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

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| SIZE APPEAL OF:<br><br>Wichita Tribal Enterprises, LLC,<br><br>Appellant,<br><br>Appealed From<br>Size Determination No. 5-2012-039 | SBA No. SIZ-5390<br><br>Decided: September 12, 2012 |

APPEARANCES

Antonio R. Franco, Esq., Patrick T. Rothwell, Esq., Megan C. Connor, Esq., and Peter B. Ford, Esq., PilieroMazza PLLC, Washington, DC, for Appellant

DECISION[1]

I. Introduction and Jurisdiction

On May 14, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 5-2012-039 finding Wichita Tribal Enterprises, LLC (Appellant) other than small for the procurement at issue. The Area Office determined that Appellant's relationship with LeGacy Resource Corporation (LeGacy) violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the Area Office committed several errors. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958,15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

[1] This decision was initially issued on August 14, 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 withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

## II. Background

### A. Solicitation and Protest

On August 18, 2011, the National Aeronautics and Space Administration (NASA) issued solicitation NNX11373093R (RFP) for Agency-Wide Contract Closeout and Procurement Support Services (ACCPSS). The ACCPSS procurement consisted of two principal types of work: contract closeout services and procurement support services. (RFP, Attachment J.1 at ¶ 4.0.) Under the contract closeout portion of ACCPSS, the contractor would be responsible for closing NASA procurement instruments, including purchase orders, delivery/task orders, contracts, grants, cooperative agreements, and interagency agreements. (*Id.* at ¶ 4.1.) Under the procurement support services of ACCPSS, the contractor would provide administrative support for NASA procurement officials. Such support was expected to consist of activities such as "data preparation, data collection, data entry, preparation of award documents and file documentation and document distribution." (*Id.* at ¶ 4.2.)

The contract closeout portion of ACCPSS is the successor to NASA's Agency-Wide Contract Closeout (AWCC) contract. LeGacy is the prime contractor for the AWCC contract. Unlike the instant ACCPSS procurement, the AWCC contract did not include procurement support services. The RFP explained that there is no single incumbent contractor for the procurement support services portion of ACCPSS, because NASA obtains those services from several firms under a number of different contracts. (*Id.* at ¶ 1.0.)

The RFP stated that the contract closeout portion of ACCPSS would be fixed-price with incentive fee, and NASA provided offerors with projected numbers of instruments to be closed. (*Id.* at § L.6 and Attachments J-5 and J-6.) For procurement support services, the RFP stated that orders could be placed by various NASA procurement offices on an indefinite delivery/indefinite quantity (ID/IQ) basis, as existing procurement support services contracts expire. The maximum value of these procurement support services orders over the duration of ACCPSS was $30 million. (*Id.* at § B.6.)

The RFP stated that proposals would be evaluated based on three factors, which were essentially equal in importance: Mission Suitability, Past Performance, and Price. (*Id.* at § M.2.) As part of the Mission Suitability factor, offerors were instructed to address their Subcontracting and Teaming Approach and their Staffing Approach. (*Id.* at § L.17.) The RFP stated that "[i]f the use of subcontractors is proposed, the Offeror shall describe its approach for compliance with [SBA's] Ostensible Subcontractor Rule ... so that [NASA] can make an affirmative determination that the Offeror and not a subcontractor(s) will be performing the primary and vital requirements for the contract." (*Id.*)

The Contracting Officer (CO) set aside the procurement exclusively for 8(a) participants, and assigned North American Industry Classification System (NAICS) code 561110, Office Administrative Services, with a corresponding size standard of $7 million in average annual receipts. Appellant submitted its initial proposal on October 4, 2011, and its final proposal revision on February 7, 2012.

On March 29, 2012, the CO announced that Appellant was the apparent awardee. On April 3, 2012, Brandan Enterprises, Inc. (BEI), a disappointed offeror, filed a size protest alleging Appellant was not an eligible small business due to affiliation with LeGacy under the ostensible subcontractor rule. BEI alleged specifically that Appellant "lacks - the requisite experience, an ACPSS relevant corporate leadership team, qualified personnel and corporate contractual/managerial track record ...; Le[G]acy possesses all of these necessary requisites ...." (Protest at 4.) BEI further alleged that closeout services are the contract's primary and vital functions, and speculated that such work would be performed by LeGacy personnel. *(Id)* BEI went on to allege that LeGacy personnel primarily authored Appellant's proposal. (*Id.* at 5.)

B. Teaming Agreement

On August 15, 2011, Appellant and LeGacy entered into a teaming agreement outlining their respective roles in the proposal preparation process, and in any contract arising out of the RFP. The teaming agreement states that:

> · Appellant will serve as the prime contractor on behalf of the team, and LeGacy will act as a subcontractor;
> · Each party will work with the other to develop the proposal, including LeGacy furnishing sufficient qualified personnel to assist Appellant in preparing the proposal and related material, for the entire length of the proposal preparation process;
> · LeGacy's proposal preparation support will include technical input of their assigned areas, past performance write-up and reference information, cost/price submittal based on assigned work, participation in overall team strategy, approaches and proposal reviews;
> · During contract performance, Appellant will perform 51% of the total cost of labor and LeGacy will perform 49%;
> · The proposal will identify LeGacy as a subcontractor and describe the relationship and respective areas of responsibility of each party;
> · To the extent the percentage of work for each party is not diminished, Appellant may add additional team members to the procurement team;
> · Each party shall bear their own respective costs, expenses, risks, and liabilities;
> · Appellant is the sole interface with the Government, although LeGacy may communicate with the Government if the Government initiates the communication and Appellant is promptly notified; and
> · The agreement is not intended to constitute or create a joint venture between the parties.

(Teaming Agreement and Exhibit A.)

C. Appellant's Proposal

Appellant is an SBA-certified 8(a) firm. It is 51%-owned by the Wichita Tribe Industrial Development Commission (WTIDC). The Wichita and Affiliated Tribes of Anadarko, Oklahoma (Tribes) formed WTIDC to oversee a number of economic development initiatives. WTIDC also

owns 51% of Anadarko Industries, LLC (Anadarko Industries).

The record contains Appellant's proposal for the ACCPSS contract. The proposal asserts that Appellant "has strategically partnered with LeGacy." (Proposal, Vol. I, § 1.0.) The proposal goes on to explain that:

> This strategic alliance provides [NASA] a responsive team that brings a full capability to meet [ACCPSS] requirements based on demonstrated past performance .... Our major subcontractor [LeGacy] brings immediate, relevant past performance as the incumbent on the ... [AWCC contract] and has other active contracts with comparable size, scope, and complexity. These combined past performance elements are directly applicable to the ... ACCPSS [contract].

(*Id.*) The proposal further states, "The [Appellant]/LeGacy professional team consists of former Federal Contract Specialists, warranted Contract Officers, and Budget/Finance Analysts .... The majority of these employees are ... presently on staff with the incumbent contractor, LeGacy." (*Id.* § 2.4.) The proposal indicates that, "51% of the incumbent employees will move to [[Appellant]." (*Id.* Figure 2.)

The proposal states that Appellant's proposed Program Manager, Ms. Annette Hawkins, was also the Program Manager for LeGacy on the incumbent AWCC contract.[2] (*Id.* § 2.4.) As Program Manager of the ACCPSS contract, the proposal represents that Ms. Hawkins will provide a "single point of responsibility/accountability for the ACCPSS performance ...." and "... will provide technical support services across all of the contract closeout activities and task orders for the procurement support services." (*Id.*) The proposal states further that Ms. Hawkins "has been granted total local autonomy to make all of the business decisions affecting the contract and its performance." (*Id.* § 2.5.)

The proposal includes a chart that shows the NASA location of each team member. (*Id.*, Figure 15.) The chart indicates that 18 of 33 total personnel are Appellant's employees, and the remaining 15 are LeGacy's employees. The proposal states that LeGacy will perform contract closeout tasks at each of its designated centers and will provide the center team lead at each location, who will report to Ms. Hawkins. Appellant intends to maintain a 53% share of all new work added to the ACCPSS contract. (*Id.* at § 4.1.) As new procurement support services ID/IQ task orders are added to the ACCPSS contract, Appellant will assume the lead role on such work and assign LeGacy support role functions. This approach will ensure that "[Appellant] will perform the majority of the more complex and costly contract functions." (*Id.*)

In response to the RFP's instruction that offerors address the ostensible subcontractor rule, Appellant's proposal states that Appellant is the prime contractor and will manage the contract on a day-to-day operational basis through the Program Manager with direct oversight

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[2] Appellant explains that Ms. Hawkins resigned from LeGacy on October 14, 2011, and was out of the workforce for the remainder of 2011. In January 2012, she began work as Appellant's Deputy Program Manager. She assisted Appellant in the final proposal revisions for the instant RFP.

from Appellant's CEO and Account Manager. (*Id.* § 4.2.) Appellant will perform 53% of the scope of the work, and Appellant has corporate reach-back capabilities for contract support services through its corporate offices. The proposal represents that Appellant identified the ACCPSS contract as a business opportunity, managed and controlled the entire proposal process, and performed all of the preparation and submission activities. The proposal goes on to state that Appellant will perform the more complex and costly contract functions, which require the Program Manager's skill set and educational background. (*Id.*) The proposal acknowledged that LeGacy does not qualify as a small business under the size standard associated with the procurement. (*Id.*)

The proposal also represented that Appellant will share resources with its sister company, Anadarko Industries. This sharing of resources allows the firms to:

> leverage synergies to optimize back office support, as well as, flowing down similar processes and systems. In the end, the benefit to the Government is that past performance and future support is interchangeable between these two companies and the customer can expect the same level of service from any of the WTIDC companies.

(*Id.* § 1.1.)

In the past performance portion of its proposal, Appellant proposed two contracts on which Anadarko Industries was the prime contractor, and two contracts on which LeGacy was the prime contractor. In addition, Appellant proposed one project on which Appellant acted as a subcontractor to Anadarko Industries. (Proposal, Vol. II.)

D. Response to the Protest

In addition to reiterating aspects of its proposal and teaming agreement, Appellant stated that its business relationship with LeGacy is confined to ACCPSS and that Appellant had no business ties with LeGacy before Appellant crafted its proposal. Appellant indicated that Appellant and LeGacy do not have common ownership or management. Appellant then emphasized that it cannot be affiliated with its sister company, Anadarko Industries, because of the exemption for affiliation between tribally-owned concerns for 8(a) contracts, 13 C.F.R. § 124.109(c)(2)(iii).

E. Size Determination

On May 14, 2012, the Area Office issued its size determination. The Area Office began by summarizing the RFP; Appellant's proposal; the teaming agreement between Appellant and LeGacy; a consultant agreement between Appellant and Ms. Hawkins; BEI's protest and Appellant's response to the protest; and declarations submitted by Appellant from Ms. Hawkins, Mr. Charles D. Crowe of LeGacy, and Mr. Michael Reeves of Anadarko Industries. (Size Determination at 1-9.) The Area Office noted that Appellant was formed in mid-2008 and had no revenues that year. Appellant's revenues for 2009 and 2010 averaged less than $300,000. (*Id.* at 3.)

The Area Office next examined Appellant's compliance with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). The Area Office found that Appellant would perform the "primary and vital" contract requirements. (*Id.* at 11.) Nevertheless, the Area Office determined that Appellant violated the ostensible subcontractor rule, because Appellant "was unduly reliant upon LeGacy to win the procurement and to secure competent employees to perform the contract." (*Id.*) To support this conclusion, the Area Office cited LeGacy's status as the incumbent on the AWCC contract, and noted Appellant's use of the incumbent contract as a past performance reference. In addition, the Area Office explained, Appellant "plans to hire all the incumbent LeGacy [personnel] to fulfill its 51% share of the contract, and has given unbridled authority for the contract to its Program Manager, Ms. Hawkins, who was the Program Manager for the incumbent contract for Le[G]acy." (*Id.*) The Area Office noted that "Ms. Hawkins left LeGacy and was unemployed for approximately 10 weeks" before taking up employment with Appellant, but remarked that this period of unemployment "does not diminish the fact that Ms. Hawkins was the Program Manager for the incumbent contract for LeGacy." (*Id.* at 11, n.9). The Area Office noted further that Ms. Hawkins had contributed to the final proposal revision.

Emphasizing that the purpose of the ostensible subcontractor rule is to "prevent other than small firms from forming relationships with small firms to evade SBA's size requirements," the Area Office questioned "what [Appellant] was able to offer on the procurement absent a relationship with LeGacy." (*Id.*) The Area Office then reiterated that Appellant's Program Manager, Ms. Hawkins, was formerly Program Manager for LeGacy, and that "51% of the employees will be hired over from LeGacy to [Appellant], and the remaining 49% will remain LeGacy employees under a subcontract." (*Id.* at 12.) The Area Office noted that LeGacy could not itself bid on the contract because it is now a large business and not an 8(a) concern. (*Id.*)

The Area Office also considered the role of Appellant's sister company, Anadarko Industries. According to the Area Office, the absolute exemption from affiliation between tribally-owned sister companies for 8(a) contracts is "different than treating the sister companies as though they are one company." (*Id.*) The Area Office noted that Appellant utilized contracts performed by Anadarko Industries as past performance, and planned to obtain administrative services from Anadarko Industries. While Anadarko Industries is not a subcontractor to Appellant on the ACCPSS procurement, the Area Office determined that Appellant's reliance on Anadarko Industries underscored Appellant's own lack of experience and capacity to perform the contract. (*Id.*)

Finally, the Area Office highlighted similarities between the instant case and *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). In *DoverStaffing*, explained the Area Office, OHA upheld a finding of undue reliance when the proposed subcontractor was the incumbent on the predecessor contract, the prime contractor proposed to hire a substantial number of the incumbent's employees, the prime contractor intended to hire managerial employees from its subcontractor, the incumbent was not an eligible offeror, and only one of the past performance references was performed by the prime contractor. (*Id.* at 12-13.)

## F. Appeal Petition

On May 30, 2012, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant first argues the Area Office's review of the record was tainted by its misunderstanding of the exception from affiliation found in 13 C.F.R. § 124.109(c)(2)(iii). Appellant contends this misunderstanding caused the Area Office to erroneously conclude Appellant was unduly reliant on LeGacy. In Appellant's view, the Area Office's concern with the administrative services Anadarko Industries would perform was irrelevant "because no formal administrative services arrangement is necessary to avoid affiliation with respect to 8(a) contract award under the absolute tribal exception to affiliation under 13 C.F.R. § 124.109(c)(2)(iii)." (Appeal at 11.) Appellant contends further that compliance with 8(a) regulations is beyond the scope of a size determination, and that by examining Appellant's relationship with Anadarko Industries, the Area Office wrongly penalized Appellant for engaging in a legally-permissible relationship. *Cf., Size Appeal of HX5, LLC*, SBA No. SIZ-5331, at 13 (2012) (finding error where an area office determined a mentor-protégé agreement indicative of undue reliance).

Next, Appellant argues the Area Office erred in finding Appellant unduly reliant on LeGacy. In Appellant's view, the Area Office overemphasized LeGacy's status as the incumbent contractor and the fact that Ms. Hawkins was formerly the Program Manager for LeGacy. In addition, argues Appellant, LeGacy did not form a relationship with Appellant in order to evade the size requirements; rather, it was Appellant who initiated and structured the relationship. (Appeal at 12.)

Appellant also argues the Area Office ignored declarations and statements on the record and therefore did not consider "all aspects of the relationship between the prime and subcontractor," as required by 13 C.F.R. § 121.103(h)(4). Appellant argues the size determination recites aspects of Ms. Hawkins's declaration but then summarily rejected her statements in a footnote. As a result, argues Appellant, "the Area Office missed the crucial point that [[Appellant] did not rely on LeGacy at all in hiring Ms. Hawkins as Program Manager because she had already left the employ of LeGacy." (Appeal at 14.)

Appellant also argues the Area Office ignored the declarations of Mr. Reeves and Mr. Crowe, which attest that Appellant and Anadarko Industries prepared the proposal and that it was Appellant that approached LeGacy. (*Id.* at 14-15.) Appellant contends that had the Area Office adequately considered these statements, it would not have found undue reliance. (*Id.* at 15.)

Next, Appellant argues that the Program Manager does not have unlimited authority to operate independently of Appellant. Appellant points out that, according to the proposal, "[the] Program Manager's and the overall contract's performance ... will be monitored by [Appellant's] Corporate [personnel] who will address any issues that may require corporate involvement." (Proposal, Vol. I § 2.5.) Moreover, the organizational chart shows that the ACCPSS Account Manager, Ms. Wooten, has authority over Ms. Hawkins. (*Id.* Figure 6.)

Appellant argues LeGacy's incumbent status is an insufficient basis for finding affiliation, as it is just one factor and "in itself is not a determinative factor." *HX5*, SBA No. SIZ-5331, at 15. Appellant's planned hiring of LeGacy's non-managerial employees cannot properly form the basis of finding affiliation, either. *E.g., Size Appeal of Spiral Solutions and Techs., Inc.*, SBA No. SIZ-5279, at 28 (2011) (holding that hiring non-management personnel is no longer indicative of undue reliance in light of Executive Order 13,495). Besides, argues Appellant, NASA fully expected that the successful offeror would hire incumbent employees, and the RFP directed offerors to explain the percentage of the incumbent work force that would be captured in their proposals. (RFP § L.17(f), (g).)

Appellant emphasizes that it will provide its own managerial personnel. For that reason, argues Appellant, this case is distinguishable from *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), cited by the Area Office. Further, the ACCPSS procurement calls for a broader range of services than were provided under the AWCC contract, so Appellant did not need to rely on LeGacy to win the contract or secure competent employees. (Appeal at 17-18.)

Next, Appellant argues it has relevant past performance, as its prior work as a subcontractor to Anadarko Industries relates to many of the elements in the RFP. Appellant argues it has experience performing Contract Closeout Services and Procurement Support Services that is unrelated to LeGacy's experience as the incumbent contractor. Appellant adds that Ms. Wooten, the proposed Corporate Account Manager, served as the Program Manager for a NASA Human Resources and Procurement Office contract and as the Corporate Account Manager for an Air Force Office of Scientific Research contract. Appellant emphasizes that these contracts are not related to LeGacy's past performance as the incumbent contractor either.

Appellant concedes that it relied on Anadarko Industries in preparing the proposal and for past performance and executive personnel, but argues that it was entitled to do so under 13 C.F.R. § 124.109(c)(2)(iii).

Finally, Appellant contends that the Area Office made a responsibility determination regarding Appellant's ability to perform the contract. Appellant notes that a "determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contractor responsibility." *Spiral Solutions*, SBA No. SIZ-5279, at 22. Specifically, argues Appellant, the Area Office erred when it opined that Appellant's "single contract with its insubstantial revenues, used in the past performance section is not comparable in value, depth, or brea[d]th to the subject contract." Appellant argues that, in making this statement, the Area Office improperly substituted its own judgment for that of the CO.

## 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

The "ostensible subcontractor" rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). To determine whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, the Area Office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Id.*; *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). The purpose of the rule is to "prevent other than small firms from forming relationships with small firms to evade SBA's size requirements." *Size Appeal of Fischer Bus. Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). Ostensible subcontractor inquiries are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

In this case, the Area Office found that Appellant would perform the contract's primary and vital requirements, but nevertheless determined that Appellant was unduly reliant on its subcontractor, LeGacy, in violation of the ostensible subcontractor rule. (Size Determination at 11.) The principal factors the Area Office cited for this conclusion were that: (1) LeGacy is the incumbent contractor, and is not itself eligible to compete for the ACCPSS procurement; (2) Appellant planned to hire the large majority of its workforce from LeGacy; (3) Appellant's proposed Program Manager, Ms. Hawkins, previously served as Program Manager for LeGacy on the incumbent contract; and (4) Appellant is a relatively new firm with modest revenues and little corporate experience. Much of the size determination focused on Appellant's plan to hire both the workforce and managerial personnel of LeGacy.

OHA has long recognized that it is common practice in Government services contracts for successor companies to hire an incumbent's employees. *E.g. Size Appeal of Ideal Servs., Inc.*, SBA No. SIZ-3317 (1990). Further, the recently-promulgated Executive Order 13,495 specifically encourages contractors to offer a right of first refusal of employment to qualified incumbent non-managerial employees. Exec. Order No. 13,495, 74 Fed. Reg. 6103 (Feb. 4, 2009). In light of widespread industry practice and the Executive Order, OHA has opined that "the hiring of incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance." *Size Appeal of Nat'l Sourcing, Inc.*, SBA No. SIZ-5305, at 12 (2011); *see also Size Appeal of Bering Straights Logistics Servs., LLC*, SBA No. SIZ-5277, at 7 (2011) ("The hiring of incumbent personnel is expected, required by Executive Order 13,495, and does not constitute undue reliance."); *Size Appeal of Spiral Solutions and Techs., Inc.*, SBA No. SIZ-5279, at 28 (2011) ("insofar as OHA may have previously suggested that the hiring of incumbent non-management personnel is indicative of undue reliance under the ostensible subcontractor rule, such an interpretation plainly is no longer sensible in light of Executive Order 13,495."); *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260, at 7 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR) ("I recognize that, as a result of this [Executive] Order,

the hiring of incumbent employees can no longer be considered a meaningful indicia of unusual reliance.").

Nevertheless, the Executive Order does not apply to managerial personnel, and does not mandate that a successor contractor will rely upon the incumbent for its entire workforce. Thus, OHA has recognized that, when the alleged ostensible subcontractor is the incumbent, and the prime contractor proposes to hire *en masse* both the workforce and managerial personnel of the alleged ostensible subcontractor, this may be grounds to conclude that the prime contractor is unusually reliant upon the alleged ostensible subcontractor. *Size Appeal of SM Resources Corp., Inc.*, SBA No. SIZ-5338 (2012); *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). In such situations, violation of the ostensible subcontractor rule is more likely to be found if the prime contractor is a new or inexperienced concern, and the alleged ostensible subcontractor is a highly-experienced incumbent. In *DoverStaffing*, for instance, the challenged firm proposed to hire "nearly all" of its staff, including all key personnel, from the alleged ostensible subcontractor, which had been the incumbent on the predecessor procurement. *DoverStaffing*, SBA No. SIZ-5300, at 9. Further, the challenged firm was unproven and was unable to demonstrate relevant experience. *Id.* at 10. On these facts, OHA agreed that the challenged firm was "bringing nothing to the procurement but its small business status," notwithstanding the fact that Executive Order 13,495 promotes the hiring of incumbent non-managerial personnel. *Id.* at 9.

Here, the Area Office identified substantial similarities with *DoverStaffing*. As in *DoverStaffing*, Appellant's sole proposed subcontractor is the incumbent on the predecessor contract and is not eligible to compete for the instant procurement. Appellant proposed to hire LeGacy's incumbent workforce *en masse*, and Appellant's proposed Program Manager was formerly Program Manager for LeGacy on the incumbent contract. Thus, as in *DoverStaffing*, Appellant would be relying heavily upon its subcontractor for both managerial and non-managerial personnel. Further, as in *DoverStaffing*, Appellant has little relevant experience. The Area Office observed that Appellant was formed only in mid-2008, and has modest annual revenues. Of five past performance references in Appellant's proposal, only one was for work performed by Appellant itself, and that project was a subcontract with Appellant's sister tribal company which involved only two full time equivalents. Thus, as in *DoverStaffing*, the Area Office questioned whether Appellant brought anything to the instant procurement beyond its status as a small business. The size determination quoted at length from *DoverStaffing* and highlighted the similarities between the cases. (Size Determination at 12-13.)

In its appeal, Appellant attempts to distinguish *DoverStaffing* on grounds that Appellant "proposed to use its own managerial staff," whereas in *DoverStaffing*, the "prime contractor proposed no managerial staffing of its own and brought nothing to the table other than its size status, rendering the prime contractor unduly reliant on the subcontractor." (Appeal at 17.) Appellant emphasizes in particular that its proposed Program Manager, Ms. Hawkins, already was employed by Appellant at the time Appellant submitted its final proposal. This argument is unpersuasive, however, because Appellant hired Ms. Hawkins shortly after she resigned from her position with LeGacy. Thus, Appellant essentially did propose to adopt the incumbent's Program Manager as its own. OHA has recognized that "undue reliance may be found when a prime contractor chooses to employ key personnel from a subcontractor, 'rather than proposing to use

its own employees or to hire new employees for the positions."' *Nat'l Sourcing*, SBA No. SIZ-5305, at 10 (quoting *Size Appeal of Alutiiq Educ. and Training, LLC*, SBA No. SIZ-5192, at 11 (2011)). The Area Office likewise rejected Appellant's argument, explaining that Ms. Hawkins's brief separation from LeGacy before starting work for Appellant "does not diminish the fact that Ms. Hawkins was the Program Manager for the incumbent contract for LeGacy." (Size Determination at 11, n.9.)

Appellant also contends that, pursuant to OHA's recent decision in *Size Appeal of HX5, LLC*, SBA No. SIZ-5331 (2012), it is immaterial that Ms. Hawkins was LeGacy's Program Manager on the predecessor contract. Specifically, in *HX5*, OHA did not consider it problematic for a prime contractor to hire its program manager from the alleged ostensible subcontractor. *HX5*, SBA No. SIZ-5331, at 11-12. I find no merit to this argument, however, as *HX5* is distinguishable from the instant case in several respects. *HX5* did not involve a situation in which the prime contractor proposed to hire virtually its entire workforce from its alleged ostensible subcontractor. Indeed, the *HX5* decision specifically notes that "the Area Office did not base its determination on Appellant's retention of the incumbent workforce." *Id.* at 15. Moreover, the *HX5* decision emphasizes that it was improper to find unusual reliance between a prime contractor and its subcontractor in light of their pending mentor/protégé agreement. *Id.* at 12-13. No such mentor/protégé arrangement exists here between Appellant and LeGacy.

Appellant also emphasizes OHA precedent holding that mere hiring of non-managerial incumbent personnel is not strong evidence of unusual reliance. As discussed above, though, OHA has recognized that when a prime contractor proposes the incumbent contractor as its subcontractor, relies heavily upon its subcontractor for both managerial and non-managerial personnel, and has little or no corporate experience, the prime contractor is still at risk of violating the ostensible subcontractor rule. *DoverStaffing*, SBA No. SIZ-5300, at 9; *SM Resources*, SBA No. SIZ-5338, at 11-12. Such is the case here. Appellant has not persuasively distinguished the *DoverStaffing* line of cases, and therefore has not demonstrated, by a preponderance of the evidence, that the Area Office erred in finding Appellant unusually reliant on LeGacy.

Appellant also argues that the Area Office improperly questioned the legitimacy of assistance provided to Appellant by its sister tribal company, Anadarko Industries, which "colored and tainted" the size determination. (Appeal at 7.) Appellant concedes that it "strongly relied upon [Anadarko Industries] to win the procurement," but emphasizes that it was legally entitled to do so. (*Id.* at 2.) I agree with Appellant that 13 C.F.R. § 124.109(c)(2)(iii) provides a broad exemption from affiliation for tribally-owned sister companies in the 8(a) program. Nevertheless, a fair reading of the size determination does not support the conclusion that the Area Office penalized Appellant for engaging in a legally-permissible relationship with its sister tribal company. Indeed, the Area Office did not find Appellant affiliated with Anadarko Industries. Rather, as discussed *supra*, the focus of the size determination was Appellant's relationship with LeGacy, particularly Appellant's plan to hire both the workforce and managerial personnel of LeGacy. LeGacy is not a tribally-owned sister company of Appellant, so 13 C.F.R. § 124.109(c)(2)(iii) affords no protection in determining whether Appellant's relationship with LeGacy violated the ostensible subcontractor rule.

Appellant also maintains that the Area Office ignored the declarations of Messrs. Reeves and Crowe, which attest that Appellant and Anadarko Industries prepared the proposal and that it was Appellant which approached LeGacy. This argument is meritless. Contrary to Appellant's contentions, the Area Office went to great lengths in the size determination to discuss these declarations, as well as the other evidence proffered by Appellant. Thus, I cannot conclude that the Area Office failed to consider this information. Furthermore, the issues discussed in the declarations were not central to the Area Office's finding of unusual reliance. Thus, even if the size determination had been silent on the declarations, Appellant's argument would still fail, because it does not appear that greater consideration of the declarations would have altered or influenced the outcome of the case. *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 11-12 (2012).

Lastly, Appellant argues the Area Office improperly made a responsibility determination—a matter reserved exclusively for the CO—by stating that Appellant's "single contract with its insubstantial revenues, used in the past performance section is not comparable in value, depth, or brea[d]th to the subject contract." This argument too lacks merit. Under OHA precedent, it is appropriate for an area office to consider the prime contractor's experience as part of an ostensible subcontractor analysis, because such matters are relevant to whether the prime contractor can perform independently from the subcontractor. *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 7 (2011); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 9-10 (2006) (prime contractor was ""unproven", and the contract in question "almost 50 times the amount of its work to date"). A broad inquiry into a firm's "capabilities," however, is the nature of a responsibility determination, and therefore is the province of the CO, not the Area Office. *HX5*, SBA No. SIZ-5331, at 14. Here, the Area Office's statement reflects a limited review of Appellant's corporate experience. The fact that Appellant is a comparatively new and inexperienced firm is significant in determining whether Appellant would be unusually reliant upon LeGacy.

## 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. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge