United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Competitive Innovations, LLC Appellant, RE: Focus Group Corporation Appealed From Size Determination No. 2-2011-158	SBA No. SIZ-5369 Decided: September 17, 2012

APPEARANCES

Michael A. Gordon, Esq., Fran Baskin, Esq., and Jason Edwards, Esq., Michael A. Gordon PLLC, Washington D.C., for Appellant

Hilary S. Cairnie, Esq., Ambika J. Biggs, Esq., and Christopher R. Noon, Esq., Baker & Hostetler LLP, Washington D.C., for Focus Group Corporation

DECISION [1]

I. Introduction and Jurisdiction

On February 17, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued a size determination in case number 2-2011-158, finding Focus Group Corporation (FGC) to be an eligible small business under the size standard associated with Solicitation No. N00421-09-R-0016. Competitive Innovations, LLC (Appellant), which had previously protested FGC's size, contends that the size determination is fundamentally flawed, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination.

In the size determination, the Area Office found that there were two primary and vital

[1] This decision was initially issued on June 22, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

contract requirements, one of which would be performed by FGC itself, and the other by FGC's subcontractors. Appellant maintains that there is only one primary and vital requirement, all of which will be performed by FGC's subcontractors, in violation of the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). Appellant argues in the alternative that, even assuming there were two primary and vital contract requirements, FGC lacks the requisite expertise to independently perform that work. For the reasons discussed *infra*, the record supports Appellant's position that there is only one primary and vital requirement, and that FGC's subcontractors would perform all of that work. Accordingly, the appeal is granted, and the size determination is reversed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. The record reflects that the size determination was issued February 17, 2012, but not received by Appellant until February 22, 2012. [2] 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). Therefore, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Initial Award Decision

On November 17, 2009, the U.S. Department of the Navy (Navy) issued Solicitation No. N00421-09-R-0016 (RFP) seeking a contractor to "design, develop, and deliver" educational seminars to Navy personnel. (RFP § C.3.0.) The RFP contemplated that there would be a total of five seminars, each of which would be delivered at least twice per year. (*Id.*) The Contracting Officer (CO) set aside the procurement for Historically Underutilized Business Zone (HUBZone) small businesses, and designated North American Industry Classification System (NAICS) code 611430, Professional and Management Development Training, with an associated size standard of $7 million in average annual receipts.

The RFP explained that, before the initial delivery of each seminar, the contractor would present a "pilot" version of each seminar to "highlight seminar design and development, demonstrate the learning continuum objectives, and showcase administrative procedures including the anticipated seminar locations, meal plans and guest speakers." (RFP § C.5.1.; *see also* RFP, § B, Contract Line Item Numbers (CLINs) 0011 - 0016.) The RFP indicated that "[i]t is expected that there will be minimal modification/updates in seminar materials after the [pilot] presentation," although "[m]odification/updates may be required as a result of changes in senior leadership goals and objectives, changes in world events, and participant feedback." (*Id.* § C.3.0.)

The RFP is the successor to an earlier procurement for similar services. The RFP stated that, "[f]or each seminar, the Government will provide the applicable Government Furnished

[2] In its appeal petition, Appellant explains that the size determination was initially transmitted to an incorrect facsimile number. (Appeal at n. 1.)

Information (GFI) to the Contractor, including ... previous seminar materials." (*Id.*) The prime contractor on the predecessor procurement was Virginia State University (VSU). (*Id.* § L.5.2.1.)

The RFP outlined the evaluation criteria the Navy would consider in awarding the contract. There were three evaluation factors: Technical, Past Performance, and Cost/Price. (*Id.* § M. 1.1.) The Technical factor was more important than Past Performance, and the Technical and Past Performance factors together were more important than Cost/Price. (*Id.*) The RFP instructed offerors to submit proposals in four volumes, with the Offer Letter in Volume I, the Technical Proposal in Volume II, Past Performance in Volume III, and the Cost/Price Proposal in Volume IV. (*Id.* § L. 1.11.1.)

Two offerors—Appellant and FGC—submitted proposals in response to the RFP. On December 16, 2010, the Navy awarded the contract to FGC. Appellant challenged that award decision, and the Navy elected to issue a stop-work order and reexamine its source selection. On February 9, 2011, the Navy began a new evaluation and permitted offerors to resubmit proposals.

On July 22, 2011, the CO announced that Appellant had been selected for the award. On July 29, 2011, FGC protested both Appellant's size and HUBZone status. The size protest alleged that Appellant and its principal subcontractor were affiliated under SBA's ostensible subcontractor rule.

B. First Size Determination

On September 1, 2011, the Area Office issued Size Determination No. 2-2011-142, finding that Appellant was not a small business for purposes of the RFP. The Area Office determined that there was an ostensible subcontractor relationship between Appellant and [Appellant's Subcontractor], Appellant's principal subcontractor.[3]

The Area Office reviewed the RFP and determined that "the primary and vital parts of the solicitation are curriculum development and instruction." (Size Determination No. 2-2011-142 at 9.) The Area Office found that [[Appellant's Subcontractor] would supply the curriculum, and that Appellant's proposal made "no reference to [Appellant's] participation in curriculum design." (*Id.* at 10.) Furthermore, although Appellant proposed that ***, the Area Office observed that Appellant planned to hire *** to perform such work. The instructors ***, ***. (*Id.* at 11.) Further, the Area Office found that Appellant "does not propose ***." (*Id.* at 10.) The Area Office concluded that [[Appellant's Subcontractor] would perform the primary and vital contract requirements, and that Appellant was unduly reliant on [Appellant's Subcontractor]. Once Appellant's receipts were combined with those of [[Appellant's Subcontractor], Appellant exceeded the applicable size standard, so Appellant was not an eligible small business for

[3] In response to the protest, Appellant attempted to convince the Area Office that its proposed subcontractor was actually the ***, an entity independent from [Appellant's Subcontractor] itself. The Area Office rejected this distinction, however, and instead determined that *** and [Appellant's Subcontractor] should be treated as one entity for purposes of the size determination. (Size Determination No. 2-2011-142 at 11.)

purposes of the RFP. Appellant did not appeal Size Determination 2-2011-142 to OHA.

After Appellant was determined to be other than small, FGC was the only remaining offeror. On September 8, 2011, the Navy selected FGC for award. On September 13, 2011, Appellant protested FGC's size, alleging that FGC was unduly reliant upon its subcontractors for equipment, facilities, and personnel.

C. FGC's Proposal

In its proposal, FGC stated that it planned to utilize four subcontractors: [[Subcontractor 1]; [Subcontractor 2]; [Subcontractor 3]; and [Subcontractor 4]. These same firms had been ***, and FGC explained that "***." (FGC Proposal, Vol. II, § 2.3.2.4.) FGC stated that "***." (*Id.*)

According to FGC's proposal, each of the four subcontractors would be responsible for delivering one or more of the seminars; none of the seminars would be delivered by FGC itself. (*Id.* § 2.2.1.) FGC's proposal indicated that FGC planned to use the existing seminar materials, developed under the predecessor contract, as a "***," and stated that "***." (*Id.* § 2.2.1.1.1.) The proposal emphasized that FGC, as the prime contractor, would oversee and manage the contract, and indicated that all seminars would be attended by FGC's program manager and/or assistant program manager. (*Id.* § 2.3.2.5.) FGC's program manager "***." (*Id.* § 2.3.1.) "***." (*Id.* § 2.3.2.2.)

FGC's proposal contained a table entitled "Workforce Qualifications." (FGC Proposal, Vol. II, § 2.1.) According to the table, out of *** total personnel involved in contract performance, *** would be employees of FGC: ***. The remaining *** personnel—including all of the instructors, many holding doctorates or other advanced degrees—would be subcontractor employees. (*Id.*) ***. (*Id.*)

FGC's proposal also contained a table entitled "Workforce Hour Matrix." (FGC Proposal, Vol. II, § 2.1.4.1.) The table estimates that FGC and its subcontractors would utilize a total of *** hours in performing the contract, assuming all option periods were exercised. Of this total, *** hours (less than 4%) were associated with development of the pilot versions of the seminars (***).

D. The Instant Size Determination

On February 17, 2012, the Area Office issued the instant size determination, concluding that FGC is a small business. The Area Office determined that FGC itself is a small business, that there is no ostensible subcontractor relationship between FGC and its four subcontractors, and that FGC is not otherwise affiliated with any of the subcontractors.

The Area Office first considered whether Appellant had standing to challenge FGC's size, given that the Area Office had already determined in Size Determination No. 2-2011-142 that Appellant was not a small business for purposes of the procurement. The Area Office observed that applicable regulations provide that "[a] concern found to be other than small in connection with the procurement is not an interested party [to file a size protest] unless there is only one

remaining offeror after the concern is found to be other than small." 13 C.F.R. § 121.1001 (a)(1)(iv). Here, Appellant and FGC were the only two offerors, so the Area Office found it appropriate to consider Appellant's protest. (Size Determination No. 2-2011-158, at 5.) The Area Office also recognized that FGC had challenged Appellant's HUBZone eligibility, as well as Appellant's size. The Area Office stated that "[i]f it is later determined that Appellant was not an interested party due to its HUBZone status, the Area Office might consider adopting [Appellants] allegations and issuing [its own] size protest." (*Id.*)

With regard to the ostensible subcontractor issue, the Area Office found that the language of RFP § C.3.0 placed "utmost emphasis" on the design, development, and delivery of the seminars. (*Id.* at 9.) As a result, the Area Office concluded that "[t]here are essentially two key components that comprise the primary and vital parts of this solicitation: the development and design of the curriculum and the delivery and/or instruction." (*Id.* at 10.) The Area Office found that FGC alone would be responsible for "managing the contract, designing and developing the curriculum, and providing the subject matter expertise." (*Id.*) The instruction function would be carried out by FGC's four subcontractors. (*Id.*)

The Area Office recognized that delivery of instruction was a "primary and vital" contract requirement, and that FGC's proposal envisioned that this work would be performed entirely by subcontractors. Thus, at a minimum, "subcontractors are performing a portion of the primary and vital parts of the contract." (*Id.* at 12.) The Area Office noted, however, that under FGC's approach, "this work is spread out over four different subcontractors." (*Id.*) Furthermore, the Area Office stated that if a prime and subcontractor are both performing primary and vital parts of a contract, the firm that is performing the greater percentage may be deemed to be performing the primary and vital requirements. The Area Office estimated that, according to its analysis of FGC's cost/price proposal, approximately XX% of total contract dollars would flow to FGC. The Area Office therefore reasoned that FGC would be performing the primary and vital requirements of the contract. (*Id.*)

The Area Office also considered whether FGC was unduly reliant on its four subcontractors, and found no such reliance. According to the Area Office, "FGC is managing the contract, providing the instructional design and implementation of the subject matter." (*Id.* at 13.) Furthermore, FGC "has the experience in functional tasks required for this procurement." (*Id.*) FGC was not dependent on its subcontractors for facilities, equipment, or materials because FGC would be using *** to conduct the training.

Lastly, the Area Office distinguished the instant size determination from its earlier determination finding Appellant affiliated with [Appellant's Subcontractor]. The Area Office explained that FGC has four subcontractors, each of which provides instructors for a specific seminar. By dividing the instruction function among four subcontractors, FGC limited each subcontractor's ability to control or influence FGC, By contrast, in Appellant's proposal, there was only one major subcontractor, and that subcontractor would play a dominant role in contract performance, providing "instructors, facilities, books, and the curriculum." (*Id.*)

E. Appeal Petition

On March 8, 2012, Appellant filed its appeal of Size Determination No. 2-2011-158 with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.

***.

Next, Appellant argues that FGC's four subcontractors will perform the contract's primary and vital requirements. Appellant agrees with the Area Office's finding that FGC's subcontractors will perform all of the instruction. However, Appellant asserts that the Area Office erroneously determined that curriculum development is also a primary requirement. Appellant contends that the curriculum for the seminars had already been developed and designed under the predecessor contract. (Appeal at 13.) "In short, there is very little or no 'development' or 'design' of the curriculum to be performed." (*Id.*)

In the event that OHA nevertheless concludes that curriculum development is a primary requirement, Appellant argues alternatively that FGC's subcontractors will perform the bulk, if not all, of such work. According to Appellant, FGC's contribution to curriculum development can only be minimal because all of the instructors would be subcontractor employees, and FGC itself has no expertise in such matters. Appellant emphasizes that FGC gave no details as to which of its employees would perform curriculum development or the number of hours those employees would expend doing it. ***.

Appellant argues that close scrutiny of FGC's proposal reveals that FGC will not perform curriculum development. *** (Appeal at 14, 19.)

Appellant disputes the notion that FGC has experience developing curriculum for commercial entities. According to Appellant, although the Area Office asserted that FGC does have relevant experience, the Area Office did not explain when FGC purportedly performed these services, or the type of curriculum development involved. (Appeal at 15.)

Appellant argues that the Area Office erroneously concluded that FGC would be performing the primary and vital requirements based on its determination that FGC would accrue the bulk of the labor cost (XX%). Appellant emphasizes that it is unknown what portion of labor will be devoted to curriculum development.[4] Therefore, in Appellant's view, it does not follow that FGC will perform the contract's primary and vital requirements. Appellant further argues that the "XX% figure is not binding." Appellant reasons that, since at least XX% of the work is for instruction, which the subcontractors will perform, FGC's share of the work will be below 50% if the subcontractors perform any curriculum development. In that case, Appellant argues, FGC is not performing the bulk of the labor cost.

[4] Appellant indicates that, in Appellant's own proposal, curriculum development accounted for only XX% of labor cost. (Appeal at 17.)

Appellant argues further that the Area Office erroneously relied on *Size Appeal of Spiral Solutions and Techs., Inc.*, SBA No. SIZ-5269 (2011) to support the view that FGC would be performing the primary and vital requirements. Appellant argues the Area Office's reliance on *Spiral Solutions* is misplaced because, in that case, the prime contractor and the subcontractor were performing the same type of work. By contrast, FGC will perform altogether different work than its subcontractors.

Next, Appellant argues the Area Office did not adequately address its protest allegation that FGC is unduly reliant on its subcontractors. In its protest, Appellant argued there was undue reliance because FGC lacks sufficient revenues or facilities to perform the contract. Appellant maintains that FGC is a very small firm with no relevant experience. As for facilities, Appellant argues that FGC's office "is a residence in a rural area which shares space with a dog breeding business." (Appeal at 17.) Appellant asserts that the Area Office ignored the issue of where FGC would perform curriculum development work and contract management activities. Appellant insists that this activity will take place at the subcontractors' facilities.

Appellant also argues that, although the Area Office attached great weight to the fact that FGC would utilize multiple subcontractors, the ostensible subcontractor rule should still apply. Appellant maintains that FGC is "totally dependent" on its subcontractors, and therefore under their control. (Appeal at 19.) Appellant states that the Area Office did not consider which firms could replace the subcontractors when it determined that FGC could control its subcontractors.

F. Appellant's Motion to Admit New Evidence and FGC's Opposition Thereto

On March 9, 2012, Appellant moved to admit a declaration from Mr. Michael J. Kennedy, the Chief Executive Officer and sole owner of Appellant, as well as information from public websites. According to Appellant, this evidence refutes FGC's contention that FGC has relevant experience in curriculum development Appellant states it did not learn of FGC's statement until February 17, 2012, when the Area Office issued the size determination. Therefore, in Appellant's view, there is good cause to admit this evidence.

Mr. Kennedy's declaration first states that he researched FGC's experience training and developing curricula for commercial customers, and found no indication that FGC has such experience. Mr. Kennedy discusses an investigation in which he contacted FGC's references. He adds that a former FGC employee informed him the experience FGC listed was inaccurate.

Mr. Kennedy disputes the notion that a pre-award audit declared FGC financially sound. Mr. Kennedy asserts that a pre-award audit of Appellant did not determine whether Appellant was financially sound. Mr. Kennedy then argues that, based on his conversation with FGC's former employee, FGC's accounting system would not have the ability to handle or provide reliable pricing information for a contract of this size, scale, and complexity.

Mr. Kennedy then addresses the Area Office's finding that FGC would perform curriculum development He argues the Area Office did not identify which FGC employees would perform curriculum development work. Mr. Kennedy goes on to share details from

Appellant's proposal pertinent to curriculum development. According to Appellant's proposal, [XX]% of the work required to perform the contract would be for curriculum development. (Kennedy Decl. ¶ 10.) Mr. Kennedy then states that Appellant learned from other sources that FGC is "reusing the exact curriculum that has already been developed by incumbent subcontractors." (*Id.*)

On March 24, 2012, FGC opposed Appellant's motion to admit new evidence. FGC argues that Appellant has not shown good cause to admit that evidence. According to FGC, Appellant's evidence has little probative value, because it is based on "multiple layers of hearsay" and "unsworn statements from unknown persons whose information has not been substantiated or verified." (Opposition at 2.) FGC further contends the evidence is not relevant to the arguments raised on appeal.

G. FGC's Motion to Admit New Evidence

On March 26, 2012, FGC moved to introduce a declaration from Dr. Skerl, FGC's Chief Executive Officer. FGC urges OHA to accept this evidence in the event that OHA admits Appellant's new evidence. Dr. Skerl's declaration responds to and rebuts arguments from Mr. Kennedy's declaration.

H. Appeal Supplement

On March 26, 2012, the date of the close of record, Appellant requested leave to supplement its appeal, and filed an appeal supplement. OHA generally has accepted new argument in support of an appeal petition, provided that it is submitted before the close of record and is based on information not previously available to the appellant. *E.g., Size Appeal of Hardie's Fruit and Vegetable Co. South, LP*, SBA No. SIZ-5347, at 8 (2012) (accepting a supplement to the appeal filed before the close of record). Here, Appellant explains that, prior to OHA's issuance of a protective order in this case, Appellant did not have access to the complete record. Accordingly, I GRANT Appellant's motion and ADMIT the appeal supplement into the record.

In its supplement, Appellant argues that FGC will not perform the primary and vital requirements. Appellant asserts that the finding that FGC would perform curriculum development was erroneous, as FGC's proposal shows that the subcontractors would develop the curriculum. By contrast, FGC would play no substantive role.

Appellant distinguishes the tasks FGC will perform from those the subcontractors will perform. ***. Therefore, argues Appellant, it is FGC's subcontractors, not FGC, that will perform curriculum development. (*Id.*)

According to Appellant, the labor categories in FGC's proposal identify two positions related to curriculum development—*** and the ***. Appellant argues *** (*Id.*) Appellant emphasizes further that FGC's proposal only identifies people for these roles in the base year. FGC did not identify any one performing curriculum development in the option years.

Appellant argues that FGC did not state in its response to the Area Office that it would perform curriculum development. Rather, FGC "vaguely claimed 'FGC provided all primary and vital requirements throughout the solicitation."' (*Id.* at 21 (quoting (FGC Response at 10)).)

Appellant emphasizes salient aspects of FGC's proposal that show the subcontractors would [utilize] existing curriculum developed under the predecessor contract, and would design changes when needed. *** In light of this evidence, Appellant argues the Area Office erred in concluding that the subcontractors are not involved in "subject matter development" or ""instructional design" but are "limited to instruction and some Information Technology work." (*Id.* (quoting (Size Determination at 12)).)

Next, Appellant argues FGC is unduly reliant on its subcontractors because FGC lacks the requisite experience to perform the contract, as the contract is for specialized training relating to a military environment. ***. According to Appellant, FGC claimed in its response to the Area Office that it had numerous contracts with federal agencies, commercial organizations and private institutions. But, Appellant argues, FGC did not list any Government contracts as references, and it did not describe any but one of these contracts. (*Id.* at 25.)

Appellant contends that the only Government contract FGC described was for the ***. However, Appellant argues that the NAICS code for this contract was ""Convention and Trade Show Organizers," and is therefore not similar to the instant procurement. (*Id.*)

Appellant goes on to cast doubt on the relevance of FGC's past performance references. First, Appellant emphasizes that *** (*Id.* at 22.) ***.

According to Appellant, FGC claimed in its Form 355 that it earned $*** in 2010 under the NAICS code for the instant procurement. Appellant argues, however, that Government contract databases do not support this claim, and that none of FGC's past performance references ***. (*Id.* at 24.)

Appellant argues that ***.

Appellant further argues that FGC is unduly reliant on its subcontractors because FGC's teaming agreement with the subcontractors shows the subcontractors were responsible for providing curriculum modification and subject matter content for the proposal. (*Id.* at 26.) Appellant argues this arrangement indicates unusual reliance because these tasks are key and critical information necessary to submit the proposal. *See Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004). Appellant asserts that the subcontractors authored the "Understanding of the Work" section of FGC's proposal in which FGC described the seminars offered. (*Id.*)

Appellant contends that FGC lacks capacity to perform a contract of this size. Appellant argues that FGC's past revenues show FGC cannot perform the instant contract, valued at approximately $14 million over five years. Appellant further argues FGC lacks the facilities to conduct seminars and that ***.

Appellant argues the Area Office erred in relying on the certificate of competency from

FGC's contract with ***. According to Appellant, this reliance is unjustifiable for two reasons. First, certificates of competency are contract-specific. Second, the *** contract bears little similarity to the instant procurement. (*Id.* at 28)

Appellant argues FGC is not performing the majority of the work. According to Appellant, FGC's proposal does not identify staff at FGC to perform curriculum development after the base year. Thus, Appellant reasons, FGC's subcontractors will perform that work in the option years. Appellant argues that, when removing costs for ***, FGC's share of the cost drops well below 50%.

I. FGC Response

On April 6, 2012, FGC filed its response to the appeal. FGC contends the appeal should be denied because there is no clear error of fact or law in the size determination. FGC requests that OHA affirm the size determination.

FGC first argues that the fact that *** does not establish that there is unusual reliance. FGC contends that Appellant's citations to *Size Appeal of Smart Data Solutions LLC T/A SDSE, LLC*, SBA No. SIZ-5071 (2009) and *Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984 (2008) are inapposite. FGC argues that, in *Smart Data*, the prime contractor had no past performance history in the primary and vital requirements; only the subcontractors could perform those services. By contrast, FGC argues that the Area Office here determined that FGC would perform curriculum development, a primary and vital contract requirement. In *Video Masters*, the prime contractor's only relevant experience was as a subcontractor to the incumbent contractor, which had been proposed as a subcontractor for the procurement at issue. Further, the prime contractor's proposed key personnel consisted mostly of the subcontractor's current or former employees. FGC argues that, unlike in *Video Masters*, the Area Office here determined that FGC has its own independent experience performing curriculum development.

FGC next argues that the Area Office correctly determined that curriculum development is a primary and vital requirement. FGC maintains that the RFP placed emphasis on such services. The first paragraph of the RFP's statement of work stated that the contractor would "design, develop, and deliver" instruction. (Response at 6.) In addition, the RFP indicated that "[t] he Contractor shall develop detailed program syllabi specifying schedules, topics, expected learning objectives, lead faculty, guest speakers, recommended facilities and instructional materials for the five (5) seminars addressed in the Statement of Work." (RFP § C.3.0.)

FGC disputes Appellant's contention that FGC lacks relevant experience. (Response at 6.) ***.

FGC responds to Appellant's argument that FGC's contribution to curriculum development will be minimal because FGC's subcontractors would be delivering the seminars, and because those same firms developed the seminars under the predecessor contract. FGC argues that, to the contrary, FGC's involvement in curriculum development will be substantial. ***.

FGC also argues that Appellant misconstrues the Area Office's rationale for determining that FGC was performing the contract's primary and vital requirements. According to FGC, the Area Office did not find that performance of the majority of work alone equates to performing the primary and vital requirements. Rather, in FGC's view, the Area Office correctly reasoned that both FGC and its subcontractors were performing the primary and vital requirements; as a result, under OHA precedent, the fact that FGC performed the majority of the work meant that FGC was providing the primary and vital requirements.

FGC contends further that an analysis of labor dollars does in fact confirm that FGC is performing the primary and vital requirements. FGC's proposal shows that FGC will incur the bulk of the labor costs. However, because FGC's proposal did not delineate what proportion of its work FGC will spend on curriculum development, Appellant substituted figures from its own proposal to argue that curriculum development is only a minor aspect of the contract. FGC argues Appellant's proposal is irrelevant and not binding on FGC, and reiterates that FGC's proposal shows it will perform the bulk of the labor.

FGC argues it has the capacity to perform the contract. Contrary to Appellant's argument that FGC lacks the necessary equipment and facilities, FGC argues ***. Further, these facilities are not co-located with a dog breeding business, although *** (Response at 9-10.)

Finally, FGC asserts that the Area Office properly distinguished FGC's size determination from Appellant's, because FGC four subcontractors do not have the same amount of influence or control over the prime contractor as Appellant's one major subcontractor would. *Size Appeal of Econo Lodge*, SBA No. SIZ-2698 (1987); *Size Appeal of Pavex Corp.*, SBA No. SIZ-2723 (1987). According to FGC, the cases Appellant references on this issue are either inapposite or do not involve violation of the ostensible subcontractor rule.

J. Motion to Dismiss

1. FGC's Motion

On March 9, 2012, FGC moved to dismiss the appeal on grounds that Appellant is not an interested party and therefore lacks standing. FGC argues that, by letter dated September 16, 2011, SBA sustained FGC's challenge to Appellant's HUBZone eligibility. Separately, the Area Office found that Appellant was not a small business for purposes of the instant procurement. By virtue of these adverse determinations, which Appellant did not appeal,[5] FGC argues that Appellant is not an interested party because it does not have a direct stake in the outcome of the appeal. According to FGC, "[e]ven if me appeal were meritorious (it is not), [Appellant] would derive no direct benefit if the appeal were sustained because it failed to meet the set-aside requirement that it be eligible to compete as a certified HUBZone entity." (Motion at 2.)

FGC argues further that 13 C.F.R. § 121.1001(a)(6) governs standing for a size protest in

[5] HUBZone eligibility determinations cannot be appealed to OHA. However, under 13 C.F.R. § 126.805, an interested party may seek review of an adverse HUBZone eligibility determination by a different SBA official than rendered the determination.

an acquisition set aside for HUBZone small businesses. FGC observes that, whereas 13 C.F.R. § 121.1001(a)(1)(iv) permits that even large businesses may protest awards of ordinary small business set-asides under certain circumstances, there is no comparable provision in 13 C.F.R. § 121.1001(a)(6) for HUBZone set-asides.

2. Appellant's Opposition

On March 26, 2012, Appellant filed its opposition to FGC's motion. Appellant argues that, although the Area Office determined Appellant to be other than small, Appellant nevertheless had the right to protest FGC's size pursuant to13 C.F.R, § 121.1001(a)(1), which confers standing on "other interested parties." Appellant argues this regulation is based on ordinary standing principles that require some form of harm. Appellant argues that if its protest had succeeded, no eligible offerors would have remained, and the Navy might then have revised the RFP to broaden the field of competition. Appellant argues it is the deprivation of that opportunity to compete that constitutes the necessary harm to confer standing. *See Size Appeal of Lajas Indus., Inc.*, SBA No. SIZ-4285 (1998).

Appellant argues further that it had the right to protest under 13 C.F.R. § 121.1001(a)(1)(i), which states, "Any offeror whom the contracting officer has not eliminated for reasons unrelated to size" may file a size protest. Appellant contends it has standing under this regulation because the purpose of this regulation "is to give standing to those concerns whose successful challenge would enable them to compete for award .... An offeror that has been eliminated for reasons unrelated to size would not be able to compete for award if the protest were successful, and, thus, should not have standing to question another firm's size status." 67 Fed. Reg. 70339, 70345 (Nov. 22, 2002).

Appellant argues it was eliminated for reasons related to its size, and to the extent Appellant was also eliminated for reasons related to its HUBZone status, Appellant argues it can still compete for the award if FGC were found to be other than small. Appellant reasons that, since small business status is a mandatory HUBZone requirement, a successful size protest against FGC would necessarily result in FGC being neither small nor HUBZone-eligible. Therefore, Appellant argues, its right to protest is consistent with SBA's intent in promulgating 13 C.F.R. § 121.1001(a)(1)(i).

Next, Appellant argues that 13 C.F.R. § 121.1001(a)(6)[6] does not restrict its right to protest because Appellant was eliminated because of its size. Appellant goes on to argue that 13

[6] The regulation provides for standing to protest in HUBZone procurements. Apart from the CO and certain SBA officials, the following parties may protest:

> (i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size; [and]
> (ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC[.]

C.F.R. § 121.1001(a)(1)(iv), which permits a large business to protest the award of a small business set-aside if there would be only one remaining offeror, also applies to § 121.1001(a)(6). Appellant argues that protests under § 121.1001(a)(6) involve a "procurement or order that has been restricted to or reserved for small businesses or a particular group of small business." *See* 13 C.F.R. § 121.1001(a)(1).

Finally, Appellant argues that it has the right to appeal under 13 C.F.R. § 134.302(a), which provides that "any person adversely affected by a size determination" may file an appeal with OHA. Appellant contends that it is adversely affected because, but for the erroneous size determination, Appellant could still compete for the contract.

3. FGC's Reply

On April 6, 2012, FGC filed a reply in support of its motion to dismiss. FGC reiterates its contention that Appellant lacks standing because Appellant did not appeal the adverse HUBZone determination.

FGC asserts that the Area Office considered Appellant's protest under 13 C.F.R. § 121.1001(a)(1)(iv), which confers standing on "other interested parties" because Appellant and FGC were the only two offerors. However, the Area Office went on to remark that "[i]f it is later determined that Appellant was not an interested party due to its HUBZone status, the Area Office might consider adopting [Appellant's] allegations and issuing an Area Director size protest." (Size Determination at 5.) FGC thus argues that the Area Office did not conclusively find that Appellant had standing to challenge FGC's size.

Next, FGC argues Appellant lacks standing to appeal to OHA under 13 C.F.R. § 134.302(a) because it was not adversely affected by the Area Office's determination. FGC argues that, even if the RFP were re-opened on an unrestricted basis, Appellant would only gain the ability to compete for the award; thus, there is no direct economic effect on Appellant and no adverse impact. *Size Appeal of Golden North Van Lines, Inc.*, SBA No. SIZ-4303 (1998).

FGC also argues that Appellant had no standing to protest FGC's size under 13 C.F.R. § 121.1001(a)(6) because Appellant was eliminated due to both its size and its HUBZone status. Therefore, regardless of whether Appellant qualifies as a small business, Appellant was also "eliminated for reasons other than size."

Finally, FGC argues that 13 C.F.R. § 121.1001(a)(1)(iv) does not apply to the protest of FGC's size. FGC contends that Appellant's reading of this regulation is illogical and contrary to rules of interpretation. Had SBA intended for the "other interested parties" exception to apply to other sections, those sections would contain the exception. FGC goes on to argue that even if that provision did apply to the other sections, Appellant would still lack standing, because Appellant was eliminated for reasons unrelated to size— its HUBZone status.

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. Standing

A threshold question is whether Appellant has standing to pursue this appeal. Although the Area Office found it appropriate to consider Appellant's protest, FGC maintains that Appellant lacked standing to bring that protest because SBA determined that Appellant did not meet HUBZone eligibility requirements. In FGC's view, Appellant could not properly protest FGC's size under 13 C.F.R. § 121.1001(a)(6), and now lacks standing to appeal under 13 C.F.R. § 134.302(a).

I find no merit to FGC's arguments. Under 13 C.F.R. § 121.1001(a)(6)(i), in a procurement set-aside for HUBZone small businesses, a size protest may be brought by any offeror "that the contracting officer has not eliminated for reasons unrelated to size." Under this provision, had Appellant been eliminated from the competition for reasons unrelated to its size—for example, as a result of a serious proposal defect—Appellant would lack standing to protest. Here, however, Appellant was not eliminated for such reasons. Indeed, the Navy initially awarded the contract to Appellant, and selected FGC only after the Area Office determined that Appellant was not a small business. *See* Section II.B,*supra*. It is thus apparent that Appellant was not awarded the contract solely on the basis of size; therefore, Appellant was "not eliminated for reasons unrelated to size." It is true, as FGC emphasizes, that, SBA separately concluded that Appellant also did not qualify as an eligible HUBZone firm. That determination, though, was reached after the Navy had already made its decision to award to FGC. Consequently, Appellant cannot be said to have been ""eliminated" from the competition on the basis of HUBZone eligibility. Accordingly, FGC's motion to dismiss for lack of standing is denied.

The conclusion that Appellant could protest FGC's size is consistent with existing OHA precedent on questions of standing. FGC and Appellant were the only two offerors on the instant procurement. Thus, if neither FGC nor Appellant were small businesses, no eligible offerors would remain, and the Navy might then have been obliged to revise the RFP such that Appellant would be eligible to compete. In that sense, the determination that FGC is a small business directly and adversely affects Appellant, as Appellant is denied further opportunity to compete for the contract. *Size Appeal of Lajas Indus., Inc.*, SBA No. SIZ-4285 (1998).

C. New Evidence

Appellant seeks to introduce new evidence, specifically Mr. Kennedy's declaration and other supporting documents, which were not previously presented to the Area Office. FGC opposes the request, but, in the event that OHA nevertheless grants Appellant's motion, FGC seeks to introduce Dr. Skerl's declaration in rebuttal.

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

In this case, I find that Appellant has not shown good cause to admit the new evidence. Mr. Kennedy's declaration reiterates Appellant's arguments from the appeal and relies on unsworn statements from a former FGC employee. Furthermore, Mr. Kennedy's declaration focuses predominantly on FGC's supposed dearth of experience in performing curriculum development. As discussed *infra*, however, it is unnecessary to consider that issue in detail, because it is apparent that curriculum development is not the contract's primary purpose. *Size Appeal of Eagle Consulting Corp., Inc.*, SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR) (finding evidence inadmissible when it was probative only of an issue OHA did not reach). Accordingly, Appellant's motion to admit new evidence is denied, and that material has not been considered in rendering this decision.

D. Analysis

The principal issue presented in this case is whether the Area Office erred in finding no ostensible subcontractor relationship between FGC and its subcontractors. In reaching this result, the Area Office determined that there were two primary and vital contract requirements: curriculum development and delivery of instruction. The Area Office found that, although FGC's subcontractors would deliver all instruction, FGC would perform all curriculum development. As a result, the Area Office concluded that FGC would be performing approximately half of the primary and vital contract requirements. As discussed below, the record demonstrates that curriculum development is not a primary and vital aspect of the contract; rather, delivery of instruction is the only primary and vital contract requirement. It is undisputed that FGC's subcontractors would be delivering all instruction. Accordingly, FGC subcontractors are performing the primary and vital contract work, in violation of the ostensible subcontractor rule.

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). Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. *Id.* To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an 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).

In this case, a reading of the full RFP, as well as FGC's own proposal, demonstrates that the delivery of instruction was the procurement's primary purpose.[7] Curriculum design and development, while not devoid of importance, were not central aspects of the RFP. Several considerations support this conclusion. First, it is apparent from the record that the curriculum for the seminars had already been developed under the predecessor contract. Indeed, FGC's proposal stated that FGC planned to ***, and remarked that "***." (FGC Proposal, Vol. II, at 2.2.1.1.1.) Similarly, the RFP indicated that the Navy would provide the existing training materials to the new contractor as Government-furnished information. (RFP § C.3.0.) Furthermore, the RFP called for the contractor to deliver "pilot" versions of each of the seminars before the commencement of any actual instruction, and stated that "[i]t is expected that there will be minimal modification/updates in seminar materials after the [[pilot] presentation." (*Id.*) FGC's proposal reflects this reality, as less than 4% of FGC's total estimated hours were devoted to CLINs 0011 - 0016, which pertained to the development of the pilot seminars. In addition, an overwhelming majority (*** of ***) of FGC's total proposed workforce were subcontractor personnel, including all *** instructors. Of the *** proposed personnel that would be employees of FGC itself, *** are managers and *** are support staff. Accordingly, the record demonstrates that curriculum development is not a major aspect of the acquisition. Rather, the contract's primary purpose is the delivery of instruction.

FGC emphasizes that the Area Office determined, based upon an independent review of FGC's proposal, that XX% of labor costs would be incurred by the prime contractor, FGC. Nevertheless, the Area Office did not examine what proportion of this labor would be associated with curriculum development. Rather, the Area Office apparently assumed that all of this labor would result from curriculum development, and that curriculum development therefore must represent a very substantial piece of the contract. The record indicates, however, that much of

[7] OHA has recognized that the views of the procuring agency may also be entitled to some weight in ascertaining which contract requirements are primary and vital. *Size Appeal of Paragon TEC Inc*, SBA No. SIZ-5290, at 11 (2011). The record here, though, contains no comments from the Navy with regard to this issue.

FGC's proposed labor cost may be attributed to the fact that FGC would oversee and manage the contract, and that FGC's personnel would be in attendance to observe all seminars. While it is possible that these activities could contribute to some "curriculum development," I nonetheless cannot conclude that curriculum development represents a major portion of the contract, particularly since the curriculum had already been developed under the predecessor contract, and the RFP contemplated only "minimal" changes. Accordingly, the mere fact that FGC would incur a majority of labor costs does not establish that FGC is performing the primary and vital requirements.

OHA has held that the ostensible subcontractor rule is violated when a prime contractor will have no meaningful role in performing the contract's primary and vital requirements. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). Such is the case here, as FGC itself would conduct no actual instruction, the primary and vital requirement. The only remaining question is whether the analysis may be altered by the fact that FGC would utilize four different subcontractors rather than a single subcontractor. It is true that OHA has recognized that where there are multiple subcontractors, none of whom perform a majority of the work, the prime contractor's retention of control over the management of the contract may be grounds for finding the prime contractor not unduly reliant on any single subcontractor. *Paragon TEC,* SBA No. SIZ-5290, at 14 (citing *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151 (2010)). These decisions, however, involved situations where the prime contractor was performing at least a substantial portion of the primary and vital requirements. More analogous to the instant case is*Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183 (2011). In *Earthcare Solutions*, the primary and vital requirements were being performed by three subcontractors, one of which was the alleged ostensible subcontractor. OHA determined that the ostensible subcontractor rule was violated, explaining "Although [the challenged firm] continually emphasizes that all three subcontractors would provide emergency and rapid response services, what is important is that [the challenged firm] will not provide those services, which constitute the primary contract requirements." *Earthcare Solutions*, SBA No. SIZ-5183, at 10. The same rationale applies here. The key issue is not that FGC would utilize multiple subcontractors, but that FGC itself will have no role in performing the contract's primary and vital requirement.

Accordingly, I find that FGC is affiliated with its four subcontractors for purposes of the instant procurement, as it is FGC's subcontractors that are performing the contract's primary requirement. The Area Office determined that at least two of FGC's subcontractors are not small businesses, so FGC exceeds the applicable $7 million size standard if affiliated with these concerns. (Size Determination 2-2011-158 at 4.) In light of this conclusion, it is unnecessary to address Appellant's additional contentions that FGC lacks sufficient experience and expertise to perform curriculum development.

IV. Conclusion

For the reasons discussed above, the appeal is GRANTED, and the size determination is REVERSED. FGC is not a small business for purposes of the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge