to the contract requirements. The Government did not require offerors to submit past performance experience exactly like that required by the contract. The CO asserts his review of Appellant's past performance, independent of TYBRIN, merited a Low Risk rating. The CO asserts Appellant provided the best value to the Government in this procurement.

G. Protestor's Response

On January 19, 2012, the protestor CWS responded to the appeal. CWS asserts first, that the Area Office did not err in basing the Size Determination on grounds other than those set forth in the protest. Second, CWS asserts the Area Office did not adopt a *per se* rule on incumbency, but rather weighed TYBRIN's incumbent status as a factor, as required by the regulation. CWS also asserts the Area Office was not required to analyze the agreements between Appellant and TYBRIN.

CWS further argues the Area Office did not usurp the CO's authority, because evaluating a prime contractor's experience is part of an ostensible subcontractor analysis. CWS asserts that past performance is an important evaluation factor, and Appellant's past performance submission stresses its subcontractor's incumbency.

CWS asserts TYBRIN will perform the primary and vital requirements of the contract. Appellant's employment of the incumbent subcontractor's project manager is indicative of unusual reliance. CWS further asserts TYBRIN will perform [xxx] % of the work on this contract, which is also an indicator of unusual reliance. CWS argues Appellant depended upon

TYBRIN's status and capabilities for the award, and that its Proposal emphasizes TYBRIN's role.

CWS further asserts that the Area Office correctly determined that the mentor/protégé exception from affiliation for joint ventures is not applicable here because SBA had not yet approved the mentor/protégé agreement between Appellant and TYBRIN.

IV. Discussion

A. Timeliness, New Evidence, 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).

I DENY Appellant's motion to admit new evidence. Evidence not considered by the Area Office is not to be admitted absent a motion establishing good cause. 13 C.F.R. § 134.308(a)(2). Appellant has failed to show good cause for the admission of new evidence.

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).

Here, while the Area Office did not explicitly find Appellant small outside of its relationship with TYBRIN, Appellant's SBA Form 355 and tax returns submitted in response to the protest clearly establish that Appellant is, by itself, a small business. The issue here then is whether the Area Office's determination that Appellant is affiliated with TYBRIN under the ostensible subcontractor rule is supported by the record.

B. The Merits of the Ostensible Subcontractor 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).

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

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).

Appellant's argument that the Area Office erred in basing the Size Determination on grounds not raised in CWS's protest is meritless. The regulation explicitly provides that a size determination may be based on grounds not raised in the protest or request for a size determination. 13 C.F.R. § 121.1009(b). The Area Office acted within its authority in investigating Appellant's size on other grounds than those raised in the protest. *Size Appeal of Excalibur Laundries, Inc.*, SBA No. SIZ-5317, at 5 (2012).

The Area Office based its determination on TYBRIN's incumbent status, the appointment of a TYBRIN employee to be the PM, the references in the Proposal to the pending mentor/protegé agreement, and Appellant's reliance on TYBRIN's past performance. Size Determination at 10.

I find the Area Office correctly determined that TYBRIN is an incumbent. The solicitation itself, in answers to questions 12 and 14 of Amendment No. 2, identifies TYBRIN as the incumbent on this contract. (“Q. If there is an incumbent, please identify the incumbent ... A. the incumbent is TYBRIN corporation”). Further, Appellant's Proposal refers to TYBRIN as the incumbent. *e.g.*, Past Performance at 3, 4.

Contrary to Appellant's argument, the Area Office did not adopt a *per se* rule that because a challenged concern's subcontractor is the incumbent, there is a violation of the ostensible subcontractor rule. The Area Office did place emphasis upon TYBRIN's incumbent status, but this is because the regulation specifically mentions the incumbency of the subcontractor as a factor to be considered. The Area Office must consider this factor. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 27 (2011). A review of the Size Determination establishes that the Area Office did not apply a *per se* rule, but relied upon TYBRIN's incumbency as one factor.

Nevertheless, the Area Office did err in finding that [Proposed PM] would hold the critical PM post as TYBRIN's employee. The Proposal and the Teaming Agreement both make clear, as noted above, that the PM will be Appellant's employee. There is no question that the PM position is a key position, and will play an important role in managing the contract. However, the PM will perform those roles as Appellant's employee. Further, the PM will report to Appellant's current COO, who has extensive experience in Information Technology and Defense contracts. [Appellant's COO] Résumé. In addition, [xxx] of the six Team Leads will be Appellant's employees. The Area Office did not base its decision on Appellant's hire of [Proposed PM] from TYBRIN, but on “the appointment of a TYBRIN employee to be the program manager”. [Proposed PM] will not be a TYBRIN employee, and thus not performing contract management as a TYBRIN employee. The Area Office thus erred in basing the Size Determination on the PM for this contract being TYBRIN's employee. OHA has established that the hiring of an incumbent's employees is not indicative of undue reliance under the ostensible subcontractor rule. *Spiral*, at 28. While it is clear that the PM will have a major role in contract

performance, it will be as Appellant's employee, not TYBRIN's. Therefore, I find that the Area Office erred in finding Appellant's placing a TYBRIN employee in the PM position as indicative of undue reliance, because [Proposed PM] would performing as Appellant's employee.

Appellant's pending mentor/protégé agreement with TYBRIN was another ground the Area Office relied on for finding Appellant unusually reliant. Two firms approved by SBA to be a mentor and protégé may form a joint venture for any Federal procurement, and are exempt from the normal rules of affiliation. 13 C.F.R. §§ 121.103(b)(6); 121.103(h)(3)(iii). A protégé firm may not be found affiliated with a mentor solely because the protégé firm receives assistance from the mentor under the program, but affiliation may be found for other reasons. 13 C.F.R. § 121.103(b)(6). However, the mentor/protégé relationship must be in existence and already approved by SBA for the joint venture to take advantage of the mentor/protégé exception. *Size Appeal of Medical and Occupational Services Alliance*, SBA No. SIZ-4989 (2008).

Here, SBA had not yet approved Appellant's mentor/protégé agreement with TYBRIN at the time Appellant submitted its offer. Therefore, Appellant may not take advantage of the mentor/protégé exception. This matter is not in dispute. Appellant did not assert that SBA had approved its mentor/protégé agreement with TYBRIN. The Proposal did not represent that the agreement was already in place. Appellant submitted the Proposal here not as a joint venture, but as prime contractor with TYBRIN as its subcontractor. The Proposal mentions numerous times that approval of the mentor/protégé agreement is pending. Appellant argues that it was not trying to take advantage of a benefit to which it was not entitled. Rather, it was demonstrating to the Government that it had a solid relationship with its subcontractor, and a strong team would be in place should they receive the award.

The Area Office however, chose to use the pending mentor/protégé agreement as a ground for finding affiliation. The Area Office was clearly disturbed by the frequent references to the pending mentor/protégé agreement in the Proposal. However, the regulation states that an approved agreement is not grounds for finding affiliation. It does not provide that an agreement which is merely pending can be affirmative grounds for finding affiliation, unless there is actual assistance being provided which assistance itself can be grounds for finding affiliation. The assistance TYBRIN was to provide Appellant under the mentor/protégé agreement had not yet commenced. As notes above, the Proposal refers many times to the mentor/protégé agreement, but makes clear that the agreement is not approved. The Proposal thus discusses potential assistance, which will be provided contingent upon SBA's approval of the agreement. The Area Office did not point to any specific assistance that led to its finding; rather, it was the references to the mentor/protégé agreement itself that led the Area Office to find this indicative of unusual reliance.

I find that the Area Office clearly erred in finding that references to Appellant's pending mentor/protégé agreement with TYBRIN were indicative of unusual reliance upon TYBRIN. While an unapproved mentor/protégé agreement offers no protection from a finding of affiliation, it should not be used to place the challenged concern in greater jeopardy of a finding of affiliation. At the time of Proposal submission, Appellant and TYBRIN's unapproved mentor/protégé agreement was merely a blueprint for a future relationship. The language in the

Proposal to which Appellant objects is too general to support a finding of unusual reliance, and it does not refer to specific assistance TYBRIN is rendering in the absence of an approved agreement which could lead to a finding of unusual reliance. The Proposal refers to the pending agreement to establish that the team was based upon a good relationship between the prime contractor and subcontractor. Further, the Proposal makes clear that all assistance to be rendered under the agreement is contingent upon approval of the agreement. References in a Proposal to a pending mentor/protégé agreement do not constitute unusual reliance by a challenged concern, so long as it does not describe actual assistance being rendered in the absence of an approved mentor/protégé agreement.

The Area Office also erred in finding Appellant unusually reliant upon TYBRIN for its past performance rating. The Area Office made its own determination that Appellant did not show relevant past performance of any magnitude in the vital contract requirements.

However, the CO's contemporaneous evaluation of Appellant's Proposal submitted with the record for this appeal describes Appellant as having a well-defined organizational structure, very high level of expertise, and outstanding level of experience. The CO also found processes such as quality control, recruiting and retention, organization and management as "unequaled" among the offerors. The Proposal includes these activities as ones Appellant will perform. In his submission here, the CO stated that the Government did not expect that any HUBZone company would have the experience of performing precisely the same work required by the RFP. The CO referred to the RFP, which stated that the Government was seeking past performance that was *relevant* to the requirements of the contract. The CO stated that his review of Appellant's past performance, independent of that of TYBRIN, merited a high rating. While this is statement is a *post hoc* pleading, it is consistent with the CO's contemporaneous evaluation contained in the Area Office file, and which the Area Office did not discuss in the Size Determination. I therefore conclude that the CO's statement that he concluded Appellant's past performance was entitled to a high is accurate, and a determination that was within the CO's purview.

Further, the RFP itself refers to "similar tasks that analogous to those tasks defined in the PWS", and states that Government will evaluate an "offeror's *relevant* and recent performance" (emphasis supplied), and required bidders to provide information "on similar tasks *analogous* to those tasks defined in the PWS" (emphasis supplied). RFP, § M, at 62-63. The RFP did not require an offeror's past performance be precisely that of the RFP's requirements. It was sufficient that the experience be relevant and analogous to the requirements.

Appellant's Past Performance submission for itself includes its ERDC contracts for the U.S. Army Corps of Engineers. These were substantial contracts, and had multiple performance locations across the U.S. The first contract required the services of over [xxx] personnel in [xxx] states, and Appellant was required to provide experienced software developer, software testers, system administrators and electronics technicians. Past Performance at 1, 5-7.

The Area Office here made its own determination on that Appellant was reliant upon TYBRIN for past performance, but this determination is not supported by the record, and infringes upon the CO's functions. The Area Office did not take into account the RFP called for past performance that was relevant to and analogous to the requirements of the PWS. The Area

Office did not discuss whether Appellant's past performance was relevant or analogous to the tasks required by the RFP. Rather, the Area Office measured Appellant's past performance on whether it had the experience in specific tasks required by the RFP. In doing so, the Area Office applied its own criteria, rather than those in the RFP. The Area Office was assessing Appellant's capability to perform the contract, and this is ultimately a question of contractor responsibility. A question of contractor responsibility is a matter for the CO, and is outside the Area Office's jurisdiction. When the Area Office undertakes to determine a challenged concern's responsibility, it has exceeded its authority and committed clear error. *Spiral*, at 22-4.

Further, the Area Office erred in finding that Appellant was dependent upon TYBRIN for its past participation rating. Appellant's Proposal's Past Performance section includes [xxx] contracts for Appellant and [xxx] for TYBRIN. The record offers no evidence to support the conclusion that the CO based its evaluation primarily upon the TYBRIN contracts. Further, I have already concluded that the CO concluded Appellant's past performance, independent of TYBRIN, merited a high rating. Therefore, the Area Office clearly erred in concluding Appellant was unusually reliant upon TYBRIN for its past performance rating. *Spiral*, at 23.

The Air National Guard evaluated Appellant's Proposal, and concluded that Appellant could successfully perform the contract. The Area Office did not consider the evaluation, did not consider the RFP's scheme for past performance evaluation, conducted its own review, and reached a conclusion Appellant was dependent upon TYBRIN for past performance unsupported by the record. The Area Office's conclusion Appellant was unusually reliant upon TYBRIN for its Past Performance was clear error.

The Area Office attempts to distinguish this case from *Spiral*, the most closely analogous case. First, the Area Office stated that its past performance analysis was proper because it was based not on the depth of Appellant's past performance, but on its breadth. I find this to be a meaningless statement. As discussed above, Appellant erred in its past performance analysis, and thus this distinction is not applicable.

Second, the Area Office asserted the PM here would be a TYBRIN employee. Again, as discussed above, this assertion was clear error.

Third, the Area Office did not rely upon Appellant's use of the term "Team" in its Proposal, as did the area office in *Spiral*. This is true. Fourth, here, TYBRIN is the incumbent contractor, which was not the case for the alleged ostensible subcontractor in TYBRIN. This is also true here. Fifth, the Area Office did not base its determination on Appellant's retention of the incumbent workforce, as the area office did in *Spiral*. This is also true here. Sixth, this contract is a firm fixed price, not ID/IQ, as was the contract in *Spiral*.

Nevertheless, while the Area Office was required to consider TYBRIN's status as incumbent, that in itself was not a determinative factor. While it is true that the Area Office here did not rely upon the use of the "team" language in the Proposal or Appellant's use of incumbent personnel, these are not relevant here, neither is the type of contract here. What is critical here is that the Area Office relied upon an erroneous determination that Appellant's PM was a TYBRIN employee, erroneously relied upon Appellant's discussion of its pending mentor/protégé

agreement as indicia of undue reliance, and erroneously evaluated Appellant's past performance submission, ignoring the RFP's criteria and stepping into the CO's shoes. These instances of clear error outweigh the distinctions the Area Office sought to draw between this case and *Spiral*.

Further, Appellant and TYBRIN will be performing the same types of work here, providing SSRs to the Air National Guard, and Appellant will be performing the majority of the work. OHA has held that in this circumstance, Appellant must be held to be performing the primary and vital tasks of the contract. *Spiral*, at 20. The Area Office clearly erred in finding Appellant unusually reliant upon TYBRIN, and therefore I must reverse this Size Determination, and grant the instant appeal.

V. Conclusion

The record on appeal does not support the Area Office's conclusion that Appellant is unusually reliant upon its subcontractor TYBRIN for performance of the instant contract. The Size Determination is REVERSED and the Appeal is GRANTED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge