

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

SIZE APPEAL OF:

iGov Technologies, Inc.,

Appellant,

RE: Arma Global Corporation

Appealed From Size Determination Nos.
3-2012-048, -049, -050, and -051

SBA No. SIZ-5359

Decided: June 13, 2012

APPEARANCES

Richard L. Moorhouse, Esq., Dorn C. McGrath, III, Esq., and William M. Jack, Esq.
Greenberg Traurig, LLP, McLean, Virginia and Washington D.C., for Appellant

Kenneth B. Weckstein, Esq., and Shlomo D. Katz, Esq., Brown Rudnick, LLP,
Washington D.C., for Arma Global Corporation

DECISION¹

I. Introduction and Jurisdiction

On March 16, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued a size determination in cases numbers 3-2012-048, -049, -050, and -051, finding Arma Global Corporation (Arma) to be an eligible small business under the size standard associated with Solicitation No. H92222-11-R-0010. iGov Technologies, Inc. (Appellant), which had originally protested Arma's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15

¹ This Decision was initially issued on June 4, 2012 under a Protective Order designed to prevent the disclosure of confidential or proprietary information. I also issued an Order for Redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published Decision. OHA received one or more timely requests for redactions and considered any requests in redacting the Decision. OHA now issues a redacted version of the Decision for public release.

U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. The record reflects that the size determination was issued March 16, 2012, but not received by Appellant until March 20, 2012. 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 and Protests

On May 18, 2011, the U.S. Special Operations Command (USSOCOM) at MacDill Air Force Base, Florida, issued Solicitation H92222-11-R-0010 (RFP) seeking a contractor to provide production, logistics, and sustainment support services for the Tactical Local Area Network (TACLAN) program. The RFP explained that TACLAN is a modular and scalable family of computer networking equipment and workstations which enables timely and secure exchange of information in support of Special Operations Forces (SOF) missions. (RFP, § C.1.0.) “TACLAN interconnects all deployed SOF elements from the smallest team to a Joint Special Operations Task Force (JSOTF) headquarters with one seamless network to share information and facilitate responsive knowledge based decisions.” (RFP, § C.2.0.)

The RFP stated that USSOCOM intended to award a single indefinite delivery/indefinite quantity contract with a maximum value of \$500 million. (RFP, § B.2.) Specific requirements would be defined in individual orders issued after award of the base contract. The contract would have a three-year base ordering period and two additional one-year ordering periods that could be earned by the contractor as incentives for excellent performance. (RFP, § B.1.) The Contracting Officer (CO) set aside the procurement exclusively for small businesses and designated North American Industry Classification System (NAICS) code 541519, Other Computer Related Services. NAICS code 541519 ordinarily is associated with a size standard of \$25 million, but the RFP indicated that the work fit within the exception for Information Technology Value Added Resellers, which utilizes a size standard of 150 employees.²

² According to SBA regulations, the Information Technology Value Added Reseller exception is appropriate under the following circumstances:

An Information Technology Value Added Reseller provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support. For purposes of Government procurement, an information technology procurement classified under this industry category must consist of at least 15% and not more than 50% of value added services as measured by the total price less the cost of information technology hardware, computer software, and profit. If the contract consists of less than 15% of value added services, then it must be classified under a NAICS manufacturing industry. If the contract consists

The RFP contained a detailed statement of work (SOW) outlining contractual requirements. (RFP § C.) The SOW indicated that the contractor would be expected to produce large quantities of TACLAN equipment in accordance with USSOCOM technical requirements, and thereafter “manage, support, service, and maintain” the equipment. (RFP § C.3.0.) The contractor must “acquire all components necessary to fabricate/produce the TACLAN [family of systems (FoS)], integrate software baseline updates, integrate hardware and software components, support baseline acceptance testing (BAT) [and] accreditation testing ..., conduct training, and field the TACLAN components.” (*Id.*) The RFP indicated that, in the production of TACLAN equipment, the contractor would be responsible for “procurement, integration, fabrication, test, [configuration management], [information assurance], security and [communications security], [[new equipment training], [unique identifiers], shipping, fielding, and on-board spares.” (RFP § C.3.2.) The lifecycle support duties included “all labor, material, and travel to support ongoing hardware/equipment replenishment as fielded hardware/equipment requires replacement or reaches end of life; reporting and management; non-warranty repair; depot spares [and repairs]; [[integrated logistics support]; ... support of trouble ticket and change request resolution, and all other tasks for complete lifecycle and customer support.” (RFP § C.3.3.) Further, the contractor must “design the TACLAN FoS to satisfy evolving user requirements,” and develop and implement a systems engineering plan. (RFP § C.7.1.)

The RFP indicated that Government facilities would generally not be available to the contractor during performance. Rather, “all production, warehousing and support shall be at the TACLAN Contractor's facilities.” (RFP § C.4.1.) USSOCOM would, however, make available its Enterprise SOF Integration Facility to assist with certain testing. (*Id.*)

The RFP outlined the evaluation criteria USSOCOM would consider in awarding the contract. There were three evaluation factors: Technical/Management, Past Performance, and Price. (RFP § M-2.) Technical/Management was significantly more important than Past Performance, which was significantly more important than Price.

The Technical/Management factor consisted of three subfactors: Systems Engineering, Life Cycle Support, and Transition Plan. Systems Engineering was the most heavily-weighted subfactor. The RFP stated that USSOCOM would evaluate proposals under this subfactor “to ensure that the offeror has an engineering approach for proactively evolving the TACLAN family of systems throughout its life cycle to include, but not limited to: design, fabrication, [hardware and software] integration test, test support, certification and accreditation, sustainability, modernization and technological insertions.” (RFP § M-3.1.2.)

The Life Cycle Support subfactor was less important than Systems Engineering but more important than Transition Plan. For this subfactor, the RFP stated that USSOCOM would evaluate proposals “to ensure that the offeror has a comprehensive process to meet the life cycle

of more than 50% of value added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement.

sustainment requirements of newly fielded and legacy TACLAN systems.” (RFP § M-3.1.3.)

Transition Plan was the least important subfactor under Technical/Management. For this subfactor, USSOCOM would assess whether the offeror would “execute a realistic, organized, seamless, and timely contract phase-in to transition the contract,” and whether the offeror “has developed a comprehensive, realistic approach for the support of legacy equipment, maintenance of technical data, and the transfer and accountability of all Government property.” (RFP § M-3.1.7.)

Arma submitted its initial proposal on June 23, 2011, and its final proposal revision on January 24, 2012. According to Arma's proposal, [REDACTED]

Arma proposed [subcontractor]³ as its principal subcontractor. The proposal indicated that, [REDACTED]

On February 14, 2012, the CO notified offerors that Arma was the apparent successful offeror. The CO received timely protests from four disappointed offerors: Intelligent Waves, LLC,⁴ Forward Slope, Inc.,⁵ Global Technical Systems (GTS),⁶ and Appellant.⁷ Appellant is the incumbent on a predecessor contract. The CO forwarded the protests to the Area Office.

B. Size Determination

On March 16, 2012, the Area Office issued consolidated Size Determination Nos. 3-2012-048, -049, -050, and -051, finding that Arma is a small business. In reaching its conclusion, the Area Office determined Arma would perform the primary and vital requirements of the TACLAN contract and that Arma was not overly reliant on its subcontractor, [subcontractor].

³ The identity of Arma's subcontractor for the instant procurement has been redacted throughout the decision. All references to [subcontractor] refer to this firm.

⁴ Intelligent Waves, LLC alleged that Arma exceeded the applicable size standard because Arma's LinkedIn profile showed employment between 200 and 500 employees. The protest was assigned Size Determination No. 3-2012-048.

⁵ Forward Slope, Inc. alleged that Arma's employee count exceeded 200 employees, and that the Central Contractor Registration showed that Arma is not a small business. The protest was assigned Size Determination No. 3-2012-049.

⁶ GTS alleged that Arma recently obtained substantial contract awards that disqualified Arma from being a small business. GTS also alleged that as of January 11, 2012, Online Representation and Certifications indicated that Arma was not a small business. Finally, GTS alleged that Arma was operating under a financially stressed condition such that Arma must be unusually reliant upon an ostensible subcontractor to complete the TACLAN. GTS did not identify the alleged ostensible subcontractor. The protest was assigned Size Determination No. 3-2012-050.

⁷ Appellant alleged that Arma's employee count exceeded 150 employees. However, Appellant did not raise any allegation concerning an ostensible subcontractor relationship. The protest was assigned Size Determination No. 3-2012-051.

Accordingly, the Area Office found that Arma was not affiliated with [subcontractor] under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).⁸

The Area Office based its determination, in part, on comments from the chairman of the panel which had evaluated offerors' proposals. (Size Determination at 5-6.) On March 15, 2012, the Area Office contacted the CO and requested a review of Arma's proposal; the CO forwarded the inquiry to the chairman. The chairman opined that “[XXXXXXXXXXXXXXXXXXXXXXXXXXXX].” (Email from [XXXXXX], Source Selection Evaluation Board Chairman, to Douglas L. Pick, CO (Mar. 15, 2012, 12:33 PM)). The chairman summarized [subcontractor's] role in contract performance, indicating that [subcontractor] would, with Arma's oversight, “[XXXXXX XXX].” (*Id.*) The chairman further remarked that “[XX].” (*Id.*)

The Area Office also conducted its own review of the RFP and Arma's proposal. (Size Determination at 6.) The Area Office found that Arma would complete all program management requirements and perform “100% of the services under the contract.” (*Id.*) Further, the Area Office determined that “[t]here are two primary system requirements in the contact: Systems Engineering and Life Cycle Support.” (*Id.*) Based on Arma's proposal, the Area Office stated that Arma would perform “100% of Systems Engineering Services” and “100% of the Lifecycle Support Services.” (*Id.*) The Area Office also addressed the work to be performed by [subcontractor], and stated that [subcontractor] would “only procure hardware, maintain the inventory database, fabricate transit cases, and complete component assemblies.” (*Id.*) [Subcontractor] “is not providing any employees or labor to perform any of the contract services.” (*Id.*)

The Area Office also found that Arma was not unduly reliant on [subcontractor] because [subcontractor's] qualifications and experience did not form the basis of Arma's ability to qualify for the instant procurement. The Area Office reiterated that Arma would perform all program management requirements, as well as all services under the contract, including the services associated with Systems Engineering and Lifecycle Support.

C. Appeal Petition

On April 3, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.

Appellant first argues that the Area Office erred as a matter of law because it did not consider “all aspects” of Arma's relationship with [subcontractor], as 13 C.F.R. § 121.103(h)(4) mandates. Specifically, Appellant insists that the Area Office should have considered the RFP; the terms of Arma's proposal, including technical responsibilities and percentage of

⁸ The Area Office also determined that Arma is affiliated with Arma Systems Corporation, but that Arma remains a small business notwithstanding this affiliation. These issues are not disputed on appeal, and therefore are not addressed further herein.

subcontracted work; other agreements between Arma and [subcontractor]; whether [subcontractor] assisted with the preparation of Arma's proposal; whether the firms are collaborating on other projects; and whether [subcontractor] provides financial assistance to Arma. (Appeal at 5.) Appellant observes that the size determination contains no citations to Arma's proposal. (Appeal at 7.)

Appellant argues that the Area Office failed to identify the “primary and vital” requirements of the TACLAN contract. Appellant contends that this omission contravenes 13 C.F.R. § 121.1009(e), which requires an area office to state in writing the basis for its findings and conclusions, and “preclude[[s] any meaningful appeal or review of the determination by [OHA], and constitutes a clear basis for remand.” (Appeal at 5 (quoting *Size Appeal of LDDS Metromedia Comm'cs Corp.*, SBA No. SIZ-3929, at 8 (1994)).) Appellant argues that, instead of properly analyzing the primary and vital requirements of the TACLAN contract, the Area Office merely regurgitated the comments of the evaluation board chairman. Appellant maintains that neither the chairman nor other USSOCOM personnel ever identified the primary and vital requirements for the Area Office. (Appeal at 5.) As a result, according to Appellant, no evidence supports the chairman's view that Arma will perform the primary and vital requirements of the TACLAN contract.

Appellant complains that the Area Office's consideration of the primary and vital requirements was inadequate because the Area Office provided no support for its conclusion that the contract's Systems Engineering and Life Cycle Support functions were the “primary systems requirements.” (Appeal at 8.) Appellant asserts that the Area Office also incorrectly stated, without support, that “[t]he purpose of the procurement is to provide technical support services, equipment, equipment life cycle support and systems engineering/studies in support of [TACLAN].” (*Id.*)

Appellant insists the Area Office should have found that “production” was the primary and vital requirement associated with TACLAN. Drawing from its own experience as the incumbent contractor, Appellant estimates that production constitutes nearly [XX]% of the contract's total value. (Appeal at 6, 9.) Appellant adds that the SOW and slides from a pre-solicitation conference repeatedly emphasize production's importance. (Appeal at 8 (citing RFP §§ C.3.0 and C.3.2 and Industry Day Slides, at 3, 19, 30-31).)

Appellant contends that the functions of assembly, integration, and testing are ancillary or secondary to production. (Appeal at 6-7.) Further, in Appellant's view, the Area Office's determinations that Arma will manage the contract, and perform all Systems Engineering and Lifecycle Support services, are misleading because those functions are not the primary and vital requirements. Appellant highlights that “[n]ot 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.” (Appeal at 9 (quoting *Size Appeal of Onopa Mgm't Corp.*, SBA No. SIZ-5302, at 17 (2011)).)

Appellant disputes the Area Office's finding that Arma is not unusually reliant on [subcontractor]. The size determination indicates that [subcontractor] will “procure hardware, maintain the inventory database, fabricate transit cases, and conduct component subassemblies.”

(Size Determination at 5.) According to Appellant, procurement, fabrication, security, and communications security management are all part of the TACLAN “production” function. (Appeal at 10.) Appellant also emphasizes that, under Arma's proposal, “production” will occur at [subcontractor's] facilities, rather than Arma's facilities, which Appellant maintains is contrary to the RFP requirement that “all production ... shall be at the TACLAN Contractor's facilities.” (Appeal at 6 (quoting RFP § C.4.1).) Appellant asserts that Arma is unusually reliant on its large subcontractor to procure, fabricate, and transport the necessary equipment, and Arma will have only limited oversight or control of its subcontractor's operations.

Finally, Appellant questions whether Arma has sufficient corporate experience to perform the TACLAN contract. (Appeal at 12.) Appellant argues that by choosing to subcontract essential production functions to [[subcontractor], Arma has essentially conceded that it lacks the experience necessary to perform the contract. (Appeal at 11.) Appellant also points to Arma's website to show that Arma does not bring the necessary experience. Appellant states that, of the last twelve contracts listed on Arma's website, ten were related to fields other than information technology. According to Appellant, the remaining two contracts related to information technology but are dissimilar to the TACLAN contract.

D. Arma Response

On April 20, 2012, Arma filed its opposition to the appeal. Arma contends that the appeal should be dismissed or denied because there is no clear error of fact or law in the size determination.

Arma first argues that OHA should dismiss the appeal because the protest allegations pertaining to the ostensible subcontractor rule lacked specificity, and therefore should not have been considered by the Area Office. According to Arma, GTS was the only protester to raise this issue, but GTS' protest did not name Arma's alleged ostensible subcontractor. Thus, Arma asserts that the Area Office should have dismissed GTS' allegation for lack of specificity, pursuant to 13 C.F.R. § 121.1007(c). In that event, the instant appeal, which pertains solely to the ostensible subcontractor issue, should be dismissed as well. (Response at 2, 5.)

Alternatively, Arma argues that the appeal is meritless and should be denied. According to Arma, Appellant's entire appeal is based on the flawed premise that the TACLAN contract is for supplies. On the contrary, argues Arma, the contract is a services acquisition. (Response at 8.) Arma emphasizes that the CO designated NAICS code 541519, Other Computer Related Services. Arma argues that this choice of NAICS code was not timely challenged, and is therefore now final. According to Arma, Appellant's arguments about which firm is performing ““production” are irrelevant to a size determination under a services-based NAICS code. As further evidence that the contract is for services, Arma points out that the CO, when asked whether the contract was for services or supplies, responded the contract was in fact for services. (Response at 8 (citing Q&A # 181 (June 15, 2011)).)

Arma disputes Appellant's assertion that the Area Office did not consider all aspects of Arma's relationship with its intended subcontractor. Arma maintains that the Area Office obtained Arma's proposal and reviewed it, including the portions of the proposal describing

Arma's and [subcontractor's] relationship and respective roles. In addition, the Area Office posed questions to Arma, and Arma directed the Area Office's attention to certain portions of the proposal. (Response at 6 (referencing email from Brian Overstreet, COO, Arma, to Scott Nirk, Procurement Center Representative, SBA (Mar. 13, 2012, 1:03 PM)).) According to Arma, the Area Office adequately explained its rationale in its written decision.

Next, Arma addresses Appellant's argument that the Area Office improperly relied upon the comments of the evaluation board chairman, in lieu of conducting a substantive review of the contract's primary and vital requirements. Arma cites 13 C.F.R. § 121.1009(b), which provides:

The size determination will be based primarily on the information supplied by the protestor of the entity requesting the size determination and that provided by the concern whose size status is at issue. . . . SBA may use other information and may make requests for additional information to . . . other parties.

Arma contends that the protestor which raised the ostensible subcontractor allegation, GTS, did not provide any detailed support for the allegation, so the size determination necessarily was “based primarily on the information supplied ... by the concern whose size status is at issue,” *i.e.*, Arma. Further, Arma insists that it was proper for the Area Office to solicit and consider the views of the procuring agency, since USSOCOM is most familiar with the RFP and offerors' proposals. (Response at 7.)

Finally, Arma argues that Appellant improperly bases some of its arguments on the contents of Appellant's own proposal, rather than Arma's proposal. Because Appellant's proposal is not in the record and is not at issue, Arma maintains that arguments pertaining to Appellant's proposal should be disregarded. Arma quotes *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 5 (2011) for the proposition that “OHA's review is based on the evidence in the record at the time the Area Office made its determination.”

E. Motion to Extend the Close of Record and Appellant's Reply

On April 20, 2012, Appellant moved to extend the close of record in order to permit Appellant to address alleged errors and inconsistencies in Arma's response. OHA granted the motion and extended the close of record until April 25, 2012.

On April 25, 2012, Appellant filed its reply to Arma's response. Appellant first addresses Arma's contention that the ostensible subcontractor allegation should have been dismissed by the Area Office, because the protester did not identify the alleged ostensible subcontractor. Appellant maintains that Arma's argument is contrary to OHA's decision in *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5294, at 3 (2011), where OHA determined that “the nature of [an ostensible subcontractor] allegation does not require that a specific affiliate be identified in order for the challenged firm to meaningfully respond.” Appellant further argues that 13 C.F.R. § 121.1007(b) only requires that the challenged firm be afforded reasonable notice as to the grounds for the protest. In this case, according to Appellant, Arma had reasonable notice that the protest allegations pertained to [subcontractor], because Arma's proposal only involved one major subcontractor.

Appellant cites OHA precedent that “[a]n area office should make its own inquiries to gain additional information to deduce an accurate understanding of the size of the protested business.” *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4848, at 6 (2007). Further, OHA has recognized that:

[P]rotests must, by necessity, raise allegations based on little information since the protested concerns have the best access to information about themselves. Area offices are charged with using the initial information to commence a further investigation which culminates with a size determination that should include a fuller understanding of the facts involved. Ultimately, the size determination is based on the complete record and includes citations to the evidence relied upon to reach the determination.

Size Appeal of Corp. Training and Dev., Inc., SBA No. SIZ-4849, at 4 (2007). In this case, the Area Office rendered a decision on the merits, despite Arma's request to dismiss the protest for lack of specificity. Accordingly, in Appellant's view, the ostensible subcontractor argument fell within the scope of the Area Office's review.

Next, Appellant argues that Arma incorrectly asserts that the Area Office considered “all aspects” of Arma's relationship with [subcontractor]. According to Appellant, nothing in the size determination discusses all aspects of the relationship, such as the subcontract, bonding assistance, or teaming agreements. Furthermore, Appellant argues, the size determination does not show that the Area Office considered the primary and vital requirements of the TACLAN contract, or assess whether Arma or [subcontractor] would perform them. Finally, Appellant contends that the Area Office did not consider two important factors that show Arma is unduly reliant on [subcontractor]: [subcontractor's] assets will support contract orders, and production will take place at [[subcontractor's] facilities. (Reply at 5-6.)

Appellant also maintains that Arma mischaracterizes Appellant's argument that the evaluation board chairman, the CO, and other USSOCOM personnel did not identify the contract's primary and vital requirements. According to Appellant, Arma construes this argument as an objection to the Area Office seeking clarification from the procuring agency. Appellant insists that the problem with the determination was not that the Area Office attempted to seek clarification, but rather that the information provided was faulty and misleading.

Appellant goes on to argue that Arma mischaracterizes Appellant's argument that “production” is the primary and vital requirement. Appellant argues it did not assert that the TACLAN contract was merely a procurement of supplies. Second, Appellant contends that the assigned NAICS code does not dictate the contract's primary and vital functions, nor does it shed light on whether there is undue reliance between the prime contractor and subcontractor. Appellant goes on to claim that Arma has failed to demonstrate that services are the primary and vital requirements.

Finally, Appellant asserts that it did not base its arguments on its own proposal, as Arma suggests. Rather, Appellant maintains that its arguments were based, in part, on its past

experience as the incumbent contractor. That past experience informs Appellant's contention that the bulk of the labor and the contract dollar value will be associated with production. Appellant maintains that Arma's own proposal confirms that the bulk of the contract dollars will go to production, as the [subcontractor] subcontract is estimated at \$[XXXXXX], approximately [XX]% of Arma's total proposed price. (Reply at 7.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an 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. Analysis

1. Protest Specificity

Arma first argues that OHA should dismiss the instant appeal because the underlying protest did not identify Arma's alleged ostensible subcontractor, and therefore lacked specificity. This argument is meritless. OHA previously considered this exact issue in *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5294 (2011). In that case, a protester alleged violation of the ostensible subcontractor rule, but was unable to identify the alleged ostensible subcontractor because the procuring agency refused to disclose that information. The area office dismissed the protest for lack of specificity, but OHA reversed, explaining that the purpose of the specificity rule is to ensure that the challenged firm has enough information to “craft a meaningful response to the protest.” *C2G*, SBA No. SIZ-5294, at 2 (quoting *Size Appeal of Unitron, LP*, SBA No. SIZ-5084, at 2 (2009)). By nature, ostensible subcontractor allegations turn largely on the challenged firm's own proposal, so the challenged firm ordinarily can prepare a proper response to the protest even if the protest does not name the alleged ostensible subcontractor. *Id.* at 3-4.

Likewise, in this case, the ostensible subcontractor allegation was sufficiently detailed to enable Arma to meaningfully respond. From the protest, Arma could ascertain that its proposal for the TACLAN procurement was at issue, based on alleged violation of the ostensible subcontractor rule. [[Subcontractor] was Arma's only major subcontractor for the procurement. Thus, Arma had notice of the specific grounds upon which its size was being challenged. Further, Arma provided a substantive response to the Area Office refuting the ostensible subcontractor allegation, thereby demonstrating that Arma was not prejudiced by the protester's failure to identify the alleged ostensible subcontractor. Accordingly, Arma's request to dismiss the appeal is denied.⁹

⁹ Because the ostensible subcontractor allegation was raised only in GTS' protest, and not in Appellant's own protest, there may be a question as to whether Appellant has proper

2. Ostensible Subcontractor

The principal issue presented in this case is whether the Area Office erred in concluding that there was not an ostensible subcontractor relationship between Arma and its subcontractor, [subcontractor]. As discussed below, Appellant has not established any reversible error in the Area Office's decision.

The “ostensible subcontractor” rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when 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). The “primary and vital” requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgm't Corp.*, SBA No. SIZ-5302, at 17 (2011). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, the area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). 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).

Here, Appellant urges that the primary purpose of the instant contract is “production” of TACLAN equipment. Appellant maintains that, under Arma's proposed approach, [subcontractor] would perform such production work—most notably, the manufacturing and acquisition of components—with Arma's participation confined to ancillary “post-production” work. (Appeal at 6.) Appellant further argues that [subcontractor] would perform production at [[subcontractor's] own facility, with limited or no oversight by Arma, and in violation of RFP requirements. Appellant observes that Arma's subcontract with [[subcontractor] accounts for more than [XX]% of total contract dollar value, which in Appellant's view underscores the importance of the “production” to the overall effort.

I find Appellant's arguments unpersuasive for several reasons. First, although Appellant construes “production” as referring primarily to the manufacturing of computer hardware, a review of the RFP as a whole does not demonstrate that such activity is the primary purpose of the TACLAN contract. The RFP contained an extensive statement of work outlining required services, and was assigned a NAICS code for services (541519, Other Computer Related Services). Thus, to characterize the TACLAN contract as primarily a vehicle for the acquisition of computer hardware ignores the very substantial role of services in the procurement. Further, although the RFP did indicate that the contractor must “acquire all components necessary to fabricate/produce the TACLAN FoS” (RFP § C.3.0), the RFP goes on to delineate a far broader

standing to argue this issue on appeal. Arma, though, does not dispute Appellant's standing to pursue this appeal. Furthermore, in prior case decisions, OHA has suggested that a protester may appeal issues that were addressed in a size determination, even if the protester did not raise those same issues in its protest. *Size Appeal of Lajas Indus., Inc.*, SBA No. SIZ-4285 (1998).

range of contractor responsibilities, including engineering and designing the TACLAN systems; integrating hardware and software into usable devices; testing, fielding, and maintaining TACLAN equipment and systems; training end users; and managing the TACLAN program. Indeed, even the “production” function itself is defined in the RFP as including not just acquisition and manufacturing of hardware, but also integration, testing, configuration management, information assurance, security and communications security, new equipment training, unique identifiers, shipping, fielding, and on-board spares. (RFP § C.3.2.) Accordingly, viewing the RFP as a whole, the primary purpose of the TACLAN acquisition is to engineer, provide, and maintain an effective and interconnected network of systems and devices.

Other aspects of the procurement support this conclusion. The RFP's evaluation criteria stated that USSOCOM would evaluate proposals with a heavy emphasis on the “Systems Engineering” and “Life Cycle Support” subfactors. (RFP §§ M-3.1.2, M-3.1.3.) Accordingly, this choice of evaluation criteria indicates that USSOCOM was primarily concerned with offerors' plans for designing and maintaining the TACLAN network of systems, not with the acquisition and manufacturing of computer hardware. Furthermore, while USSOCOM's evaluation chairman did not specifically explain which aspects of the procurement he considered to be “primary and vital,” he nevertheless did assert that Arma would be performing the primary and vital requirements, including all “critical” services, while acknowledging that [subcontractor] would “procure hardware” and “conduct[] component subassemblies.” It is therefore apparent that the chairman did not consider acquisition or manufacturing of components to be among the contract's “primary and vital” requirements.¹⁰

OHA considered an analogous situation in *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010). That case involved a procurement to provide boxed lunches, where the challenged firm hired a subcontractor to make the sandwiches. The area office determined that the preparation of the sandwiches was the primary and vital contract task, but OHA reversed, stating:

A fair reading of the full [solicitation] leads to the conclusion that it is the provision and service of the noon meal at the [Government facility] that is the primary contract task. In other words, this contract is essentially one for services. Obviously, the sandwiches are an important part of the contract, but it is the service of an entire meal that must be provided under the [[solicitation]. The conclusion would be different if [the challenged firm] was merely transporting the box lunches to the [Government facility] and the [[Government agency] was serving them. But here, it is [the challenged firm] who must assemble the lunches, serve the lunches, and clean up afterwards. These services are the heart of the contract, and because [the challenged firm] will provide these services, I find it is [the challenged firm] who will perform the primary contract task of providing the noon meal.

¹⁰ Although the primary and vital requirements are ascertained principally from the solicitation itself, the views of the procuring agency are also entitled to some weight. *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 11 (2011).

TLC Catering, SBA No. SIZ-5172, at 4.

Likewise, the Area Office here reasonably concluded that Arma would be performing the primary and vital requirements. Although the procurement and manufacturing of hardware is indisputably an important part of the procurement, a review of the acquisition as a whole demonstrates that the primary focus is not procurement or manufacturing of computer hardware, but rather services (particularly engineering, integration, testing, and maintenance) essential to creating and sustaining a functional TACLAN network. Arma would perform all such services, and therefore is performing the primary and vital requirements.

Appellant points out that, according to Arma's proposal, the subcontract with [subcontractor] accounts for approximately [XX]% of the total contract dollar value. Appellant asserts that since subassembly (production) comprises the bulk of the contract's dollar value, it also should be deemed the contract's primary and vital requirement. It is true that OHA has opined that “[f]requently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value.” *Santa Fe Protective Servs.*, SBA No. SIZ-5312, at 10. However, whether a subcontract constitutes the bulk of the contract's dollar value does not dispose of the inquiry into whether the subcontractor is performing the contract's primary and vital requirements. For that reason, OHA has stated that it is “also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements.” *Id.* (citing *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”). In this case, although computer hardware may comprise the bulk of contract dollar value, the components themselves have little value unless properly engineered and integrated into an effective network. Thus, the importance of ensuring interoperability and providing support over the life of the TACLAN systems overshadows the quantitative factor of dollar value.

Appellant further contends that the Area Office failed to scrutinize “all aspects” of Arma's relationship with [subcontractor], and complains that the Area Office never identified the contract's primary and vital requirements and made no citations to Arma's proposal. I agree with Appellant that the size determination's discussion of the ostensible subcontractor issue was relatively brief. Nevertheless, the record demonstrates that the Area Office had access to the relevant documents, including Arma's complete proposal; the subcontract between Arma and [subcontractor]; the analysis of the procuring agency; Arma's response to the protest allegations; and the RFP, including all amendments. Despite the fact that the Area Office did not discuss all these documents in detail in the size determination, it is not clear that the Area Office failed to review or consider these documents. Moreover, it does not appear in any event that a more thorough discussion of these documents would have resulted in a different outcome. Accordingly, I find that any error in this respect is harmless. *E.g.*, *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected the outcome).

Appellant also argues Arma is unduly reliant on [subcontractor] to procure hardware, maintain the inventory database, fabricate transit cases, and conduct component subassemblies. Another argument for undue reliance is that [[subcontractor] will use its own assets to support

contract orders, and that production will occur at [subcontractor's] facilities.¹¹ These arguments are meritless. OHA has recognized that a subcontractor's performance of discrete tasks at its own facility does not establish undue reliance. *Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 10 (2011). In this case, Arma subcontracted to [subcontractor] the procurement, manufacturing, and end-of-life notification of the subassembly parts. As in *Patrick Wolffe*, those tasks are discrete and not the contract's primary purpose. Therefore, their performance by a subcontractor does not amount to undue reliance. I find no error in the Area Office's determination that Arma is not unduly reliant on [subcontractor].

Finally, there is Arma's argument that, in the appeal, Appellant referred to its own proposal, and to its experience as the incumbent contractor, as a basis for several arguments. I agree with Arma that Appellant's approach to the TACLAN contract is not necessarily identical to Arma's, and therefore sheds no light on whether Arma's approach is contrary to the ostensible subcontractor rule. Furthermore, Appellant's proposal is not in the record, and therefore cannot properly be examined in any event. *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 5 (2011) (recognizing that "OHA's review is based on the evidence in the record at the time the Area Office made its determination."). Accordingly, Appellant's arguments with respect to its own proposal, or to its experience in performing the predecessor contract, are not relevant here, and have formed no basis of this decision.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the 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

¹¹ Appellant suggests that performance of production at a subcontractor facility, rather than the prime contractor's facility, is "in violation of Section 4.1. of the SOW." (Appeal at 6-7.) Insofar as Appellant is contending that Arma's proposal did not comply with the RFP, such issues are matters of proposal responsiveness, beyond OHA's jurisdiction. *E.g.*, *Size Appeal of Morris-Clark Contracting, LLC*, SBA No. SIZ-5044, at n.1 (2009) (refusing to consider allegation that another offeror's proposal "be disallowed as a non-responsive bid.").