

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

SIZE APPEAL OF:

InGenesis, Inc.,

Appellant,

Appealed From
Size Determination No. 5-2012-075

SBA No. SIZ-5436

Decided: January 28, 2013

APPEARANCES

Edward J. Tolchin, Esq., Offit Kurman, PA, Bethesda, Maryland, for Appellant

John E. McCarthy, Esq., and Derek R. Mullins, Esq., Crowell & Moring LLP,
Washington, D.C., for Distinctive Spectrum Joint Venture 8(a) LLC

John W. Klein, Esq., Office of General Counsel, U.S. Small Business Administration
Washington, D.C., for the Agency

DECISION¹

I. Introduction and Jurisdiction

On September 14, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 5-2012-075 finding that InGenesis, Inc. (Appellant) is not a small business under the size standard associated with Request for Quotations (RFQ) No. HSCECR-12-Q-00011. The Area Office determined that Appellant's relationship with STG International, Inc. (STGi) violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). STGi is Appellant's subcontractor for the instant procurement, and also Appellant's mentor under an SBA-approved 8(a) mentor-protégé agreement. Appellant maintains that the Area Office committed several errors. For the reasons discussed *infra*, the appeal is granted, and the size determination is reversed.

¹ This decision was originally issued on January 7, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded the parties an opportunity to request redactions. OHA received a timely request for redactions and considered that request in issuing this redacted version of the decision for public release.

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.

II. Background

A. Solicitation and Protest

On March 12, 2012, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) Health Service Corps, issued RFQ No. HSCECR-12-Q-00011 for medical staffing and support services. The Contracting Officer (CO) set aside the procurement entirely for participants in the 8(a) program, and assigned North American Industry Classification System (NAICS) code 622110, General Medical and Surgical Hospitals, with a corresponding size standard of \$34.5 million in annual receipts. (RFQ, Amendment 3, at 5.) The RFQ stated that ICE planned to make a single award to an 8(a) firm under the General Services Administration (GSA) Federal Supply Schedule 621-I, Professional and Allied Healthcare Staffing Services. (*Id.* at 6.) STGi was the incumbent on the predecessor contract for similar services. (*Id.*)

The RFQ specified that offerors could propose one or more subcontractors, but that no teaming arrangements were permitted. (RFQ, Amendment 1, at 2; Amendment 3, at 4; Amendment 4, at 4.) The prime contractor and any subcontractors must hold GSA Schedule contracts. (RFQ, Amendment 3, at 6.) The RFQ stated that the prime contractor could use GSA sources of supply under Federal Acquisition Regulation (FAR) subpart 51.1, to provide for locations and Special Item Numbers (SINs) that it did not possess on its own GSA contract. (*Id.* at 5.) Offerors were instructed to identify proposed subcontractors and their GSA contracts in their proposals.

Appellant submitted its proposal on April 26, 2012. There were no subsequent proposal revisions. On July 16, 2012, the CO notified offerors, including Distinctive Spectrum Joint Venture 8(a), LLC (Distinctive), of the award of the task order to Appellant. The July 16 letter contains no indication that Distinctive was ever excluded from the competition. On July 23, 2012, Distinctive filed a size protest with the CO. Distinctive alleged that (1) Appellant, by itself, exceeds the size standard, based on media reports; and (2) Appellant is unusually reliant upon STGi, Appellant's ostensible subcontractor.

In support of its ostensible subcontractor allegation, Distinctive asserted that STGi is a large incumbent and, thus, the relationship between Appellant and STGi is subject to a “heightened level of scrutiny” under OHA case law; that STGi “likely chased this procurement, [and] took a lead role in the proposal process,” and that Appellant had never received a contract award of comparable magnitude. (Protest at 5.) Further, “it is Distinctive's understanding” that Appellant “does not have the requisite staff ... but is reliant on STGi to provide its employees to fulfill these staffing requirements.” (Protest at 5-6.) As an example, Distinctive pointed out that the RFQ requires pharmacy technicians, but Appellant does not have the appropriate SIN 621-

051 on its GSA Schedule contract. (Protest at 6, n.2.) The CO forwarded the protest to the Area Office for a size determination.

B. Performance Based Statement of Work

The RFQ included a Performance Based Statement of Work (SOW) outlining contractual requirements. The SOW explained that the ICE Health Services Corps provides facilities for the health care and treatment of detainees in ICE custody. The contractor will furnish a total of 569 Health Care Personnel (HCPs) to provide medical and other services to detainees at 21 detention facilities across the United States. The numbers and types of contract personnel vary by location, as delineated in Attachments 2 and 3. ICE “may add or delete positions at any time.” (RFQ at 9.)

The contractor must identify, recruit, select, and place qualified contractor personnel for each location. (RFQ at 9.) The contractor is responsible for the recruitment, hiring, credentialing, and retention of medical and administrative support personnel. (*Id.*) Medical personnel includes physicians, psychiatrists, mental health social workers, dentists and dental assistants, pharmacists and pharmacy technicians, registered nurses, nursing aides, medical assistants, and others. (*Id.* at 10.) Administrative support services include various clerical and management support functions. (*Id.*)

The RFQ explained that the predecessor contract “is not staffed at 100% as of today. The number of vacancies is 25 but that changes regularly.” (RFQ, Amendment 4, at 6.)

The RFQ specified three key personnel for the contract: Program Manager, Deputy Program Manager, and Senior Recruiter. (RFQ, Amendment 2, at 2-3; Amendment 3, at 10.) The Program Manager provides “senior management expertise and oversight,” whereas the Deputy Program Manager carries out the “day-to-day oversight and management of contract activities.” (RFQ, Amendment 2, at 4.)

C. Evaluation Criteria and Process

The RFQ stated that ICE would make a single award to the offeror whose proposal represented the best value, considering technical merit and price. The Technical Evaluation consisted of three factors: (1) Past Performance, (2) Resumes/Qualifications of Key Personnel and Staffing Plan, and (3) Management Plan/Transition Plan and Quality Control Plan. Factor 1 was significantly more important than Factors 2 and 3 combined. Factor 2 was more important than Factor 3. The technical factors collectively were significantly more important than Price. (RFQ at 25.)

For the past performance evaluation, references would be reviewed for relevance and quality, as demonstrated by customer feedback. (RFQ at 26.) The evaluation would be based solely on the prime contractor's past performance, and the past performance of any subcontractors would not be considered in the evaluation. (RFQ, Amendment 3, at 7.) Factor 2 includes review of key personnel resumes and review of the Staffing Plan for its logic and correlation to the work requirements. (RFQ at 26-27.) Under Factor 3, ICE would assess offerors' overall transition plan for “ramp up”, and offerors' quality control program with inspections,

monitoring and methods to ensure compliance with the performance requirements. (*Id.* at 27.) Price would be evaluated for reasonableness, but would not be scored. (RFQ at 26.)

D. Appellant's Proposal

Appellant proposed itself as prime contractor, and STGi, the incumbent, as Appellant's sole subcontractor. Appellant stated it will provide 51% of contract services, and STGi will provide the remaining 49%. (Vol. I—Exec. Summary at 1.) Appellant noted that it was founded in 1998 and is “a mature company with proven competency in program management, responsive [human resources] support, recruiting, credentialing, superior customer satisfaction, and advanced systems and processes.” (*Id.*) Appellant “currently manages over [***] medical, administrative, and management personnel at [***] client facilities in [***] states across [***] federal contracts.” (*Id.*) STGi has nearly 1,100 health care workers in 41 states. (*Id.*)

For Past Performance, Appellant submitted five contracts, all of which involve health care worker staffing. (Vol. I—Past Performance at 1-10.) On two of the contracts, Appellant was the prime contractor; the other three contracts involved joint ventures between Appellant and its former mentor, The Arora Group, Inc. (Arora). (*Id.*) One of the prime contracts, valued at \$[***] million over five years, involved over [***] health care workers at [***] sites in [[***] states. STGi was Appellant's subcontractor on that effort. (*Id.* at 1-2.) The other prime contract was for \$[***] million annually from 2004 to 2011, and involved placement of [***] health care workers over contract lifetime in [[***] dispersed sites in Texas. (*Id.* at 3-4.) The joint venture contracts are for \$[***] million over five years, \$[***] million over five years, and \$[***] million over five years, and involve (respectively) [***] FTEs at [[***] sites, [***] FTEs ([***] in Option Year One) at one site, and [***] FTEs at various remote sites. (*Id.* at 5-10.) Appellant provided no Past Performance references for STGi.

For the three key positions, Appellant proposed [Program Manager] as Program Manager; [Deputy PM] as Deputy Program Manager; and [Senior Recruiter] as Senior Recruiter. (Vol. I—Staffing Plan at 2.) All three individuals were employed by STGi on the predecessor contract. (*Id.*) However, [Program Manager] has a contingent offer to become Appellant's employee upon contract award. (*Id.*) The proposal states that the Program Manager, “an employee of [[Appellant], will be the only point of contact between our Team and [ICE].” (*Id.* at 15.)

The proposal contains an organizational chart depicting [Program Manager] over [[Deputy PM] and [Senior Recruiter], and as the only contact with ICE. (Vol. I— Staffing Plan at 3.) “Executive Oversight” will be provided by Ms. Veronica Edwards, President of Appellant, and Ms. Michelle Lee, President and CEO of STGi. Appellant's Nursing Director, [Employee 1], is also part of oversight. (*Id.*) The proposal identifies two more employees of Appellant in managerial roles for this contract. They are [Employee 2], Facility Security Officer; and [[Employee 3], Transition Manager. (*Id.* at 3, 12-13.)

Appellant planned to use STGi to staff 12 of the 21 locations, and a social worker position in Washington, D.C. (Vol. II—Pricing Information at 11.) The remaining locations would be staffed by Appellant. (*Id.*) Further, “[a]ll contractor employees at each site will be

employees of either [Appellant] or STGi. There will be no mix of contractor staff at any given detention facility ...” (Vol. I—Staffing Plan at 16.)

The proposal described Appellant's approach to hiring employees. Appellant explained that it reviews applicants individually to determine if they possess the requisite experience, education, and licensure. (Vol. I—Staffing Plan at 6.) Appellant conducts “extensive telephone screening to determine the aptitude and potential success of each applicant and to develop a list of top candidates.” (*Id.*) The best candidates are interviewed, and if selected, are required to complete a security background check and credential verification. (*Id.* at 6-7.) Successful candidates are sent a formal offer letter, and a recruiter “contacts the applicant to negotiate a start date and coordinates on-boarding and required orientation and training.” (*Id.* at 7.)

E. Size Determination Proceedings

In response to the size protest, Appellant submitted its 2009 and 2010 tax returns and financial statements for 2009, 2010, and 2011; its mentor-protégé agreement with STGi, approved by SBA on May 6, 2011; its proposal for the instant RFQ; its subcontract with STGi; a declaration of Appellant's Vice President, Ms. Julie Buser; a rebuttal to Distinctive's protest allegations; and other documents to the Area Office. Appellant stated that it is an 8(a) participant and is 100% owned by Ms. Edwards. Ms. Edwards has no business interests beyond Appellant and its various joint ventures.

Appellant noted that Distinctive is a joint venture and “not on the GSA Schedule,” and therefore may lack standing to protest. (Response at 2, n.1.) Appellant went on to address the merits of Distinctive's protest. Appellant denied that it is, by itself, other than small, pointing to its financial information. Furthermore, the Area Office had previously determined that Appellant is a small business. *Size Appeal of Professional Performance Development Group, Inc.*, SBA No. SIZ-5398 (2012).

Regarding the ostensible subcontractor allegation, Appellant asserted that, under 13 C.F.R. §§ 121.103(b)(6) and 124.520(d)(4), it is not affiliated with STGi because STGi is Appellant's mentor under an SBA-approved mentor-protégé agreement in effect at the time of proposal submission. Appellant also attacked the ostensible subcontractor protest allegation as unsupported speculation and “simply untrue”. (Response to Protest at 3.)

The subcontract names Appellant as the prime contractor and STGi as subcontractor. The agreement states that STGi will designate the Deputy Program Manager and Senior Recruiter as key personnel, and Appellant will designate the Program Manager, who will act as “the contract manager and day-to-day manager of the relationship of the parties under this Agreement.” (Subcontract § II.C.1.)

Regarding work allocation, the subcontract provides:

The parties have agreed that the services, supplies and work under the Contract are to be allocated, as closely as reasonably possible, 51% to Prime Contractor and 49% to Subcontractor. ... It is the intent of the parties to make adjustments in

the services, supplies, and work under the Contract so that the resultant revenues to each party are 51% to Prime Contractor and 49% to Subcontractor.

(Subcontract § IV.) The subcontract also provides for quarterly reviews to determine whether the 51/49 allocation is being achieved and, if not, what adjustments are necessary to achieve it. (*Id.*)

Regarding client contact, the subcontract provides:

Subcontractor shall not contact [ICE] or any of its employees, agents, or representatives directly to provide, coordinate placement of, or manage the assignments of HCPs unless such contact is approved in advance by Prime Contractor. During the term of this Agreement, Subcontractor shall not accept direct solicitations from [ICE] to provide health care personnel under the Contract.

(Subcontract § III.I.)

The Buser declaration, prepared by Appellant's Vice President who was personally involved in Appellant's efforts on the instant RFQ, states that Appellant had followed the procurement for several years. Ms. Buser states that Appellant responded to ICE's "sources sought" announcement in 2009 as part of a mentor-protégé joint venture with its previous mentor, and entered into teaming arrangements with two other concerns for this procurement, although those arrangements expired before ICE issued the instant RFQ in 2012. (Buser Decl. ¶ 2.)

According to Ms. Buser, Appellant took the lead role in the proposal process, including regulatory research, submission of questions, adding the medical personnel SINs to its GSA Schedule as required by the RFQ, and calculating prices for labor rates. (Buser Decl. ¶ 3.) Appellant priced the proposal using its GSA Schedule 621-I pricing, which was based on its own invoices, contracts, and past performance. (*Id.*) Appellant also did market research for labor categories at ICE facilities. Appellant prepared the proposal, obtained and edited STGi's input and incorporated it into the proposal. (*Id.*) STGi served a support role, not the lead role, in this process. (*Id.*)

Ms. Buser states that Appellant "will perform the primary and vital requirements" of the contract, and "exercise control over all aspects of the contract." (Buser Decl. ¶ 4.) She states that the Executive Project Director, the Program Manager, and the Transition Manager will all be Appellant's employees; the Quality Control Director is Appellant's Nursing Director; and security is overseen by Appellant's Facility Security Officer. (*Id.*) Also, the Contract Finance Director, Contract Manager, and Contract HR Manager are all Appellant's own employees. (*Id.* ¶ 7.) Under the subcontract, only Appellant has direct contact with ICE, and Appellant controls the flow of information with ICE, as the contract documentation and modifications do not flow through to STGi. (Buser Decl. ¶¶ 4-5.) Thus, Appellant has control of the contract. (*Id.*)

Appellant is responsible for sourcing/recruiting, human resources, credentialing and qualifying employees, legal and regulatory compliance, scheduling, and billing and invoicing.

(*Id.*) Further, Appellant is not reliant on STGi because Appellant has its own “experienced staff, systems, processes, and procedures” in place capable of performing this contract, and Appellant “has done work of the same magnitude as the ICE contract in the past.” (Buser Decl. ¶¶ 5, 8.) Appellant generally expects to retain the incumbent workforce, but will also hire new staff “to replace employees who lack required qualifications and/or are not in good standing, and to fill openings as they arise.” (Buser Decl. ¶ 8.) Appellant intends to self-finance the effort through its own independent line of credit, rather than rely on financial assistance from STGi. (Buser Decl. ¶ 6.)

F. Size Determination

On September 14, 2012, the Area Office issued its size determination. The Area Office found that as of Appellant's April 26, 2012 self-certification date, Appellant, by itself, did not exceed the \$34.5 million size standard. The Area Office then noted that Appellant and STGi are parties to an SBA-approved mentor-protégé agreement, and that 13 C.F.R. § 121.103(h)(3)(iii) permits that “[t]wo firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement.” Nevertheless, Appellant could not utilize this exception because Appellant's offer was not structured as a joint venture. Rather, Appellant was the prime contractor and STGi the subcontractor, an approach not recognized under the exception. (Size Determination at 4.)

Turning to the ostensible subcontractor rule, the Area Office found that Appellant will be the prime contractor and will perform a majority (51%) of the required work. Further, Appellant “will be managing the prime contract.” (Size Determination at 5.) The Area Office noted that Appellant had sought this contract since 2009; that Appellant discussed only its own past performance, not STGi's, in the proposal; that Appellant planned to hire new staff in addition to incumbent STGi personnel; and that Appellant will receive no financial assistance from STGi.

The Area Office found, however, that STGi is the incumbent on the predecessor contract, and that STGi is ineligible to compete for the procurement at issue. Appellant proposed that two of three key personnel will be STGi employees, and the Program Manager, who will be Appellant's employee, will be hired from STGi. Thus, Appellant “is reliant on STGi for a significant number of the three top key employees.” (Size Determination at 5.) Further, discrete tasks were not assigned to Appellant and STGi; instead, new work will be divided during contract performance to maintain a 51/49 split. (*Id.*) The Area Office stated that “[b]ecause discrete tasks have not been allocated between the parties, this is clear indication that this is not a true subcontracting relationship.” (*Id.*)

The Area Office concluded the instant case is similar to *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). The Area Office explained that, in *DoverStaffing*, OHA found undue reliance where the subcontractor was the incumbent and was ineligible to bid, and the prime contractor would hire the subcontractor's workforce and managerial personnel *en masse*. Here, based on Appellant's proposal and the subcontract, the Area Office found that Appellant is “unduly reliant on STGi to perform vital and primary personnel roles.” (Size Determination at 5.)

The Area Office also determined that “[o]ther than its 8(a) status, [Appellant] plays a minimal role in this contract.” (*Id.*) Thus, the Area Office concluded that STGi is Appellant's ostensible subcontractor and the two firms are affiliated for this procurement. (*Id.*)

The Area Office found that Appellant's receipts, when aggregated with those of STGi, exceed the applicable size standard. As a result, Appellant is not an eligible small business for the instant procurement.

G. OHA Proceedings

1. The Appeal

On September 25, 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 that the ostensible subcontractor rule is inapplicable to the instant situation, because Appellant has an SBA-approved 8(a) mentor-protégé agreement with STGi, even though STGi is Appellant's subcontractor rather than its joint venture partner. Appellant points out that, according to SBA's regulations, “[a] contractor and its ostensible subcontractor are treated as joint venturers.” 13 C.F.R. § 121.103(h)(4). The mentor-protégé program expressly permits joint ventures between a mentor and protégé. 13 C.F.R. §§ 121,103(h)(3)(iii) and 124.520(d). (Appeal at 3-4.) Further, forming a joint venture to compete for contracts is a form of assistance permitted under a mentor-protégé agreement, and thus is exempt from affiliation under 13 C.F.R. § 124.520(a). *Size Appeal of Magnum Opus Technologies, Inc.*, SBA No. SIZ-5372 (2012). (Appeal Petition at 4-6.)

Appellant also contends that, in the instant case, application of the ostensible subcontractor rule is “even more problematical” because the RFQ prohibited bidding by formal joint ventures. (Appeal at 5.) Thus, Appellant's proposal was not, and could not have been, structured as a joint venture.

Alternatively, Appellant contends that, even if the ostensible subcontractor rule were applicable here, the Area Office misapplied the rule by failing to examine all aspects of the relationship between Appellant and STGi. In Appellant's view, the Area Office based its determination on “meager facts,” including at least one issue that is legally irrelevant. (Appeal at 3.) Specifically, explains Appellant, OHA no longer considers hiring a substantial number of the incumbent's non-managerial employees to be indicative of undue reliance in light of Executive Order 13,495. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011). Appellant argues that OHA extended this principle to managerial employees in *Size Appeal of HX5, LLC*, SBA No. SIZ-5331 (2012). (Appeal at 9-11.) Thus, the fact that [[Program Manager], Appellant's proposed Program Manager, would be hired from STGi is not indicative of undue reliance because she will become Appellant's employee. (Appeal at 11.)

Further, the organizational chart in Appellant's proposal makes clear that STGi's two key employees both report to Appellant's key employee, the Program Manager. Appellant argues that these circumstances are similar to *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305

(2011), where OHA concluded that the prime contractor would retain control of the contract, even though the subcontractor would provide various subordinate managers. (Appeal at 12.)

Appellant asserts that the Area Office engaged in a superficial analysis and did not consider all aspects of the relationship between prime and subcontractor. Appellant provides a list of facts the Area Office purportedly ignored: Appellant is managing the contract; Appellant is overseeing the technical aspects of contract performance; Appellant is performing the primary and vital requirements by managing the overall contract and performing 51% of the labor, and Appellant's headquarters staff is performing all project support as in *National Sourcing*; Appellant controls communications with ICE; there are discrete tasks assigned to Appellant and STGi in the form of specific billets; Appellant has chased this contract for years, and won it based on its own Past Performance record; Appellant is hiring employees beyond incumbent personnel; and Appellant is financing the work on its own. (Appeal at 13-16.)

Finally, Appellant distinguishes this case from *DoverStaffing* on several grounds. Appellant observes that, in *DoverStaffing*, there was no mentor-protégé relationship; the prime contractor in *DoverStaffing* was entirely reliant on one of its subcontractors for past performance; the prime contractor in *DoverStaffing* proposed none of its own employees but instead hired subcontractor employees *en masse*; and the subcontractor in *DoverStaffing* was given “equal participation in managing the contract”. (Appeal at 15-17.) Appellant instead likens its hiring to that in *Spiral Solutions*.

Appellant also renews its contention, made at the Area Office level, that Distinctive lacked standing to protest. (Appeal at n.1.) Appellant insists that the protest should have been dismissed because Distinctive “is a joint venture that was prohibited from bidding” for the RFQ. (Appeal at 5.)

2. Distinctive's Response

On October 25, 2012, Distinctive responded to the appeal. Distinctive maintains that the appeal is meritless and should be denied.

Distinctive first contends the Area Office did not err in finding the mentor-protégé exception to affiliation inapplicable. Distinctive emphasizes that, under SBA regulations, “[t]wo firms approved by SBA to be a mentor and protégé under § 124.520 of these regulations may joint venture as a small business for any Federal government prime contract or subcontract. . . .” 13 C.F.R. § 121.103(h)(3)(iii). In this case, though, Appellant and STGi did not submit a proposal as a joint venture, but rather as a prime contractor and subcontractor. Thus, the exception does not apply. (Distinctive Response at 4-5.)

Second, Distinctive maintains the Area Office did not err in concluding Appellant's proposal violated the ostensible subcontractor rule. Distinctive asserts that STGi will play a major role in managing the contract because all three key personnel positions will be staffed by individuals who are current STGi employees. Appellant will hire only one of those individuals, with the other two key personnel remaining at STGi. “Thus, the majority of the key personnel will be employees of the ostensible subcontractor, STGi.” (*Id.* at 7.) Distinctive further observes

that, under OHA precedent, 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 (citing *Size Appeal of Alutiiq Educ. and Training, LLC*, SBA No. SIZ-5192, at 11 (2011)).

Distinctive notes that Appellant has not disputed that Appellant will hire a substantial portion of STGi's non-managerial workforce to perform the contract. Although Appellant maintains that such hiring practices are immaterial in light of Executive Order 13,495, "OHA in *DoverStaffing* acknowledged the requirements of Executive Order 13,495, but nonetheless found that the prime contractor was unusually reliant upon, and therefore affiliated with, its subcontractor." (Distinctive Response at 10.)

Next, Distinctive supports the Area Office's conclusion that Appellant's proposal did not allocate discrete tasks between Appellant and STGi. "For example, STGi is not tasked to provide all of the pharmacy requirements." (*Id.* at 12.) Distinctive urges that, pursuant to OHA case law, unusual reliance may be found when a prime contractor and subcontractor fail to specify the discrete tasks each is to perform.

Lastly, Distinctive observes that Appellant's proposal made "incessant" references to Appellant and STGi as a "team," highlighted STGi's experience on the predecessor contract, and relied upon STGi for "most of the key aspects of its technical approach." (*Id.* at 15.) In Distinctive's view, these factors constitute further evidence of Appellant's unusual reliance upon STGi.

Distinctive does not contend that Appellant, by itself, is other than a small business.

3. SBA's Response

On October 25, 2012, the date of the close of record, SBA timely intervened² and filed a response to the appeal. SBA maintains that the Area Office did not err in finding the mentor-protégé joint venture exception to affiliation inapplicable. SBA bases its argument largely on 13 C.F.R. § 124.513(c), which prescribes the required elements of an eligible 8(a) joint venture agreement. Because the subcontract between Appellant and STGi omitted several of these elements, the joint venture exception is not available to Appellant.

SBA further observes that, under 13 C.F.R. § 121.103(b)(6), a protégé firm "is not affiliated with a mentor firm solely because the protégé firm receives assistance from the mentor." In SBA's view, though, this exception is not applicable here because Appellant is not receiving assistance from STGi, but rather is subcontracting work to STGi. "A mentor used as a subcontractor is subject to the ostensible subcontracting analysis." (SBA Response at 2.)

² "SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first." 13 C.F.R. § 134.210(a).

4. Appellant's Reply

Appellant requested, and was granted, leave to reply to Distinctive's and SBA's responses, and on November 7, 2012 filed its reply. Appellant asserts, first, that Distinctive's response inaccurately claims the mentor-protégé exception to affiliation applies only where there is a joint venture. Appellant cites several OHA decisions in support of the proposition that the mentor-protégé exception to affiliation covers other assistance, such as subcontracts.

Second, Appellant takes issue with Distinctive's arguments pertaining to the ostensible subcontractor rule. Appellant emphasizes that the Program Manager will be Appellant's own employee, not STGi's. Further, although the Program Manager will necessarily communicate with STGi staff in performing her duties, she is not under the control of STGi. (Reply at 3.)

In response to SBA's arguments, Appellant insists that it need not have structured its proposal as a joint venture in order to utilize the exception from affiliation at 13 C.F.R. § 121.103(b)(6). Instead, the regulation refers broadly to “assistance” between a mentor and protégé, and 13 C.F.R. § 124.520(a) indicates that subcontracts are a form of “assistance.” (Reply at 8.)

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. Mentor-Protégé

Appellant first argues that there can be no violation of the ostensible subcontractor rule in this case because Appellant and STGi are parties to an SBA-approved mentor-protégé agreement. Appellant emphasizes that the ostensible subcontractor rule has the effect of treating a prime contractor and subcontractor as joint venturers for a particular acquisition. 13 C.F.R. § 121.103(h)(4). However, SBA's regulations authorize a mentor and protégé to joint venture as a small business for any Federal procurement. 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(1). Moreover, the regulations stipulate that assistance provided under an approved mentor-protégé agreement does not create affiliation between the mentor and protégé, 13 C.F.R. §§ 121.103(b)(6) and 124.520(d)(4), and 13 C.F.R. § 124.520(a) defines “assistance” as encompassing “subcontracts.” Appellant urges that the subcontract between Appellant and STGi is “assistance” under their mentor-protégé agreement, and therefore is an improper basis to find

affiliation.

SBA counters that 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(1) apply only to formal joint ventures approved by SBA, not to constructive joint ventures as envisioned by the ostensible subcontractor rule. Further, 13 C.F.R. §§ 121.103(b)(6) and 124.520(d)(4) apply to assistance provided by a mentor to a protégé, not vice versa. Thus, although 13 C.F.R. §§ 121.103(b)(6) and 124.520(d)(4) might preclude affiliation if the mentor were the prime contractor and the protégé the subcontractor, the rules do not extend to situations, such as found here, where a protégé provides subcontracts or other assistance to its mentor. SBA also asserts that to find the ostensible subcontractor rule inapplicable whenever the prime contractor and subcontractor are mentor and protégé would undermine the purpose of creating joint ventures in the first instance, because a mentor and protégé could then avoid the added requirements and scrutiny associated with joint ventures simply by characterizing their agreements as “subcontracts.”

I find SBA's reasoning persuasive. 13 C.F.R. § 121.103(h)(3)(iii) indicates that, for contracts awarded to joint ventures through the 8(a) program, “SBA must approve the joint venture pursuant to § 124.513.” Similarly, 13 C.F.R. § 124.520(d)(1)(ii) states that “[i]n order to receive the exclusion from affiliation for both 8(a) and non-8(a) procurements, the joint venture must meet the requirements set in § 124.513(c).” Thus, the regulations contemplate an exception from affiliation only for formal joint ventures compliant with 13 C.F.R. § 124.513(c). All parties here agree that Appellant's proposal was not structured as a formal joint venture, and does not comport with 13 C.F.R. § 124.513(c). Indeed, Appellant takes the view that formal joint venture arrangements were prohibited under the terms of the instant RFQ. It is thus apparent that Appellant and STGi do not have a formal SBA-approved joint venture that would qualify for exclusion from affiliation under 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(1).

SBA is also correct that both 13 C.F.R. § 121.103(b)(6) and 13 C.F.R. § 124.520(a) refer to assistance provided by a mentor to a protégé under an approved mentor-protégé arrangement. The purpose of these provisions is to “encourage approved mentors to provide various forms of business development assistance to protégé firms.” 13 C.F.R. § 124.520(a). Thus, the rules are not intended to apply in the reverse situation, where a protégé provides subcontracts or other assistance to its mentor. Here, Appellant (the protégé) is the prime contractor and STGi (the mentor) is Appellant's subcontractor. Such an arrangement is not assistance from the mentor to the protégé, and therefore does not fall within the scope of 13 C.F.R. §§ 121.103(b)(5) and 124.520(d)(4).

For these reasons, I reject Appellant's contention that there can be no violation of the ostensible subcontractor rule because Appellant and STGi are parties to an SBA-approved mentor-protégé agreement. Rather, I find that the presence of a mentor-protégé agreement does not necessarily insulate those parties from violation of ostensible subcontractor rule, if the protégé is the prime contractor and the mentor is the subcontractor.

2. Ostensible Subcontractor

Appellant's stronger argument is that the Area Office erroneously determined that

Appellant's arrangement with STGi violated the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

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). The rule “asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). 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. *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, the Area Office recognized that, based on Appellant's proposal and the subcontract, Appellant will perform the majority (51%) of the work, Appellant and STGi will perform the same types of work, and Appellant “will be managing the prime contract.” (Size Determination at 5.) Under such circumstances, OHA has held that the prime contractor is performing the ““primary and vital” contract requirements. *E.g., Size Appeal of CymSTAR Servs., LLC*, SBA No. SIZ-5329, at 13 (2012) (“Where a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital functions of the contract, and there is no violation of the ostensible subcontractor rule.”); *Size Appeal of HX5, LLC*, SBA No. SIZ-5331, at 15 (2012); *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 9 (2010). Nevertheless, the Area Office determined that Appellant did not comply with the ostensible subcontractor rule because Appellant will be unusually reliant upon STGi. The Area Office based its analysis on purported similarities between the instant case and *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), explaining that, in both cases:

The proposed subcontractor [] is the incumbent on the predecessor contract; the prime contractor [] proposed to hire a substantial number of the incumbent's employees, including managerial employees from its subcontractor; and the incumbent was ineligible to bid on the contract because it is not small.

(Size Determination at 5.) The Area Office further found that Appellant failed to allocate discrete tasks between itself and STGi, a “clear indication that this is not a true subcontracting relationship.” (*Id.*)

Having thoroughly reviewed the record and the parties' arguments, I must agree with Appellant that the Area Office's analysis of the ostensible subcontractor rule is flawed. The Area Office premised its determination on parallels with *DoverStaffing*, but overlooked key distinctions between the cases.

First, unlike *DoverStaffing*, the record here contains no indication that Appellant is dependent upon its subcontractor either to win or to perform the contract. In *DoverStaffing*, the prime contractor was an unproven concern with no relevant experience. *DoverStaffing*, SBA No. SIZ-5300, at 10. OHA found that the prime contractor relied entirely upon its subcontractor's performance record to win the contract, which OHA considered to be compelling evidence that the prime contractor must also rely upon its subcontractor to perform the contract. *Id.* at 10-11.

By contrast, Appellant here is a well-established company with an extensive record performing similar work of comparable magnitude. Indeed, the proposal makes clear that Appellant “currently manages over [***] medical, administrative, and management personnel at [***] client facilities in [[***] states across [***] federal contracts.” (Vol. I—Exec. Summary at 1.) The Area Office did not find that Appellant would receive any technical or financial assistance to perform the contract. Furthermore, the RFQ specified that past performance was the most heavily-weighted evaluation factor, and that past performance evaluations would be based solely on the prime contractor's own performance record. (RFQ, Amendment 3, at 7.) Appellant submitted five past performance references, only one of which involved STGi (as a subcontractor to Appellant). (Vol. I—Past Performance at 1-10.) Thus, under the RFQ's evaluation scheme, Appellant was awarded the contract on its own performance record, which the procuring agency found sufficient to meet the contractual requirements. STGi's record could not have played any role in the award decision. In short, then, unlike the prime contractor in *DoverStaffing*, there is simply no evidence here that Appellant was dependent upon STGi either to win, or to perform, the contract.

Similarly, OHA case law has applied *DoverStaffing* only in situations where the prime contractor has “little or no corporate experience” of its own, and thus relied heavily upon its subcontractor's experience to win the contract, and presumably to perform the primary and vital requirements. *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390, at 11 (2012); *Size Appeal of SM Resources Corp., Inc.*, SBA No. SIZ-5338, at 11-12 (2012). OHA has not previously extended *DoverStaffing* to cases, such as presented here, involving a highly-experienced prime contractor, where the prime contractor will perform the majority of the work, will manage the contract, and will perform the primary and vital contract requirements. On the contrary, OHA has suggested that *DoverStaffing* would not apply under these circumstances. *SM Resources*, SBA No. SIZ-5338, at 14 (“A prime contractor must bring something to the table beyond its small business or 8(a) status, it must bring, at a minimum, the ability to perform the primary and vital requirements of the contract.”).

The Area Office also overlooked another significant distinction between *DoverStaffing* and the instant case. In *DoverStaffing*, OHA was troubled by the fact that the prime contractor proposed “not a single one of its own employees to perform this contract,” but rather intended to engage in the *en masse* transfer of personnel — including both managerial and non-managerial personnel — from its subcontractor. *DoverStaffing*, SBA No. SIZ-5300, at 11. By contrast, in the instant case, Appellant represented, and the Area Office accepted, that Appellant would hire new staff in addition to incumbent STGi personnel. (Size Determination at 5.) Indeed, according to the RFQ, the predecessor contract was not fully staffed; rather, there were 25 vacancies, and this total “changes regularly.” (RFQ, Amendment 4, at 6.) As distinguished from *DoverStaffing*, then, Appellant here would not, and could not, rely solely on

the incumbent workforce to staff the contract, but must instead furnish employees from alternate sources. Thus, the instant case does not involve a situation where the prime contractor relies upon its subcontractor for essentially all of its workforce. Furthermore, although Appellant's proposal did indicate that Appellant planned to hire incumbent employees if practicable, the proposal nevertheless makes plain that Appellant will utilize a detailed vetting process to evaluate, and negotiate, with employees individually. (Vol. I—Staffing Plan at 6-7.) Given that Executive Order 13,495 encourages the hiring of incumbent non-managerial personnel, OHA has found that it is not problematic for a prime contractor to hire a subcontractor's non-managerial workforce, provided that personnel are reviewed individually rather than unilaterally transferred or hired *en masse*. *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12 (2011) (“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 Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277, at 7 (“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); *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.”). Accordingly, Appellant's plan to hire much of its non-managerial workforce from STGi, after evaluating and negotiating with those employees individually, does not establish unusual reliance upon STGi.

The Area Office also faulted Appellant for failing to allocate “discrete tasks” between itself and STGi. The Area Office neglected to consider, however, the nature and structure of the underlying contract. This contract is a staffing vehicle which calls for the contractor to provide various quantities of medical and support personnel at particular locations. Further, the specific staffing requirements fluctuate over time, depending on the needs of the procuring agency. It is therefore not apparent how Appellant could have allocated work between itself and STGi, except by location or by labor category. Appellant's proposal divided the work by location, with certain locations staffed solely by Appellant and other locations staffed solely by STGi. (Vol. II—Pricing Information at 11.) Contrary to the size determination, then, Appellant's proposal does reflect a clear and reasonable division of responsibilities between Appellant and STGi, given the limitations of the contract structure. Distinctive points out that Appellant and STGi could have divided the work by labor category, rather than by location. Such an approach, though, is of questionable validity, because it would result in the companies' personnel being commingled at individual locations, as well as creating confused lines of authority and communication. OHA has previously cited such factors as suggestive of a joint venture (rather than a true subcontract) relationship. *E.g.*, *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003).

The Area Office cited two other issues as evidence of unusual reliance: STGi's status as the incumbent contractor, and Appellant's plan to utilize current, or former, STGi employees to manage the contract. While these issues are relevant in an ostensible subcontractor analysis, neither is sufficient grounds to find violation of the rule. OHA has repeatedly explained that engaging the incumbent as a subcontractor leads to heightened scrutiny of the arrangement, but is not a *per se* violation. *E.g.*, *HX5*, SBA No. SIZ-5331, at 11. Thus, the mere fact that STGi is the incumbent contractor cannot establish unusual reliance. Similarly, the use of two current

STGi employees ([Deputy PM] and [Senior Recruiter]) as key personnel does not create unusual reliance. OHA has recognized that when a prime contractor proposes subcontractor employees as key personnel, but those subcontractor employees are clearly subordinate to the prime contractor's own employees, there is no violation of the ostensible subcontractor rule. *National Sourcing*, SBA No. SIZ-5305, at 11 (concluding that the prime contractor would retain control of the contract, although the subcontractor would provide various subordinate managers). Although Appellant did propose [Deputy PM] and [Senior Recruiter] as key personnel, the proposal makes clear that they are subordinate to Appellant's Program Manager, [Program Manager]. Appellant also proposed that [Program Manager] herself would leave her employment with STGi and become Appellant's own employee. In this regard, OHA has held that, 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," this may be suggestive of unusual reliance. *Size Appeal of Alutiiq Educ. and Training, LLC*, SBA No. SIZ-5192, at 11 (2011). Such a practice does not necessarily establish unusual reliance, however, particularly when the managerial personnel remain under the supervision and control of the prime contractor. *Size Appeal of J.W. Mills Management, LLC*, SBA No. SIZ-5416, at 8 (2012). Here, although [Program Manager] was employed by STGi on the predecessor contract, she would become Appellant's own employee upon contract award, and report to Appellant's executive leadership. Further, the Area Office itself determined that Appellant alone would manage the prime contract. (Size Determination at 5.) Thus, Appellant's plan to hire [Program Manager] from STGi does not undermine Appellant's control of the contract, or suggest any particular reliance upon STGi.

Lastly, Distinctive complains that Appellant's proposal made "incessant" references to Appellant and STGi as a "team," and that the proposal reveals that Appellant is "reliant upon STGi for most of the key aspects of its technical approach." (Distinctive Response at 15.) Distinctive asserts these are further evidence of Appellant's unusual reliance upon STGi. (*Id.*) I find no merit to these arguments. OHA has held that "the use of 'team' language, particularly if it does not imply that the proposed subcontractor is the dominant partner, is not indicative of unusual reliance or that any subcontractor will be performing the primary and vital functions of the contract." *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 10 (2011). Appellant's reference to itself and STGi as a team is, therefore, immaterial. As to Appellant's alleged reliance upon STGi's technical approach, this issue was not part of the Area Office's analysis, nor was technical approach among the evaluation factors presented in the RFQ. I thus see no basis to conclude that Appellant was heavily reliant upon STGi to develop a unique technical solution.

IV. Conclusion

Appellant is not a formal joint venture, and the instant procurement does not constitute assistance from a mentor to a protégé, so Appellant cannot avail itself of the mentor-protégé and mentor-protégé joint venture exceptions to affiliation. Nevertheless, Appellant has persuasively shown that there is no violation of the ostensible subcontractor rule. Appellant will perform the primary and vital contract requirements, will manage the contract, and there no indication that Appellant is unusually reliant upon its subcontractor STGi to win or perform the instant contract. The Area Office determined that Appellant, by itself, is a small business, and that issue is not disputed on appeal. For these reasons, the appeal is GRANTED, and the size determination is

REVERSED.³

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

KENNETH M. HYDE
Administrative Judge

³ In light of this outcome, I need not decide Appellant's claim that Distinctive lacked standing to protest. I note, however, that SBA's regulations afford standing to protest to any offeror "not eliminated for reasons unrelated to size." 13 C.F.R. § 121.1001(a)(2)(i). The record here does not demonstrate that Distinctive was ever excluded from the competition.